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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
The Honorable Larry B. Hyman, Circuit Court Judge

Appellate Case No. 2018-002056

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SC Court of Appeals

THE STATE,

Respondent,

v.

RANDY COLLINS,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

JIMMY A. RICHARDSON
Solicitor, Fifteenth Judicial Circuit

Post Office Drawer 1276
Conway, SC 29526
(843)-915-5460

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STATEMENT OF ISSUES ON APPEAL

I.

Whether the trial judge properly admitted Appellant's voluntary statement when Appellant agreed to be interviewed by law enforcement, where he waived his rights to an attorney, where he was given multiple breaks during the interview, where he admitted he was not threatened by law enforcement, and ultimately acknowledged at trial that his statement was true?

II.

Whether the trial judge abused his discretion by refusing to order a further evaluation of Appellant by the Department of Disabilities and Special Needs when the examiners appointed by the Department of Mental Health found that Appellant did not suffer from an intellectual disability, and therefore any further examination was unnecessary?

STATEMENT OF THE CASE

In August 2014, the Georgetown County Grand Jury indicted Appellant for one count of arson, first degree, one count of criminal conspiracy, and one count of murder. On November 5-9, 2018, a jury trial was held in the Georgetown County Court of General Sessions with the Honorable Larry B. Hyman, presiding. Appellant was represented by Ralph Wilson, Jr., Esquire. The State was represented by Assistant Solicitors Alicia Richardson and Randerson Stephens of the Fifteenth Circuit Solicitor's Office. The State proceeded to trial on the charges of arson, first degree and criminal conspiracy, but declined to proceed with the murder charge. At the conclusion of trial, the jury convicted Appellant of both counts. Following the verdict, the trial judge sentenced Appellant to thirty years' imprisonment for arson, first degree and five years' imprisonment for criminal conspiracy. Each sentence ran concurrently with the other resulting in an aggregate term of thirty years' imprisonment. Appellant then timely served a notice of appeal and an initial brief.

STATEMENT OF FACTS

In the early hours of March 29, 2014, a trailer located at 10 James Drive in the town of Andrews, South Carolina was set on fire. (R. 307-09). First responders were initially told the trailer was abandoned and no one lived in it. (R. 309, 313, 316). After the fire was extinguished, firefighters entered the home and found the body of a twelve year-old boy inside. (R. 316). The body was identified as David "Syience" Coombs. Coombs' cause of death was smoke inhalation. (R. 600). Coombs was Marissa Cohen's son. Cohen arrived at the scene of the fire shortly after first responders. Multiple first responders noted Cohen was acting unusually calm, and seemed unaffected after learning of her child's death. (R. 321, 329-30, 336). Loretta Miller witnessed Cohen's behavior at the scene. Miller reported that when Cohen was informed that her son was killed she made a phone call to Appellant. (R. 614). According to Miller, Cohen said "Randy, my baby's dead. My baby Syience dead on the floor." Miller heard Appellant respond "You got to live with that." (R. 614, lines 13-14). Earlier that evening at approximately 8:30 pm, Coombs went to a birthday party at the local recreation center. Coombs and his friend, Ricky Nelson, left the party at approximately 12:30 am. Coombs told Nelson he was going home to check on his mother, get some clothes, and then he would sleep over at Nelson's house. (R. 301). Nelson waited for Coombs to arrive at his house but eventually fell asleep.

In February 2014, Cohen applied for a \$25,000 contents-only insurance policy on the trailer at 10 James Drive. (R. 348). Cohen filed a claim with the insurance company on April 7, 2014. (R. 351). The insurance company declined to pay the claim. (R. 354). Investigator Melvyn Garrett of the Georgetown County Sheriff's Office received an anonymous tip that Cohen and Appellant were involved in setting the fire. (R. 134, 665-66). As a result of this tip, Garrett spoke with gas station attendant Charlene Scott. Scott reported that Cohen bought \$20 worth of

kerosene the night before the fire. (R. 372-73). Earlier in the week of the fire, Cohen began moving furniture and other items out of the trailer into a storage unit. (R. 309, 366-67, 377). Cohen asked Benjamin "Mano" Brown and Everett Langley to help her move. After Brown had finished moving the items out of the trailer, Cohen told Brown she was going to burn down the trailer. (R. 377).

