STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Hampton County
The Honorable Perry M. Buckner, Circuit Court Judge

Appellate Case No. 2011-195246

THE STATE,

Respondent,

v.

JOSEPH DAVIS,

Appellant.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Whether the trial court reversibly erred by failing to suppress appellant's confession in violation of his Due Process rights where, on the day of the confession, the interrogating officers gave assurances to appellant that they would reopen the unrelated case of his mother's murder?

STATEMENT OF THE CASE

On June 23, 2007, appellant, Joseph Davis, murdered Ronnie Wooten in Hampton County. After an investigation that took over one (1) year, appellant was arrested and charged with murder, armed robbery, and burglary 2nd degree (violent). Three (3) co-defendants were also charged with the same crimes. Appellant was subsequently indicted by the Hampton County grand jury for murder, armed robbery, and burglary in the 2nd degree. (Indictment Numbers 2008-GS-25-588 through 590). (R.p. 112-13). Appellant was represented by Stephanie Smart-Gittings and Kimberly Jordan, Esquires. Appellant proceeded to trial before the Honorable Perry M. Buckner, III., Circuit Court Judge, and a jury from June 27-29, 2011. At the conclusion of the trial, the jury found appellant guilty as charged. (R.p. 382-83). Judge Buckner sentenced appellant to life imprisonment for murder, thirty (30) years for armed robbery, and fifteen (15) years for burglary 2nd degree, violent. (R. p. 391).[1] This appeal follows.

[1]Appellant had previously been convicted of shoplifting in 1999, attempted grand larceny in 1999, grand larceny in 2004, and grand larceny in 2008. Appellant also admitted prior to trial to being a member of the "Bloods" street gang. (R. p. 386-88).

RESPONDENT'S STATEMENT OF FACTS

On June 23, 2007, appellant Joseph Davis, his brother Sean Davis, and two (2) friends [Marquis Bryant and Derrick Adkins] committed an armed robbery and burglary of Lena's Quick Stop in Hampton County. The four (4) men believed the owner/operator of the store would have a large amount of cash on his person. During the commission of those crimes, appellant shot and killed the owner of Lena's Quick Stop, Ronnie Wooten ("Wooten" or "victim"). Immediately upon his entry into the store, appellant shot Wooten in the head with a .22 caliber pistol killing him. Appellant and a co-defendant then searched Wooten's pant's pocket and wallet, stole some cigarettes, and fled the scene. (R. p. 121-167, 168-187,197-204, 209-216, 217-222, 223-233, 234-242, 243-257, 258-275, 277-297).[2]

Appellant was arrested a year and approximately three (3) months later. Appellant eventually confessed to each of the crimes including the murder of Wooten. (R. p. 258-276, 277-297,168-187, 197-204). This video and audio recorded confession was played for the jury. (R.p. 258-276, 277-297, Court's Ex. 9/State's Ex. 20). In his confession, appellant also identified the other individuals who were involved in the crimes with him, i.e. his brother Sean, Derrick Adkins, and Marquis Bryant. (R. p. 267-68, R.p. 443, 445, Court's Ex. 9/State's Ex. 20).

Appellant's co-defendants, who participated in the robbery and burglary of the store, also testified at his trial, were hostile witnesses, and were impeached with their written statements given to police, that appellant was the triggerman, they participated in the robbery and burglary of Lena's

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[2]Police found the victim laying on his left side near some video-poker machines. His right pants pocket was turned inside out and the contents of his wallet were spread on the floor. A .22 caliber bullet was removed from the victim's head at autopsy. The victim had been shot in the face. (R. p. 170-71).

Quick Stop, and two (2) of them disposed of the murder weapon after the murder by selling it to a Hispanic male. (R. p. 217-242, R. 443-44, 445-46, State's Ex. 24, State's Ex. 25). Two (2) of their statements were also admitted in evidence. Additionally, Saul Benitez-Romero (the Hispanic male) testified appellant's brother, Sean, and another co-defendant, Derrick Adkins, sold him a .22 caliber pistol after the robbery and murder for $100.[3] (R. p. 209-216). This witness had previously identified appellant's brother Sean and the other male, Adkins, in separate photographic line-ups shown by police after the murder, as the men who sold him the pistol. (R. p. 209-216).

[3]This gun was recovered by police and introduced by the State at trial. (R. p. 209-215). Because the bullet removed from the victim's skull was badly damaged, a positive identification to this weapon could not be made. However, the forensic firearms examiner testified the bullet was consistent with having come from this weapon or a weapon with similar rifling characteristics. (R. p. 243-254).

ARGUMENT

Judge Buckner did not err in deciding to admit appellant's confession for the jury's consideration.

What Occurred Below

Prior to the trial beginning, Judge Buckner conducted an *in camera* Jackson v. Denno[4] hearing on the issue of the voluntariness of appellant's statements. (R. p. 9-111). At the Denno hearing, the State called five (5) witnesses: Detectives Chauncey Solomon and James Freeman of the Hampton County Sheriff's Office, Captain Anthony Russell of the Hampton County Sheriff's Office, and SLED agents Teddy Cone and J.J. Evans, who all testified appellant's inculpatory written and video-recorded statements were made freely, voluntarily, and intelligently without any threats, promises, inducements, or coercion. (R. p. 21-92). Appellant called three (3) witnesses: his aunt, his grandmother, and a detention center nurse. (R. p. 93-108). The nurse could only testify that appellant was on an anti-psychotic drug in October or November of 2008, not August and September when appellant gave his incriminating statements. (R. p. 103-08). Appellant's aunt and grandmother testified officers told them they had promised appellant to re-open his mother's murder case. (R. p. 94-103).[5] Appellant did not testify at the Denno hearing. (R. p. 21-111).

Appellant's Incriminating Statements

The testimony from the State at the Denno hearing established appellant gave several incriminating statements to law enforcement in August and September 2008. The first (1st) statement occurred on August 22, 2008. In this statement, appellant admitted he was present at the scene of

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[4]378 U.S. 368, 84 S.Ct.1774 (1964).

