ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Anderson County

R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MATTHEW FULLBRIGHT,

APPELLANT

Appellate Case No. 2012-207553

FINAL BRIEF OF APPELLANT

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II. The trial court erred in admitting the video-recorded statements by Appellant at his arraignment, in which he responded to specific questions by the brother of the deceased, a non-judicial officer, concerning the crime by asking for forgiveness and essentially admitting his guilt where the danger of unfair prejudice substantially outweighed the probative value.

III. The trial judge erred in admitting Appellant's statement to police where the statement was obtained in violation of Appellant's right pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and Article One, Section Twelve of the South Carolina Constitution due to Appellant's inability to knowingly and voluntarily waive his rights in light of his drug use and medical condition, and the lengthy interrogation employed by the police.

STATEMENT OF THE CASE

An Anderson County grand jury indicted Appellant for two counts of murder (2010-GS-04-00069, -00070) and two counts of armed robbery (2010-GS-04-00071, -00072) on January 19, 2010. R. 701 (Indictments). Appellant was tried before the Honorable R. Lawton McIntosh and a jury during the week of January 23, 2012. Chrissy Adams and Catherine Huey represented the state, and Scott Robinson represented Appellant. R. 1. The jury found Appellant guilty as charged. Tr. 726, lines 5-23. Judge McIntosh sentenced Appellant to life imprisonment on each of the murder charges and to thirty years' imprisonment on each of the armed robbery charges. He ordered the sentences to run consecutively. R. 686, lines 1-6; R. 703 (Sentence sheets).

Appellant filed a timely notice of appeal. This brief follows.

STATEMENT OF FACTS

On October 24, 2009, police officers responded to a call concerning an abandoned vehicle. Officers observed blood inside the car. Eventually, officers determined the car belonged to Homer (Husband) and Joann (Wife) Staton. On October 25, 2009, officers discovered Husband's body. Using Husband's phone records, officers determined his phone had been used to call Irving "Ernie" Ramirez. Officers then interviewed Ramirez. Appellant became the focus of the investigation based upon Ramirez's statements. R. 200, line 2- R. 204, line 5.

On October 28, 2009, officers interviewed Appellant, who allegedly provided officers with numerous inculpatory statements and led officers to the body of Wife. Thereafter, Appellant was charged with two counts of murder and two counts of armed robbery relating to the deaths of Husband and Wife. R. 204, lines 15-24; R. 206, lines 1-4; R. 221, line 5 – R. 225, line 7.

ARGUMENT

I. In violation of Appellant's right against self-incrimination pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and Article One, Section Twelve of the South Carolina Constitution, the trial judge erred in admitting Appellant's video-recorded statements at his arraignment hearing where the statements were obtained through questioning by the brother of the deceased and Appellant neither received advisement of his right against self-incrimination nor voluntarily waived his right.

Relevant facts

On November 4, 2009, Appellant appeared at an arraignment hearing after being charged with conspiracy relating to the murders of Husband and Wife. R. 54, lines 13-16; R. 187, lines 18-21.[1] The arraignment was conducted using video conferencing. Appellant, dressed in prison garb, remained at the jail surrounded by officers while appearing on video before the judge for his arraignment. The presiding judge, Husband's brother, and the victim's advocate were in a separate area. During the arraignment and in the presence of the judge, Husband's brother interrogated Appellant. Specifically, Husband's brother asked Appellant why he killed Husband and Wife in the manner in which the prosecution alleged. Appellant responded that people make certain decisions when they are caught up in a lifestyle, that he did not justify it, and did not expect the family's forgiveness. Appellant then narrated the Biblical story of King David having Bathsheba's husband killed so that he may wed her and of God's forgiveness of David. State's Exhibit #15.[2] Local television

[1] Appellant stood trial for two counts of murder and two counts of armed robbery concerning Husband and Wife. The prosecution did not call the conspiracy count for trial.

[2] State's Exhibit #15 is on file with this Court.

station, WYFF 4, attended the arraignment and videotaped the exchange between Husband's brother and Appellant. The prosecution wanted to admit the video recorded by the local news channel as no official recording of the proceeding existed. R. 151, lines 18-19; R. 152, lines 11-12; State's Exhibit #15.

In pretrial proceedings, Appellant moved to exclude the video. Appellant attacked the admissibility of the video on multiple fronts, including Appellant's rights pursuant to the Fifth Amendment and Sixth Amendment to the United States Constitution. In addition to relying upon Gardner v. Broderick, 392 U.S. 273 (1968) concerning Appellant's rights against self-incrimination, Appellant also argued there was "no evidence that his rights to an attorney were knowingly and voluntarily given." R. 139, line 17 – R. 140, line 24. Regarding a computerized "checklist," Appellant argued it was completed by a judge and did not indicate whether Appellant knowingly and voluntarily waived his rights. R. 141, line 13 – R. 142, line 3.

The prosecution relied upon State v. Kirton, 381 S.C. 7, 671 S.E.2d 107 (Ct. App. 2008) to argue that advisement of Miranda warnings was not required because Appellant was "not subject to custodial interrogation." Additionally, the prosecutor explained she had a "checklist" that showed Appellant "was advised of his rights." The prosecutor failed to make the checklist a part of the record, however. R. 141, lines 1-9.

