STATE OF SOUTH CAROLINA
IN SUPREME COURT

Appeal from Anderson County
The Honorable R. Lawton McIntosh, Circuit Court Judge

Opinion No. 2014-UP-399 (Ct. App. filed 11/12/2014)

10-GS-04-00069-00072

THE STATE,

Respondent,

v.

MATTHEW BRANDON FULLBRIGHT,

Appellant/Petitioner.

Appellate Case No. 2015-000080

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF ISSUES ON CERTIORARI

I. In violation of Appellant's right against self-incrimination pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and Article One, Section Twelve of the South Carolina Constitution, the trial judge erred in admitting Appellant's video-recorded statements at his arraignment hearing where the statements were obtained through questioning by the brother of the deceased and Appellant neither received advisement of his right against self-incrimination nor voluntarily waived his right.

II. The trial court erred in admitting the video-recorded statements by Appellant at his arraignment, in which he responded to specific questions by the brother of the deceased, a non-judicial officer, concerning the crime by asking for forgiveness and essentially admitting his guilt where the danger of unfair prejudice substantially outweighed the probative value.

III. The trial judge erred in admitting Appellant's statement to police where the statement was obtained in violation of Appellant's right pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and Article One, Section Twelve of the South Carolina Constitution due to Appellant's inability to knowingly and voluntarily waive his rights in light of his drug use and medical condition, and the lengthy interrogation employed by police.

STATEMENT OF THE CASE

On October 23, 2009, Homer and JoAnn Staton were murdered in Anderson County. On October 29th, petitioner was arrested for the murders. On January 19, 2010, the Anderson County grand jury indicted petitioner for both murders and armed robbery (2 counts).[1] Petitioner proceeded to trial January 23-27, 2012 before Judge R. Lawton McIntosh and a jury.[2] At its' conclusion, the jury found petitioner guilty as charged. He was sentenced to life for each murder and 30 years for each armed robbery consecutive.[3] He appealed his convictions. On November 12, 2014, the Court of Appeals affirmed. State v. Fullbright, 2014-UP-399 (Ct. App. 2014). A petition for rehearing was denied. This petition followed raising the same issues.

RESPONDENT'S STATEMENT OF FACTS

The victims, Homer and JoAnn Staton ("Homer" and "JoAnn"), were an elderly married couple.[4] They bought and sold gold jewelry for about 30 years at the time of their deaths and would travel to various parts of the Upstate to do so. Homer would usually carry about $25,000 on his person consisting almost entirely of $100 bills. He also wore gold jewelry. JoAnn would drive to the transaction locations, and Homer would sit in the passenger seat. The victims would not engage in transactions after dark unless they knew the person involved. (R. 170-83, 404).

On October 23, 2009, about 4 p.m., the victims visited with their daughter in Greenville. That evening, after receiving a phone call at their home in Taylors, the victims headed to Anderson County in their *black Toyota Corolla*. The next day, the *car* was found abandoned on

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1 Fullbright was represented by Scott Robinson, Esquire and the State by Solicitor Chrissy Adams. (R. 109).

[2]A Jackson v. Denno, 378 U.S. 368 (1964), hearing was conducted prior to trial on November 17, 2011. (R. 1-108). Additional testimony, regarding statements Fullbright made to police, was taken on January 23, 2012, before the trial began. (R. 110-36).

3 (R. 170-78, 198-241, 244-59, 395-415, 685-86, *Ind. #s 2010-GS-04-69 - 72*).

4 Both wore glasses. Homer wore a hearing aid and a colostomy bag.

Horton Rd. in Anderson County filled with blood, bone fragments, and human tissue.[5] (R. 170-83, 198-201, 220-28, 268-74, 312-40, 364-67, 418-21, 494-97, 268-74, 364-67, 220-28, 484-88).

While police were investigating, 2 days later, Homer's body was found on Asaville School Rd. in Anderson County. His jewelry was missing and no cash was on his person. An autopsy determined he died from blunt force trauma to the head. He was hit a minimum of 12 times. Some, if not all, of the injuries, were caused by an object consistent with the head of a hammer. (R. 198-201, 395-96, 488-89).

Police obtained the victims' cell phone records and discovered 1 of the last calls to Homer was from the phone of Irving Ramirez of Belton. Ramirez was interviewed. He informed police his neighbor, petitioner Matthew Fullbright ("Fullbright), had borrowed his cell phone the evening of October 23rd. The investigation then turned to petitioner. (R. 201-04, 268-74, 483-92).

On October 28th, Fullbright turned himself in to police on unrelated charges and agreed to speak with investigators at the Anderson Sheriff's Office. JoAnn had still not been found. Fullbright eventually admitted he knew where JoAnn was and agreed to lead police to her. While seated in a patrol car, Fullbright gave directions to a new, desolate, residential development in Iva. It was dark when police and Fullbright arrived. Based on Fullbright's directions where she would be found, police located JoAnn's body. (R. 201-41, 244-59, 264-71, 492-503, 517-22).

Her autopsy revealed she also died from blunt force trauma to the head consistent with a hammer like object. She was hit a minimum of 18 times. The autopsies of both victims revealed they had been struck numerous times on the right side of the head. The pathologist *and* a crime scene reconstruction expert testified the victims' injuries were consistent with being murdered in

5 The front portions of the 2 front seat belts also contained blood, bone, and tissue matter, indicating the 2 front occupants in the car were seated with their seatbelts fastened when they were assaulted. The victims were absent.

their car by someone in the back seat wielding a hammer-like weapon. (R. 395-417, 418-22).

After directing police to JoAnn and returning to the Sheriff's Office, Fullbright confessed to being an integral part of the murders and armed robberies of the victims. The motive for the murders was theft; Fullbright had prior dealings with the victims, and they were expected to have a large amount of cash on them and jewelry. (R. 229-41, 170-83, 244-59, 688, 697, State's 2, 4).[6] Fullbright admitted to planning to kill and rob the Statons but did not admit to swinging the hammer; he blamed that on Ramirez.[7] Fullbright claimed he was outside *the car* on the ground, pretending to be robbed, when Ramirez got in the rear of the victim's car and attacked them. However, Fullbright admitted to planning the murders and robberies, being present, being an integral part of the crimes, and getting proceeds of the crimes afterward. He also admitted he disposed of Homer's body and *the car*. (R. 229-41, 244-59, 492-519, 688, 697, State's 2 & 4).[8]

Fullbright also admitted involvement in the crimes at his bond/arraignment hearing on a conspiracy charge. At this hearing, on November 4, 2009, Fullbright was asked by *the victim Homer Staton's brother* why he killed the victims. Fullbright responded he had gotten into a

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6 Fullbright gave police a detailed account of what happened October 23rd. He explained the plan was to set up a fake jewelry buy in a secluded place and to lure the victims there. He arranged for them to pick him up near his home and to travel to and meet a fictitious gold seller. He admitted the victims picked him up as planned; JoAnn drove; Homer was in the passenger seat; and, he was in the back seat of the *Corrolla*. When they reached the secluded area, a newer neighborhood in Iva, the victims were bludgeoned to death in their car with a hammer and robbed of jewelry and cash. Fullbright explained the victims were still in their same seats when attacked. He explained JoAnn was discarded at the crime scene, and he drove the *victims' car*, with Homer dying or deceased in the passenger seat, to Asaville School Rd. where Homer's body was dumped. And, *the car* was eventually abandoned on Horton Rd. He even described the murder weapon, which was a hammer, and led police to a swamp off Monitor Rd., which was drained and a hammer consistent with that described by Fullbright as the murder weapon was recovered. (R. 244-59, 299-300, 341-45, 347-3, 492-519).

