STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal From Oconee County
The Honorable Alexander S. Macaulay, Circuit Court Judge
Appellate Case No. 2013-002328

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THE STATE,

Respondent,

v.

TIMOTHY R. WIRTZ,

Appellant.

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# FINAL BRIEF OF RESPONDENT

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## STATEMENT OF ISSUES ON APPEAL

I. There is ample evidence in the record to support the circuit court's determination Appellant freely and voluntarily gave two written statements regarding the burglary.

II. The circuit court properly determined the probative value of the audio recording of Appellant's telephone calls attempting to recover some of the stolen property outweighed any prejudice from drug related statements Appellant made during the calls.

## STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

## STATEMENT OF THE FACTS

On June 11, 2012, the Oconee County Grand Jury indicted Appellant Timothy R. Wirtz on one count of first degree burglary, one count of grand larceny, one count of kidnapping, one count of armed robbery, and one count of possession of a weapon during a crime of violence, arising from a home invasion and burglary on February 11, 2012. The case was called for a jury trial on October 14, 2013, before the Honorable Alexander Macauley, Circuit Court Judge.

Prior to trial, Appellant moved to exclude two written statements he gave to law enforcement the night he was arrested, and audio recordings of phone calls he made that night. The circuit court conducted a Jackson v. Denno[1] hearing to determine the voluntariness of Appellant's written statements.

Investigator David McMahan of the Oconee County Sheriff's Office testified he was the lead investigator assigned to work a burglary on Ivy Creek Road on February 11, 2012. The victim reported someone entered his home, tied him up, held him at gunpoint, and stole numerous firearms and personal items, including his credit cards. (October 14/15, 2013 Hearing Transcript [HT], pp. 48-49; Record on Appeal [R.], pp. 5-6).

Approximately thirty to forty-five minutes after the burglary, someone used one of the victim's credit cards at a local convenience store. Inv. McMahan obtained the video surveillance tape from the convenience store, and identified Appellant as the person using the victim's credit card. Other sources and information also implicated Appellant in the burglary. (HT, pp. 50-52; R., pp. 7-9).

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[1] Jackson v. Denno, 378 U.S. 368 (1964)

On February 14, 2012, Inv. McMahan met Appellant in a church parking lot around 5:00 p.m. He went over Appellant's Miranda[2] rights while they sat in the back seat of Inv. McMahan's vehicle, and Appellant waived those rights. (State's Exhibit 1; R., p. 492). Inv. McMahan testified Appellant looked "tired," but he was coherent, and did not appear to be impaired in any way. (HT, pp. 52-58; R., pp. 9-15).

Appellant agreed to go to the Sheriff's Office to talk about the burglary. After they arrived there, Inv. McMahan told Appellant about the convenience store video, and Appellant eventually made statements indicating he was involved in the burglary. At that time, Inv. McMahan called another investigator, Lieutenant Gentry Hawk, into the room to witness the discussion. (HT, pp. 58-60; R., pp. 15-17).

Appellant agreed to give a written statement about the burglary. Before Appellant wrote the statement, Inv. McMahan went over the Miranda rights again, which Appellant again waived. The statement form also indicated the statement was "**voluntary**," and made "**without promise of hope or reward, without fear or threat of physical harm, without coercion, favor or offer of favor, without leniency or offer of leniency, by any persons whomsoever.**" (State's Exhibit 2; R., pp. 493-494) (emphasis added).

Appellant then wrote out a statement admitting his involvement in the planning and execution of the burglary. He also admitted using the victim's credit card at the convenience store and selling some of the stolen guns for drugs. (State's Exhibit 2; R., pp. 493-494). Inv. McMahan testified he left the room while Appellant wrote out the statement so he "wouldn't be hanging over his shoulder," and he did not promise Appellant anything, or threaten him in any way, to induce the statement. Appellant

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

started writing the statement at 6:30 p.m., and completed it in approximately thirty minutes.[3] (HT, pp. 61-68; R., pp. 18-25).

A short time after he completed the first written statement, Appellant told Inv. McMahan he left something out. Inv. McMahan gave Appellant a new statement form, and Appellant wrote a second statement, which he started at 7:37 p.m. and completed at 7:40 p.m. (HT, pp. 68-70, State's Exhibit 3; R., pp. 25-27, 495).

