THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of General Sessions
Knox McMahon, Circuit Court Judge

Court of Appeals Case No. 2014-000051

The State of South Carolina,

Respondent,

v.

Kenneth Ordell Murray,

Appellant.

Initial Brief of Respondent

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES

I.

Did the trial court err in admitting Appellant's redacted August 2, 2011, statement into evidence where the evidence established by a preponderance of the evidence that it was voluntarily given and that law enforcement complied with *Miranda v. Arizona*, 384 U.S. 436 (1966), and it was not excludable under the fruit of the poisonous tree doctrine?

II.

Inasmuch as the trial court found Appellant's redacted August 2 statement to be voluntary, and the State corroborated Appellant's statement by proof *aliunde* of the *corpus delicti* of armed robbery, did the trial court err in denying Appellant's motion for directed verdict?

STATEMENT OF THE CASE

Appellant was indicted for the offense of armed robbery (Indictment 2012-GS-10-2229). He pled not guilty and was tried before a jury on October 30 – November 1, 2013. At the conclusion of his trial, the jury found him guilty as charged. The trial court thereafter sentenced Appellant to a 28-year term of incarceration, with credit for time served since July 28, 2011.

This appeal follows.

ARGUMENT

I.

The trial court properly admitted Appellant's redacted August 2, 2011, statement made by Appellant because (1) the evidence established by a preponderance of the evidence that it was voluntarily given and that law enforcement complied with *Miranda v. Arizona*, 384 U.S. 436 (1966), and (2) the fruit of the poisonous tree doctrine did not require its exclusion. (Issue I)

Factual Background

A. State's Motion to Admit Redacted Version of Appellant's August 2 Statement

1. *In Camera State's Witnesses*

During the *in camera* hearing held at the beginning of Appellant's trial for the armed robbery of a Pizza Hut restaurant in Mt. Pleasant, the State moved to admit a redacted version[1] of Appellant's statement made on August 2, 2011. The State called four witnesses, current and former members of the Mt. Pleasant Police Department.

Detective Justin Hembree, an almost 12-year veteran with the Mount Pleasant Police Department, testified that on July 28, 2011, he assisted in the execution of a search warrant at 2627 Linnen Lane. Upon seeing Appellant at the residence, he was taken into custody. When a pat-down revealed cocaine, Appellant was arrested for possession of such and handcuffed. (p. 52, line 12 – p. 53, line 12; p. 53, line 18 – p. 54, line 2; p. 69, line 22 – p. 70, line 10.) After his arrest, Appellant was not immediately transported to the police department. At the house, Detective Hembree verbally advised of his *Miranda* rights[2] in the presence of Officer Matt Parks. Appellant did not invoke his rights – he did

[1] The statement was redacted to remove references to another armed robbery (see n. 8, *infra*).

[2] Detective Hembree explained that he was a team leader for the SWAT team during the

not ask for an attorney or indicate that he did not want to talk to anyone. They remained at the house for approximately an hour. (p. 54, lines 3-15; p. 70, line 11 – p. 71, line 14.) While at the house, Appellant was evasive and did not talk much. (p. 71, line 18 – p. 72, line 5.)

After being transported to the police department, Appellant was placed in an air-conditioned interview room. There were no windows in the room and no decoration or furniture except for a table and some chairs. (p. 73, line 7 – p. 74, line 4.) Officer Julius Buncum, using the Department's standard written advisement form, advised Appellant of his rights. (p. 124, lines 20-21; p. 125, lines 22-24.) Officer Buncum began by filling in the top portion of the form with Appellant's name, address, race, sex, date of birth, and telephone number (using information provided by Appellant) and then inserting his name as a member of the Department. He then went through each of the rights listed on the form and had Appellant acknowledge his understanding of them. (p. 126, line 17 – p. 129, line 8.) The five rights separately listed on the form and explained to Appellant were:

> 1. That I have the absolute right to remain silent and do not have to answer any question or give a statement and this fact cannot be used against me.
> 2. That if I do answer questions or give a statement, anything I say can and will be used against me in a Court of Law.
> 3. That I have the right to consult with a lawyer of my choice before I answer questions or give a statement and also to have him present while I am being questioned.
> 4. That if I wish to talk to a lawyer or have him present, but am unable to afford to hire a lawyer,

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execution of the search warrant, and, because of efforts to clear the house and take other action, it was not realistic to have a written advisement of rights form to go through at the scene. (p. 71, lines 1-14.)

> one will be appointed to represent me free of charge.
> 5. That if I decide to answer questions or give a statement without having a lawyer present representing me, I have the absolute right during this interview to stop answering questions and to remain silent.

(Court's Exhibit 4.) Appellant indicated his understanding of each of these rights both verbally and by signing an acknowledgement on the form[3] that was witnessed by Officer Buncum. (p. 127, line 8 – p. 129, line 8; Court's Exhibit 4.) That acknowledgement read, "I FULLY UNDERSTAND EACH OF THESE RIGHTS WHICH HAVE BEEN EXPLAINED TO ME." (Court's Exhibit 4.) Appellant, who appeared nervous and, based on Officer Buncum's experience, probably did not want to be there, did not have any difficulty communicating with Officer Bunkum, appeared to understand his questions and have the ability to respond appropriately. (p. 125, lines 7-20; p. 132, line 19 – p. 10.)

After indicating his understanding of his rights both verbally and in writing, Appellant waived his rights by signing the waiver of rights at the bottom of the advisement of rights form. (p. 129, line 9 – p. 130, line 1; Court's Exhibit 4.) That waiver read as follows.

> 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 have been made to me by anyone to induce or cause me to waive these rights and answer questions.

(p. 129, lines 17-22; Court's Exhibit 4.) Officer Buncum witnessed Appellant's signature

[3] On the form, by each of the individual rights read to Appellant there appears a check. (Court's Exhibit 4.) Officer Buncum testified during the in camera hearing that he normally had defendants initial by each of the rights, but that did not happen here. He could not remember specifically if Appellant had put them there, but testified that Appellant must have done so because he, Officer Buncum, would not have done so. (p. 128, line 16 – p. 129, line 5; p. 135, lines 14-21.)

indicating his waiver. (p. 129, line 24 – p. 130, line 4.)

Officer Buncum's role was, in addition to advising Appellant of his rights, to build a rapport with him and loosen him up so that he was more comfortable. (p. 126, lines 7-16; 130, lines 15-18; p. 131, lines 17-18; p. 11 – p. 1.) At no time did Appellant indicate that he wanted to speak to a lawyer or ask Officer Buncum to call a lawyer for him.[4] (p. 130, lines 5-12; p. 131, line 1 – p. 132, line 6.) Officer Buncum spent an hour "or so" advising Appellant of his rights, obtaining the waiver, and talking to Appellant in an effort to calm him. (p. 135, lines 6-13.)

Detective Hembree then interviewed Appellant. During the interview, Appellant was questioned about several recent armed robberies in the Mt. Pleasant area, including an armed robbery at a Pizza Hut. (p. 54, lines 16-23.) At first, Appellant did not seem as if he wanted to talk – he was just quiet. He eventually gave a written statement implicating himself in a robbery of a Piggly Wiggle, but stating that that was the only robbery he committed. (Court's Exhibit 3.)

Appellant was in the interview room for approximately nine hours,[5] but he was not questioned for that entire period. The first hour or so was spent with Officer Buncum. Some portion of the remainder was spent with Detective Hembree – he did not remain in

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[4] Officer Buncum testified during the *in camera* hearing that he thought he knew some of Appellant's family members, but that he could not remember whether he offered to call or actually did call a family member for Appellant. (p. 130, line 20 – p. 131, line 24; p. 134, line 2 – p. 135, line 5.)

[5] The record seems to indicate that the time period may have been less than nine hours. The Return on the search warrant indicated that the search warrant was executed at 1:45 p.m. on July 28. (Court's Exhibit 5.) Detective Hembree testified that Appellant was arrested soon after they executed the search warrant and remained at the house for some period of time before he was transported to the police department. (p. 70, line 11 – p. 71, line 14.) Appellant's written statement was made at 11:15 p.m. that night. (p. 75, lines 2-6; Court's Exhibit 3.)

the room with Appellant the entire time, but was in and out. (p. 74, lines 5-14; p. 135, lines 6-13.) Appellant was not allowed to move in and out of the room. He remained handcuffed, but the handcuffs were moved to the front. (p. 75, lines 7-14.) Appellant was offered a Pepsi and accepted it after apparently starting his written statement. (p. 78, lines 1-23; Court's Exhibit 3.)

As a result of the July 28 interview, Appellant was charged with robbery of a Piggly Wiggly in Mt. Pleasant. (p. 54, line 16 – p. 55, line 3.) He was thereafter booked into the Charleston County Detention Center on that charge. (p. 55, lines 4-8.)

