STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Roger M. Young, Circuit Court Judge
Appellate Tracking No: 2011-192370

THE STATE,

Respondent,

vs.

ALONZA DENNIS,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JULIE KATE KEENEY
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE

On October 5, 2009, a Charleston County Grand Jury indicted Appellant for assault and battery with intent to kill ("ABWIK" or "ABIK"), attempted armed robbery, and possession of a firearm during a crime of violence. (R. pp. 534-537.)

On March 14, 2011, Appellant proceeded to trial. Andrew Grimes and Megan Ehrlich represented Appellant, and Assistant Solicitors Jennifer Shealy and Timmy Finch represented the State.

On March 16, 2011, the jury returned a verdict of guilty on the ABWIK charge, guilty on the possession of a firearm during a crime of violence charge, and not guilty on the attempted armed robbery charge. (R. p. 495.) The Honorable Roger M. Young sentenced Appellant to the mandatory sentence of life without the possibility of parole ("LWOP") based upon a prior conviction in the State of New York for rape in the first degree. (R. pp. 497.)

On March 25, 2011, Appellant filed a Motion to Reconsider the Sentence. However, on May 11, 2011, Judge Young issued an Order denying the Motion to Reconsider.

On May 17, 2011, Appellant filed a Notice of Appeal.

STATEMENT OF FACTS

The Shooting

On June 22, 2009, Appellant fired five shots at Moses Alford. (R. p. 132.) Out of the five shots, three of the bullets hit Alford.

Earlier that day, Appellant went to the home of La Seto Gibson ("Quan"). Quan's cousins, Kaylab Wright and Trevor Gibbs, were also at Quan's house. (R. pp. 174-175.) Quan called Alford to see if he could purchase some clothes. [1] (R. pp. 116-117; R. p. 175.) Alford agreed to meet Quan at the Kangaroo gas station in McClellanville. (R. p. 118.)

According to Gibbs, Appellant wanted to rob Alford; however, Quan, Wright, and Gibbs left Appellant at Quan's house because they did not want to be involved in a robbery. (R. pp. 179-180.) Quan's grandfather drove Appellant to the Kangaroo where Quan, Wright, and Gibbs were located. Appellant got into Quan's car. Quan and Wright got out of Quan's car and went to Alford's car to look at the clothing. (R. p. 127.) Wright returned to Quan's car because he did not like any of the clothes. (R. p. 184.)

At some point, Wright took Appellant's gun from him. Appellant wanted his gun back. (R. p. 185.) Wright gave Appellant his gun back and told Appellant to not do anything stupid. (R. pp. 185-186.) Upon Appellant's request, Wright let Appellant out of the car. (R. p. 186.)

While Alford was looking in the back seat of the car for an article of clothing, Appellant approached Alford's car.[2] (R. pp. 129-131.) Appellant pointed a gun at Alford and said, "Give

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[1] Alford owned his own clothing business in Georgetown, but he would occasionally bring clothes to customers. (R. pp. 112-113.)

[2] Alford later identified Appellant in a photo lineup as the man that shot him. (R. p. 131.)

me everything." (R. pp. 130-132.) When Alford reached for his gun,[3] Appellant shot Alford in the arm, leg, and back. (R. p. 132; R. p. 383.) At trial, Appellant testified he did not intend to kill Alford; he just wanted to scare Alford. (R. p. 387; R. p. 411.) However, Appellant testified he shot to the side of Alford instead of shooting in the air. (R. p. 410.) After Appellant shot Alford, Appellant ran into the woods. (R. p. 134.)

On the day of the shooting, Peggy Owen testified she saw Appellant hide behind a car in her driveway, and Appellant ran away when the police got close. (R. p. 226-227.) Shortly thereafter, a canine unit found Appellant. (R. p. 244.) The police found a crack pipe in Appellant's pocket. (R. p. 395; R. p. 451.)

Two days after the shooting, the police found the gun Appellant used to shoot Alford in a drainage pipe near Owen's house. (R. pp. 228-230; R. pp. 257-260.) At trial, Investigator Kathy Kjellman testified that no shell casings were found at the scene of the shooting. (R. p. 273.) However, revolvers do not eject shelling casings. Moreover, the gun found in the drainage pipe near Owen's house was a revolver.

During Appellant's direct examination, Appellant's trial counsel elicited Appellant's prior conviction for grand larceny. (R. p. 367.)

The Stolen Gun / Crack Use

According to Gibbs, on the day of the shooting, Appellant tried to sell him a revolver. (R. pp. 162-163; R. pp. 175-179.) Appellant told Gibbs he stole the revolver, and he needed to sell the gun in order to get another "blast" (i.e. crack). (R. p. 178.)

During opening statements, Appellant's trial counsel argued: "When [Appellant] woke up on the morning of June 22, [Appellant] didn't have a gun. [Appellant] didn't have a plan to rob

[3] Alford carried two guns in his car for protection. (R. pp. 121-122.) Alford had a concealed weapons permit for both guns.

anyone, and he certainly didn't have plans of shooting anyone." (R. p. 105.) Additionally, Appellant's trial counsel argued that Appellant's co-defendants provided Appellant with the gun. (R. p. 107.) Moreover, Appellant's trial counsel argued that Quan, Wright, and Gibbs told Appellant to grab the gun in the back seat right before the robbery. (R. p. 107.)

Appellant's trial counsel objected to Gibbs' testimony regarding the stolen gun and drug use. Regarding Appellant's drug use, Appellant's trial counsel argued the testimony was more prejudicial than probative. (R. p. 163.) In addition, Appellant's trial counsel argued motive was not an element of the crime, and the testimony regarding Appellant's drug use went to Appellant's character. (R. p. 164.) With respect to the testimony regarding Appellant stealing a gun, Appellant's trial counsel argued the testimony was more prejudicial than probative.

After hearing all arguments, the trial judge held the testimony regarding the stolen gun was probative to rebut Appellant's trial counsel's contention that Appellant did not have a gun on the morning of the shooting. (R. p. 165.) Furthermore, the trial judge held the testimony regarding Appellant's need for crack was admissible to establish motive.

The Statements

After the canine unit found Appellant, the police brought Appellant back to the Kangaroo. (R. pp. 6-7.) At that time, Appellant was under arrest for trespass. (R. pp. 44-45.) Detective Wagner conducted a gun residue test on Appellant, and Detective Albert Casale read Appellant his rights under Miranda.[4] (R. pp. 7-9; R. p. 13.) According to Detective Casale, Appellant cooperated and did not seem to be confused or intoxicated. (R. p. 11; R. p. 14.) Detective Casale told Appellant that if Appellant wanted to talk to the police, then he needed to

[4] Miranda v. Arizona, 384 U.S. 436 (1996); see State v. Lynch, 375 S.C. 628, 633 n. 5, 654 S.E.2d 292, 295 n. 5 (Ct. App. 2007) ("The well-known *Miranda* rights are that the accused must be informed of: the right to remain silent; any statement made may be used as evidence against him or her; and the right to the presence of an attorney.") (citations omitted).

sign the waiver form. (R. p. 13.) Appellant told Detective Casale that he did not really want to talk "at that time." [5] (R. p. 14; R. pp. 17-18.) At that point, Detective Casale secured Appellant in the car and informed Appellant that Detective Charles Lawrence would speak to Appellant later that day. (R. pp. 13-14; R. pp. 18-19.) Thereafter, Deputy Robert Thornley transported Appellant to the police headquarters. (R. p. 220.)