Judge McIntosh insisted the issue involved Miranda – whether Appellant knowingly and intelligently waived his rights. He ruled the case was controlled by Kirton and "it is a Miranda question." He determined the video was admissible. R. 142, lines 17-24. When discussing the foundation requirements for admitting the video, the judge clarified his ruling regarding the video. He explained he previously ruled at a pretrial that under Kirton, the

scenario did not involve custodial interrogation and therefore, there was no requirement that Appellant be advised of his rights pursuant to Miranda. Additionally, he explained that he overruled Appellant's objection pursuant to the Sixth Amendment - that the state presented no evidence he had waived his right to an attorney and that an attorney was not present for the arraignment. R. 185, lines 3-11.

Later, the judge placed additional comments on the record regarding his ruling on the video evidence. He explained the admission of the video of the arraignment "was resisted by [Appellant] on several grounds which would include, but not be limited to, the Fifth Amendment right to Miranda, and also the Sixth Amendment right to counsel." He previously ruled the arraignment was not a custodial interrogation so that the Fifth Amendment Miranda warning requirement was inapplicable to the circumstances. Turning to the Sixth Amendment claim, he explained the arraignment was a critical juncture at which Appellant had a right to counsel. He further explained that the Sixth Amendment right to counsel is offense-specific "even if the offenses are factually related." Here, Appellant was being arraigned on a new charge stemming from the same underlying facts in the case before the court for adjudication. Judge McIntosh found Appellant "did not invoke his right to counsel concerning this new charge. In fact, [Appellant] executed a waiver of his right to counsel, and therefore, ... the protections afforded by the Sixth Amendment right to counsel were not implicated under the circumstances involved at the arraignment hearing." R. 391, line 20 – R. 393, line 5.

At the conclusion of the state's case, the prosecutor played the arraignment video for the jury. R. 540, lines 3-8. Additionally, the prosecutor played the arraignment video for the jury at the conclusion of her closing argument. She explained to the jury that it had

Appellant's "written words" and "his spoken words" to use to convict him. She left the jury with Appellant's "spoken words." R. 684, lines 4-5.

Discussion

Appellant is unaware of any case in the country in which a murder victim's relative has been permitted to interrogate a criminal defendant in a courtroom setting or of any such interrogation being viewed by the jury. Thus, this is a novel issue before the Court. A historical analysis of the protections afforded by the Fifth Amendment provides context in order to examine Appellant's claim.

The Fifth Amendment to the United States Constitution provides that "No person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This privilege has been extended to the states through the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 6 (1964). The Fifth Amendment proscribes self-incrimination obtained by compulsion of testimony. Michigan v. Tucker, 417 U.S. 433, 440 (1974). The Fifth Amendment privileges a person "not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." Lefkowitz v. Turley, 414 U.S. 70, 77 (1973). "The essence of this basic constitutional principle is 'the requirement that the state which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.'" Estelle v. Smith, 451 U.S. 454, 462 (1981)(quoting Culombe v. Connecticut, 367 U.S. 568, 581-582 (1961)). "[T]he availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure it invites." In re Gault, 387 U.S. 1, 49 (1967). "[T]he Fifth

Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." Miranda v. Arizona, 384 U.S. 436, 467 (1966). The Fifth Amendment guarantees a criminal defendant an unqualified right to choose whether to testify at trial and at sentencing. Harris v. New York, 401 U.S. 222, 225 (1971).

The Fifth Amendment privilege is violated by officially coerced self-accusation. United States v. Washington, 431 U.S. 181, 187 (1977). Thus, the Fifth Amendment's protections extend to statements or acts that are (1) compelled; (2) testimonial; and (3) incriminating of the person in a criminal proceeding. United States v. Hubbell, 530 U.S. 27, 34-37 (2000).

Without question, Appellant's statements made during the arraignment hearing were self-incriminating and testimonial. In Doe v. United States, 487 U.S. 201, 210 n. 9 (1988), the Supreme Court held that a testimonial "communication must itself, explicitly or implicitly, relate a factual assertion or disclose information" that expresses "the contents of an individual's mind." Testimony is self-incriminating "if reasonable cause exists to believe that the testimony would either support a conviction or provide a link in the chain of evidence leading to a conviction." Hoffman v. United States, 341 U.S. 479, 486 (1968). The statements must pose a "substantial and 'real,' and not merely trifling or imaginary hazard" of criminal prosecution. Marchetti v. United States, 390 U.S. 39, 53 (1968). Appellant's requesting of forgiveness, narrating one of the oldest stories of forgiveness for the ultimate sin of murder, and explaining the decisions made from living a drug "lifestyle," when asked by Husband's brother why Husband and Wife were killed were clearly

communications, which, explicitly or implicitly, related information that expressed the contents of Appellant's mind and would support either Appellant's conviction or provide a link in the chain of evidence leading to Appellant's conviction. Judge McIntosh found the statements were essentially admissions. R. 105, lines 1-13("the conversation purports to be what would sound like an admission of the allegations").

Appellant's statements at the arraignment were compelled. The test is whether, considering the totality of the circumstances, the free will of the witness was overborne. Rogers v. Richmond, 365 U.S. 534, 544 (1961). Thus, courts look at the circumstances surrounding the incriminating statements to determine whether the environment was such as would compel a defendant to give self-incriminating testimony. While Appellant is unaware of any case holding that statements made by a criminal defendant when the defendant was interrogated by the brother of the deceased in the presence of the court during an arraignment, the history of the scope of the protections afforded under the Fifth Amendment require application of its protections to the instant matter.