[7]Police eventually determined Ramirez was not involved in *the murders*; however, Ramirez had picked up Fullbright after the murders and after Fullbright had abandoned the victims' car on Horton Rd. (R. 268-74, 525-30).

[8]Fullbright actually gave 2 written statements to police. The 1st was lengthy, and he initialed several pages but refused to sign it because he was sleepy and did not like the order of events as set forth in the statement. The 2nd was shorter and basically a synopsis of the 1st statement, which Fullbright gave after being given some time to sleep, and he signed this statement as true and correct. (R. 229-41, 244-59, 492-519, 688, 697, State's 2 & 4).

lifestyle [drugs] that led to these murders, and like *David of the Bible*, who murdered *Uriah* to have *his wife*, God could forgive him, Fullbright, for the victims' murders. This conversation was recorded on video by WYFF News and was played for the jury. (R. 196-97, 515, State's 15).

The testimony at trial also established the underlying motive for the robbery and murders. Fullbright was a heavy user of illegal drugs.[9] Cell phone records also established Fullbright's guilt.[10] However, the phone records and investigation showed Fullbright did not immediately call Ramirez after the murders, as he claimed in his confessions. (R. 268-74, 364-77, 423-28, 429-84, 497-500, 510-14, 517-19).[11]

ARGUMENT I.

Judge McIntosh did not err in admitting the video-recorded statements of Fullbright at his bond/arraignment hearing because it was not required Fullbright be advised of his Miranda rights where he was questioned by the brother of the victim who was not acting as an agent of the State; and, he received advisement of his right against self-incrimination and voluntarily waived his right, and, even if the admission of this evidence was error, it was harmless given the other overwhelming evidence of Fullbright's guilt.

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9 A drug dealer testified that on the night of the murders Fullbright contacted him by phone and arranged a meeting. When Fullbright arrived, he was driving a *small black car* the dealer had never seen Fullbright in before. The meeting took place shortly after the victims were murdered. Fullbright purchased a large amount of drugs from the dealer with cash including $100 bills; and, over the next days, Fullbright purchased even more drugs. The dealer described these purchases as more than the usual amount Fullbright bought before the murders. (R. 355-63, 364-77).

10 Cell phone records established Fullbright had in fact been in contact with the victims before the day of their murders using his aunt's phone. Also, in his confessions, Fullbright admitted he used Ramirez' phone to "set up" the victims on the day of their deaths. Further, cell phone records established on the day of their murders the victims were contacted at home in Taylors about 6:00 p.m., and they drove through Williamston, to Belton, and eventually ended up in Iva. Homer stopped making calls on his personal cell phone around 8:00 p.m. Fullbright started making phone calls to a friend and then the drug dealer after 9:00 p.m. on a "Go Phone" recently purchased by Homer, which Fullbright admitted in his confession. The box for this phone was recovered in the abandoned *Corrolla*.

11 The State was also able show, through receipts and surveillance video, the day following the murders, Fullbright entered a Walmart and bought 2 gas cans and gas at a nearby gas station. Ramirez informed police that the day following the murders, he accompanied Fullbright hunting, where Fullbright burned items in a burn pile. Ramirez took police to the same; it was photographed, and the photos were admitted at trial. Fullbright also admitted in his confession to burning items from the murders in the burn pile. The State also established through 2 separate witnesses, Fullbright entered a convenience store the day after the murders and made 3 separate purchases each with a $100 bill buying items that could be used to smoke drugs. (R. 268-74, 341-42, 378-90, 259, 501-09).

What Occurred Below

Prior to trial, Fullbright objected to the admission of his video-recorded statements *to the victim's brother* alleging they were taken in violation of his 6th Amendment right to counsel. (R. 138-43, 149-71, 184-94). In fact, several times counsel pointed out he was not arguing the 5th Amendment but the 6th Amendment right to counsel. (R. 141-42). While counsel acquiesced that the issue he was raising brought in Miranda[12] concerns, he repeatedly raised a 6th Amendment right to counsel violation, not a 5th Amendment violation. (R. 139-43).

There was no evidence admitted during the pre-trial hearing or during the trial itself that the victim's brother was acting at the behest of the State or law enforcement when he asked Fullbright why he committed the murders. (R. 139-43, 149-71, 184-94, 391-93). Judge McIntosh ruled Fullbright's statement to the victim's brother was admissible as an admission against interest. He also ruled Fullbright's 5th and 6th Amendment rights were not violated, and he would allow Fullbright to make any objection preserving the issues for appeal. (R. 139-43, 149-71, 184-94, 391-93).[13] The State introduced the videotaped admissions during the trial and published them to the jury. (State's 15, R. 196-97, 540, 684). Fullbright did not contemporaneously object when the tape was played for the jury. (R. 196-97, 391-93, 540, 684).

Lack of Preservation of the Issue Raised on Appeal

On appeal, Fullbright argued his statements made on T.V. to the victim's brother should be suppressed because his *5th* Amendment right not to incriminate himself was violated. (See

12 Miranda v. Arizona, 384 U.S. 436 (1966).

13 Specifically, Judge McIntosh found Fullbright's 5th Amendment right against self-incrimination was not violated because he was not subject to custodial interrogation by law enforcement as held in State v. Kirton, 381 S.C. 7, 671 S.E.2d 107 (Ct. App. 2008), and therefore Miranda was not applicable. Judge McIntosh held Fullbright's 6th Amendment right to counsel was not violated because the 6th Amendment right to counsel was offense specific, and while the right was applicable to an arraignment hearing, Fullbright did not invoke his right to counsel on this specific charge. Further, Fullbright executed a waiver of his right to counsel. (R. 391-93).

BOA, p. i, 1, 4-17).[14] This issue is not preserved for appellate review because it was not raised him below. (R. 139-43, 149-71, 184-94) *Cf.* Mize v. Blue Ridge Ry. Co., 219 S.C. 119, 64 S.E.2d 253 (1951); State v. Fletcher, 363 S.C. 221, 609 S.E.2d 572 (Ct. App. 2005); Duncan v. Hampton County Sch. Dist. No. 2, 335 S.C. 535, 517 S.E.2d 449 (Ct. App. 1999); Wierszewski v. Takarick, 308 S.C. 441, 418 S.E.2d 557 (Ct. App. 1992)(issue not preserved for review merely because the trial judge mentions it). While the trial court later stated Fullbright objected on both 5th and 6th Amendment grounds (See R. 391-93), this was incorrect. (R. 139-43, 149-71, 184-94). Fullbright raised only a 6th Amendment violation below, not a 5th Amendment violation. (R. 139-43, 89-111, 184-94). Further, when the tape was actually introduced or played for the jury, there was no objection on any basis, and this occurred at the end of the trial and again at the end of the State's closing. (R. 540, 684). State v. Wannamaker, 346 S.C. 495, 552 S.E.2d 284 (2001); State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996); Ramos v. Hawley, 316 S.C. 534, 451 S.E.2d 27 (Ct. App. 1994)(failure to object to evidence at time offered waives right to object on appeal). Fullbright's 5th Amendment argument is not preserved for appellate review.[15]

The Lack of Merit of this Issue

Even if the issue Fullbright argues under ground one was somehow preserved, i.e. his 5th Amendment right against self-incrimination was allegedly violated, the issue has no merit.

