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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Williamsburg County
The Honorable William Jeffrey Young, Circuit Court Judge
Appeal Case No. 2013-00700

THE STATE

RESPONDENT,

V.

MARC A. PALMER

APPELLANT

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

1. Did the trial court error in granting the State's Batson v. Kentucky motion and quashing the original jury?
2. Did the trial court error in denying the Appellant's motion for a mistrial and new trial after the admission of a witness taking and successfully passing a polygraph examination?
3. Did the trial court error in refusing to dismiss the case after the State violated the Appellant's right to a speedy trial?
4. Did the trial court error in admitting the Appellant's statement after he unambiguously invoked his right to counsel?
5. Did the trial court error in imposing a five-year sentence on the possession of a weapon during the commission of a violent crime after sentencing the Appellant to life without parole on the murder?

RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

1. Whether the trial court abused its discretion in granting the State's Batson motion when it employed the proper procedure in analyzing the motion, the trial court's findings of pretext were supported by the record, and any error in granting the motion was harmless?

2. Whether the trial court abused its discretion in denying a motion for a mistrial and a motion for a new trial after allowing the solicitor to ask a defense witness about a polygraph examination when the question was not improper and any error in allowing the question was harmless?

3. Whether the trial court erred in denying Appellant's motion for a speedy trial?

4. Whether the trial court erred in admitting Appellant's statement to law enforcement when the statement was voluntary and the record supports the trial court's determination that the initial possible invocation of Appellant's right to have counsel present was ambiguous, and it was clarified that he was not requesting counsel to be present after further clarification questions?

5. Whether the trial court erred in sentencing Appellant on a possession of a weapon during the commission of a violent crime conviction after sentencing him to life imprisonment for the murder?

STATEMENT OF THE CASE

On March 11-14, 2013, Appellant Marc Anthony Palmer ("Appellant") was tried by a jury for the murder of Therris Keels and possession of a weapon during the commission of a violent crime. Appellant was tried in the Williamsburg County Court of General Sessions before the Honorable William Jeffrey Young, Circuit Court Judge. Guy Ballinger, represented Appellant. The State was represented by Assistant Solicitor Kimberly V. Barr of the Solicitor's Office for the Third Judicial Circuit.

On March 14, 2013, Appellant was convicted of murder and possession of a weapon during the commission of a violent crime. (R. p. 518). He was sentenced to life imprisonment for the murder conviction and five years confinement for the possession of a firearm during the commission of a violent crime conviction, to be served concurrently. (R. pp. 530-31).

Before this Court is Appellant's direct appeal of his convictions. Appellant requests this Court reverse his convictions and order a new trial. Appellant further requests his sentence for the possession of a weapon during the commission of a violent crime be vacated. The State respectfully requests this Court deny Appellant's appeal and affirm his convictions.

RESPONDENT'S STATEMENT OF FACTS

On October 28, 2010, Appellant shot and killed Therris Keels in Greeleyville, SC. Keels was shot twice; once in the head and once in the abdomen. (R. p. 177). The shot to the victim's head passed through his left cheek, the left side of his skull, both sides of his brain, and exited the right side of his skull. (R. p. 181). The shot to the victim's abdomen entered from the front, passed through his liver and part of his spine, and exited through his back. (R. pp. 183-84). Both gunshot wounds would have been fatal. (R. p. 185).

Appellant and the victim were not on good terms on the night of the shooting

Maurice Smith testified that he had witnessed animosity between Appellant and Keels. (R. p. 118). A week or two before the murder, Smith saw Keels on top of Appellant. Roger Williams separated the two, and Smith heard Appellant say that it wasn't over. (R. p. 119). Detrel Matthews also recalled observing Appellant in an argument with Keels approximately one month before the murder. (R. pp. 223-24). Even Appellant admitted there was some animosity between him and the victim around the date of the shooting. In his statement to law enforcement, Appellant indicated that the victim had threatened to rob Appellant. (R. p. 578). At trial, Appellant noted that he and the victim had gotten into a confrontation before. (R. pp. 394-95). He also indicated Appellant had threatened to rob him earlier on the day of the shooting. (R. pp. 359-61).

Appellant had access to a pistol on the night of the shooting.

Smith also testified that saw an altercation between Appellant and another individual named Dominique a few weeks before the murder. (R. p. 120). During

that altercation, Smith saw Appellant drop a gun. (R. p. 121). Smith also noted that he saw Appellant ask Dominique to return the gun to him. (R. p. 121). Matthews also recalled seeing Appellant with what appeared to be a pistol during another confrontation Appellant had with a second individual named Dominique. (R. pp. 224-26). Matthews noted that he saw the gun fall from Appellant's waist during that confrontation. (R. p. 226). Investigator McFadden of the Williamsburg County Sheriff's Office also testified that he learned from Matthews that Matthews' brother returned a .45 caliber handgun to Appellant before the shooting. (R. pp. 324-27).

Witnesses placed Appellant at the scene of the shooting shortly prior to the shooting.

On the night of the shooting, Smith saw Keels outside the Lodge. (R. pp. 121-22). Smith also saw Appellant; Smith noted Appellant spoke to everyone and then went back to Keels and told him "I'll see you later." (R. p. 124, ll 23-5). Smith indicated Appellant left. (R. p. 126). Britney Croskey, another eyewitness to the shooting, Smith, Keels, and Appellant that night out near where the shooting occurred. (R. pp. 197-98). McFadden also recovered surveillance video from a business close to the shooting location from the time near the shooting. On the video, a vehicle missing its front left hubcap could be seen.[1] (R. pp. 329-37).

The Shooting

Smith also testified that he later saw Keels go into the shop with a man nicknamed TT. (R. pp. 125-26). Smith testified that as the two came out of the

[1] Appellant later admitted it was his car in the video. (R. pp. 366-67).

shop and started heading towards Wes's house, Smith saw Appellant coming across the side of the road. (R. p. 126). Appellant walked up to Keels, and Keels put his hands up. (R. p. 127). Smith saw Appellant had a gun pointing out, and he saw Appellant shoot Keels. (R. p. 127). Keels fell to the ground, and Appellant shot him again. (R. p. 127). Appellant walked across the road, then turned around and shot Keels a third time. (R. p. 127). After the third shot, Appellant ran off another way. (R. pp. 127-28). Smith noted that he did not see Appellant's Dodge Neon that night; however, he did recall hearing it squealing shortly after the shooting. (R. pp. 131-32).

Wesley Walker testified he saw Keels on the night of the shooting. (R. pp. 147, 149). He recalled the shooting occurred between 10 and 10:30 that evening. (R. p. 149). He testified that Keels and Sapp ("TT") were at Walker's house to get jumper cables. (R. p. 149). Walker and Sapp went to get the cables. (R. p. 149). Walker had not seen Keels with a gun that night. (R. p. 151). He saw the shooter reach into his pants pocket, pull out a gun, and shoot Keels two times. (R. p. 151). Walker ran after he saw the two shots. (R. p. 151).

Croskey testified that she saw Keels with his hands up when she heard a gunshot. (R. p. 200). She then heard a second shot before Keels fell to the ground. (R. pp. 200-01). Then Croskey observed the person who shot Keels stand over Keels and shoot him again. (R. pp. 200-01). Prior to the shooting, she saw seeing someone pacing back and forth under a light on the street. (R. p. 199). Croskey noted that the person walked in a way that appeared to be similar to how she had seen Appellant walk on a prior occasion. (R. pp. 199-

200). After seeing that, Croskey got in her car and left the scene. (R. pp. 201-02).

Matthews testified that while he was in the general vicinity of the shooting when it occurred, he did not observe the shooting. (R. pp. 230-35). After the shooting, Matthews and others walked down the road to where Keels was located. Matthews indicated that he heard a car crank up, and the car left the scene. (R. pp. 235-36).

