

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

R. Knox McMahon, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

WORTH EDWARD COOK, III,

APPELLANT

APPELLATE CASE NO 2016-000546

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in admitting statements made by Appellant to law enforcement where (1) the police failed to scrupulously honor his invocation of his right to counsel and (2) the police coerced him to waive his rights to counsel and silence by threatening to arrest the mother of his child and place his child in the custody of social services?

STATEMENT OF THE CASE

On January 13, 2014, a Lexington County grand jury indicted Appellant for murder (2014-GS-32-228). R. 1192-1193. The state, represented by D. Shawn Graham and Micah Caskey, called the case to trial before the Honorable R. Knox McMahon and a jury on February 29, 2016. R. 1. Sally Henry and Beth Fullwood represented Appellant. R. 1. Based on the evidence presented, Judge McMahon charged the jury on the offenses of murder and voluntary manslaughter, and the defenses of self-defense, defense of others, and defense of habitation. R. 954, l. 9 – R. 964, l. 6; R. 970, l. 21 – R. 971, l. 25. On March 4, 2016, the jury found Appellant guilty as charged. R. 974, ll. 6-13. Judge McMahon sentenced Appellant to thirty-five years' imprisonment. R. 990, ll. 1-6; R. 1194.

Appellant served his notice of appeal on March 9, 2016. This brief follows.

ARGUMENT

The trial judge erred in admitting statements made by Appellant to law enforcement where (1) the police failed to scrupulously honor his invocation of his right to counsel and (2) the police coerced him to waive his rights to counsel and silence by threatening to arrest the mother of his child and place his child in the custody of social services.

Relevant facts

There was no dispute that Appellant killed the deceased, David Diblasi. R. 216, ll. 22-23; R. 905, ll. 1-3; R. 910, ll. 12-13. The only question was whether Appellant acted in self-defense, defense of others, and/or defense of habitation. R. 216, l. 25 – R. 217, l. 2; R. 910, ll. 21-23.

In early 2013, Appellant was a mechanic and methamphetamine addict. R. 754, ll. 2-3. In February 2013, he was living in a mobile home with his girlfriend, Shannon Tart, who was about eight months pregnant. R. 358, l. 24 – R. 359, l. 5; R. 694, ll. 2-6; R. 694, ll. 18-22; R. 698, ll. 6-8; R. 755, ll. 18-23. Appellant and Shannon were friendly with Richard “Rick” Barnes¹ and his girlfriend, Kaycee Turner. R. 341, l. 25 – R. 342, l. 2; R. 343, ll. 13-25; R. 695, l. 17 – R. 696, l. 7; R. 756, l. 9 – R. 757, l. 3.

On February 25, 2013, Appellant and Rick went to the home of Jackie Boyer. R. 757, ll. 4-8. While there, Appellant met Diblasi, a heroin dealer. R. 264, ll. 2-3; R. 595, ll. 1-4; R. 757, ll. 16-17. Diblasi was in need of repairs to his truck and motorcycle. R. 269, ll. 9-16; R. 283, l. 24 – R. 284, l. 6; R. 757, ll. 20-25. Appellant agreed to work on Diblasi’s vehicles that day. R. 758, ll. 1-6. Appellant and Rick followed Diblasi to his home where he dropped off his motorcycle and picked up his truck. R. 758, ll. 7-21. Diblasi did not have the money required

¹ At the time of Appellant’s trial, Barnes had been convicted and sentenced for accessory after the fact due to his involvement with Diblasi’s death. R. 342, l. 9 – R. 343, l. 2. He did not testify at Appellant’s trial.

for Appellant to fix his vehicles so the three men went around collecting debts owed to Diblasi. R. 759, ll. 15-18. First, they went to Pelion where Diblasi collected money he was owed relative to his drug dealing enterprise. R. 264, l. 7 - R. 267, l. 11; R. 760, ll. 1-24. Next, they went to a hotel in Columbia where Diblasi met with a woman. R. 763, ll. 1-6. Then, they went back to Diblasi's home where they loaded up his motorcycle. R. 764, l. 24 - R. 765, l. 1. Rick left so he could pick up Shannon and took her to his house. R. 345, ll. 1-10; R. 347, ll. 9-11; R. 698, ll. 14-20; R. 765, ll. 16-21. Before going to Appellant's home, Appellant and Diblasi stopped by Jackie's to pick up some methamphetamine. R. 766, ll. 3-16.