[5]Appellant's mother was the victim in a different murder case.

the crime when the murder occurred, and he participated in the burglary, armed robbery, and murder as a lookout, i.e. as an accomplice. He named someone else as the shooter. In this first (1st) statement, appellant did not name any of his co-defendants who were actually present when the crimes were committed, but others. (R. p. 22-46).[6]

On September 4, 2008, after police had conducted further investigation and interviews, appellant was questioned again, and on this occasion appellant gave a video and audio recorded statement in which he admitted he was the person who shot and killed the victim, and he participated in the armed robbery and burglary of the store. (R. p. 46-72, 74-79 Court's Ex. 9/State's Ex. 20). Appellant described a plan to obtain from the victim of a large amount of cash the victim was supposed to have on his person. According to appellant, once he (appellant) shot the victim, appellant and a co-defendant could not locate the cash on the victim's person, and they fled the store after a co-defendant tried to unsuccessfully open the store's cash register and stole some cigarettes and cigars. (R. p. 46-72, 74-79, Court's Ex. 9/State's Ex. 20). Appellant also described how after the crimes he gave the murder weapon to a co-defendant. (R. p. 46-72, 74-79, Court's Ex. 9/State's Ex. 20).

On September 12, 2008, appellant gave his last statement in which he claimed to have been hired by the victim's brother to rob the victim's store, and while there, he witnessed the victim's brother shoot and kill the victim. Appellant admitted that he then searched the victim's clothing for money but was unable to find any.[7] (R. p. 80-87, R. 440 Court's 8).

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[6]While this statement was introduced at the Denno hearing to show the voluntariness of appellant's statements, the State did not introduce this first (1st) statement before the jury.

[7]While this statement was introduced at the Denno hearing to show the voluntariness of appellant's statements, the State did not introduce this last statement before the jury.

At the Denno hearing, the State's witnesses testified appellant was not promised anything or threatened in any way to give a statement. (R. p. 21-92). The officers did testify appellant gave them information regarding, or asked the officers to look into or reopen, his mother's homicide. Appellant informed the officers that the person who was convicted of his mother's death was not the person who actually murdered her. (R. p. 46-72, 74-79). However, Agent Cone testified that while he told appellant they could look into his mother's case, based on the information he provided them, they made no promises to him regarding the same to induce a statement regarding this case, the Wooten murder. This was a completely separate matter. (R. p. 69-74). It was not an inducement for appellant to give a statement. (R. p. 69-74). The other officers testified similarly. (R. p. 46-72, 74-79). Appellant did not testify at the Denno hearing. (R. p. 22-111).

Appellate Court's Standard of Review

In criminal cases, an appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Wood, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct. App. 2004). An appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id.; State v. Landis, 362 S.C. 97, 101, 606 S.E.2d 503, 504 (Ct. App. 2004). On appeal, the appellate court is limited to determining whether the trial court abused its discretion. State v. Walker, 366 S.C. 643, 653, 623 S.E.2d 122, 127 (Ct. App. 2005). The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed absent a prejudicial abuse of discretion. State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982).

Standard of Review /Admission of Evidence

The admission or exclusion of evidence is within the sound discretion of the trial judge and

is reversible only for an abuse of discretion. State v. Morris, 376 S.C. 189, 205, 656 S.E.2d 359, 368 (2008) State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006); State v. Stanley, 365 S.C. 24, 33, 615 S.E.2d 455, 460 (Ct. App. 2005). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. Pittman, 373 S.C. 527, 577, 647 S.E.2d 144, 170 (2007); State v. Wilson, 345 S.C. 1, 5-6. 545 S.E.2d 827, 829 (2001). The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court, and a ruling will be disturbed only upon a showing of an abuse of discretion. State v. Rosemond, 335 S.C. 593, 518.S.E.2d 588 (1999).

Admissibility of a Defendant's Statements

As a general rule, it is an exception to the hearsay rule that a defendant's out of court statement may be testified to by the witness who heard an oral statement, or received a written statement. State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980); State v. Shorter, 85 S.C. 170, 67 S.E.121 (1910); State v. Hambright, 310 S.C. 382, 426 S.E.2d 806 (Ct. App. 1992); State v. Good, 308 S.C. 313, 417 S.E.2d 643 (Ct. App. 1992). Anything that a defendant has stated, which is relevant to any question involved in the trial, is admissible in evidence against him. State v. Pittman, 137 S.C. 75, 134 S.E.514 (1926); State v. Turner, 117 S.C. 470, 109 S.E.119 (1921). This is true, so long as the statement, if made to police during custodial interrogation, was voluntarily made. State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989); State v. Sanders, 227 S.C. 287, 87 S.E.2d 826 (1955); State v. Judge, 208 S.C. 497, 38 S.E.2d 715 (1946).

Standard of Review / Jackson v. Denno Hearing

In a pre-trial Jackson v. Denno[8] hearing, the prosecution's burden is to present evidence

[8]378 U.S. 368 (1964).

which establishes by *a preponderance of the evidence* that the statement made by the defendant was voluntary, that Miranda warnings were properly administered, and that the statement is admissible. Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619 (1972); State v. Washington, 296 S.C. 54, 370 S.E.2d 611 (1988): State v. Neely, 244 S.E.2d 522 (1978); State v. Smith, 268 S.C. 349, 354, 234 S.E.2d 19, 21 (1977)("It has been uniformly held a confession may be introduced upon proof of its voluntariness by a preponderance of the evidence."); State v. Moses, 390 S.C. 502, 702 S.E.2d 395 (Ct. App. 2010). In determining whether a defendant's statement should be admitted, the trial judge should not rely on whether the statement is in fact true, only whether it is voluntary and legally admissible. Rogers v. Richmond, 365 U.S. 534, 81 S.Ct. 735 (1961).

