STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN CALVIN SLEDGE,

APPELLANT

APPELLATE CASE NO 2016-000641

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On June 30, 2015, the Greenville County Grand Jury returned an indictment against Appellant John Calvin Sledge for murder and possession of a pistol during the commission of a violent crime. R.*. On February 16, 2016, the Greenville County Grand Jury returned an additional indictment against Sledge for unlawful conduct toward a child. R.*.

On March 14 – 16, 2016, Sledge appeared for trial before the Honorable D. Garrison Hill. Tr. 1. Sledge was represented by Charles Propst and Stuart Sarratt, and the state was represented by assistant solicitors Judith Munson and Brittany Scott. Tr. 1.

The jury returned verdicts of guilty on all three offenses. Tr. 374, ll. 2-23. Judge Hill sentenced Sledge to concurrent terms of life in prison for murder, five years for the weapons offense, and ten years for unlawful conduct toward a child. Tr. 378, ll. 11-24.

STATEMENT OF FACTS

Appellant John Sledge was accused of shooting his wife, Kimberly Sledge ("hereinafter "Kimberly"), in the head, resulting in her death. The primary "evidence" against Sledge was the lack of evidence against anyone else. Tr. 257, l. 21 – 260, l. 5; Tr. 276, l. 3 – 278, l. 10; Tr. 290, ll. 23-25

According to Sledge's ten-year old stepson, Michael W., Sledge and Kimberly had been arguing. He alleged that Kimberly's collarbone was broken in an altercation that he interrupted earlier in the evening. Michael went to bed at approximately 9:00 p.m. but came out of his room five minutes after he heard "a loud bang and the house shook." Tr. 304, l. 4 – 309, l. 11. Michael saw his mother face down on the floor in the bathroom doorway and did not see Sledge in the house. Tr. 309, ll. 12-25. He found a phone on the bathroom floor and called 911 at 10:15 p.m., 10:16 p.m., and 10:17 p.m. The completed call to 911 lasted twenty-two minutes and twenty-nine seconds. Tr. 89, l. 11 – 90, l. 6; Tr. 310, ll. 1-9. While officers testified that there were no footprints in the snow going up to the backdoors or windows of the home, there were a variety of impressions in the front of the house, including those of the first responders. Tr. 115, ll. 8-16; Tr. 255, ll. 14-18; see also Tr. 158, ll. 1-12; Tr. 160, ll. 10-20.

The pathologist, Dr. James Fuller, testified that Kimberly died from one gunshot wound to the back of the head, fired from several feet away. Tr. 212, l. 25 – 214, l. 25; Tr. 222, ll. 11-18. The toxicology report revealed that her blood alcohol level was 0.192 percent weight by volume. Tr. 217, ll. 3-17. **Dr. Fuller did not find any other injuries to Kimberly's body** once the blood was cleaned off of it. Tr. 217, l. 21 – 218, l. 1; Tr. 220, l. 13 – 221, l. 8.

A .357 caliber revolver, in a closed fabric case, was seized from a chair on the front porch of the family home. There were three cartridges and one cartridge casing, all .357 Magnum,

loaded inside of the cylinder of the gun. There were also three .38 Special cartridges loose in the gun case. Tr. 162, ll. 9-25; Tr. 165, ll. 1-20; Tr. 195, l. 9 – 198, l. 6; State's Exs. 15 and 16 (photographs).[1] The state's firearms examiner, James Armstrong, testified that the gun was operable. Tr. 195, l. 9 – 196, l. 6. Not surprisingly, Armstrong determined that the spent .357 Magnum cartridge casing inside of the cylinder of the revolver was fired by it. Tr. 196, l. 7 – 197, l. 15. He confirmed that the seized gun was capable of firing both .357 Magnum and .38 Special ammunition. Tr. 198, ll. 2-6.

Armstrong also examined metal fragments collected from the bathrooms, which he identified as a fired bullet core found in Michael's bathroom and a portion of a fired bullet core found in the sink of the bathroom where the victim laid. Tr. 182, ll. 11-20; Tr. 200, l. 23 – 204, l. 6. Armstrong opined that the fired bullet core was a .38/9mm and had general rifling characteristics "consistent with five lands and grooves with a right-hand twist," like that of the seized gun. Tr. 201, ll. 1-22; Tr. 202, l. 21 – 203, l. 7. On cross-examination, Armstrong admitted that there are a large number of guns manufactured with five lands and grooves with a right-hand twist. Tr. 205, l. 22 – 206, l. 16. Additionally, there was no copper jacket collected, which is necessary to see the identifying features of a firing gun on a projectile. Tr. 202, ll. 7-20; Tr. 205, ll. 18-21. With the bullet core only, Armstrong could merely say that it was possible that the seized gun fired the bullet core found in Michael's bathroom. Tr. 203, ll. 5-7. The other metal fragment was consistent with being a portion of a fired bullet core but was not suitable for microscopic comparison. Tr. 203, ll. 19-22.