Appellant and Diblasi smoked the methamphetamine. R. 767, ll. 20-21. While Appellant worked on Diblasi's vehicles, Diblasi changed clothes in preparation for his evening plans. R. 767, ll. 21-25. Afterwards, Appellant and Diblasi continued using drugs. R. 768, ll. 14-25. Diblasi paid Appellant \$80 in cash and "a couple baggies of heroin" for the mechanic work. R. 770, ll. 21-22. He also paid Appellant with a couple more bags of heroin in trade for the meth belonging to Appellant that he had smoked. R. 770, ll. 23-25. Diblasi then left. R. 771, ll. 18-21.

Shortly thereafter, in response to a text message from Appellant, Rick took Shannon home. R. 350, l. 4 - R. 351, l. 17; R. 700, l. 19 - R. 701, l. 4; R. 771, l. 21 - R. 772, l. 1. When Shannon arrived, she was angry because Appellant was high. R. 355, ll. 7-11; R. 772, ll. 22-25. She went to the bedroom area. R. 701, l. 23 - R. 702, l. 18; R. 773, ll. 1-2. Appellant then gave Rick some meth and \$40 that he owed him, and Rick left. R. 773, ll. 17-20.

Suddenly, Diblasi burst through Appellant's door. R. 774, ll. 1-3. Diblasi was angry, yelling about his phone and claiming people were taking advantage of him. R. 774, l. 5; R. 776, ll. 13-18. Diblasi demanded Appellant return the money and drugs he had been paid for the

mechanic work. R. 776, ll. 20-22. When Diblasi started maniacally waving his arms around, Appellant saw a knife in his hand. R. 778, ll. 1-18. Suddenly, Diblasi rushed at Appellant with the knife. R. 778, l. 25. The two began to struggle for control of the knife. R. 779, ll. 1-3. Appellant tripped, falling onto a chair. R. 779, ll. 1-7. Diblasi was on top of Appellant, one hand holding the knife and one hand on Appellant's throat. R. 779, ll. 8-15.

Hearing the commotion, Shannon entered the room. R. 702, l. 19 – R. 6; R. 780, ll. 6-9. Shannon saw Diblasi on top of Appellant with his hand on Appellant's neck and a knife in his other hand. R. 703, ll. 7-11. Seeing Shannon, Diblasi kicked her in the stomach. R. 704, ll. 23-25; R. 705, ll. 3-4; R. 780, ll. 9-14. Shannon hit her head on a dresser on the way down to the floor and was knocked unconscious briefly. R. 705, ll. 8-13; R. 706, ll. 11-15; R. 780, ll. 12-18. Using the distraction to his benefit, Appellant grabbed a knife from a nearby table and stabbed Diblasi. R. 706, ll. 14-17; R. 781, ll. 10-21. The men continued to struggle, however. R. 782, ll. 1-12. Eventually, Appellant got the upper hand and Diblasi ended up in the chair. R. 707, ll. 13-18; R. 782, ll. 16-19. Appellant stabbed Diblasi in the eye. R. 782, ll. 21-22.

Panicked, Appellant checked on Shannon and ensured she and the baby were alive and unharmed. R. 707, l. 25 – R. 708, l. 7; R. 784, l. 19 – R. 785, l. 7. He helped Shannon to their bed. R. 784, l. 19 – R. 785, l. 7. Still high on methamphetamine, Appellant cleaned the room and moved Diblasi's body and other items of furniture to the back of the house. R. 789, ll. 3-12. A day or two later, Appellant buried Diblasi's body in his backyard. R. 788, ll. 14-23. In the days that followed, Appellant and Rick cut up Diblasi's truck and motorcycle and sold the pieces for scrap metal. R. 790, l. 6 – R. 791, l. 16. Appellant and Rick also used Diblasi's credit card to buy some items for Appellant's unborn child at Wal-Mart. R. 793, ll. 9-25.

