STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Florence County

D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MELVIN DURANT,

APPELLANT

APPELLATE CASE NO 2016-001390

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial judge err in permitting the prosecution to introduce a statement allegedly made by Appellant during custodial interrogation in light of the totality of the circumstances, including his extreme intoxication, demonstrating the statement was not made pursuant to a voluntary, knowing, and intelligent waiver?

II. Did the trial judge err in permitting the prosecution to introduce a statement allegedly made by Appellant during custodial interrogation where the evidence demonstrated Appellant invoked his right to silence, was extremely intoxicated, and the officer promised to help Appellant if he agreed to cooperate?

STATEMENT OF THE CASE

On March 12, 2015, a Florence County grand jury indicted Appellant for attempted murder (2015-GS-21-00211). R. 202-203. The state, represented by David Richardson, called the case to trial before the Honorable D. Craig Brown and a jury on June 20-21, 2016. R. 1. William Vickery Meetze represented Appellant. R. 1. The jury acquitted Appellant of attempted murder, but found him guilty of the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN). R. 192, l. 20 – R. 193, l. 6. Judge Brown sentenced Appellant to twenty years' imprisonment. R. 198, ll. 7-10; R. 204.

On June 24, 2016, Appellant served his notice of appeal. This brief follows.

STATEMENT OF FACTS

In November 2014, Wiley Jones and Appellant were living in a transitional shelter in Florence, South Carolina. R. 66, ll. 3-8. The Pee Dee Transitional Shelter was a place for "folks who [were] down on their luck or [who had] no place to stay." R. 38, ll. 8-12. The shelter provided its residents with "time to make that transition back into the real world." R. 38, ll. 13-14. While in the shelter, Wiley and Appellant did not get along. R. 66, ll. 9-19. In fact, Wiley did not get along with a lot of people during this time. R. 66, ll. 14-19; R. 76, l. 24 – R. 77, l. 5. Wiley explained the problem: "It's like I come from the north and I'm here in the south and my point of views in life is different and theirs is different. So we kind of clashed on not a lot of things, but on things. I got my opinion and they have theirs." R. 66, ll. 15-19.

On November 12, 2014, Jones invited Appellant out for drinks. R. 76, ll. 7-14. According to Wiley, Appellant was telling Wiley how to spend his "earned-hard money." R. 76, ll. 20-21. A conflict arose because Wiley believed he could spend his money the way he wanted. R. 76, ll. 21-22. Wiley claimed Appellant got offended by Wiley's refusal to accept Appellant's financial advice. R. 76, ll. 21-23.

When Appellant returned to the shelter, he immediately went to talk to Carl Wheeling, who was a resident of the shelter. R. 39, ll. 5-12. Although Wheeling did not act in a supervisory capacity, he was "considered sort of in charge after hours, after the staff had left." R. 38, ll. 19-22. It was his duty "to keep the director informed of … fights, arguments, people coming in after hours, after curfew hours, which was ten o'clock, and just sort of keep the peace." R. 38, ll. 22 – R. 39, l. 1. Wheeling was sitting in his "little cubicle," which was separated by a curtain from other areas. R. 39, ll. 7-10. Appellant knocked on the curtain and explained he wanted to speak to Wheeling. R. 39, ll. 10-12.

As soon as Appellant entered the cubicle, Wheeling was overwhelmed by the odor of alcohol.[1] R. 39, ll. 14-16. Wheeling noticed Appellant's speech was slurred and he was "highly agitated." R. 39, ll. 16-17. According to Wheeling, Appellant stated that he and Wiley Jones had gone to a house across from 413, where Wiley offered to buy him drinks. R. 39, l. 22 – R. 40, l. 1. Wiley started walking around "bragging about the money he had." R. 40, ll. 2-3. Viewing Wiley's behavior as impolite, Appellant pulled Wiley to the side to let him know that it was "not polite for [him] to be in somebody else's home ... flashing this money around." R. 40, ll. 6-8. Thereafter, the two men had a few words. R. 40, ll. 8-9. Appellant also told Wheeling that Wiley "had been messing with him" and that if it continued, there would "be a problem." R. 40, ll. 13-15. Wheeling thought Appellant "used the word hurt" in describing the problem. R. 40, ll. 16-20.