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14 Under this ground in his brief, Fullbright did not argue his *6th* Amendment right to counsel was violated; however, he did mention this ground was raised below by his counsel. (IBOA. pp. 4-17). He repeatedly argued under this ground only that his *5th* Amendment right against compulsory self-incrimination was violated. (See IBOA pp. 4-17). This is also clearly stated in his statement of issue on appeal. (IBOA, p. 1). Under the 2nd ground of his brief, Petitioner stated he argued below both 5th and 6th Amendment concerns to the trial court. However, this is incorrect. Below, Petitioner made clear he was arguing a 6th Amendment violation, not a 5th Amendment violation. (R. 138-43). As a result, the issue Petitioner argues under ground one was not preserved for appellate review.

15 For the latter reason, any 6th Amendment claim, if raised here is not preserved. Further, any 6th Amendment claim was abandoned in the statement of issue on appeal and in the body of his brief. (BOA, pp. i, 1, 4-17).[15] Rule 208(b)(1)(B), Calhoun v. Calhoun, 339 S.C. 96, 529 S.E.2d 14 (2000)(ordinarily, no point will be considered on appeal which is not set forth in the statement of the issues on appeal); *See* Eubank v. Eubank, 347 S.C. 367, 555 S.E.2d 413 (Ct. App. 2001)(statement of issue when read in conjunction with argument adequately raised issue).

Standard of Review[16]

Admission of evidence is within the sound discretion of the trial judge and is reversible only for an abuse of discretion. State v. Morris, 376 S.C. 189, 656 S.E.2d 359, (2008). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007).

As a general rule, a defendant's out of court statement may be testified to by a witness who heard it. State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980). Anything a defendant has stated, relevant to any question involved at trial, is admissible against him. State v. Pittman, 137 S.C. 75, 134 S.E.514 (1926); State v. Turner, 117 S.C. 470, 109 S.E.119 (1921). This is true, so long as the statement, *if made to police during custodial interrogation*, was voluntarily made. State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989). However, when evidence is obtained by a 3rd person, not acting at the direction of the police or prosecutors, there is no 5th Amendment violation, because the suspect is not being compelled by a governmental actor or agent. State v. Kirton, 381 S.C. 7, 671 S.E.2d 107 (Ct. App. 2008)(statement defendant made during arraignment in response to magistrate's innocuous question was not in a custodial type setting and was admissible). Incriminating statements not deliberately elicited by agents of the State or judges, may be used against a defendant, and although a defendant incarcerated is "in custody" there is no requirement Miranda warnings be given. State v. Edwards, 220 S.C. 373, 66 S.E.2d 348 (1951)(magistrate permitted to testify while bond for co-defendants was being arranged, he

16 In criminal cases, this Court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006). This Court is bound by the trial court's factual findings unless clearly erroneous. Id. On appeal, this Court is limited to determining whether the trial court abused its discretion. State v. Walker, 366 S.C. 643, 623 S.E.2d 122 (Ct. App. 2005). The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed absent a prejudicial abuse of discretion. State v. Bridges, 278 S.C. 447, 298 S.E.2d 212 (1982).

heard statements made in his presence about the case and connection between the defendants); Kirton; State v. Holliday, 333 S.C. 585, 510 S.E.2d 436 (Ct. App. 1999)(defendant's statements made before a magistrate at bond hearing admissible at trial); State v. Morris, 307 S.C. 480, 415 S.E.2d 819 (Ct. App. 1991)(defendant was arrested, Mirandized, and taken to jail, after having never invoked any of his rights, and during booking, jailer engaged in a normal conversation with defendant, during which he made incriminating statements, statements were admissible.).

The statements of Fullbright at the bond/arraignment hearing are not different from those made by a defendant to a family member or friend in the presence of police. Arizona v. Mauro, 481 U.S. 520 (1987)(defendant's statements to wife made in presence of policeman who he knew was there and recording conversation, were admissible because conversation with wife was not functional equivalent of questioning by police, where officer never asked questions or directed wife to ask any); State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996)(defendant's statements to his employer, also a part-time magistrate, were admissible where magistrate was visiting defendant in jail as employer not as agent of State).[17]

The requirements of Miranda only apply to custodial interrogations by the State or agents of the State; accordingly, statements made to private persons are not subject to its requirements. State v. Lynch, 375 S.C. 628, 654 S.E.2d 292 (Ct. App. 2007)(defendant prison inmate's statements to news reporter were not subject to Miranda's requirements because reporter was not acting as agent of the State). *See e.g.* State v. Commander, 384 S.C. 66, 681 S.E.2d 81 (Ct. App. 2009)(fellow inmate testified to statements defendant made to him about his trial strategy and inmate was not acting as agent of the State); State v. Turner, 371 S.C. 594, 641 S.E.2d 435

17 *See* Good (statement by juvenile [tried as adult] to his guardian/uncle was not protected by any testimonial privilege, and was admissible through uncle); In re Drolshagen, 280 S.C. 84, 310 S.E.2d 927 (1984)(questioning of student by principal, in his office with police officer present, was not a custodial interrogation).

(2007)(defendant's recorded statement to co-defendant in police car was admissible because there was no interrogation by police or its functional equivalent, Miranda did not apply). As a result, Judge McIntosh did not err in admitting this evidence.

Further, the record shows, before the arraignment, Fullbright had been apprised of his Miranda rights at least 3 times by police.[18] Further, the evidence in the pre-trial hearing regarding the admissibility of the video reflected the magistrate at the arraignment had advised him of his Miranda rights. (R. 53-57, 89-110, 184-94). The magistrate did not require Fullbright to answer the victim's brother's question. (State's 15). Fullbright knowingly and voluntarily chose to answer the question. As a result, for this additional reason, this issue has no merit.[19]

Harmless Error

Further, even assuming *arguendo* error in admitting Fullbright's admissions on video, it was harmless given the other overwhelming evidence of his guilt. Arizona v. Fulminante, 499

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18 This included that anything he said could and would be used against him in court, and Fullbright acknowledged he was aware of those rights and waived them. (State's Ex. 1, 3, 6, R. 5-93; R. 110-36).

19 Even if Fullbright raised a 6th Amendment claim here, *which he is not*, it would have no merit. As Judge McIntosh found, there was no 6th Amendment violation. The 6th Amendment right to counsel attaches when adversarial proceedings have been initiated and at all critical stages, and in the context of the questioning/statement setting, only to "post-indictment" interrogations. Michigan v. Harvey, 494 U.S. 344 (1990): State v. Register, 323 S.C. 471, 476 S.E.2d 153 (1996); State v. Kennedy, 325 S.C. 295, 479 S.E.2d 838 (Ct. App. 1996). Further, the 6th Amendment right to counsel is offense specific. Accordingly, if a defendant has been appointed or retained counsel in 1 case, it does not preclude the prosecution from talking to a defendant about another matter. McNeil v. Wisconsin, 501 U.S. 171 (1991); Arizona v. Roberson, 486 US. 675 (1988); State v. McCray, 332 S.C. 536, 506 S.E.2d 301 (1998); Register. This is true even when the defendant is arrested on a related charge, arising out of the same transaction or occurrence. Texas v. Cobb, 532 U.S. 162 (2001); State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996); State v. Wilder, 306 S.C. 535, 413 S.E.2d 323 (1991); State v. Howard, 295 S.C. 462, 369 S.E.2d 132 (1988). Although the 6th Amendment right to counsel may attach at an arraignment proceeding, the right must be invoked by the defendant, even if the charge is related to the same facts on which he may have invoked the right on other charges. Patterson v. Illinois, 487 U.S. 285 (1988). *See* Montejo v. Louisiana, 556 US. 778 (2009). Further, the victim's brother was not an agent of the State, so there was no 6th Amendment violation. State v. Stahlnecker, 386 S.C. 609, 690 S.E.2d 565 (2010). Further, Fullbright had not been indicted for the conspiracy count or any offense when questioning by the victim's brother took place. State v. Compton, 366 S.C. 670, 623 S.E.2d 661 (Ct. App. 2005). Finally, even if Fullbright could show a 6th Amendment violation, his confession on T.V. would have been admissible as impeachment evidence where he claimed he did not commit the crimes and did not confess. Kansas v. Ventris, 556 U.S. 586 (2009)(statement taken in violation of 6th Amendment is still admissible as impeachment evidence to prevent perjury).