Sometime on or before August 2, 2011, Detective Hembree received a telephone message that Appellant wanted to speak to him again. He had Appellant brought to the Mt. Pleasant Police Department from the Detention Center on that same day so that he could further interview him. Upon Appellant's arrival at approximately 10:00 a.m., he was placed in one of the Department's interview rooms. (p. 55, line 9 – p. 56, line 5; p. 68, lines 21-22; p. 81, lines 7-10.) The interview room was a different one than used on July 28. It was a medium-sized office space – maybe ten by eight feet – with a desk and some chairs, but no decorations. The room was used to interview both suspects and victims. (p. 62, lines 16-23; p. 72, line 13 – p. 73, line 18.)

Before starting the interview, Detective Hembree offered Appellant a smoke break. The two men went outside; Appellant smoked. (p. 56, lines 6-8; p. 77, lines 6-7.)

After Appellant finished smoking, the two men returned to the interview room where Detective Hembree, using the Department's standard written advisement form, advised Appellant of his rights. (p. 56, line 8 – p. 57, line 18; p. 77, lines 7-9.) Explaining each line of the form, Detective Hembree began by filling in the top portion of the form

with Appellant's name, address, race, sex, date of birth, and telephone number and then inserting his name as a member of the Police Department. He then went through each of the rights listed on the form and had Appellant acknowledge his understanding of them. (p. 58, line 3 – p. 60, line 8.) The five rights separately listed on the form and explained to Appellant were:

1. That I have the absolute right to remain silent and do not have to answer any question or give a statement and this fact cannot be used against me.
2. That if I do answer questions or give a statement, anything I say can and will be used against me in a Court of Law.
3. That I have the right to consult with a lawyer of my choice before I answer questions or give a statement and also to have him present while I am being questioned.
4. That if I wish to talk to a lawyer or have him present, but am unable to afford to hire a lawyer, one will be appointed to represent me free of charge.
5. That if I decide to answer questions or give a statement without having a lawyer present representing me, I have the absolute right during this interview to stop answering questions and to remain silent.

(State's Exhibit 14; Court's Exhibit 1.) Appellant initialed beside each of these five rights indicating that he was advised of each and also verbally indicated his understanding of these rights. (p. 58, line 8 – p. 59, line 25; State's Exhibit 14; Court's Exhibit 1). He did not appear to Detective Hembree to have any difficulty understanding his rights. (p. 60, line 24 – p. 61, line 1.) Appellant also acknowledged his understanding of these rights by signing an acknowledgement on the form that was witnessed by Detective Hembree. (p. 59, line 21 – p. 60, line 8; State's Exhibit 14; Court's Exhibit 1.) That acknowledgement read, "I FULLY UNDERSTAND EACH OF THESE RIGHTS WHICH HAVE BEEN

EXPLAINED TO ME." (State's Exhibit 14; Court's Exhibit 1.)

After indicating his understanding of his rights both verbally and in writing, Appellant waived his rights by signing the waiver of rights at the bottom of the advisement of rights form. (p. 60, lines 9-23; State's Exhibit 14; Court's Exhibit 1.) That waiver read as follows.

> 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 have been made to me by anyone to induce or cause me to waive these rights and answer questions.

(State's Exhibit 14; Court's Exhibit 1.) Detective Hembree witnessed Appellant's signature indicating his waiver. (p. 60, lines 21-23.)

Immediately after being advised of and waiving his rights, Appellant told Detective Hembree that he wanted to talk to him and called to talk to him from the jail. (p. 77, lines 7-12.) The entire interview lasted approximately three hours. Appellant was quiet, calm and rational, and he did not request food, drink, or to use a bathroom. (p. 62, line 24 – p. 63, line 10; p. 77, lines 13-16; p. 117, lines 13-14.). During the interview, Detective Hembree took breaks when information provided by Appellant resulted in the need to leave the interview room to relay that information with other investigators. (p. 68, line 21 – p. 69, line 6.) Captain Amy McCarthy – then a 21 year member of the Mt. Pleasant Police Department and, then and at the time of the trial, Commander of narcotics investigations and evidence and crime scene units – was present for approximately 10 minutes towards the end of the interview when Appellant's statement was reduced to writing by Detective Hembree (which occurred at 1:25 p.m.).[6] After writing out the

[6] Captain McCarthy testified it was standard procedure for an officer to write a suspect's words down on paper. (p. 117, lines 21-24.)

statement, Detective Hembree read it back to Appellant, but Appellant made no corrections to it. Appellant then signed the statement, and Detective Hembree and Captain Amy McCarthy witnessed his signature. (p. 63, line 14 – p. 64, line 2; p. 65, line 7 – p. 67, line 3; p. 116, lines 5-14; p. 119, lines 12-17; p. 120, lines 21 – p. 122, line 15; State's Exhibit 15; Court's Exhibit 2.)

During the interview, 28-year-old Appellant was cooperative, polite, coherent, and rational. He did not appear to be under the influence of alcohol or drugs, and did not appear to have any physical problems or defects. He seemed to understand what was happening. (p. 61, line 14 – p. 62, line 6; p. 117, lines 15-18.) Appellant was not threatened, promised anything, coerced, or misled to obtain his statement. Appellant was not under duress in any way.[7] (p. 62, lines 7-15; p. 68, lines11-14; p. 117, lines 19-20.) During the interview, Appellant never told Detective Hembree he wanted a lawyer, and Detective Hembree thought Appellant's statement was freely and voluntarily made. (p. 63, lines 11-13; p. 81, lines 11-13.) Detective Hembree did not attempt to influence what Appellant said during the interview, but instead wrote the statement using what Appellant said. (p. 119, lines 2-17.)

The statement made by Appellant, as redacted for his trial[8], was as follows.

> 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 you'll found

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[7] Captain McCarthy testified that while she was present, she saw no one angry or being generally loud; she also said – apparently referring to when she was not inside the interview room – she did not hear any chairs "being flown" around or loud noise coming from the room. (p. 117, lines 6-12.)

[8] The State informed the trial court that Appellant was interviewed about the robbery of the Piggly Wiggly, but that those statements were redacted from the statement as offered at the trial related to the Pizza Hut armed robbery. (p. 64, line 6 – p. 65, line 19.)

> under my mattress. Bootsie had a 9mm 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 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.

(State's Exhibit 15; Court's Exhibit 2.) Below the written statement on the form used there was the statement, "I have read (Had read to me) the foregoing statement which has been freely and voluntarily made by me and it is true and correct to the best of my knowledge." (State's Exhibit 15; Court's Exhibit 2.) His statement was read to Appellant, and he acknowledged he understood it. (p. 118, lines 5-6.) He then signed the statement, and his signature was witnessed by Detective Hembree and Captain Murphy. (p. 117, line 25 – p. 118, line 21; State's Exhibit 15; Court's Exhibit 2.)

Some of the information provided by Appellant during his August 2 interview, such as the participation of "Bootsie" in the Pizza Hut armed robbery, was previously unknown to Detective Hembree. (p. 67, lines 4-24.) Through the use of a photographic lineup shown to Appellant, Detective Hembree was able to determine that Bootsie was Cleveland Clarence Major. (p. 67, lines 18-24.) During the photographic line-up procedure, Appellant cried some. (p. 77, lines 17-25.)

2. *In Camera Defense Witness*

During the *in camera* hearing, the defense presented Appellant's testimony. He testified that he was 27 years old in 2011 and went as far as the twelfth grade in school. (p. 85, lines 15-23.) Beginning in the seventh grade, Appellant was "kind of in special ed classes." (p. 86, lines 20-25.) Appellant explained that he had a disability in school – he really had no comprehension, which he explained meant that he "can't understand [some

things] very well." (p. 86, lines 1-10; p. 86, lines 17-19.) He does not know that he was ever tested, but he just had trouble with homework and study. And he would get in trouble in classes. (p. 86, lines 11-16.) School was easy for Appellant for Appellant even though he was in special ed classes. (p. 87, lines 6-11.)

Turning to the events of July 28, Appellant testified that he had had five alcoholic drinks before he was arrested by the police. As a result, he was drowsy. (p. 89, line 19 – p. 90, line 3.) He did not "sleep, sleep," but he slept a little bit over the course of the interview session when he was alone in the interview room. (p. 111, line 23 – p. 112, line 6.)

After he was handcuffed, Appellant told the police he did not want to speak. (p. 87, lines 16-20.) He did not have a lawyer at the time, but when he arrived at the police department he told Corporal Buncum he "wanted to speak to my lawyer or someone."[9] Corporal Buncum called Appellant's father, but did not allow Appellant to speak to him. (p. 88, lines 2-16; p. 89, lines 15-18.)