Approximately five to six hours after Detective Casale advised Appellant of his rights at the Kangaroo station, Detective Kip Cooke advised Appellant of his rights at the police headquarters. (R. p. 21; R. p. 23; R. p. 95.) While Detective Cooke was advising Appellant of his rights, Detective Lawrence came into the room. (R. p. 23.) Appellant signed the waiver of rights form. (R. p. 27.) Detective Casale left the room in order to work on another case.

At 9:04 p.m., Detective Lawrence began the interview. (R. p. 57.) Neither Detective Cooke nor Detective Lawrence knew that Appellant told Detective Casale that he did not want to talk "at that time." (R. p. 33; R. pp. 65-66.) Furthermore, Appellant never told Detective Lawrence he did not want to talk. (R. pp. 47-48.) Moreover, Appellant never asked for an attorney. (R. p. 28; R. p. 48.)

During the interview, Detective Lawrence did not make any promises or threats. (R. p. 48.) Appellant made a statement essentially denying any involvement in the robbery. Appellant stated he did not know why he was under arrest. (R. pp. 502-503.) The interview lasted approximately two hours. (R. p. 47.)

On June 29, 2009, after learning new developments in the case, Detective Lawrence decided to interview Appellant again. (R. pp. 50-51.) Detective Lawrence transported Appellant to the police headquarters and read Appellant his Miranda rights. (R. p. 50; R. p. 52.) Appellant

[5] Appellant did not request an attorney.

signed the acknowledgment and waiver of rights form. (R. pp. 53-55.) Detective Lawrence did not make any threats or promises. (R. p. 55; R. p. 285.) Although Appellant claimed Detective Lawrence told him that if the federal authorities picked up his case it would be hard on him, Detective Lawrence testified he never threatened to turn over Appellant's case to the federal authorities. (R. pp. 48-49; R. pp. 77-78.) However, Detective Lawrence did inform Appellant that Alford identified Appellant as the shooter. (R. p. 56.) At that point, Appellant made a statement. (R. pp. 56-57.)

According to Appellant's June 29th statement, Quan, Wright, and Gibbs wanted to rob someone, and they wanted Appellant to be involved. (R. p 72; R. pp. 504-509.) However, before the robbery took place, they told Appellant that they did not need him. Quan, Wright, and Gibbs left Quan's house, and Quan's grandfather gave Appellant a ride to the Kangaroo. Appellant saw Quan, Wright, and Gibbs at the Kangaroo. They "forced" Appellant into Quan's car. They told Appellant to get the gun and rob Alford. Someone told Alford to give "us" your money. At that point, Alford went for his gun as he attempted to run away from Appellant. Appellant admitted he shot Alford; however, Appellant claimed he only shot Alford to keep Alford from shooting him. Appellant's testimony at trial was largely consistent with his June 29th statement. (R. pp. 370-388.) However, at trial, Appellant admitted no one threatened or forced him to rob and shoot Alford; Appellant was just scared of Quan, Wright, and Gibbs. (R. pp. 407-408; R. p. 412; R. p. 417.)

The Jury Charges

At the close of the evidence, Appellant's trial counsel asked the trial judge to instruct the jury on assault and battery of a high and aggravated nature ("ABHAN"). (R. p. 445.) Appellant argued he shot the victim under a heat of passion and sudden provocation, and Appellant did not

do anything to provoke the difficulties. Moreover, Appellant claimed Appellant had no ill will towards Alford. (R. p. 445-446.) In addition, Appellant argued that in murder cases, voluntary manslaughter was given as a jury instruction in heat of passion cases as a lesser-included offense of murder. (R. p. 447.) Therefore, Appellant claimed the evidence supported a charge of ABHAN as a lesser-included offense of ABWIK. Ultimately, the trial judge denied Appellant's request and refused to charge ABHAN. (R. p. 446.)

The Sentencing

During sentencing, Appellant argued that he should not be sentenced to LWOP because the State did not prove the New York conviction met the elements of what would be considered a most serious offense under South Carolina law. (R. p. 498.) However, the State provided a signed and sealed Certificate of Disposition Indictment that stated Appellant was convicted of "Rape 1st Degree PL 130.35 03 BF," which was the equivalent of South Carolina's criminal sexual conduct with a minor offense ("CSC with a minor"). (R. p. 500; R. p. 510.) Furthermore, the State provided a rap sheet and paperwork, which stated Appellant "forcibly raped 10 YO step-niece, twice on same day." (R. pp. 499-500; Supp. R. p. 3.) After hearing the arguments, the trial judge sentenced Appellant to LWOP. (R. p. 501.) Appellant filed a Motion to Reconsider the Sentence accompanied with a Memorandum of Law in Support of Motion to Reconsider. (R. pp. 518-532.) The trial judge denied Appellant's Motion to Reconsider the Sentence.

ARGUMENT

I.

The trial judge properly admitted the testimony regarding Appellant's need to sell a gun he stole and Appellant's need for crack because it was a prior bad act that was used to show Appellant's motive and intent. In addition, the testimony was relevant and highly probative. Moreover, the testimony was admissible under the res gestae theory and opening the door theory. Even if the trial judge erred in admitting the testimony, any error was harmless.

On appeal, Appellant argues the testimony regarding Appellant's attempt to sell a gun he stole in order to buy crack was inadmissible under Rules 403 and 404 (a) (1), SCRE. However, with respect to Gibbs' testimony regarding Appellant's need for crack, Appellant's trial counsel never objected on the ground of improper character evidence. Regardless, the State did not elicit the testimony in order to attack Appellant's character. The State was not trying to prove that Appellant was a "bad guy." To the contrary, the State sought to elicit the testimony to show Appellant's motive and intent under Rule 404 (b), SCRE. Therefore, the testimony was admissible under Rules 404 (b), 401, 402, and 403, SCRE. Furthermore, the testimony was admissible under the res gestae theory and the opening the door theory.

A. Rule 404 (b)- Prior Bad Acts

Under South Carolina law, prior bad act evidence must be established by clear and convincing evidence. State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000). However, our Supreme Court advised:

> [W]e do not review a trial judge's ruling on the admissibility of other bad acts by determining de novo whether the evidence rises to the level of clear and convincing. If there is **any evidence** to support the admission of the bad act evidence, the trial judge's ruling will not be disturbed on appeal.

State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001) (emphasis added).

Furthermore, Rule 404 (b), SCRE provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."

First, concerning the testimony that Appellant needed crack, Appellant's trial counsel never objected on grounds of improper character evidence. (R. pp. 163-164.) Appellant's trial counsel only argued that the testimony was irrelevant and more prejudicial than probative. The only time Appellant's trial counsel mentioned improper character evidence was with respect to the stolen gun testimony. (R. p. 164.)