The Supreme Court held that the admission of incriminating statements made during the course of a court-ordered psychiatric examination violated the Fifth Amendment because the statements were not "given freely and voluntarily without any compelling influences." Estelle, 451 U.S. at 468-469. In order for incriminating statements obtained during a psychiatric examination to be admissible at trial, the prosecution must show the government apprised the defendant of his right to remain silent and that his statement could be used against him and the defendant knowingly waived that right. Id. "The considerations calling for the accused to be warned prior to custodial interrogation apply with no less force to the pretrial psychiatric examination." Id. at 467. The questioner –

whether psychiatrist, police officer, government informant, or prosecutor - was immaterial to the Court's decision. Id. When the psychiatrist went beyond reporting on the issuance of competence and testified for the prosecution as to the crucial issue of future dangerousness, "his role changed and became essentially like that of an agent of the state recounting unwarned statements made in a post-arrest custodial setting." Id.

However, when the defendant was advised of his right to remain silent during a court-ordered psychiatric evaluation, the Fourth Circuit found no violation of the Fifth Amendment when the prosecutor introduced psychiatric testimony concerning the defendant's future dangerousness. Woomer v. Aiken, 856 F.2d 677, 681-682 (4th Cir. 1988); see also Savino v. Murray, 82 F.3d 593, 604-605 (4th Cir. 1996)(finding no Fifth Amendment violation when government's psychiatric evaluation was admitted because the defendant requested the evaluation and received warnings from the government's psychiatrist and his lawyer about potential use of information revealed).

Numerous federal circuits have found various situations analogous to the one presented here as creating environments in which the defendant was compelled to give testimony against himself. The First Circuit found a defendant was compelled to incriminate himself by threat of job termination if he did not answer investigators' questions. As a result, the defendant's Fifth Amendment right to remain silent was violated. Sher v. U.S. Dep't of Veterans Affairs, 488 F.3d 489, 502 (1st Cir. 2007). The Second Circuit found a defendant's refusal to cooperate with the government and the resulting five-year sentence increase was a Fifth Amendment violation because the penalty was for his silence. United States v. Rivera, 201 F.3d 99, 101-102 (2nd Cir. 1999). In United States v. Pavelko, 992 F.2d 32, 34 (3rd Cir. 1993), the Court found a Fifth Amendment violation

where the prosecutor used a defendant's financial affidavit, prepared to obtain court-appointed counsel, against the defendant at trial because preparation of the affidavit created a conflict between the defendant's Fifth and Sixth amendment rights. See also United States v. Aguirre, 605 F.3d 351, 358 (6th Cir. 2010); United States v. Hardwell, 80 F.3d 1471, 1484 (10th Cir. 1996)(finding violation of the Fifth Amendment when financial documents defendant was required to prepare to receive court- appointed counsel were admitted at trial).

In United States v. Kennedy, 372 F.3d 686, 691-692 (4th Cir. 2004), the Fourth Circuit found a violation of the Fifth Amendment when the defendant was compelled to provide grand jury testimony relating to a drug conviction because the government misadvised him that refusal to answer was subject to perjury charges though conviction under appeal.

In Minnesota v. Murphy, 465 U.S. 420, 427 (1984), the Supreme Court held that answering questions before a probation officer did not convert otherwise voluntary statements into compelled ones. However, if the questions required answers that would incriminate the probationer in pending or later criminal proceedings where failure to answer would result in revocation of probation, then the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution. Id. at 435. Noteworthy, the probationer was not in custody or under arrest at the time. Relying upon Murphy, this Court held that a probationer's statements to his probation agent that he had been using cocaine the night for an automobile accident were inadmissible where there was no indication the probationer had been warned that his statements may be used against him in a pending matter unrelated to his probation. This Court was persuaded by the fact that the probationer

was in jail at the time of the agent's interrogation resulting in the creation of an environment in which the probationer felt compelled to answer. State v. Hook, 348 S.C. 401, 412-414, 559 S.E.2d 856, 861-862 (Ct. App. 2002).

In State v. Kirton, 381 S.C. 7, 671 S.E.2d 107 (Ct. App. 2008), this Court examined the circumstances surrounding Kirton's statements to determine the statements were not compelled. At his bond hearing, Kirton was advised of his Miranda rights, including that he had the right to remain silent and that anything he said could be used against him. The magistrate then asked Kirton if he would like to address the court. When Kirton responded that he needed help, the magistrate inquired what kind of help, to which Kirton responded "I need mental help." Id. at 22, 671 S.E.2d at 114. This Court held Kirton was not subjected to custodial interrogation. Although he was in custody, "[t]here [was] no evidence that he was subjected to questioning by law enforcement or any other interrogation such that the requirement to provide Miranda warnings attached." 381 S.C. at 39, 671 S.E.2d at 123.

While finding that Kirton was not questioned by law enforcement or anyone associated with law enforcement, this Court emphasized that Kirton was asked a single question by a magistrate presiding over his bond hearing, which related solely to the setting of bond and was not intended to illicit an incriminating response. Id. at 41, 671 S.E.2d at 124. Thus, this Court concluded there was no requirement that Kirton be advised of his Miranda rights and no requirement that a waiver of those rights be obtained. Id.[3] This Court concluded that a bond hearing was not an inherently coercive environment requiring the presiding judge to advise the defendant of his rights. This Court examined the specific

[3] This Court's alternative holding was that Kirton had been advised of his rights and voluntarily waived those rights. Kirton, 381 S.C. at 42, 671 S.E.2d at 125.

circumstances surrounding Kirton's statements and determined the single question by the magistrate unrelated to the crime was not of the kind that would make a defendant feel compelled to give incriminating evidence. Thus, the magistrate had no duty to warn Kirton of his rights or obtain a waiver of those rights.