In response to questioning by defense counsel, Appellant testified inconsistently as whether he told the police that he did not want to speak to them.

> Q And you told them you didn't have anything to say to them?
>
> A No.
>
> Q And you didn't want to speak?

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[9] On redirect examination and in response to a leading question, Appellant testified differently than during his direct or cross examinations. He said that, on July 28, he had asked for a lawyer (rather than asking to speak to a lawyer or somebody).

> Q And you told the police you wanted a lawyer?
>
> A Yeah, earlier that day.

(p. 112, lines 9-10.) On re-cross-examination, Apellant testified he was in a room "with them" all day, but he only told one officer, Officer Buncum, that he wanted a lawyer. He also testified that he signed the waiver for Officer Buncum. (p. 113, lines 7-25.)

[PROSECUTOR]: Object to the leading, Your Honor.

THE COURT: Rephrase the question, ma'am.

Q Did you tell the police you wanted to speak to them?

A No. I mean yeah, I did tell them I didn't want to speak to them.

Q Okay, nothing further.

A Numerous times.

Q I'm sorry, Kenneth. I cut you off. What did you say?

A Numerous times I told them all day long I didn't know anything. All day long I told them that.

(p. 112, lines 11-25.)

While he was in the interview room at the Mt. Pleasant Police Department, Appellant testified he was tortured by Detective Hembree. (p. 90, lines 16-19.) When asked to explain, Appellant testified as follows.

Q What do you mean by that? Be specific.

A By him going in and out the room. He kept kicking, kicked chairs and he was – kept accusing me of being someone that did a robbery.

Q So, when he told you no, he didn't just leave you, did he?

A No, ma'am.

* * *

Q What was Hembree like when he was questioning you?

A He was aggressive.

Q What does aggressive mean?

A Like he was getting all in my face telling me that I was a person that had robbed something and someone gave him information on something, some females, and I told him I don't know anything about that, and that's when he had led me out of the room, he had come back in, and he kicked chairs, and I mean I was in handcuffs. I was scared. I didn't

know what to do, and that went on for about ten hours. At least ten hours.

(p. 90, line 20 – p. 91, line 18.) Appellant also testified that Detective Hembree threatened him.

Q Okay. Now, when you were at the station ---

Q … did anybody threaten you?

A Detective Hembree did.

Q What did he say?

A He threatened me about getting me time. He showed me – he told me that he found a bullet on my porch and that if I didn't tell him something about the crime that he would get me about 15 years or something like that, and I told him I didn't know anything about the crime.

Q Did you believe him when he said that?

A I didn't know what to believe.

(p. 90, lines 4-15.) Appellant said that he neither wrote nor read the statement on July 28; Detective Hembree did and Appellant was forced to sign it. When asked to explain how he was forced to sign it, Appellant testified he could not say anything. (p. 91, line 19 – p. 92, line 9.)

Appellant testified that on August 2, he called the Mt. Pleasant Police Department to speak to Detective Hembree about the armed robbery the detective had "put on" him. (p. 92, lines 10-15.) He explained what happened after he arrived at the Police Department.

> We was – I spoke to him about what happened that first time cause I was intoxicated and I was dozing off on him, and I really wanted to know what really happened cause if I had confessed it I would of just left if alone, but I wanted to know what happened.

(p. 92, lines 19-23.) He said that he was not in charge of the conversation on August 2,

but that Detective Hembree was. (p. 92, line 24 – p. 93, line 3.) Appellant testified that he had not seen the statement from August 2 – he did not write or read it. Detective Hembree wrote it and did not give him a chance to read it. Appellant testified he signed it because he was forced to do so. (p. 93, lines 4-16.) Appellant testified that, during the August 2 interview, he cried when "forced to pick out people that, that [he didn't] know about in the investigation." (p. 93, lines 17-24.)

On cross-examination, Appellant testified that he had done okay in school and used to work full-time with his father doing plastering (which work did not require reading). At the time of his arrest, he was not working anywhere. (p. 94, line 13 – p. 95, line 5; p. 111, lines 2-14.)

Talking about the interview on July 28, Appellant explained that he first nodded off – but did not sleep –when Corporal Buncum was talking to him when he first arrived at the police station at around 3:00 p.m. He did not doze off again until later on that night. (p. 97, line 4 – p. 99, line 3.) Appellant testified that Detective Hembree did not throw any chairs – he kicked a chair. (p. 96, lines 6-13.) He then said that the detective kicked the chair a couple of times.[10] (p. 97, lines 2-3.)

Appellant testified further about how he was threatened by Detective Hembree.

> He said he found a bullet on my porch and he 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. If I don't, he's gonna call them and he's gonna try to get me time.

(p. 99, lines 13-16.) Appellant insisted that he did not write a statement or have Detective

[10] On redirect, Appellant – when explaining that he never really feel asleep in the interview room on the July 28 – testified that one time when Detective Hembree entered the interview room he just saw a chair flying. (p. 112, lines 4-7.) On recross-examination, Appellant first seemed to say this happened before he waived his rights, but then said it was later. (p. 113, line 23 – p. 114, line 8.)

Hembree write one for him. He testified that Detective Hembree wrote the statement and forced him to sign it. (p. 100, line 14 – p. 101, line 18.)

Q How did he force you to sign it?

A Doing aggressive things around me.

Q Okay. Tell me those aggressive things again.

A He jumps in my face and does all the aggressive stuff.

Q Like what?

A Like kicking stuff, aggressive things.

Q Well, you said it wasn't all that kicking.

A No, I mean that's what he does, and from that first time, I, I didn't – I was scared of him.

Q Were you scared because you knew you were in trouble?

A I know how he is.

Q You know how Sergeant Hembree is?

A Yes.

Q Did he know how you were?

A No.

Q You were scared because you knew your goose was cooked?

A No, I wasn't.

Q You had the opportunity to look at this statement before you signed it, did you not?

A No, ma'am.

Q You're saying Sergeant Hembree just handed it to you and said sign it?

A Yes, ma'am.

Q And Captain McCarthy was in there as well, is that correct?

A She was – she only came in when I was crying that night.

Q And you were crying because why?

A Cause I, I did something that I was forced to do.

Q Meaning the statement?

A Yes, ma'am.

Q Not going into a grocery store with a loaded weapon and pointing it at teenagers?

A. No, I didn't ---

* * *

Q You were weeping that night because you were forced to sign a statement –

A Yes, ma'am.

Q --- or because you felt bad about what you had done?

A No.

Q You didn't feel bad?

A No, not – I was held hostage.

Q Oh, you were held hostage?

A You might as well say.

Q Might as well say. Okay. And this is after he gave you a Pepsi?

A Yeah, that was after.

Q And then after the Pepsi and restroom break, all of a sudden you're a hostage?

A I been a hostage all day since one o'clock in the afternnon all the way to midnight.

Q Do you use the word hostage to mean the same things as arrested?

A You might as well say. I was in handcuff.

Q Okay. So, you were arrested, therefore you were a hostage?

A Might as well say. I couldn't do anything. I was tired.

Q Sleeping?

A I didn't, I didn't have nothing to say.

(p. 101, line – p. 104, line 15.)

Appellant said he never told Detective Hembree on July 28 that he wanted a

lawyer, but he told Corporal Buncum. (p. 104, lines 22-24.) While he could not remember signing the advisement of rights form, he did testify – upon reviewing Court's Exhibit 4 – that he was advised of his rights and waived them by signing the form. (p. 104, line 25 – p. 106, line 2.) His cross-examination then continued.

Q But now you're telling the court that that's not right?

A No, I didn't say that.

Q You told them you wanted a lawyer?

A I didn't say that's right. That wasn't right.

Q Is it right?

A Yeah, that is right.

Q So, he told you you had the rights and you said you'd go ahead and talk?

A No, I didn't speak to him about nothing around the time I was arrested. I spoke to him – I got in the interview room about three o'clock in the afternoon, and as soon as I got – they say I don't know nothing about nothing and I don't want to speak to nobody, and that's when I told him I needed – I wanted to speak to my lawyer or somebody and that's when he referred – he said Corporal Buncum, he said he know my father and he know my aunt and every – my uncles and he said he grew up with them and this and that, and that's when I told him that I wanted to speak to somebody and that's when he referred – instead of him referring me to my lawyer, he decided to call my, my father and he didn't even let me speak to my father.

Q Well, did you tell him – did you tell Officer Buncum that you wanted to talk to your family?

A No, he just – he, he came up with that.

Q He came up with it?

A Yeah, he – when I asked for a lawyer or someone to speak to he decided to call my father.

Q Okay. But you signed that you waive your rights after he read them to you?

A I don't know too much about that.

Q Well, you know about that's your signature?