An argument not raised and ruled on by the trial court is not preserved for appeal. State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997). Furthermore, "a specific objection to the admission of evidence must be made to preserve the issue for appeal." McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct. App. 1996). In other words, "[t]he objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge." Id. "The same ground argued on appeal must have been argued to the trial judge." Id. Thus, any improper character issue regarding Appellant's need for crack is not preserved.

Secondly, even if the issue was preserved, the testimony regarding both Appellant's need for crack and Appellant's need to sell the gun he stole would have been admissible under Rule 404 (b). The testimony was not admitted in order to prove Appellant was a "bad guy." Rather, the testimony was admitted to show Appellant's motive and intent for the attempted armed robbery.

During opening statements, Appellant's trial counsel argued Appellant did not have a gun on the morning of the shooting. (R. p. 105.) Furthermore, Appellant's trial counsel argued Appellant did not have the intent to rob the victim. Thus, the fact Appellant tried to sell a stolen gun on the morning of the shooting in order to buy crack went to motive and intent for the attempted armed robbery. Cf. State v. Adams, 322 S.C. 114, 118-119, 470 S.E.2d 366, 369 (2003) (holding the defendant's cocaine use on the morning of the robbery and murder was relevant to show the defendant's motive and intent); State v. Gilchrist, 329 S.C. 621, 626-627, 496 S.E.2d 424, 427 (Ct. App. 1998) (holding the trial court properly admitted evidence that the defendant gave his codefendant crack to smoke before the attempted robbery because it was logically relevant to establish the defendant's motive for the crime).

In summary, the testimony was admissible under Rule 404 (b).

B. Rules 401 and 402- Relevance

Furthermore, Gibbs' testimony was relevant and admissible under Rules 401 and 402, SCRE. "The trial judge's decision regarding the relevancy of evidence should only be overturned for a clear abuse of discretion." State v. Lyles, 379 S.C. 328, 339, 665 S.E.2d 201, 207 (Ct. App. 2008).

Under Rules 401 and 402 of the South Carolina Rules of Evidence, all relevant evidence, which is 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[,]" is admissible. Moreover, "[e]vidence is admissible if 'logically relevant' to establish a material fact or element of the crime; it need not be 'necessary' to the State's case in order to be admitted." State v. Sweat, 362 S.C. 117,127, 606 S.E.2d 508, 513 (Ct. App. 2004) (citing State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990)).

Although motive is generally not an element of a crime that the State must prove, the State can often use motive as circumstantial evidence to prove intent to commit the crime charged when intent is in issue. Sweat, 362 S.C. at 124, 606 S.E.2d at 512.

Here, the State had to prove Appellant had the specific intent to commit armed robbery. See State v. Thompson, 374 S.C. 257, 262, 647 S.E.2d 702, 705 (Ct. App. 2007) ("A person is guilty of attempted armed robbery if the person had a specific intent to commit armed robbery.").

Therefore, the testimony was relevant as it suggested motive and intent and tended to make the State's version of the case more probable. While motive was not completely necessary to the State's case, it was logically related to why Appellant got out of the car with the gun and what his intentions were when he approached Alford.

C. Rule 403- Probative Value/Unfair Prejudice

In addition, Gibbs' testimony was admissible under Rule 403, SCRE. The trial judge's determination of the comparative probative value and prejudicial effect of evidence should only be overturned in exceptional circumstances. State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003). The appellate court reviews the trial judge's determination pursuant to Rule 403, SCRE, under an abuse of discretion standard and is obligated to give the trial judge's judgment great deference. Lyles, 379 S.C at 339, 665 S.E.2d at 207.

Under Rule 403, SCRE, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Our Supreme Court defined unfair prejudice as "an undue tendency to suggest [a] decision on an improper basis, commonly, though not necessarily, an emotional one." State v.

Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991). Moreover, this Court noted the following: "We recognize the 'great possibility that unfair prejudice may result from evidence of a criminal defendant's past use of cocaine.' However, this does not mean the danger of unfair prejudice always outweighs the probative value of evidence of prior drug involvement by a criminal defendant." Gilchrist, 329 S.C. at 627, 496 S.E.2d at 427 (quoting Adams, 322 S.C. at 119, 470 S.E.2d at 369) (internal citations omitted).

Here, the probative value of the testimony was very high. The State had to prove Appellant had the intent to rob the victim. Thompson, 374 S.C. at 262, 647 S.E.2d at 705. Because Appellant argued in his opening statement that he was forced to rob the victim and had no intent to rob the victim, the State had to present evidence to the contrary. By presenting Gibbs' testimony regarding Appellant's need to sell a gun he stole in order to buy crack, the State was able to present evidence that not only was Appellant was the one that brought the gun to the robbery, but Appellant was also the one who had the motive to rob the victim.

On the other hand, the danger of unfair prejudice was minimal. At most, the testimony would have revealed that Appellant stole a gun and used drugs. However, the jury already heard about Appellant's prior conviction for grand larceny. (R. p. 367.) Moreover, Appellant was not on trial for any drug related offenses. Therefore, the testimony regarding Appellant's need for crack was not propensity evidence. Furthermore, the jury heard testimony that when Appellant was arrested, the police found a crack pipe in his pocket. (R. p. 395; R. p. 451.) Thus, the prejudicial effect of the testimony was minimal.

In summary, the unfair prejudice of admitting the testimony did not substantially outweigh the probative value.

D. Res Gestae

Moreover, Gibbs' testimony was admissible under the res gestae theory. Evidence of a defendant's prior bad acts is properly admissible if these acts form part of the res gestae of the charged offense. Anderson v. State, 354 S.C. 431, 435, 581 S.E.2d 834, 836 (2003). The res gestae theory recognizes that evidence of other bad acts may be an integral part of a charged crime or may be necessary to aid the fact finder in understanding the context in which the crime occurred. State v. Preslar, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct. App. 2005). To constitute part of the res gestae of an offense, it is important that the prior bad acts have a close temporal proximity to the charged crime. State v. Martucci, 380 S.C. 232, 258, 669 S.E.2d 558, 612 (Ct. App. 2008); see State v. Williams, 321 S.C. 455, 461–63, 469 S.E.2d 49, 53–54 (1996) (finding evidence of crack cocaine sale between defendant and victim several hours prior to the murder was a part of the res gestae of the crime).

In State v. Adams, our Supreme Court explained the res gestae theory:

> One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae' " or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other . . .' [and is thus] part of the res gestae of the crime charged." And where evidence is admissible to provide this "full presentation" of the offense, "[t]here is no reason to fragmentize the event under inquiry" by suppressing parts of the "res gestae."

Adams, 322 S.C. at 122, 470 S.E.2d at 370-371 (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980) (alteration in original)).

In Adams, our Supreme Court held the defendant's use of cocaine immediately before the robbery was properly admitted as part of the res gestae of the crimes for which the defendant was tried. Id. at 121, 470 S.E.2d at 370. The court reasoned that because the "temporal proximity of the cocaine use to the robbery and murder [was] so close . . . one [could not] deny that the cocaine use was so much a part of the 'environment' of the crime [and] omitting the evidence . . . would unnecessarily fragmentize the State's case." Id. at 122, S.E.2d at 371.