Where there is conflicting evidence as to whether the defendant's statement is voluntary, it is, in the first instance, the province of the trial court to determine this factual issue by a preponderance of the evidence. State v. Howard, 296 S.C. 481, 374 S.E.2d 284 (1988); State v. Washington. *supra*; State v. Davis, 267 S.C. 474, 229 S.E.2d 594 (1976); State v. Crowe, 258 S.C. 258, 188 S.E.2d 279 (1972); State v. Barrs, 257 S.C. 193, 184 S.E.2d 708 (1971); State v. Cannon, 248 S.C. 506, 151 S.E.2d 752 (1966), *after remand*, 250 S.C. 437, 158 S.E.2d 357 (1967); State v. Simmons, Op. No. 4569 (Ct. App., filed June 17, 2009). Whenever there is conflicting evidence relative to the validity of the statement or confession, as is quite often the case, it becomes the initial duty of the trial judge to make a factual finding as to the validity of the statement. If found valid, the court should allow the statement to go to the jury for its ultimate determination of validity. State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996); State v. Atchison, 268 S.C. 588, 599, 235 S.E.2d 294, 299 (1977); State v. Valenti, 265 S.C. 380, 218 S.E.2d 726 (1975). Validity deals with whether the statement was voluntary or not. Von Dohlen, *supra*; State v. Goolsby, 275 S.C. 110,

268 S.E.2d 31 (1980), *overruled on other grounds by* State v. Torrence.

In a Jackson v. Denno hearing, the circuit court has the opportunity to listen to the testimony, assess the demeanor and credibility of all witnesses, and weigh their testimony accordingly. State v. Miller, 375 S.C. 370, 387, 652 S.E.2d 444, 453 (Ct. App. 2007). In passing on the preliminary question of admissibility, a trial judge is not bound to accept as true the defendant's testimony as to intimidation, even if such testimony is not directly controverted by the testimony of other witnesses. State v. Boone, 228 S.C. 438, 90 S.E.2d 640 (1955), *over-ruled on other grounds* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. McAlister, 133 S.C. 99, 130 S.E. 511 (1925).

The trial court's 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. Baccus, 367 S.C. at 48, 625 S.E.2d at 220; Von Dohlen, 322 S.C. at 242, 471 S.E.2d at 695; State v. Franklin, 390 S.C. 535, 702 S.E.2d 568 (Ct. App. 2010); State v. Arrowood, 375 S.C. 359, 652 S.E.2d 438 (Ct. App. 2008). An appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Baccus, 367 S.C. at 48, 625 S.E.2d at 220. 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); State v. Franklin, 390 S.C. 535, 702 S.E.2d 568 (Ct. App. 2010); State v. Arrowood, 375 S.C. 359, 652 S.E.2d 438 (Ct. App. 2008).

The Jackson v. Denno Hearing

Prior to the admission of appellant's statements, Judge Buckner conducted a Jackson v. Denno hearing as required by South Carolina law. *See* State v. Simmons, 384 S.C. 145, 682 S.E.2d

19 (Ct. App. 2009); State v. Miller, 375 S.C. 370, 379, 652 S.E.2d 444, 448 (Ct. App. 2007). At the Denno hearing the State called five (5) witnesses, and appellant called three (3) witnesses. The State also introduced the Miranda[9] waiver forms executed by appellant, the written statements signed by appellant, and the videotaped statement of appellant. (R. p. 21-92).

The State's witnesses all testified appellant was read his Miranda rights multiple times, was read his Miranda rights before each time he was questioned, understood his Miranda rights, signed waivers of his Miranda rights, waived his Miranda rights, and each statement he gave was voluntarily, intelligently, and knowingly made. (R. p. 21-92). The State's witnesses also testified appellant's 2nd statement, the video-taped statement, was not the result of any promise to re-open or look into his mother's murder case. (R. p. 46-72, 74-79, Court's Ex. 9/State's Ex. 20). All of the State's witnesses testified appellant did not appear to be under the influence of any alcohol or drugs during any of the occasions they questioned him, and they were not aware if appellant was taking any psychiatric medications or not at the time of the questioning of appellant. (R. p. 22-92). All of the State's witnesses also testified appellant appeared to understand the questions they were asking him, and had no trouble providing them answers to their questions. (R. p. 22-92).

One (1) of appellant's witnesses testified appellant began taking psychiatric medication in October and November of 2008, which was after his statements were given. (R. p. 103-08). Two (2) of appellant's witnesses, his aunt and grandmother, testified that investigators told them at some point in time after the videotaped statement that they had promised appellant they would re-open his mother's murder case. (R. p. 94-103). However, these witnesses were admittedly not present when appellant's incriminatory statements were given and could not testify that appellant's incriminatory

[9]Miranda v. Arizona, 386 U.S. 436, 86 S.Ct. 1602 (1966).

statements were the result of any promise made by law enforcement officers to re-open or look into his mother's murder case. (R. p. 94-103). Appellant did not testify at the Denno hearing. Appellant provided no testimony linking any of his incriminating statements, including the statement of September 4th, to any assurance by the State that they would look into or re-open his mother's murder case. (R. p. 21-111).

At the conclusion of the Denno hearing, Judge Buckner found by a preponderance of the evidence, after carefully considering all of the evidence offered by the State and appellant, that appellant's statements were freely and voluntarily given without duress, coercion, undue influence, reward, promise or hope of reward, promise of leniency, threat of injury, or compulsion or inducement of any kind. And, appellant's statements were a voluntary product of the free and unconstrained will of appellant. The statements were therefore admissible for the jury's consideration. (R. p. 109-11).[10]

At the conclusion of the trial, Judge Buckner appropriately instructed the jury that they could not consider any statement of appellant unless they found beyond a reasonable doubt that the statement was free and voluntary.[11] Judge Buckner also appropriately instructed the jury that the burden was on the State to prove the voluntariness of any statement of appellant beyond a reasonable

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[10]Judge Buckner also considered the State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981), hearing record and competency evaluations submitted in that hearing, and the medications appellant was receiving prior to trial, in making his determination that appellant's statements were freely, intelligently, and voluntarily given. (R. p. 109-11, Court's Ex. 1 & 2). Appellant was initially determined to be not competent to stand trial but likely to be restored. Later, appellant was determined to be competent to stand trial and most probably *malingering* his psychiatric symptoms. (Court's Ex. 2).