Witnesses indicated that the shooter had characteristics similar to Appellant's

Maurice Smith testified Appellant had dreadlocks on the night of the shooting. (R. pp. 114, 139). Smith recalled that when he saw Appellant earlier, he was wearing pants and a dark hoodie. (R. pp. 129, 141). He also stated that he was able to identify Appellant by his walk. (R. p. 129). Croskey testified that Appellant had hair that was long enough to be in a ponytail back when the shooting occurred. (R. p. 195). Walker could only say the man who shot Keels had a ponytail and puffed hair. (R. pp. 151-52). Walker also noted that when he saw Appellant at times before October 2010, he wore his hair in a ponytail puffed out. (R. p. 152).

Law Enforcement Investigation

Three .45 caliber shell casings were recovered from the scene. (R. pp. 259-64, 267). SLED Agent Mark Creech testified that he and two investigators from the Williamsburg County Sheriff's Office interviewed Appellant. (R. pp. 274-77). He further testified about Appellant's statement to law enforcement, and he noted that no one could corroborate Appellant's whereabouts from 10:10 p.m.

and 3:00 a.m. (R. pp. 278-87). No blood was found on the items analyzed from Appellant's vehicle, no gunshot residue was found, and no fingerprints were found on the shell casings or a soda can from the scene. (R. pp. 287-91). Further, the only DNA that could be analyzed belonged to the victim. (R. p. 291).

Investigator Wayne McFadden testified that he attempted to verify Appellant's alibi for the evening of the shooting. (R. pp. 317-20). McFadden noted that he did not see Appellant's vehicle on surveillance video at a gas station where Appellant had claimed to be for part of the night of the shooting. (R. pp. 320-21).

Glenn Kennedy testified that some time after the shooting, he received a phone call from his cousin, Elijah (now deceased). (R. pp. 299-01). Kennedy indicated that he saw the Dodge Neon parked at Elijah's house behind a shed barn where horses and tractors were kept. (R. pp. 304-06). Kennedy noted that the Sheriff's Department came out to the house that day. (R. pp. 306-08).

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE STATE'S BATSON MOTION; THE TRIAL COURT UTILIZED THE PROPER PROCEDURE IN ANALYZING THE BATSON CLAIMS RAISED, THE TRIAL COURT'S FINDINGS THAT SOME OF THE PEREMPTORY STRIKES UTILIZED BY THE DEFENSE WERE PRETEXTUAL IS SUPPORTED BY THE RECORD, AND ANY ERROR IN GRANTING THE STATE'S BATSON MOTION WAS HARMLESS.

Relevant Facts and Argument

After the jury was initially selected, the State made a Batson[2] motion, challenging the strikes of several jurors made by Palmer.

> At this time we would make a motion under Batson vs Kentucky in support of that motion Judge we would submit to the court that the defense in this case exercised its challenges against eleven jurors. Juror 99 who is a black female, juror number 20 who is a white male, juror number 178 who is white male, juror number 31 who is white female, juror number 97 who's a white male, juror number 136 who's a white male, juror number 173 who's a white male, juror number 7 who's a white male, juror number 194 who's a black female, alternates strikes were against juror number 5 who's a white and juror number 29 who's a black female. Your Honor out of those nine names or during numbers that I called out of the eleven juror numbers that I called nine of those jurors are Caucasian jurors we take the position that those jurors are a protected class of citizens and that the defense should be called upon to provide a race neutral or gender neutral reason as to why they exercised those strikes in the manner that they did.

(R. p. 32, l 25 – R. p. 33, l 18).

In response to motion, defense counsel gave the following reasons for his striking of the Caucasian jurors. First, for juror 46, Palmer stated his notes reflected she was employed by Williamsburg County, as was her husband. (R. p. 34). He further stated that he struck county employees when the Sheriff's Office makes a case for the county. Id. For juror 178, defense counsel noted that he

[2] Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712 (1986).

was employed by the Department of Natural Resources, and counsel believed there was potentially a law enforcement connection or sympathies for law enforcement. (R. p. 35). Counsel further noted that juror 31 was employed by the Department of Social Services, and based on his interactions with DSS workers in family court, counsel believed anyone involved with DSS may be sympathetic to law enforcement. Id.

For juror 97, counsel asserted that she was employed by the United States Postal Service, and he believed that based on her employment she may have some sympathies for law enforcement. (R. p. 35). Counsel indicated the strike of juror 136 was at Appellant's request. (R. pp. 35-6). Counsel noted that the basis for the strike was the juror was a Hemingway resident and that he worked for the steel company. Id. Counsel explained that he thought the analytical skills of an electrician would not be suitable for the jury because he could sway other jurors based on some of his training. Id. He also expressed some concern because there may be issues regarding the mechanical condition of Palmer's car in the case. Id. For juror 173, defense counsel stated the juror was a plant supervisor, and given his supervisory capacity, he could be potentially unsympathetic to Appellant if he was appointed foreman. (R. p. 36). Counsel also noted that he tends not to seek supervisors. Id.

As to juror 7, Appellant's counsel noted the juror responded that his daughter was involved in a criminal case. (R. p. 36). Counsel explained that he struck juror 5, a proposed alternate, because his wife is a registered nurse in the operating room. (R. p. 37). Counsel stated he was familiar with the relationship

between operating nurses and law enforcement, and he noted that he has found operating room nurses can be sympathetic to law enforcement. Id. Defense counsel asserted he struck juror 29 because she is a paramedic, and paramedics are registered nurses in the operating room who have close working relationships with law enforcement. Id.

The solicitor argued the reasons given by Appellant for the peremptory strikes were pretextual in nature.

> Judge I would take the position that some of the reasons advanced to the court for the strike at pretextural in nature. For example one of the reasons advanced for striking a white jurors is because of the employment being in government related employment. The defense thought that they would be sympathetic to the state, however the defense seated juror number 27 who was retired from the County Transit Authority and she would be no different from the white male juror who's retired from the United States Post Office in terms of government employee. That particular juror was a white male who was struck by the defense, however juror number 27 is a black female and she had the same type retirement from government employment and she was seated. Judge I was actually trying to go through the list to see whether or not any of the jurors who were seated whether they were from Hemmingway because that was another reason advanced. Also Judge another reason was advanced by the defense was that they did want anybody who was in the medical field. They used that a reason to strike a paramedic and they used that a reason to strike a juror who is not employed with the medical field but his wife is a nurse as I understand, but Judge at the same time they seated juror number 12 who is a black female. She worked at Georgetown Hospital as a CNA and actually her brother is a witness on this case, but she's a black female and they seated her and Judge in all candor I hadn't had quite an opportunity to go down the through everybody. Also Judge it was advanced that they didn't want jurors from Hemmingway however juror number 27 is from Hemmingway. Your Honor if you look at juror number 61 he's a black male he's from Hemmingway. Judge if you also look at juror number 87 although she's a white female she' s through Hemmingway as well and the defense seat her and Judge we would take the position obviously some of the reasons that were advanced by the defense are in fact pretextural that they applied those to white to strike the

> jurors but at the same time similarly situated black jurors were seated and so we obviously would take position that that is in direct violation of Batson vs Kentucky we ask that our motion be granted.

(R. p. 38, l 1 – R. p. 39, l 15).

In response to the State's argument regarding pretext, Appellant argued his concern with juror 36 was more that the juror was a mechanic and not that he was from Hemingway. (R. pp. 39-40). Further, Appellant asserted the bus driver who was not struck was not similar to the county employees he struck because she would not have similar leanings supporting law enforcement. (R. pp. 39-40).

Ultimately, the trial court found the answers provided by Appellant were not race neutral and struck the panel.