Inv. McMahan testified he told Appellant the stolen guns were cherished items to the victim, and "it would be a great opportunity for us to get these guns back if [Appellant] could help us find out where all of them went to, places wherever they were distributed." Appellant agreed to call some people in an effort to get the guns back, and he then used his personal phone to make and record the calls. (HT, pp. 71-73; R., pp. 28-30). Inv. McMahan stated no one promised Appellant anything to make the phone calls. (HT, p. 77; R., p. 34).

The State offered a CD containing the recorded calls, and planned to "play a few of the calls" for purposes of the hearing, particularly to show Appellant's "state of mind, the clarity of his speech, and the fact that he is able to make phone calls to people and talk to them and try to get the guns back." Appellant objected to the State only playing parts of the recordings, stating: "[h]e can't pick and choose, Your Honor. Either he plays it in its entirety, not just to help him out, Your Honor, but to get a true picture of

[3]Appellant wrote 6:30 p.m. as the starting time and 9:05 p.m. as the completion time on the statement form. Inv. McMahan testified that was an error, and it did not take him two and a half hours to write the statement. His testimony is verified by the times written on Appellant's subsequent statement.

what happened that day we need to get the entire tape." (HT, pp. 73-77; State's Exhibit 4; R., pp. 30-34).[4]

On cross-examination, Inv. McMahan stated he did not tell Appellant he would let him go if he helped get the guns back, or what to say when he make the phone calls. He testified he did tell Appellant all he wanted from the people who had possession of the guns at that time was to get the guns back, but that did not relate to Appellant. (HT, pp. 88-101; R., pp. 45-58).

Lt. Hawk testified he was present during part of the discussion between Inv. McMahan and Appellant, and when Appellant agreed to write his statements and made the telephone calls. He stated Appellant was coherent, did not appear to be under the influence of drugs or alcohol, "seemed to know exactly what was going on," and "seemed to be knowledgeable about what happened at the scene." He witnessed Inv. McMahan going over the Miranda rights with Appellant, and stated no one promised Appellant leniency or coerced him into giving a statement. (HT, pp. 103-114; R., pp. 60-71).

Appellant testified he was "very high" when he went to the Sheriff's Office with Inv. McMahan, and he did not recall going over the Miranda rights form with Inv. McMahan. He stated Inv. McMahan gave him some details about the burglary to try and get him to talk about it, and told him "he needed to place someone at the scene," and he would help Appellant out if Appellant gave a statement. Appellant stated Inv. McMahan "implied I would be released," and "it wouldn't be brought against me." He further testified he made the phone calls because Inv. McMahan told him he could go home if he got the guns back. (HT, pp. 133-144; R., pp. 90-101).

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[4]State's Exhibit 4 (CD) will be transported to the Court for consideration.

The State argued the evidence showed Appellant freely and voluntarily gave the two written statements and made the phone calls about recovering the guns. Appellant argued the various factors the court must consider in determining the voluntariness of a statement, including his physical condition, and the alleged promises of leniency, indicated the statements were not knowing and voluntary. (HT, pp. 165-173; R., pp. 122-130).

The circuit court found by a preponderance of the evidence that the statements were knowing and voluntary, and admissible as evidence. Specifically, the court found Appellant knowingly waived his Miranda rights, and was able to remember what he did in connection with the burglary and write it down. Based on the testimony from the police officers, the court found they did not make any promises of leniency to Appellant to induce the written statements. (HT, pp. 173-178; R., pp. 130-135).

Appellant objected to admission of the CD with the phone call recordings on the grounds of inadequate foundation, and undue prejudice because some of the calls included discussions of drug deals. The State argued the calls corroborated portions of Appellant's written statements, and one call included an admission by Appellant. (HT, pp. 178-180; R., pp. 135-137).

The circuit court noted Appellant originally objected to the State only playing some of the calls during the hearing, arguing he was entitled to have all the calls played. The court then found at least some of the calls corroborated Appellant's statements, and went directly to Appellant's knowledge of the offenses, and the CD was admissible. (HT, p. 181; R., pp. 138). Appellant did **not** request redaction of the recordings to delete references to drug deals.

After presenting evidence regarding the burglary on February 11, 2012, and Appellant's subsequent use of the victim's credit card and disposition of some of the stolen guns, the State presented Inv. McMahan to testify about the investigation, Appellant's statements, and the phone calls Appellant made about retrieving the stolen guns. The circuit court admitted the statements over Appellant's objection, and immediately instructed the jury it would have to make the final determination regarding the voluntariness of the statements beyond a reasonable doubt. (Trial Transcript [TT], pp. 24-159; R., pp. 143-273).