A Yes, ma'am.

Q Right? And you've agreed that there's nothing wrong with this form, is that correct?

A Yea, I don't know too much about it, ma'am.

(p. 106, line 3 – p. 107, line 13.)

Appellant testified that, between the dates of July 28 and August 2, he called and left a message for Detective Hembree because he wanted to talk to him about what he had been "forced to do" during the first interview. (p. 104, lines 16-21; p. 107, line 15 – p. 108, line 11.) Appellant testified that he did not ask for a lawyer on August 2. (p. 110, lines 11-15.) Appellant said he wanted to speak to Detective Hembree – even through the detective had kept him hostage, threatened him, and been aggressive – because he was in jail. (p. 108, lines12-15.) During the August 2 interview, Appellant said he did not provide Detective Hembree with any details of the robberies; he only picked out people he knew from photographic line-ups – people whose names Detective Hembree already had – and the detective either already had the details or made them up. (p. 108, line 20 – p. 110, line 7.)

3. *Objection, Argument, and Trial Court's Ruling*

At the conclusion of the hearing, the defense argued Appellant's statements should be suppressed for two reasons. First, it claimed that Appellant's *Miranda* rights were violated on July 28. Appellant invoked his *Miranda* rights on July 28 by both requesting an attorney and saying he did not want to talk. Instead of honoring his request, law enforcement continued to talk to and question him for a total of almost 10 hours. Appellant eventually signed the July 28 statement because he was threatened with a bullet, with charges, and with doing 15 years. The defense maintained that the August 2

statement, made during a three hour interview, fell under the fruit of the poisonous tree doctrine. (p. 137, line 15 – p. 139, line 15.) The defense's second ground for suppression was that the July 28 statement was involuntary. The defense maintained that Appellant was a special education student from the seventh grade and, while he did okay in school, he did not finish. Over the course of the 10 hours he was in custody, he only received one Pepsi, he was threatened with charges, and Detective Hembree kicked chairs and invaded Appellant's personal space. The defense claimed that Appellant's will was overborne and he did what he thought he had to do – sign the statement – to get out of there. The words used were not his. (p. 139, line 16 – p. 140, line 8.)

Arguing in favor of the admission of the August 2 statement, the State argued there was no credible evidence that Appellant invoked his *Miranda* rights on July 28, and Appellant did not testify that he was either hungry or thirsty during the interview. (p. 140, lines 16-24.) The State maintained that Appellant – an adult with no physical or mental defects – initiated the August 2 interview by calling the police department and leaving a message for Detective Hembree that he wanted to speak to him. Detective Hembree had Appellant brought to the police department where, prior to beginning the interview, he advised appellant of his rights. The State contended the August 2 statement was admissible because the interview was voluntary and the statement taken in compliance with *Miranda*. (p. 136, line 17 – p. 137, line 10.)

Noting that the motion to suppress was focused on the August 2 statement, the trial court stated the burden – using the preponderance of evidence standard – was on the State and that the court was to make its determination under the totality of the circumstances. (p. 141, lines 15-23.) The trial court then addressed each of four questions

to be answered in determining the admissibility of a statement. (p. 141, line 24.)

QUESTION	ANSWER	TRIAL COURT'S FINDINGS
1. Did Appellant make the August 2 statement?	Yes	The State proved by a preponderance of the evidence that Appellant did make that statement. The court noted the testimony of Detective Hembree, and the signatures of Appellant and that of the witnesses. (p. 141, line 24 – p. 142, line 13.)
2. Was Appellant advised of his *Miranda* rights before making the August 2 statement?	Yes	Appellant was advised of his rights twice on July 28, once verbally and once in writing, and once on August 2 after he initiated the contact. Appellant, by signing the waiver of rights form, acknowledged receipt of the rights. (p. 142, line 14 – p. 144, line 6; p. 145, lines 8-12.) The court rejected the defense arguments premised on the use of the good guy/ "softener" approach by Sergeant Buncum.[11] (p. 144, line 7 – p. 145, line 7.)
3. Did Appellant waive his *Miranda* rights prior to making the August 2 statement?	Yes	Appellant's testimony about his condition (drowsy and feeling the effects of alcoholic drinks) on July 28, the actions of the police, and his invocation of his rights to a lawyer and to remain silent is not credible. (p. 145, line 13 – p. 146, line 3.) The State proved by a preponderance of the evidence that Appellant knowingly and intelligently waived his rights on both July 28 and August 2. (p. 145, lines 10-14; p. 148, lines 2-9.)
4. Did Appellant voluntarily make his August 2 statement? [12]	Yes	Appellant's version of the events of July 28 is not credible. (p. 147, lines 1-7.) The August 2 interview was initiated by Appellant through his request to meet with Detective Hembree. (p. 146, lines 25 – p. 147, line 6.) Despite the evidence that Appellant attended

[11] When rejecting the defense's challenge to the use of Corporal Buncum, who grew up in the same area as Appellant's family and may have known members of the family, to "soften up" Appellant, the trial court cited to *Miller v. Fenton*, 479 U.S. 104 (1985); *Beckwith v. U.S.*, 425 U.S. 341 (1976); and *Frazier v. Cupp*, 394 U.S. 731 (1969).

[12] In determining the voluntariness of the statement, the trial court considered the totality of the circumstances surrounding the making of the statement, including "his youth, his education or lack thereof, low intelligence, lack of any advice of the accused's Constitutional rights, length of detention, repeated and prolonged nature of questioning, and the use of physical punishment such as depravation of food or sleep." (p. 146, lines 15-22; see also p. 141, lines 18-20.)

		special education classes in school and did not finish high school, Appellant was able to understand the questioning from both attorneys and to respond reasonably and appropriately, albeit with "non-credible" testimony. (p. 147, lines 8-19.) Neither Appellant's age, the three-hour length of the questioning on August 2, nor the fact that the session was not videotaped adversely impacted the statement's voluntariness. (p. 147, lines 20-25.)

The trial court concluded the prosecution had met its burden and the August 2 statement – as redacted to remove references to another armed robbery – was admissible. (p. 148, lines 10-14.)

B. Defense Motion to Suppress Appellant's August 2 Statement as Fruit of the Poisonous Tree

The defense then challenged the admissibility of the redacted August 2 statement on the ground that it was fruit of the poisonous tree, with the poisonous tree being the search of 2627 Linnen Lane during which Appellant was first encountered and arrested by Detective Hembree. They argued the search warrant was insufficient because it was conclusory as to why law enforcement believed guns would be in the house and it contained no information as to the credibility of the source, who provided the information about the presence of guns, other than a statement that the source was credible. The defense maintained that the August 2 statement was the product of the search conducted pursuant to an constitutionally insufficient search warrant. (p. 148, line 15 – p. 150, line 12.)

1. *In Camera Witness*

To address Appellant's Motion, the State called Michele Bacon, with the Mt. Pleasant Police Department, to the stand. Officer Bacon testified that, in July 2011, she was a member of the Department's detective unit and had been there for approximately

seven years. (p. 150, line 14 – p. 151, line 8). On July 28, 2011, she was investigating an armed robbery of the Golden Bowl restaurant that occurred on May 27, 2011. The armed robbery was committed by two suspects, one of whom was armed with a handgun. One of the suspects was dressed all in black and the other was wearing a little bit of camouflage clothing; both suspects had their faces covered. The two suspects obtained money from the cash register and the restaurants money bags containing money, receipts, and other paperwork. (p. 151, line 9 – p. 152, line 20.) At some point, Officer Bacon interviewed a suspect, Denzel Moultrie. He told her that he was the lookout for the armed robbery, and that Jarrett Graddick and Keenan Coakley went into the restaurant to commit the armed robbery. He also provided her with details of the plan to commit the armed robbery. (p. 152, line 21 – p. 153, line 17.) After interviewing Moultrie, Officer Bacon prepared a search warrant, with supporting affidavit, for the residence of Jarrett Graddick at 2627 Linnen Lane in Mt. Pleasant. (p. 153, line 18 – p. 154, line 1; p. 157, lines 3-19.) The search warrant described the property sought as: "any instrumentalities of the crime of Armed Robbery to include but not limited to any clothing i.e. camouflage clothing, mask, glasses, gloves, shoes, shirt, pants, white socks, guns, BB&T currency bags, U.S. currency, notes, ledgers, credit card receipts, and phones used and taken during the commission of this crime." (Court's Exhibit 5; p. 155, lines 17-22.) This list was based upon information received from the victim and Moultrie. (p. 156, lines 5-15; p. 158, line 6 – p. 158, line 24.)

The search warrant was supported by an affidavit that read as follows.

