ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICKY ANTHONY SHORT,

APPELLANT

APPELLATE CASE NO. 2018-000782

INITIAL BRIEF OF APPELLANT

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2.

Whether the court erred by allowing Detective Serrundo to testify that during his investigation he "cleared" another suspect since this irrelevant testimony was not, as the court reasoned, made relevant because the defense maintained another person, and not appellant, killed the decedent?

3.

Whether the court erred by refusing to suppress appellant's statements, since appellant's will was overborne by police deception where the Detectives admitted they did not believe appellant was telling them the truth but continued with the interrogation while engaging in the condemned Missouri v. Seibert, 542 U.S. 600 (2004) and State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010), "question first-give Miranda warnings later" tactic where appellant was handcuffed at the crime scene, and interrogated for about four hours at the police station before Miranda warnings were given, since the police deliberately locked appellant into his "narrative" they did not believe before appellant was given Miranda warnings?

STATEMENT OF THE CASE

Appellant was indicted at the April 2016 term of the Charleston County Grand Jury for two counts of murder and possession of a weapon during the commission of a violent crime. R. p. *. The second victim was the decedent's twenty-four week old baby who died two weeks after her birth. The decedent was appellant's girlfriend.

Appellant's case was called to trial on April 16, 2018, before the Honorable Deadra Jefferson, and a jury. Peter Shahid represented appellant. Burns Wetmore and Richard Waring were the solicitors. Tr. I, 1.

On April 20, 2018, the jury found appellant guilty on all three counts. Tr. V, 272, ll. 8-23. Judge Jefferson sentenced appellant to life imprisonment on the two counts of murder and imposed a five-year concurrent term on the weapons charge. Tr. V, 284, ll. 7-14.

This appeal follows.

STANDARD OF REVIEW

Admission of evidence

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id.

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

"Rule 701 of the South Carolina Rules of Evidence explains when lay witness testimony is admissible." Id. at 439, 721 S.E.2d at 467.

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

Statements given by a criminal defendant

"On appeal, the conclusion of the trial judge on issues of fact as to the voluntariness of a confession will not be disturbed unless so manifestly erroneous as to show an abuse of discretion." State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990); see also State v. Reed, 332 S.C. 35, 43, 503 S.E.2d 747, 751 (1998). Put another way, the reviewing court will reverse a trial judge's ruling on the voluntariness of the confession when the ruling is "so erroneous as to constitute an abuse of discretion." State v. Myers, 359 S.C. 40, 47, 596 S.E.2d

488, 492 (2004). "In criminal cases, appellate courts are bound by fact finding in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law." State v. Asbury, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997).

STATEMENT OF FACTS

Appellant's statements during interrogation

Prior to trial, defense counsel filed a motion to suppress appellant's statements and a memorandum in support of that motion to suppress citing Missouri v. Seibert, 542 U.S. 600 (2004) and State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010). The defense argued the state in this case engaged in the now condemned "question first–Mirandize later" tactic. R. p. *.

The memorandum noted that appellant was handcuffed at the crime scene in the street where his six-month pregnant girlfriend was found stabbed on Railroad Avenue in North Charleston. Appellant called 911 at 11:23 p.m. that Saturday October 10, 2015 night to report the crime. Appellant was handcuffed at 11:35 p.m. and transported to the North Charleston Police Department. R. p. * (Memorandum at 2).

Between 1:19 a.m. Sunday morning (or earlier) and 4:25 a.m., detectives entered, interrogated appellant, and left the interrogation room. It was not until 4:26 a.m. on Sunday morning that appellant was read his Miranda[1] warnings "in spite of approximately 3 hours of off-and-on interrogation." Appellant was interrogated by at least three detectives. R. p. * (Memorandum at 3 – 6).