Perhaps the most widely known area of application of the Fifth Amendment is in the context of custodial interrogations. Due to the concerns about police coercion resulting in compulsion of self-incriminating statements, the Miranda Court determined custodial interrogations were inherently coercive. As a result, the Court required a person subjected to custodial interrogations be advised of his rights prior to the interrogation.

> The Miranda decision is meant to preserve the privilege against self-incrimination during interrogation of a suspect in a police dominated atmosphere. The police dominated atmosphere generates "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."

State v. Lynch, 375 S.C. 628, 635, 654 S.E.2d 292, 296 (Ct. App. 2007)(quoting Illinois v. Perkins, 496 U.S. 292, 296 (1990)). "[T]he concern of the Court in Miranda was that the 'interrogation environment' created by the interplay of interrogation and custody would 'subjugate the individual to the will of his examiner' and there by undermine the privilege against compulsory self-incrimination." Rhode Island v. Innis, 446 U.S. 291, 299 (1980). However, custodial interrogations are only one area in which the Fifth Amendment protects a person against self-incrimination, as demonstrated. The question is whether the accused was deprived of his free choice to admit, to deny, or to refuse to answer. Lisenba v. California, 314 U.S. 219, 241 (1941).

The privilege may be waived in appropriate circumstances if the waiver is knowingly and voluntarily made. Gardner, 392 U.S. at 276. Gardner, a police officer, was

summoned to testify before a grand jury in an investigation of alleged criminal conduct. When he refused to answer and refused to waive his constitutional right against self-incrimination, he was fired. The Supreme Court found he was dismissed for failing to relinquish the protections of the privilege against self-incrimination where it was clear that Gardner's testimony was demanded before the grand jury in part so that it might be used to prosecute him. "[T]he mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment." Id. at 279.

In Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation of the City of New York, 392 U.S. 280, 283 (1968), the Supreme Court held employees' rights were violated when the city fired them after they refused to waive their constitutional right against self-incrimination. The Court held the employees were "entitled to remain silent because it was clear that New York was seeking, not merely an accounting of their use or abuse of their public trust, but testimony from their own lips which, despite the constitutional prohibition, could be used to prosecution them criminally." Id. at 284.

The South Carolina Supreme Court noted "[t]he decision to testify or not is a perilous one." Due to the significant constitutional rights implicated, "[a] defendant's decision to testify or not must be made with knowledge of the consequences of either choice." Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000)(citing State v. Orr, 304 S.C. 185, 403 S.E.2d 623 (1991)). Although the Court declined to require an on-the-record waiver of a defendant's right against compelled testimony, the Court found trial counsel provided constitutionally deficient assistance by failing to advise the defendant of

his Fifth Amendment privilege and the consequences of waiving that privilege. Id. at 595, 533 S.E.2d at 310.

Thus, the question presented in Appellant's case is whether the video recorded statements were the product of compulsion, and if so, whether Appellant waived his right not to testify. Appellant's arraignment presented all of the hallmarks of a coercive environment. As an initial matter, Appellant was required to be present for his arraignment. Our law provides:

> The arraignment of a prisoner, against whom a true bill for an offense has been found by the grand jury is for the purpose of obtaining from him his answer to the indictment. It consists of reading the indictment to him, and requiring him to say in open court whether or not he is guilty of what is therein charged against him.

State v. Stewart, 26 S.C. 125, 1 S.E. 468 (1887).[4] Our law also provides for the attendance of victims at judicial proceedings. In South Carolina, victims of crime have the right to be present during the criminal proceedings. S.C. Code Ann. § 16-3-1550 (I). The protections afforded victims provides that the circuit court "must hear or review any victim impact statement, whether written or oral, before sentencing." However, the victim impact statement is not admissible as evidence in any trial. S.C. Code Ann. § 16-3-1550(F). Victim impact statements may include "any ... information the victim believes to be important and pertinent." S.C. Code Ann. § 16-3-1545(A)(6). The Victims' Bill of Rights provides for victims to "be heard at any proceeding involving a post-arrest release decision, a plea, or sentencing." S.C. Const. Art. I, § 24(A)(5). Although statutory law provides for victims to have "a voice at critical stages of the criminal justice proceedings," neither

[4] It is unclear why Appellant appeared before a magistrate judge for an arraignment; however, the parties repeatedly referred to the appearance as an arraignment.

statutory nor case law provide for victims to interrogate defendants. Ex parte Littlefield, 343 S.C. 212, 217, 540 S.E.2d 81, 84 (2000).

Appellant remained at the jail during his arraignment. He was in prison garb and shackled throughout the entire hearing. He was surrounded by officers as well. The presiding judge and other participants were in a separate area, which Appellant accessed only through video conferencing. Perhaps the most disturbing aspect of the video was that the person interrogating Appellant was Husband's brother, who was very emotional and deserving of the utmost sympathy. Although Husband's brother had a right to attend the hearing, his questioning of Appellant regarding the crime and attempting to elicit incriminating statements went beyond anything permissible in the Victims' Bill of Rights or South Carolina law. See S.C. Const. Art. I, § 24. In fact, America's unique criminal justice system relies upon objective rules and neutral arbiters to resolve conflicts. Victims must be "treated with dignity, respect, courtesy, and sensitivity," but victims must not act as prosecutors. Ex parte Littlefield, 343 S.C. at 218, 540 S.E.2d at 84. "The criminal justice system gives prosecutors, as opposed to victims, broad discretion in deciding which cases to try because prosecutors are less likely to be prejudiced by personal and emotional motives." Id. Certainly, "prosecutors have some duties to crime victims," but "'their prosecutorial discretion is not contracted or limited by victims' rights laws.'" Id. at 219, 540 S.E.2d at 84 (quoting Reed v. Becka, 333 S.C. 676, 676, 511 S.E.2d 396, 400 (Ct. App. 1999)).