Dibiasi's family filed a missing person's report on March 9, 2013. R. 221, l. 24 – R. 222, l. 1. Thereafter, the police began investigating the case. R. 226, ll. 13-22. During the investigation, Appellant provided seven statements to law enforcement. R. 46, ll. 1-2.²

First Statement – April 3, 2013

On April 3, 2013, Appellant met with two detectives, Douglas Novak and James Kemfort, while he was working at a friend's home. R. 47, ll. 13-24; R. 48, ll. 5-10; R. 56, l. 24 – R. 60, l. 15; R. 288, ll. 14-24; R. 292, l. 19 - R. 293, l. 11; R. 794, l. 8 – R. 795, l. 8. Appellant was high from methamphetamine at the time. R. 65, ll. 13-20. He had been on a meth binge for days. R. 66, l. 3 – R. 67, l. 3. Nevertheless, Appellant provided a written statement. R. 49, l. 22 - R. 51, l. 12; R. 60, ll. 16-24; R. 795, l. 24 – R. 796, l. 1; R. 292, ll. 15-25; R. 1113-1114.³ At the conclusion of the interrogation, the officers discovered there was an outstanding warrant against Appellant so he was arrested and transported to jail. R. 53, ll. 3-12; R. 61, l. 19 – R. 62, l. 3; R. 797, ll. 6-25.

Second Statement - April 3, 2013

Prior to booking Appellant, the officers interrogated Appellant at the sheriff's department. R. 75, ll. 6-12; R. 798, ll. 10-17. After the officers advised Appellant of his rights, Appellant waived his rights and provided another written statement. R. 75, l. 6 - R. 83, l. 17; R.

² The seventh statement involved Appellant speaking to law enforcement with his counsel present. There was no objection posed during the pre-trial hearing, and there is no issue raised on appeal concerning this statement. R. 203, l. 25 – R. 204, l. 2. Appellant has not provided details of the circumstances of this statement as it does not bear on the totality of the circumstances of the statements challenged on appeal.

³ Appellant posed no objection to the introduction of this statement at trial. R. 73, ll. 10-17. Therefore, Appellant raises no issue on appeal concerning this statement. However, the circumstances surrounding the interrogation are relevant to the "totality of the circumstances" of subsequent statements, which are the subject of the appeal.

91, l. 17 – R. 97, l. 5; R. 798, l. 18 – R. 799, l. 5; R. 1115-1118; R. 1119-1123.⁴ During this interrogation, Novak told Appellant he could be prosecuted because he had used Diblasi's credit cards and was the last person to be seen with Diblasi. R. 100, ll. 23-25; R. 801, ll. 17-24. This scared Appellant. R. 101, ll. 4-20. The interrogators were aggressive leading Appellant, who had suffered trauma in his childhood, to submit. R. 102, l. 17 – R. 103, l. 4.

Third Statement – April 4, 2013

The following day, April 4, 2013, two other detectives, Michael Gooding and Marty Longshore, interrogated Appellant. R. 802, ll. 3-21; R. 803, ll. 12-15. The police advised Appellant of his rights and obtained a waiver. R. 127, l. 1 - R. 131, l. 14; R. 138, l. 8 – R. 141, l. 6; R. 1124. Oddly, the police officers claimed they did not request a written statement during this interrogation. R. 134, l. 18 – R. 135, l. 3; R. 143, ll. 1-14. One of the interrogators claimed no written statement was requested because Appellant did not provide anything "useful" to the investigation. R. 143, ll. 12-14.

When Gooding told Appellant that the police had found blood at his house, Appellant responded that he believed the police were "using that for tactic to" get a confession. R. 133, ll. 19-22; R. 148, ll. 16-23; R. 803, l. 19 – R. 804, l. 1.⁵ At that point, Appellant requested an attorney. R. 401, ll. 12-15; R. 148, ll. 16-23; R. 804, ll. 1-2. Enraged, Gooding drew an X over the advisement of rights form and on the statement forms Appellant had completed. R. 148, l. 24

⁴ Although Appellant objected to the introduction of this statement at trial, this statement is not one of the statements being challenged on appeal. R. 122, l. 10 – R. 123, l. 4. However, this statement and the interrogation that accompanied it are part of the "totality of circumstances" this Court must consider when determining the admissibility of the statements that Appellant does challenge.