A Jackson v. Denno[2] hearing was held prior to trial. Robert Bailey had been a North Charleston detective for about thirteen years. Tr. I, 47, l. 15 – 48, l. 2. He was dispatched to the area near Railroad Avenue regarding a homicide late that Saturday, October 10, 2015 night. Tr. I, 48, l. 3 – 49, l. 3. Appellant was overheard at the crime scene saying he had argued with the decedent earlier. The decedent was six months pregnant, and she had been stabbed. 51, l. 7 – 52,

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

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

l. 10. Bailey claimed appellant was not considered a suspect, "he was just a person with information," although appellant was handcuffed at the crime scene, and taken to the police station immediately. Tr. I, 48, l. 12 – 51, l. 18. The police learned appellant was the decedent's boyfriend and the father of one of her children. Tr. I, 51, l. 7 – 52, l. 10.

Bailey estimated appellant arrived at the police department at about 1:00 in the morning on Sunday. Bailey said he was "in and out of the room just trying to get as much information from him" for about "two to three hours." Tr. I, 52, l. 8 – 54, l. 14. Appellant had blood on his clothing – it was undisputed that appellant did not have a shirt on, and that he was dirty and bloody. "I noticed that he had blood on his forehead and I wanted to see what more blood he had on him because I do know [from]witnesses and from what we saw on the scene from officers that he [appellant] attended [to] the victim as she was lying on the ground." Tr. I, 54, l. 11 – 55, l. 1.

Bailey had appellant stand up in the interrogation room, and Bailey noticed blood on appellant's hands, a cut on his finger and injuries to his face and nose. Bailey thought the cut on appellant's hand was from a knife, a razor blade, or other sharp object. Tr. I, 55, l. 2 – 56, l. 18.

Bailey said appellant became a suspect at some point during the interrogation, and he claimed that was the reason the police only then gave appellant Miranda warnings at that late time. Tr. I, 56, l. 4 – 59, l. 2. Appellant was given his Miranda warnings at 4:24 in the morning on Sunday, October 11, 2015. Tr. I, 59, ll. 3-9.

Appellant waived his rights and he told the police that he had been involved in an argument with his decedent girlfriend. He explained the cuts on his hands had come from him pulling roses or flowers from a window box in downtown Charleston a few days prior to this. Tr. I, 60, l. 8 – 65, l. 15. Bailey said appellant never admitted his guilt, and he also thought appellant's statements were "mainly self-serving." Tr. I, 67, ll. 7-25.

On cross-examination, Bailey admitted he knew appellant was handcuffed immediately at the crime scene where his girlfriend was found stabbed. Bailey knew a Hispanic woman on the scene gave a statement to a Spanish speaking police officer about a suspect, and law enforcement thought it was inculpatory of appellant. However, others on the scene were not interviewed for whatever reason. This Hispanic woman apparently "disappeared" between this night, and the time of trial. Tr. I, 70, l. 4 – 74, l. 22.

Bailey admitted that appellant was in custody from around 11:30 p.m. on Saturday night, October 10, 2015 until the interview ended at about 12 o'clock noon on Sunday afternoon, October 11, 2015. Bailey acknowledged appellant was not read his Miranda warnings until five hours after he was initially handcuffed, detained, and brought to the police station for interrogation. Tr. I, 75, l. 2 – 79, l. 16. Bailey claimed he could not remember if appellant was ever told he was a suspect in the murder while he was questioned. Tr. I, 79, ll. 9-16.

Detective Sam Riedel was the state's second in camera witness. Riedel also responded to Railroad Avenue scene late at night on October 10, 2015 into the early hours of October 11, 2015. Tr. I, 84, l. 13 – 86, l. 10. Riedel next saw appellant at the police station where he entered the room while appellant was being interrogated by Detective Bailey. Riedel estimated this was about 3:30 or 3:45 on Sunday morning, October 11, 2015. Tr. I, 86, ll. 10-20. Riedel offered that appellant seemed coherent and awake. Riedel added: "[D]etails didn't obviously match up with what I had already known." Tr. I, 87, l. 11 – 88, l. 8.

Riedel maintained at about 4:30 in the morning on Sunday, "it was determined at that point that *it was likely that he was a suspect rather than a witness because of the finite details that hadn't matched up.*" (emphasis added). Appellant was *then* given Miranda warnings at

about 4:30 a.m. by Detectives Bailey and Riedel. Tr. I, 88, ll. 9-22. This was about three hours after appellant was initially brought in, according to Riedel. Tr. I, 92, ll. 7-13.