[11]During the trial of the case, appellant also called as witnesses before the jury the nurse, his aunt, and grandmother. Their testimony was similar to that presented at the Denno hearing. Appellant did not testify before the jury.

doubt. (R. p. 363-65).

The Lack of Merit of Appellant's Sole Ground

It was in Judge Buckner's discretion to determine the credibility of the witnesses at the Denno hearing and whether to admit appellant's statements. State v. Simmons, 384 S.C. 145, 682 S.E.2d 19 (Ct. App. 2009)(in determining whether the defendant made voluntary statements, the circuit court properly considered the credibility of the witnesses, as it must); Miller, 375 S.C. at 387, 652 S.E.2d at 453 (finding in a Denno hearing, the circuit court has the opportunity to listen to the testimony, assess the demeanor and credibility of all witnesses, and weigh the evidence accordingly). *See* State v. Parker, 381 S.C. 68, 671 S.E.2d 619 (Ct. App. 2008)(similar). As previously stated, in passing on the preliminary question of admissibility, a trial judge is *not* bound to accept as true the defendant's claims as to intimidation, promises, or threats, even if such testimony is not directly controverted by the testimony of other witnesses. State v. Boone, 228 S.C. 438, 90 S.E.2d 640 (1955); State v. McAlister, 133 S.C. 99, 130 S.E. 511 (1925). Furthermore, before the trial judge admits a statement to the jury, the State need only show its voluntariness by a preponderance of the evidence. State v. Smith, 268 S.C. 349, 354, 234 S.E.2d 19, 21 (1977). A preponderance of the evidence is by the greater weight of the evidence.

In determining whether the State has shown by a preponderance of the evidence that a statement was freely, voluntarily, and knowingly made, the trial judge is to look at the totality of the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041 (1973); Saltz, 346 S.C. at 136, 551 S.E.2d at 252; State v. Miller, 375 S.C. 370, 652 S.E.2d 444 (Ct. App. 2007). Appellate courts have looked at the following factors in determining, under the totality of the circumstances, whether the prosecution has met its burden of proof to show the statement(s) was/were voluntary by

a preponderance of the evidence: the length of the interrogation, its location, its continuity, the defendants age or maturity, education, physical condition, and mental health. Id. The factors also include the failure of police to advise the defendant of his rights to remain silent and to have counsel present during custodial interrogation, whether threats of violence were made, whether promises of leniency were made, whether police made misrepresentations regarding evidence, and whether the deprivation of food or sleep was used as a punishment. Id. The factors also include the background, experience, and conduct of the accused. Id. No one factor is determinative, but each case requires careful scrutiny of all the surrounding circumstances. State v. Parker, *supra*; State v. Moses, 390 S.C. 507, 702 S.E.2d 395 (Ct. App. 2010). The totality of the circumstances supports Judge Buckner's finding that the State met its burden by the preponderance or greater weight of the evidence that appellant's statements were voluntary. Id.

Appellant was advised of his constitutional rights

Appellant was read his Miranda rights not once but several times by police officers. On August 22nd, appellant was read his Miranda rights two (2) times and voluntarily admitted he was present at the crime scene and guilty of murder, armed robbery, and burglary as an accomplice, i.e. a lookout. **(R. p. 22-46, Court's Ex. 3, 4, 5).**

Appellant was again read his Miranda rights on September 4th before being questioned at all about the murder of Wooten. **(R. p. 46-72, 74-79 ,Court's Ex. 6).** Appellant was again read his Miranda rights a second 2nd time on September 4th before the second (2nd) statement (the video-taped statement) was taken. **(R. p. 46-72, 74-79 ,Court's Ex. 6, 7, 9/State's Ex. 20).** Appellant signed each right that was read to him indicating that he understood them, and he signed the form indicating that he was waiving and giving up those rights and voluntarily talking to investigators about the

murder of Wooten. **(R. p. 46-72, 74-79, Court's Ex. 6, 7, 9/ State's Ex. 20).**

Appellant was again read his Miranda rights before his last statement on September 12th. **(R. p. 81-87, Court's Ex. 8).** Appellant again spoke with police about the murder of Wooten. At the Denno hearing, appellant did not dispute the fact that his Miranda rights were read to him or that he understood those rights. **(R. p. 21-111).** Under the totality of the circumstances, this factor weighs in favor of the voluntariness of appellant's' statements.

Further, appellant's willingness to talk to police on August 22, and September 12, indicates appellant's willingness to talk to police on September 4th about the burglary, armed robbery, and murder at the convenience store was not motivated by anything that occurred on September 4th, but his own desire to talk to police about Wooten's murder. **(R. p. 21-46, Court's Ex. 3, 4, 5, R. p. 8, 80-87, Court's 8).** This factor weighs in favor of the voluntariness of appellant's statements

The Length of the Questioning

Appellant's questioning on August 22nd, began at 7:55 p.m. (R. p. 24). The actual written statement of that date was taken around 10:17 p.m. (R. p. 27). Appellant wrote his own statement. Appellant was not questioned again until September 4th.

Appellant's 1st questioning on September 4th began around 10:07 a.m. and ended before lunch. (R. p. 58). Captain Russell testified the total questioning during this interview lasted approximately one (1) hour to one (1) hour and a half (½), and appellant was then taken back to the jail where he would have been allowed to eat lunch if he so chose. **(R. p. 58-59).** Appellant was not questioned again on September 4th until after 2:00 p.m, [2:19 p.m. to be exact]. **(R. p. 58-59, 65).** After this approximately three (3) hour break, and after reviewing and executing a 2nd Miranda waiver form, the questioning concluded approximately thirty (30) minutes later. **(R. p. 287, ll. 17-**

22, Court's 9/State's 20). *Cf.* Von Dohlen, 322 S.C. at 245, 471 S.E.2d 696 (finding three (3) hour interrogation did not render statement involuntary based on the totality of the circumstances). The length of the questioning in this case is in favor of voluntariness. *See* State v. Crawley, 349 S.C. 459, 562 S.E.2d 683 (Ct. App. 2002)(statement was voluntary where interrogation lasted approximately seven and a half (7 ½) hours in which defendant also received dinner and rest-room breaks); State v. Saltz, *supra* (six and a half (6 ½) hours); State v. Chaffee and Ferrell, 285 S.C. 21, 328 S.E.2d 464 (1984)(five (5) hours); State v. Cannon, 260 S.C. 537, 197 S.E.2d 678 (1973)(five and a half (5 ½) hours); State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990)(two and a half (2 ½) hours). Appellant was not questioned again until September 12, 2008.