Turning to the case at hand, the testimony regarding Appellant's attempt to sell a gun he stole in order to buy crack a few hours before the attempted robbery and shooting was properly admitted to "complete the story of the crime." During opening statements, Appellant claimed he did not have a gun on the morning of the shooting, and he had no reason to rob the victim. However, the testimony presented evidence that not only did Appellant have a gun on the morning of the shooting, but he also had motive for robbing the victim. Similar to the defendant's prior bad act evidence in Williams and Adams, Appellant's prior bad act evidence was close in temporal proximity to the crimes for which Appellant was being tried.

In summary, the testimony was admissible under the res gestae theory.

E. Opening the Door

In the alternative, Gibbs' testimony was admissible because Appellant opened the door during opening statements. "It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence." State v. Page, 378 S.C. 476, 482, 663 S.E.2d 357, 360 (Ct. App. 2008). Moreover, "[w]hether a person opens the door to the admission of otherwise inadmissible evidence during the course of a trial is addressed to the sound discretion of the trial judge." Id. at 483, 663 S.E.2d at 360 (citations omitted).

In the case at hand, Appellant opened the door to the stolen gun and drug testimony during his opening statement. Appellant's trial counsel argued: "When [Appellant] woke up on

the morning of June 22, [Appellant] didn't have a gun. [Appellant] didn't have a plan to rob anyone, and he certainly didn't have plans of shooting anyone." (R. p. 105.) Moreover, Appellant's trial counsel argued that Appellant's co-defendants provided Appellant with the gun. (R. p. 107.) Thus, Appellant's opening statement opened the door to the testimony regarding Appellant's attempt to sell a stolen gun so he could buy crack on the morning of the shooting. See State v. Dunlap, 353 S.C. 539, 541, 579 S.E.2d 318, 319 (2003) (holding defense counsel's opening statement "opened the door to the introduction of evidence rebutting the contention that [defendant] was merely an addict").

F. Harmless Error

Even if the trial judge erred in admitting the testimony, any error was harmless. See Martucci, 380 S.C. at 261, 669 S.E.2d at 613 ("Error is harmless where it could not reasonably have affected the result of the trial."); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (stating the erroneous admission of prior bad act evidence is harmless beyond a reasonable doubt if its impact is minimal in the context of the entire record); see also State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (finding any error in the admission of evidence cumulative to other unobjected-to evidence is harmless).

Here, the testimony regarding the stolen gun and the use of drugs went to show motive and intent for the attempted armed robbery. However, the jury acquitted Appellant of attempted armed robbery. Thus, any error in admitting the testimony could not have reasonably affected the result of the trial. Moreover, Appellant's credibility was already called into question because of his prior conviction for grand larceny. Therefore, any error in admitting the testimony was harmless.

II.

The trial court properly denied Appellant's request to charge ABHAN as a lesser-included offense of ABWIK because there was no evidence Appellant was guilty of ABHAN.

At trial, Appellant's trial counsel argued that the trial judge should have charged ABHAN because the shooting occurred under a heat of passion and sudden provocation scenario. (R. pp. 445-446.) Furthermore, Appellant's trial counsel argued Appellant did not have any ill-will towards Alford. However, even if heat of passion and sudden provocation could negate the malice element of ABWIK, Appellant did not have a sufficient legal provocation in this case. Moreover, there was no evidence Appellant was guilty of ABHAN. Therefore, the trial judge properly denied Appellant's request to charge the jury on ABHAN.

Standard of Review

The law to be charged is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). The trial judge is required to charge only the current and correct law of South Carolina. State v. Buckner, 341 S.C. 241, 246, 534 S.E.2d 15, 18 (Ct. App. 2000). Our Supreme Court noted the following: "It is not error to refuse to charge the lesser-included offense unless there is evidence tending to show the defendant was guilty *only* of the lesser offense." State v. Coleman, 342 S.C. 172, 175, 536 S.E.2d 387, 388 (Ct. App. 2000)

"No instruction should be given by the trial judge, at the request of the appellant, which tenders an issue which is not presented or supported by the evidence." State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975). In other words, the trial judge does not err in refusing to charge the lesser-included offense when there is no evidence that the defendant was guilty of the lesser-included offense. State v. Drayton, 293 S.C. 417, 428, 361 S.E.2d 329, 335 (1987).

A. Heat of passion/ Sudden Legal Provocation

Appellant's trial counsel argued that the shooting occurred under a heat of passion and sudden provocation scenario; therefore, ABHAN should have been charged. (R. pp. 445-446.) However, heat of passion and sudden provocation is not an element of ABHAN. Furthermore, Appellant did not have sufficient legal provocation in this case. Thus, the trial judge properly denied Appellant's request to charge the jury on ABHAN.

The offense of ABWIK is defined as "an unlawful act of a violent nature to the person of another with malice aforethought, either express or implied." State v. Kinard, 373 S.C. 500, 503, 646 S.E.2d 168, 169 (Ct. App. 2007); see State v. Sutton, 340 S.C. 393, 396, 532 S.E.2d 283, 285 (2000) ("ABIK is an unlawful act of violent nature to the person of another with malice aforethought, either express or implied. The often cited language to describe ABIK is: if the victim had died from the injury, the defendant would have been guilty of murder. Furthermore, a specific intent is not required to commit ABIK." (citations omitted)).

"Malice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong." State v. Zeigler, 364 S.C. 94, 103, 610 S.E.2d 859, 864 (Ct. App. 2005). The four possible mental states encompassed by malice aforethought are: (1) an intent to kill; (2) an intent to inflict grievous bodily harm; (3) extremely reckless indifference to the value of human life; and (4) an intent to commit a felony. Kinard, 373 S.C. at 503-504, 646 S.E.2d at 169.

In order to establish the offense of ABWIK, there must be evidence demonstrating a general intent to kill. See State v. Foust, 325 S.C. 12, 15, 479 S.E.2d 50, 51 (1996) ("Although the cases indicate that **some** intent must be demonstrated before an accused may be convicted of ABIK we do not believe they stand for the proposition that a **specific** intent to kill must be shown. We hold that it is sufficient if there is shown some general intent, such as that heretofore applied in cases of murder in this State.") (emphasis in original); Coleman, 342 S.C. at 176, 536 S.E.2d at

389 ("ABIK also requires the intent to kill. However, this intent need only be a general intent, demonstrated by acts and conduct from which a jury may naturally and reasonably infer intent." (citations omitted)). Moreover, intent may be proven by evidence of the character of the means or instrument used, the manner in which the instrument was used, the purpose to be accomplished, and the resulting injuries to the victim. Coleman, 342 S.C. at 176, 536 S.E.2d at 389.

Similarly, ABHAN is defined as an unlawful act of violent injury accompanied circumstances of aggravation. State v. Geiger, 370 S.C. 600, 605, 635 S.E.2d 669, 672 (Ct. App. 2006). "As an element of ABHAN, circumstances of aggravation include, inter alia, the use of a deadly weapon, intent to commit a felony, infliction of serious bodily injury, great disparity in the ages or physical conditions of the parties, differences in gender, taking indecent liberties or familiarities with a female, purposeful infliction of shame and disgrace, and resistance to lawful authority." Id. at 605-606, 635 S.E.2d at 672. "An ABHAN charge is appropriate when the evidence demonstrates the defendant lacked the requisite intent to kill." Coleman, 342 S.C. at 176, 536 S.E.2d at 389.