Riedel remembered appellant explaining the injuries to his hand as coming from when he was picking flowers out of a flower bed "a few nights prior while being downtown in Charleston" with the decedent. Tr. I, 94, ll. 11-22.

Riedel also recalled that Detective Johnson entered the room at about 6:30 that Sunday morning. "We did *another recap* to better allow Detective Johnson to get an understanding as he [appellant] would tell [what happened]" Tr. I, 95, ll. 2-11. (emphasis added).

Riedel testified that appellant explained to them that he had sex with the decedent that night, that they had gone to the Wal-Mart after that, and another argument later ensued. The decedent was said to hit appellant in the face with car keys, and the decedent walked away. Appellant's also told the detectives that he heard screaming down the street, and he ran in that direction to find someone assaulting the decedent. The assailant ran away. This also, Riedel told the trial judge, was inconsistent with what the police believed had occurred based upon their investigation. Tr. I, 98, l. 2 – 99, l. 23.

Riedel offered that appellant's demeanor as "totally flat." Appellant asked the Detectives during interrogation, and prior to Miranda warnings if he was being charged in the crime. Riedel maintained he answered appellant, something like: "Probably not right now." Riedel also claimed appellant was only, in his estimation, "bordering on being a suspect." Tr. I, 116, l. 20 – 118, l. 15. However, he admitted Detective Bailey *already considered appellant the "primary suspect"* prior to Miranda warnings being given. Tr. I, 117, l 6 – 118, l. 15.

Riedel admitted appellant was detained, not free to leave from 11:30 p.m. on Saturday night until 4:30 in the morning on Sunday, October 11, 2015, without Miranda warnings being

read to him, and not being told he was a suspect. Law enforcement, as just seen above, affirmatively denied that appellant was a suspect when he asked. Tr. I, 120, l. 10 – 121, l. 9.

Law enforcement had an eyewitness account, referenced above, that the assailant was wearing a black jacket and a white shirt. Riedel said appellant told Detective Johnson, in statement at 6:30 in the morning that he had given his black jacket to a homeless person on a prior occasion. The black jacket, a white shirt appellant was wearing, and a knife, were key crime scene forensic evidence items. Tr. I, 126, l. 17 – 127, l. 8.

Riedel told the solicitor on redirect examination that he did not have any duty to inform appellant he was a suspect. He told appellant he was not being charged when appellant asked, and Riedel maintained appellant was not "charged until several hours later." Tr. I, 129, l. 10 – 130, l. 7.

Detective Angela Johnson talked to appellant at about 6:30 a.m. on the morning of October 11, 2015. Tr. I, 132, l. 16 – 133, l. 25. Appellant was not wearing a shirt and he had a pair of pants on. Johnson was told by appellant that the argument began with his decedent girlfriend over her belief that another woman was calling appellant on his telephone. The decedent hit appellant with her car keys and she walked away. "He said that he didn't immediately follow her and then he heard screams. So then he ran down the road and saw I believe a black male." Tr. I, 136, l. 1 – 137, l. 10.

Appellant also told Johnson the cut on his hands came from "reaching into a flower bed downtown to pull some flowers for Malakia [the decedent] and he cut his hand on a thorn." Johnson agreed with the other detectives that appellant's statements were self-serving and "he didn't seem like he was remorseful or he wasn't crying." Johnson said appellant knew at this point that his decedent girlfriend had died at the hospital. Tr. I, 139, l. 2 – 141, l. 23.

Appellant was also told "that officers had found the knife, black jacket, long sleeved [white] shirt all together covered in blood." Appellant "didn't directly admit his guilt" at that time either. Tr. I, 141, l. 13 – 142, l. 12. Appellant did not tell Johnson that she could tell the decedent's mother that "he [appellant] was sorry." Tr. I, 142, l. 16 – 143, l. 16.

Johnson admitted she did a "supplemental report" in January of 2016, three months after the incident, where she added additional information. Tr. I, 148, l. 16 – 151, l. 12. Johnson admitted it was not good police work to wait such a long time to do a report.