Sledge did not testify at trial, but the videos of his detention pursuant to a traffic stop and a redacted video of his interrogation were admitted into evidence. Sledge said that he and

[1] State's Exhibit Nos. 15 and 16 (photographs) are on file with this Court.

Kimberly had argued that night and he left, but that he was returning home when police stopped him. He admitted firing the gun that was found on the porch earlier in the day. He denied killing his wife. State's Ex. 7 (traffic stop video); [2] State's Ex. 61 (redacted interrogation).[3] Police obtained video surveillance footage from a Spinx convenience store, which showed that Sledge purchased beer there at 10:27 p.m. Tr. 260, ll. 18-25. Sledge was stopped by deputies at 11:08 p.m., as he was travelling northbound on Highway 25, toward his home. Tr. 108, ll. 1-3; Tr. 114, l. 7 – 116, l. 4; Tr. 261, ll. 1-2; State's Ex. 7.

Admissibility of 911 Call

Defense counsel made a pre-trial motion *in limine* to exclude the portions of the 911 call where the caller, Michael, said that Sledge shot his mother and referenced fighting among Sledge and Kimberly that occurred prior to the shooting. Tr. 37, l. 20 – 38, l. 1. Counsel argued that the statements were hearsay, not falling under any exception. Tr. 38, ll. 2-15. The solicitor argued that Michael would testify regarding the fighting at trial and observed approximately thirty minutes prior to the 911 call. Thus, he argued that the statements about Sledge and Kimberly fighting were both a present sense impression and excited utterance made during a call immediately after finding his mother laying on the floor. Tr. 38, l. 23 – 39, l. 6. Regarding the response that "John Sledge" shot his mother, the solicitor argued: "[A]gain, this witness will

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[2] State's Exhibit No. 7 (traffic stop video) is on file with this Court. Notations to specific times with respect to this exhibit are based upon the Windows Media Player time display.

[3] State's Exhibit No. 62 (redacted interrogation video) is on file with this Court. The redactions were agreed upon and ruled upon in compliance with State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015) ("remind[ing] trial courts that the questions police pose during suspect interviews may contain false accusations, inherently unreliable, unconfirmed or false statements, and inflammatory remarks that constitute legitimate points of inquiry during a police investigation, but that would otherwise be inadmissible in open court"). Tr. 65, l. 23 – 68, l. 17; Tr. 223, l. 16 – 238, l. 11; Tr. 288, ll. 9-14. However, the unredacted version of the interrogation video was marked as Court's Exhibit 2.

testify. And there is no issue here with the confrontation in this case." Tr. 39, ll. 7-9. The solicitor agreed that the 911 call was approximately twenty-two minutes long. Tr. 39, ll. 10-16. The solicitor attempted to narrow the timeline further, claiming that the testimony would reveal that the fighting between the parties occurred ten to fifteen minutes prior to the gunshot. Tr. 39, l. 17 – 40, l. 1.

Judge Hill ruled that the entirety of the 911 call was admissible. Tr. 40, ll. 2-11. The recording of the 911 call was admitted into evidence over defense counsel's renewed objection through the state's first witness. Tr. 88, ll. 3-23; State's Ex. 1 (911 call).[4]

Jackson v. Denno[5] Hearing

Sledge made statements following his initial detention after a traffic stop and during his interrogation at the police station, both of which Judge Hill ruled admissible following the pre-trial Denno hearing. Tr. 40, l. 13 – 65, l. 20. At the hearing, the solicitor presented testimony from Master Deputy Robert May, who initiated the traffic stop, and Sergeant Roman Rivera, who was the lead interrogator. Judge Hill also watched portions of the in-car video and interrogation. Tr. 50, ll. 2-8; Tr. 55, ll. 17-24.

May testified that he and Deputy Williams were at the Hot Spot gas station on Augusta Road when they saw Sledge's car, which was consistent with the "be on the lookout" description they heard over the radio. Tr. 41, l. 10 – 42, l. 11. As seen on the in-car video, when they initiated the stop at **11:08 p.m.**, the deputies arrived in separate cruisers with their sirens and lights activated. They both had their **guns drawn**. Tr. 46, ll. 9-15; State's Ex. 7, 00:00-01:12.

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[4] State's Exhibit No. 1 (911 call) is on file with this Court. Notations to specific times with respect to this exhibit are based upon the Windows Media Player time display.

[5] 378 U.S. 368, 84 S.Ct. 1774 (1964).