Garrett spoke with Appellant for the first time on April 9, 2014. Appellant allowed Garrett to write a statement on his behalf which Appellant subsequently signed. (R. 667-69, 826). Appellant denied any role in setting the fire and claimed he was with his nephew, James Miller¹, from 9:00 PM to 3:00 AM at Carnell's Club. (R. 668, 826). After his initial interview with Appellant, Garrett executed search warrants for the phone records of Appellant and Cohen. (R. 671-72).

Law enforcement discovered that Appellant and Cohen exchanged a total of six phone calls in the hours before and after the fire. (R. 529-30). Three phone calls occurred before the fire in the afternoon and evening of March 28, 2014. (R. 529). An additional three phone calls occurred between 2:30 AM and 3:30 AM on March 29, 2014. (R. 529-30).

Garrett and Agent Scott Hardee of SLED arranged for Appellant to retrieve his phones from the Andrews town hall on June 4, 2014. Appellant agreed to stay and talk with Hardee and Garrett about the fire. (R. 673). Appellant was read his Miranda rights and he signed a form indicating he understood and waived his rights. (R. 534, 827). Appellant gave a statement to Hardee and Garrett acknowledging his involvement with the fire. Appellant initially denied any involvement with the fire, but gradually acknowledged he was with Miller when Miller set the

¹ James Miller was eventually charged as a codefendant of Marissa Cohen and Appellant. Prior to Appellant's trial, Miller was killed. Devon Coombs, another son of Marissa Cohen and older brother of David "Syience" Coombs, plead guilty to killing Miller prior to the start of Appellant's trial. (R. 182, 611).

fire. (State's Exhibit #3, R. 829-30). Appellant said Cohen approached him about burning down her trailer and offered him \$5,000 for his help. Appellant told Miller about the offer. Miller seemed interested in the offer because he needed some money. On the night of the fire, Appellant and Miller went to the trailer together. According to Appellant, Miller lit a piece of paper on fire and threw it through a window while Appellant looked on. (State's Exhibit #3, R. 829-30). Appellant denied lighting the match that started the fire, but admitted he was at the trailer with Miller. Garrett wrote a statement on Appellant's behalf, which Appellant reviewed and signed. (R. 829-30).

Prior to trial, a mental evaluation of Appellant was ordered by the Honorable Benjamin Culbertson. Appellant was evaluated at the Medical University of South Carolina by Dr. Abby Mulay and Dr. Emily Gottfried. Mulay concluded that Appellant did not have a mental illness nor did he have an intellectual disability. (R. 63, 838-46). Both Mulay and Gottfried concluded Appellant could assist his lawyer at trial and was competent to stand trial. (R. 63, 111, 838-46).

At trial, the State tendered Agent Brian Wright of SLED as an expert in fire origin and cause. Wright classified the fire as incendiary and determined it originated from accelerant that was poured on the floor of the trailer. (R. 487). The State also called a handwriting expert to authenticate a letter dated November 11, 2014 from Cohen to her older son Devon. Cohen made the following statements regarding Appellant in the letter: "I heard Randy has a bond. I wish that I had some backup and Randy did have a bond just to deal with him" and "Do you think that I'm going to get life? I hope not. I need a gun and meet up with Randy and Mano." (R. 652, lines 2-4, lines 9-11).

The State also called Cohen's cousin, Rose Collins as a witness. Collins testified that she traveled with her husband to Andrews the day after the fire and met with Appellant at his house.

When she arrived at Appellant's home, Appellant approached her vehicle and said "We fucked – everything's f'd up. It wasn't supposed to go down like that, nephew. We, we f'd up." (R. 411, lines 12-13). Appellant declined to testify in his own defense. At the conclusion of trial, Appellant was convicted of both counts.