U.S. 279, 310 (1991)(error in admission of involuntary confession is subject to harmless error analysis); Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001); State v. Perry, 74 S.C. 551, 54 S.E.764 (1906)(admission not prejudicial in part because defendant made same confession to others). Separate from the arraignment, the evidence of Fullbright's guilt was overwhelming.[20]

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20 The record shows the victims were last seen alive on the afternoon of October 23rd by their daughter in Greenville. The victims regularly engaged in buying gold; however, they would not engage in transactions after dark unless they knew the person involved. Homer Staton wore expensive jewelry and carried approximately $25,000 in cash on his person, mostly in $100 bills. Phone records established Homer received a call at his residence in Taylors the night of October 23rd from a cell phone in Anderson County belonging to Ramirez, a neighbor of Fullbright. The victims' car was found the next day in Anderson County abandoned on a secluded road with blood spatter, human bone, and human tissue inside consistent with the victims' D.N.A. This evidence indicated the victims were seated with their seatbelts on when assaulted. Two days later, Homer's body was found on a secluded road in Anderson County. His jewelry and cash were missing. An autopsy determined he died from blunt force trauma to the head consistent with being struck in the head with a hammer and struck at least 11 times. Based on Homer's phone records, police interviewed Ramirez who indicated Fullbright had possession of his cell phone the night the victims disappeared. Fullbright was questioned and admitted he knew where JoAnn was. While dark, Fullbright led police to JoAnn's body in a secluded wooded area, 30 to 40 minutes from the Sheriff's Office. Police recovered her body only as a result of Fullbright's directions. Her autopsy also revealed she was bludgeoned to death with a hammer and was struck about 18 times. Fullbright described *to police* the murder weapon as a hammer, drew the weapon on paper, and described its various colors. He eventually led police to a swamp on property owned by or next to property owned by his father where he alleged the murder weapon had been thrown. After draining the swamp, police able to recover a hammer matching the description Fullbright had gave of the murder weapon. In 2 confessions, 1 initialed, and 1 signed, Fullbright admitted being an integral part in the planning of the armed robbery of the victims and explained the motive for the murders. In his 2nd statement, he admitted the plan all along was to murder the victims and rob them of cash and jewelry they were expected to have. He also admitted leading the victims to where they were to be robbed and murdered, *sitting in the back seat behind them* on the way there, participating in the robberies and murders as an aider and abetter, disposing of Homer's body and *the car*, and receiving proceeds from the crimes. The confessions were admitted before the jury. Phone records established Fullbright had been in contact with the Statons *before the day of their murders* by contacting them on his aunt's phone. Fullbright admitted at trial he had known the victims for a long period of time, and he had arranged previous gold transactions for them in which he received a finder's fee. In his confessions, he admitted he used Ramirez' phone to "set up" the victims the day of their murders. Also, phone records proved the victims were contacted at home in Taylors, around 6:00 p.m.; they then drove through Williamston and Belton and ended up in Iva, where they were murdered. The records also proved Homer stopped making calls on his personal cell phone around 8:00 p.m., and Fullbright started making calls to *a friend* and then *a drug dealer* after 9:00 p.m. on a Go Phone purchased by Homer, which Fullbright admitted in his confession. The box for this phone was recovered in the victims' abandoned *car*. However, phone records showed Fullbright *did not* immediately call Ramirez after the murders, as he claimed in his confessions implicating Ramirez. The records also established, on that night, Fullbright made calls from the area where Homer's body was dumped, from where *the car* was abandoned, and Fullbright met the drug dealer at an abandoned store. The drug dealer testified that on the night of the murders, Fullbright contacted him, by phone, and arranged a meeting. When Fullbright arrived, he was driving a *small black car* the dealer had never seen him in before. This meeting took place shortly after the victims were murdered. Fullbright then purchased a large amount of drugs from the dealer with cash including $100.00 bills. Over the next days, Fullbright purchased more drugs, and these purchases were for more than the usual amount he bought from the dealer prior to the night of the murders. Receipts and surveillance footage proved the following day Fullbright entered a Walmart and bought 2 gas cans and gas at an adjoining station. Ramirez informed police that the day following the murders, he saw Fullbright

As a result, even if the court erred in admitting the video, it was harmless where the evidence of Fullbright's guilt was overwhelming, including 2 written confessions and taking police to 1 victim's body. State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003)(admission of improper evidence is harmless where the evidence is merely cumulative to other evidence).[21]

ARGUMENT II.

Judge McIntosh did not err in admitting the video-recorded admission of of Fullbright to a relative of the victim under Rule 403, SCRE because the probative value of the admission of guilt was not substantially outweighed by any prejudicial effect to Fullbright.

Judge McIntosh also denied Fullbright's *in limine* objection under Rule 403, SCRE, to admission of the arraignment video. Fullbright argued the prejudicial effect of his video recorded admissions to a relative of the victim *substantially outweighed* its probative value. Judge McIntosh found the probative value of the admissions outweighed any prejudicial effect.[22]

Lack of Preservation of the Issue

As previously set forth, at the time the video was published for the jury, even though Judge McIntosh had informed Fullbright he would allow him to place his objections on the record to preserve the issue for appeal, Fullbright did not renew his objection to the admission of the video on any basis, including under Rule 403, SCRE.[23] As a result, Respondent submits this issue is not preserved for appellate review. Wannamaker; Simpson; Ramos (failure to object to photographs at the time they were offered waives right to object on appeal).

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burning items in a burn pile. Ramirez took police to the burn pile; it was photographed, and the photos were admitted before the jury. Two other witnesses proved Fullbright also entered a store the day after the murders and made 3 separate purchases each with a $100.00 bill. He purchased items that could be used to smoke drugs.

21 *See* State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001); State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978); State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996)(error in admission of evidence is harmless where it is cumulative to other evidence properly admitted); State v. Douglas, 367 S.C. 498, 626 S.E.2d 59 (Ct. App. 2006).

22 **(R. 139-143, 149-170, 184-94, 391-93).**

23 **(R. 540, 684).**

The Lack of Merit of this Ground

Regardless, even if this Court determines this issue is preserved for appellate review, it has no merit for the reasons stated below.

Standard of Review

In reviewing a trial court's ruling on the admissibility of evidence, this Court recognizes the trial judge has considerable latitude and will not disturb its' rulings absent a prejudicial abuse of discretion. State v. Whitner, 399 S.C. 547, 732 S.E.2d 861 (2012). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Whitner, 399 S.C. at 557, 732 S.E.2d at 866.

Under Rule 403, SCRE, "..evidence may be excluded if its probative value is **substantially outweighed** by the danger of *unfair prejudice* ..." Rule 403, SCRE (emphasis added). "A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances." State v. Martuci, 380 S.C. 232, 250, 669 S.E.2d 598, 607 (Ct. App. 2008); State v. Vang, 353 S.C. 78, 87, 577 S.E.2d 225, 229 (Ct. App. 2003). "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." State v. Spears, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013); State v. Collins, 398 S.C. 197, 727 S.E.2d 751 (Ct. App. 2012).