The specific nature of Appellant's arraignment hearing required the presiding judge warn him of his right against self-incrimination and obtain a waiver of those rights prior to any questioning of Appellant. In light of the failure to warn Appellant and obtain a waiver,

the admission of those statements during the trial violated Appellant's right against self-incrimination.

II. The trial court erred in admitting the video-recorded statements by Appellant at his arraignment, in which he responded to specific questions by the deceased's brother, a non-judicial officer, concerning the crime by asking for forgiveness and essentially admitting his guilt where the danger of unfair prejudice substantially outweighed the probative value.

Relevant facts

Appellant incorporates the relevant facts and case law described in Issue I, supra. In addition to the arguments presented by Appellant concerning the Fifth and Sixth Amendments as bases for excluding the video recording of the arraignment, Appellant argued the video should be excluded on the basis that the danger of unfair prejudice outweighed the probative effect of the video. Judge McIntosh overruled the objection. R. 142, line 25 – R. 143, line 2. When the parties revisited the admissibility issue, Appellant again argued the video was inadmissible due to the danger of unfair prejudice. R. 162, line 24 – R. 163, line 1. Appellant admitted the evidence was relevant, but maintained the prejudicial effect outweighed any probative value. R. 163, lines 5-14; R. 163, line 22 – R. 164, line 1.

Judge McIntosh found the video was relevant "because the conversation purports to be what would sound like an admission of the allegations." Pursuant to Rule 403, SCRE, he held the prejudice did not "substantially outweigh[]" the probative value, but he agreed to hear additional argument. R. 165, lines 1-13.

When the parties returned to the subject, Appellant agreed the evidence was material, but continued to argue the danger of unfair prejudice outweighed the probative value. He remarked upon the fact that the prosecution had no physical evidence connected Appellant to the crimes. R. 189, lines 13-25. Judge McIntosh held that "unfair prejudice …

means undue tendency to suggest a decision on an improper basis commonly, though not necessarily, an emotional one." He held the evidence was "not such to suggest unfair prejudice as implicated by that Rule in the sense that it does not suggest a decision on an improper basis. It is simply a video of the statements made by the defendant." Thus, he found the video admissible. R. 194, lines 7-18.

Discussion.

Rule 403 of the South Carolina Rules of Evidence provides that even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." This Court's analysis of Rule 403 in State v. Collins, 398 S.C. 197, 727 S.E.2d 751 (Ct. App. 2012) provides a four-step guide for analyzing whether the danger of unfair prejudice resulting from proffered evidence outweighs the probative value. The first step requires a determination of the probative value of the evidence. The second requires an evaluation of the danger of unfair prejudice resulting from the introduction of the evidence. Third, a court must balance the probative value and unfair prejudice. And finally, the appellate court reviews the decision of the trial court for an abuse of discretion. Id.

The video statement provided probative evidence of the crimes with which Appellant was charged. As the judge indicated, in the video, Appellant essentially admits his guilt to the murders. Thus, the video statements were probative as to who committed the crimes. However, the probative value was low as Appellant's statements addressed his remorse and potential motivation, which were not elements of the charges requiring proof by the state.

Admission of the video into evidence presented a high level of danger of unfair prejudice. Evidence is unfairly prejudicial when it has a "'tendency to suggest a decision on

an improper basis, commonly, though not necessarily, an emotional one.'" State v. Martucci, 380 S.C. 232, 250, 669 S.E.2d 598, 607 (Ct. App. 2008); see also State v. Stokes, 381 S.C. 390, 673 S.E.2d 434 (2009); State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001); State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000); State v. Franklin, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995). The video presented evidence encouraging, if not demanding, the jury base its decision on emotion. Husband's brother appeared in the video comparing Husband to Appellant in size, age, and health. Husband's brother expressed dismay and extreme loss at the passing of Husband and Wife. Victim impact testimony of this nature is not admissible during the guilt phase of a criminal trial because it encourages the jury to base its decision on emotion, rather than the evidence.

Additionally, Appellant appeared in prison garb in the video. The Supreme Court held the prosecution may not compel a defendant to wear jail clothing during his trial. Estelle, 425 US at 512. The Court explained the potential negative effects of presenting an accused before the jury in prison attire were obvious in light of the almost universal holdings throughout the country that an accused should not be compelled to go to trial in jail clothing because of the possible impairment of the presumption of innocence. Id. at 504. The Court held a defendant appearing in prison attire serves as a "constant reminder of the accused's condition implicit in such distinctive, identifiable attire [that] may affect a juror's judgment." Id. at 504-505. According to the Court, "[t]he defendant's clothing is so likely to be a continuing influence throughout the trial that ... an unacceptable risk is presented of impermissible factors coming into play." Id. at 505. Compelling a defendant to wear jail clothing furthers no essential state policy. Id. In addition, typically defendants wearing prison clothing are the poor because those who can post bail are not subjected to the

condition, which offends the concept of equal justice embodied in the criminal justice system. Id. at 505-506.