⁵ Appellant objected to the oral statements Appellant allegedly made during this interrogation. Nevertheless, Appellant does not challenge the admissibility of these oral statements on appeal. The circumstances surrounding this interrogation, however, form the basis for the objections to the subsequent statements, which are challenged on appeal.

- R. 149, l. 6; R. 804, ll. 5-9. Gooding complained that Appellant had wasted his time, and told Appellant “to rethink the whole requesting an attorney issue.” R. 149, ll. 1-8; R. 410, ll. 5-7; R. 804, ll. 12-13. He threatened that if Appellant did not cooperate, the police would arrest Shannon and turn their two-week old baby over to social services. R. 149, ll. 9-13; R. 410, ll. 7-10; R. 414, l. 24 – R. 415, l. 3; R. 804, ll. 13-17. Frightened for his child and the mother of his child, Appellant agreed to cooperate with the police on the condition that his two loved ones be left alone. R. 149, l. 14 – R. 150, l. 8; R. 404, ll. 19-21.

Fourth Statement – April 5, 2013

Thereafter, the police – Gooding and Longshore – interrogated Appellant again on April 5, 2013, extracting a statement. R. 372, ll. 9-10; R. 381, l. 23 – R. 385, l. 11; R. 390, l. 10 – R. 396, l. 19; R. 805, l. 9 – R. 807, l. 13; R. 1124-1141. Beginning the interrogation at 4:48 p.m., Gooding advised Appellant of his rights and obtained a written waiver of those rights from Appellant. R. 374, l. 12 – R. 377, l. 11; R. 389, ll. 15-17; R. 390, l. 13 – R. 393, l. 19; R. 1130. During this interrogation, Gooding and Longshore confronted Appellant with what they claimed was evidence found at his house during the execution of a search warrant. R. 379, l. 18 – R. 380, l. 3; R. 403, l. 19 – R. 404, l. 4. This included alleged blood evidence and the deceased’s body buried in the backyard. R. 379, l. 18 – R. 380, l. 3. This interrogation lasted roughly five hours with two breaks. R. 386, ll. 15-24; R. 388, ll. 15-18; R. 396, ll. 15-19.

Appellant explained he was “extremely worried about Shannon” during this interrogation based on the threat from the previous day and the officers’ statements regarding finding evidence at the home where Shannon lived. R. 404, ll. 5-16; R. 412, ll. 5-6. In Appellant’s mind, the threat from the day before carried over to the April 5, 2013, interrogation. R. 413, ll. 4-7. Appellant decided “to cooperate with them as best” as he could as a result. R. 404, ll. 16-21.

Although Appellant admitted he was advised of his rights and understood them, he did not request a lawyer because he did not “want to violate the agreement to cooperate so that nothing happened to Shannon and the baby.” R. 405, ll. 1-7. Appellant “felt threatened” because he knew that if he did not cooperate and give the police a story. R. 406, ll. 6-9. He worried that if he statement did not please the police, then “Shannon would get in trouble” and both of his child’s parents would be in prison. R. 407, ll. 14-20; R. 416, ll. 2-8.

Fifth Statement – April 6, 2013

Relentless, the police interrogated Appellant yet again on April 6, 2013, obtaining another written statement. R. 434, ll. 13-15; R. 809, ll. 2-21. Gooding and Longshore began this interrogation at 10:49 a.m. R. 435, ll. 2-3; R. 448, l. 17 – R. 450, l. 13. They advised Appellant of his rights and obtained a waiver of those rights. R. 435, ll. 15-25; R. 450, ll. 18-21; R. 1142. After some oral discussion, Appellant wrote a statement beginning at 11 a.m. R. 438, l. 8 – R. 439, l. 6; R. 1143-1148. The interrogation concluded at 12:31 p.m., lasting approximately 2.5 hours. R. 453, ll. 9-13.