When Appellant finished telling this story to Wheeling, he was "very calm." R. 40, ll. 10-11. Appellant thanked Wheeling for listening and pulled back the curtain to leave. R. 40, ll. 21-24. Wiley was standing there wearing a smirk on his face – "he had been standing there through the whole conversation of [Appellant] talking to [Wheeling]." R. 40, l. 23 – R. 41, l. 1; R. 54, l. 18; see also, R. 67, ll. 4-23. Wiley confronted Appellant regarding his discussion with Wheeling, stating, "I thought we were going to leave this outside. ... [W]e had done discussed not to bring this in here." R. 41, ll. 2-4; R. 77, ll. 9-11. Thereafter, the two men had a heated argument. R. 54, ll. 3-25; R. 92, ll. 7-8. Wheeling saw the two men walk in opposite directions after this exchange. R. 41, ll. 5-6.

Wiley told the jurors that he went to the restroom after this exchange. R. 68, ll. 1-3. While standing at a urinal, Wiley "felt someone behind" him. R. 68, ll. 14-16. He claimed that

[1] The first responding officer, Jimmy Cantey, told the jurors that Appellant and Wiley were "extremely intoxicated." R. 92, ll. 9-11.

someone was Appellant and that Appellant started stabbing him with a knife. R. 68, ll. 16-18.[2] Wiley also told the jurors that he had his back "turned towards the wall" so he "turned around and looked" at Appellant. R. 68, ll. 18-20. Wiley claimed Appellant said, "I told you to leave me alone." R. 69, ll. 7-8.

Minutes after seeing the two men leave his cubicle, Wheeling "heard a rumble in the bathroom." R. 41, ll. 8-9. He went inside to investigate. R. 41, ll. 10-11. Wheeling claimed he saw Appellant holding Wiley "up against the urinal" with his left hand. R. 41, ll. 13-14. He also claimed he saw Appellant with a knife in his right hand. R. 41, ll. 14-17. Wheeling, who was weak from a recent open-heart surgery, grabbed Appellant by the arm. R. 41, l. 22 – R. 42, l. 6. This allowed Wiley to walk away. R. 42, ll. 10-13. Wheeling released Appellant, who also walked out of the bathroom. R. 42, ll. 14-16.

Initially, Wiley did not mention Wheeling's presence in the restroom; instead, he simply said that he "ran out the bathroom." R. 69, l. 8. However, when the solicitor asked about Wheeling, Wiley recalled Wheeling entered the restroom and grabbed Appellant's wrist. R. 69, l. 13 – R. 70, l. 1. Wiley "scooted away" and "ran out the facility." R. 70, ll. 1-2.

Wheeling called the shelter director to notify her of the commotion. R. 42, ll. 17-18; R. 71, ll. 6-7. Wiley called 911. R. 69, ll. 11-12; R. 70, ll. 5-6; R. 71, ll. 7-10. By the time Wheeling walked outside, the ambulance and police had arrived. R. 42, ll. 22-24; see also, R. 71, ll. 13-14. Emergency medical personnel treated Wiley, who was crouched down under a tree. R. 42, l. 24 – R. 43, l. 2. The police "threw [Appellant] up on the hood of the squad car and handcuffed him." R. 43, ll. 12-14.

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[2] Photographs of Wiley's injuries were admitted into evidence. R. 73, l. 13 – R. 74, l. 1; State's Exhibit #13; State's Exhibit #14.

Tommy Nesmith also lived in the shelter in November 2014. R. 59, ll. 1-3. Nesmith claimed that on the night of November 12, 2014, Appellant walked outside to where Nesmith was standing near the rear of the shelter. R. 59, ll. 7-12. Nesmith was smoking a cigarette, and gave a cigarette to Appellant. R. 59, ll. 11-12; R. 60, ll. 7-10. Nesmith claimed Appellant "threw a knife across the fence." R. 59, ll. 7-10. Three days later, Nesmith retrieved the knife, which was behind the Housing Authority. R. 60, ll. 21-25. Nesmith recalled "other people [were] being accused of having the knife" and these accusations sparked his investigation. R. 61, ll. 15-17. Upon finding the knife, Nesmith gave it to Wiley. R. 61, ll. 20-21; R. 74, l. 25 – R. 75, l. 3.

