STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Williamsburg County
Clifton Newman, Circuit Court Judge

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SC Court of Appeals

THE STATE,

Respondent,

v.

ANTHONY ANDERSON,

Appellant

Appellate Case No. 2019-001406.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF THE ISSUES ON APPEAL

I. Did the trial judge err in finding Appellant knowingly, intelligently, and voluntarily waived his rights against self-incrimination and to counsel where the totality of the circumstances showed Appellant suffered from a traumatic brain injury that resulted in his psychotic disorder and cognitive impairments?

II. Did the trial judge err when he refused to admit a detailed confession by a third person where (1) the defense established the statement was admissible as a statement against penal interest as an exception to the rule against hearsay because the third person was unavailable and the circumstances surrounding the making of the confession corroborated it to establish its trustworthiness and (2) the defense authenticated the confession by showing it was a business record and a public record?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUES ON APPEAL

I. Whether the trial court erred in admitting Appellant's recorded interview with law enforcement, where law enforcement exhibited no coercive behavior, and where Appellant made several statements to law enforcement indicating he understood the nature of the right being abandoned and the consequences of the decision to abandon it.

II. Whether the trial court erred in suppressing Appellant's proffered third-party confession, where the declarant was unavailable, and where the hearsay statement lacked the corroboration required to clearly indicate the statement's trustworthiness.

STATEMENT OF THE CASE

In August 2011, the Williamsburg County Grand Jury indicted Appellant Anthony Anderson for the June 5, 2011 murders of his grandmother, Rosa Lee McCray, and his uncle, Theward McCray, and for possession of a weapon during the commission of a violent crime. (R. pp. 643 Indictment No. 2011-GS-45-00140).

Appellant proceeded to a jury trial May 12 through 14, 2014, before the Honorable Clifton Newman. Kimberly Barr, Esquire, appeared on behalf of the Third Circuit Solicitor's Office. Steven S. McKenzie, Esquire, of the Clarendon County Bar represented Appellant on the charges. (R. p. 1). Prior to trial, Dr. Richard. Frierson evaluated Appellant and found him competent to stand trial. (R. pp. 538 Court's Ex. 1).

The jury convicted Appellant as indicted. (R. p. 515, lines 12-22). Judge Newman sentenced Appellant to 30 years for each murder and to a consecutive five years for the possession of a weapon during the commission of a violent crime. (R. 527, lines 3-8).

On May 23, 2014, Appellant filed a motion and memorandum for a new trial. (R. pp. 625 Mot. for New Trial). Judge Newman heard arguments on the motion at an August 7, 2019 hearing in Bamberg County. (R. pp. 528 Aug. 7, 2019 R., pp. 1, 3). At the conclusion of that hearing, Judge Newman denied Appellant's motion. (R. pp. 528 Aug. 7, 2019 R., p. 557). Judge Newman memorialized that ruling in a formal Order issued August 12, 2019. (R. pp. 640 Or. on Mot. for New Trial).

This appeal follows with notice being served August 20, 2019. (R. pp. 641 Notice of Appeal).

STATEMENT OF FACTS

The 911 operator had a difficult time understanding the words coming from Theward (Seward) McCray. She "knew he was in distress" as he asked her to send help to an address at Seward Ave. (R. p. 109, lines 1-11). The operator could make out the caller saying someone "killed his mother and shot him." (R. p. 109, lines 22-23; State's Ex. 1, Tracks 1 and 4). "It seem[ed] like he was saying his nephew" did it. (R. p. 109, lines 24-25; R. p. 111, lines 12-25). The call came in at 1:35 AM on June 5, 2011. (R. p. 104, lines 13-19; R. p. 105, lines 11-15). In one part of the recording, the distressed caller clearly states, "my nephew killed me and my momma." (State's Ex. 1, Track 1). Later, the caller states, "Anthony Anders--." (State's Ex. 1, Track 4 at 0:29-0:33).

About twenty minutes after dispatch, officers arrived at the scene. (R. p. 118, lines 9-17). Inside the home, officers found two gunshot wound victims. They located one male, Theward McCray, alive and conscious on the living room floor, (R. p. 119, lines 4-18). One officer asked the victim who shot him. (R. p. 120, line 1). The victim answered, "Anthony." (R. p. 120, line 3). "He said it several times." (R. p. 134, line 3). They located the second victim, an "older female subject," in a bedroom. She was "deceased in the bed". (R. p. 119, lines 8-10). The headboard and curtains in that bedroom "[a]ppeared to be [damaged] from a shotgun." (R. p. 129, line 14 – p. 130, line 12).

Anthony Anderson had lived with the victims, his grandmother, Rosa Lee McCray, and his uncle, Theward McCray, at that address since December. (R. p. 344, lines 6-15). According to Anderson's Aunt, Eva Evans, Anderson sometimes got along with the McCrays, "and sometimes they ha[d] little arguments." (R. p. 345, lines 4-7). About three weeks before the 911 call, Anderson told Evans he was "gonna kill" Theward "one day." (R. p. 345, lines 11-25).

Anderson told Evans he's "not leaving any witnesses. Even if it's a baby, even if he's old enough to talk I'm gonna take him out." (R. p. 346, lines 7-10). Evans said Anderson "would always say things. He would say it in a way, you know, and laugh . . . You, know, he was just playing." (R. p. 354, lines 6-8). He typically "would tell jokes about different things, but not always like that." (R. p. 354, lines 14-22).

Then, about a week before the 911 call, Anderson asked Evans how she would feel if something happened to Rosa, who was Evans' mother. (R. p. 349, lines 1-2). This time, Evans thought Anderson was concerned he would have to move if something happened to his aging grandma because he and his uncle "weren't getting along that good." (R. p. 349, lines 14-24). After the shooting, Evans found that Anderson had packed up his clothes in his bedroom. (R. p. 351, line 22 – p. 352, line 13).

The day of the shooting, Anderson called his younger sister, Jessica McCray,[1] "expressing concern about not feeling loved and thinking that someone was trying to kill him and talking about an insurance policy." (R. p. 442, lines 10-14). Jessica described the call as "typical." (R. p. 442, line 15).