> That on May 27, 2011 the victims, Xiu Zhu Li, Fu Liu, and Zhi Feng Liu (owners of Golden Bowl Chinese Restaurant), reported to the Mt. Pleasant Police Department that two unknown black males with their faces covered

> entered the restaurant through the back door. One of the males was armed with a black pistol and the other male was carrying a bag. The suspects obtained cash from the register and fled the restaurant out of the back door.
>
> That on July 26, 2011 Denzel Lamar Moultrie gave Det. Bacon, Det. Cpl. Harris, and Cpl Buncum a post-Miranda written statement admitting to his involvement in the robbery as being the "lookout" and implicated Jarret Graddick and Keenan Coakley as being the other two individuals who entered the business and committed the robbery. Denzel Moultrie gave specific; corroborating information relative to the robbery.
>
> In that Detectives received information from a credible source that guns were seen at Jarrett Graddick's listed residence, 2627 Linnen Lane, Mr. Pleasant, SC.

(Court's Exhibit 5.)

Officer Bacon testified that she took the search warrant, with its supporting affidavit, to the office of Judge Thomas Lynn, Charleston County Magistrate. Once there, she handed him the paperwork, he read through everything, and he asked her questions about where the information came from, how they developed their suspects, why they believed the items were at the home they wanted to search, and where they had gotten their information. Officer Bacon said that she told Judge Lynn she obtained the information included in the affidavit, upon which she based the search warrant, from the victim and Moultrie. (p. 154, line 17 – 156, line 19; p. 157, line 20 – p. 159, line 5.) She testified she told Judge Lynn that the corroborating information from Moultrie referred to in the affidavit was that (1) Moultrie was parked on Coakley Corner waiting for the others to return from the committing the armed robbery, and the K-9 unit tracked from the restaurant to Coakley Road, right near that corner; (2) Moultrie said one of his co-defendants had a gun and the victims confirmed that one of the two robbers had a gun; (3) Moultrie said that his co-defendants had a white bag to put the money they took in

and the victims said that the robbers had a white bag they used to put the money in; and (4) Moultrie's description of the clothing worn by the co-defendants was similar to what the victims reported as having been worn. (p. 159, line 1 – p. 160, line 5.) Officer Bacon, explaining the reference to a "credible source" in the last sentence of the affidavit, testified she told Judge Lynn that the source was a criminal informant who had told narcotics detectives, within perhaps a week of her requesting the warrant, that he had seen guns in Graddick's residence and that guns were always there after a robbery had occurred. (p. 160, line 6 – p. 161, line 4.)

Officer Bacon testified that after she verbally gave him the facts and he read the warrant, he administered an oath to her and asked if the information in the affidavit and what she told him that day was true and correct to the best of her knowledge. She swore it was and then she signed the affidavit and he signed it. (p. 161, line 5 – p. 162, line 17.) Officer Bacon testified she was aware of nothing in the affidavit that was not accurate, and that she did not attempt to deceive Judge Lynn in any way. (p. 162, lines 18-24.)

On cross-examination, Officer Bacon testified that Moultrie gave a couple of different statements. In the first statement, he said he was not involved in the Golden Bowl robbery, but was at Black Biker's week. (p. 163, line 25 – p. 164, line 11.) He eventually gave a statement saying he was the driver. (p. 164, lines 17-19.)

On redirect examination, Officer Bacon testified that it is not uncommon for suspects to initially to minimize involvement in a crime. (p. 165, lines 8-16.) She also testified that, at the time Moultrie confessed to being the lookout and waiting for the others in the car at Coakley Corner, he would not have known about the K-9's hit there. (p. 165, lines 17-23.) Based upon the Moultrie's implication of himself and corroboration

of some of the information by the victims, Officer Bacon said she found Moultrie to be credible in terms of using his information for the search warrant. (p. 165, line 24 – p. 166, line 3.) She testified that a gun was used in the armed robbery and she had independent information obtained by the narcotics division that Graddick had guns in his house. (p. 166, lines 7-9.)

2. Argument and Trial Court's Ruling

The defense argued that the State failed to present sufficient evidence to fix the facial invalidity of the search warrant, and the general information provided about guns being in Graddick's home fails to link the gun used to the home because of the lack of any specifics about the gun used in the robbery or seen at the home. (p. 166, line 22 – p. 167, line 14.) The State maintained that the search warrant was valid because it described some very specific, unique items identified as being used in or obtained during the course of the armed robbery; it satisfied Section 17-13-140 on its face; and supplemental information was provided to the magistrate. (p. 167, line 18 – p. 168, line 4.)

The trial court found the search warrant was constitutionally sufficient and that the fruit of the poisonous tree doctrine was inapplicable.

> In reviewing magistrate's determination of the search warrant, I give great deference to the magistrate whether or not he had a substantial basis for concluding that probable cause existed.
>
> In reviewing that determination, it's governed by again, the totality of the circumstances and our Appellate Courts direct that we are to give great deference to the magistrate. Affidavits are not metidulously drawn by lawyers. They are normally drafted by nonlawyers in the haste of a criminal investigation and should, therefore, therefore, be viewed in a common sense and realistic fashion.
>
> The term probable cause does not import absolute certainty. Rather, in determining whether a search warrant should be issued, magistrates are concerned with

probabilities and not certainties.

As search is based on warrants will be given judicial deference to the extent that an otherwise marginal search warrant may be justified which meets the standard of probable cause, and obviously it's clear, under State versus Wesson and a long line of cases, that you, you can supplement written affidavit in the search warrant in lieu of testimony.

I think there is sufficient probable cause in the affidavit itself, number one.

Number two, however, a reviewing Court, if this is ever reviewed, would say no there's not. I would then look to that oral testimony that Detective Sergeant Bacon testified to and the procedure that the magistrate went through and her supplying specific information how she developed the individual as a suspect, that the judge read the entire warrant, and the judge asked her a number of questions.

Further, the additional info concerning the BB&T bags, the white bags, it's also corroborated by a K-9 officer that tracked to where the Codefendant Moultrie stated they parked the car while he was the lookout.

The, the gun, in the last sentence, says further corroborated by CI with narcotics that said that all of that information came within a weeks period of time of the issuance of the search warrant. Guns were always there after a robbery had occurred.

I also take into account that, that Moultie had given different statements, according to cross-examination, that A, nothing – he had nothing to do with the Golden Bowl. B, that he was at biker week in Myrtle Beach, and then, C, eventually he gave a statement that he was the driver. He offered to testify in redirect that his – generally that pattern of denial, I was somewhere else, and then admission of.

So, I will find that the affidavit and the search warrant is sufficient, and the statements of the Defendant Murray are not fruits of the poisonous, poisonous tree.

(p. 168, line 11 – p. 170, line 12.)

Thereafter, in the presence of the jury, Detective Hembree testified about the circumstances surrounding the August 2 statement. The testimony was similar to that

given during the *in camera* hearing conducted prior to the trial. (p. 291, line 15 – p. 311, line 18; p. 366, line 3 – p. 368, line 19; p. 370, line 23 – p. 374, line 1; p. 375, line 7 – p. 376, line 17.) At the time the State began its examination of the detective and when the State offered the redacted version of Appellant's August 2 statement, the defense renewed its objections under the Fourth, Fifth, Sixth, and Fourteen Amendments to the United States Constitution and the comparable provisions of the South Carolina Constitution on the grounds that Appellant had invoked his right to counsel, the statement was not voluntary, and the statement was the fruit of the poisonous tree as the result of a search warrant lacking probable cause. The trial court, overruling the objections, renewed its previous rulings. (p. 289, line 18 – p. 290, line 23; p. 300, lines 17-22.) The redacted version of Appellant's August 2 statement was admitted as State's Exhibit No. 15. (p. 300, line 13 – p. 301, line 4.)

Argument

On appeal, Appellant claims the trial court erred in admitting his July 28 and August 2, 2011 statements because law enforcement did not comply with *Miranda* prior to obtaining the custodial statements and the statements were not voluntary. He also contends that the statements should not have been admitted under the fruit of the poisonous tree doctrine because the search warrant executed on July 28 was constitutionally deficient because it was not supported by probable cause, it was conclusory, and there was no information as to the informant's credibility.

The State strongly disagrees with Appellant's assertion of error for several reasons. In regard to the July 28 statement, the State maintains that because the July 28 statement was not introduced into evidence at Appellant's trial, any issue related to it is

not properly before this Court. *State v. Horton*, 271 S.C. 413, 414, 248 S.E.2d 263, 263 (1978) ("Initially, appellant challenges the constitutionality of the affidavit giving rise to the search warrant. As any items seized pursuant to this warrant were not introduced into evidence, appellant's exception to the sufficiency of the affidavit is without merit."). *See also Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 748 S.E.2d 781 (2013) (issues that are contingent, hypothetical or abstract are not ripe for judicial review). In regard to the August 2 statement, the State maintains the trial court properly admitted it because the record supports the court's determination that it (1) was made voluntarily and taken in compliance with *Miranda*, and (2) is not fruit of the poisonous tree.