Arguments of counsel

The judge told defense counsel "I read your brief" [memorandum], and defense counsel then argued that "it is undisputed his advice of rights was not given until 4:26 a.m." In total, "[t]his is a 12-hour ordeal. There is no other way of describing that was how this is transpiring." Tr. I, 166, ll. 2-17.

Appellant was immediately handcuffed at the scene, taken to the police department, and questioned until 4:25 with no Miranda warnings being given. Defense counsel argued that law enforcement was making a calculated claim that appellant was not as a suspect until later in the interrogation but that "just doesn't hold any water." Tr. I, 166, l. 2 – 168, l. 4. Appellant was interrogated for hours in a calculated attempt to obtain inculpatory statements before Miranda warnings were given. Tr. 167, l. 3 – 168, l. 16.

The solicitor argued that appellant was not a suspect at the time the police found him shirtless with blood on him. They knew he was the decedent's boyfriend. The solicitor argued the police were just trying to determine what happened initially, and when they saw cuts on his hands. This was before they gave appellant Miranda warnings at 4:30 a.m. on the morning of October 11, 2015. Tr. I, 168, l. 19 – 174, l. 4.

The solicitor also urged the judge prior to her ruling that the state only wanted to admit three statements appellant gave during interrogation. The first was at 4:30 a.m., which was appellant's "self-serving statement about how he cut his hand." The second was appellant's statement that he gave his black jacket to a homeless person. That occurred at about 6:30 a.m. The solicitor also said at 11:36 a.m. appellant expressed his regret for what occurred. The solicitor argued all three statements were voluntarily given and they did not violate Missouri v. Seibert.[3] The solicitor claimed: "They are trying to guard against a question first strategy." Tr. I, 170, l. 1 – 174, l. 4.

Defense counsel responded it was clear appellant was in custody and that he could not leave. Pursuant to State v. Navy, the judge had to look at the "location, purpose, and length of interrogation." Defense counsel told the judge that law enforcement was "getting bits and pieces of information from him" that led to the three statements the police wanted to use against appellant. Tr. I, 175, l. 5 – 177, l. 17. Defense counsel also said that Missouri v. Seibert and State v. Navy did not create a magic line for when a suspect should be given his Miranda warnings. Tr. I, 177, l. 17 – 178, l. 8.

Ruling

The judge ruled that appellant gave self-serving statements to law enforcement, and she did not believe that appellant's rights were violated in this case pursuant to Miranda or Missouri v. Seibert. Tr. I, 179, l. 4 – 188, l. 7.

Jury In

Officer John O'Connell testified he went to the crime scene at about 11:26 p.m. on October 10, 2015. The crime scene was Railroad Avenue in North Charleston. Tr. II, 136, l. 4 –

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[3] Missouri v. Seibert, 542 U.S. 600 (2004).

138, l. 6. He found "a female lying face up on the ground at the edge of the driveway . . ." Tr. II, 138, l. 24 – 140, l. 3.

The decedent was not responsive, and O'Connell was told she was not breathing. O'Connell could tell that the decedent had been badly wounded by her stab wounds and he did CPR on her until EMS arrived "a few minutes later and at which time they took over." Tr. II, 140, l. 4 – 148, l. 5.

O'Connell at some point noticed appellant standing nearby without a shirt on. O'Connell said he heard appellant utter "a statement that it was his girlfriend and they were in an argument." Tr. II, 148, l. 17 – 151, l. 8. O'Connell said appellant was detained because he had admitted he an argument with the badly wounded decedent. O'Connell wavered on cross-examination when asked to admit that appellant was also kneeling next to the decedent and touching her. Tr. II, 158, l. 24 – 160, l. 16. Regardless, O'Connell did acknowledge that appellant was not free to leave once he was handcuffed and detained. Tr. II, 160, l. 24 – 161, l. 23.

When he was then shown a film of the crime scene, O'Connell did admit that appellant was seen kneeling down next to the decedent with no shirt on. Tr. II, 173, l. 16 – 175, l. 5.

North Charleston police officer Justin Infinger was the second officer to arrive on the crime scene at 11:30 p.m. on the night of October 10, 2015. He remembered seeing the pregnant decedent laying on the ground. Tr. II, 176, l. 22 – 179, l. 14.