Inv. McMahan then testified regarding his discussion with Appellant about recovering the stolen guns, and the phone calls Appellant made attempting to do so. The circuit court admitted the CD over Appellant's objection, and again instructed the jury it had to determine the validity of the calls beyond a reasonable doubt. (TT, pp. 160-175; R., pp. 274-280).

Lt. Hawk testified about the circumstances surrounding Appellant's statements and the phone calls. He stated no one made any promises or threats to induce Appellant to give the statements or make the calls. (TT, pp. 239-251; R., pp. 338-350).

The circuit court gave extensive instructions to the jury regarding its duty to determine the voluntariness of any alleged statements beyond a reasonable doubt. Appellant did not object to any part of the jury instructions, or ask for additional instructions. (TT, pp. 385-388, 403; R., pp. 456-459, 474).

The jury convicted Appellant on all charges, and the circuit court sentenced him to an aggregate incarceration term of thirty years. (TT, pp. 413-426; R., pp. 480-491). This appeal followed.

## ARGUMENT

**I. There is ample evidence in the record to support the circuit court's determination Appellant freely and voluntarily gave two written statements regarding the burglary.**

Appellant asserts the circuit court erred in admitting his written statements, arguing they were unlawfully obtained by deception, promises of leniency, and improper influence. Contrary to Appellant's assertion, the evidence amply supports the circuit court's ruling.

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion, which occurs when the trial court's conclusions either lack evidentiary support, or are controlled by an error of law. State v. Pagan, 369 S.C. 201, 631 S.E.2d 262, 265 (2006). The trial court's factual conclusions regarding the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion, and the appellate court does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence. State v. Saltz, 346 S.C. 114, 551 S.E.2d 240, 252 (2001); *see also* State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009) (same); State v. Miller, 375 S.C. 370, 652 S.E.2d 444, 448 (Ct. App. 2007) (same).

> In South Carolina, the test for determining whether a defendant's confession was given freely, knowingly, and voluntarily focuses upon whether the defendant's will was overborne by the totality of the circumstances surrounding the confession. 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. This list of factors is not an exclusive list. Moreover, no single factor is dispositive and each case requires careful scrutiny of all surrounding circumstances.

State v. Moses, 390 S.C. 502, 702 S.E.2d 395, 401 (Ct. App. 2010) (internal citations omitted). A statement may not be extracted by threats, violence, direct or implied promises, however slight, or the exertion of improper influence. Miller, 652 S.E.2d at 452. Statements induced by a promise of leniency are involuntary only if they are so connected with the inducement they were a consequence of the promise. *Id.*

This case essentially came down to a credibility determination between the two police officers present when Appellant gave the statements and Appellant. Both officers testified, **without qualification,** there were no promises or threats made to induce the statements.[5] Appellant testified Inv. McMahan told him he could go home that night if he gave a statement saying he participated in the burglary and tried to get the guns back.

Appellant had extensive experience with the criminal justice system prior to February 2012, and clearly knew he was in serious trouble, as evidenced by his statement during one of the phone calls that he was facing sixty years in prison. The extraordinary aspect of his hearing testimony was his purported inability to recall major events from February 14, 2012, such as signing the Miranda waiver or writing the statements, but he had absolute clarity regarding how many Xanax pills he took that day and the alleged promise he could go home if he confessed and helped get the guns back. (HT, pp. 148-162; R., pp. 105-219).

[5]Appellant attempts to denigrate their testimony on this issue by referring to it as mere "claims."

Appellant may have **hoped** his cooperation would help him. Other than his incredibly convenient memory, however, there is no evidence anyone promised it would have any impact on the charges he was facing.

Based on the testimony, the phone call recordings, and the statements, the circuit court found by a preponderance of the evidence Appellant freely and voluntarily gave the statements. The evidence supports the court's finding, and the jury ultimately determined the statements were voluntary beyond a reasonable doubt. The circuit court did not abuse its discretion in finding the statements were voluntary, and its ruling should be affirmed.

**II. The circuit court properly determined the probative value of the audio recording of Appellant's telephone calls attempting to recover some of the stolen property outweighed any prejudice from admissions and drug related statements Appellant made during the calls.**

Appellant contends the circuit court also erred in admitting the CD containing the phone call recordings, arguing the references to drug transactions constituted "unfair" prejudice substantially outweighing the recordings' probative value. His contention ignores the significant probative value of the phone calls on the voluntariness of his statements, as well as his knowledge of, and participation in, the criminal acts.