While working the scene, Williamsburg County investigators received a call from an investigator in Horry County. Anderson's mother had called Horry County law enforcement. (R. p. 370, lines 8-17). In response, Horry County officers visited Anderson's mother's home in Conway "to try to secure the evidence." (R. p. 145, lines 9-25). They located Anderson there. (R. p. 155, lines 10-16). Anderson's mother gave the Horry County investigator "a series of pill bottles," each prescribed to Anderson. (R. p. 182, lines 2-19). The investigator recognized one of the medications was used to treat psychiatric disorders. (R. p. 182, lines 4-7). He received the

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[1] Jessica McCray testified on Petitioner's behalf at trial. (R. p. 428, lines 18-24).

bottles prior to making contact with Anderson. (R. p. 181, line 14 – p. 182, line 4). Horry County officers also located Anderson's pickup truck parked at an apartment complex about one street over from his mother's home. (R. p. 146, lines 11-20; R. p. 149, line 8).

Horry County investigators apprehended Anderson, who waived his Miranda rights and provided a statement. (R. p. 163, line 18 – p. 164, line 13; R. p. 82 Court's Ex. 4). In his interview, Anderson said he got in an argument with his grandma, the female victim, over an insurance policy premium she typically paid on Anderson's behalf. (R. p. 170, line 18 – p. 171, line 1; State's Ex. 52 at 13:15 – 14:05); (*see also* R. pp. 566 Court's Ex. 2).[2] Anderson said he got angry, took his uncle's twelve-gauge shotgun from his uncle's bedroom closet, and fired it in the living room. The victims were not armed. (R. p. 171, line 16 – p. 173 line 22; State's Ex. 52 at 14:34 – 17:00). The gun was already loaded. (State's Ex. 52 at 23:14 – 23:53).

Anderson told the investigator, "I just started shooting." (State's Ex. 52 at 16:38 – 16:45). Anderson said that he did not want to do it, but felt they were "pushing back and forth all this month, I mean all this whole year . . ." and he was tired of arguing with his uncle. (State's Ex. 52 at 20:00 to 21:08). He said his grandma had "pulled [his] chain" and did not know she had made him so mad. And his uncle was yelling at him. (State's Ex. 52 at 29:12 – 30:08)

Anderson shot his uncle first. (R. p. 201, lines 12-22). When his grandma fled to the bedroom, Anderson kicked in his grandma's bedroom door and shot again. (R. p. 173, line 22 – p. 174, line 3; State's Ex. 52 at 17:30 – 18:30). Then, Anderson walked out of the house, got in his truck, and drove to his mother's house in Conway. He threw the gun out of the window along the way. (R. p. 174, lines 10-11; State's Ex. 52 at 21:36 – 23:13). Anderson declined to show

[2] This transcript of the recorded statement does not account for pauses and transitions occurring in the recording.

officers where he tossed it. (R. p. 174, lines 15-24).

Anderson also revealed that he had attended counseling at Waccamaw Mental Health and took medication to control his temper and depression. (R. p. 191, line 14 – p. 192, line 21). He told the investigator that he did not take his medications the morning of the shooting, but had taken them the night before. (R. p. 208, line 21 – p. 209, line 1; State's Ex. 52 at 25:35 – 26:39). During his interview, Anderson did not "appear to be sick" or "to be injured." He "appeared to understand questions" and gave "competent responses." (R. p. 189, lines 12-16).

Anderson did not test positive for gunshot residue. (R. p. 255, lines 11-23). Investigators recovered spent shotgun shells on the bedroom and kitchen floors, in a box behind the stove, and behind the house. (R. p. 269 line 18 – p. 271, line 18). Apparent biological or textile debris clung to two of the fired shells. (R. p. 289, lines 18-22; R. p. 290 lines 3-9). The State's expert opined that three of the four shells had been fired by the same gun, (R. p. 294, lines 12-18), "but there just weren't enough markings on the [fourth] to say they were all four fired by the same gun and no other gun of kind situation." (R. p. 295, lines 1-8).

Shotgun wadding and pellets recovered from the victims' autopsies were consistent with a twelve gauge shotgun. (R. p. 292, line 10 – p. 294, line 3). "[I]n order for the wadding to actually go into the victim," as it had with Rosa McCray, "usually it denotes [a gunshot] that's very, very close." (R. p. 307, lines 10-14; R. p. 321, lines 6-8). Based upon the characteristics of the entrance wounds, the number of pellets retained in the body, and the wadding, the forensic pathologist opined that Rosa McCray had been shot in the back right pelvic region from a distance of three to five feet. (R. p. 322, lines 10-15; R. p. 323, lines 5-12).

The pathologist further opined that Theward McCray sustained a minimum of two shotgun wounds to the left and right side of his chest. In addition, "much of the left thumb had

been blown away by a shotgun shot." (R. p. 329, lines 2-13; R. p. 337, line 22 – p. 338, line 4). The pathologist opined that Theward McCray had been shot front-to-back from a distance of four to ten feet. (R. p. 335, lines 1-22). He also tested positive for particles consistent with gunshot residue on the back of both hands, and on his left palm. (R. p. 256 line 16 – p. 257 line 4). The State's gunshot residue expert opined that the location of the particles on Theward's hands indicated a "defensive posture situation." (R. p. 264, lines 1-11).

Testimony regarding Anderson's mental state

In 1995, Anderson "was found in a ditch on the side of the road." (R. p. 220, lines 15-16). "He had had a single car accident the night before and had laid in the ditch pretty much all night long." (R. p. 220, lines 16-18). The accident injured the left frontal lobe of Andersons' brain, requiring a year in a rehabilitation hospital. During that year, Anderson re-learned basic functions such as walking. (R. p. 221, lines 2-16).

Prior to trial, Dr. Richard Frierson evaluated Anderson for competency. (R. p. 213, lines 7-9). Dr. Frierson found Anderson competent to stand trial, though he had some intellectual limitations. (R. p. 216, line 23 – p. 217, line 1). Anderson's mother told Dr. Frierson that Anderson "was a different person after his head injury." (R. p. 221, lines 19-20). He was depressed and "quite paranoid," believing others were talking about him "all the time." (R. p. 221 line 20 – p. 222, line 1). This caused Anderson to not want to be around other people. (R. p. 222, lines 1-7).

Dr. Frierson diagnosed Anderson with psychotic disorder (paranoia), depression, and cognitive disorder, each due to traumatic brain injury. (R. p. 245, line 23 – p. 246, line 6). Dr. Frierson opined Anderson "would have been capable of distinguishing legal and moral right from legal and moral wrong" at the time of the shooting. (R. p 219, lines 6-15). He also opined

that "the combination" of Anderson's "paranoid thinking and his inability to control anger as a result of the injury in this part of the brain impaired his ability to conform his conduct to the requirements of law." (R. 244, lines 5-9).