During this interrogation, Gooding “used an investigative technique where [he] presented a document to [Appellant] in an attempt to help to get him to tell the truth.” R. 441, ll. 19-24. Specifically, Gooding told Appellant the police “knew that the killer of [Dibiasi] was right-handed and that he was right-handed and Richard Barnes was left-handed.” R. 441, l. 24 – R. 442, l. 1. Additionally, Gooding showed Appellant the booking data for Rick on the computer. R. 442, l. 24 – R. 443, l. 3. This data “indicated that Richard Barnes was left-handed.” R. 443, ll. 3-4. Gooding also showed Appellant an article entitled “Assessing the Involvement of Anatomical Structures in Penetrating Trauma Probabilistically.” R. 443, l. 10 – R. 444, l. 1; R. 1151-1191. Gooding had reviewed the “abstract” of the article and determined the article was a

“study” “to determine the type and magnitude of injuries involved in penetrating trauma from gunshot and stab wounds, a working knowledge of the relationship between human anatomy, physiology, and physical manifestations acquired.” R. 445, ll. 3-11. That was “about all” he could “understand from the study.” R. 445, ll. 11-15. Gooding used the article and a physical demonstration to claim the police knew the deceased was killed by a right-handed person.⁶ R. 445, l. 17 – R. 447, l. 25.

Appellant waived his rights again on April 6, 2013, for the very same reasons he waived his rights on April 5, 2013. R. 457, ll. 12-17. He wanted to continue to cooperate with Gooding “because he was the one that made a threat [and] was what was keeping Shannon out of trouble.” R. 458, ll. 1-4. He feared that requesting counsel would result in Shannon being charged with a crime. R. 458, ll. 8-12. After Gooding confronted him with Barnes’ left-handedness and the article regarding body mechanics, Appellant knew he had to tell the officers what they wanted to hear – that he had killed Diblasi – and that story had to match the evidence the police had gathered. R. 459, ll. 9-17. Appellant emphasized he was all too aware on April 6, 2013, that if he did not cooperate with the police, then “Shannon would be charged” and they “would lose custody of [their] child.” R. 460, ll. 22-25.

Sixth Statement – May 29, 2013

On May 29, 2013, Appellant, who was in jail awaiting trial, requested to speak to Kemfort. R. 184, ll. 12-13; R. 888, l. 17 - R. 889, l. 19; R. 1125-1128. In response to the request, Kemfort met with Appellant the following day. R. 185, l. 18 – R. 186, l. 7. Kemfort advised Appellant of his rights and obtained a waiver of those rights. R. 186, ll. 8-14.

⁶ The pathologist, Dr. Janice Ross, testified at trial that she was unable to say the assailant was left or right-handed. R. 667, ll. 12-15.

Thereafter, Kemfort requested Appellant confirm the contents of the information contained on the request form, and Appellant did so. R. 186, l. 18 – R. 187, l. 5.

Appellant sent the form to Kemfort to ensure he was complying with his agreement with police that he would cooperate in exchange for his wife and child being left unharmed. R. 190, ll. 14-18. He was motivated by his desire to protect Shannon and his daughter. R. 191, ll. 12-14.

Objections

Prior to his trial, Appellant challenged the admissibility of the statements he made to law enforcement.

Regarding the statement of April 5, 2013, Appellant argued it was “tainted” due to Appellant’s request for counsel on April 4, 2013, and law enforcement’s failure to honor the request. R. 429, ll. 10-12. Further, Appellant argued the April 5, 2013, statement was inadmissible because “Gooding threatened him with prosecution of his paramour and removal of their child from their home if he sought counsel and did not give him a statement.” R. 429, ll. 12-15. Appellant “was motivated solely by that fear the next day on the 5th.” R. 429, ll. 15-17. When Appellant requested counsel the day before, “he had seen what happened that day ... and realized that he was going to exercise his Fifth and [Fourteenth] Amendment Rights then he was running the risk that his girlfriend would be incarcerated, his child would go [into] the foster care [system] or worse, and nobody in his family was going to survive this ordeal.” R. 429, ll. 19-25.

Appellant argued the April 6, 2013, statement was inadmissible for the same reasons the April 5, 2013, statement was inadmissible. R. 466, ll. 6-7. However, with this statement, the court was obligated to consider, as part of the totality of the circumstances, the trickery used by law enforcement that the police knew the killer was right-handed. This included the demonstration by Gooding, the article, and Rick’s booking data. R. 466, ll. 7-16. The police

claimed “they could prove scientifically that he was guilty.” R. 466, ll. 16-16. Defense counsel acknowledged “the law allows police to use misrepresentations to a certain extent while interrogating suspects,” but, defense counsel argued, this was another fact “to add to the totality of the circumstances to render the statement involuntary and obtained in violation of his Fifth and Fourteenth Amendment Rights.” R. 466, ll. 17-24.