STANDARD OF REVIEW

I.

“It has been uniformly held a confession may be introduced upon proof of its voluntariness by preponderance of the evidence.” State v. Washington, 296 S.C. 54, 55, 370 S.E.2d 611 (1988) (quoting State v. Smith, 268 S.C. 349, 354, 234 S.E.2d 19, 21 (1997)). “On appeal, the conclusion of the trial judge as to the voluntariness of a statement will not be reversed unless so erroneous as to show an abuse of discretion.” State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007). “When reviewing a trial court’s ruling concerning voluntariness, this court does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court’s ruling is supported by any evidence.” State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001).

II.

“The defendant bears the burden of proving his lack of competence by a preponderance of the evidence, and the trial judge’s ruling will be upheld on appeal if supported by the evidence and not against its preponderance.” State v. Weik, 356 S.C. 76, 81, 587 S.E.2d 683, 685 (2002).

ARGUMENT

I.

The trial judge properly admitted Appellant's voluntary statement because Appellant agreed to be interviewed by law enforcement, waived his rights to an attorney, was given multiple breaks during the interview, admitted he was not threatened by law enforcement, and acknowledged at trial that his statement was true.

Appellant contends the trial judge erred in admitting his confession because it was not voluntarily given. Appellant argues the statement was induced by deception, promises of leniency, and threats of punishment. Appellant's argument is meritless. When considering the totality of the circumstances, Appellant's confession was voluntary. Appellant was not in custody and was free to leave the interrogation at any time. (R. 146-47, 228). Appellant was read his Miranda rights and he waived those rights in writing. (R. 144, 827). Appellant was told that he would be free to go at the end of the interview and would not be arrested no matter what he said. (R.147, 677, Court's Exhibit #3). Appellant was allowed to go home at the end of the interview. Appellant was given multiple breaks to use the bathroom and smoke a cigarette and was allowed to drink a soda during the interview. (R. 145-46, 232-34). Appellant was not promised any specific relief and was only told that law enforcement would speak with the solicitor on his behalf. (R. 147, State's Exhibit #3, disk 2, part 2). Appellant's statement implicated himself, but ultimately was self-serving and attempted to place blame on his co-defendant, James Miller. (R. 829-30). Finally, when Appellant testified on his own behalf at the Jackson v. Denno hearing, he admitted that his written statement was true. (R. 265). When each of the aforementioned circumstances is considered, the trial judge did not abuse his discretion in finding Appellant's confession was voluntary.

“[A] defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession.” Jackson v. Denno, 378 U.S. 368,

376 (1964). A defendant has a constitutional right to object to “the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness.” Denno 378 U.S. at 377. “The process for determining whether a statement is voluntary, and thus admissible, is bifurcated; it involves determinations by both the judge and the jury.” Miller, 375 S.C. at 379, 652 S.E.2d at 448. “Initially, the trial judge must conduct an evidentiary hearing in the absence of a jury. At this phase of the proceedings, the State must show the statement was voluntarily made by a preponderance of the evidence.” State v. Breeze, 379 S.C. 538, 543, 665 S.E.2d 247, 250 (Ct. App. 2008). “If the statement is found to have been given voluntarily, it is then submitted to the jury, where its voluntariness must be established beyond a reasonable doubt. Miller, 375 S.C. at 379, 652 S.E.2d at 448.

“In determining whether a confession was given ‘voluntarily’, this Court must consider the totality of the circumstances surrounding the defendant’s giving the confession.” State v. Pittman, 373 S.C. 527, 566, 647 S.E.2d 144, 164 (2007). Ultimately, an appellate court must decide whether “‘a defendant’s will was overborne’ by the circumstances surrounding the giving of a confession.” Dickerson v. U.S., 530 U.S. 428, 434 (2000) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)). Appellate courts in South Carolina have recognized a variety of factors to consider in the totality of the circumstances analysis. Those factors include: “background, experience, and conduct of the accused; age; length of custody; police misrepresentations; isolation of a minor from his or her parent; threats of violence; and promises of leniency.” Miller, 375 S.C. at 386, 652 S.E.2d at 452.