Appellant's statement of September 12, 2008 was taken at 3:44 p.m. Appellant wrote his own statement. While there is no testimony regarding the length of this questioning, it does not appear from the record or the statement itself that it was lengthy. (R. p. 8, 80-87, Court's 8). Again, the length of questioning favors voluntariness.

The Nature of the Questioning

Investigators testified that appellant was not threatened or coerced in any way to give a statement. On September 4th, appellant was not questioned in the middle of the night, nor was he deprived of any sleep. Neither the investigators nor appellant testified that appellant was hungry and asked for anything to eat. Necessities were not withheld from appellant in an attempt to force him to give a statement. On September 4th, investigators took appellant back to the jail at lunch time, so appellant was able to eat if he wished. **(R. p. 58-59).** This factor weighs in favor of the voluntariness of the statements. Similarly, appellant's questioning on August 22nd and September 12th did not take place in the middle of the night. There was no testimony appellant was deprived

or food or necessities in order to get him to give these statements.

There was absolutely no evidence or testimony presented during the Denno hearing that appellant was made any promises of leniency regarding the crimes committed at Lena's Quick Stop. **(R. p. 22-111).** In fact, appellant makes no claim that any of the investigators who questioned him promised him leniency with regard the charges of murder, burglary, and armed robbery if he cooperated and talked with police. *Compare* State v. Peake, 291 S.C. 138, 352 S.E.2d 487 (1987)(confession involuntary where detective promised defendant if he gave a statement State would not seek the death penalty against him). This factor weighs in favor of the voluntariness of appellant's statements.

Appellant's interrogation did not always take place in a police dominated atmosphere. Only two (2) investigators were in the conference room with appellant at the time of his first (1st) statement on August 22nd. While three (3) investigators were present during the 2nd interrogation on September 4th, appellant did not claim the number of investigators rendered his statement involuntary. Additionally, while three (3) investigators were present, appellant had already been read his Miranda rights twice on August 22nd, and was read his Miranda rights an additional two (2) times on September 4th and signed waivers of those rights. *See* State v. Kirton, 381 S.C. 1, 39, 671 S.E.2d 107, 123 (Ct. App. 2008)(stating that Miranda rights are meant to protect the privilege against self-incrimination during interrogation of a suspect in a police-dominated atmosphere). And, the officer's questioning of appellant was conversational. State v. Cannon, 260 S.C. 537, 544-545, 197 S.E.2d 678, 681 (1973)(relaxed and conversational manner of interrogation indicated confession was voluntary even though number of officers and intensity of interrogation questioned). Finally, during appellant's last statement, on September 12th, only one (1) investigator was present. *See* State v.

Dye, 384 S.C. 42, 681 S.E.2d 23 (Ct. App. 2009)(finding when defendant confessed he was not in a police dominated atmosphere as only one officer was present in the room). And, appellant was not interrogated in a cell at the jail, but in conference room at the police sub-station. This factor weighs in favor of the voluntariness of appellant's statements.

There was no evidence that appellant was ever physically assaulted or threatened with a physical assault. **(R. p. 21-111).** And, appellant did not testify that he was threatened with physical violence nor was any physical violence used against him. Investigators testified they did not threaten or coerce appellant in any way. There was no testimony that there was any yelling or screaming at appellant by police officers. **(R. p. 21-111).** There is simply no evidence of any police coercion. **(R. p. 21-111).** This factor weighs in favor of the voluntariness of appellant's' statements. *Compare* Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461 (1936)(confession involuntary where physical force and torture used to extract confession); State v. Bing, 115 S.C. 506, 106 S.E. 573 (1921)(similar).

Nor was there any evidence police misrepresented any evidence during any of appellant's questioning. Appellant did not testify at the Denno hearing, and no officer testified that they misrepresented any evidence in the case to get appellant to confess. These factors all weigh in favor of the voluntariness of appellant's statements.

The Age and Experience of the Defendant

Appellant was twenty-seven (27) years old at the time he was questioned. **(R. p. 31, Court's Ex. 5).** This factor weighs in favor of the voluntariness of appellant's statements. *See* Pittman (12 year old's confession to double murder voluntary); State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001)(17 year old's statements voluntary and admissible); State v. Smith, 268 S.C. 349, 234 S.E.2d

19 (1977)(confession of 13 year old voluntary and admissible after valid Miranda waiver).

It is also clear that this was not appellant's first (1st) experience with law enforcement. Appellant had been previously charged and convicted of shoplifting, attempted grand larceny, and grand larceny (2 times) before he was questioned in this case. **(Tr. pp. 487-89).** That a defendant has been arrested on prior occasions and is familiar with his rights under Miranda is a factor to be considered in accessing his understanding of those rights; whether a waiver was intelligently made; and whether any statement was voluntarily made. State v. McLeod, 303 S.C. 420, 401 S.E.2d 175 (1991); State v. Linnen, 278 S.C. 175, 293 S.E.2d 851 (1982); State v. Patterson, 263 S.C. 176, 209 S.E.2d 39 (1974); In re Christopher W., 285 S.C. 329, 329 S.E.2d 769 (Ct. App. 1985). This factor weighs in favor of the voluntariness of appellant's statements. State v. Miller, 375 S.C. 370, 652 S.E.2d 444 (Ct. App. 2007)(totality of the circumstances includes background and experience of the accused). Further, appellant's competency evaluation shows appellant had been incarcerated in prison before. Appellant was familiar with the criminal justice system. State v. Parker, 381 S.C. 68, 671 S.E.2d 619 (Ct. App. 2008)(fact that appellant had previously served time in DJJ was factor in favor of voluntariness); Fare v. Michael C., 442 U.S. 707 (1979)(considering teenager's prior arrest and time in juvenile camp as a factor in whether he understood the consequences of waiving his Miranda rights).[12]