Concerning the May 29, 2013, statement, Appellant explained it was in violation of Appellant’s invocation of his right to counsel and was the product of the threat posed during the earlier interrogation. R. 197, ll. 8-10. According to Appellant the “taint” from the request for counsel, the officers’ failure to scrupulously honor the request, and the threat to arrest Appellant’s girlfriend and take custody of his child, “carried over into motivating him to write the inmate request form on May 29, 2013.” R. 430, ll. 1-6.

In sum, trial counsel argued the statements given after April 3, 2013, “were taken in violation of his right to counsel” and “were involuntary because he had been threatened with the loss of his child and the incarceration of the woman he loved.” R. 430, ll. 4-9.

Rulings

Regarding the fourth statement, which was given on April 5, 2013, the trial judge found Appellant’s “testimony incredible that he would not have continued to sign and check off his rights form on his advise of rights and sign each and every page of the statements that he gives.” R. 433, ll. 2-6. The judge did “not believe there were any threats, coercion, or promises made based on the testimony” of the officers. R. 433, ll. 7-9. He found the statement admissible “based on the totality of the circumstances, the written rights, credibility of the witnesses involved, [and] the fact that there is a lack of any corroboration by the defendant whatsoever.” R. 433, ll. 18-23.

Examining the April 6, 2013, statement, the judge stated, “It is generally recognized that the police may use some psychological tactics in eliciting a statement from a suspect. These ploys may play a part in the suspect’s decision to confess, but so long as that decision is the product of the suspect’s own balancing of competing consideration, the confession is voluntary.” R. 468, ll. 13-18. He acknowledged misrepresentation of evidence by the police was a relevant factor, but did not render a statement involuntary per se. R. 468, ll. 19-25. He concluded by finding “that based on the totality of the circumstances that this statement was freely and voluntarily given after full advise of rights and is, therefore, admissible.” R. 469, ll. 19-22.

Discussion

In 1966, the United States Supreme Court issued its landmark decision Miranda v. Arizona, 384 U.S. 426 (1966). As explained by the Court in Duckworth v. Eagan, 492 U.S. 195, 201 (1989), Miranda established “certain procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation.” In Miranda, the Court delineated four specific warnings: “(1) the right to remain silent; (2) that anything he says can be used against him in a court of law; (3) that he has the right to the presence of an attorney, and (4) that if he cannot afford an attorney one will be appointed for him prior to any questioning if he wants.” Miranda, 384 U.S. at 479. Concerned that the circumstances surrounding a custodial interrogation can quickly overbear one’s will, the Court held advising an individual of his right to consult with a lawyer and to have the lawyer present during interrogation was “an absolute prerequisite to interrogation.” Id. at 471.

In Jackson v. Denno, 378 U.S. 368, 376 (1964), the United States Supreme Court held that “a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the

confession.” To introduce a statement produced during custodial interrogation, the prosecution must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda. State v. Von Dohlen, 322 S.C. 234, 243, 471 S.E.2d 689, 694 (1996); 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, 652 S.E.2d 444, 448 (Ct. App. 2007); State v. Compton, 366 S.C. 671, 680, 623 S.E.2d 661, 666 (Ct. App. 2005); State v. Crawley, 349 S.C. 459, 463, 562 S.E.2d 683, 685 (Ct. App. 2002).

The waiver has two distinct dimensions. It must be “voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception,” and it must be “made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” Moran v. Burbine, 475 U.S. 412, 421 (1986); see also State v. Middleton, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986). It is not enough that the interrogator advised the suspect of his rights and the suspect made an uncoerced statement. The prosecution must show that the accused understood the rights. Berghuis v. Thompkins, 560 U.S. 370, 384 (2010) (citing Colorado v. Spring, 479 U.S. 564, 573-575 (1987); Connecticut v. Barrett, 479 U.S. 523, 530 (1987)).