“A statement induced by a promise of leniency is involuntary only if so connected with the inducement as to be a consequence of the promise.” State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 246-47 (1990). “[M]isrepresentations of evidence by police, although a relevant

fact, do not render an otherwise voluntary confession inadmissible.” State v. Von Dohlen, 322 S.C. 234, 244, 471 S.E.2d 689, 695 (1996), overruled on other grounds by State v. Burdette, Op. No. 27910 (S.C. Sup. Ct. filed July 31, 2019) (Shearouse Adv. Sh. No. 31 at 8). “A defendant’s mental condition in and of itself does not render a statement involuntary in violation of due process.” State v. Hill, 361 S.C. 297, 306, 604 S.E.2d 696, 701 (2004). The voluntariness of a waiver of rights “can be discerned from the fact that the statement which followed it was self-serving and was an attempt on [a defendant’s] part to cast the blame on his co-defendant.” State v. Pendergrass, 270 S.C. 1, 8, 239 S.E.2d 750, 753 (1977).

Because Appellant has alleged multiple reasons why his confession was involuntary, it is instructive to address each reason individually.

Misrepresentation and Deception

Appellant asserts that he was coerced into making an inculpatory statement because law enforcement misled him by suggesting that no one else would see the tape of his interview.

Agent Hardee did make one statement early in Appellant’s interview that whatever Appellant told him “aint gonna leave this room.” (State’s Exhibit #3, Disk 1, part 1, 21:10-21:35).

Appellant correctly asserts that the question of whether a statement can be considered voluntary after police make a promise of confidentiality is an issue of first impression in South Carolina.

The State concedes that at the very least Hardee’s statement was problematic and would be an improper tactic to use if such a promise was used in a repeated manner². However, Hardee only made this statement one time approximately 21 minutes into a three and a half hour interview.

Neither Hardee nor Garrett repeated this statement or anything similar to it for the remainder of

² Despite the inappropriate nature of Hardee’s statement, Appellant acknowledged on cross-examination during the Jackson v. Denno hearing that he was familiar with Miranda rights and knew that his statements could be used against him in court. (R. 261-62).

the interview. Furthermore, Hardee's statement did not immediately precede Appellant's confession. Appellant continued to deny any involvement in the crime for at least one hour after Hardee made the statement³. In fact, as Appellant acknowledges in his brief, even in Appellant's confession he continued to downplay his responsibility for the fire and claimed he did not actually set the fire. (Initial Brief of Appellant 10). Appellant consistently claimed that Miller started the fire and he just happened to be there watching. (R. 829-30). Therefore, it is unlikely that one statement by Hardee which occurred approximately three hours before Appellant's written confession overbore Appellant's will. When examining the totality of the circumstances, Hardee's lone statement had little effect on Appellant's eventual confession and certainly did not overbear Appellant's will to the point of making the confession involuntary.

Appellant cites three cases from other states to support his position. Each case cited by Appellant has a similar fact pattern to the current case but they also differ in important ways. In Redmond v. People, Redmond was told by law enforcement that the police would only take notes on the portion of his confession that involved his co-defendant and that anything he told them that didn't involve his co-defendant would not be used against him. Redmond v. People, 180 Colo. 24, 26, 501 P.2d 1051, 1052 (1972). The Colorado Supreme Court ruled that it was impossible to tell from the confusing agreement law enforcement proposed which portions of the confession would be used against Redmond and which ones wouldn't. The situation in Redmond is not present in the current case. No promise was made to Appellant about some portions of his confession being used against him, but others not being used against him.