As a general rule, all relevant evidence is admissible. Rule 402, SCRE. "'Relevant evidence' means 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," but relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 401, SCRE; Rule 403, SCRE.

The appellate court reviews a trial judge's decision regarding the comparative probative value and prejudicial effect of evidence for abuse of discretion, and is obligated to give great deference to the trial judge's judgment. State v. Collins, 763 S.E.2d 22, 27-28 (2014). The trial judge's decision "'should be reversed only in exceptional circumstances.'" *Id.* (*quoting* State v. Adams, 354 S.C. 361, 580 S.E.2d 785, 794 [Ct. App. 2003]).

Corroborative evidence is evidence that tends to strengthen, confirm, or make more certain other evidence, and whether particular evidence corroborates other evidence is a question for the jury. State v. Pagan, 369 S.C. 201, 631 S.E.2d 262, 266 (2006).

When evidence is highly probative, corroborative, and material in establishing the elements of the offenses charged, its probative value outweighs its potential prejudice, and the appellate court should not invade the trial court's discretion in admitting it. Collins, 763 S.E.2d at 28.

In this case, the circuit court found some of the phone calls corroborated Appellant's statements, and went directly to his personal knowledge of the offenses. (HT, p. 181; R., p. 138). As the solicitor argued, Appellant stated in one call that he did not want someone else to "take the fall for something [Appellant] did," which constituted an admission of his involvement, and the people Appellant called were the ones to whom he admitted trading or selling the stolen guns. (HT, pp. 178-180; R., pp. 135-137).

Further, the recordings served to corroborate the police officers' testimony that Appellant was coherent, did not appear to be under the influence of anything, fully understood what he was doing when he waived his Miranda rights, gave the written statements, and made the phone calls. (TT, pp. 132-135, 240-241; R., pp. 246-249, 339-340). During the calls, Appellant's speech was clear, and he was able to quickly respond to things other parties brought up in the conversations.[6] (State's Exhibit 4 [CD]).

As to drug transaction references during some of the calls, those references were included as a direct result of Appellant's insistence that the entire CD be played if any of it was played. (HT, pp. 74, 181; R., pp. 31, 138). Significantly, Appellant did not move to redact the drug references at either the suppression hearing, or when the CD was admitted during trial. (HT, pp. 178-181, TT, pp. 139-141, 164-165; R., pp. 135-138, 253-255, 278-279). On the contrary, he attempted to use the drug references as evidence he

[6]The clarity of Appellant's speech stands in stark contrast to the slurred and incoherent speech of some of the people he called.

made the calls to help law enforcement and in exchange for promises to let him go. (TT, pp. 220-221, 251, 363-364, 371-372; R., pp. 319-329, 350, 434-435, 442-443). Assuming for argument only it was error to admit the drug references, Appellant created it and he cannot complain. State v. Curtis, 356 S.C. 622, 591 S.E.2d 600, 605 (2004) (party cannot complain of an error which his own conduct created or induced).

Contrary to Appellant's assertion the contents of the phone calls indicating he knew who possessed the stolen guns constituted an improper basis for the jury to convict him of charges related to the burglary, such knowledge was at least strong circumstantial evidence of his involvement in the burglary itself, and was proper for the jury's consideration. Appellant's further assertion his attempts to make drug deals "may have made the jury more inclined to find him guilty of the [burglary related] charges" is speculative on its face. The jury was well aware Appellant was in police custody at the time, and he had been a paid narcotics informant in the past. The jury could readily conclude Appellant was saying anything to put the people he was trying to convince to return the stolen guns more at ease. As Inv. McMahan testified, Appellant was trying to get the guns back, and "he felt relaxed talking about drugs" in those efforts.

The phone call recordings were highly probative of Appellant's mental condition at the time he gave the written statements, as well as his involvement in the burglary. They also corroborated the police officers' testimony and portions of Appellant's statements. In the context of the trial, the drug references were tangential at best, and not unduly prejudicial to Appellant. The circuit court did not abuse its discretion in admitting the CD, and its ruling should be affirmed.

## CONCLUSION

Based on the foregoing, Respondent submits Appellant's conviction and sentence should be affirmed.

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December 11, 2014

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**CERTIFICATE OF COUNSEL**

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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."

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December 10, 2014