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[12]Federal authority is in agreement with this reasoning. *See* Correll v. Thompson, 63 F.3d 1279, 1288 (4th Cir. 1995)(confession voluntary despite low I.Q. because defendant had numerous experiences with law enforcement and was "streetwise"); United States v. Collins, 40 F.3d 95, 98 (5th Cir. 1994)(confession was voluntary because defendant had extensive criminal history and was familiar with the criminal justice system); United States v. Haynes, 301 F.3d 669, 684 (6th Cir. 2002)(confession voluntary because 43 year old defendant informed of his rights and had "ample experience with the criminal justice system"); United States v. Morris, 247 F.2d 1080, 1090 (10th Cir. 2001)(confession voluntary in part because 19 year old defendant had 5 prior arrests). *See also* Martin v. Wainwright, 770 F.2d 918, 925-26 (11th Cir. 1985).

The Defendant's Mentality

As with most facts considered by a trial judge in determining the voluntariness of a statement, the mental condition, or even mental deficiency of a defendant is but one factor to be considered. Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515 (1986); Blackburn v. Alabama, 361 U.S. 199, 80 S.Ct. 274 (1960); State v. Jennings, 280 S.C. 62, 309 S.E.2d 759 (1983); State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979); State v. Callahan, 263 S.C. 35, 208 S.E.2d 284 (1974); State v. Cain, 247 S.C. 536, 144 S.E.2d 905 (1965); Fikes v. Alabama, 352 U.S. 191, 77 S.Ct. 281 (1957). Coercive police activity is a necessary predicate to finding that a statement is not voluntary within the meaning of the Due Process clause, and a defendant's mental condition does not justify a conclusion that his mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional voluntariness. Connelly. The South Carolina Supreme Court has consistently held that mental capacity alone will not invalidate a statement or render it involuntary. State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999); State v. Jennings, 280 S.C. 62, 309 S.E.2d 759 (1983); Tyner, *supra*. In State v. Doby, 273 S.C. 704, 258 S.E.2d 896 (1979), the Court held:

> We have consistently held that mental deficiency alone is not sufficient to render a confession involuntary, but that it is a factor to be considered along with all the other attendant facts and circumstances in determining the voluntariness of the confession. State v. Cain, 247 S.C. 536, 144 S.E.2d 905 (1965); State v. Callahan, 263 S.C. 35, 208 S.E.2d 284 (1974). In re Williams, 265 S.C. 295, 301, 217 S.E.2d 719 (1975).

Doby, 273 S.C. at 709, 258 S.E.2d at 899. In this case, there is simply no evidence of any police coercion. **(R. p. 21-111).**

When a defendant cites his mental capacity as a factor in the consideration of a statement's voluntariness, he is entitled to present the testimony of a psychiatrist, or other mental health expert

during the suppression hearing and trial. Callahan; Cain. Appellant presented only the detention center nurse, who testified that she began treating appellant in November of 2008, which would have been two (2) months after he gave his three (3) statements to law enforcement. She testified that she prescribed an anti-psychotic medication for appellant, due to his complaints to her; however, she did not testify at the Denno hearing that appellant was being treated with anti-psychotic medication in August or September of 2008 when he gave his statements to law enforcement. Appellant did not call any other psychiatric professional to testify at the Denno hearing. Out of an abundance of precaution, Judge Buckner also considered the evidence introduced at the Blair hearing contained in the competency evaluations, and the other information he was aware of regarding appellant's mentality as the case proceeded to trial.

In State v. Ballington, 346 S.C. 262, 551 S.E.2d 280 (Ct. App. 2001), this Court held that although the defendant's behavior may have indicated he was not rational, the defendant's statements, although irrationally made, were nevertheless voluntary. Additionally, a statement by the interviewing officer that advised the defendant that his earlier statements were not consistent with the physical evidence, and that he should be honest, were not such as to overborne the defendant's will, even considering his irrational mental state.

Nor is there any evidence appellant suffered from any serious mental illness *at the time of his questioning* in August and September of 2008. **(R. p. 9-15, Court's Ex. 1, 2).** During the video and audio recorded statement, appellant denied that he was under the influence of any alcohol or drugs. He also stated he had attended school through the 10th grade. The investigators who questioned appellant testified that he did not appear to be under the influence of alcohol or drugs when giving his statements. **(R. p. 22-46, 46-72, 74-79).** During the Denno hearing, there was no

testimony that appellant was under the influence of drugs or narcotics, much less taking narcotic medication, at the time he was questioned in August and September of 2008. All of the State's witnesses testified appellant did not appear to be under the influence of any alcohol or drugs during any of the occasions they questioned him, and they were not aware if appellant was taking any psychiatric medications or not, at the time of the questioning of appellant. (R. p. 22-92). All of the State's witnesses also testified appellant appeared to understand the questions they were asking him and had no trouble providing them answers to their questions. (R. p. 22-92). The recording of the videotaped statement supports the investigators' testimony that appellant's statements were freely and voluntarily given and he was not suffering from any mental illness at the time of this statement. **(Court's Ex. 9/State's Ex. 20)**. Appellant wrote his 1st and 3rd statements to police himself. These factors weigh in favor of the voluntariness of appellant' statements. State v. Bellue, 259 S.C. 487, 193 S.E.2d 121 (1972)(where officers testified that the defendant was normal at the time he made his confession, an inference was created that the confession was voluntary, despite defendant's claim he could not waive his rights because of drug or narcotic intoxication). *See* State v. Collins, 266 S.C. 566, 225 S.E.2d 189 (1976)(that one is intoxicated at the time a confession is made does not necessarily render him incapable of comprehending the meaning and affect of words; thus, proof that an accused was intoxicated at the time he confessed does not render any statement made by him inadmissible as a matter of law, unless his intoxication was such that he did not realize what he was saying); State v. Saxon, 261 S.C. 523, 201 S.E.2d 114 (1973)(Proof of a defendant's intoxication, short of rendering a defendant unconscious of what he is saying, goes to the weight and credibility to be accorded to any statement made by the defendant, but does not require that the statement be excluded from evidence); McCall v. State, 257 S.C. 93, 184 S.E.2d 341 (1971). *See also* State v.