Wiley gave the knife to the shelter's director and claimed that he explained to the director that Nesmith had found the knife. R. 75, ll. 11-14. The director called 911, and the police arrived immediately.[3] R. 75, l. 14; R. 77, ll. 17-22. Later, in his testimony, Wiley admitted that Nesmith did not want to be involved so Wiley may have told the director that he, Wiley, found the knife. R. 78, ll. 1-6. Wiley also admitted that he may have told the police officer the same thing – that he, Wiley, found the knife. R. 78, ll. 7-25. After the police received the knife from Wiley and the shelter's director, forensic testing was conducted. SLED's forensic DNA analyst determined a swab from the knife revealed the presence of blood and Wiley's DNA. R. 138, ll. 14-20.

[3] In direct contradiction to Wiley's testimony, the responding officer, Sam Ervin, testified that "A Mr. Jones called in to say that he had recovered a knife that was used in a stabbing case earlier." R. 81, ll. 19-21.

ARGUMENT

I. The trial judge erred in permitting the prosecution to introduce a statement allegedly made by Appellant during custodial interrogation in light of the totality of the circumstances, including his extreme intoxication, demonstrating the statement was not made pursuant to a voluntary, knowing, and intelligent waiver.

Relevant facts

When Mark Happ of the Florence Police Department arrived at the transitional shelter, another officer already had a suspect – Appellant – in custody. R. 3, ll. 10-24. Happ and Appellant initially stood outside of Happ's car. R. 4, ll. 12-15; R. 6, ll. 4-7. The ensuing conversation was captured on Happ's digital voice recorder. R. 4, ll. 12-20; State's Exhibit #1. Happ advised Appellant of his rights, and then began interrogating him. R. 5, ll. 14-22.

Happ claimed there was nothing about Appellant's "physical condition" or "mental condition" that gave him "any pause with respect to him knowing what he was doing there talking" to Happ. R. 6, ll. 20-24. Happ further claimed Appellant "seemed responsive" to his questions and never asked to terminate the interrogation. R. 6, l. 25 – R. 7, l. 5. According to Happ, Appellant did not "appear to be in need of any sort of medical attention or anything." R. 6, ll. 11-13.

Happ was aware that Appellant had been drinking alcohol that evening.[4] R. 10, ll. 6-8. Happ acknowledged that Appellant's "words were slurred when he spoke." R. 10, ll. 20-23. Happ did not conduct "any kind of testing to say what his level of intoxication was," but it was obvious Appellant "had been drinking." R. 10, l. 20 – R. 11, l. 1. According to Happ, it was "absolutely" possible that Appellant was "to the level of being intoxicated." R. 11, ll. 2-4. In

[4] The first officer on the scene described Appellant as "extremely intoxicated." R. 22, ll. 11-25; see also, R. 92, ll. 9-11.

talking to Happ, Appellant stated he had been drinking – "[s]omething about doing shots" – at a house on Church Street. R. 11, ll. 5-14.

The audio recording confirmed obvious signs of Appellant's intoxication, including the slurring of words and confusion at times. State's Exhibit #1. The recording also revealed Appellant was questioned prior to the advisement of rights, specifically about a knife. State's Exhibit #1. When Appellant initially stuttered and answered in a confusing fashion, Happ directed Appellant to a call the police received earlier in the evening at another location. State's Exhibit #1. At times, Appellant was completely incoherent. State's Exhibit #1. During these times, Happ would pose more direct questions to Appellant. State's Exhibit #1.

At the conclusion of the pre-trial hearing, defense counsel moved to exclude the first statement made to Happ. Specifically, defense counsel argued the evidence showed Appellant "was extremely intoxicated to a point where he was not capable of a free and voluntary waiver" of his rights "and fully understanding those rights at the time he was questioned." R. 24, ll. 2-7.

The solicitor argued "evidence of intoxication" did not make the statement "per se involuntary." R. 25, ll. 6-8. According to the state, Appellant indicated he understood his rights and agreed to speak with Happ. R. 25, ll. 10-13. During that statement, Appellant "denied any involvement in the activities that evening and stuck with that story." R. 25, ll. 13-14. While speaking with Happ, Appellant "did admit to having a knife earlier in the day, which he said fell out of his pocket." R. 25, ll. 14-16.

After hearing the arguments of counsel, the judge stated he was unaware of any case law "that specifically says that signs of intoxication are per se prohibitive of the admissibility of a statement." R. 27, ll. 21-23. According to the judge,

> There is some case law out there which says - - US v. Pelton, 835 F.2d 1067, which was a Fourth Circuit case, and State v. Saxon, 201 S.E.2d 114, which is a

> 1973 case, and State v. Crawley, 562 S.E.2d 683, which says that the fact that the defendant exhibits symptoms of drug withdrawal when she confesses does not alone render her statement involuntary.