Dr. Frierson further opined that while the shooting "fit his pattern of paranoia," Anderson also appeared to have been motivated by anger over the life insurance policy argument. (R. p. 229, line 15 – p. 233, line 12). Anderson told Dr. Frierson that he thought his grandmother and his uncle "were trying to mess with him;" because "they had taken an insurance policy out on him," they intended to "kill him or try [to] do him in to collect the money from the insurance policy." (R. p. 222, lines 9-19).

Dr. Frierson narrowed on a series of factual details that indicated to Dr. Frierson "that [Anderson] was aware that this was something that he did [that] was wrong." (R. p. 225, lines 1-3). According to the police report Dr. Frierson reviewed, Anderson "called his mother earlier that day [of the shooting] to tell her that he felt they were harming him or going to do something to him." (R. p. 222, lines 19-24). Anderson fled from the scene rather than stay and assert self-defense, and also consciously disposed of evidence by throwing the gun out of the car. (R. p. 223, line 18 – p. 224, line 11). Making reference to Anderson's recorded statement, Dr. Frierson noted Anderson told his mother to call the police, and then told the police that he "messed" his life up and knew he would "get some time" for his actions. (R. p. 224, lines 11-20). Further, during his evaluation, Anderson "acknowledged that he likely shot them," (R. p. 231, lines 1-2), and Anderson did not report having hallucinations on that particular day. (R. p. 231, line 17 – p. 232, line 12).

Two other family members testified about Anderson's perceived mental state. Anderson's younger sister, Jessica McCray, explained that Anderson's 1995 accident greatly

impacted his life and her own. (R. p. 430, line 8 – p. 433, line 20). Jessica described Anderson as being in a frequent state of paranoia over various things. (R. p. 435, line 12 – p. 437, line 18). She testified that "the people and family members that he had around him tended to take advantage of him." (R. p. 438, lines 3-5).

Conversely, Anderson's Aunt Eva Evans testified that she knew Anderson suffered from a major car accident in 1995 and had undergone a period of inpatient treatment, but she had never witnessed him act paranoid or hallucinate. (R. p. 353, lines 1-22; R. p. 355, line 14 – p. 359, line 1).

STANDARD OF REVIEW

"The admission or exclusion of evidence falls within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion," which occurs "when the trial court's decision is based on an error of law or upon factual findings that are without evidentiary support." *State v. McEachern*, 399 S.C. 125, 136-37, 731 S.E.2d 604, 609-10 (Ct. App. 2012).

When this Court reviews a trial court's admission of a defendant's statement as knowing, intelligent, and voluntary, "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). For an improperly admitted statement to warrant reversal, the statement's introduction must have prejudiced the defendant. *State v. Easler*, 327 S.C. 121, 129, 489 S.E.2d 617, 621-22 (1997), *overruled on other grounds*, *State v. Greene*, 814 S.E.2d 496, 423 S.C. 263 (2018).

The abuse of discretion standard also applies to a trial court's ruling regarding the admissibility of hearsay offered under the exception established for statements against the declarant's penal interest. *State v. Forney*, 321 S.C. 353, 468 S.E.2d 641 (1996).

I. Anderson made an uncoerced *Miranda* waiver, and exhibited the requisite mental capacity for doing so, as Anderson made multiple statements to the interviewing officer denoting he understood the nature of the right being abandoned and the consequences of the decision to abandon it.

A statement obtained from custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his or her rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). "If a suspect is advised of his *Miranda* rights, but chooses to make a statement, the burden is on the State to prove by a preponderance of the evidence that his rights

were voluntarily waived." *State v. Arrowood*, 375 S.C. 359, 366-67, 652 S.E.2d 438, 442 (Ct. App. 2007). "If admitted, the jury must then determine whether the statement was given freely and voluntarily beyond a reasonable doubt." *State v. Parker*, 381 S.C. 68, 74, 671 S.E.2d 619, 622 (Ct. App. 2008).

A voluntary waiver need not be express. Rather, "(1) the waiver must be 'voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception' and (2) the waiver must be 'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" *State v. Moses*, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (2010) (quoting *Berghuis v. Thompkins*, 560 U.S. 370, 382, 130 S.Ct. 2250, 2260 (2010)). "In South Carolina, the test for determining whether a defendant's confession was given freely, knowingly, and voluntarily focuses upon whether the defendant's will was overborne by the totality of the circumstances surrounding the confession." *Id.* "Coercive police activity is a necessary predicate to finding a statement is not voluntary." *State v. Miller*, 375 S.C. 370, 386, 652 S.E.2d 444, 452 (Ct. App. 2007). "Coercion is determined from the perspective of the suspect." *Id.* (citing *Illinois v. Perkins*, 496 U.S. 292, 110 S.Ct. 2394 (1990)).

The "[d]etermination of whether a statement is involuntary [also] 'requires more than a mere color-matching of cases.'" *Mincey v. Arizona*, 437 U.S. 385, 401, 98 S. Ct. 2408, 2418 (1978) (quoting *Reck v. Pate*, 367 U.S. 433, 442, 81 S.Ct. 1541, 1547 (1961)). "[E]ach case requires careful scrutiny of all the surrounding circumstances." *State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007). The factors to be considered are frequently examined and broadly defined. The defendant's "background, experience, and conduct" are relevant, as are the circumstances creating the environment in which the statement is made: the length of the

interrogation; its location; its continuity; the defendant's maturity; education; physical condition; and mental health." *State v. Miller*, 375 S.C. at 385, 652 S.E.2d at 452 (quoting *Withrow v. Williams*, 507 U.S. 680, 113 S.Ct. 1745 (1993) (collecting cases)).

"Further, under State law, a confession is not inadmissible because of mental deficiency alone." *State v. Hughes*, 336 S.C. 585, 594, 521 S.E.2d 500, 505 (1999) (citing *State v. Doby*, 273 S.C. 704, 258 S.E.2d 896 (1979), *cert. denied*, 444 U.S. 1048, 100 S.Ct. 739 (1980)). A defendant may have "a below-average I.Q., limited education and reading problems," but "these factors are not in and of themselves determinative of the voluntariness of a waiver[.]" *United States v. Young*, 529 F.2d 193, 195 (4th Cir. 1975); *State v. Jennings*, 280 S.C. 62, 64, 309 S.E.2d 759, 760 (1983) ("Neither the length of custody before the confession was made, nor the physical deficiencies of the appellant, were conclusive" of voluntariness), *overruled on other grounds*, *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019); *see also Vance v. Bordenkircher*, 692 F.2d 978, 981, n.1 (4th Cir. 1982) (quoting *Young*, *supra*). "Although there is likely to be a level of deficiency so great that it renders a defendant unable to make a knowing and intelligent waiver, nearly every court to consider the issue has held that mental impairments . . . must be considered along with the totality of the circumstances." *State v. Blackstock*, 19 S.W.3d 200, 208 (Tenn. 2000). "As a result, courts tend to reach results that are somewhat fact-specific." *Id.* at 208 and n.4 (collecting cases from Federal courts of appeals).