³ It is unclear when Appellant first began to acknowledge his role in the crime because the video recorder used by Agent Hardee ran out of power after approximately 87 minutes. (R. 231-32, 676, State's Exhibit #3). When the recording resumes, Appellant is drawing a diagram of the trailer and explaining the chain of events on March 29, 2014 to Hardee and Garrett.

In Porter v. State, Porter was explicitly told immediately after his Miranda warnings were read to him that his statement would not be used against him, but would instead be used to assist a secretary in typing notes for an interview. Porter v. State, 143 Ga. App. 640, 642, 239 S.E.2d 694, 696 (Ga. Ct. App. 1977). Here, Appellant was read his Miranda rights and no such promise was made to him. Hardee did not make his statement regarding information provided by Appellant not leaving the room until 21 minutes after the interview began. The final case cited by Appellant, U.S. v. Preston, features an extreme example of coercion by law enforcement that would not be acceptable in any court in this country. In addition suggesting that if he confessed Preston could move on with his life after apologizing to the victim, law enforcement also presented him with “the choice of confessing to a heinous crime or to a less heinous crime; rejected his denials of guilt; instructed him on the responses they would accept; and fed him the details of the crime to which they wanted him to confess.” U.S. v. Preston, 751 F.3d 1008, 1010 (9th Cir. 2014). None of the aforementioned coercive conduct in Preston took place in this case. Neither Hardee nor Garrett promised Appellant he would not be prosecuted. Law enforcement merely promised Appellant that he would be allowed to go home at the conclusion of the interview and they fulfilled that promise.

Promises of Leniency

Appellant next asserts that his confession was involuntary because of promises of leniency made to Appellant by law enforcement. Specifically, Appellant argues that law enforcement encouraged Appellant to save himself by confessing to the crime and implied that he would be spared from harsh punishment if he cooperated. Appellant’s assertions are not supported by the record. Appellant was not encouraged to save himself by confessing to the crime, but rather Appellant was encouraged not to lie to save his family member, James Miller.

There are two relevant portions of the interview where law enforcement encourages Appellant not to lie to protect Miller. The first exchange occurs when law enforcement is asking Appellant about Miller's role in the fire. The following exchange occurs:

Garrett: See I understand, this is what I understand. I understand that James is your nephew

Appellant: Mm hmm

Garrett: That you guys are family, but you got to understand that trying to lie to save him or you at this point is not going to work. Okay? So we need to know the truth. Now only thing you got to worry about is Randy.

(State's Exhibit #3, disk 2, part 1 7:00-7:40). The second exchange occurred a few minutes later:

Garrett: Did you see [Miller] or did you not see [Miller]?

Hardee: I know your stomach is tore up right now, but you're getting this off your chest.

Garrett: And, and this is about you. I mean you know, again, you cannot save anybody but yourself. I'm sorry, but that's just the fact of the matter. So, did you see, did you, what happened?

(State's Exhibit #3, disk 2, part 1, 13:00-13:30). Appellant was not told to save himself by confessing to the crime, but he was encouraged not to lie to protect a family member.

Appellant was not promised anything in exchange for his confession. Garrett and Hardee did not say they would speak to the Solicitor on Appellant's behalf until after Appellant had already confessed. (State's Exhibit #3, disk 2, part 2). Even when Hardee and Garrett said they would speak to the Solicitor, no specific promises were made. Garrett told Appellant: "I'm going to speak with the Solicitor and try to get you as much help as I can okay?" (State's Exhibit #3, disk 2, part 2 29:00-29:05). Similarly, Hardee told Appellant: "Like I said, we're not making any promises, but we will go talk to the Solicitor. I'll go talk to the Solicitor with [Garrett] and let them know what happened today." (State's Exhibit #3, disk 2, part 2 29:45-30:00). Not only

did law enforcement not promise Appellant anything other than speaking to the solicitor on his behalf, but they did not make that promise until after Appellant had already confessed. Therefore, Appellant's confession had nothing to do with a promise of leniency by law enforcement.