R. 27, l. 23 – R. 28, l. 4. The judge did "not find simply signs of intoxication or some evidence of intoxication - - that alone does not render the statement by [Appellant] involuntary." R. 28, ll. 5-7. The judge concluded that Appellant "clearly was appropriately responsive to the questions that were asked of him by Officer Happ – Corporal Happ." R. 28, ll. 7-11. In conclusion, the judge held Appellant's statement to Happ was admissible. R. 28, ll. 18-20.[5]

Discussion

The Fifth Amendment provides that no person shall be compelled to be a witness against himself in a criminal matter. U.S. Const. amend. V. Based on the Fifth Amendment's protection, the United States Supreme Court held that in criminal prosecutions, statements by the accused are not admissible unless the prosecution demonstrates the use of procedural safeguards. Miranda v. Arizona, 384 U.S. 426, 444 (1966). However, the required use of these safeguards is required only when the accused is in custodial interrogation. State v. Kennedy, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct. App. 1996). The United States Supreme Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 444.

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

[5] Defense counsel renewed his objection when the prosecutor offered the audio recording as an exhibit during the trial. R. 96, ll. 16-18. The judge overruled the objection and permitted the recording to be introduced along with Happ's testimony regarding the statement. R. 96, l. 19.

must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda, supra. 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)).

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); see also Withrow v. Williams, 507 U.S. 680, 693-694 (1993). 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); see also State v. Miller, 375 S.C. 370, 384, 652 S.E.2d 444, 451 (Ct. App. 2007).

Intoxication

Over four decades ago, the South Carolina Supreme Court held "[t]he fact that one is intoxicated at the time a confession is made does not necessarily render him incapable of comprehending the meaning and effect of his words." State v. Saxon, 261 S.C. 523, 529, 201 S.E.2d 114, 117 (1973). According to the Court, "proof that an accused was intoxicated at the time he made a confession does not render the statement inadmissible as a matter of law, unless the accused's intoxication was such that he did not realize what he was saying." Id. Further, the Court stated that "[p]roof of intoxication, short of rendering the accused unconscious of what he is saying, goes to the weight and credibility to be accorded to the confession, but does not require that the confession be excluded from evidence." Id. Nevertheless, after making these pronouncements of the law, the Court ruled as follows:

> While there is testimony that [Saxon] had been drinking rather heavily and was not acting normally, there is other testimony from which the conclusion may be reasonably drawn that he was not drunk and fully comprehended what he was doing and saying. In fact, [Saxon] testified, and the inferences to be drawn from his own testimony amply support the conclusion that his statement was understandingly and voluntarily given. The testimony was properly admitted in evidence.

Id. at 529-530, 201 S.E.2d at 117. Thus, the Court analyzed the evidence to determine whether there was evidence that Saxon was "not drunk and fully comprehended what he was doing and saying." This holding contradicted the legal principles previously enunciated, which suggested that

unless an individual were intoxicated to the point unconsciousness, then any statements made by the individual were not *per se* inadmissible. The Court's holding in the case rested upon its view that evidence existed in the record that Saxon "was not drunk and fully comprehended what he was doing and saying."

Three years after Saxon, the South Carolina Supreme Court had the opportunity to examine another case in which a statement was allegedly made while the defendant was intoxicated. State v. Collins, 266 S.C. 566, 225 S.E.2d 189 (1976). Collins and a co-defendant were charged with armed robbery of a local store. Id. at 568, 225 S.E.2d at 190-191. There was no dispute that on the day of the robbery, the men "had been drinking heavily." Id. at 568, 225 S.E.2d at 191. Collins was arrested on the day of the robbery for public drunkenness. Id. at 569, 225 S.E.2d at 191. A detective questioned Collins concerning the robbery about an hour after his arrest. Id. According to the detective, he "determined, by means of a field sobriety test, that [Collins] was capable of and did understand his rights before questions were asked." Id. To the contrary, the officer who arrested Collins "stated that in his opinion, [Collins] was still intoxicated" after being questioned. Id. at 569-570, 225 S.E.2d at 191.