The Ruling Below

Pursuant to *Jackson v. Denno*, 378 U.S. 368, 376, 84 S.Ct. 1774, 1780 (1964), the trial court received testimony from Horry County Investigator Neil Frebowitz and Anderson's mother, Joani Burroughs. (R. p. 39, line 2 – p. 76, line 17). The court also received as exhibits a

transcript of Anderson's recorded interview and a copy of Anderson's signed *Miranda* waiver.[3] (R. p. 39, lines 4-12; R. pp. 566 & 605 Court's Ex. 2 and 4).

Frebowitz testified that he responded to Burroughs' home, where he first observed Anderson in the back of a patrol car. (R. p. 40, lines 8-18). Before contacting, arresting, and Mirandizing Anderson, Frebowitz interviewed Burroughs in her living room. (R. p. 40, lines 20-23). Burroughs told Frebowitz that Anderson had a previous brain injury and was on medication. She relayed that Anderson came to her home in a "delusional" state. (R. p. 49, line 14 – p. 50, line 9). Frebowitz did not ask if Anderson had taken his medication prior to Frebowitz's interviewing him. (R. p. 51, line 13 – p. 52, line 4; R. p. 54, lines 17-24).

Other than appearing anxious, Frebowitz did not observe Anderson to have delusions at any point during their interaction. (R. p. 53, lines 2-31). Frebowitz brought Anderson to an interview room at the Horry County Sheriff's Department that Frebowitz described as "relatively comfortable." (R. p. 43, lines 19-20). It had two or three padded chairs, a table, a camera, "and not much else." (R. p. 43, lines 20-23). Anderson knew that he was being recorded. (R. p. 46, lines 6-14). Frebowitz made sure an officer gave Anderson access to his medications prior to the start of the interview. (R. p. 566 Court's Ex. 2, p. 2, lines 3-5). Once Frebowitz and Anderson were situated in the interview room together, Frebowitz offered Anderson a drink and explained

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[3] Prior to the *Denno* hearing Dr. Richard Frierson testified, opining Anderson was competent to stand trial. (R. p. 19, line 23 – p. 27, line 5). Dr. Frierson delivered some of Anderson's personal history, describing a brain injury and significant deficits caused by a car accident which occurred in 1995. He noted Anderson had never been hospitalized for mental health reasons. (R. p. 11, line 1 – p. 15, line 1). Dr. Frierson noted Anderson had been treated for depression at times after his head injury, and diagnosed him with depressive disorder. (R. p. 19, lines 1-7). Noting Anderson described symptoms of paranoia, Dr. Frierson diagnosed him with psychotic disorder due to his traumatic brain injury. He also diagnosed Anderson with cognitive disorder not otherwise specified, because Anderson "had some memory decline because of his head injury." Rr. p. 19, lines 9-15).

to him what was on the table and why they were there. Then, Frebrowitz read Anderson's *Miranda* rights to him and asked him to sign and print his name on the waiver. (R. p. 566 Court's Ex. 2, R. p. 2, line 11 – p. 3, line 25).

Frebowitz testified he deployed no threats, promises, or coercion in that room with Anderson. (R. p. 43, lines 8-14). Frebowitz testified Anderson "understood what was going on. He was able to answer [the] questions in a responsive manner that directly answered the questions." (Rr. p. 55, lines 3-6). Frebowitz believed Anderson waived his *Miranda* rights freely, knowingly, and voluntarily. (R. p. 47, lines 1-6).

In making this assessment, Frebowitz juxtaposed his interactions with Anderson to others conducted over the course of his career. (R. p. 57, lines 4-7). He explained that he continued to interview Anderson after Anderson told him he had undergone mental health counseling because "the fact that [Anderson] thought he might need help indicated to [Frebowitz] he was aware of his surroundings, aware of what his mental issues were." (R. p. 60, lines 1-8). Frebowitz "found no reason to believe he didn't understand" the *Miranda* rights, the waiver, and the subsequent questions, which he described Anderson as answering "in a clear, concise, and appropriate manner." (R. p. 61, lines 9-14).

Burroughs, Anderson's mother, testified next. She described Anderson as having "delusions" when he arrived at her house: "He was crying that something happened, but he never c[a]me in the house. He was just crying and was telling me to call the police kind of like saying what happened, and he just saying call the police and crying and just paranoid." (R. p. 65, lines 2-7). Burroughs gave Anderson his medication around 5:00 AM and described his condition to officers when they arrived about an hour later. (R. p. 67, lines 5-15; R. p. 68, lines 1-4). According to Burroughs, the medication would ordinarily calm Anderson down, but it did not

calm him down that morning. (R. p. 75, lines 1-9).

When officers questioned her, Burroughs provided a statement that Anderson "came and knocked and [her] door and told [her], 'I killed them, call the police.'" (R. p. 72, line 2 – p. 73, line 12). Burroughs openly testified she did not believe Anderson. (R. p. 73, lines 13-17).

Prior to ruling, the court received additional testimony from Dr. Richard Frierson, who had testified earlier regarding Anderson's competency to stand trial. (R. p. 84, lines 15-22). Dr. Frierson interviewed Anderson two years after the shooting. (R. p. 85, lines 5-6). He did not have an opinion regarding Anderson's ability to understand the *Miranda* warnings at the time Frebowitz issued them, because Dr. Frierson did not meet with Anderson for the purpose of making that precise assessment. (R. p. 85, lines 7-12; R. p. 86, lines 4-18). Making reference to the argument Anderson described having prior to the shooting, Dr. Frierson did opine "that some of the thoughts that he presented during his statement are consistent with delusional thinking, especially that they wanted to harm him in some way." (R. p. 88, lines 17-25). However, "on a mental status, from reading the statement [Anderson gave,] he appear[ed] to understand the questions and giving answers to the questions." (R. p. 86, lines 21-23; *see* R. pp. 566 Court's Ex. 2).