When seeking to introduce a statement made in response to custodial interrogation, the State must prove by a preponderance of the evidence that the defendant was advised of and voluntarily waived his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966).[13] *Dickerson v. United States,* 530 U.S. 428 (2000); *State v. Salz*, 346 S.C. 114, 135-136, 551 S.E.2d 240, 253 (2001); *State v. Middleton,* 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986). If a defendant was advised of his *Miranda* rights, but nevertheless chose to make a statement, the State has the burden of proving by a preponderance of the

[13] The question of whether law enforcement complied with the requirements of *Miranda* in obtaining a statement is for the court, not the jury. *State v. Goodwin*, 384 S.C. 588, 602, 683 S.E.2d 500, 507 (Ct. App. 2009); *State v. Davis,* 309 S.C. 326, 342, 422 S.E.2d 133, 143 (1992), *overruled on other grounds by Brightman v. State,* 336 S.C. 348, 520 S.E.2d 614 (1999). However, the question of whether a defendant voluntarily made a statement is for both the court and the jury. *Id.* While the trial court must make the initial determination of voluntariness when passing on admissibility, the jury is the ultimate finder of that fact. The trial court must instruct the jury that it cannot consider any statement unless it finds beyond a reasonable doubt that the defendant made his statement freely and voluntarily under the totality of the circumstances. *State v. Goodwin*, *supra*; *State v. Davis,* 309 S.C. at 342-343, 422 S.E.2d at 143. In this case, the trial court made the initial determination that the statement was voluntary and taken in compliance with *Miranda*, and it thereafter instructed the jury that before they could consider it they had to find it was beyond a reasonable doubt that the defendant made his statement freely and voluntarily under the totality of the circumstances. (p. 451, line 17 – p. 453, line 3.)

evidence that he voluntarily waived his rights. *State v. Salz*, 346 S.C. at 136, 551 S.E.2d at 253; *State v. Washington,* 296 S.C. 54, 56, 370 S.E.2d 611, 612 (1988). The trial judge's determination of the voluntariness of a statement is to be based on the totality of the circumstances, including the maturity, education, physical condition, mental health, experience, and conduct of the defendant, as well as the length, location, and continuity of the interrogation and any police coercion. *Withrow v. Williams,* 507 U.S. 680, 693 (1993); *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973); *State v. Salz, supra.* If a defendant's will is overborne such that his capacity for self-determination is critically impaired, use of the resulting confession violate's the defendant's right to due process. *State v. Salz, supra.* "A statement induced by a promise of leniency is involuntary only if so connected with the inducement as to be a consequence of the promise." *Id.* A trial court's factual conclusions related to the voluntariness of a statement will not be disturbed on appeal unless they are so "manifestly erroneous" as to show an abuse of discretion. *Id.* When reviewing a trial court's ruling concerning voluntariness, the appellate court is not to reevaluate the facts based on its own view of the preponderance of the evidence, but simply to determine whether the trial court's ruling is supported by any evidence. *Id.*; *State v. Goodwin,* 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009); *State v. Miller,* 375 S.C. 370, 378-379, 652 S.E.2d 444, 448 (Ct. App. 2007).

The statement at issue here is that given by Appellant on August 2, 2011. The trial court concluded the State had met its burden of proving by a preponderance of evidence that Appellant's statement was made voluntarily and taken in compliance with *Miranda.* (p. 148, lines 10-14.) Summarizing the evidence set forth more fully above, the record supports the trial court's ruling:

- First and perhaps most important – given the fact that Appellant's *in camera* testimony as to his interaction with law enforcement from the execution of the search warrant through his signing of the August 2 statement was diametrically opposed to that of the officers – the record, as summarized above, clearly contains evidence supporting the trial court's finding that, except for Appellant's testimony about calling to request a meeting with Detective Hembree, Appellant was not a credible witness. Appellant's testimony was inconsistent not only with itself, but also with his actions. This Court is to accord great deference to a trial court's determination as to the credibility of witnesses because of the trial court's unique opportunity to observe the witnesses as they testify. See, *e.g.*, *State v. Casey*, 325 S.C. 447, 481 S.E.2d 169 (Ct. App. 1997).

- Appellant initiated the August 2 interview with Detective Hembree –
    - Testimony of Detective Hembree (p. 55, lines 4-25; p. 81, lines 7-10), and
    - Appellant's Testimony (p. 92, lines 10-23);

  Courts generally perceive conversations initiated by defendants as voluntary. See, *e.g.*, *Wyrick v. Fields*, 459 U.S. 42, 53 (1982); *State v. Franklin*, 299 S.C. 133, 138, 382 S.E.2d 911, 914 (1989);

- Appellant was able to understand the questioning and to respond coherently –
    - Testimony of Detective Hembree (p. 61, line 14 – p. 62, line 6), and
    - Testimony of Captain McCarthy (p. 117, lines 15-18);

- Appellant was advised of, appeared to understand, and waived his rights on August 2 –
    - Testimony of Detective Hembree (p. 56, line 8 – p. 57, line 18; p. 58, line 9 – p. 60, line 23; p. 61, line 14 – p. 62, line 6; p. 63, lines 11-13; p. 77, lines 7-12),
    - Appellant's testimony (p. 110, lines 11-15), and
    - Court's Exhibit 1/State's Exhibit 14;

- no misrepresentations, promises, threats, or duress were used to induce Appellant to make a statement –
    - Testimony of Detective Hembree (p. 62, lines 7-15; p. 68, lines 11-14), and
    - Testimony of Captain McCarthy (p. 117, lines 3-20);

- Appellant voluntarily made his statement –
    - Testimony of Detective Hembree (p. 62, lines 7-15; p. 68, lines 11-14), and
    - Testimony of Captain McCarthy (p. 117, line 17 – p. 118, line 22);

- Court's Exhibit 1/State's Exhibit 14;

- the entire August 2 interview was approximately three hours long, Appellant was given a smoke break before it began, and Appellant did not request any other breaks –
  - Testimony of Detective Hembree (p. 62, line 24 – p. 63, line 10); and
- Appellant made the August 2, 2011 statement, which was reduced to writing by Detective Hembree –
  - Testimony of Detective Hembree (p. 63, line 14 – p. 64, line 2; p. 65, line 7 – p. 67, line 3), and
  - Testimony of Captain McCarthy (p. 116, lines 5-14; p. 117, lines 21-24; p. 119, lines 2-17; p. 120, line 21 – p. 122, line 15).

Inasmuch as the record establishes that the evidence supports the trial court's findings related to the knowing, intelligent and voluntary nature of Appellant's August 2 statement, the trial court did not err in admitting the statement. *State v. Salz, supra*; *State v. Goodwin, supra*; *State v. Miller, supra.*

The State also maintains that the trial court also properly found the fruit of the poisonous tree doctrine did not require the exclusion of the statement. The State agrees with the trial court that the search warrant was constitutionally sufficient. It also believes that the doctrine does not apply because, even if the search warrant was insufficient, the August 2 statement was attenuated enough from it to dissipate any taint.

A search warrant is only to be issued upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. amend IV; S.C. Const. art. I, Section 10; State v. Spears, 393 S.C. 466, 713 S.E.2d 324 (Ct. App. 2011). S.C. Code Section 17-13-140 requires that all search warrants issued by state judges be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant. A judge may only issue a search warrant upon a finding of probable cause, and this determination requires the judge to make a practical, common-

sense decision of whether there is probably cause (*i.e.*, a reason to believe) that contraband or evidence of a crime will be found in the place to be searched. See *State v. Tench*, 353 S.C. 531, 579 S.E.2d 314 (2003); *State v. Spears*, 393 S.C. 466, 713 S.E.2d 324 (Ct. App. 2011). The trial court is to make a probable cause determination using the "totality of the circumstances" standard looking to the information set forth in the affidavit and any supplemental information provided orally under oath. See *Illinois v. Gates*, 462 U.S. 213 (1983). The totality of the circumstances includes the veracity, reliability, and basis of knowledge of persons supplying the information. *Id.* "A deficiency in one of the elements of veracity and reliability may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." *Id.*, 462 U.S. at 233-234. "A search warrant affidavit which itself is insufficient to establish probable cause may be *supplemented* before the magistrate by sworn oral testimony." *State v. McKnight*, 291 S.C. 110, 352 S.E.2d 471, 472 (1987). However, sworn oral testimony alone will not satisfy the statutory requirements. *Id.*, 352 S.E.2d at 473.