Contrary to Appellant's assertion, this case is not similar to State v. Peake. In Peake a police officer guaranteed Peake that the State would not seek the death penalty if Peake gave a statement. State v. Peake, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987). Our Supreme Court ruled Peake's statement was a product of the officer's promise of leniency. Here, Garrett and Hardee merely promised to speak to the solicitor on Appellant's behalf after he had already given a confession.

Appellant's Lack of Intelligence

Appellant next argues that his lack of intelligence rendered his confession involuntary. Appellant makes a conclusory argument that because he did not go far in school and suffered a recent stroke, his statement could not have been voluntary. In support of this contention, Appellant cites to his self-serving testimony given at the Jackson v. Denno hearing. In the relevant portion of Appellant's testimony, Appellant claims to not remember signing his Miranda waiver and that he did not understand his Miranda rights. (R. 250-52). However, on cross-examination Appellant admitted he was familiar with his Miranda rights and recited two of those rights. When asked what the police say when they arrest someone, Appellant responded "You're under arrest. You have the right to remain silence" and "Any, any chance you talk will and could be used against you in a court of law." (R. 261, lines 21-22, 24-25). Not only did Appellant acknowledge he understood his Miranda rights, but he admitted when asked by the trial judge,

that he was not threatened by Hardee and Garrett and his written statement was true. (R. 264-65, 829-30).

Appellant's testimony lacked credibility because of its' self-serving nature and its' many contradictions. Appellant demonstrated an ability to remember facts that were favorable to him and not remember unfavorable ones. Indeed, the trial judge noted Appellant's selective memory in making his ruling regarding the admissibility of the confession. The trial judge remarked "he only forgets things that may be harmful to him." (R. 275, lines 1-2). Appellant's ability to rationalize his behavior and deflect blame to others demonstrates that he had the requisite intelligence to waive his rights and make a voluntary statement.

Even if this Court finds Appellant's testimony credible, Appellant still failed to present any evidence regarding his lack of intelligence. The only expert testimony presented to the trial judge came from the State's experts, who both opined that Appellant was competent to stand trial. Appellant did not present any expert testimony of his own regarding his mental condition. Therefore, the only evidence in the record regarding Appellant's lack of intelligence was his own self-serving testimony and even that testimony lacked credibility because of its' inherent contradictions.

Length of Interrogation

Finally, Appellant argues his statement was involuntary because of the length of the interrogation, Appellant's lack of access to food, and Appellant's lack of sleep. The record plainly contradicts Appellant's argument. After picking up his phones, Appellant agreed to remain at the town hall and answer the investigators' questions. (R. 673). Appellant was cooperative throughout the interview and even offered to continue to help law enforcement with their investigation at the end of the interview. (State's Exhibit #3, disk 2, part 2, 28:10-28:30).

Appellant was allowed multiple bathroom breaks as well as cigarette breaks. (R. 145-46, 232-34). Appellant was allowed to drink a soda by law enforcement, and although Appellant did not have any food with him, Garrett testified that law enforcement would have provided Appellant food if Appellant said he was hungry. (R. 145, 675-76). Appellant was not suffering from a lack of sleep. At the beginning of his interview with police, Appellant said he went to bed the previous night at 1:00 AM and got up at 10:00 AM. (State's Exhibit #3, disk 1, part 1, 5:00-5:30). Thus, Appellant got nine hours of sleep and was not sleep deprived. Finally, the overall length of the interview was not excessive when considering the number of breaks given to Appellant during the interview.

The facts of this case differ considerable from State v. Parker where this Court also considered whether a confession was voluntary under much more severe circumstances. Like Appellant, Parker was also subjected to a three and a half hour interview with law enforcement, but unlike Appellant, Parker was "in a car wreck, shot at by police, exposed overnight to the cold, and taken to the hospital." State v. Parker, 381, 381 S.C. 68, 93, 671 S.E.2d 619, 632 (Ct. App. 2008). Despite these harrowing circumstances, this Court held that Parker's statement was freely and voluntarily given. Id. Appellant did not face any of the same circumstances. Appellant got nine hours of sleep, had a soda to drink and was given bathroom breaks and cigarette breaks. When taking into consideration all of the circumstances of Appellant's interview with law enforcement, this Court should hold that Appellant's will was not overborne, his statement was voluntarily given, and the trial judge did not abuse his discretion in admitting the statement. Appellant's convictions and sentences should be affirmed.