Dr. Frierson further noted Anderson "was supposed to be on medication at the time he made that statement" and was on medication when, two years after the shooting, Dr. Frierson evaluated Anderson and found him competent to stand trial. (R. p. 87, lines 6-9). Dr. Frierson explained that Anderson "has cognitive deficits that are a result of his [1995] head injury. They're not so severe as to qualify for a diagnosis of dementia, . . . he's still able to drive to function. Now he's not able to work, but he can take care of himself." (R. p. 85, lines 18-24). He also noted it "is possible" for a person who suffers from psychotic disorder to provide law

enforcement with a knowing, intelligent, and voluntary statement. (R. p. 88, lines 1-5).

The court took the matter under advisement. (R. p. 89, lines 18-23). It thereafter ruled that after considering Anderson's statement, the advisement of *Miranda* rights, and Anderson's waiver, that Anderson gave:

> a statement in which it appears that he clearly understood all questions that [sic] and he gave appropriate responses such that he was communicating meaningfully with the officer. There is always a question and there's a question in this case as to whether or not his, the defendant[,] had the mental ability to understand the implications of *Miranda*, the medical testimony doesn't help very much in assessing that determination. It's very difficult for the court [ ] in any case to, where there is a statement or confession to make an assessment as to the degree of understanding of any defendant as to what might be the consequences of giving a confession or statement. Of course, the *Miranda* warning itself warns the individual that the statement may be used against them in court.
>
> I think given the totality of the circumstances and whether as close to and looking at the entire matter here, it appeared that Mr. Anderson sufficiently understood the nature of the *Miranda* warnings. There's no coercion whatsoever by law enforcement, that he made a free and voluntary statement after having been informed of his constitutional right to remain silent, so the State has established by a preponderance of the evidence that the statement should be admitted. The State still has the burden of proof beyond a reasonable doubt to the jury that the statement is a free and voluntary statement and should the State fail to meet that burden in the jury's eyes, the jury's eye, then the statement should be disregarded all together, that's a jury issue, a jury question. So I deny the motion to suppress.

(R. p. 90, line 11 – p. 138, line 1; *see also* R. p. 169, lines 2-6 (objection renewed)).

Discussion

"'Only if the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.'" *United States v. Cristobal*, 293 F.3d 134, 140 (4th Cir. 2002) (quoting *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 1141 (1986)). Here, competent evidence received at the *Denno* hearing demonstrates Anderson was capable of

making a knowing, intelligent, and voluntary *Miranda* waiver, and did so.

Speaking first to voluntariness, the circumstances of the waiver do not support a finding that Anderson's will was overborne. "[W]hile mental condition is surely relevant to an individual's susceptibility to police coercion, mere examination of the confessant's state of mind can never conclude the due process inquiry." *Colorado v. Connelly*, 479 U.S. 157, 165, 107 S.Ct. 515, 520-21 (1986). Instead, the court "must ultimately focus on the actions of the law enforcement officials to determine if police overreaching occurred in this case." *United States v. Cristobal*, 293 F.3d at 141; *compare Mincey v. Arizona*, 437 U.S. at 398-402, 98 S.Ct. at 2416-18 (confession involuntary where "barely conscious" suspect, "depressed almost to the point of coma," and giving unresponsive answers, expressed on numerous occasions that he did not wish to be questioned without a lawyer). "[D]eficient mental condition (whether the result of a pre-existing mental illness or, for example, pain killing narcotics administered after emergency treatment) is not, without more, enough to render a waiver involuntary." *Cristobal*, 293 F.3d at 141.

Here, only Anderson and Frebowitz were present in the interview room. (R. p. 566 Court's Ex. 2, p. 2, line 23 – p. 3, line 11). Frebowitz described the interview room as "relatively comfortable," with padded chairs. (R. p. 43, lines 19-23). From the outset, Frebowitz ensured Anderson was offered his medication and a drink. (R. p. 566 Court's Ex. 2, p. 2, lines 3-17). Without pressure or coercion, Frebowitz Mirandized Anderson and asked him if he understood. (R. p. 566 Court's Ex. 2, p. 2, line 21 – p. 3, line 18; *see also* State's Ex. 52). While not alone dispositive, Anderson checked "yes" twice and both printed and signed his name on the advisement of rights form. (R. p. 605 Court's Ex. 4). Thereafter, Frebowitz did not subject Anderson to continuous or unrelenting questioning. More, Anderson did not provide only "yes"

and "yeah" responses. The interview reads like a conversation, with Anderson at all times engaging in appropriate and meaningful responses to Frebowitz's inquiries—whether they pertained to the reason for the interview or to miscellaneous matters. (R. p. 566 Court's Ex. 2). Frebowitz took time to ask Anderson if he felt he had been treated nicely. He let Anderson know he planned to address any perceived threats or unfairness Anderson reported. Anderson denied receiving any threats or unfair treatment. (R. p 566 Court's Ex. 2, p. 28, line 18 – p. 29, line 14). Objectively, the environment in which Anderson made his *Miranda* waiver cannot be found coercive.

As to Anderson's ability to make a knowing and intelligent waiver, competent evidence establishes Anderson had "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *State v. Moses*, 390 S.C. at 513, 702 S.E.2d at 401 (2010). Testimony from a neutral expert, Dr. Richard Frierson, supports the trial court's finding that Anderson had the requisite level of comprehension. His review of Anderson's statement led him to testify that "on a mental status," Anderson "appear[ed] to understand the questions and giving answers to the questions." (R. p. 86, lines 21-23). While Dr. Frierson opined "some of the thoughts [Anderson] presented during his statement are consistent with delusional thinking," he testified that Anderson had been evaluated competent while consistently taking his medication, and Anderson "was supposed to be on medication at the time he made that statement." (R. p. 87, lines 6-9; Rr. p. 88, lines 17-25). Anderson's mother, Joani Burroughs, testified she administered Anderson his medication prior to officers' arrival at her home. (R. p. 67, lines 5-15; R. p. 68, lines 1-4). In his interview, Anderson said he "didn't take it that morning" before the shooting, but that he did take it "that night." (Court's Ex. 2, p. 582, line 24 –

p. 583, line 2). Additionally, Dr. Frierson testified during the *Blair*[4] hearing that Anderson had no history of mental health hospitalizations. (R. p. 11, line 1 – p. 15, line 1).