The probative value of Fullbright's admission to the commission of the murders is clear, compelling, and highly relevant. Fullbright was on trial for 2 murders and armed robberies. His admission to the victim's brother he committed the murders, and why, identified him as the murderer of the victims, or at least as a participant in the murders, and established the motive for

the crimes. Fullbright admitted it was his drug addiction or lifestyle that led to the murders.[24] Fullbright conceded the video provided probative evidence of the crimes because in the tape he admitted his guilt to the murders.[25] Further, *in his opening statement*, Fullbright told the jury **he did not make the written confessions police would testify he made and signed**, and **he was completely innocent of the crimes** and had been **framed by police.**[26] This claim further enhanced the probative value of the evidence at issue, because it showed Fullbright had confessed and was not trying to hide his guilt shortly after making the written confessions.[27] The video completely undercut and disproved his claim he did not confess and was innocent.

The prejudice to Fullbright was minimal. The jury knew Fullbright was arrested and charged with the victims' murders and armed robberies. Therefore, the jury knew Fullbright was incarcerated at some point pending trial. Also, an investigator testified to Fullbright's detention after arrest and accompanying the officer to several locations to attempt to recover evidence. Further, Fullbright admitted in his trial testimony he was incarcerated for 2 years prior to trial.[28] Jurors are well aware inmates detained in a county jail wear uniforms issued by the facility. The prejudice from this was minimal. Further, Fullbright was not dressed in orange at trial but street clothes. It was only in the *arraignment* video that he was wearing orange. The relevance of the video was Fullbright's *statements*, his admission he committed the murders and why.

In order to exclude relevant probative evidence, the prejudice must *substantially outweigh* its probative value. Rule 403, SCRE. In this case, Fullbright has not shown any conceivable prejudice to him from the videotape substantially outweighed the probative value of

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24 **(State's 15).**
25 **(BOA, 19).**
26 **(R. 144-49).**
27 **(State's Ex. 15, 2, 4).**
28 **(R. 541-83, 592-611).**

his admission of guilt to the murders and admission to the motive for the murders.

Further, even if the evidence had not been admitted in the State's case in chief, its probative value, which *was* already great, was heightened even further by Fullbright's trial testimony he did not confess; his confessions were fabricated by police, and he was innocent.[29] The video would have been admissible in reply and its probative value far outweighed any prejudicial effect where he contended *he was innocent* and *never confessed.*[30] Rule 403, SCRE.

Harmless Error

Further, as stated, even assuming *arguendo* error in admitting this evidence under Rule 403, it was harmless given the other overwhelming evidence of Fullbright's guilt including 2 written confessions and taking police to 1 victim's body. Fulminante (error in admission of involuntary confession is subject to harmless error analysis); Franklin (same); Perry (admission not prejudicial in part because defendant made same confession to others); Haselden (admission of improper evidence is harmless where the evidence is merely cumulative to other evidence).

ARGUMENT III.

Judge McIntosh did not err in admitting Fullbright's statements *to police* because the statements were not obtained in violation of Fullbright's constitutional rights, and Fullbright's statements were voluntary under the totality of the circumstances.

STANDARD OF REVIEW

The admission or exclusion of evidence is within the sound discretion of the trial judge and is reversible only for an abuse of discretion. Morris. An abuse of discretion occurs when the trial court's conclusions lack evidentiary support or are controlled by an error of law. Pittman.

A defendant's out of court statement may be testified to by the witness who heard an oral

29 **(R. 541-83, 592-611).**
30 **(R. 541-83, 592-611, State's 15).**

statement or received a written statement. Plyler; Shorter; Hambright; Good. Anything a defendant has stated, relevant to any question involved in the trial, is admissible against him. Pittman, 137 S.C. 75, 134 S.E. 514; Turner. This is true, so long as the statement, if made to police during custodial interrogation, was voluntarily made. Childs; Sanders.

Standard of Review / Jackson v. Denno Hearing

In a pre-trial Denno[31] hearing, the State's burden is to present evidence establishimg by *a preponderance of the evidence* the statement made by the defendant was voluntary, Miranda warnings were properly administered, and the statement is admissible. Lego v. Twomey, 404 U.S. 477 (1972); State v. Washington, 296 S.C. 54, 370 S.E.2d 611 (1988). In determining if a defendant's statement should be admitted, the trial judge is not to rely on its truthfullness, only whether it is voluntary and legally admissible. Rogers v. Richmond, 365 U.S. 534 (1961).

Where there is conflicting evidence as to whether the defendant's statement is voluntary, it is, in the first instance, the province of the trial court to determine this factual issue by a preponderance of the evidence. State v. Howard, 296 S.C. 481, 374 S.E.2d 284 (1988); Washington. Whenever there is conflicting evidence relative to the validity of the statement or confession, as is quite often the case, it becomes the initial duty of the trial judge to make a factual finding as to the validity of the statement. If found valid, the court should allow the statement to go to the jury for its ultimate determination of validity. State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996). Validity deals with whether the statement was voluntary or not. Von Dohlen; State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31 (1980).

In a Denno hearing, the circuit court has the opportunity to listen to the testimony, assess

[31]Jackson v. Denno, 378 U.S. 368 (1964).

the demeanor and credibility of all witnesses, and weigh their testimony accordingly. State v. Miller, 375 S.C. 370, 652 S.E.2d 444 (Ct. App. 2007).[32] The trial court's 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. Baccus, 367 S.C. at 48, 625 S.E.2d at 220; Von Dohlen. This Court is bound by the trial court's factual findings unless clearly erroneous. Id. When reviewing a trial judge's ruling concerning voluntariness, this Court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines if the trial judge's ruling is supported by any evidence. State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001).

What Occurred Below
(The Jackson v. Denno Hearing)

Prior to trial and the admission of Fullbright's statements, the court conducted a Denno hearing.[33] Additional Denno testimony was taken *in camera*, on the 1st day of trial, regarding statements of Fullbright and a drawing of the murder weapon made after his 2 written confessions.[34] In these Denno proceedings, the State called 4 witnesses and Fullbright 1.[35] The State introduced the Miranda[36] waiver forms executed by Fullbright, the written statements initialed or signed by him, and a drawing of the murder weapon initialed by him.[37] The State's witnesses all testified Fullbright was read his Miranda rights multiple times, understood those

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32 In passing on the preliminary question of admissibility, a trial judge is not bound to accept as true the defendant's testimony as to intimidation, even if such testimony is not directly controverted by the testimony of other witnesses. State v. Boone, 228 S.C. 438, 90 S.E.2d 640 (1955); State v. McAlister, 133 S.C. 99, 130 S.E. 511 (1925). And, there is no requirement the State present every witness who may have knowledge about any statement made by the defendant, and the failure of to do so does not render any statement of the defendant inadmissible. State v. Brown, 212 S.C. 237, 47 S.E.2d 521 (1948); State v. Howard, 35 S.C. 197, 14 S.E. 481 (1892).