In the case at hand, Appellant's trial counsel argued that in murder cases, voluntary manslaughter was given as a jury instruction in heat of passion cases as a lesser-included offense of murder. Because it was a heat of passion case, the trial judge should have charged ABHAN as a lesser-included offense of ABWIK.

However, our Supreme Court has repeatedly held that heat of passion and sudden legal provocation is not an element of ABHAN. State v. Pilgrim, 326 S.C. 24, 482 S.E.2d 562 (1997) (holding it was error for a trial court to give jury instructions which equate ABHAN with voluntary manslaughter); State v. Tyler, 348 S.C. 526, 560 S.E.2d 888 (2002).

Furthermore, even if heat of passion and sufficient legal provocation negates the malice element in some cases, there was no legal provocation in this case. Appellant testified he

attempted to rob Alford because he was scared Quan, Wright, and Gibbs would hurt him if he refused. In an attempt to defend himself, Alford ran away and reached for his gun. Just because Alford tried to defend himself from an armed robbery, does not give Appellant, who was one trying to commit the armed robbery, sufficient legal provocation to shoot Alford. See State v. Hernandez, 386 S.C. 655, 661, 690 S.E.2d 582, 585 (Ct. App. 2010) ("Neither the exercise of a legal right nor a victim's attempts to resist or defend himself from crime constitute sufficient legal provocation.").

Thus, the trial judge properly denied Appellant's request to charge the jury on ABHAN.

B. Extremely Reckless Indifference to the Value of Human life

Furthermore, all of the evidence at trial pointed to the fact that Appellant acted with malice when he shot Alford three times. As discussed above, one of the possible mental states encompassed by malice aforethought is an extremely reckless indifference to the value of human life.

At trial, the evidence proved Appellant fired a gun five times and three of the bullets hit Alford. During the defense's case, Appellant testified he fired the gun five times and three of the bullets hit Alford. Appellant claimed he did not intend to kill Alford; he just wanted to scare Alford. (R. p. 387; R. pp. 402-403; R. p. 411.) However, instead of shooting up in the air, Appellant testified he shot to the side of Alford. (R. p. 410.)

Despite Appellant's claim that he did not intend to kill Alford, South Carolina law does not require Appellant to have the specific intent to kill, only a general intent to kill. See Coleman, 342 S.C. at 176-177, 536 S.E.2d at 389 ("We find the facts of this case analogous to those in Foust. In Foust, the appellant was convicted of first degree burglary, ABIK, and possession of a knife during the commission of a violent crime. The victim was stabbed in the chest by Foust when she returned home from work and discovered him burglarizing her home. At trial, the State

introduced a letter written by Foust in which he claimed he never intended to hurt the victim. Foust, 325 S.C. at 13, 479 S.E.2d at 50. The supreme court found that despite Foust's denial of an intent to kill the victim, a general intent to kill was sufficient to support an ABIK charge. His use of a deadly weapon while burglarizing victim's home, and the fact that the victim sustained serious injuries, were held to be adequate evidence of such general intent.")

In the case at hand, Appellant fired the gun five times in the direction of the victim, which proved he acted with an extremely reckless indifference to the value of human life. Appellant's theory of the case was **not** that he was guilty of ABHAN because he lacked the requisite intent to kill. Rather, his theory was that he was not guilty of ABWIK because he acted in self-defense. Thus, the record did not contain any evidence warranting the lesser charge of ABHAN.

C. Intent to Commit a Felony

As discussed above, one of the possible mental states encompassed by malice aforethought is intent to commit a felony.

Here, Appellant testified he attempted to rob Alford because he was scared Quan, Wright, and Gibbs would hurt him if he refused. Because Appellant intended to commit a felony, he acted with malice aforethought. Therefore, all of the evidence proved Appellant committed ABWIK, not ABHAN.

D. Abandonment

On appeal, Appellant merely recited the trial testimony and arguments made by Appellant's trial counsel. Appellant never adopted his trial counsel's arguments. Moreover, Appellant only cited to general law regarding when a trial judge should charge a lesser-included offense. First Savings Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (stating when an "[a]ppellant fails to provide arguments or supporting authority for his assertion," the issue is deemed abandoned on appeal).

Because Appellant's argument regarding ABHAN is merely conclusory, Appellant abandoned the issue on appeal.

III.

The trial judge properly sentenced Appellant to life without the possibility of parole because Appellant's out-of-state conviction for rape in the first degree qualified as a most serious offense under South Carolina law.

Appellant asserts the trial judge committed reversible error by sentencing him to LWOP pursuant to section 17-25-45 of the South Carolina Code. Appellant contends that the trial judge erred in relying on the computer printouts instead of comparing the elements of the offenses. However, the State provided a signed and sealed Certificate of Disposition Indictment that stated Appellant was convicted of "Rape 1st Degree PL 130.35 03 BF," which was the equivalent of South Carolina's CSC with a minor offense. (Supp. R. p. 1; R. pp. 510; R. p. 500.)[6] Furthermore, Appellant argues the jury should have decided whether or not Appellant's conviction qualified as a most serious offense in South Carolina. However, in South Carolina, judges decide questions of law, not juries.

Generally, the trial judge has broad discretion in imposing a sentence within the statutory limits. State v. Sidell, 262 S.C. 397, 398, 205 S.E.2d 2, 3 (1974). "A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed." State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008). Appellate courts typically only interfere in a trial

[6] It is questionable to whether or not Appellant's argument regarding the trial judge's error in relying upon the computer printouts is preserved for appeal. Appellant did not specifically object to the trial judge's consideration of the computer printouts until he filed his Memorandum in Support of his Motion to Reconsider the Sentence. See State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005) (noting that an issue is not preserved for review unless a contemporaneous objection is made to and ruled upon by the trial court).

judge's discretionary sentencing decision in rare and unusual circumstances. State v. Ferguson, 221 S.C. 300, 307, 70 S.E.2d 355, 358 (1952).

However, under section 17-25-45(A) of the South Carolina Code, a trial judge has no sentencing discretion and must sentence a defendant to a term of imprisonment of life without the possibility of parole where the defendant was convicted of a "most serious" offense and has either one or more prior convictions for a "most serious" offense or two or more prior convictions for a "serious" offense.

When determining whether a defendant has a prior "most serious" conviction for sentencing enhancement purposes, a defendant's prior criminal record expressly includes "a federal or out-of-state conviction for **an offense that would be classified as a most serious offense under this section**[.]" S.C. Code Ann. §17-25-45 (A)(1)(b) (emphasis added). Therefore, if a defendant was convicted of a prior out-of-state offense that would have constituted a "most serious" offense in South Carolina, the trial judge can use the earlier conviction to enhance the defendant's sentence under our recidivist offender statute. Id.

A. South Carolina's Criminal Sexual Conduct with a Minor Statute

Pursuant to South Carolina's CSC with a minor statute, "a person is guilty of criminal sexual conduct with a minor in the first degree if . . . the actor engages in sexual battery with a victim who is less than eleven years of age . . . ." S.C. Code Ann. §16-3-655 (A)(1). Furthermore, "a person is guilty of criminal sexual conduct with a minor in the second degree if . . . the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age. . . ." S.C. Code Ann. §16-3-655 (B)(1).