In deciding whether the trial judge abused his discretion in determining the statement by Collins was voluntarily and knowingly given, the South Carolina Supreme Court cited Saxon, supra, for the proposition that "[p]roof of accused's intoxication, short of rendering him unconscious of what he is saying, does not require in every case, that statements he made while in that condition be excluded from evidence." Id. at 572-573, 225 S.E.2d at 193. However, the Court based its ruling on the fact that "[t]he evidence, including the condition of the defendant presented a factual situation which the judge determined unfavorably to the defendant." Id. at 573, 225 S.E.2d at 193. See also, Gladden v. Unsworth, 396 F.2d 373, 381 (9th Cir. 1968)(ordering the state court to

conduct a hearing on the voluntariness of Unsworth's statements where the undisputed evidence showed he was "in a state of gross intoxication" at the time of the making of the statements); Reddish v. State, 167 So.2d 858, 863 (Fla. 1964)(holding a defendant's confessions "should not be permitted to stand as evidence against" the defendant where the "totality of all the circumstances, such as the man's physical condition, in combination with the impact of narcotics, as well as the lack of clear-cut testimony regarding his mental condition at the time he gave the statements" meant the confessions "were not obtained in a manner consistent with constitutional standards against compulsive self-incrimination"); State v. Young, 875 P.2d 1119, 1123 (N.M. Ct. App. 1994)(remanding where the trial court erroneously determined the defendant's intoxication was irrelevant to the issue of waiver because "voluntary intoxication is relevant to determining whether a waiver was knowing and intelligent"); State v. Bramlett, 609 P.2d 345, 350 (N.M. Ct. App. 1980) overruled on other grounds by Armijo v. State Through Transp. Dep't, 737 P.2d 552 (N.M. Ct. App. 1987)(holding the contradictory testimony from the officers that the defendant was too intoxicated to be released and was detained for his own protection, but was not so intoxicated that he could not provide a knowing waiver of his constitutional rights "offends the standards of fundamental fairness under the due process clause" "and is unworthy of the degree of belief necessary to sustain a finding of voluntary waiver").

To the extent, this Court determines that Saxon stands for the proposition that intoxication short of unconsciousness may *never* render a statement involuntarily made, Appellant argues against precedent. Appellant urges this Court to review the entire Saxon opinion, which demonstrates the South Carolina Supreme Court determined the trial judge did not abuse his discretion in finding Saxon's statement was voluntary because there was evidence in the record that Saxon was not intoxicated and fully understood what he was doing and saying. The only evidence

in the record was that Appellant was extremely intoxicated at the time Happ interrogated him. There was no contradictory evidence as there was in Saxon, supra. The prosecution presented no contrary evidence that Appellant was not extremely intoxicated, and all of the evidence, including the voice recorder and the video, corroborated Appellant's version that he was extremely intoxicated at the time he gave a statement to Happ, and as a result, in viewing the totality of the circumstances, Appellant's statement was inadmissible.

II. The trial judge erred in permitting the prosecution to introduce a statement allegedly made by Appellant during custodial interrogation where the evidence demonstrated Appellant invoked his right to silence, was extremely intoxicated, and the officer promised to help Appellant if he agreed to cooperate.

Relevant facts

Appellant incorporates the relevant discussion of the facts presented in Issue I, supra. While Appellant remained handcuffed in Happ's car, Howard Wynn, an investigator, arrived on the scene. R. 16, ll. 1-2. Happ's car was equipped with a camera that permitted audio and video recording of the inside and the outside of the car. R. 12, l. 23 – R. 13, l. 5. When Wynn arrived, he began speaking to Appellant through the rear window, and Happ's camera captured the interrogation. R. 13, ll. 9-21; R. 16, ll. 6-15; State's Exhibit #2.

When Wynn warned Appellant of his rights pursuant to Miranda and asked if Appellant wanted to speak to him, Appellant said he did not. R. 19, ll. 4-14; State's Exhibit #2. When Appellant clearly, unambiguously, and unequivocally stated he did not want to speak to Wynn, Wynn responded by saying, "you don't, sort of with an inflection in [his] voice as if … it would be a question." R. 19, ll. 15-21; State's Exhibit #2. Only after Wynn challenged Appellant's invocation of his right to silence did Appellant succumb and agree to waive his constitutional right and answer Wynn's questions. R. 20, ll. 5-9.

Although Wynn acknowledged Appellant had consumed alcohol prior to the interrogation, Wynn maintained his belief that Appellant did not "appear to be to a level of intoxication" that would have given Wynn "pause as far as speaking with him and getting a statement form him that night." R. 17, ll. 14-19; R. 18, ll. 18-20; R. 21, ll. 20-24. Wynn even noted Appellant's slurred speech during their interaction. R. 18, l. 21 – R. 19, l. 3.