> The defense has stricken and I'm not convinced that the answers that were race neutral and therefore I am going to strike this jury. We will re-strike the entire panel. So if you can bring the entire panel back in put the jurors back into the pool and then we will start over.

(R. p. 40, ll 9-14).

Standard of Review

The Equal Protection Clause of the Fourteenth Amendment to the Constitution prohibits the striking of a venire person on the basis of race or gender. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); State v. Evins, 373 S.C. 404, 415, 645 S.E.2d 904, 909 (2007).

> The United States Supreme Court has set forth a three-step inquiry for evaluating whether a party executed a peremptory challenge in a manner which violated the Equal Protection Clause. See Purkett v. Elem, 514 U.S. 765, 767–68, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). First, the [party asserting the Batson] challenge must make a prima facie showing that the challenge was based on race. If a sufficient showing is made, the trial court will move to the second step in the process, which requires the [party opposing the Batson]

> challenge to provide a race neutral explanation for the challenge. If the trial court finds that burden has been met, the process will proceed to the third step, at which point the trial court must determine whether the [party asserting] the challenge has proved purposeful discrimination. The ultimate burden always rests with the [party asserting the Batson challenge] to prove purposeful discrimination.

State v. Inman, 409 S.C. 19, 26, 760 S.E.2d 105, 108 (2014), reh'g denied (July 24, 2014).

"An explanation for a jury strike will be deemed race-neutral **unless a discriminatory intent is inherent**." Robinson v. Bon Secours St. Francis Health Sys., Inc., 382 S.C. 224, 227, 675 S.E.2d 744, 746 (2009) (citing Purkett v. Elem, 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834, (1995); State v. Adams, 322 S.C. 114, 123, 470 S.E.2d 366, 371 (1996) (emphasis in original). "Whether a Batson violation has occurred must be determined by examining the totality of the facts and circumstances in the record." State v. Edwards, 384 S.C. 504, 509, 682 S.E.2d 820, 822 (2009). The burden of persuading the court that a Batson violation has occurred remains at all times on the opponent of the strike. State v. Evins, 373 S.C. 404, 415, 645 S.E.2d 904, 909 (2007). The trial court's finding of purposeful discrimination rests on its evaluation of demeanor and credibility. Edwards, 384 S.C. at 509, 682 S.E.2d at 823.

> "Typically, the decisive question becomes whether counsel's race-neutral explanation for a peremptory challenge should be believed.... [T]here is seldom much evidence in the record bearing on that issue, and the trial court's findings regarding purposeful discrimination necessarily will rest largely on the evaluation of demeanor and credibility of counsel. Therefore, those findings are given great deference and will not be set aside unless clearly erroneous."

Evins, 373 S.C. at 415-16, 645 S.E.2d at 909-10 (quoting State v. Cochran, 369 S.C. 308, 631 S.E.2d 294 (Ct.App.2006)). See Hernandez v. New York, 500 U.S. 352, 365, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991); State v. Taylor, 396 S.C. 193, 720 S.E.2d 522, 525 (Ct. App. 2011).

The trial court did not err in granting the State's Batson motion. First, the trial court utilized the proper procedure for the Batson hearing. The State identified the jurors against whom it asserted the defense improperly struck based on race. (R. p. 33). The trial court then moved to step two of the process and allowed the proponent of the strikes, the defense, to provide race-neutral explanations for the peremptory strikes. (R. pp. 34-7). After the race neutral explanations were provided, the trial court moved on to step three of the process and allowed the State to present argument as to why the racially neutral reasons given by the defense were mere pretext. (R. pp. 37-9). The trial court's ruling reflects that, after hearing argument from the State, it felt the State met its burden of showing that the explanations for the use of the peremptory strikes were pretextual.

Second, the trial court's findings that the defense's use of some of its peremptory strikes were improperly racially motivated is supported by the record. As noted by the solicitor, the Appellant's strikes of two jurors based upon their connection to the medical field were pretextual. Appellant did not strike another witness who was similarly situated, a certified nursing assistant who was seated.[3]

[3] Respondent would note that Appellant's contention now that there was a distinction between a certified nursing assistant and an operating room nurse or a paramedic was not one made during the Batson hearing, and is thus not

(R. pp. 38-9). Further, the explanation given for the strike of Juror 5 was especially tenuous because the juror was not an operating room nurse; his wife was one. (R. pp. 37, 38). As to the remainder of the strikes challenged, Respondent would note "[t]he trial judge's findings of purposeful discrimination rest largely on his evaluation of demeanor and credibility, and the reviewing court should give the findings great deference on appeal." State v. Ford, 334 S.C. 59, 65, 512 S.E.2d 500, 503 (1999) (citing Sumpter v. State, 312 S.C. 221, 439 S.E.2d 842 (1994); State v. Green, 306 S.C. 94, 409 S.E.2d 785 (1991)). In light of the arguments asserted by the solicitor regarding the pretextual nature of some of the strikes utilized by Appellant in jury selection, the trial court's grant of the Batson motion should be affirmed.

Finally, any error in granting the State's Batson motion was harmless. Appellant contends that prejudice should be presumed because Juror 173, who was initially struck in the first jury, was allowed to sit in the second jury. Appellant further contends the strike of Juror 173 was one of the challenged strikes. Appellant's reliance on the seating of Juror 173 on the second jury is misplaced. While the strike of Juror 173 was initially listed by the State as one of the peremptory strikes being challenged in step one of the process, the State did not assert that the argument given for Juror 173 was not race neutral or pretextual in step three. By not asserting the reason given for the strike of Juror

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preserved for review. State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (S.C. Ct. App. 2003); see State v. Perez, 334 S.C. 563, 565-66, 514 S.E.2d 754, 755 (1999) (issue not raised and ruled upon by trial court is procedurally barred and not preserved for appeal); see also State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995) (party cannot argue one ground below and then another on appeal).

173 was pretext, the State withdrew its challenge to that strike. This withdrawal is reflected in the argument presented by the solicitor in response to the race-neutral reasons given by the defense for its strikes. The solicitor specifically challenged the explanations given for the jurors who were struck because of their government related employment, the jurors who were struck because of their relation to the medical field, and the juror who was struck because it was from Hemingway. (R. pp. 38-9). The solicitor further stated "Judge we would take the position obviously **some of the reasons** that were advanced by the defense are in fact pretextural that they applied those to white to strike the jurors but at the same time similarly situated black jurors were seated. . . " (R. p. 39, ll 9-13).

Since the State withdrew its challenge to Juror 173 before the trial court ruled upon the Batson motion, the fact Juror 173 was seated on the second jury does not warrant a presumption of prejudice.

> If a trial court improperly grants the State's Batson motion, but none of the disputed jurors serve on the jury, any error in improperly quashing the jury is harmless because a defendant is not entitled to the jury of her choice. State v. Rayfield, 369 S.C. 106, 114, 631 S.E.2d 244, 248 (2006). However, if one of the disputed jurors is seated on the jury, then the erroneous Batson ruling has tainted the jury and prejudice is presumed in such cases "because there is no way to determine with any degree of certainty whether a defendant's right to a fair trial by an impartial jury was abridged." Id. at 114, 631 S.E.2d at 248. The proper remedy in such cases is the granting of a new trial.

State v. Edwards, 384 S.C. 504, 509, 682 S.E.2d 820, 823 (2009). Since Juror 173 was not, in the end, a disputed juror, any error the trial court may have made in granting the State's Batson motion as to any other juror was harmless. This

claim should therefore be denied and dismissed, and Appellant's convictions should be affirmed.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PALMER'S MOTION FOR A MISTRIAL AND MOTION FOR A NEW TRIAL FOR ALLOWING THE SOLICITOR TO ASK ONE QUESTION OF A DEFENSE WITNESS REGARDING HIS SUBMITTING TO A POLYGRAPH EXAMINATION; THE ADMISSION OF THE TESTIMONY WAS NOT IMPROPER, AND ANY ERROR BY THE TRIAL COURT IN ADMITTING THE SINGLE QUESTION AND ANSWER WAS HARMLESS.