A prior conviction for first degree or second degree CSC with a minor is considered a most serious offense under South Carolina law. S.C. Code Ann. § 17-25-45 (C) (1).

B. New York's Rape in the First Degree Statute

On the other hand, New York's rape in the first degree statute provides the following:

> A person is guilty of rape in the first degree when he or she engages in sexual intercourse with another person:
>
> 1. By forcible compulsion; or
>
> 2. Who is incapable of consent by reason of being physically helpless; or
>
> **3. Who is less than eleven years old; or**
>
> 4. Who is less than thirteen years old and the actor is eighteen years old or more.
>
> Rape in the first degree is a class B felony.

N.Y. Pen. Law § 130.35 (emphasis added).

C. Comparing the Elements

The State provided a signed and sealed copy of the Certificate of Disposition Indictment from New York." (Supp. R. p. 1.) The Certificate of Disposition Indictment stated Appellant was convicted of **subsection 3** of section 130.35, which deals with sexual intercourse with a victim that is under eleven years old.

When one compares New York's statute for rape in the first degree (subsection 3) to South Carolina's statute for CSC with a minor, first degree, it is clear that Appellant's out-of-state conviction would be considered a most serious offense in South Carolina. See State v. Washington, 338 S.C. 392, 397–98, 526 S.E.2d 709, 711 (2000) ("Since Defendant had pled guilty to common law burglary in 1982, the trial court properly ruled that this prior conviction would constitute a 'most serious' offense because it contained the same legal elements as burglary, first degree that section 17-25-45(C)(1) declares a 'most serious' offense."); State v. Phillips, 393 S.C. 407, 414–15, 712 S.E.2d 457, 461 (Ct. App. 2011) (citation omitted) (noting that when a

prior conviction is for an offense is not contemplated by section 17-25-45, the trial court should examine the elements of the offense and determine whether they are equivalent to any current offense classified as "serious" or "most serious."); Hinton v. S.C. Dep't of Prob., Parole, and Pardon Servs., 357 S.C. 327, 339, 592 S.E.2d 335, 342 (Ct. App. 2004) (noting under the "same-elements" test, when comparing the elements of the offenses, a court "looks to whether the particular actions taken by the defendant which satisfy the elements of the crime in the other state would satisfy the elements of one of the enumerated crimes.").

Therefore, because New York's statute for rape in the first degree (subsection 3) contains the same elements as South Carolina's most serious offense of CSC with a minor, first degree, the trial judge properly sentenced Appellant to LWOP.

In opposition to the enhancement of his sentence, Appellant cites to State v. Lindsey. In Lindsey, our Supreme Court held that the defendant's prior rape conviction did not "necessarily" fall into the category of the "most serious" offenses of first-degree or second-degree criminal sexual conduct. 355 S.C. 15, 19-20, 583 S.E.2d 740, 742 (2003). Because rape only required force and not aggravated force for a conviction, the Court held that Lindsey's prior rape conviction was not necessarily for a "most serious" offense. Id. Moreover, the form indictment gave no details of the facts or circumstances surrounding the rape. Id. Thus, Lindsey's prior rape conviction may have fallen into the category of third-degree criminal sexual conduct. Id.

However, unlike the evidence in Lindsey, the evidence in Appellant's case stated that Appellant was convicted of subsection 3 of New York's rape in the first degree statute, which involves sexual intercourse with a victim under the age of eleven.

Furthermore, Appellant contends his New York rape in the first degree conviction should not have been used for enhancement purposes because Appellant was only sentenced to six to eighteen years of imprisonment in New York, and CSC with a minor in South Carolina carries a

mandatory minimum sentence of twenty-five years. In addition, Appellant contends his sentence should not have been enhanced based upon his prior New York conviction because the offense is a Class B felony, while CSC with a minor in South Carolina is a Class A felony.

However, when determining whether a defendant is subject to sentencing enhancement based on an earlier out-of-state conviction, the relevant inquiry is not how the out-of-state jurisdiction chooses to classify the out-of-state offense or what the potential punishment for that offense is in another jurisdiction. Instead, pursuant to section 17-25-45 of the South Carolina Code, the relevant inquiry is whether or not the out-of-state offense would be classified as a "most serious" offense in South Carolina. See S.C. Code Ann. § 17-25-45(A)(1)(b) (requiring a sentence of life imprisonment following conviction for a "most serious" offense if the defendant has a prior "out-of-state conviction for an offense that would be classified as a most serious offense **under this section**[.]") (emphasis added); see e.g., Daniels v. State, 621 So. 2d 335, 342 (Ala. Crim. App. 1992) ("In determining whether an out-of-state conviction will be used to enhance punishment pursuant to the [Habitual Felony Offender Act], the **conduct** upon which the foreign conviction is based must be considered and **not** the foreign jurisdiction's treatment of that conduct.") (emphasis added).

Therefore, the fact Appellant's New York sentence for rape in the first degree was below South Carolina's statutory minimum sentence for CSC with a minor has no bearing on whether or not a New York rape in the first degree conviction can be used for sentencing enhancement purposes in South Carolina. Furthermore, the fact New York classifies rape in the first degree as a Class B offense while South Carolina classifies CSC with a minor as a Class A offense is completely irrelevant to the sentencing enhancement analysis.

In summary, Appellant's New York conviction for rape in the first degree, subsection 3, is the equivalent of South Carolina's most serious offense of CSC with a minor, first degree. Thus, the trial court properly sentenced Appellant to LWOP.[7]

D. Role of Juries and Judges

Appellant argues the jury should have decided whether or not Appellant's conviction qualified as a most serious offense in South Carolina. However, in South Carolina, judges decided questions of law, not juries.

Moreover, Appellant's reliance on Apprendi v. New Jersey is misplaced. 350 U.S. 466 (2000) ("Other than the fact of a **prior conviction**, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and prove beyond a reasonable doubt." (emphasis added); see also People v. Ramos, 742 N.E.2d 763, 774 (Ill. App. Ct. 2000) ("Apprendi clearly exempts recidivist statutes.").

Whether or not Appellant's prior conviction amounted to a most serious offense in South Carolina was a question of law, which was for the judge to decide. See Waston v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 174 (2010) ("The jury and the trial court each have distinct roles and separate responsibilities that they must execute during a trial. The jury serves as the fact finder and is charged with the duty of weighing the evidence admitted at trial and reaching a verdict. The trial court, on the other hand, is charged with the duty of determining issues of law.").

[7] The "categorical approach" Appellant urges this Court to adopt applies to cases involving the federal sentencing guidelines and is inapplicable in South Carolina. See S.C. Code Ann. § 17-25-45(A)(1)(b) (requiring a sentence of life imprisonment following conviction for a "most serious" offense if the defendant has a prior "out-of-state conviction for an offense that would be classified as a most serious offense **under this section**[.]") (emphasis added).