May screamed at Sledge: **"Show me your fucking hands. Put your hands out of the fucking window. Put 'em out of the window. The Sheriff's Office. Hands out the fucking window."** State's Ex. 7, 00:05-00:18; Tr. 46, ll. 16-25. Williams was also screaming: "Hands out of the window. Get out of the car. Get on the ground. Get on the ground." State's Ex. 7, 00:15-00:24. Despite Sledge's compliance with their instructions, the officers held Sledge down on the pavement and handcuffed his hands behind his back. State's Ex. 7, 00:23-01:12. Sledge was then placed in the backseat of May's patrol car and was not free to leave. Tr. 42, l. 12 – 43, l. 6. May testified that he smelled a strong odor of alcohol on Sledge's person and he appeared intoxicated. Tr. 44, ll. 6-10; Tr. 47, ll. 3-7.

May read Sledge his Miranda[6] rights from a card. Tr. 43, l. 7 – 44, l. 5; State's Ex. 04:00-04:30. In response to whether he wanted to speak with May, the following exchange occurred:

SLEDGE: Why?

DEPUTY MAY: Do you wish to speak with me or no?

SLEDGE: I'd like to speak, I understand – try and understand why.

DEPUTY MAY: Alright. You said you wish to speak, correct?

SLEDGE: **I'd like to know what, what's going on.**

DEPUTY MAY: You're being detained right now, okay, because there's some people over at your house investigating a crime scene.

SLEDGE: A crime scene?

DEPUTY MAY: Mmm, hmm.

SLEDGE: Why?

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[6] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966).

DEPUTY MAY: A crime scene.

SLEDGE: Why?

DEPUTY MAY: You don't know why?

SLEDGE: No, sir, I don't.

DEPUTY MAY: Okay, what were you doing before you left?

State's Ex. 7, 04:28-05:13. Sledge then described some of the day's activities, including that he left after getting into an argument with his wife. He said he was on his way back home. State's Ex. 7, 05:14-05:53. Sledge then asked May "what's wrong?" several times, concerned for both his child and wife. May responded that Sledge's wife had been hurt but would not provide any further detail regarding what happened. State's Ex. 7, 05:53-06:19. Soon after, another officer interrupted and told May not to ask Sledge any more questions. State's Ex. 7, 06:19-07:12.

A few minutes later, Sledge asked May "what is going on?" May responded: "**Well, you're being detained right now. Okay. And there's some people that want to speak to you. Alright. And that's all I can tell you right now.**" Sledge asked "for what reason," and May responded "because something happened at your house." State's Ex. 7, 10:24-10:44. When May returned to the police car approximately thirty minutes later and began driving Sledge away from the scene of the traffic stop, Sledge again asked "what the heck is going on?" May responded: "**Like I said, you're being detained for an investigation. Somebody's going to talk to you about that, okay.**" State's Ex. 7, 39:02-39:16.

Rather than taking Sledge immediately back to the police station, May pulled over with Sledge at **11:55 p.m.**, where they met an officer who swabbed Sledge's hands for gun shot residue. **Sledge expressed his need to urinate at 11:57 p.m.** May said that he could not let him urinate outside but promised that they would let him use the bathroom when they got downtown.

State's Ex. 7, 46:05-52:03. At the Denno hearing, May testified that he did not recall Sledge asking to use the bathroom during transport but believed he asked once they arrived at the law enforcement center. Tr. 48, ll. 6-22; Tr. 49, ll. 12-19.

Sledge finally arrived at the police station at **12:26 a.m.** State's Ex. 7, 1:17:55. Sergeant Rivera and Investigator King conducted Sledge's recorded custodial interrogation in the Greenville City Police "interview room." Tr. 51, l. 6 – 52, l. 19. Prior to that, Rivera saw Sledge in the waiting area, where Sledge asked if he could use the restroom. Rivera told him he would be back in five minutes. Tr. 52, ll. 20-25. A search warrant was then served on Sledge, which included **stripping Sledge naked while a female officer photographed him.** Tr. 53, ll. 4-7; Tr. 57, l. 16 – 59, l. 4.

On direct examination, Rivera said that when he returned, he asked Sledge if he still needed to use the restroom, to which Sledge said "no." Tr. 53, ll. 1-3. However, on cross-examination, Rivera admitted that when he returned to begin the interrogation **Sledge had urinated on himself.** Tr. 59, ll. 5-22. The recording of Sledge's interrogation began at **1:41 a.m., nearly two hours after his initial request to use the restroom was documented** by the in-car recording. Court's Ex. 2 (unredacted interrogation video);[7] State's Ex. 7, 48:33-48:46 and 50:08-50:25. Rivera and King told Sledge that his name had come up in an investigation they were conducting. Sledge asked if his child and wife were fine. Rivera responded: "I don't know anything other than that I'm here to talk to you." King responded: "I know your child is fine." Court's Ex. 2, 1:41:51AM - 1:43:40AM. Sledge admitted that he drank two beers but said that was three or four hours prior and he was not under the influence of alcohol or drugs. Court's Ex.

[7] Court's Exhibit No. 2 (unredacted interrogation video) is on file with this Court. Notations to specific times with respect to this exhibit are based upon the time-stamp in the left corner of the video.