During the interrogation, Wynn told Appellant that what he was saying was not 100% true and he knew this to be the case based on what individuals inside the transitional shelter told him. State's Exhibit #2. Wynn told Appellant that he could not help Appellant if Appellant did not tell him the truth. State's Exhibit #2.

Defense counsel moved to exclude Appellant's second statement based upon Appellant's extreme intoxication and his invocation of his right to silence when Wynn sought a waiver of that right. R. 24, ll. 8-13. The Constitution mandated Wynn stop his interrogation when Appellant invoked his right to silence. R. 24, ll. 11-13. However, "Wynn kept on talking with him until eventually he did say that he would answer questions." R. 24, ll. 14-17. The prosecutor admitted Appellant "initially" said "no" when Wynn asked if he wanted to speak to Wynn. R. 25, ll. 17-18. According to the prosecutor, however, "in the same stream - - I mean it's pretty much the same sentence, basically a run-on sentence, and they're talking over one another as I recall at one point or very close to it, but he does agree without any sort of provocation or anything like that to talk to Investigator Wynn about the case and on they went from there." R. 25, ll. 17-23. In the solicitor's view, Appellant "denied any involvement" and said he left his knife at his cousin's house. R. 25, ll. 24-25. Per the solicitor,

> [B]ased on [Appellant's] ability to recognize the situation he was in - - in fact, there was one point where he gives Investigator Wynn information where to locate the knife and Investigator Wynn says something that appeared to me to indicate he was going to check on that to try to verify the information and shut the door, and then [Appellant] utters several expletives, as if his story were about to be checked up on and it may not be accurate.

R. 26, ll. 3-10. In conclusion, the solicitor argued that "the content of his statement shows that he did know what he was doing because he was providing denials about every accusation they made at him." R. 26, ll. 11-14.

After noting that Appellant was in custody, which was not disputed, the judge found the state "provided sufficient evidence to show that his statement was knowingly, freely, voluntarily given." R. 27, ll. 16-20. After ruling on the intoxication aspect of the argument, discussed supra, the judge found that although Appellant clearly told Wynn he did not want to talk, Appellant "continued to initiate conversation with the investigator, showing a willingness to further discuss the investigation with the officer." R. 28, ll. 12-17. Thus, the judge ruled the statement was admissible. R. 28, ll. 18-20.[6]

In his closing argument, the solicitor relied heavily on Appellant's statements to law enforcement as ammunition for a conviction. R. 154, l. 6 – R. 155, l. 3. According to the solicitor, Appellant's denial of stabbing Wiley was "ridiculous." R. 154, ll. 11-13. Additionally, the solicitor told the jurors to pay close attention to Appellant's statement to Happ wherein he admitted to having a knife earlier in the evening. R. 154, ll. 14-15. The solicitor claimed Appellant told Happ the knife fell from his pocket, but that he told Wynn that he left the knife at his cousin's house. R. 154, ll. 15-21. According to the solicitor, Appellant was "distancing himself from the weapon" and this was evidence of consciousness of guilt. R. 154, l. 21 – R. 155, l. 1. The solicitor, using Appellant's statements to police, argued Appellant was "running from this": "But he's showing through these denials of anything happening and distancing himself from the weapon a consciousness of guilt here. You know, he's running from this by telling the police these misleading things." R. 154, l. 24 – R. 155, l. 2.

Discussion

Appellant incorporates the relevant discussion of the law presented in Issue I, supra.

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[6] Defense counsel renewed his objection when the prosecutor offered the video of Wynn's interrogation of Appellant during the trial. R. 103, l. 13. The judge overruled the objection. R. 103, ll. 14-16.

Invocation of right to silence

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, 384 U.S. at 473-474. If a suspect invokes his right to silence, the interrogators must scrupulously honored. 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, 560 U.S. at 381; 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. The Court made clear, however, that these "factors are not exclusively controlling, nor do they establish a test which can be woodenly applied." Id. at 477, 549 S.E.2d at 261. "Rather, the factors provide a framework for determining whether, under the circumstances, an accused's right to silence was scrupulously honored." Id.