But again, "[a] defendant's mental condition in and of itself does not render a statement involuntary in violation of due process." *State v. Hughes*, 336 S.C. at 594, 521 S.E.2d at 505. When the totality of the circumstances indicate the making of a knowing and voluntary statement, a mental health's expert inability to opine as to a defendant's competency at the time he waived his *Miranda* rights does not render the resulting statement inadmissible. *Rychtarik v. State*, 334 Ark. 492, 496-98, 976 S.W.2d 374, 376-77 (Ark. 1998) (mental health experts examined appellant for competency to stand trial, found he "suffered "from amphetamine-induced psychotic disorder with delusions," but did not evaluate him for purposes of opining "whether appellant was competent to waive his *Miranda* rights at the time of his confession"). Standing alone, a diagnosed psychiatric disorder is not enough to render a statement inadmissible, so long as the diagnoses are "not so severe as to interfere with his ability to comprehend instruction and advice [and] make decisions." *State v. DeAngelis*, 200 Conn. 224, 234–35, 511 A.2d 310, 317 (Conn. 1986) (statement not rendered involuntary where competency evaluation concluded appellant suffered from a psychiatric disorder and "some cognitive impairment secondary to low intelligence and residual thought disorder").

By a preponderance of the evidence, the State established that Anderson was capable of understanding and intelligently deciding to waive his *Miranda* rights. From the outset, Anderson established he was alert to person, place and time, affirming the date to Frebowitz. (R. p. 566 Court's Ex. 2, p. 4, lines 1-4). The advisement of rights denoted Anderson's *Miranda* rights in four succinct, plain-language statements. (R. p. 605 Court's Ex. 4). After printing and signing the

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[4] *State v. Blair*, 275 S.C. 529, 273 S.E.2d 536 (1981).

form, Anderson provided lucid answers, explaining what happened before, during, and after the shooting, and what motivated it. (R. p. 566 Court's Ex. 2, p. 5, line 13 – p. 13, line 24).

More crucially, Anderson indicated he knew he was in significant trouble. He told Frebowitz that he "messed" his "life up" and made "a big" mistake. (R. p. 566 Court's Ex. 2, p. 16, line 19 – p. 17, line 7). Later, Anderson volunteered to Frebowitz "that's two murder charges," therein indicating full awareness of the consequences of his actions and the reason for the interview. (R. p. 566 Court's Ex. 2, p. 23, lines 14-20). Even earlier, Anderson specifically stated: "I know I'm going to get some time." (R. 566 Court's Ex. 2, p. 18, line 4). When Frebowitz asked if Anderson "knew the difference between right and wrong" and "got mad," Anderson agreed with him. (R. p. 566 Court's Ex. 2, p. 2, lines 21-25). Though Burroughs testified she did not believe her son when he showed up at her house and told her "I killed them, call the police," (R. p. 72, line 2 – p. 73, line 17), her testimony does not foreclose the veracity of Anderson's statements. As Dr. Frierson had earlier testified, Anderson conducted a series of conscious acts indicating he had the capacity to understand the gravity of the situation: he fled the scene, disposed of the weapon, and told his mother to call the police. (R. p. 223, line 18 – p. 224, line 20).

Frebowitz, an experienced investigator, had the impression that Anderson was "aware of his surroundings, aware of what his mental issues were" and answered the questions "in a clear, concise, and appropriate manner." (R. p. 60, lines 1-8). As a result, he "found no reason to believe he didn't understand" the consequences of the waiver. (R. p. 61, lines 9-14). Anderson did not exhibit irrational behavior during his interactions with Frebowitz. *See Palmer v. State*, 277 Ga. 124, 125, 587 S.E.2d 1, 2 (Ga. 2003) (statement voluntary where appellant "testified that he had been taking his medication throughout the time period in question, and [his] expert

testified that [his] illness was controlled by that medication"); *Stanton v. Com.*, 349 S.W.3d 914, 920-21 (Ky. 2011) (no abuse of discretion in admitting statement where investigators did not "exploit Stanton's bipolar disorder and his low intelligence . . . or that those limitations prevented Stanton from understanding the situation"); *Michael v. Com.*, No. 2012-SC-000097-MR, 2013 WL 1188052, at *5 (Ky. Mar. 21, 2013) (statement admissible where appellant "exhibited calm and rational behavior throughout both interrogations" and was not exploited by law enforcement, despite post-arrest diagnosis with major depressive disorder with psychotic features, and despite not sleeping and consuming wine the night before the interview) (unpublished) (citing *Stanton*, *supra*). Given the coherence of his responses to Frebowitz, the totality of the circumstances fail to establish that Anderson's mental impairments superseded the knowing, voluntary, and intelligent nature of the statement.

Finally, any error in the trial court's introduction of Anderson's statement should be found harmless, as voluntariness is the only reasonable inference to be drawn from evidence regarding Anderson's confession. *See State v. Salisbury*, 330 S.C. 250, 272, 498 S.E.2d 655, 666 (Ct. App. 1998), *aff'd as modified*, 343 S.C. 520, 541 S.E.2d 247 (2001) (harmless error applies when the only reasonable inference is that the statement was voluntarily given). Though not introduced at the *Denno* hearing, the recorded statement establishes Anderson delivered calm, coherent, rational, and independent responses for the duration of interview. Anderson appeared uncoerced and able to comprehend each stage of his conversation with Frebowitz, including the consequences. Neither party to the interview exercised more influence over the other during the conversation. (State's Ex. 52).

Furthermore, any error is harmless under the standard established in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824 (1967), where "considering the entire record on appeal, the

reviewing court finds beyond a reasonable doubt that the error did not contribute to the verdict." *State v. Creech*, 314 S.C. 76, 86, 441 S.E.2d 635, 640 (Ct. App. 1993); *State v. Easler*, 327 S.C. at 129, 489 S.E.2d at 621-22 (applying harmless error to improperly admitted statement). Other competent, succinct evidence established Anderson's guilt beyond a reasonable doubt. Anderson's family knew he and his uncle Theward McCray "weren't getting along that good." (R. p. 349, lines 14-24). His sister testified she frequently had to calm him down from a "panic state," and that others "around him tended to take advantage of him." (R. p. 434, line 6 – p. 438, line 5). Approximately three weeks prior to the shooting, Anderson told his Aunt Evans he was "gonna kill" Theward "one day," and would not be "leaving any witnesses. (R. p. 345, lines 11-25; R. p. 346, lines 7-10). The day of the shooting, Anderson called his sister "expressing concern about not feeling loved and thinking that someone was trying to kill him . . . ." (R. p. 442, lines 10-15). She described it as a "typical" call during which she would calm him down from one of "his moments." (R. p. 442, lines 15-19). Upon examination, Theward had particles consistent with gunshot residue on the backs of each hand and on his left palm, indicating he was in a "defensive posture" at the time of the shooting. (R. p. 256, line 16 – p. 257, line 4; R. p. 264, lines 1-11). Theward survived Anderson's attack to call 911 and tell the operator that his "nephew killed [him] and [his] momma." (State's Ex. 1, Track 1). He can be heard naming "Anthony Anders--." (State's Ex. 1, Track 4 at 0:29-0:33). Then he repeated the name "Anthony" to the responding officer. (R. p. 120, line 3; R. p. 134, line 3).