2, 1:43:40AM - 1:44:15AM. Because Sledge could not read the small type without his glasses, Rivera read Sledge the information on the waiver of rights form, which Sledge signed. Tr. 53, l. 8 – 55, l. 16; Court's Ex. 2, 1:44:15AM - 1:48:00AM. During the interrogation, Sledge was wearing an orange jumpsuit and had one hand cuffed to a belly chain. At 3:50 a.m., King handcuffed Sledge's second hand to the belly chain, which is how it remained until the conclusion of the interrogation at **4:14 a.m.**, when the officers told Sledge he would be charged with murder. Court's Ex. 2. By that time, Sledge had been in police custody for over five hours.

Defense counsel argued that both statements should be suppressed, but particularly the statements made during the interrogation by Rivera and King. Tr. 61, ll. 15-18. He noted that at the initial traffic stop "guns are drawn and he is rushed upon by two officers." Tr. 61, ll. 19-23. He was immediately handcuffed and put in the back of the patrol car. He was told he was being detained but not told why. Tr. 61, l. 23 – 62, l. 1. Additionally, May testified that Sledge was intoxicated. Tr. 62, ll. 1-6. Once Sledge was finally transported to the law enforcement center, he remained handcuffed and was denied the opportunity to use the bathroom. He had to urinate on himself. Tr. 62, ll. 7-13. He was then stripped naked and photographed by a female officer. Tr. 62, ll. 14-15; Tr. 64, ll. 1-2. Finally, he was placed into an orange jumpsuit and chain belt so that his hands could be cuffed in front of him. Sledge was never free to leave. Tr. 62, ll. 15-18. Thus, he argued that the waiver of rights was not free and voluntary based on a totality of the circumstances. Tr. 62, l. 25 – 63, l. 11. Despite being the party with the burden of proof, the state presented no argument.

Judge Hill ruled that the statements were admissible. Tr. 63, l. 25 – 65, l. 20. He found that Sledge was Mirandized twice and signed a written waiver of rights. He said that with respect to the interview room setting, the video showed that "it was not a hostile atmosphere."

Tr. 64, ll. 7-20. Judge Hill noted the evidence of intoxication, but found that it did not "erase[] his ability to understand, process and – process information and make rational decisions." Tr. 64, ll. 21-24; Tr. 65, ll. 12-16. He further ruled:

> I don't find any evidence of coercion or pressure to the extent that would find that the Defendant's will was overborne.
>
> I understand the incident regarding the access to the restroom, and his using the restroom. But I don't find that that by itself interfered with the voluntariness of the statement or his knowing and intelligent waiver of his rights under *Miranda*.
>
> I don't find anything in the record that would show me that the statements he gave were not the product of his free and voluntary choice. I don't have any information about his educational background, but he appeared to be in physical and mental health sufficient to give a statement.

Tr. 64, l. 24 – 65, l. 6. Thus, Judge Hill ruled that the state had proven beyond a reasonable doubt that the waivers were freely and voluntarily made such that the statements were admissible. Tr. 65, l. 17-20.

Defense counsel renewed his pre-trial objection to the admissibility of State's Exhibit 7, the traffic stop video when it was offered into evidence. Judge Hill overruled the objection. Tr. 99, ll. 1-8. After obtaining rulings from the trial judge and agreeing upon redactions of the interrogation video, State's Exhibit 61 was also admitted into evidence. Tr. 65, l. 23 – 68, l. 17; Tr. 223, l. 16 – 238, l. 11; Tr. 288, ll. 9-14.

ARGUMENT

I. The trial court erred in admitting the portions of the 911 call where the caller said that Appellant and his mother were fighting earlier in the evening and where the caller said that Appellant shot his mother because the statements were inadmissible hearsay and more prejudicial than probative.

Defense counsel objected to the admission of portions of the 911 call made by Sledge's ten-year old stepson, Michael. He argued that the portions where Michael said that John Sledge shot his mom and the discussion of prior arguments between Sledge and Kimberly were inadmissible hearsay, not subject to any exception. Tr. 37, l. 20 – 38, l. 15. Specifically, the relevant portions of the 911 call included:

OPERATOR: **Who shot your mom?**

CALLER: **John Sledge.**

OPERATOR: When?

CALLER: Just a minute ago; I heard a loud [inaudible].

State's Ex. 1, 1:01-1:10. Michael also told the operator "I think my dad just ran off." State's Ex. 1, 1:35-1:39.

OPERATOR: **Were they arguing?**

CALLER: **Yes, they were arguing.**

OPERATOR: Okay.

State's Ex. 1, 7:44-7:49.

OPERATOR: Were you in your room or something?

CALLER: Yes. I was in my room.

OPERATOR: **Oh, okay. And you just heard them arguing and then heard that, and when you came in there, your mom, did your mom still have the phone in her hand?**

CALLER: **Yeah**, and she dropped it and it flew away.