33 **(R. 1-108).**

34 **(R. 110-36).**

35 **(R. 1-108 & 110-36).**

36 Miranda v. Arizona, 384 U.S. 436 (1966).

37 **(State's 1, 2, 3, 4, 5, & 6).**

rights, signed waivers, waived his rights, and each statement was voluntarily, intelligently, and knowingly made. **(R. 5-94, 110-36).** The State's witnesses testified Fullbright's statements were not the result of any promise, threat, or hope of reward. **(R. 5-94, 110-36).** These witnesses also testified Fullbright initialed his 1st statement and signed his 2nd statement. **(R. 5-94, 110-36).**[38]

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38 Specifically, the State's witnesses testified Fullbright's questioning began about 6:30 p.m. on October 28th when he reported to the Sheriff's Office and was questioned in a conference room. At that time, Fullbright was read his Miranda rights and executed a written Waiver waiving those rights. Fullbright spoke with investigators for about 4 hours. At about 10:00 p.m., Fullbright appeared as if he was sick or about to pass out and fell out of his chair onto the floor. An investigator with training in emergency medicine checked Fullbright's eyes, performed a sternum rub, and determined he was not unconscious. Out of an abundance of caution, E.M.S. was contacted and an E.M.T. responded and evaluated Fullbright. It was determined there was nothing physically wrong with him. Fullbright also twice refused any medical treatment. At this time, the Sheriff, who was not involved in the questioning, knelt beside Fullbright [who was still on the floor], and informed him it was time for him to tell police where JoAnn was. Fullbright admitted he knew where JoAnn was and told the Sheriff he would take police to her. **(R. 5-70).** Fullbright then led police to JoAnn by giving them directions to her body in rural Anderson County. During the ride, Fullbright talked about and answered some questions about the crimes and how they occurred, but he was sobbing and upset and told investigators he did not really feel able to answer questions about the crimes themselves at that time, only giving directions to where JoAnn was. However, Fullbright did not invoke his right to remain silent. He continued to give police directions until he led them to within 50 feet of JoAnn's body, which was recovered. **(R. 5-70).** On the return trip to the Sheriff's Office, investigators testified Fullbright was more composed and relaxed. Fullbright was asked if he needed anything to eat, to which he responded yes. Officers stopped at a Taco Bell and obtained food for themselves and Fullbright. After returning to the Office, Fullbright ate with the investigators. **(R. 5-55).** Fullbright stated he was willing to talk about the crimes, and gave police a detailed account of how and why the victims were murdered. **(R. 5-55, State's 1 & 2).** Fullbright explained he contacted the victims using a cell phone belonging to Ramirez. Fullbright explained the plan was to stage a fake buy of gold to lure the victims to Anderson County. He further explained the victims knew him, and he contacted them and arranged what the victims believed was a purchase of gold. When the victims arrived, he got in the rear of their car and led them to a secluded location where, unknown to the victims, they were to be robbed by Ramirez, and he, Fullbright, was to pretend he was a victim of the robbery as well. Fullbright explained when he and the victims arrived at the location which he and Ramirez had predetermined, Ramirez came out of the woods and pretended to rob him [Fullbright], and then Ramirez got into the back of the victims' car and beat the victims to death with the butt of a pistol and then a hammer. Fullbright stated Ramirez hit the victims numerous times with the hammer. Fullbright then explained Ramirez removed JoAnn from the car and drug her body in the woods near the crime scene. After Ramirez robbed Homer of cash and jewelry, he, Fullbright, drove the victims' car with Homer still in the passenger seat to Asaville School Rd. where he, Fullbright, disposed of Homer's body. Fullbright then took the victims' car and abandoned it on Horton Rd. Fullbright also admitted he received proceeds of the murders and robbery from Ramirez. **(R. 5-55, 71-88, State's 1, 2).** At the end of this interview, Fullbright informed officers he wanted to "come clean." He then admitted the plan all along was to murder the victims and rob them, not just to rob them. Fullbright reviewed several pages of this 1st statement and initialed them, but told officers before he signed it, he wanted some of the sequence of events changed because it was not correct, and he [Fullbright] was also tired and would like to get some rest before signing the same. However, Fullbright agreed to continue to talk with investigators and make the necessary changes he wanted after he got some sleep. Fullbright was then taken to the jail so he could get some rest. This interview terminated at approximately 4:00 a.m. on October 29th. **(R. 5-55, State's Ex. 1 & 2).** The following day, around 2:30 p.m., investigators met with Fullbright at the jail in a conference room. Fullbright appeared more rested and agreed to continue to speak with officers. He was again read his Miranda rights and executed a Waiver. **(State's 3).** Fullbright gave a 2nd written statement which he signed. **(State's 4).** Fullbright again admitted his role

Fullbright's only witness in the Denno hearing was his father, who testified the initials on the 1st statement, 2nd Miranda Waiver, and 2nd statement, were not his son's handwriting. **(R. 94-99).** The implication being investigators fabricated the confessions and 2nd waiver of Miranda rights. The State's witnesses had already testified the initials on Fullbright's 1st statement, and the initials and signature on the 2nd Waiver and 2nd statement were written by Fullbright in their presence. **(R. 1-93).** Inv. Barton also testified *in limine* the 1st day of trial Fullbright executed the 2nd waiver and signed the 2nd statement. **(R. 110-36).**

Judge McIntosh ruled, under the totality of the circumstances, and by a preponderance of the evidence, Fullbright's statements were voluntarily, knowingly, and intelligently made and therefore admissible.[39] As a result, Judge McIntosh ruled the statements would be submitted to the jury for their consideration if the State proved to the jury they were voluntarily, knowingly, and intelligently made beyond a reasonable doubt. **(R. 100-105, 137-39).**

The Lack of Merit of this Ground

It was in Judge McIntosh's discretion to determine the credibility of the witnesses at the Denno hearings and whether to admit Fullbright's statements. Simmons (in determining whether

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in luring the victims to Anderson and participating in their murders and armed robbery. This statement included the fact the plan was to murder the victims, not just to rob them. This statement was basically the same as his 1st statement, just more concise. Fullbright signed this statement as true and correct. After completing this statement, Fullbright drew for investigators the hammer he contended was the murder weapon and initialed it. **(R. 5-55, 71-89, R. 110-36, State's 4 & 5).** Another investigator testified that on October 29th, Fullbright went with him and another officer after agreeing to attempt to locate some of the items of evidence he mentioned in his earlier statements. Fullbright accompanied the investigators to several locations describing items that were discarded after the murders. **(R. 110-36).** The investigator testified that on October 30th, he met with Fullbright again, at which time Fullbright executed another Waiver and accompanied he and another investigator to several locations pointing out again where he believed items of evidence were discarded, 1 of which was the swamp where Fullbright claimed the hammer was discarded. **(R. 110-36, State's 6).**

39 In making this determination, Judge McIntosh considered the continuity of the questioning, Fullbright's age, the location of the questioning, the lack of any coercion, the lack of any testimony Fullbright invoked any of his constitutional rights, the execution of voluntary waivers of rights by Fullbright prior to any questioning, and necessities were not withheld from Fullbright in any fashion.

the defendant made voluntary statements, the trial court properly considered the credibility of the witnesses, as it must); Miller, 375 S.C. at 387, 652 S.E.2d at 453 (in a Denno hearing, the court is able to listen to the testimony, assess the demeanor and credibility of witnesses, and weigh the evidence accordingly); State v. Parker, 381 S.C. 68, 671 S.E.2d 619 (Ct. App. 2008)(similar). As previously stated, in passing on the preliminary question of admissibility, a trial judge is *not* bound to accept as true the defendant's claims as to intimidation, promises, or threats. Boone; McAlister. In this case, the State's witnesses directly contradicted the claims of Fullbright's father.[40] Further, before admitting a statement to the jury, the State need only show its voluntariness by a preponderance of the evidence, i.e. the greater weight of the evidence. Smith, 268 S.C. at 354, 234 S.E.2d at 21.

In determining whether the State has shown by a preponderance of the evidence a statement was freely, voluntarily, and knowingly made, the trial judge is to look at the totality of the circumstances. Saltz, 346 S.C. at 136, 551 S.E.2d at 252; Miller. Courts have looked at the several factors in determining, under the totality of the circumstances, whether the State has met its burden of proof to show a statement was voluntary by a preponderance of the evidence.[41] Judge McIntosh considered each of these factors in concluding under the totality of the circumstances Fullbright's statements were admissible. **(R. 100-05).** The totality of the circumstances supports Judge McIntosh's finding the State met its burden by the preponderance of the evidence that Fullbright's statements were voluntary.