Infinger also saw appellant there. He remembered appellant telling someone that the decedent was pregnant. He did not consider appellant to be any threat to anyone. Tr. II, 179, l. 17 – 181, l. 7.

Again, the suspect was said to be a black man wearing jeans, a white shirt and black jacket. Officer Cindy Bordallo testified she spoke to a Hispanic woman who gave her this description. Again, the state could not locate this Hispanic woman to testify at appellant's trial. Tr. II, 200, l. 23 – 202, l. 23.

The next day, the police found a black jacket and a white shirt about two blocks from where the decedent was found lying in the road the night before. A knife was also found in the same overgrown area, and the items appeared to have been thrown over a fence. Tr. II, 214, l. 6 – 221, l. 23.

Appellant's statements during interrogation

Detective Bailey testified in the presence of the jury and he opined, over objection, that appellant's "story" did not match up with what other witnesses were telling him. Tr. III, 5, l. 3 – 6, l. 24.

Bailey was also asked if appellant's explanation that he had cut his hand picking thorny flowers for the decedent seemed like a reasonable explanation to him. Defense counsel objected that this was outside the ability of Detective Bailey to answer, that it was an opinion, and that it called was speculation. The judge agreed that it was speculation. However, the judge ruled that Detective Bailey could give his opinion because it was a rational explanation or "perception based on his years of experience." Tr. III, 76, l. 14 – 77, l. 24. Detective Bailey then said he did not believe appellant's "story" about the flowers having cut his hand. Tr. III, 77, ll. 21-24.

Detective Sam Riedel also testified in the presence of the jury. Riedel was asked whether he believed appellant's statement that he followed the decedent that evening because he wanted to calm her down. Defense counsel also objected that this opinion would not be relevant. That objection was also overruled, with the judge adding, "goes to the course of the investigation."

Tr. III, ll. 4-24. Detective Riedel then said that appellant's explanation "wasn't completely believable, no." Tr. III, 101, l. 14 – 102, l. 10.

When defense counsel asked Detective Riedel on cross-examination if he had ever lied to anyone during the investigation, the solicitor objected that this was irrelevant. The judge ruled this was an improper question but that defense counsel could argue to the jury that Riedel had lied. However, counsel could not ask Riedel if he lied. Tr. III, 111, l. 18 – 114, l. 10.

Detective Ruben Serrudo testified that he was given the names of some prior boyfriends of the decedent, and he was asked to contact them during his investigation. When the solicitor asked the detective whether he was able to "clear" them as suspects in this crime, defense counsel again objected to the relevance of this question. The trial judge responded that the state could anticipate that appellant was denying having committed the crime and that it was therefore permissible for the solicitor to have law enforcement testify they cleared other suspects. Tr. III, 177, l 3 – 178, l. 21. Serrudo then testified that he was able to clear another person as a suspect, and that it was "a misunderstanding as far as him [the suspect] having contact at all." Tr. III, 178, l. 21 – 179, l. 7.

Other testimony

SLED DNA expert Jennifer Clayton testified the decedent's DNA was found on appellant's jacket. The victim's DNA was also found on appellant's boxer shorts and on his white shirt. The victim's DNA being found on the alleged murder weapon, the knife, found two blocks from the crime scene was a DNA "match" of one in 130,000. The defendant's DNA being under the victim's fingernails was a one in 16 million "match." Tr. IV, 74, ll. 8-16; Tr. IV, 81, l. 6 – 83, l. 3; Tr. IV, 84, ll. 1-5; Tr. IV, 92, ll. 1-11; Tr. IV, 95, ll. 5-12.

Dr. Julie Ross testified that the decedent's baby lived for two weeks in intensive care before the baby died. The baby was born at twenty-four weeks and five days. Dr. Ross and Dr. John Cahill both termed a baby born at twenty-four weeks and five days "potentially viable." Nonetheless, the baby did live for two weeks but it was admitted the baby could not have lived without extreme technological medical measures. Tr. IV, 140, l. 5 – 152, l. 19; Tr. IV, 171, l. 4 – 174, l. 21.

The pathologist, Erin Presnell, testified the decedent was stabbed thirty times and that her baby died of "complications of prematurity due to premature birth that would be due to maternal assault." Tr. IV, 196, l. 7 – 211, l. 5.