OPERATOR: Uh, huh. Okay.

State's Ex. 1, 9:00-9:17. The operator warned Michael to tell her if his father returned home. State's Ex. 1, 11:29-11:39, 12:18-12:26, and 12:44-13:00.

The solicitor argued that the statements were excited utterances and present sense impressions and seemed to imply that the lack of a Confrontation Clause problem rendered the entire call admissible. Tr. 38, l. 19 – 40, l. 1. The trial judge did not specify which hearsay exception(s) he found applicable, instead ruling: "I don't think there's any problem under Rule 403 with that or any other prohibition under the rules of evidence." Tr. 40, ll. 2-8. He found the relevance of the statements to be "high" and ruled that "any confusion of the issues or unfair prejudice to the Defendant is vastly outweighed by the probative value of the call." Tr. 40, ll. 9-11.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" in the statement. Rule 801(c), SCRE. "Hearsay is not admissible" unless an exception applies, or "as provided by . . . other rules . . . or by statute." Rule 802, SCRE. Rule 803, SCRE, provides various exceptions which are not excluded by the hearsay rule, even though the declarant is available as a witness.

A "present sense impression" is one such exception, defined as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Rule 803(1), SCRE. "There are three elements to the foundation for the admission of a hearsay statement as a present sense impression: (1) the statement must describe or explain an event or condition; (2) the statement must be contemporaneous with the event; and (3) **the declarant must have personally perceived the**

event." State v. Hendricks, 408 S.C. 525, 533, 759 S.E.2d 434, 438 (Ct. App. 2014) (emphasis added).

An "excited utterance" is another exception to the rule against hearsay. It is defined as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Rule 803(2), SCRE. "The excited utterance exception is based on the rationale that the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication." State v. Ladner, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007). Our Supreme Court has identified three elements a trial court must consider when determining whether a statement has the spontaneous quality necessary for admission as an excited utterance: "(1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition." Id. at 532, 759 S.E.2d at 437–38 (Ct. App. 2014) (quoting State v. Washington, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008)). "**[S]tatements which are not based on firsthand information, such as where the declarant was not an actual witness to the event, are not admissible under the excited utterance exception to the hearsay rule.**" State v. Davis, 371 S.C. 170, 179, 638 S.E.2d 57, 62 (2006) (citing State v. Hill, 331 S.C. 94, 99, 501 S.E.2d 122, 125 (1998)) (emphasis added).

The applicability of a hearsay exception is not the end of a trial court's analysis. For evidence to be admissible, it must be relevant. Rules 401 & 402, SCRE. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE; State v. Pagan, 357 S.C. 132, 142, 591 S.E.2d 646, 651

(Ct. App. 2004). Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. In re Care and Treatment of Corley, 353 S.C. 202, 577 S.E.2d 451 (2003); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE.

A. Response to "Who Shot Your Mother?"

At first glance, Michael's response that "John Sledge" shot his mom may appear to be a present sense impression or excited utterance. The 911 call at 10:17 p.m. was made within minutes of Michael's discovery of his mother's body and the statement about who shot her was made within the first minute of the 911 call. However, neither exception is applicable to Michael's statement because **Michael did not witness the shooting and, as such, had no firsthand knowledge of who shot Kimberly**. Additionally, any probative value of the statement was outweighed by the danger of unfair prejudice.

In State v. Davis, 371 S.C. 170, 178-81, 638 S.E.2d 57, 61-63 (2006), our Supreme Court found that the trial court committed reversible error in admitting the co-defendant's statements, as an excited utterance, that his brother had shot the victim because the victim had taken a swing at his brother. In addition to a lack of evidence that the co-defendant was under the stress or excitement of the shooting when he made the statement, the Davis Court found that the record did not support the conclusion that Hill witnessed the shooting. 371 S.C. at 180, 638 S.E.2d at 63. Thus, the Court ruled: "Because there is no evidence Hill actually saw Paul get shot, Hill's statement is not admissible under the excited utterance exception to the hearsay rule." Id. The Court further noted that "because there is insufficient evidence Hill witnessed the shooting, the State's alternate argument that his statement was properly admitted under the present sense

impression exception is without merit." Id. at 180, n. 9, 638 S.E.2d at 63, n. 9. Relying on Davis, this Court ruled in State v. Hendricks, 408 S.C. 525, 533, 759 S.E.2d 434, 438 (Ct. App. 2014), that the victim's mother's statements about her daughter's rape were not admissible as present sense impressions because she "did not perceive" the rape.