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40 And, there is no requirement the State present every witness who may have knowledge about any statement made by the defendant, and the failure to present every such witness does not render any statement of the defendant inadmissible. Brown; Howard.

41 These factors include the length of the interrogation, its location, its continuity, the defendant's age or maturity, education, physical condition, and mental health, the failure of police to advise the defendant of his constitutional rights, whether threats of violence, promises of leniency, misrepresentations regarding evidence were made, whether deprivation of food or sleep was used as a punishment, and the background, experience, and conduct of the accused. Id. No 1 factor is determinative, but each case requires careful scrutiny of all the surrounding circumstances. Parker.

Fullbright was read his Miranda rights not once but several times by police. On October 28th, he was read his Miranda rights and voluntarily admitted he was present at the crime scene and guilty of murder and armed robbery.[42] Fullbright was again read his Miranda rights before being questioned at all about the murder on October 29th.[43] He executed this Waiver and gave a written signed confession he was guilty of the murders and robberies. He executed an additional Waiver before he took an investigator to various locations where he claimed evidence of the crimes was discarded.[44] Fullbright signed each Waiver each time indicating his rights were read to him; he understood them; and, he signed the form indicating he was waiving and giving up those rights and voluntarily talking to detectives.[45] This factor weighs in favor of the voluntariness of Fullbright's statements.

Fullbright's 1st questioning began around 6:30 p.m on October 28th and ended around 4:00 a.m. on October 29th.[46] Investigators testified the total questioning lasted approximately 10 hours; however, this included smoke breaks, bathroom breaks, an approximately 1 ½ hour trip to the crime scene and back, stopping at a restaurant to get food for Fullbright and investigators to eat, and then taking more time to eat this meal. **(R. 5-55).** Also, more time was taken because Fullbright appeared to faint during the interrogation; E.M.S. was contacted, and E.M.S. evaluated Fullbright for approximately 40-45 minutes. **(R. 5-93).** Further, because Fullbright was sleepy, the questioning ceased so he could get some sleep. The length of the actual questioning, approximately 7 ½ hours, after considering breaks, is in favor of voluntariness. *See* State v. Crawley, 349 S.C. 459, 562 S.E.2d 683 (Ct. App. 2002)(statement voluntary where

42 **(R. 5-55, State's 1, 2).**
43 **(R. 5-55, R. 110-36 & State's 3).**
44 **(State's 6).**
45 **(R. 5-55, 110-36, State's 1, 3, 6).**
46 **(R. 5-55).**

interrogation lasted about 7 ½ hours in which defendant also received dinner and rest-room breaks); Saltz (6 ½ hours); State v. Chaffee-Ferrell, 285 S.C. 21, 328 S.E.2d 464 (1984)(5 hours); State v. Cannon, 260 S.C. 537, 197 S.E.2d 678 (1973)(5 ½ hours).

Fullbright's 2nd questioning the following day did not last very long at all. This factor weighs in favor of the admissibility of Fullbright's 2nd statement. Von Dohlen, 322 S.C. at 245, 471 S.E.2d 696 (3 hour interrogation did not render statement involuntary based on the totality of the circumstances); State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990)(2 ½ hours).

Investigators testified Fullbright was not threatened or coerced in any way to give a statement. Neither the investigators nor Fullbright testified Fullbright was hungry or asked for anything to eat, except for the 1 time on the return trip from the crime scene where officers got him something to eat, and he did eat. **(R. 5-55).** Necessities were not withheld in an attempt to force him to give a statement. Further, when Fullbright said he was tired, investigators stopped questioning him and did not resume questioning until around 2:20 p.m. the next day, after he had been given an opportunity to rest. **(R. 5-55, 110-36).** This factor weighs in favor of the voluntariness.

Respondent submits Fullbright's interrogation did not take place in a police dominated atmosphere. With regard to his 1st statement, only 1 officer was doing the questioning; the other was in the room taking notes. *See* State v. Dye, 384 S.C. 42, 681 S.E.2d 23 (Ct. App. 2009)(finding when defendant confessed he was not in a police dominated atmosphere as only 1 officer was present in the room). And, Fullbright was not interrogated in a cell, but questioned in a conference room at the Sheriff's Office, in an investigator's office upon returning from the crime scene, or in a conference room at the jail. This factor weighs in favor of voluntariness.

Fullbright was 29 to 30 years old at the time of questioning.[47] Fullbright had also completed his GED. This factor weighs in favor of the voluntariness of Fullbright's statements. *See* Davis v. North Carolina, 384 U.S. 737 (1966); Pittman, 373 S.C. 527, 647 S.E.2d 144.

Nor is there any evidence Fullbright was under the influence of drugs or alcohol when questioned.[48] This factor weighs in favor of voluntariness. State v. Belue, 259 S.C. 487, 193 S.E.2d 121 (1972); State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999).

There was no evidence Fullbright was ever physically assaulted or threatened with a physical assault. The only testimony was an investigator touched Fullbright *only to see if he was unconscious* after he appeared to have passed out and fell on the floor of the conference room. Out of an abundance of caution, police contacted EMS. Further, the EMT testified Fullbright did not need medical attention, and Fullbright declined any further medical treatment 2 different times. **(R. 5-93).** And, Fullbright did not testify in the Denno hearing he was threatened with physical violence nor was any physical violence used against him. Investigators testified they did not threaten or coerce Fullbright in any way. There was no testimony there was any yelling or screaming by police officers. **(R. 5-93, 110-36).** This factor weighs in favor of voluntariness.

Further, there was no evidence elicited in the Denno hearings police misrepresented the evidence in the case to get Fullbright to confess.[49] This factor weighs in favor of voluntariness.

With regard to Fullbright's claim investigators fabricated his confession, made through his father, it was within the trial court's discretion to find this claim and testimony was not

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47 **(R. 94-99, State's Ex. 1, 3, & 6).**

48 During the written statement, Fullbright denied he was under the influence of any alcohol or drugs. Investigators who questioned him testified he did not appear to be under the influence of the same. An EMT also testified that while Fullbright told him he had taken some prescription pills within the past 72 hours, Fullbright did not appear to him, the trained E.M.T., to be under the influence of alcohol or drugs at the time he examined him, approximately ½ way through his initial questioning on the 28th. Further, the 2nd questioning did not occur until 2:20 p.m. on the 29th, and there is no indication he was under the influence of anything at that time. **(R. 5-93).**

49 **(R. 5-99, 110-36).**

credible given all of the evidence before it.[50] The investigators' testimony and credibility are supported by the waivers and written statements of Fullbright.[51] Under the totality of the circumstances, Judge McIntosh did not abuse his discretion in finding the 1st and 2nd statements were made voluntarily, intelligently, and knowingly by a preponderance of the evidence.[52]

Additionally, Judge McIntosh, who had the opportunity to view the investigators', Fullbright's father's, and the EMT's testimony, could judge their credibility accordingly. Miller, 375 S.C. at 387, 652 S.E.2d at 453. This determination was within his discretion. Id. He was not required to accept Fullbright's father's testimony as credible or believable. Boone; McAlister. He was not required to believe Fullbright's *allegation* police fabricated his confessions. Brown; Howard.[53] Further, the credibility of Fullbright's claim at the Denno hearing was dubious, at best. Each investigator who testified at the Denno hearing testified Fullbright signed each Miranda waiver, and Fullbright either initialed or signed his written statements. Judge McIntosh was entitled to reject Fullbright's *claims* at the Denno hearing as not credible. Miller; Boone; McAlister; Brown; Howard; Dillard; Wright. And, given the facts and evidence

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50 It is clear Judge McIntosh determined Fullbright's argument, and his father's testimony, was not credible and the investigator's testimony, that Fullbright signed his waivers, initialed his 1st statement, and signed his 2nd statement, was credible. This is implicit in his ruling. This is supported by the fact Fullbright's father admitted he was not present during any of Fullbright's statements to police. In fact, Fullbright did not testify at the Denno hearing and establish any coercive or threatening conduct by the police. **(R. 5-108, 110-36).**

51 In the waivers, Fullbright acknowledged, by his signature, he was making the statements freely and voluntarily with full understanding of his constitutional rights. He also acknowledged by his signature *no* threats, force, or promise *of any kind* had been made *by anyone* to induce or cause him to waive his rights and answer questions. In fact, he initialed several pages of his 1st statement, only wanted to change the order of events in the same, and signed the 2nd statement indicating the statement was true and correct.