What occurred at trial

During his case-in-chief, Appellant presented testimony from Michael Montgomery. (R. pp. 424-31). Mr. Montgomery testified that on the night before the shooting, he went to Frank Conyer's club in Greeleyville. (R. pp. 425-26). Montgomery also testified that he slept at Conyer's house that night. (R. p. 426). Montgomery indicated that he went to the victim's mother's house the next day. (R. p. 427). He further testified that he demanded that he wanted his money. (R. p. 427). Montgomery stated that the next day, he was at his home. (R. p. 427). He also acknowledged that he owned a 12 gauge firearm. (R. pp. 427-28).

During cross-examination, the following exchange with the solicitor occurred:

> Q: Were you anywhere in the area of the shop on C.E. Murray Boulevard at the time Therris Keels was murdered?
>
> A: No ma'am.
>
> Q: And as a matter of fact the police actually came and interviewed you correct?
>
> A: That's right.
>
> Q: Did you corroborate with the police?
>
> A: Yes ma' am.
>
> Q: Matter of fact you voluntarily gave them a DNA sample right?
>
> A: That's right.

Q: You voluntarily submitted yourself to a polygraph right?

Mr. Ballinger: Objection.

The Court: No overruled.

Q: You volutarily[sic] submitted yourself to a polygraph right?

A: Correct.

Q: Anything they asked of you, you gave it to them right?

A: That's correct.

Q: And you were cleared by the police?

A: Correct.

(R. p. 430, ll 2-19). Thereafter, two more witnesses testified in Appellant's defense. After the defense rested, Appellant renewed his motion for a directed verdict. (R. p. 467). After the motion was denied, Appellant moved for a mistrial based upon the introduction of the fact that Montgomery took a polygraph. (R. pp. 467-68).

> Mr. Ballinger: ...For the record Your Honor my client believes that the reference to polygraph was improper it was objected to and since it was admitted then that would entitle him to a mistrial, I'd move accordingly thank you Judge.
>
> The Court: Ms. Barr.
>
> Ms. Barr: Your Honor the reference to the polygraph was from a witness not the defendant. It didn't collate to whether or not the defendant refused to take a polygraph it's typically in a context where we'll see that objection raised and as a matter of fact the court specifically excluded that portion from being played during the course of his statement. So we would certainly argue that that objection and the motion for a mistrial is improper and that the testimony by Mr. Montgomery that he took a polygraph is certainly relative evidence. Also Judge I just.

> The Court: It would be different if it was Mr. Montgomery's trial.
>
> Ms. Barr: Correct I agree.
>
> The Court: The fact that it's his trial it makes no difference what so ever and I would not grant a mistrial on that bases.

(R. p. 467, l 21 – R. p. 468, l 17).

After Appellant was found guilty, he moved for a new trial based upon the admission of the information that Montgomery took a polygraph test. (R. pp. 522-23). Specifically, he argued the jury could infer Montgomery passed the polygraph and was no longer a suspect, and that Appellant did not take one because he could not pass one. (R. pp. 522-23). He further argued it was improper burden shifting. Id. In regards to the reference to the polygraph, the State contended the discussion about the polygraph was not in reference to the defendant, but was instead in reference to a witness. (R. p. 523). The State further renewed its argument made in response during the earlier argument. (R. p. 524). The Court denied the motion for a new trial.

> I find that it certainly appeared that he received a fair trial. I am going to deny your motion for a new trial and I don't believe that, by the witness concerning the polygraph and quite frankly I think that was one of your weaknesses that was called at that time. I am going to deny I will sentence the defendant you all can take him back.

(R. p. 524, ll 3-9).

Standard of Review

"In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion."

State v. Scott, 405 S.C. 489, 497, 748 S.E.2d 236, 241 (Ct.App.2013) (citing State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Whitner, 399 S.C. at 557, 732 S.E.2d at 866 (citation omitted).

The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Crim, 327 S.C. 254, 257, 489 S.E.2d 478, 479 (1997); State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct.App.1999). Appellate courts have favored the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988). "It is only in cases of abuse of discretion which result in prejudice that this court will intervene and grant a new trial." State v. Key, 256 S.C. 90, 94, 180 S.E.2d 888, 890 (1971). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." Patterson, 337 S.C. at 227, 522 S.E.2d at 851; see also State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989); State v. Kirby, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977) ("The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes.").

"[A] mistrial should not be ordered in every case in which incompetent evidence is improperly admitted." State v. White, 371 S.C. 439, 444, 639 S.E.2d

160, 162 (Ct.App.2006)(citing State v. Johnson, 334 S.C. 78, 89, 512 S.E.2d 795, 801 (1999) and Patterson, 337 S.C. at 227, 522 S.E.2d at 851). "[T]he trial judge should exhaust other methods to cure possible prejudice before aborting a trial. In order to receive a mistrial, the defendant must show error and resulting prejudice." State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999) (internal citation omitted).

> "This Court [the South Carolina Supreme Court] has consistently held the results of polygraph examinations are generally not admissible because the reliability of the tests is questionable." State v. Council, 335 S.C. 1, 23, 515 S.E.2d 508, 519 (1999), cert. denied, 528 U.S. 1050, 120 S.Ct. 588, 145 L.Ed.2d 489 (1999). Although this Court in Council declined to recognize a per se rule against the admission of polygraph evidence, it indicated that the "admissibility of this type of scientific evidence should be analyzed under Rules 702 and 403, SCRE and the Jones factors." Id. at 24, 515 S.E.2d at 520.

Lorenzen v. State, 376 S.C. 521, 533, 657 S.E.2d 771, 778 (2008). "The general rule is that no mention of a polygraph test should be placed before the jury. It is thus incumbent upon the trial judge to ensure that should such a reference be made, no improper inference be drawn therefrom." State v. Johnson, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007) (citing State v. McGuire, 272 S.C. 547, 551, 253 S.E.2d 103, 105 (1979)).

First, Respondent submits the trial court did not err in allowing the solicitor to ask the single question about whether Montgomery submitted himself to a polygraph examination. The transcript reflects that the question was intended solely to show that Montgomery had cooperated with law enforcement during their investigation. Unlike the case in Johnson, no mention of the results of the

polygraph were made. There was no mention of whether Appellant was subjected or offered a polygraph.

Even if the trial court erred in allowing the question, Appellant suffered no prejudice. While Mr. Montgomery was asked if he had voluntarily submitted to a polygraph, the results of the polygraph were not discussed at trial. See Bruno v. State, 347 S.C. 446, 452, 556 S.E.2d 393, 396 (2001) (finding that a defendant could not establish he was prejudiced by counsel's failure to object to mention of a polygraph examination when the results of the exam were not presented in any form). Further, the one question during Montgomery's cross-examination was the only reference to a polygraph throughout Appellant's trial. The solicitor did not attempt to use the testimony about the polygraph in any way throughout the rest of the trial. Further, Montgomery's testimony was neither inculpatory or exculpatory. Montgomery was not a witness to the shooting, and nothing in his testimony reflected on the credibility of any other witness involved in the case. The single mention of a polygraph examination for a witness who provided no information that implicated Appellant in the crime did not render Appellant's case unfair. Since Appellant was not prejudiced by the single mention of a polygraph examination in Montgomery's cross-examination, the trial court did not abuse its discretion in denying Appellant's motion for a mistrial and motion for a new trial. This claim should therefore be denied and dismissed, and Appellant's convictions should be affirmed.