II.

The trial judge did not abuse his discretion by refusing to order a further evaluation of Appellant by the Department of Disabilities and Special Needs when the examiners appointed by the Department of Mental Health found that Appellant did not suffer from an intellectual disability, and therefore any further examination was unnecessary.

Appellant next argues the trial judge erred by not ordering a further evaluation of Appellant's competency to stand trial by the South Carolina Department of Disabilities and Special Needs (DDSN). Appellant contends that Dr. Mulay and Dr. Gottfried found indications that Appellant had an intellectual disability and therefore should not have rendered an evaluation of Appellant's mental capacity. Rather, Appellant argues Mulay and Gottfried should have recommended that Appellant be referred to DDSN for further evaluation. Appellant's argument is without merit. Dr. Mulay and Dr. Gottfried did not find that Appellant had an intellectual disability. Therefore, it was appropriate for Dr. Mulay and Dr. Gottfried, in their role as examiners appointed by the Department of Mental Health (DMH), to render an opinion on Appellant's mental capacity. Furthermore, the trial judge's ruling that Appellant was competent to stand trial was supported by the evidence presented both in the experts' report and in their testimony during the pretrial hearing. Accordingly, the trial judge did not abuse his discretion in ruling that Appellant was competent to stand trial.

Whenever a trial judge has reason to believe that a person on trial before him lacks the mental capacity to understand the proceedings against them or to assist in their own defense, the trial judge shall order an examination by either DMH or DDSN. S.C. Code Ann. § 44-23-410(A)(1). If a defendant is suspected of having a mental illness, they shall be evaluated by examiners from DMH. However, if a defendant is suspected of having an intellectual disability, then they should be evaluated by DDSN. *Id.* If examiners from DMH:

find indications of intellectual disability or a related disability but not mental illness, the department shall not render an evaluation on the person's mental capacity, but shall inform the court that the person is "not mentally ill" and recommend that the person should be evaluated for competency to stand trial by the Department of Disabilities and Special Needs.

S.C. Code Ann. § 44-23-410(D). Similarly, if examiners from DDSN find indications of mental illness, but not intellectual disability, they should not render an evaluation on a defendant's mental state but shall recommend to the court that DMH evaluate the defendant. S.C. Code Ann. § 44-23-410(D).

"A criminal defendant may not be tried unless he is competent." Godinez v. Moran, 509, U.S. 389, 396 (1993). "The test for determining competency to stand trial is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as a factual understanding of the proceedings against him." Weik, 356 S.C. at 81, 587 S.E.2d at 685 (2002). "The defendant bears the burden of proving his lack of competence by a preponderance of the evidence, and the trial judge's ruling will be upheld on appeal if supported by the evidence and not against its preponderance." Id.

Here, Judge Culbertson ordered Appellant to be evaluated by DMH to determine if he was competent to stand trial pursuant to State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981). (R. 19). Dr. Mulay and Dr. Gottfried were appointed by DMH after consulting with Dr. Alicia Hall of DDSN. Dr. Hall advised that any mental issues that Appellant suffered from were related to his 2013 stroke and not an intellectual disability. (R. 24-26, 838-46). Nonetheless, Dr. Mulay and Dr. Gottfried still considered whether Appellant suffered from an intellectual disability when conducting their evaluation. Mulay and Gottfried referenced the definition of intellectual disability as defined in the DSM-V. They noted "an intellectual disability is a 'disorder with inset

during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains.” (R. 843). Applying this definition to Appellant, the experts concluded: “Overall, [Appellant] does not demonstrate significant impairments in adaptive functioning.” (R. 843). Mulay and Gottfried acknowledged that Appellant “[did] indicate some degree of impairment in general intellectual functioning” but because “he does not demonstrate impairments in the domain of adaptive functioning, a diagnosis of intellectual disability is not assigned.” (R. 843).