The duty of the appellate court is simply to determine whether the magistrate had a substantial basis for concluding that probable cause existed. *State v. Spears, supra.* "The appellate court should give great deference to a magistrate's determination of probable cause." *Id.*, 393 S.C. at 483, 713 S.E.2d at 333, *citing State v. Dunbar*, 361 S.C. 240, 253, 603 S.E.2d 615, 622 (Ct. App. 2004). The fact that an affidavit supporting a search warrant contains misstatements or unsupported statements is not necessarily dispositive of the affidavit's validity. A trial court may redact such "bad" portions from a supporting affidavit and consider the remaining content of the affidavit to determine if it

is sufficient to establish probable cause. *State v. Spears*, 393 S.C. at 483, 713 S.E.2d at 333, *citing State v. Davis*, 371 S.C. 412, 415-417, 639 S.E.2d 457, 459-460 (2007).

Evidence derived from an illegal search or arrest is generally deemed to be fruit of the poisonous tree and is inadmissible. *Wong Sun v. United States,* 371 U.S. 471, 484–85 (1963); *State v. Adams*, 409 S.C. 641, 763 S.E.2d 341 (2014).

> "However, not all evidence conceivably derived from an illegal search need be suppressed if it is somehow attenuated enough from the violation to dissipate the taint." "To determine whether the derivative evidence has been purged of the taint of the unlawful search, we [may] consider several factors, including: (1) the amount of time between the illegal action and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct." *United States v. Gaines,* 668 F.3d 170, 173 (4th Cir. 2012) (citing *Brown v. Illinois,* 422 U.S. 590, 603–04, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975)).

State v. Adams, 409 S.C. at 648, 763 S.E.2d at 345.[14]

Assuming *arguendo* the last sentence of the affidavit setting forth the "informant's" gun information is deficient because neither the affidavit itself nor the oral testimony of Officer Bacon contained information as to the reliability of the informant, that sentence can be redacted from the affidavit and the remaining portion is sufficient to establish probable cause. Even without that last sentence, the remaining portions of the affidavit and the supplemental testimony of Officer Bacon before the magistrate provided a sufficient basis to establish probable cause that a gun used in an armed robbery would

[14] In *State v. Plath*, 277 S.C. 126, 134-135, 284 S.E.2d 221, 226 (1981), *overruled on other grounds by State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998), and State v. Short*, 333 S.C. 473, 511 S.E.2d 358 (1999), the Court was faced with a challenge to a confession on the ground that it was the product of an illegal arrest. The Court, citing to its earlier holding in *State v. Funchess*, 255 S.C. 385, 391, 179 S.E.2d 25, 28 (1971), reiterated that "[e]ven if the arrest was illegal, the fruit of the poisonous tree doctrine will not apply to a confession if it is freely and voluntarily given."

be found in the home of a participant. As summarized above, Officer Bacon testified she told the magistrate that Denzel Moultrie, who had confessed to his part in the Golden Bowl armed robbery, provided the names of his co-defendants and said one of his co-defendants had a gun during the robbery, and the search warrant was for the home of Jarrett Graddick (one of those co-defendants).

Further assuming *arguendo* the search warrant was invalid, such would not render the August 2 statement inadmissible as fruit of the poisonous tree because the statement is attenuated enough from the violation to dissipate any taint from the execution of the search warrant. The search warrant was executed on July 28. The statement in question was given on August 2, just over four days after the execution of the search warrant. More importantly, however, the August 2 statement was the direct result of Appellant's request to talk to Detective Hembree. Appellant himself does not contest this fact, and it is, as contemplated by *Wong Sun, supra*, unquestionably an act of free will that purges any taint from the execution of the search warrant.

The trial court did not err in admitting Appellant's redacted August 2, 2011 statement.

II.

Inasmuch as the trial court found Appellant's August 2 statement to be voluntary, and the State corroborated Appellant's statement by proof *aliunde* of the *corpus delicti* of armed robbery, the trial court properly denied Appellant's motion for directed verdict. (Issue II)

Factual Background

On the night of Friday, July 22, 2011, Desmonde Ellington, Lamar Mitchell, and Fouad Bouani were working in the Pizza Hut off of Highway 17 in Mt. Pleasant in Charleston County. Shortly before the midnight closing time – sometime between 11:30 and 11:45 p.m. – Mr. Ellington saw two black men stuck a stick in the door and ran in, one after the other, while armed with guns. (p. 201, line 20 – p. 202, line 15; p. 207, line 6 – p. 208, line 13; p. 208, line 21 – p. 209, line 14; p. 282, lines 13-19.) One man put a stick in the door so that it would not lock. The robbers were wearing gray sweaters and black pants, with their sweaters over their heads so that Mr. Ellington could only see their chin and mouth area. (p. 208, line 14 – p. 209, line 3; p. 268, line 20 – p. 270, line 5; p. 273, lines 8-10.) When the men entered, one of told them to get down. Because the gun was pointed in his direction, Mr. Mitchell,[15] the cook, immediately lay face down on the floor near the doorway in the kitchen area. Mr. Bouani,[16] the delivery driver, walked back

[15] Mr. Mitchell testified he only saw one man enter the store, but that he heard the movement or actions of a second person. The man he saw enter the store was black, he was holding a gun, he pointed it at him, and he told them to get down on the floor. Mr. Mitchell complied. (p. 272, lines 8-15; p. 277, lines 17-23.)

[16] Mr. Bouani testified that he only saw one robber. He said that he saw one man outside the store with a plywood stick; the man came into the store, dived over the counter, and shouted at them all to get down and that it was a robbery. Mr. Bouani said he just went face down to the ground, which was why he could not see anything. (p. p. 256, line 12 – p. 259, line 3; 260, line 1 – p. 262, line 12; p. 267, line 11 – p. 268, line 8.) He did testify that he would not

toward the kitchen and lay face down on the floor near Mr. Mitchell. The first robber, who was taller than both the second robber and Mr. Ellington (who estimated the first robber's height at about six feet), pointed his long-barreled gun at them when he came in, jumped the counter and pointed the gun in Mr. Ellington's face. Mr. Ellington then backed away and lay on the floor. (p. 209, line 22 – p. 211, line 9; p. 212, lines 4-20; p. 217, lines 14-17; p. 218, line 2 – p. 220, line 4; p. 222, lines 3-9; p. 260, line 4 – p. 261, line 6; p. 271, line 23 – p. 273, line 10; p. 274, lines 1-25.)

As the second robber went into the doorway of kitchen area, the first robber talked to Mr. Mitchell and Mr. Bouani. He told them to open the drawer. Mr. Ellington, telling the first robber that he would get the money, got up and walked to the cash register. The first robber stood behind him. (p. 210, lines 20-22; p. 211, lines 10-20; p. 211, line 25 – p. 212, line 3; p. 220, lines 9-13.). The first robber, while holding the gun, told Mr. Ellington to hurry up and open the cash register or he was going to shoot somebody. (p. 211, lines 21-24; p. 212, lines 4-23; p. 222, lines 16-20.) Mr. Ellington opened the cash register drawer and backed away from it. The first robber started taking money out of it, and the second robber came up and helped him.[17] As they did so, they told the men to open the safe. All of the men told them they could not and Mr. Ellington showed them that he was unable to open the safe at that time of night. (p. 212, line 24 – p. 213, line 23.) Mr. Bouani testified that the only robber he saw was wearing a trench coat

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have been able to see if another person was in certain areas of the restaurant. (p. 264, line 25 – p. 265, line 14.)

[17] Again, only Mr. Ellington saw the second robber. Neither Mr. Bouani nor Mr. Mitchell saw a second robber, but Mr. Mitchell could hear a second person getting money out of the drawer while the man he had seen was talking to them. Mr. Bouani said that he would not have been able to see another person because of his position on the floor of the restaurant. (p. 264, line 25 – p. 265, line 14; p. 275, line 20 – p. 276, line 6; p. 278, line 22 – p. 279, line 16; p. 280, lines 7-12.)

with what looks like a gun sticking out; the robber pulled a gun on everyone's head and was telling them to open the safe. (p. 263, lines 16-21; p. 264, lines 2-22.)

The second robber acted like a lookout – he stood in the doorway in between the kitchen and area where the soda machine was located. (p. 213, line 24 – p. 214, line 6.) As Mr. Ellington started to turn around after opening the cash register drawer, he saw the second robber walking toward the counter. (p. 214, lines 7-10.) Mr. Ellington saw that the second robber also carried a long-barreled gun that looked like the one the first robber carried. (p. 214, lines 21-25.)

After Mr. Ellington explained that he could not open the safe, the first robber – who Mr. Ellington referred to as "the mean guy" jumped over the counter and ran out the door. The second robber glanced back into the kitchen and then he ran out the door. They ran out of the store in the same direction from which they had come – in the direction of the dry cleaner. (p. 215, lines 1-12.) The robbers took the money from the cash register. (p. 207, lines 9-15; p. 215, lines 14-15; p. 275, line 20 – p. 276, line 8.)