III. THE TRIAL COURT DID NOT ERR IN DENYING PALMER'S MOTIONS FOR A SPEEDY TRIAL.

What occurred pre-trial

Appellant was arrested on November 15, 2010. (R. pp. 572-73). He was initially represented by Legrand Carraway, Esquire, a public defender for Williamsburg County. On March 24, 2011, Appellant filed his first Motion for a Speedy Trial. (R. pp. 4-5). A hearing on the Motion was heard by the Honorable Howard P. King, Circuit Court Judge on or about March 31, 2011. Mr. Carraway was later relieved as counsel. W. James Hoffmeyer, Esquire was then appointed to represent Palmer.

A hearing on a motion for reconsideration of bond was heard by the Honorable George C. James, Circuit Court Judge, on July 22, 2011. At that hearing, Mr. Hoffmeyer renewed the motion for a speedy trial. (R. pp. 540-41). Prior to the renewal of the motion, the solicitor indicated that Appellant's trial would probably be set for the spring of 2012 based upon the trial schedule already set for the remainder of 2011. (R. pp. 540). It was noted on the record that a deadline had not been set for Appellant's trial. (R. pp. 541). The motion to dismiss the charges was denied. (R. pp. 544).

Mr. Hoffmeyer moved to be relieved as counsel on October 4, 2011. His motion was heard on December 15, 2011 by the Honorable R. Ferrell Cothran, Jr., Circuit Court Judge. (R. pp. 546-62). At the hearing, Mr. Hoffmeyer was relieved. (R. pp. 559-60). William J. Barr, Esquire, was appointed to represent Appellant on December 15, 2011. (R. p. 562).

On March 26, 2012, Appellant filed a second Motion for a Speedy Trial. (R. pp. 6-7). Mr. Barr subsequently moved to be relieved as counsel. A hearing on that motion was heard by the Honorable William Jeffrey Young, Circuit Court Judge on July 30, 2012. (R. pp. 564-70). At that hearing, Mr. Barr was relieved as counsel. (R. pp. 569-70). Everett G. Ballinger, Esquire was subsequently appointed to represent Palmer.

On March 5, 2013, Palmer filed a Motion in Limine. (R. pp. 11-16). In that motion, Appellant renewed his motion for a speedy trial and requested that his charges be dismissed because he was denied his right to a speedy trial. (R. pp. 11, 15-16). In the Motion, Appellant argued as follows:

> The Defendant asserts, as to factors one and two, that this case has been pending for over two years, and that, to the best of Defendant's counsel's knowledge, this matter has never been scheduled for trial until March 11, 2013 and the Defendant has been afforded no reason for the delay. As to the third factor, the Defendant-asserted his right approximately four months after his arrest and the State was on notice that the Defendant desired to exercise his right to speedy trial. Regarding the fourth factor, the Defendant has been prejudiced.
>
> "Prejudice. ...should be assessed in light of the interests of defendant which the speedy trial right was designed to protect. This Court has identified three such interests (I) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Barker v. Wingo, Id. The Defendant asserts that the length of the delay has caused oppressive pretrial incarceration, increased the anxiety of the accused, and prejudiced the Defendant's case in that this is a highly eye witness driven case. The State has virtually no evidence connecting the Defendant to this crime, other than eye witness testimony. The Defendant may call some of the State's witnesses in his case in chief in the event that the Defendant in fact testifies. The length of time between the murder and trial will be over two years. "There is prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always

> reflected in the record because what has been forgotten can rarely be shown." Barker v. Wingo, Id.

(R. pp. 15-16). The motion was heard by the Judge Young after jury selection. (R. pp. 50-55). During the argument on the motion, Appellant argued that there was over a two year delay in bringing his case to trial, and Appellant had been asserting his right from the outset. (R. p. 51). He denied that he consented to Mr. Barr being relieved as counsel, but Mr. Barr indicated there was a break down in communication. Id.

In response, the solicitor explained the procedural history of the case. (R. p. 52). She outlined that his first attorney was relieved after a potential conflict of interest. (R. p. 52). She noted that his second attorney was relieved after Palmer requested that he move to be relieved as counsel. (R. p. 52). The solicitor further stated that Judge Cothran noted in granting the motion that Appellant would be required to represent himself if he had an issue with his newly appointed attorney. (R. pp. 52-3). The solicitor then noted that Appellant's next attorney, Mr. Barr, was relieved and that Palmer consented to the relief. (R. p. 53). The solicitor further contended that it was not proper for Appellant to say he was prejudiced by the delay when he fired all of his attorneys. (R. p. 53). She further argued that the delay was not so long that it would create prejudice to Appellant, noting there had been cases where the delay was longer. Id.

Appellant responded by arguing that he was prejudiced because this case was driven by eyewitnesses, and with the case being of some age, they may have some difficulty recalling information. (R. p. 54). Appellant also asserted that a case in which a speedy trial motion was not filed had been tried. (R. p.

54). The solicitor responded by stating that the trial mentioned by Palmer had not been tried. (R. p. 55).

The trial court denied the motion.

> Alright based upon the criteria. It is two years out I've seen longer and again the apparently a highly technical case we've got over thirty something witnesses named in this. One of the reason obviously it appears to be at least Mr. Palmer being unsatisfied with his attorneys I think he's now got a great attorney. You've tried cases in front of me before and been very successful. I understand that he has asserted this right at point in time as he should have but I don't find where he's could be unfairly prejudice in this matter and I'm going to deny your motion.

(R. p. 55, ll 4-14).

Standard of Review

"A criminal defendant is guaranteed the right to a speedy trial." State v. Cooper, 386 S.C. 210, 216, 687 S.E.2d 62, 66 (Ct.App.2009), citing U.S. Const. amend. VI; S.C. Const. art. I,§ 14; State v. Pittman, 373 S.C. 527, 548, 647 S.E.2d 144, 155 (2007). However, "[t]here is no universal test to determine whether a defendant's right to a speedy trial has been violated." Cooper, 386 S.C. at 216, 687 S.E.2d at 66 (citing State v. Waites, 270 S.C. 104, 107, 240 S.E.2d 651, 653 (1978)). "[T]he determination that a defendant has been deprived of this right is not based on the passage of a specific period of time, but instead is analyzed in terms of the circumstances of each case, balancing the conduct of the prosecution and the defense." Pittman, 373 S.C. at 549, 647 S.E.2d at 155; see Cooper, 386 S.C. at 217, 687 S.E.2d at 66.

> A reviewing court should consider four factors when determining whether a defendant has been deprived of his or her right to a speedy trial: 1) length of the delay; 2) reason for the delay; 3) defendant's assertion of the right; and 4) prejudice to the

> defendant. Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); see also State v. Brazell, 325 S.C. 65, 75, 480 S.E.2d 64, 70 (1997). These four factors are related and must be considered together with any other relevant circumstances. Barker, 407 U.S. at 533, 92 S.Ct. 2182.

Cooper, 386 S.C. at 216-17, 687 S.E.2d at 66. Respondent submits that in reviewing the factors to be considered in determining whether Palmer was deprived of his right to a speedy trial, the trial court's denial of Palmer's motion was reasonable.

Length of time for delay

In reviewing a speedy trial claim, analysis begins "with the 'triggering mechanism' of a speedy trial claim, which is the length of the delay." State v. Langford, 400 S.C. 421, 442, 735 S.E.2d 471, 482 (2012).[4]

> The clock starts running on a defendant's speedy trial right when he is "indicted, arrested, or otherwise officially accused," and therefore we are to include the time between arrest and indictment. United States v. MacDonald, 456 U.S. 1, 6, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982). The Supreme Court was quick to remind in Barker, however, that even the length of time necessary to trigger the full inquiry "is necessarily dependent upon the peculiar circumstances of the case." 407 U.S. at 530–31, 92 S.Ct. 2182. Thus, a simple prosecution for ordinary street crime may have a lower threshold for a presumptively prejudicial delay than a more complex conspiracy case. Id. at 531, 92 S.Ct. 2182; see also id. at 531 n. 31, 92 S.Ct. 2182 (suggesting that a delay of nine months could have been presumptively prejudicial in a case that depended on eyewitness testimony (citing United States v. Butler, 426 F.2d 1275, 1277 (1st Cir.1970))).