Appellant testifies

Thirty-nine-year-old appellant Rusty Short testified that the decedent was the mother of his seven-year-old son. Tr. V, 6, l. 5 – 9, l. 7. Appellant remembered on the night of the decedent's death he was sitting in the decedent's car listening to music. They had sexual intercourse inside the car. Tr. V, 17, ll. 7-17. Appellant said they then went to the Wal-Mart to purchase tape to fix the decedent's tail light on her car, and then purchase medicine for their son. They also looked at Halloween customs. Tr. V, 17, l. 23 – 21, l. 19; Tr. V, 32, l. 10 – 33, l. 22.

Appellant testified and told the jury essentially the identical facts he had told Bailey, Riedell, and Johnson about having an argument with the decedent, walking after her down the street, hearing a scream, and finding the decedent stabbed. Tr. V, 34, l. 18 – 45, l. 14; Tr. V, 126, l. 6 – 129, l. 21.

The judge charged the jury the law of murder, voluntary manslaughter, and "transferred intent." Tr. V, 259, l. 11 – 267, l. 10.

ARGUMENTS

1. & 2.

The court erred by allowing Detectives Bailey and Riedel to testify they did not believe appellant's explanation for certain matters related to murders, since their "investigative opinions" constituted irrelevant speculation that were wholly improper of law enforcement witnesses (Issue one). Additionally, the court erred by allowing Detective Serrundo to testify that during his investigation he "cleared" another suspect since this testimony was not, as the court reasoned, made relevant because the defense maintained another person, and not appellant killed the decedent (Issue two).

As seen, the judge allowed Detective Bailey to testify over objection that he did not believe appellant's "story" about the cut and blood on his hands having come from picking a thorny rose out of a window box in downtown Charleston for the decedent on a prior occasion. Defense counsel properly objected that this was an improper opinion and that it was speculation on Bailey's part. Tr. III, 76, l. 14 – 77, l. 24.

Similarly, Detective Riedel was asked whether he believed appellant's statement that appellant followed the decedent down the road that evening because he wanted to calm her down. Detective Riedel was also allowed to testify over objection that he did not believe appellant was completely believable in this critical regard. Tr. III. 101, l. 14 – 102, l. 10.

Finally, Detective Serrudo was allowed to testify that he had "cleared" another person as a suspect in the decedent's murder. Defense counsel properly objected that this testimony was irrelevant. Tr. III, 177, l. 3 – 179, l. 7.

The law enforcement opinions in this case by Detectives Bailey and Riedel and were inadmissible lay opinions. Law enforcement officials are expected to investigate and gather

facts, not give inadmissible opinion testimony in violation of Rule 701, SCRE. See State v. Westmoreland, 421 S.C. 410, 807 S.E.2d 701 (Ct. App. 2017).

In Westmoreland, a coroner who was not qualified as an expert witness, testified that the manner of death was a "homicide." The state argued that the coroner had a legal duty to determine the manner of death and given that unique circumstance, the opinion did not violate Rule 701, even though the coroner was not an expert witness.

This Court disagreed. Rule 701, SCRE, allows a lay opinion where the opinion or inferences are: (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience, or training.

Here, all three detectives were involved in investigating the decedent's murder. Their individual opinions involved them making deductive reasoning from the investigation, what they heard from others, and the opinions were not rationally based on the perception of the witness. They were also not helpful to a clear understanding of the testimony or a determination of a fact at issue. The jury could determine if it believed appellant cut his hand on thorny flowers and whether he followed the decedent that evening to "calm her down," or whether appellant in fact stabbed and killed his decedent girlfriend on the street that night.

The opinions of investigating officers that they did not believe the defendant were irrelevant. There opinions were speculation, and the judge's reasoning that because they were experienced law enforcement officers they could speculate and give those opinions was incorrect pursuant to Rule 701, SCRE.

Appellant respectfully submits such lay opinion evidence by law enforcement officials are disturbing because the inferences and conclusions to be drawn from evidence gathered in the

investigation should be province of the solicitor to argue in closing, for the jury to find during deliberations. and not for law enforcement witnesses to espouse while a witness. Law enforcement witnesses should not be used to draw conclusions from the evidence they are responsible for gathering. State v. Westmoreland.