Similarly, here, there is no evidence that Michael witnessed the shooting. Rather, he was in his room at the time that the shooting occurred. Tr. 307, l. 2 – 309, l. 16. While some earlier reports in the investigation indicated that Michael saw his father in the house immediately after the shooting, officers were unable to determine the source of that information and ultimately determined that it was not true. Tr. 273, l. 19 – 275, l. 12; Tr. 278, ll. 6-10; Tr. 294, l. 16 – 295, l. 14. Investigator Campbell characterized the information that Michael saw Sledge immediately after the shooting as "merely a rumor that turned out to be untrue." Tr. 275, ll. 9-12. Thus, the 911 operator's question "Who shot your mom" and Michael's response "John Sledge" were inadmissible hearsay.

Assuming *arguendo* that some hearsay exception did apply, the statement was also unduly prejudicial in light of the fact that Michael did not witness the shooting. While Michael could testify to the facts and circumstances surrounding the shooting, our rules of evidence did not allow him to speculate that Sledge shot his mother. See Rule 602, SCRE ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony."). Notably, the solicitor never asked Michael who shot his mother during his testimony at trial, as such a question would have inevitably garnered a sustainable objection. Because the trial judge erred in admitting the question and answer regarding who shot Kimberly, Sledge is entitled to a new trial.

B. Statements Regarding Prior Arguments

The statements that Sledge and Kimberly were arguing were likewise inadmissible under the present sense impression and excited utterance exceptions. In order to fall under the "present sense impression" exception, the declarant's statement has to be made "while . . . perceiving the event or condition, or immediately thereafter." Rule 803(1), SCRE. It is the contemporaneous requirement that causes the statements in this case to fail. The arguing between Sledge and Kimberly that Michael allegedly observed occurred prior to his bedtime of 9:00 p.m., over an hour before the 911 call was made at 10:17 p.m. Though Michael said he heard more arguing after his mother left his room, the solicitor did not establish the timeline of when Michael heard the arguing compared to when he heard the gunshot. Tr. 303, l. 21 – 310, l. 9. Even so, Michael said he waited in his room for about five minutes after he heard the "bang" and did not see Sledge in the house. Tr. 308, l. 2 – 309, l. 16. As such, he was certainly not perceiving any argument between Sledge and Kimberly at seven and half minutes into the 911 call, when the operator started asking about whether they were arguing. See Hendricks, 408 S.C. at 533, 759 S.E.2d at 438.

The statements about the prior arguments were not an excited utterance. While the 911 call evidences Michael's emotional state, a murder is not sufficient in and of itself to establish an excited utterance. Davis, 371 S.C. at 179, 638 S.E.2d at 62 ("The Court of Appeals relied heavily on the fact that 'murder is certainly a startling event.' In our opinion, however, relying on the fact that there was a murder, or that the statement was about the weapon used to commit the murder, is inadequate to establish excited utterance."). Moreover, "the intrinsic reliability of an excited utterance derives from the statement's **spontaneity** which is determined by the totality of the circumstances surrounding the statement when it was uttered." State v. Ladner, 373 S.C.

103, 119–20, 644 S.E.2d 684, 693 (2007) (emphasis added). Here, the statements were not spontaneous. Rather, over seven minutes into the call, the 911 operator asked Michael "were they arguing?" Michael responded: "Yes, they were arguing." State's Ex. 1, 7:44-7:49. Almost a minute later, nine minutes into the call, the 911 operator presented the following scenario: "[Y]ou just heard them arguing and then heard that, and when you came in there, your mom, did your mom still have the phone in her hand?," to which Michael responded "Yeah, and she dropped it and it flew away." State's Ex. 1, 9:00 – 9:17. Thus, with respect to the second question and answer, Michael merely agreed with the operator's suggestion of how things occurred. While Michael's trial testimony regarding the earlier fighting was admissible, his prior consistent statement regarding their arguing was not admissible since there was no allegation of fabrication or improper influence or motive. See Rule 801(d)(1), SCRE. Without any applicable hearsay exception, Michael's prior statements served no purpose other than to improperly bolster his trial testimony. See State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003) (holding improper admission of witness' prior consistent statement constituted reversible error). Thus, the trial court erred in admitting the portions of the 911 call related to the alleged arguments between Sledge and Kimberly. Sledge is accordingly entitled to a new trial.

II. The trial court erred in admitting Appellant's statements to police where his statements were not free and voluntary based on a totality of the circumstances.

The trial judge erred in admitting Sledge's statements in the patrol car and during the interrogation at the police station. A review of the entirety of the trial judge's ruling reveals that he looked at the various facts and circumstances surrounding Sledge's custodial interrogation piecemeal rather than properly focusing on the totality of the circumstances. Judge Hill found that though there was evidence of intoxication, it was not "to such an extent that it **erased** his ability to understand . . . and process information and make rational decisions." Tr. 64, ll. 21-24 (emphasis added). Regarding the denial of Sledge's access to the bathroom, Judge Hill said: "I don't find that that **by itself** interfered with the voluntariness of the statement or his knowing and intelligent waiver of his rights under Miranda." Tr. 65, ll. 3-6 (emphasis added). He further ruled: "**I don't find anything in the record that would show me that the statements he gave were not the product of his free and voluntary choice.**" Tr. 65, ll. 7-9 (emphasis added). The trial judge's failure to look at the totality of the circumstances in making his ruling on the voluntariness of Sledge's waivers was error.