Langford, 400 S.C. 421 at 442, 735 S.E.2d 471 at 482.

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[4] In Langford, the Supreme Court noted that the other factors should not be examined until there was some delay that was presumptively prejudicial. Langford, 400 S.C. at 442, 735 S.E.2d at 482 (quoting Barker).

In Appellant's case, nearly twenty-eight months elapsed between the date of Appellant's arrest and his trial. While this time was lengthy, it was not outside the parameters of cases in which a lengthy delay was not considered to constitute a violation of the right to a speedy trial. See Langford, supra (twenty-three month delay reviewed in armed robbery, first degree burglary and kidnapping case); Pittman, supra (reviewing three year delay between arrest and trial in murder case); Waites, supra (reviewing two year four month delay in assault and battery of a high and aggravated nature and pointing and presenting a firearm); Cooper, supra (reviewing forty-four month delay on murder re-trial). See also State v. Brazell, 325 S.C. 65, 480 S.E.2d 64 (1997) (reviewing three years and five months delay in aimed robbery and murder case); State v. Kennedy, 339 S.C. 243, 528 S.E.2d 700 (Ct.App. 2000), affirmed by State v. Kennedy, 348 S.C. 32, 558 S.E.2d 527 (2002) (reviewing two year and two month delay in grand larceny, first degree burglary and financial transaction card fraud case); State v. Smith, 307 S.C. 376, 415 S.E.2d 409 (Ct.App. 1992) (reviewing three year delay in murder case).

The Reason for the Delay

Barker provides not only should the reason for the delay be considered, but also that those reasons should be examined as to relative justification:

> Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government

> rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Barker v. Wingo, 407 U.S. at 531.

Several concerns factored in the delay in Appellant's trial. First, as noted at the initial consideration of the speedy trial motion was the trial docket. At the July 21, 2011 hearing, the solicitor noted that Appellant's case would not have been able to be tried until, at the earliest the Spring of 2012 because of other matters already scheduled. (R. p. 40). Second, Appellant had three attorneys relieved during the period between his arrest and trial. In fact, on two separate occasions, Appellant had an attorney relieved at the hearing where the speedy trial motion was considered. The delay caused by the time needed for each new attorney to prepare for trial was properly weighted by the trial court against Appellant.

The Defendant 's Assertion of the Right

"[T]he defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right." Barker, 407 U.S. at 528. Multiple assertions of the right will weigh heavily in a defendant's favor. See, for example, United States v. Bass, 460 F.3d 830, 837 (6th Cir. 2006)("Between his arraignment and trial, Bass filed three motions to dismiss based upon speedy trial grounds: (1) in January 1999, two months after the arraignment; (2) in March 2000; and (3) in March 2002. Accordingly, Bass asserted his right to a speedy trial, and this factor weighs in his favor.").

Here, Appellant did assert his right early by filing a motion on March 24, 2011. Appellant also asserted his right to a speedy trial on more than one

occasion. Altogether, he filed three motions with the trial court, and he made oral motions at multiple hearings. Thus, this factor weighs in favor of Appellant.

Whether There Is Prejudice to the Defendant

As already noted, the delay itself is not dispositive of whether a violation has occurred. Neither is the time at issue dispositive of prejudice. Pittman, 373 S.C. at 551, 647 S.E.2d at 156) (rejecting Pittman's argument "that the delay of his trial was so lengthy that it not only meets the requisite finding of delay, but also that the delay is presumptively prejudicial"). Other courts have examined similar delays and declined to find presumptive prejudice. See United States v. Blanco, 861 F.2d 773, 778 (2nd Cir. 1988) (rejecting general assertion of prejudice in ten year delay between indictment and trial where defendant at fault in delay and where "delay can just as easily hurt the government's case"); United States v. Tchibassa, 452 F.3d 918, 925-927 (D.C.Cir. 2006) (finding no presumptive prejudice where defendant more at fault than government in eleven year delay). Accord United States v. Mendoza, 530 F.3d 758, 764-765 (9th Cir. 2008) (noting that if government had "exercised due diligence," for speedy trial claim on delay of eight years, defendant would have had to have shown "specific prejudice to his defense" rather than assessing presumptive prejudice). The Supreme Court in Barker specifically noted the damage that may very well be done to the prosecution's case:

> A second difference between the right to speedy trial and the accused's other constitutional rights is that deprivation of the right may work to the accused's advantage. Delay is not an uncommon defense tactic. As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its

> case will be weakened, sometimes seriously so. And it is the prosecution which carries the burden of proof. Thus, unlike the right to counsel or the right to be free from compelled self-in-crimination, deprivation of the right to speedy trial does not per se prejudice the accused's ability to defend himself.

Barker, 407 U.S. at 521.

In contending that he was prejudiced during the last pre-trial hearing on the motion before the trial court, Appellant only contended that he would be prejudiced because his case hinged on eyewitness testimony, and they may have difficulty recalling. (R. p. 54). The trial court noted that the concern could very well work in Appellant's favor. (R. p. 54). Respondent submits the trial court's finding that Appellant did not suffer any prejudice from the delay is supported by the record. The trial transcript reflects that Appellant was able to challenge some witnesses' credibility with the use of their prior statements. (See R. pp. 134-36, 137-38, 209-11, 248-50). Appellant's assertion on appeal that he was prejudiced by the unavailability of Elijah Kennedy was not an argument raised at trial. Thus, to the extent he relies upon that contention as a source of prejudice, his argument is not preserved for appellate review. Adams, 354 S.C. at 380, 580 S.E.2d at 795; see Perez, 334 S.C. at 565-66, 514 S.E.2d at 755; see also Tucker, 319 S.C. at 428, 462 S.E.2d at 265. Furthermore, the transcript reflects that Kennedy's testimony was likely more favorable to the State. (See R. pp. 301-04).

In reviewing all of the factors together, it was not unreasonable for the trial court to deny Appellant's motion to dismiss the charges because of the speedy trial claim. While Appellant did assert his right to a speedy trial early and

consistently, a substantial portion of the delay was due to Appellant's actions and continual attempts to have counsel replaced. Each new attorney had to be afforded adequate time to properly prepare a defense. Further, there was no evidence the delay was the result of any attempt from the State to hinder Appellant's ability to present a defense. In light of the very limited, if any, prejudice Appellant may have suffered, in balance with the other factors, dismissal of Appellant's case was not warranted. Appellant's convictions should therefore be affirmed.

IV. THE TRIAL COURT DID NOT ERR IN ADMITTING PALMER'S STATEMENT TO LAW ENFORCEMENT INTO EVIDENCE; THE RECORD SUPPORTS THE TRIAL COURT'S DETERMINATION THAT THE STATEMENT WAS FREELY AND VOLUNTARILY GIVEN.

What occurred pre-trial

Appellant moved to suppress his October 29, 2010 statement to law enforcement. He contended the statement was not freely and voluntarily given. (R. p. 55). At the pre-trial hearing, SLED Agent John Mark Creech testified he assisted in interviewing Appellant. (R. pp. 56-7). He testified that he, Investigator Wayne McFadden, and Investigator Gene Lail, both of the Williamsburg County Sheriff's Office, were involved in the interview of Appellant on October 29. (R. p. 57). Creech further testified that he read Appellant his Miranda rights. (R. p. 58). Creech stated Appellant did not appear to be under the influence of drugs or alcohol, he gave responses that were appropriate to the questions regarding the Miranda warnings, and that Creech did not have any concerns about Appellant's competency. (R. p. 58). Creech also indicated that Investigator McFadden recorded the interview with Appellant. (R. p. 59).