The South Carolina Supreme Court confronted this issue similar in Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001). The defendant wore a prison jumpsuit, shackles, and a prison identification bracelet during his trial. Id. at 334, 548 S.E.2d at 863. The only issue before the Court in Humbert was whether trial counsel rendered deficient performance in permitting the defendant to proceed to trial in the prison jumpsuit because the issues concerning shackling and the identification bracelet were not preserved for review. Id. at 337, 548 S.E.2d at 865. The Court determined trial counsel was deficient in allowing the defendant to proceed to trial dressed in prison clothing. Id. The Court explained "it [is] generally improper for a defendant to appear for a jury trial dressed in readily identifiable prison clothing." Id. In a footnote, the Court explained that a defendant's appearance at trial dressed in jail clothing is not automatically reversible error because there may be situations where counsel determines the jail attire benefits the defense as a matter of trial strategy. Id. at 338 n.4, 548 S.E.2d at 865 n.4. In Humbert, this Court went on to hold the defendant was not prejudiced by trial counsel's deficient performance concerning the prison clothing based upon the "overwhelming evidence" against him. Id. at 338, 548 S.E.2d at 865-866.

Here, the jury observed Appellant in a prison jumpsuit and surrounded by police officers in the video. Due to the video conferencing aspect of the arraignment, Appellant was not even permitted in the same room with the judge and other participants. This reinforced the appearance that Appellant was dangerous and must be kept far away from the public. Appellant's appearance was in sharp contrast to his interrogator, Husband's brother,

who pleaded for understanding over the loss of his family. The obvious inference drawn by the jury was Appellant was guilty and was dangerous to the public at large in light of the fact that Appellant appeared in prison garb in the video, which was admitted into evidence.

Balancing the probative value and the danger of unfair prejudice in this case clearly demonstrated that the unfair prejudice substantially outweighed the probative value. As expressed, the probative value was low in light of the state's burden of proof and the elements it was required to prove for murder and armed robbery. The danger of unfair prejudice was extremely high due to the statements made by Appellant and Husband's brother, the nature of the video conferencing placing Appellant separate from others, and Appellant's appearance in a prison garb.

Finally, Judge McIntosh abused his discretion in determining the danger of unfair prejudice did not substantially outweigh the probative value. According to Judge McIntosh, "[i]t [was] simply a video of the statements made by [Appellant]." R. 194, lines 7-18. One look at the video demonstrates the judge was well wide of the mark. The judge looked at the video as one accustomed to seeing individuals dressed in prison jumpsuits, accustomed to hearing the emotional pleas of victims' family members, accustomed to police officers providing generalized courtroom security, and with the knowledge that the video conferencing was for judicial efficiency and economy. He did not observe Appellant in the video as a juror would – a dangerous man dressed in prison clothing, surrounded by police, evoking fear and loathing, and not even permitted in the same room as other members of society. He did not observe Husband's brother in the video as a juror would - a grief-stricken brother confused at the loss of his loved ones and crying out for justice and answers.

III. The trial judge erred in admitting Appellant's statement to police where the statement was obtained in violation of Appellant's right pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and Article One, Section Twelve of the South Carolina Constitution due to Appellant's inability to knowingly and voluntarily waive his rights in light of his drug use and medical condition, and the lengthy interrogation employed by the police.

Relevant facts.

On November 17, 2011, Judge McIntosh convened a hearing concerning the prosecution's motion to present evidence of several statements allegedly given by Appellant to police. Nov. Tr. 1. Chris Beusee and Robert Gebing, employees of the Anderson County Sheriff's Office, testified that they advised Appellant of his rights pursuant to Miranda v. Arizona, 384 U.S. 436, 478-479 (1966) at 6:35 p.m. in a small interview room at the Sheriff's Office. Appellant was in handcuffs during the entirety of the interview. Beusee and Gebing claimed Appellant could have used the bathroom and obtained food if he wanted. The officers insisted that Appellant had several smoke breaks during the interview. R. 6, line 3 – R. 9, line 1; R. 38, line 5 – R. 39, line 14; R. 687 (State's Exhibit #1). Beusse asked Appellant for biographical information and completed the top portion. He then asked Appellant to read the first two lines and initial those on the advisement form. Then, Beusse read the remainder of the form to Appellant. Appellant signed the form. R. 9, line 2 – R. 10, line 10; R. 39, line 18 – R. 40, line 12; R. 687 (State's Exhibit #1). Thereafter, Beusse read the waiver of rights portion of the form to Appellant. Appellant signed the waiver of rights portion of the form as well. R. 11, line 2 – R. 12, line 12; R. 40, lines 223-25; R. 687 (State's Exhibit #1). Appellant did not appear to be under the influence of drugs or alcohol,

and officers made no threats or promises and officers did not act to intimidate. Appellant was emotional throughout the interview. R. 10, lines 14-24; R. 39, lines 15-17; R. 40, lines 16-20; R. 42, lines 3-11.

Beusse showed Appellant photographs of Husband and Wife, explaining he was investigating Husband's death and Wife's disappearance. He and Gebing then interviewed Appellant for "the next several hours." Beusse asked questions while Gebing took notes. R. 12, line 13 – R. 13, line 3. According to Beusse, Appellant

> began to come to a breaking point in the interview. He was looking down at the floor, wouldn't make eye contact, started taking deep breaths. Then he started to act as if he was going to throw up and proceeded to fall out of the chair onto the floor as if he was passed out.