A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his rights under Miranda . . . ." State v. Aleksey, 343 S.C. 20, 30, 538 S.E.2d 248, 253 (2000). In Miranda v. Arizona, 384 U.S. 436, 479, 86 S.Ct. 1602, 1630 (1966), the United States Supreme Court determined that the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination required that custodial interrogation be preceded by advice to the putative defendant that he has the right to remain silent and also the right to the presence of an attorney. Under Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 (1964), "a defendant is entitled to a reliable determination as to the voluntariness of his [statement] by a tribunal other than the jury charged with deciding his guilt

or innocence." State v. Miller, 375 S.C. 370, 381, 652 S.E.2d 444, 450 (Ct. App. 2007) (quoting State v. Fortner, 266 S.C. 223, 226, 222 S.E.2d 508, 510 (1976). In South Carolina, the judge makes this initial determination of voluntariness required by Denno. Id. at 382, 652 at 450.

In the initial phase of review by the trial judge, if a defendant was advised of his Miranda rights, but chose to make a statement anyway, the "burden is on the State to prove *by a preponderance of the evidence* that his rights were voluntarily waived." [8] State v. Washington, 296 S.C. 54, 55, 370 S.E.2d 611, 612 (1988) (emphasis in original). **The State bears this burden of proof even where a defendant has signed a waiver of rights form.** State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31 (1980).

"[T]he trial judge must examine the totality of the circumstances surrounding the statement and determine whether the State has carried its burden of showing the statement was made voluntarily." Miller, 375 S.C. at 383, 652 S.E.2d at 450 (emphasis added). When considering the voluntariness of a statement, the court and jury should consider "not only the crucial element of police coercion; the length of the interrogation; its location; its continuity; the defendant's maturity; education; physical condition; and mental health." Withrow v. Williams, 507 U.S. 680, 693, 113 S.Ct. 1745 (1993) (omitting internal citations). "Coercion is determined from the perspective of the suspect." Miller, 375 S.C. at 386, 652 S.E.2d at 452. **Statements given** pursuant to threats or **under inherently coercive circumstances are not admissible.** See

[8] Here, despite the applicability of the preponderance of the evidence standard at a Denno hearing, Judge Hill found that the state "has proven beyond a reasonable doubt that the waivers were freely and voluntarily made." Tr. 65, ll. 17-20; see Washington, 296 S.C. at 55, 370 S.E.2d at 612. While this was not as problematic as applying a lower burden of proof or applying it to the wrong party, it further evidences the trial court's confusion over the applicable principles to his determination of admissibility of the Appellant's statements.

Mincey v. Arizona, 437 U.S. 385, 398-99, 98 S.Ct. 2408 (1978); Minnesota v. Murphy 465 U.S. 420, 427, 104 S.Ct. 1136 (1984).

The **five hours** that Sledge spent in the police custody prior to his arrest began with his traffic stop by two officers at **11:08 p.m. Guns drawn**, they yelled commands mixed with obscenities at Sledge, including: **"Show me your fucking hands. Put your hands out of the fucking window. Put 'em out of the window. The Sheriff's Office. Hands out the fucking window."** He was further instructed to get down on the ground. Despite his compliance, both officers held Sledge down on the pavement and handcuffed him. Tr. 46, ll. 9-25; State's Ex. 7. Master Deputy May said that he smelled a strong odor of alcohol and believed that **Sledge was intoxicated**. Tr. 44, ll. 6-10; Tr. 47, ll. 3-7. Sledge was immediately placed into the back of a patrol car and read his Miranda rights. Sledge said that he wanted to know what was going on. May told him only that he was being detained because **some people want to speak to him** about something that happened at his house. Even so, Sledge seemed to think that his detention was related his consumption of alcohol and was concerned about where they would tow his car. Sledge repeatedly asked the deputy for an explanation of what was going on. The deputy finally told Sledge that his wife had been hurt but repeatedly told him that **someone else "downtown" would talk to him** and provide him more information. Tr. 42, l. 12 – 43, l. 6; State's Ex. 7.

Sledge was then driven from the location of the traffic stop to the parking lot of what appeared to be a closed business, where his hands were swabbed for gunshot residue ("GSR"). Sledge again asked what happened to his wife and was provided with no new information. Sledge also made his **first request to the use bathroom**, indicating his need to urinate while the officer collected the GSR swabs at **11:56 p.m.** While the officer understandably could not allow Sledge to urinate outside, he assured Sledge that he would be given an opportunity to use the

bathroom when they arrived at the law enforcement center. Sledge expressed his disbelief that he could maintain control of his bladder for the half-hour ride, but the officer made no accommodation. State's Ex. 7.