Invocation of right to counsel

The United States Supreme Court held that “[i]f [an] individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. ... [A]ny statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.” Miranda v. Arizona, 384 U.S. 426, 473-474 (1966). If a suspect invokes his right to silence, the interrogators must scrupulously honor the invocation. Michigan v. Mosley, 423 U.S. 96, 103 (1975); State v. Benjamin, 345 S.C. 470, 476, 549 S.E.2d 258, 261

(2001). A suspect invokes his right to silence by clearly articulating his desire to end the interrogation and must do so “unambiguously.” Berghuis v. Thompkins, 560 U.S. 370, 381 (2010); Davis v. United States, 512 U.S. 452, 459 (1994); State v. Reed, 332 S.C. 35, 42, 503 S.E.2d 747, 750 (1998).

Our state supreme court noted with approval that other courts have set forth five factors to analyze to ascertain whether the defendant’s right to cut off questioning was scrupulously honored. The first is whether the police warned the defendant of his Miranda rights at the first interrogation. The second is whether the police immediately stopped the interrogation when the defendant indicated he did not want to answer questions. The third is whether the police resumed questioning only after passage of a significant period of time. The fourth is whether the police provided a second set of Miranda warnings prior to the second interrogation. Finally, the fifth factor is whether the second interrogation was restricted to a crime that had not been the subject of the earlier interrogation. Benjamin, 345 S.C. at 476-477, 549 S.E.2d at 261. These “factors provide a framework for determining whether, under the circumstances, an accused’s right to silence was scrupulously honored.” Id. at 477, 549 S.E.2d at 261.

In Benjamin, the South Carolina Supreme Court agreed with other courts that a second interrogation on the same subject matter is not rendered unconstitutional automatically. Id. at 477, 549 S.E.2d at 262. After Benjamin was arrested, he was not advised of his Miranda warnings and told the questioning officer that he did not want to talk to him. Id. at 475, 549 S.E.2d at 261. Approximately one hour later, a SLED agent interrogated Benjamin. The SLED agent advised him of his rights and Benjamin agreed to waive those rights and speak. Id. In deciding that the statement was admissible, the Court noted that the initial officer did not advise Benjamin of his right to silence, that the officer immediately ceased talking to him, and there was no immediate

resumption of questioning. Id. at 478, 549 S.E.2d at 262. The Court explained that “[w]hat is paramount is that police, under the totality of the circumstances, ‘scrupulously honor’ the suspect’s right to remain silent.” Id.

Coercion

In South Carolina, a court must examine the totality of the circumstances surrounding the custodial statement. The examining court must answer the question: did totality of the circumstances surrounding the custodial statement defeat the defendant’s will? State v. Moses, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct. App. 2010).

Courts have recognized appropriate factors that may be considered in a totality of the circumstances analysis: background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations; isolation of a minor from his or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep.

Id. at 513-514, 702 S.E.2d at 401 (internal citations omitted). The test requires consideration of “‘totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation.’” Dickerson v. United States, 530 U.S. 428, 434 (2000)(citations omitted).

“A statement may not be ‘extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] obtained by the exertion of improper influence.’” State v. Miller, 375 S.C. 370, 386, 652 S.E.2d 444, 452 (Ct. App. 2007)(quoting State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990)). In State v. Osborne, 301 S.C. 363, 365-367, 392 S.E.2d 178, 179 (1990), the South Carolina Supreme Court held a defendant’s statements were inadmissible where the police repeatedly told the defendant that if she withheld evidence, she could be charged with a crime.

In a case very much like the one presented, the South Carolina Court of Appeals held a defendant's statements were not admissible when the police, "at the very least," coerced his conviction "by means of veiled threats against his family." State v. Corns, 310 S.C. 546, 552, 426 S.E.2d 324, 327 (Ct. App. 1992). The police conceded they informed the defendant "his wife could be arrested, that she could be 'involved in the marijuana,' and that their children could be taken from them amounted to an exertion of improper influence rendering [the defendant]'s statement involuntary." Id.

The trial judge erred in admitting the statements made by Appellant on April 5, 2013, April 6, 2013, and May 29, 2013 because the police failed to scrupulously honor Appellant's invocation of his right to counsel and coerced him to waive his rights by threatening to arrest the mother of his child and place his newborn daughter in the care of social services. During the interrogation on April 4, 2013, Appellant requested a lawyer when the police began confronting him about evidence collected in his home that suggested Appellant had killed Diblasi. Although the police presented a written waiver of rights from this interrogation, the police provided no written statement. This was the only interrogation for which the police could provide no written statement from Appellant. The police claimed it was because Appellant provided nothing "useful" for the investigation. However, the glaring absence of a written statement corroborates Appellant's contention that Gooding drew an X through his written statement and then threatened his family when he requested counsel.