II. Anderson's proffered third party confession from an unavailable declarant lacked the corroborating evidence required for admission, as Anderson provided no other evidence to clearly indicate the trustworthiness of the hearsay statement.

Generally, a party may not introduce hearsay, which is an out-of-court statement "offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. "Hearsay is inadmissible unless the statement is of a type specifically excepted from the rule." *State v. Holmes*, 342 S.C. 113, 116, 536 S.E.2d 671, 672 (2000). Rule 804(b)(3), SCRE provides an exception for statements made by an unavailable declarant made against his penal interest and offered to exculpate the criminal defendant.

"To bring the evidence within this exception, [the] [d]efendant must show that the proffered statements were made by an unavailable declarant, that the statements exposed the declarant to criminal liability, and that corroborating circumstances clearly indicate the trustworthiness of the statements." *State v. McDonald*, 343 S.C. 319, 323, 540 S.E.2d 464, 465-66 (2000); *State v. Doctor*, 306 S.C. 527, 529, 413 S.E.2d 36, 38 (1992). A declarant is unavailable when absent from trial and the party seeking to introduce and the statement has been unable to procure the declarant "by process or other reasonable means." Rule 804(a)(5), SCRE.

"Whether a statement has been sufficiently corroborated is a question left to the discretion of the trial judge after considering the totality of the circumstances under which a declaration against penal interest was made." *State v. Wannamaker*, 346 S.C. 495, 501, 552 S.E.2d 284, 287 (2001) (internal quotations omitted). The proponent of the statement carries the "formidable burden" of "clearly corroborating the making of the statement." *Id.* (citing *State v. Kinloch*, 338 S.C. 385, 388, 526 S.E.2d 705, 706 (2000); *State v. Cope*, 405 S.C. 317, 342-43, 748 S.E.2d 194, 207 (2013). This does not mean that the statement must be clearly corroborated

in a manner establishing its truth. *State v. McDonald*, 343 S.C. at 324, 540 S.E.2d at 466. However, it is often "not possible to separate" the making of the statement from circumstances indicating its truth. *Id.* "As a practical matter the two inquiries are related, ordinarily requiring the trial court to examine the content of the statements as part of its analysis of the totality of the circumstances. *Id.* at n.5, 540 S.E.2d at 466, n.5.

"This entails a searching examination of both content and context." *State v. Young*, 420 S.C. 608, 619, 803 S.E.2d 888, 894 (Ct. App. 2017). Our courts "interpret the rule allowing statements against penal interest stringently," emphasizing the rule is to be applied 'very narrowly to only those portions of a hearsay statement which are plainly self-inculpatory.'" *Id.* (quoting *State v. Holmes*, 342 S.C. at 117, 536 S.E.2d at 673). At the end of the inquiry, "[e]xculpatory evidence that is not corroborated with other evidence that clearly shows its trustworthiness is excluded." *State v. Staten*, 364 S.C. 7, 38, 610 S.E.2d 823, 839 (Ct. App. 2005), *vacated in part*, 374 S.C. 9, 647 S.E.2d 207 (2007).

The Ruling Below

During the State's case, Anderson informed the court of his intent to introduce a statement from "a defendant in New York," as exculpatory evidence indicating that third party's guilt. Anderson also moved for the state to compel the third party's attendance at trial. (R. p. 137, lines 1-22). In the alternative, Anderson moved to introduce the statement as one made against the declarant's penal interest and with sufficient corroboration for introduction as an exception to the rule against hearsay. (R. p. 141, line 6 – p. 142, line 21; R. p. 419, lines 10-12).

The trial court initially noted the third party's statement appeared "to be something close to wild speculation that attempts to come close to what occurred in this case, but is not on point," and not exculpatory. (R. p. 138, line 21 – p. 139, line 6; R. p. 140, lines 3-10). Because the

statement had been discredited by law enforcement's investigation, the court denied the motion to compel the third party's attendance. (R. p. 137, line 24 – p. 139, line 12). The court deferred ruling upon any motion to introduce the statement as an exception to the rule against hearsay until such time as Anderson sought to introduce it during his own case-in-chief. (R. p. 142, line 23 – p. 143, line 10).

At the appropriate juncture, Anderson proffered testimony on the topic. (R. p. 383, line 10 – p. 384, line 23). Williamsburg County Lieutenant Lisa Collins testified that on December 29, 2010, she received the third party's statement in a fax from an investigator in in New York. (R. p. 385, line 19 – p. 386, line 4). She passed it to Williamsburg County Investigator Pamela Wrenn. (R. p. 386, lines 8-17). The statement, made by Dennis Hedman, stated he "was arrested for DWI in Livonia, NY" and, while "being processed," informed the officers he "wanted to confess to a double homicide." (R. pp. 606 Motion for Compulsory Process, Voluntary Statement, p. 1). The statement thereafter described that Hedman took a bus to Kingstree seeking to kill Anderson, but ended up shooting Theward and Rosa Lee McCray instead. (R. pp. 606 Motion for Compulsory Process, Voluntary Statement, pp. 1-2). Lieutenant Collins spoke with the New York investigator, who relayed that Hedman lived with his wife at the time he made the statement. (R. p. 386, line 19 – p. 387, line 3). At Collins' request, the New York investigator contacted Hedman's wife, who verified that Hedman was working in New York at the time of the shooting. (R. p. 387, lines 4-10).

Lieutenant Collins testified that she found other inconsistencies among the details of the investigation and Hedman's statement. Hedman said the murders happened in July 2010, but they actually occurred in June 2011. (R. p. 388, lines 6-20). Hedman stated he was friends with Anderson, not related to him. (R. p. 389, lines 11-13). Hedman also stated that Theward McCray

was "Anthony's uncle" and not his own, (R. pp. 606 Motion for Compulsory Process, Voluntary Statement). The statement also did not make sense to Lt. Collins because Hedman said he had a pistol on him, but then confessed to grabbing a shotgun from the living room in the victims' home and shooting them with that. (R. p. 389, lines 14-25; R. pp. 606 Motion for Compulsory Process, Voluntary Statement). Hedman also said he never saw Rosa Lee McCray and must have shot her through the wall, but no victim had been shot through a wall. (R. p. 390, lines 4-14; R. pp. 606 Motion for Compulsory Process, Voluntary Statement).