Applying the factors to the instant matter requires reversal of Appellant's conviction and remanding of the case for a new trial. During the first interrogation, Happ advised Appellant of his rights, and Appellant waived those rights, agreeing to speak with Happ. Additionally, Wynn advised Appellant of his rights. However, when Appellant clearly, unambiguously, and unequivocally invoked his right to silence, Wynn challenged his invocation. Wynn did not immediately cease the interrogation as the Constitution requires. Instead, Wynn confronted Appellant regarding his invocation. This confrontation and the resumption of questioning occurred within seconds of Appellant's invocation – not after the passage of a significant period of time. Wynn did not advise Appellant of his rights again; instead, when Appellant told Wynn that he did not want to speak to him, Wynn said he was going to ask him a couple of questions. Only then did Appellant acquiesce. The entire questioning by Wynn concerned the stabbing at the transitional shelter – not a separate incident.

Promise of help

"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)).

It is not enough that a defendant previously waived his rights to silence. Rochester, 301 S.C. at 200, 391 S.E.2d at 246. "[A] voluntary waiver continues" only "until the individual being questioned indicates that he wants to revoke the waiver and remain silent or circumstances exist which establish that his 'will has been overborne and his capacity for self-determination critically impaired.'" Id. (quoting State v. Moultrie, 273 S.C. 60, 62, 254 S.E.2d 294, 295 (1979)). A confession may not be induced by any sort of threats or violence, or obtained by any direct or

implied promises, however slight, or by the exertion of improper influence. Id. (citing Hutto v. Ross, 429 U.S. 28, 30 (1976)). When a statement induced by a promise of lenience is so connected with the inducement as to be a consequence of the promise, the statement is involuntary and inadmissible. Id. at 200, 391 S.E.2d at 246-247 (citing State v. Peake, 291 S.C. 138, 352 S.E.2d 487 (1987)).

The South Carolina Supreme Court held the state failed to meet its burden of showing a defendant's statement was voluntary and not the product of the officer's promise of leniency where the officer "made a suggestion" to the defendant that the state "would not ask for the death penalty" in his case and that the officer "would call the solicitor and have him put it in writing to that effect." Peake, 291 S.C. at 139, 352 S.E.2d at 487. The officer testified that he essentially guaranteed the defendant that the state would not seek the death penalty if he gave a statement. Id.

In Rochester, a polygraph examiner told the suspect that it would be in his best interest to tell the truth. Rochester, 301 S.C. at 199, 391 S.E.2d at 246. Almost immediately thereafter, the suspect gave a detailed confession. Id. According to the South Carolina Supreme Court, "[t]he polygraph examiner's statement was not on its face an inducement or hope of lighter punishment. Standing alone, the polygraph examiner's comment did not constitute the kind of hope of reward or benefit condemned by this Court in Peake." Id. at 200-201, 391 S.E.2d at 247.

Wynn clearly promised Appellant help if Appellant would speak to him. This offer of help is particularly troubling in light of Appellant's invocation of his right to silence, which Wynn failed to honor as required by the Constitution. Wynn did not advise Appellant that it would be in his best interest to tell the truth as the polygraph examiner in Rochester, supra, did. Rather, Wynn offered Appellant help if Appellant would tell him the truth about what happened. This offer of help is more akin to the promise not to seek the death penalty in Peake, supra, because it was the officer

affirmatively extending assistance to Appellant concerning the criminal matter in exchange for Appellant waiving his constitutional right to silence.

Totality of the circumstances

Examining the totality of the circumstances surrounding Appellant's statement to Wynn requires reversal as Appellant's statement was not made pursuant to a knowing and voluntary waiver of his constitutional right to silence. Wynn's failure to scrupulously honor Appellant's invocation of his right to silence – not once, but twice – shows the futility of any resistance to law enforcement or the exercise of his constitutional right. Wynn was aware of Appellant's state of extreme intoxication. Rather than wait to interrogate Appellant when he was less inebriated, Wynn chose to interrogate Appellant immediately – seizing upon his discombobulation resulting from the over-consumption of alcohol. Compounding the failure to honor the invocation, Wynn first took advantage of Appellant's intoxicated state and then made him an irresistible offer of help if only he agreed to cooperate with the police. The trial judge erred in allowing the state to introduce the statements made by Appellant to Wynn where the state failed to carry its burden of proving by a preponderance of the evidence that Appellant's waiver was knowing and involuntary.

CONCLUSION

Appellant respectfully requests this Court reverse his conviction and remand the case for a new trial.

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Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of September, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

September 14, 2017

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