Further, this case involved accusations by the defense that the investigating detectives were using improper and indeed illegal interrogation tactics meant to procure a confession from appellant as argued in issue three. While misrepresenting evidence and asking the accused to produce evidence voluntarily which the prosecution hopes it can prove is not true is an acceptable interrogation tactic, courts must guard against law enforcement officers signaling to the jury that statements by the defendant are not true. See State v. Von Dohlen, 322 S.C. 234, 244, 471 S.E.2d 689, 695 (1996) (misrepresentations by law enforcement are acceptable). State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015) (our Supreme Court expressed its concern over law enforcement evidence which highlights that law enforcement does not believe the defendant and which puts the burden on a defendant to prove his innocence while casting him in a bad light during interrogation).

The opinions of Detective Bailey and Detective Riedel were improper opinions under Rule 701, SCRE. Detective Bailey speculated and opined that he did not believe the cuts on appellant's hands came from appellant picking thorny roses out of a window box. This opinion that appellant was not being honest was also speculation that appellant was not credible as a whole.

This was a concerted effort by the prosecution in this case that the judge aided by allowing Detective Bailey's improper opinion, and then Detective Riedel's improper opinion that he did not find appellant's statement that he only followed the decedent that evening to calm her

down credible. Law enforcement's opinion on appellant's credibility were also irrelevant. Appellant did not have to prove his innocence to the police.

Finally, Detective Serrudo's testimony (Issue two) that he cleared another person as a suspect in the murder was irrelevant. It was not made relevant, as the trial judge reasoned, because appellant pled not guilty and was asserting that another person killed the decedent. Obviously, the decedent was murdered in this case.

Appellant did not have a burden to prove that someone else killed the decedent. Rather, the state had the burden to prove appellant killed the decedent with malice aforethought beyond a reasonable doubt. Rule 401 defines relevant evidence as "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." See State v. Schmidt.

Detective Serrudo's claim to have cleared another person in the murders did not make it more probable that appellant was guilty. Rule 401, SCRE; State v. Schmidt. The state offered this evidence because it hoped the jury would draw the spurious inference or conclusion that because another suspect was cleared, and appellant was arrested, that it was more probable that appellant was guilty.

Testimony from Detective Riedel that he did not believe appellant was following the decedent to calm her down was not a matter within his personal knowledge and it was a gratuitous opinion meant to convey to the jury that Detective Riedel did not believe appellant was telling the truth. Testimony of a law enforcement official that he does not believe the defendant on a particular issue or find him credible is not proper consideration and is not helpful to a clear understanding of any legitimate matter. See Rule 701, SCRE.

The properly objected to testimony of Detective Bailey, Detective Riedel, and Detective Serrudo each went beyond the bounds of legitimate fact-gathering evidence in the course of an investigation, and espoused an irrelevant opinion of either disbelief in a particular statement given by appellant during interrogation or that another suspect had been cleared in the investigation of the decedent's murder. Conclusions from evidence and assertions why a witness should not be believed are traditionally and properly best reserved for the closing arguments of counsel, for the jury, but not through the testimony of law enforcement witnesses. See State v. Westmoreland; Rule 701, SCRE, supra. Appellant should be granted a new trial given the improper law enforcement irrelevant opinion testimony in this case.

3.

The court erred by refusing to suppress appellant's statements, since appellant's will was overborne by police deception where the detectives admitted they did not believe appellant was telling them the truth but continued with the interrogation while engaging in the condemned *Missouri v. Seibert*, 542 U.S. 600 (2004) and *State v. Navy*, 386 S.C. 294, 688 S.E.2d 838 (2010), "question first-give Miranda warnings later" tactic where appellant was handcuffed at the crime scene, and interrogated for about four hours at the police station before *Miranda* warnings were given, since the police deliberately locked appellant into his "narrative" they did not believe before appellant was given *Miranda* warnings and allowed to continue saying the same things.