R. 13, lines 16-25; see also R. 42, lines 12-13. Beusse notified EMS, who responded. Beusse claimed Appellant did not require medical treatment, however. R. 14, lines 7-8. Gebing attempted to evaluate Appellant, including calling his name, shaking him, opening his eyes, and administering a "sternum rub." R. 42, line 15 – R. 43, line 12. After EMS attended to Appellant, the Sheriff knelt down to Appellant, who remained lying on the floor, and told Appellant it was time to tell the police where Wife was. R. 14, lines 14-25; R. 44, lines 8-15.

Thereafter, Beusse and Gebing placed Appellant in a police car. Appellant allegedly gave them directions to locate Wife's body. During the drive, Appellant sobbed and indicated he did not want to talk to the police. R. 15, lines 1-21; R. 44, line 19 – R. 45, line 4. Officers searched the area indicated by Appellant and found Wife's body. Beusse, Gebing, and Appellant returned to the Sheriff's Office, stopping by Taco Bell to pick up dinner for the three. R. 16, lines 8-16; R. 45, line 23 – R. 46, line 10. After eating, officers began working on a written statement around 12:30 a.m. or 1 a.m. while sitting in Beusse's

office. R. 17, lines 1-21; R. 46, lines 11-15. Beusse typed the statement as Appellant relayed it to him. R. 17, line 22 – R. 18, line 2.

Beusse read the statement to Appellant, who acknowledged it was his statement, but complained that it was not in the correct order. Appellant refused to sign the statement because the order was not correct and he was tired. R. 18, line 3 – R. 19, line 16; R. 41, line 19 – R. 42, line 2; R. 47, lines 8-15. Thereafter, Appellant was booked at the jail at 4:35 a.m. R. 18, line 21 – R. 19, line 2. This initial interview lasted over ten hours. R. 20, line 1.

The following afternoon, Beusse and Gebing met with Appellant again. Beusse again advised Appellant of his rights at 2:20 p.m. on October 29, 2009, and Appellant waived those rights. Beusse, Gebing, and Danny Barton interviewed Appellant in an old storage room, which was converted into an interview room, at the detention center. R. 21, line 9 – R. 21, line 12; R. 23, line 19; R. 48, line 21 – R. 50, line 23; R. 51, lines 7-9; R. 696 (State's Exhibit #3). Again, officers testified that Appellant did not appear to be under the influence of drugs or alcohol and appeared more rested than the night before. Beusse was unaware of Appellant receiving any medication. Beusse testified no threats or promises were made to Appellant. R. 22, lines 13-24. Gebing typed the statement as Appellant narrated. R. 23, lines 20-24; R. 51, lines 10-23. After Gebing completed the statement, Appellant indicated it was his statement and placed his initials at the beginning and the end and by signing at the end. R. 24, lines 3-7; R. 52, lines 1-5; R. 697 (State's Exhibit #4).

Additionally, officers reviewed the statement from the previous night with Appellant. Appellant agreed that the first five pages were accurate and he initialed and signed those pages. R. 24, lines 10-22; R. 52, line 5 – R. 53, line 16.

Beusse denied that Appellant's initials on the advisement of rights form only as to the first two rights indicated that Appellant requested representation by counsel. R. 25, line 24 – R. 26, line 6. On cross-examination Beusse admitted that the signatures on the advisory of rights and waiver of rights forms and statements appeared different. R. 32, line 17 – R. 34, line 9.

William Henderson, an employee with Medshore Ambulance Service testified that he responded to the sheriff's office on October 29, 2009 in reference to a "nonresponsive patient." R. 56, lines 14-21. He arrived at 9:45 p.m. R. 57, lines 3-5. He observed Appellant, who was awake and alert, lying supine on the floor of the interview room. R, lines 8-13. Appellant complained of "right-sided abdominal discomfort." Henderson observed an abrasion to Appellant's chest and both of his hands. R. 58, lines 13-20. Henderson stated the chest abrasion may have been caused by a "sternum rub." R. 58, line 21 – R. 59, line 2. Henderson testified Appellant exhibited none of the usual signs associated with intoxication; however, Appellant had ingested Oxycontin, Lortab, and Darvocet within the last seventy-two hours. R. 62, lines 8-14; R. 63, line 25 – R. 64, line 3. Although Henderson determined Appellant did not require medical attention, he admitted that EMS remained at the scene for over forty minutes, when the normal medical contact should last no longer than twenty-five minutes. R. 64, lines 6-12. Henderson claimed Appellant refused to be transported for additional medical treatment. R. 64, lines 13-23. On cross-examination, Henderson admitted that the drug combination described by Appellant would result in a "drunken stupor." R. 68, lines 4-12.

Appellant's father, Marshall Fullbright, testified that he could recognize Appellant's handwriting as to his signature and initials. R. 95, line 11 – R. 96, line 2. He agreed that the

signature and initials appearing on State's Exhibit #1 were written by Appellant. However, he testified the initials and signatures on State's Exhibits #2, #3, and #4 were not written by Appellant. R. 96, line 3 – R. 97, line 20.

At the conclusion of the pretrial hearing, Judge McIntosh found the statements allegedly given on the night of October 28th and into the morning of October 29th and later during the afternoon of October 29th were admissible. Appellant was obviously in police custody and officers engaged in interrogating him; therefore, the law required Appellant be advised of his rights prior to questioning. Judge McIntosh found the officers advised Appellant correctly of his rights on the night of his initial interrogation and on the second day of the interrogation. He further found Appellant knowingly, intelligently, freely, and voluntarily waived his rights under Miranda, supra. Concerning the circumstances of the interrogations, Judge McIntosh found there was no police coercion despite the "fairly lengthy initial interrogation." He noted Appellant "was given multiple smoke breaks," "allowed to use the restroom," and provided with dinner. The only comfort denied Appellant, according to Judge McIntosh, was that he was handcuffed in the front of his body; which the judge found was not unduly coercive under the circumstances. R. 102, lines 13-21. Judge McIntosh considered "the fact that the interrogation did take place at the Sheriff's office," "the continuity of the interrogation," and the "significant passage of time between the first interrogation and the second interrogation on the next day," including the change of location between the first statement and the second statement. R. 102, line 22 – R. 103, line 5; R. 104, lines 17-21.