E. Harmless Error

Assuming, arguendo, the trial judge erred in relying on the computer printouts, any error was harmless because the signed and sealed Certificate of Disposition Indictment clearly indicated Appellant was convicted under subsection 3 of New York's rape in the first degree statute, which was the equivalent of South Carolina's CSC with a minor. See State v. Arnold, 319 S.C. 256, 460 S.E.2d 403 (Ct.App.1995) (holding Rule 220(c), SCACR, allows the court of appeals to affirm on any ground appearing in the record).

IV.

The trial judge properly admitted Appellant's two statements because Appellant's right to remain silent was scrupulously honored. Furthermore, Appellant abandoned his coercion argument on appeal. In addition, Appellant failed to obtain a ruling on the coercion issue; therefore, the issue was not preserved. Moreover, there was evidence in the record that supported the trial judge's decision. Regardless, any error in admitting the statements was harmless.

Appellant argues his statements were inadmissible because his right to remain silent was not scrupulously honored by the detectives. Furthermore, Appellant's trial counsel argued Appellant's second statement was inadmissible because Detective Lawrence allegedly told Appellant he could take his case to the federal authorities and Appellant could get more time. However, Appellant merely stated he did not want to talk "at that time." Thus, the investigators scrupulously honored Appellant's right to remain silent when they waited five to six hours to interview Appellant for the second time. Moreover, Appellant abandoned the coercion argument on appeal. Furthermore, Detective Lawrence testified he never threatened Appellant by stating he would take Appellant's case to the federal authorities. Thus, there is evidence in the record that supported the trial judge's ruling that Appellant voluntarily made the statements. Therefore, this Court should affirm the trial judge's ruling on the admissibility of the two statements.

When determining whether or not a statement is voluntary, the trial judge must conduct an evidentiary hearing, outside the presence of the jury. State v. Simmons, 384 S.C. 145,162, 682 S.E.2d 19, 28 (Ct. App. 2009). During the evidentiary hearing, the State must prove the statement was voluntarily made by a preponderance of the evidence. Id. If the trial judge finds the statement voluntary and admissible, an appellate court will not reverse unless the decision was so erroneous as to demonstrate an abuse of discretion. Id. In other words, when reviewing a trial judge's ruling concerning voluntariness, the appellate court does not re-evaluate the facts based on its own view

of the preponderance of the evidence, but instead determines whether the trial judge's ruling is supported by **any evidence**. State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001).

A. The June 22nd Statement

Approximately five to six hours after Detective Casale advised Appellant of his rights at the Kangaroo station and Appellant stated he did not want to talk "at that time," Detective Kip Cooke advised Appellant of his rights at the police headquarters. (R. pp. 13-19; R. p. 21; R. p. 23.) Thereafter, Appellant signed the waiver of rights form. (R. p. 27.)

At 9:04 p.m., Detective Lawrence began the interview. (R. p. 57.) Neither Detective Cooke nor Detective Lawrence knew Appellant told Detective Casale that he did not want to talk at that time. (R. p. 33; R. pp. 65-66.) Furthermore, Appellant never told Detective Lawrence he did not want to talk. (R. pp. 47-48.) Moreover, Appellant never asked for an attorney. (R. p. 28; R. p. 48.)

During the interview, Detective Lawrence did not make any promises or threats. (R. p. 48.) Appellant made a statement essentially denying any involvement in the robbery. Appellant stated he did not know why he was under arrest. (R. pp. 502.) The interview lasted approximately two hours. (R. p. 47.)

"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) (internal citations omitted). When determining whether or not a statement was voluntarily made, courts look at the totality of the circumstances. Id.

"When a suspect invokes his right to remain silent, law enforcement officers must scrupulously honor it. However, before law enforcement officers are required to discontinue

questioning, the suspect must clearly articulate his desire to end the interrogation." Aleksey, 343 S.C. at 31, 538 S.E.2d at 253 (internal citations omitted).

A five factor test has been adopted from Mosley[8] to determine whether a defendant's right to cut off questioning was "scrupulously honored":

> (1) whether the suspect was given *Miranda* warnings at the first interrogation; (2) whether police immediately ceased the interrogation when the suspect indicated he did not want to answer questions; (3) whether police resumed questioning the suspect only after the passage of a significant period of time; (4) whether police provided a fresh set of *Miranda* warnings before the second interrogation; and (5) whether the second interrogation was restricted to a crime that had not been a subject of earlier interrogation.

State v. Benjamin, 345 S.C. 470, 476, 549 S.E.2d 258, 261 (2001) (citations omitted).

"However, the Mosley factors are not exclusively controlling, nor do they establish a test which can be woodenly applied." Benjamin, 345 S.C. 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.

First, Detective Casale advised Appellant of his rights under Miranda before any any interrogation took place. (R. pp. 7-9; R. p. 13.) Right after Detective Casale read Appellant his rights, Appellant told Detective Casale that he did not really want to talk "at that time." (R. p. 17.) Thus, no interrogation took place at that time.

Second, Detective Casale did not interrogate Appellant after Appellant said he did not want to talk "at that time." (R. pp. 13-19; R. p. 21; R. p. 23.)

Third, Detective Lawrence began questioning Appellant approximately five to six hours after Appellant stated he did not really want to talk "at that time." (R. p. 21; R. p. 23; R. p. 95.);

[8] Michigan v. Mosley, 423 U.S. 96 (1975).

Cf. Benjamin, 345 S.C. at 478, 549 S.E.2d at 262 (holding the defendant's right to remain silent was scrupulously honored when the police resumed questioning one hour after the defendant invoked his right to remain silent); State v. Franklin, 390 S.C. 535, 541, 702 S.E.2d 568, 572 (2010) (holding the defendant's right to remain silent was scrupulously honored when the police resumed questioning three hours after the defendant invoked his right to remain silent); Mills v. Commonwealth, 996 S.W.2d 473 (Ky. 1999), *overruled on other grounds*, (holding no Miranda violation after defendant invoked his right to remain silent with the first officer, and twenty minutes a second officer questioned the defendant about the same crime).

Fourth, Detective Cooke provided a fresh set of Miranda warnings before Detective Lawrence began the interrogation. (R. p. 21; R. p. 23.)

Fifth, because Detective Casale never interrogated Appellant, there was really no "second interrogation" on June 22nd. (R. pp. 44-45.) Thus, the fifth factor is not helpful to the analysis. However, even if the detectives conducted a subsequent interrogation concerning the same subject matter, that in itself is not a violation of Appellant's right to remain silent. See Benjamin, 345 S.C. at 478, 549 S.E.2d at 262 ("[A] subsequent interrogation concerning the same crime does not, in and of itself, violate an accused's rights to remain silent . . .".)

Finally, Appellant told Detective Casale that he did not really want to talk "at that time." (R. p. 17.) Thus, Appellant did not make an unequivocal invocation of his right to discontinue questioning. See Aleksey, 343 S.C. at 31, 538 S.E.2d at 253-254 (holding that the defendant's statement, "[t]hat's all I have to say," was ambiguous and not an unequivocal invocation of his right to remain silent.)

In summary, the detectives scrupulously honored Appellant's right to remain silent.