What is apparent in this case, given the testimony of Detective Riedel, Detective Bailey, and Detective Johnson is that they did not believe appellant was telling them the truth. Detective Riedel knew Detective Bailey, who spoke to appellant first, considered appellant to be a prime suspect in the murder before Riedel admitted he came to the same conclusion.

As seen, appellant was detained at the crime scene, handcuffed, and taken to the police station to be interrogated. He was interrogated for three and a half to four hours before he was finally given his Miranda warnings. It can only be an unfair legal fiction to claim appellant was not a suspect in this murder. He should have been Miranda warnings, since he was in custody -- he was not free to leave -- and he was being interrogated. See State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010) *citing* State v. Evans, 354 S.C. 579, 582 S.E.2d 407 (2003). Here, unlike Navy, a reasonable person would have believed he was in custody at the time he began being questioned by the police.

While the police have the right to deception pursuant to Von Dolen and other cases, it is apparent appellant, having been handcuffed at the crime scene and taken to the police station to be immediately interrogated, was a suspect. Appellant was also lied to by the detectives when he asked if he was a suspect. Appellant did not have a shirt on, and he was bloody and dirty. The explanation that he cut his hand on thorns while picking flowers for the decedent a few days prior to being interrogated was not believed by the police. It was thought that appellant had been cut by a knife when the decedent was stabbed to death. Appellant's statement that he followed the decedent that evening to "calm her down" was also not believed.

The defense properly urged that appellant's statements were the product of the "question first-give Miranda warnings later" police tactic condemned in Missouri v. Seibert, 542 U.S. 600 (2004). The essence of this tactic consists of the suspect talking to the police prior to Miranda warnings, getting him "vested" in a "story," and then Mirandize the suspect. The suspect will then continue with the story after being given Miranda warnings. That is what happened in State v. Navy, and it was what occurred in this case.

The factors to be considered in determining whether a constitutional violation occurred in this setting, according to the Seibert plurality opinion, are: (1) the completeness and detail of the questions and answers in the first round of interrogation; (2) the timing and setting of the first questioning and the second; (3) the continuity of police personnel; and (4) the degree to which the interrogator's questions treated the second round as continuous with the first. State v. Navy, 386 S.C. 294, 302, 688 S.E.2d 838, 841-842 (2010) *citing* Missouri v. Siebert.

It is apparent in this case that three detectives participated in the interrogation. It is apparent that appellant was asked to repeat his "story" several times as highlighted above. The

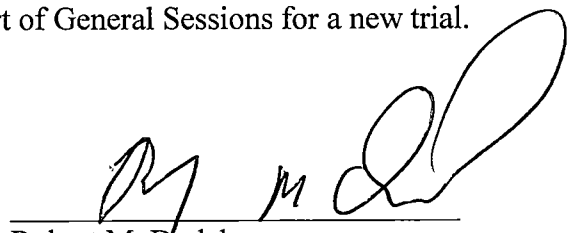
testimony of the detectives was that at some point, appellant was deemed to be a suspect, he was Mirandized, and then the same questioning that the detectives already did not believe continued.

Respectfully, there can be no doubt that the detectives were not being straightforward and honest with appellant. Appellant was handcuffed at about 11:30 p.m. on Saturday night at the crime scene and transported to the police station. He was interrogated -- with apparent breaks with law enforcement officials entering and leaving -- until about 4:30 in the morning. Riedel claimed he was not completely convinced appellant was a suspect but he admitted Bailey already considered appellant the "prime suspect," yet Miranda warnings inexplicably – unless the forbidden Seibert tactic was being utilized – had not yet been given.

The police got appellant locked into his narrative, then gave him Miranda warnings, and allowed him to continue with his "story." Given the totality of the circumstances, including the use of the condemned Missouri v. Seibert, and State v. Navy, question first – Miranda warnings later tactic, the judge erred in admitting appellant's statements into evidence. See State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990)("totality of the circumstances" test); Missouri v. Seibert, 542 U.S. 600 (2004); State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010).

CONCLUSION

By reason of the foregoing arguments, appellant's convictions should be reversed, and this case remanded to the Charleston County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of April, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICKY ANTHONY SHORT,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Ricky Anthony Short, #376066, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 26th day of April, 2019.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 26th day of April, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028