After Appellant was evaluated, the trial judge held a hearing to determine Appellant’s competency as required by Blair. The trial judge considered the report submitted by Mulay and Gottfried as well as their testimony. The experts’ testimony mirrored the findings of their report. Mulay concluded that Appellant did not suffer from an intellectual disability nor did he suffer from mental illness. (R. 63, 67). Gottfried and Mulay each found that Appellant had a sufficient ability to work with his lawyer, he had a rational understanding of the charges against him, and he had a rational understanding of the court process and the roles of court personnel. (R. 60, 111). Each doctor concluded Appellant was competent to stand trial.

Appellant contends the trial judge found “some intellectual disabilities” in Appellant. (Initial Brief of Appellant 23). Appellant’s assertion is contradicted by the record. The trial judge remarked “the doctors, nevertheless, find that there is – there are some intellectual disabilities or impairments. Let’s call them impairments. However, [Appellant] functions quite well.” (R. 125, lines 20-23). The record demonstrates the trial judge did not find Appellant had an intellectual disability. The trial judge mistakenly used the words “intellectual disability” as evidenced by the fact that he immediately corrected himself and used the word impairments. In fact, the record demonstrates the trial judge endeavored to be very clear in his ruling on Appellant’s competency

to stand trial. During Mulay's testimony, the trial judge sought clarification by questioning Mulay directly as to whether an intellectual impairment was an indication of an intellectual disability. (R. 67-68). Mulay reiterated that despite finding intellectual impairments⁴, there was no indication of an intellectual disability⁵. At the conclusion of the Blair hearing the trial judge made a detailed ruling. The judge ruled that: any deficiencies in Appellant were related to his 2013 stroke and did not require a referral to DDSN, neither doctor found an indication of an intellectual disability, and Appellant failed to prove by a preponderance of the evidence that he lacked the capacity to stand trial. (R. 126-27). The trial judge did not abuse his discretion in ruling that Appellant was competent to stand trial. Appellant's convictions and sentences should be affirmed.

⁴ The findings of intellectual impairments or deficits primarily relate to evidence that Appellant did poorly in school as a child. The trial judge discounted this evidence and noted that it was "anecdotal." (R. 125, line 18). The other possible basis for the experts' findings of impairments was Appellant's low score on the Montreal Cognitive Assessment (MOCA). However, both doctors noted the MOCA is not a diagnostic tool, but rather a brief screening tool used to determine if further testing needs to be done on a particular patient. (R. 29-30, 36, 51, 99-100).

⁵ In questioning Mulay at this point in the record, the trial judge used the term "mental retardation" rather than "intellectual disability". The trial judge previously asked Mulay whether the terms "mental retardation" and "intellectual disability" were synonymous and Mulay testified that they were. (R. 44). Appellant claims the trial judge erred by making a distinction between the two terms. The record contradicts Appellant's assertion and demonstrates the trial judge used the terms interchangeably because the terms were synonymous. (R. 44, 127).

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court be affirmed.


Respectfully submitted,

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General

JIMMY A. RICHARDSON
Solicitor, Fifteenth Judicial Circuit

Post Office Drawer 1276
Conway, SC 29526
(843)-915-5460

BY: 
SCOTT MATTHEWS
Bar # 101464

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

October 3, 2019

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
The Honorable Larry B. Hyman, Circuit Court Judge

Appellate Case No. 2018-002056

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SC Court of Appeals

THE STATE,

Respondent,

v.

RANDY COLLINS,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule
211(b), SCACR.

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General

JIMMY A. RICHARDSON
Solicitor, Fifteenth Judicial Circuit

Post Office Drawer 1276
Conway, SC 29256
(843)-915-5460

BY:



Scott Matthews
Bar # 101464

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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