Creech testified that during the interview, Appellant stated that he would talk with the investigators, but he wanted them to call Charles Barr, an attorney. (R. pp. 59-60). Creech asked Appellant if he wanted Mr. Barr there, and Appellant indicated that he would like for Mr. Barr to come. (R. p. 60). Creech then asked if Appellant wanted Mr. Barr to be present before he would talk with law enforcement. (R. p. 60). Creech stated that "[h]e said no I'm going to talk to you." (R. p. 60, l 15). Creech noted that the response did not appear in the transcript of the tape recording. (R. p. 61). Creech indicated that he asked

Appellant for further clarification. (R. p. 62). At the hearing, Creech testified that "that's when I asked him again the question on the form. Are you willing to talk with us and he said yes sir and then I read the waiver paragraph at the bottom of the form. And I asked him to sign if he was, if he understood that and he signed it." (R. p. 62, ll 11-5).

Creech noted that he did not promise Appellant anything in order to get him to speak with him. (R. p. 64). Creech believed that Appellant understood all of his rights as he was advised. (R. p. 64).

During cross-examination, Creech noted that he was not sure when Appellant asked for Barr if he meant that he wanted a lawyer. (R. p. 66). That was why Creech asked Appellant the follow up question. (R. p. 66). Creech noted that Appellant asked for an attorney toward the end of the statement. (R. p. 67). After giving his statement, he said that he was not going to say anything else and that he wanted to talk to a lawyer. At that point, Creech ended the interview. (R. p. 68). He noted that this exchange occurred after Appellant was asked if he would take a polygraph examination. (R. pp. 68-9).

Appellant also testified at the hearing. Appellant stated that he was initially told that he was under arrest by Investigator Collins. (R. p. 72). He noted that once he got to the sheriff's office, he was told that he was not under arrest. (R. p. 72). Appellant indicated that he kept asking for Charles Barr and told them that his mom had told him to speak to Charles Barr before talking with anybody. (R. p. 72). He claimed that Investigator Collins had taken away his cell phone, and that he could not call Charles Barr himself because he did not have his

phone. (R. p. 72). Appellant asserted that he was scared when they started questioning him. (R. pp. 72-3). Appellant testified as follows:

> So finally when I was like well alright alright you know. They bring me the waiver and then Investigator McFadden he brings out the recorder the recorder and he turns it on then and then after I signed it everything and they read it to me again and I'm think and I'm like you know hold up I want you to call Charles Barr you know and they asked me will you talk to me I'm like well I want you to call Charles Barr too because I'm suppose to have an attorney present before I talk to anybody. Then you know I guess I was just kind of scared because you know they telling me that they trying to blame me for killing somebody so then he's like and basically it made me look like I can't go nowhere. So he asked me you know well are you willing to talk to us and I was yeah I'll be willing but I just wanted a lawyer present but he was like so will you talk to us and I told him yeah. Then I guessed without an attorney present and I was like well look I'll talk to you.

(R. p. 73, ll 4-21). He further noted that he told the investigator that he would talk with him when he wanted a lawyer present because he was scared and he had never been involved in a situation like that before. (R. p. 73). Appellant also testified that before the tape recorder was started, Agent Creech said that Appellant would not really be waiving his right. (R. p. 74).

During cross-examination, Appellant testified that he was scared the entire time. (R. pp. 75-6). He further acknowledged that he understood his Miranda warnings and that he could have told law enforcement that he would not talk with them. (R. p. 79).

The transcript of the interview recording reflects as follows:

> Investigator Creech: I want to give you your rights. Anything you say can and will be used against in a court of law as evidence against you. You have the right to talk to a lawyer now and have him present with you now and at anytime during questioning. If you cannot afford an attorney, one will be appointed for you without any cost to you. If you decide to answer the questions now without a

lawyer present, you will still have the right to stop answering questions at anytime. You also have the right to stop answering questions at anytime until you talk to lawyer. Do you understand that?

Marc Palmer Yes, sir.

(From this point forward questions will be posed by Investigator Mark Creech, and answers will be given by Marc Palmer, unless otherwise noted.)

Q: Do you wish to talk to us?

A: I wish to talk to you, but I need for you to call Charles Barr too.

Q: You want him here?

A: I want him to come, yes.

Q: Before you talk with us?

A: I'll talk to you.

Q: That's what I'm asking.

A: Okay, what do you want to know?

Q: Are you willing to talk to us?

A: Yes.

Q: Do you understand your rights and do you understand what your rights are, and you want to talk to us? You want to talk to us without a lawyer present?

A: Yes.

Q: You understand and know what you're doing, and we haven't promised you any tiling or threatened you in anyway.

A: No.

Q: And no pressure or coercion of any kind has been used against you by anyone?

A: No.

Q: Sign right there.

(R. p. 576, l 1 – p. 577, l 15).

After all of the testimony at the pre-trial hearing, Appellant argued that the statement should be suppressed under State v. Wanamaker, 346 S.C. 495 (2001). Appellant contended that law enforcement was not required to stop questioning unless the suspect makes an unambiguous request for counsel. (R. p. 81). He argued that his request was unambiguous. (R. p. 81). At the very least, Appellant contended that the end of the statement should at least be suppressed when Appellant again invoked his right to counsel. Id. The State objected to the motion and relied upon State v. Kennedy.[5] The State argued that Appellant's case was more ambiguous than the situation in Kennedy. (R. p. 82). The officer was clearly asking for clarification on the issue about whether or not he was invoking his right to counsel. (R. p. 82). The solicitor also noted that the recording of the interview reflected that Agent Creech asked Appellant if he wanted Mr. Barr there before Appellant started talking with them, and Appellant said no. (R. p. 82). The solicitor further noted that Appellant was intelligent, had gone to school, knew his right ot counsel, and knew that he had the opportunity to have counsel present if he wanted. (R. p. 82).

The trial court denied the motion to suppress admission of the statement. (R. p. 83).

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[5] While the transcript reflects that the solicitor cited to 510 S.E.2d 174, it appears the case referenced is found State v. Kennedy, 333 S.C. 426, 510 S.E.2d 714 (1998).

> Alright I've listened to the audio, I've read the transcript and I read this waiver. It certainly seems to me that he cave it freely and voluntarily. He re-instituted the conversation with the officer and it really matches up better when you listen to it because you see the pace of the conversation. In the transcript you don't know what pace is but when you listen to it. It's clear that the officer is just getting a clarification as to whether he wanted him to call Mr. Barr or whether he was actually invoking his right to have an attorney present even if he had. He still he started the conversation back. He said he wanted to talk he said I'll talk to you and then he goes on for twenty something more pages talking with him. I don't know how much clearer it could be that he waived his right and started talking again.

(R. p. 83, ll 5-19).[6]

Appellant renewed his motion when the audio recording was introduced at trial. (R. p. 279). The objection was overruled. (R. p. 280). Appellant further renewed the motion after the jury verdict. (R. p. 523).

Standard of Review

The trial judge determines the admissibility of a statement upon proof of its voluntariness by a preponderance of the evidence. State v. Arrowood, 375 S.C. 359, 365, 652 S.E.2d 438, 441 (Ct.App.2007) (citing State v. Washington, 296 S.C. 54, 55, 370 S.E.2d 611, 612 (1988); State v. Smith, 268 S.C. 349, 354, 234 S.E.2d 19, 21 (1977)). "If admitted, the jury determines whether the statement was freely and voluntarily given beyond a reasonable doubt." Arrowood, 375 S.C. at 365, 652 S.E.2d at 441.