They arrived at the police station at **12:26 a.m., where Sledge remained handcuffed.** Tr. 56, ll. 6-14; State's Ex. 7. Sledge was still not given access to a restroom. Tr. 48, ll. 6-22; Tr. 49, ll. 12-19. While Sergeant Rivera could not give a specific time, he recalled Sledge saying the he needed to use the bathroom prior to the beginning of the interrogation at **1:41 a.m.** Instead of allowing Sledge to use the restroom, a search warrant was executed upon his person. **Sledge was stripped naked in the presence of three officers, one of whom – a female – photographed him.** Tr. 52, l. 20 – 53, l. 7; Tr. 57, l. 16 – 59, l. 4. Notably, the photographing of Sledge's nude body was not mentioned in the trial judge's "analysis." See Tr. 63, l. 25 – 65, l. 20. Sometime during that process, **Sledge urinated on himself**. Tr. 59, ll. 5-22. During the interrogation, Sledge wore an **orange jumpsuit** and **one hand cuffed in front of him to a chain link belt**. At 3:50 a.m., **Sledge's second hand was cuffed to the belt**, where it remained until the officers told Sledge he would be charged with murder at **4:14 a.m.** Tr. 58, ll. 11-16; Court's Ex. 2.

While none of these facts alone undermined the voluntariness of Sledge's statements, they had the cumulative effect of rendering his waiver involuntary. Sledge's first "waiver" of rights was far from unequivocal. He merely expressed his desire to understand why he was being detained, as an intoxicated driver is not typically approached by multiple officers with guns drawn and profane commands to get out of the car and on the ground, then rushed, handcuffed, and forced into the back of patrol car. Though Sledge did sign a waiver of rights form at the police station, it was apparent to him at that point that the only way he could learn

any details regarding why he was being detained, since he had not yet been charged with any crime, was if he spoke with police. Further, he had been denied access to the restroom, stripped naked, photographed by a female officer, put into an orange jumpsuit, and handcuffed during the approximately two and a half hours prior to the start of the interrogation. Additionally, thought permissible, the officer's lies to Sledge about what Michael saw were another factor to be considered under the totality of the circumstances. Based on this evidence, the state could not meet its burden of proving that either of Sledge's waivers of his rights were voluntary. The trial judge erred in failing to consider the totality of the circumstances and in ruling that the statements were admissible.

III. The trial court erred in sentencing Appellant to five-years incarceration for possession of a weapon during the commission of a violent crime where Appellant was sentenced to life for murder and S.C. CODE ANN. § 16-23-490 expressly provides that the five-year sentence "does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime."

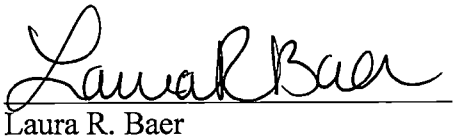
Sledge was sentenced to a term of life for the offense of murder and to a term of five years for possession of a firearm during the commission of a violent crime. Tr. 378. Under S.C. CODE ANN. § 16-3-20(A), life imprisonment for murder "means until the death of the offender without the possibility of parole . . . ." Therefore, Sledge's life sentence is without parole.

"If a person is in possession of a firearm . . . during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime . . . he must be imprisoned for five years, in addition to the punishment provided for the principal crime." S.C. CODE ANN. § 16-23-490(A). However, this statute expressly provides: "This five-year sentence **does not apply** in cases where . . . a life sentence without parole is imposed for the violent crime" Id. (emphasis added). Thus, under the plain language of the statute, Sledge should not have been sentenced to an additional five years for possession of weapon during the commission of a violent crime based on those offenses. See State v. Owens, 346 S.C. 637, 666-67, 552 S.E.2d 745, 760 (2001), *overruled on other grounds by*, State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) (holding a defendant sentenced to death could not also be sentenced to five years for possession of a firearm during the commission of a violent offense).

Therefore, the trial judge erred as a matter of law in sentencing Johnson and the five year sentence for possession of weapon during the commission of a violent crime pursuant to S.C. CODE ANN. § 16-23-490 should be vacated. Though defense counsel did not raise an objection to the improper imposition of this sentence during Sledge's sentencing hearing, this Court can address this issue in the interest of judicial economy. See, e.g., State v. Vick, 384 S.C. 189, 201-03, 682 S.E.2d 275, 281-82 (Ct. App. 2009).

CONCLUSION

Based on the foregoing, Appellant John Calvin Sledge respectfully requests that this Court reverse his convictions and remand his case for a new trial (Issues I and II), and vacate his sentence for the weapons offense (Issue III).



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of January, 2016.

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN CALVIN SLEDGE,

APPELLANT

APPELLATE CASE NO 2016-000641

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and upon John Calvin Sledge, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 9th day of January, 2016.

Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 9th day of January, 2016.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.