After the robbers left, Mr. Ellington went to the front door of the restaurant to lock it. As he was locking the door, he heard the sound of a car pulling off from the direction of the Baker dealership on what would be the closest road to the restaurant in that direction. Mr. Ellington saw what looked like a "purplish and bluish" Suzuki Forenza go by. (p. 215, lines 16 – p. 216, line 24.) Mr. Ellington then called the police.

Mr. Ellington and Mr. Mitchell both estimated the whole robbery last only two or three minutes. (p. 221, line 23 – p. 222, line 2; p. 276, lines 15-19.) He also testified that he was the only one with an unobstructed view of the two men. (p. 224, line 16 – p. 225, line 8.)

Officer Vance Stephenson responded to the call about the robbery at 11:42 p.m.; he estimated he arrived within three minutes of when the call went out. He and other officers found a stake or stick lying on the floor inside the door of the Pizza Hut and a shoe print on top of the counter. (p. 285, lines 2-8; p. 286, line 7 – p. 287, line 3; p. 287, lines 13-22.)

Ann Son, who managed the dry cleaner next to the Pizza Hut, testified that, at the request of the police, she looked at the surveillance video for the time period of 11:00 p.m. to midnight on the night of the robbery. The video was from a camera outside the dry cleaners that provided a view of the door to the Pizza Hut. On the video, she saw two men walking quickly past the dry cleaners and into the Pizza Hut. She could not tell if the shorter, stockier man was carrying anything, but the taller, slender man was holding a two by four in his hand. When they came out of the Pizza Hut after only two or three minutes, they were running. She did not see anything in their hands. She was unable to make a copy of the video from her computer and the police could not access it because her computer had a virus. (p. 226, line 19 – p. 227, line 7; p. 239, lines 12-15; p. 240, line 2 – p. 245, line 4; p. 251, line 21 – p. 254, line 22.)

Detective Hembree testified about his interview of Appellant on August 2 and the circumstances surrounding it. At the time the State began its examination of the detective and when the State offered the redacted version of Appellant's August 2 statement, the defense renewed its objections under the Fourth, Fifth, Sixth, and Fourteen Amendments to the United States Constitution and the comparable provisions of the South Carolina Constitution on the grounds that Appellant had invoked his right to counsel, the statement was not voluntary, and the statement was the fruit of the poisonous tree as the result of a

search warrant lacking probable cause. The trial court, overruling the objections, renewed its previous rulings. (p. 289, line 18 – p. 290, line 23; p. 300, lines 17-22.) Detective Hembree's testimony was similar to that given during the *in camera* hearing conducted prior to the trial. (p. 291, line 15 – p. 311, line 18; p. 366, line 3 – p. 368, line 19; p. 370, line 23 – p. 374, line 1; p. 375, line 7 – p. 376, line 17.) The redacted version of Appellant's August 2 statement – in which he admitted his participation in the armed robbery of the Pizza Hut as the getaway driver – was admitted as State's Exhibit No. 15. (p. 300, line 13 – p. 301, line 4; State's Exhibit No. 15.)

Officer Ray Haupt, of the Mt. Pleasant Police Department testified that during the search of the home at 2627 Linnen Lane on July 28, 2011, he found a Powerline BB pistol under the mattress in a bedroom in which paperwork belonging to Appellant was found. The gun and a photo of the gun were introduced into evidence. (p. 393, line 12 – p. 396, line 25.)

After the State rested its case, the defense moved for a directed verdict based on the fact that there was no identification of Appellant and no evidence linking him to the crime other than his August 2 statement to which they had objected. (p. 404, lines 5-25.) Finding the State had introduced an abundance of direct and circumstantial evidence of the *corpus delicti* of the crime of armed robbery such that Appellant's statement was admissible as proof of his involvement in the crime, the trial court denied the motion. (p. 405, lines 2-15.)

Argument

On appeal, Appellant argues the trial erred in not granting his motions for directed verdict on the armed robbery charge because the only evidence that he committed the

crime was his own August 2 inculpatory statement, which he contends was involuntary.

Respondent strongly disagrees. Inasmuch as the trial court found Appellant's August 2 statement to be voluntary, its admission and use at trial was proper. Moreover, because the State corroborated Appellant's statement by proof *aliunde* of the *corpus delicti*, the trial court properly denied the motion for directed verdict.

In a criminal case, a trial court ruling on a motion for directed verdict must view the evidence in the light most favorable to the State. *State v. Buckmon,* 347 S.C. 316, 321, 555 S.E.2d 402, 404 (2001); *State v. James*, 362 S.C. 557, 608 S.E.2d 455 (Ct. App. 2004). The trial court is concerned with the existence or nonexistence of evidence, not its weight. *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004); *State v. Gaster,* 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002); *State v. Elmore*, 368 S.C. 230, 628 S.E.2d 271 (Ct. App. 2006). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged, *State v. McHoney,* 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001), and the court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the defendant is guilty. *State v. Mitchell,* 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000).

When reviewing a denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. *State v. Burdette,* 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999); *State v. Buckmon, supra.* If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the defendant, the appellate court must find the case was properly submitted to the jury. *State v. Pinckney,* 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000).

The "corroboration rule" requires that the inculpatory statement or confession of a defendant be corroborated by proof *aliunde* of the *corpus delicti*, *i.e.*, that the crime has actually been committed. *State v. Dodd*, 354 S.C. 13, 17, 579 S.E.2d 331, 333 (Ct. App. 2003). "The [rule] is satisfied if the State provides sufficient independent evidence which serves to corroborate the defendant's extra-judicial statements and, together with such statements, permits a reasonable belief that the crime occurred." *State v. Osborne,* 335 S.C. 172, 180, 516 S.E.2d 201, 205 (1999). The State may prove the *corpus delicti* of the offense of armed robbery by establishing that a robbery was committed and either that: (1) the robber was armed with a deadly weapon or (2) the robber alleged he was armed with a deadly weapon, either by action or words, while using a representation of a deadly weapon or any object. *State v. Dodd, supra*; S.C. Code Ann. Section 16–11–330(A).

Appellant, at trial and on appeal, has ***not*** challenged the fact that an armed robbery occurred at the Pizza Hut on the night of July 22, 2011. (p. 404, lines 5-25; Initial Brief of Appellant at 25-30.) And, as summarized above on pages 37-40, the State presented substantial circumstantial and direct evidence that the Pizza Hut was robbed on the night of Friday, July 22, 2011, by two men and that at least one of the men was armed with a gun, which is a deadly weapon, or alleged that he was armed with a gun, either by action or words, while using a representation of a deadly weapon or any object. The State also presented evidence that one of the victims heard, from the closest road in the direction the men ran toward, the sound of a car speeding off after the robbery and that a gun was found under Appellant's mattress. This evidence clearly satisfied the State's burden of presenting sufficient independent evidence to corroborate Appellant's statement that he and another man entered the Pizza Hut while both were armed with

guns (Appellant with the B.B. gun found by the police) and robbed it. *See State v. Dodd*, 354 S.C. at 17-18, 579 S.E.2d at 333-334. Because there was independent evidence tending to establish the *corpus delicti* of armed robbery and because Appellant's statement was corroborated, the trial court properly denied the motion for a directed verdict. *Id. See also State v. Osborne*, *supra*; *State v. Abraham*, 408 S.C. 589, 592-593, 759 S.E.2d 440, 441-442 (Ct. App. 2014).

CONCLUSION

For the foregoing reasons and any other appearing in the Record on Appeal (as provided for in Rule 220, SCACR), this Court should affirm the judgment of the circuit court.

Respectfully submitted,

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CONCLUSION

For the foregoing reasons and any other appearing in the Record on Appeal (as provided for in Rule 220, SCACR), the judgment and conviction of the lower court should be affirmed.

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May 26, 2015

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of General Sessions
Knox McMahon, Circuit Court Judge

Court of Appeals Case No. 2014-000051

The State of South Carolina,

Respondent,

v.

Kenneth Ordell Murray,

Appellant.

PROOF OF SERVICE

I certify that I have today served the Initial Brief of Respondent and Designation of Matter to be Included in the Record on Appeal on Appellant, Kenneth Ordell Murray, by depositing one copy of such in the United States Mail, first class postage prepaid, addressed to his attorney of record, Leah B. Moody, Esquire, Law Office of Leah B. Moody, LLC, 235 East Main Street, Suite 115, Rock Hill, South Carolina 29730, and by depositing one copy of such in the United States Mail, first class postage prepaid, addressed to his co-counsel, Robert M. Dudek, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211.

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