A waiver of Miranda[7] rights is determined from the totality of the circumstances. State v. Moultrie, 273 S.C. 60, 254 S.E.2d 294 (1979). On

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[6] The trial court also ordered that information regarding the request that Palmer take a polygraph test be redacted from the statement. (R. p. 83).
[7] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).

appeal, the conclusion of the trial judge on issues of fact as to the voluntariness of a statement will not be disturbed unless so manifestly erroneous as to show an abuse of discretion. State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990). Factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Von Dohlen, 322 S.C. 234, 242, 471 S.E.2d 689, 695 (1996); Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct.App.1999). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." Arrowood, 375 S.C. at 366, 652 S.E.2d at 442; State v. Preslar, 364 S.C. 466, 472, 613 S.E.2d 381, 384 (Ct.App.2005). Accordingly, the appellate courts are "bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law." Reed, 333 S.C. at 685, 511 S.E.2d at 401 (citing State v. Amerson, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993)). 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 simply 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).

An express waiver is unnecessary to support a finding that the defendant has waived the right to remain silent or the right to counsel guaranteed by Miranda. North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286

(1979). Statements elicited during interrogation are admissible if the prosecution can establish that the suspect "knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." Miranda, 384 U.S. at 475, 86 S.Ct. at 1628.

> Once an accused requests counsel, police interrogation must cease unless the accused himself "initiates further communication, exchanges, or conversations with the police." Edwards v. Arizona, 451 U.S. 477, 485, 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378, 386 (1981). Interrogation is the express questioning, or its functional equivalent which includes "words or actions on the part of the police ... that the police should know are reasonably likely to elicit an incriminating response." State v. Sims, 304 S.C. 409, 417, 405 S.E.2d 377, 381 (1991) (citing Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 1690, 64 L.Ed.2d 297, 308 (1980)).

State v. Kennedy, 333 S.C. 426, 431, 510 S.E.2d 714, 716 (1998).

However, the United States Supreme Court has declined to extend Edwards to situations where a suspect makes an ambiguous or equivocal reference to an attorney. Davis v. United States, 512 U.S. 452, 459, 114 S. Ct. 2350, 2355 (1994).

> [A]fter a knowing and voluntary waiver of the Miranda rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney. Of course, when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney. ... Clarifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one, and will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement regarding counsel. But we decline to adopt a rule requiring officers to ask clarifying questions. If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.

Davis, 512 U.S. at 461-62, 114 S.Ct. at 2356.

The trial court did not err in admitting Appellant's statement into evidence; the record supports the trial court's determination that the statement was freely and voluntarily given. Contrary to Appellant's assertions, the record does not support a finding that Appellant unambiguously invoked his right to counsel. To be clear, the transcript of the interview reflects that when Appellant indicated he was willing to talk with law enforcement, he also requested they call Charles Barr, a local defense attorney. (R. p. 576). Not being sure of whether Appellant was invoking his right to have counsel present for the interview, the SLED agent asked a few questions for clarification. The record supports the trial court's finding that Appellant's alleged invocation of his right to counsel was not clear, and that the SLED agent properly sought clarification regarding whether Appellant was invoking his right to have counsel present for the interview.

Q: You want him here?

A: I want him to come, yes.

Q: Before you talk with us?

A: I'll talk to you.[8]

Q: That's what I'm asking.

A: Okay, what do you want to know?

Q: Are you willing to talk to us?

A: Yes.

[8] State's Exhibit 2, the audio recording of the interview, is not consistent with the transcript of the recording. In response to the question, the audio indicates Appellant states, "No, I'm a talk to you."

(State's Exhibit 2; R. pp. 576-77). As noted by the tiral court, the audio better and clearly reflects the ambiguity of Appellant's response and the need for the clarification questions. (State's Exhibit 2). Since Appellant's request that law enforcement call Charles Barr was not an unambiguous invocation of his right to counsel, Agent Creech was not required to cease questioning Appellant, and it was not improper for Agent Creech to ask clarifying questions to determine whether Appellant was invoking his right to have counsel present.

Even if Appellant's statement constituted an unambiguous request for counsel, both the audio recording of the statement and the transcript reflected that Appellant re-instituted the interview. The trial court's finding is supported by State's Exhibit 2 and State's Exhibit 3. Appellant clearly stated that he was going to talk to the investigators, and he asked the investigators what they wanted to know. Respondent submits Appellant's statements were analogous to those made in Kennedy, 333 S.C. at 430-31, 510 S.E.2d at 715-16. As was the case in Kennedy, Appellant here indicated he wanted to continue talking with law enforcement after being advised of his Miranda rights. Appellant voluntarily waived his rights before a statement was taken. None of the questions asked of Appellant prior to the waiver were reasonably likely to elicit an incriminating response. In viewing the colloquy under the totality of the circumstances, the trial court correctly found the waiver of Appellant's right to counsel was voluntary, and the statement was freely and voluntarily given. Thus, this claim in the appeal should be denied, and Appellant's convictions should be affirmed.

V. IF PALMER'S MURDER CONVICTION AND SENTENCE ARE AFFIRMED, THEN THE SENTENCE HE RECEIVED FOR POSSESSION OF A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME SHOULD BE VACATED.

After Palmer was convicted, Judge Young sentenced him to life imprisonment for the murder conviction. (R. p. 530). Judge Young sentenced Palmer to five years confinement on the possession of a weapon during the commission of a violent crime conviction. (R. pp. 530-31). Initially, the sentence was consecutive to the life sentence for the murder conviction; after an objection from Palmer, Judge Young indicated the conviction was to be concurrent to the life sentence. (R. pp. 530-31). Palmer did raise an objection to the sentence. (R. pp. 530, 531).

Respondent submits that if this Court affirms Palmer's conviction and life sentence for the murder of Therris Keels, then his sentence for possession of a weapon during the commission of a violent crime should be vacated. S.C. Code Ann. § 16-23-290(A) states:

> If a person is in possession of a firearm or visibly displays what appears to be a firearm or visibly displays a knife during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60, he must be imprisoned five years, in addition to the punishment provided for the principal crime. This five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime.

In light of the language of the statute, a sentence for possession of a weapon during the commission of a violent crime should not have been imposed. See generally State v. Owens, 346 S.C. 637, 666-67, 552 S.E.2d 745, 760 (2001) overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); State v. Owens, 378 S.C. 636, 638 n. 1, 664 S.E.2d 80, 81 n. 1

(2008); State v. Marin, 404 S.C. 615, 619 n. 3, 745 S.E.2d 148, 150 n. 3 (Ct.App.2013).

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court deny Appellant's appeal and affirm his convictions in the murder of Therris Keels and possession of a weapon during the commission of a violent crime.

Respectfully submitted,

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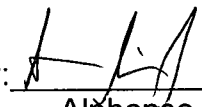
By: 
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November 24, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Williamsburg County
The Honorable William Jeffrey Young, Circuit Court Judge
Appeal Case No. 2013-00700

THE STATE

RESPONDENT,

V.

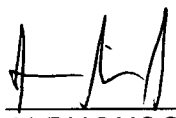
MARC ANTHONY PALMER,

APPELLANT.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 24th day of November, 2014.



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STATE OF SOUTH CAROLINA
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The Honorable William Jeffrey Young, Circuit Court Judge
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THE STATE

RESPONDENT,

V.

MARC ANTHONY PALMER,

APPELLANT.

CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing three (3) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, Robert M. Dudek, Esq., South Carolina Commission on Indigent Defense, Division of Appellate Defense, 1330 Lady Street, Ste. #401, Columbia, SC 29201, and to Ryan L. Beasley, Esq., 650 E. Washington Street, Greenville, SC 29601.

I further certify that all parties required by Rule to be served have been served.

This 24th day of November, 2014.

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