Ledford, 351 S.C. 83, 567 S.E.2d 904 (Ct. App. 2002)(where defendant was too intoxicated to walk, and was in and out of consciousness, the trial court erred in failing to make an initial determination as to the voluntariness of the statement); 23 C.J.S. Section 912 (1991). Appellant offered no testimony at the Denno hearing that he was so intoxicated by medication on September 4th that he did not know what he was saying. This factor also weighs in favor of the voluntariness of appellant's statements.[13]

The Lack of Credibility of Appellant's Claim

With regard to appellant's *claim* that he was coerced or induced into giving *a* statement, made through the testimony of his aunt and grandmother, it was within Judge Buckner's discretion to find this claim was not credible given all of the evidence before him. It is clear Judge Buckner determined that appellant's *argument* was not credible and that the investigators' testimony was credible. This is implicit in his ruling. This is supported by the fact that appellant's relatives admitted they were not present during *any* of appellant's three (3) statements to police. In fact, appellant did not testify at the Denno hearing and establish **any connection** between the State re-opening or looking into his mother's death investigation and any of the (3) statements appellant gave regarding the murder of Ronnie Wooten.

Therefore, there was a conflict between appellant's *claims* and the testimony and evidence presented by the State at the Denno hearing, which had to be resolved by Judge Buckner.

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[13]While appellant's final competency evaluation showed appellant had borderline intellectual functioning and possible mental retardation, appellant had no trouble understanding or answering the investigators questions and clearly understood his rights. **(Court's Ex. 9/State's 20).** Correll v. Thompson, 63 F.3d 1279, 1288 (4th Cir. 1995)(confession voluntary despite low I.Q. because defendant had numerous experiences with law enforcement and was "streetwise"). Further, the competency evaluation showed most of appellant's psychiatric complaints were most probably due to *malingering*. (Court's Ex. 2).

Appellant's argument and the investigators' testimony of how appellant's statement(s) were obtained differed.

The investigator's' testimony and credibility are supported by the numerous Miranda waiver forms executed by appellant and the written and videotaped statements of appellant. In the written waiver forms, appellant acknowledged, by his signature, that he was making the statements freely and voluntarily with full understanding of his constitutional rights. And, he signed each page of his written statements, indicating that his statements were given freely and voluntarily. He also acknowledged by his signature that *no* threats, force, or *promise of any kind* had been made *by anyone* to induce or cause him to waive his rights and answer questions. **(R. p. 263-67, Court's Ex. 3, 4, 5, 6, 7, 8).** The videotape recording of the investigator's reading appellant's Miranda rights to him and his execution of his waiver on videotape also corroborates the investigators' testimony and discredits appellant's *claim* at the Denno hearing that before he gave any statement he was promised something in order to give his statements. **(Court's Ex. 9/State's Ex. 20).** Under the totality of the circumstances, Judge Buckner did not abuse his discretion in finding appellant's' first (1st), second (2nd), or third (3rd) statements were made voluntarily, intelligently, and knowingly given the evidence before him by a preponderance of the evidence.

Additionally, Judge Buckner, who had the opportunity to view the investigators, appellant's family's testimony, and that of the jail nurse, could judge their credibility accordingly. Miller, 375 S.C. at 387, 652 S.E.2d at 453. This determination was within his discretion. Id. He was not required to accept appellant's family's testimony or that of the nurse as credible or believable. State

v. Boone; State v. McAlister.[14] He was not required to believe appellant's *allegation* of coercion or inducement. State v. Brown; State v. Howard. *See* State v. Dillard, 327 S.C. 340, 486 S.E.2d 278 (Ct. App. 1997)(a trier of fact must not always believe uncontradicted testimony because "[t]here remains the question of the inherent probability of the testimony and the credibility of the witness or the interest of the witness in the result of the litigation."), *citing* Black v. Hodge, 306 S.C. 196, 410 S.E.2d 595 (Ct. App. 1991)(trier of fact is not required to believe uncontradicted testimony, since there remains the question of the inherent probability of the testimony and the credibility of the witness or the interests of the witness in the result of the litigation). *See also* State v. Wright, 354 S.C. 48, 55, 579 S.E.2d 538, 542 (Ct. App. 2003)(stating the "evaluation of demeanor and credibility [are] matters within the peculiar province of the circuit court").

Further, Judge Buckner was free to disregard the testimony of appellant's family and that of the nurse, since neither had any direct relevance or materiality to appellant's statements given in August and September of 2008; the statements were not given in the presence of any of appellant's witnesses, and the nurse could only testify she began treating appellant in November of 2008, long after his statements were given in August and September of 2008. **(R. p. 103-08, 94-103).**

Furthermore, the credibility of appellant's claim at the Denno hearing was dubious, at best, given the documents introduced and the videotape. Judge Buckner was entitled to reject appellant's *claims* at the Denno hearing as not credible. Miller; Boone; McAlister; Brown; Howard; Dillard; Wright.