52 **(R. 1-93; R. 110-36; State's 1, 2, 3, 4, 6).**

53 *See e.g.* State v. Dillard, 327 S.C. 340, 486 S.E.2d 278 (Ct. App. 1997)(trier of fact must not always believe uncontradicted testimony because "[t]here remains the question of the inherent probability of the testimony and the credibility of the witness or the interest of the witness in the result of the litigation."), *citing* Black v. Hodge, 306 S.C. 196, 410 S.E.2d 595 (Ct. App. 1991)(trier of fact is not required to believe uncontradicted testimony, since there remains the question of the inherent probability of the testimony and the credibility of the witness or the interests of the witness in the result of the litigation); State v. Wright, 354 S.C. 48, 579 S.E.2d 538 (Ct. App. 2003)(the evaluation of demeanor and credibility [are] matters within the peculiar province of the circuit court).

developed at the Denno hearing, Judge McIntosh did not abuse his discretion in finding the State had proven the voluntariness of Fullbright's statements by a preponderance of the evidence.[54] Judge McIntosh did not abuse his discretion in admitting Fullbright's statements. Given the record below, Fullbright has failed to show the ruling is not supported by any evidence or the court's ruling on the preponderance of the evidence was manifestly erroneous. Baccus, 367 S.C. at 48, 625 S.E.2d at 220; Von Dohlen, 322 S.C. at 242, 471 S.E.2d at 695; Franklin; Arrowood.

Harmless Error

Even assuming *arguendo*, error in the admission of Fullbright's statement(s), their admission was harmless. Fulminante (error in admission of involuntary confession is subject to harmless error analysis); Franklin; Perry (finding admission not prejudicial in part because defendant made same confession to others). In making a determination regarding harmless error, this Court will look at the entire record. State v. Miller, 367 S.C. 329, 626 S.E.2d 328 (2006). This Court will not set aside a conviction for an insubstantial error not affecting the result when guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached. State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995). The evidence against Fullbright was overwhelming. Guilt was conclusively proven, and no other rational conclusion could have been reached.[55] Therefore, the admission of Fullbright's statements was harmless

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54 This is especially true given in his written statements and waivers Fullbright acknowledged he was answering questions **knowingly, intelligently, and voluntarily.** Further, the investigators all testified Fullbright's statements were voluntary, and he was not promised anything in order to get him to talk about the murders in this case. *See* State v. Linnen, 278 S.C. 175, 293 S.E.2d 851 (1982)(even though officers encouraged defendant to make a statement, their actions were not coercive or threatening). This evidence was before Judge McIntosh. He could accept it or reject it in his own discretion. Finally, Fullbright did not testify at the Denno hearing providing any testimony as to the voluntariness of his statements. **(R. 5-108, 110-36).**

55 The victims were last seen alive on October 23, 2009. Homer Staton bought and sold gold jewelry and regularly carried $25,000 on his person, mostly in $100 bills. The victims traveled all over the Upstate to buy and sell gold, but they would not do so after dark unless they knew the person involved. Phone records showed Fullbright had previously contacted the victims before October 23rd using an aunt's phone, and Homer received a phone call at his

beyond a reasonable doubt. Perry (admission not prejudicial in part because defendant made same confession to others); Haselden (admission of improper evidence is harmless where it is cumulative to other evidence); Williams (error in admission of evidence is harmless where cumulative to properly admitted evidence); Douglas; Fulminante; Franklin.

CONCLUSION

Based on the above, the petition for writ of certiorari must be denied.

Respectfully submitted,

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February 17, 2015

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home in Taylors around 6:00 p.m. on October 23rd from a phone belonging to Ramirez, a neighbor of Fullbright. Testimony established Fullbright had borrowed Ramirez' phone the evening of October 23rd. Phone records proved the victims left Taylors and drove to Anderson County passing through Williamston and arriving in Belton, where Fullbright lived. The records showed the victims then traveled to Iva, with Homer making his last call on his personal cell phone around 8:00 p.m. Testimony and phone records proved Fullbright began making calls on Homer's "Go Phone" around 9:00 p.m. and then appeared at an arranged meeting to purchase drugs in a *small black car* he had never been seen in before. Phone records corroborated Ramirez' claim he was at his home during the time period the victims were murdered, not in Iva where Fullbright was making his calls. The records also established Fullbright made a phone call to Ramirez from the area of Horton Rd. the night of October 23rd, and Ramirez received the call at his home in Belton. The victims' car was found the next day abandoned on Horton Rd. filled with blood, bone fragments and human tissue of the victims. The pathologist *and* a crime scene reconstruction expert determined the victims were murdered while seated in the front seat of their car by someone in the back seat striking them with a hammer type weapon. Receipts and surveillance footage proved early the following morning, Fullbright purchased 2 gas cans at Walmart and gas at a nearby station. Ramirez informed police that the morning of October 24th he accompanied Fullbright and witnessed Fullbright burning items. Ramirez led police to the site and photos of the burn pile were taken and admitted before the jury. The burn site was located on property owned by or adjacent to property owned by Fullbright's father. The same day Fullbright appeared at a store on 3 separate occasions and made purchases with separate $100 bills buying items used to take drugs. Over the next days, Fullbright purchased even more drugs, more than he had ever purchased before the murders. Fullbright admitted at an arraignment that he committed the murders, and it was his drug lifestyle that led to the murders.

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S.C. Supreme Court

CERTIFICATE OF SERVICE

I, Donna D'Alessio, Legal Assistant to Anthony Mabry, hereby certify that I have served the ***Return to Petition for Writ of Certiorari*** in the foregoing action by depositing two copies in the United States Mail, post-prepaid, first class to Susan B. Hackett, Appellate Defender, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 17th day of February, 2015.

Donna D'Alessio

Donna D'Alessio, Legal Assistant to
ANTHONY MABRY
Assistant Attorney General

ALAN WILSON
ATTORNEY GENERAL

February 17, 2015

Honorable Daniel E. Shearouse, Clerk of Court
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: The State v. Matthew B. Fullbright
Appellate Case No. 2015-000080

Dear Mr. Shearouse:

Enclosed please an original and six (6) copies of a Return to Petition for Writ of Certiorari in the above-referenced case for filing. By copy of this letter, I am serving opposing counsel with same.

Thank you for your assistance in this matter.

Sincerely,

Donna D'Alessio
Legal Assistant to Anthony Mabry
Assistant Attorney General

/dmd
Enclosures

cc: Susan B. Hackett, Esq. (w/two copies of encls.)