B. The June 29th Statement

At trial, Appellant claimed the detectives coerced him into making a statement because they allegedly threatened to send his case to the federal authorities. However, on appeal, Appellant failed to cite authority supporting his coercion claim; therefore, Appellant abandoned the issue. Furthermore, Appellant failed to preserve the issue for appeal because he never requested a ruling on his coercion argument. Moreover, the record supports the trial judge's finding that the statement was voluntary.

i. Appellant abandoned the coercion argument.

In Appellant's Statement of Issue, Appellant claimed he was coerced into making the second statement when Detective Lawrence allegedly threatened to send Appellant's case to the federal authorities.[9]

However, Appellant merely recited the trial testimony and arguments made by Appellant's trial counsel. Appellant never adopted his trial counsel's arguments. Moreover, Appellant never cited any authority supporting his coercion claim. Cf. State v. Hill, 394 S.C. 280, 296-297, 715 S.E.2d 368, 377-378 (Ct. App. 2011) (holding the issue was abandoned when appellate counsel merely recited the extensive testimony and arguments of trial counsel without adopting trial counsel's argument, and appellate counsel only made a two sentence conclusory argument with citation to only one case with no analysis whatsoever as to why the case applied); State v. Colf, 332 S.C. 313, 332, 504 S.E.2d 360, 364 (Ct. App. 1998) (affirmed as modified by

[9] At trial, Appellant first argued that the June 29th statement was inadmissible under Mosley. However, shortly thereafter, Appellant conceded there had been a significant amount of time between the invocation of Appellant's right to remain silent and the June 29th statement. (R. p. 94.) Therefore, Appellant asked the Court to suppress the June 29th statement based solely upon the alleged threat of Appellant's case going federal. (R. p. 95.) Thus, any argument that the June 29th statement was inadmissible under Mosley was waived. Nevertheless, because the June 22nd statement was admissible under Mosley, the June 29th statement was clearly admissible under Mosley (i.e. seven days between Appellant's "invocation" of his right to remain silent and the interrogation).

State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000) (holding a conclusory two-paragraph argument citing no authority other than an evidentiary rule was deemed abandoned on appeal); *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct.App.2006) (finding an issue listed in the statement of issues on appeal but not addressed in the brief is abandoned).

Because Appellant's coercion argument is merely conclusory, Appellant abandoned the issue on appeal.

ii. Appellant failed to preserve the coercion argument.

During the evidentiary hearing, Appellant argued the June 29th statement was inadmissible because the investigators allegedly threatened to give Appellant's case to the federal authorities. (R. p. 95.) The trial judge ultimately found the statement voluntary. (R. p. 96.) However, the trial judge never specifically ruled upon the coercion argument.

Appellant failed to request a specific ruling as to the coercion issue; therefore, the issue was not preserved for appeal. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and **ruled upon** by the trial [court]. Issues not raised and **ruled upon** in the trial court will **not** be considered on appeal.") (emphasis added); see also State v. McLaughlin, 307 S.C. 19, 23, 413 S.E.2d 819, 821 (1992) ("Moreover, the trial judge's general ruling that the statements were admissible does not constitute reversible error. McLaughlin's failure to request a more explicit ruling constitutes a waiver to any objection to the judge's general ruling. Finally, since the record supports the judge's implicit ruling that McLaughlin's *Miranda* rights were voluntarily waived, the failure to make a more detailed ruling is harmless.") (internal citations omitted).

Therefore, Appellant failed to preserve the coercion issue by not demanding a specific ruling on his coercion argument.

iii. The trial judge's finding that the statement was voluntary was supported by evidence.

During the evidentiary hearing, Appellant claimed the detectives threatened to send his case to the federal authorities. However, the detectives testified they never threatened Appellant or promised Appellant anything. Moreover, Detective Lawrence specifically denied ever telling Appellant that his case would go to the federal authorities if he did not make a statement.

Because Appellant failed to obtain a specific ruling regarding the coercion issue, it is unclear on how the trial judge came to the determination that the statement was voluntary. On one hand, the trial judge could have found the detectives' testimony credible and Appellant's testimony not credible.[10] On the other hand, the trial judge could have found that Appellant's version of events did not rise to the level of coercion necessary to find a statement involuntary based upon the totality of the circumstances. Therefore, the fact this Court cannot pinpoint the reason the trial judge admitted the testimony reiterates the fact that the coercion issue was not preserved for review.

However, because of this Court's limited standard of review, all this Court needs to decide is whether there was any evidence to support the trial judge's finding that the statement was voluntary. See Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252. Because the detectives testified they never threatened to take Appellant's case to the federal authorities unless Appellant made a

[10] See State v. Smith, 383 S.C. 159, 167-168, 679 S.E.2d 176, 181 (2009) ("Clearly, the trial judge was in the best position to assess the credibility of the witnesses that testified at the hearing on the motion for a new trial."); State v. Cutro, 332 S.C. 100, 117, 504 S.E.2d 324, 332 (1998) ("The trial judge, not this Court, is in the best position to be arbiter of [the witness'] credibility."); State v. Tutton, 354 S.C. 319, 325, 580 S.E.2d 186, 190 (Ct. App. 2003) ("The determination of a witness's credibility must be left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate his or her veracity."); see also State v. Miller, 375 S.C. 370, 387, 652 S.E.2d 444, 453 (Ct. App. 2007) (upholding the trial judge's finding of voluntariness where defendant's attorney claimed the defendant was coerced into making statements by a promise of a lenient sentence; however, three law enforcement officials and an assistant attorney general denied any promise of leniency).

statement, there is evidence in the record to support the trial judge's ruling that the statement was voluntary, and this Court should affirm. See Id.

C. Harmless Error

Even if the trial judge erred in admitting the two statements, any error was harmless. See Bell, 302 S.C. at 27, 393 S.E.2d at 369 (noting exclusion of evidence is reversible only where error and prejudice are shown); see also Haselden, 353 S.C. at 197, 577 S.E.2d at 448-49 (noting admission of improper evidence is harmless where it is merely cumulative to other evidence).

With respect to the June 22nd statement, Appellant did not make an incriminating statement. At most, the statement called into question Appellant's credibility. However, Appellant's credibility was already called into question because of his prior conviction for grand larceny. Thus, Appellant suffered no prejudice from the admission of the June 22nd statement.

With respect to the June 29th statement, Appellant suffered no prejudice because Appellant's testimony was consistent with the statement. Thus, the statement was merely cumulative to his testimony.

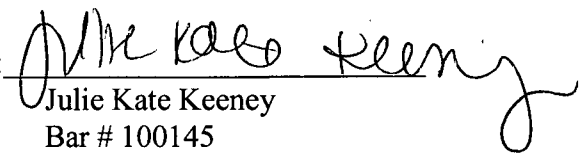
CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JULIE KATE KEENEY
Assistant Attorney General

BY: 
Julie Kate Keeney
Bar # 100145

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

November 8, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Roger M. Young, Circuit Court Judge
Appellate Tracking No: 2011-192370

THE STATE,

Respondent,

vs.

ALONZA DENNIS,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON
Attorney General

JULIE KATE KEENEY
Assistant Attorney General

BY: Julie Kate Keeney

Julie Kate Keeney
Bar # 100145

Office of the Attorney General
Post Office Box 11549

Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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