Gooding's threat and the officers' continuation of custodial interrogation the following day demonstrated the failure of law enforcement to scrupulously honor Appellant's invocation. Applying the five factors from Benjamin, supra, the judge's error becomes clear. It was undisputed that the police warned Appellant of his rights during the April 4, 2013, interrogation. However, the police did not immediately stop the interrogation. Rather, Gooding told Appellant to "rethink" his

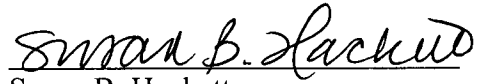
exercise of his constitutional right and threatened to arrest Appellant's girlfriend and have his child placed with social services. While one could argue the police did not resume questioning until the following day, certainly that was not after the passage of a significant period of time and Gooding's threat from the following evening must be considered as well. His threat was not only a failure by law enforcement to honor Appellant's invocation, but it was a continuation of interrogation. The fact that the officers ended the interrogation shortly thereafter is of no consequence to the analysis. It was undisputed the officers provided a second set of Miranda warnings prior to the interrogation on April 5, 2013, but those warnings were tainted by Gooding's threat. Finally, the interrogation that continued concerned the same crime – the disappearance and murder of Diblasi.

The totality of the circumstances revealed Appellant's waivers were the product of police coercion. The impact of Gooding's threat cannot be overstated. As this Court held in Corns, supra, a threat to arrest a loved one and remove a child from its parents is an exertion of improper influence rendering a statement involuntary. Additional considerations for the totality of the circumstances were Appellant's lack of education, his consumption of methamphetamine, the number and length of the interrogations, the misrepresentations by the police of the evidence, another officer's prior threat that Appellant could be prosecuted because he had used Diblasi's credit card, and Appellant's detention in the jail where sleep and nutrition are inadequate. One of the more glaring deceptions by law enforcement was the use of the article found on the internet to set up a ruse to convince Appellant that the killer was right-handed. The officer who found the article and used it during the interrogation admitted he had not read the article and did not even understand what he had read. Instead, he wanted to use the article – principally its title and the intimidating language used in the article – and a physical demonstration to convince Appellant that the police could prove “scientifically” that Appellant was the one who killed Diblasi. This type of

subterfuge must weigh heavily in favor of police coercion. Appellant's statements were the product of coercion and should have been suppressed.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of February, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

R. Knox McMahon, Circuit Court Judge

RECEIVED

FEB 13 2017

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

WORTH EDWARD COOK, III,

APPELLANT

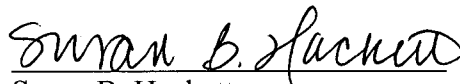
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Worth Edward Cook states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent Appellant.
2. She has reviewed the record of Appellant's trial before Judge R. Knox McMahon, which was held on February 29 - March 4, 2016, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. Pursuant to Anders v. California, 386 U.S. 738 (1967), she has briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Worth Edward Cook.

Respectfully Submitted,



Susan B. Hackett

Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of February, 2017.

STATE OF SOUTH CAROLINA
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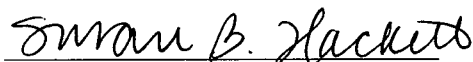
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) Entire trial transcript dated February 29-March 4, 2016;
- (2) State's Exhibits #1 (statement), #2 (statement), #3 (medical screening), #4 (advisement of rights), #5 (request form), #6 (advisement of rights), #23 (advisement of rights), #24 (statement), #25 (advisement of rights), #26 (statement);
- (3) Defendant's #1 (statement);
- (4) Defendant's #2 (article);
- (5) Amended true-billed indictment (2014-GS-32-228);
- (6) Sentence sheet.

I certify that this designation contains no matter which is irrelevant to this appeal.

February 13, 2017



Susan B. Hackett
Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert C. Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Worth Edward Cook, III, #293532, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 13th day of February, 2017.

Susan B. Hackett
Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 13th day of February, 2017.

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