He considered Appellant's age, which was either twenty-nine or thirty, so that "he should have been mature." During the interview, Appellant "fell out on the floor ...

complaining of right-side abdominal pain and right-sided pain." He was checked by a police officer with medical training and by emergency medical personnel who were called to examine Appellant. Judge McIntosh considered that EMS found Appellant was "okay" and refused medical treatment. During the examination, Appellant "appeared to be alert, awake and oriented and not under the influence of any medications or drugs." The judge acknowledged the testimony that Appellant informed EMS that he had taken prescription pain killers within the previous seventy-two hours; however, the judge was persuaded by the EMS technician's testimony that Appellant did not believe him to be under the influence. Noteworthy, Judge McIntosh concluded Appellant's drug use and medical condition went to the weight of the evidence and not to its admissibility. R. 103, line 6 – R. 104, line 6.

Judge McIntosh found no police misrepresentations during the interrogations, no threats of violence, no intimidation, and no promises of leniency. R. 104, lines 12-17.

Judge McIntosh determined the dissimilarities among the signatures and initials on the advisement of rights forms, waiver of rights forms, and statements were not factors for consideration as to admissibility; rather, the obvious and clear dissimilarities among the various signatures and initials were to be considered by the jury. R. 104, line 22 – R. 105, line 3.

Thus, Judge McIntosh concluded state's proposed exhibits #1-4 were admissible as long as the prosecution laid the proper foundation. R. 101, line 2 – R. 102, line 12; R. 105, lines 3-5; R.687-697 (State's Exhibits #1-4).

Immediately prior to the trial, Judge McIntosh allowed the prosecution to present additional evidence concerning statements allegedly made by Appellant. Danny Barton, an employee with the Anderson County Sherriff's office, testified that he assisted Beusse with

the interview of Appellant on October 29, 2009. R. 112, lines 10-18. Barton claimed he witnessed Appellant sign the advisory of rights from marked as State's Exhibit #3. R. 113, lines 2-23. Barton additionally testified that Appellant drew a picture of a hammer at Beusse's direction as part of his statement. He claimed he witnessed Appellant initial the hammer sketch. R. 114, line 1 – R. 115, line 18; R. 699 (State's Exhibit #5).

Barton and Beusse then escorted Appellant to several locations in Anderson County looking for evidence to connect Appellant to the crimes, but found none. R. 117, line 10 – R. 119, line 7. The following day, October 30, 2009, Barton and John Williams escorted Appellant looking for evidence. Barton testified that he advised Appellant of his rights, and Appellant waived those rights. R. 119, lines 18 – R. 123, line 7; R. 700 (State's Exhibit #6). They were unable to find any evidence in the areas indicated by Appellant. R. 123, line 21 – R. 126, line 18.

Judge McIntosh found the hammer sketch admissible as the result of a free and voluntary statement given by Appellant after waiving his rights. R. 116, lines 11-17. Additionally, Judge McIntosh found the advisory of rights and waiver conducted by Barton admissible. R. 123, line 14. He went on to reiterate his ruling from pre-trial hearing. He added that Barton's testimony regarding Appellant directing him where to go to find evidence was admissible as it was the product of Appellant freely and voluntarily waiving his rights. R. 138, line 12 – R. 139, line 7.

Discussion.

The Fifth Amendment's privilege against self-incrimination provides an individual who has been accused of a crime the right to consult with an attorney and to have an

attorney present during custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 478-479 (1966).

In Jackson v. Denno, 378 U.S. 368, 376 (1964), the United States Supreme Court held that "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." To introduce a statement produced during custodial interrogation, the prosecution must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda. See State v. Pittman, 373 S.C. 527, 656, 647 S.E.2d 144, 164 (2007); 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).

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); see also Withrow v. Williams, 507 U.S. 680, 693 (1993).

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

Id. at 513-514, 702 S.E.2d at 401 (internal citations omitted). The test requires consideration of "'totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation.'" Dickerson v. United States, 530 U.S. 428, 434 (2000)(citations omitted). Consideration of a person's mental capacity is an important factor in determining whether a statement to police was voluntary. State v. Callahan, 263 S.C. 35, 41, 208 S.E.2d 284, 286 (1974)(citing State v. Cain, 246 S.C. 536, 144 S.E.2d 905 (1965)).

An examination of the totality of the circumstances demonstrates Appellant's alleged waiver was unknowing and involuntary. Appellant admitted to taking dangerous narcotic medications, which were not prescribed for him, within seventy-two hours of the interrogation. Appellant suffered a medical emergency during the interrogation requiring the services of emergency medical personnel. He complained of severe abdominal pain. As admitted by the officers, the initial interrogation continued for over ten hours. The totality of the circumstances required exclusion of Appellant's statements to police officers.

CONCLUSION

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

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of March, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Anderson County

R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MATTHEW FULLBRIGHT,

APPELLANT

Appellate Case No. 2012-207553

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Anthony Mabry, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 25th day of March, 2014.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 25th day of March, 2014.

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