And, given the facts and evidence developed at the Denno hearing, Judge Buckner did not

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[14]Especially in light of the determination in the final competency evaluation which found appellant was in all likelihood malingering his psychiatric symptoms.

abuse his discretion in finding the State had proven the voluntariness of the statements by a preponderance or greater weight of the evidence. Especially, in light of the fact that in his video-taped and written statements appellant acknowledged that he was answering questions **knowingly, intelligently, and voluntarily without any promises or inducements. (Court's Ex. 3, 4. 5, 6, 7, 8, 9/State's Ex. 20).** Furthermore, the investigators all testified appellant's statements were voluntary, and he was not promised anything in order to get him to talk about the murder of the victim in this case. *See* State v. Linnen, 278 S.C. 175, 179, 293 S.E.2d 851, 854 (1982)(holding that even though interrogating officers encouraged defendant to make a statement, their actions were not coercive or threatening). And, the investigators all testified that there were no promises of leniency or promises of reward made to appellant in order to induce him to give a statement. Judge Buckner could accept or reject this testimony in his own discretion. Finally, appellant did not testify at the Denno hearing providing a link between any statement by investigators they would look into his mother's murder case or any promise to re-open his mother's murder case to the voluntariness of his statements. **(R. p. 22-111).** *See* State v. Howard, 296 S.C. 481, 374 S.E.2d 284 (1988); State v. Peake, 291 S.C. 138, 352 S.E.2d 487 (1987)(a statement is involuntary only if so connected with the inducement as to be a consequence of the promise). *See also* State v. Dye, 384 S.C. 42, 681 S.E.2d 23 (Ct. App. 2009)(where no competing testimony was introduced to contradict officer's testimony, trial judge was free to accept officer's version of events in making its voluntariness determination) *citing* Miller, 375 S.C. at 387, 652 S.E.2d at 453. (finding that in a Jackson v. Denno hearing, the circuit court has the opportunity to listen to the testimony, assess the demeanor and credibility of all witnesses, and weigh the evidence accordingly).

Judge Buckner did not abuse his discretion in admitting appellant's statements. State v.

Johnson, 260 S.C. 600, 197 S.E.2d 823 (1973)(where defendant was read his Miranda warnings and stated he understood them, and then spoke with officers, an intelligent waiver was established). Given the record below, appellant has failed to show Judge Buckner's ruling is not supported by any evidence. Appellant has failed to show Judge Buckner's ruling on the preponderance of the evidence was manifestly erroneous. Baccus, 367 S.C. at 48, 625 S.E.2d at 220; Von Dohlen, 322 S.C. at 242, 471 S.E.2d at 695; State v. Franklin, 390 S.C. 535, 702 S.E.2d 568 (Ct. App. 2010); State v. Arrowood, 375 S.C. 359, 652 S.E.2d 438 (Ct. App. 2008). Therefore, this appeal must be dismissed.

Harmless Error

Even assuming *arguendo*, error in the admission of appellant's statement, its admission was harmless. Arizona v. Fulminante, 499 U.S. 279, 310, 111 S.Ct. 1246 (1991)(holding error in admission of involuntary confession is subject to harmless error analysis); Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001)(same); State v. Perry, 74 S.C. 551, 54 S.E.764 (1906)(finding admission not prejudicial in part because defendant made same confession to others).

The Evidence against Appellant

In making a determination regarding harmless error, this Court will look at the entire record. State v. Miller, 367 S.C. 329, 626 S.E.2d 328 (2006). This Court will not set aside a conviction for an insubstantial error not affecting the result when guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached. State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995). The evidence against appellant was overwhelming.[15] Guilt was conclusively proven, and no other rational conclusion could have been reached.

The evidence of appellant's guilt was overwhelming, such that the admission of his 2nd

[15]Appellant did not testify at his trial.

statement to police were harmless and did not effect the verdict obtained. "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." Pagan, 369 S.C. at 212, 631 S.E.2d at 267 (*citing* Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)); State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315, 318-19 (2002).

Appellant's 2nd Statement was Cumulative to other evidence of his Guilt

The State established the victim was murdered during a burglary and armed robbery of his convenience store. The State established the victim was killed by a .22 caliber bullet wound to the head. The State established through the testimony of appellant's co-defendants that appellant was the triggerman. (R. p. 217-242, 277-281, 293, State's Ex. 24, 25). The State established through the testimony of the Hispanic male, that two (2) of appellant's co-defendants disposed of the murder weapon shortly after the murder. (R. p. 209-216). The State also established through the forensic firearms examiner that the bullet taken from the victim's head was consistent with having been fired from the weapon appellant's co-defendants disposed of after the murder, burglary, and armed robbery of Lena's Quick Stop. (R. p. 243-254).

Furthermore, Judge Buckner's admission of appellant's 1st and 3rd statements to police could not be prejudicial because the State did not offer either of these statements before the jury. The substance of part of these statements were brought out by appellant, not the State.

Therefore, the admission of appellant's's statements even if erroneous, was harmless beyond a reasonable doubt. State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003)(admission of improper evidence is harmless where the evidence is merely cumulative to other evidence); State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001); State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978); *see also* State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996)(instructing that error in admission of

evidence is harmless where it is cumulative to other evidence which was properly admitted); State v. Douglas, 367 S.C. 498, 520, 626 S.E.2d 59, 71 (Ct. App. 2006)("The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence"). *See also* State v. Locklair, 341 S.C. 614, 582 S.E.2d 426 (2003)(holding error without prejudice does not warrant reversal). Therefore, the admission of the 2nd statement to police was harmless beyond a reasonable doubt where it was cumulative to other evidence properly admitted. This appeal must be dismissed. Arizona v. Fulminante; Franklin v. Catoe.

CONCLUSION

Based on the foregoing, appellant' convictions and sentences for murder, burglary, and armed robbery must be affirmed and this appeal dismissed.

Respectfully submitted,

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February 11, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Hampton County
The Honorable Perry M. Buckner, Circuit Court Judge

Appellate Case No. 2011-195246

THE STATE,

Respondent,

v.

JOSEPH DAVIS,

Appellant.

CERTIFICATE OF COMPLIANCE

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

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CERTIFICATE OF SERVICE

I, Anthony Mabry, hereby certify that I have served the ***Final Brief of Respondent*** in the foregoing action by depositing copies in the Interagency Mail to Breen R. Stevens, Appellate Defender, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 11th day of February, 2013.

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