Moreover, Hedman said he threw his .45 in the trees behind a dumpster at the end of the road as he fled the scene, "but there was no dumpster at the end of the road." (R. p. 392, lines 13-18). During the initial investigation, Collins walked that route looking for the gun Anderson said he tossed, but "didn't see a dumpster out there." (R. p. 392, lines 21-22; R. p. 393, line 8 – p. 394, line 3). Collins also "travel[ed] that road all the time. There was no dumpster there." (R. p. 394, lines 6-7). If there was, she testified, they would have checked it as part of their investigation. (R. p. 394, lines 12-14).

Williamsburg County Investigator Pamela Wrenn testified that upon learning of the statement from Collins and placing it in the case file, Wrenn considered it "frivolous information." (R. p. 396, lines 7-15). Wrenn "knew there was no dumpster" because Williamsburg County does not have "open trash sites or dump sites." (R. p. 397, lines 10-12). Hedman's statement also appeared to have "several discrepancies prior to ever getting to the point concerning a dumpster." (R. p. 398, lines 1-18). For example, Hedman said "Joe drove [him] to the bus station in Kingstree," but "[t]here is no bus station" in Kingstree. (R. p. 399, lines 3-11).

Citing S.C. Code Ann. § 19-9-70, the court denied the motion to compel Hedman's

attendance. (R. p. 422, line 1 – p. 424, line 17). When the jury returned, Anderson moved to introduce Hedman's statement through the testimony of Lt. Collins, who identified the statement as a part of Anderson's case file retained as a record of the investigation. (R. p. 427, lines 9-21). The State objected on the basis of "hearsay and lack of foundation." (R. p. 427, lines 23-24).

The court sustained the objection. (R. p. 427, lines 25). At the next break in the proceeding, the trial court revisited Anderson's motion to introduce Hedman's statement as a statement against penal interest. (R. p. 459, lines 13-16). The court found the statement uncorroborated and thus inadmissible because it was "not exculpatory based on its untrustworthiness as presented in the evidence in this case." (R. p. 459, line 16 – p. 460, line 13).

Discussion

A statement which appears exculpatory on its face but which lacks clear indications of trustworthiness should not be introduced as an exception to the rule against hearsay. *State v. Forney*, 321 S.C. at 360, 468 S.E.2d at 645. While Hedman was outside of the jurisdiction of South Carolina and rendered unavailable at the time Anderson sought to introduce the statement, Rule 804(a)(5), SCRE, and while the statement appears to be against Hedman's penal interest, neither its contents nor the circumstances surrounding its generation indicate the truthworthiness required for its admission. Here, "the circumstances do not clearly indicate that [Hedman's] statement was not fabricated." *See State v. Kinloch*, 338 S.C. at 390, 526 S.E.2d at 707.

Anderson failed to substantiate the basis for Hedman's making the statement. By the face of the statement, it appears Hedman, a New York resident, serendipitously confessed to two murders in South Carolina upon arrest for driving under the influence in New York. (R. pp. 606 Motion for Compulsory Process, Voluntary Statement). That Hedman provided this statement to authorities in New York, and that its retention could be authenticated by the arresting or

investigating agency, do not "clearly indicate the trustworthiness of the statement." Rule 804(b)(3), SCRE. As the State pointed out, Hedman "curiously" made this statement in "December of 2012, which was very shortly after [the State] submitted Rule 5 material to the defendant." (R. p. 138, lines 6-10).

Further, as our courts recognize, "it is not possible to separate" the incongruent assertions within the statement's contents from the circumstances in which it was made. *State v. McDonald*, 343 S.C. at 324, 540 S.E.2d at 466. The series of events Hedman describes lack sufficient corroboration. When examined among the totality of the circumstances in which the statement was made, few, if any, of the assertions within Hedman's statement are not circumspect.

Hedman stated he "was a friend of" Anderson at some time in the 1990s, not that he was related to Anderson or the McCrays. (R. pp. 606 Motion for Compulsory Process). Hedman stated that he attributed a two-decades-old arrest to Anderson, and took a bus from Rochester New York to Kingstree, South Carolina to exact revenge. He said a fourth party known only as "Joe" picked him up at the bus station and dropped him off at the dirt road leading to Anderson's house. (*Motion for Compulsory Process, p. 1). However, "[t]here is no bus station" in Kingstree, (R. p. 399, lines 3-11), and Theward McCray declared to the 911 operator and to the responding officer that his "nephew" named "Anthony" was the perpetrator. (State's Ex. 1, Tracks 1 and 4; R. p. 120, line 3).

Hedman stated he arrived at Anderson's in "daylight," entered the house when Anderson and the victim(s) came home, grabbed a shotgun, began firing, and spent the night in the woods. His December 2012 statement stated he believed this occurred in July 2010. (R. pp. 606 Motion for Compulsory Process). However, Theward McCray's 911 call came in at 1:35 AM on June 5, 2011, (R. p. 104, lines 13-19 *and* R. p. 105, lines 11-15), and Hedman's wife informed

investigators Hedman was living and working in New York at that time. (R. p. 386, line 19 – p. 387, line 3).

Hedman also made the offbeat assertion that he arrived with a handgun and bullets and engaged in some target practice on the approach to Anderson's house, but used a shotgun from Anderson's living room to shoot the victims. (R. pp. 606 Motion for Compulsory Process). Hedman stated he "shot Theward in his chest with the gun," but "never saw Rosalee" and thought he "may have accidentally shot Rosalee through the wall." (R. p. 606 Motion for Compulsory Process, p. 2). The investigation revealed that though Theward McCray had been shot in the chest at least twice, (Rr. p. 329, lines 2-13), Rosa Lee McCray had been shot at such close range that the lightweight plastic wadding from the shotgun shell was embedded in her pelvic region. (R. p. 307, lines 10-14; R. p. 321, lines 6-8). And, no forensic evidence could corroborate Hedman's declaration that anyone was shot through a wall in the home. (*See* R. p. 269 line 18 – p. 271, line 18).

Finally, though Hedman stated he threw the shotgun "in some trees behind a dumpster," there are no open dumpsters or dump sites in Williamsburg County, let alone near the dirt road leading to Anderson's house. (*Compare* R. p. 606 Motion for Compulsory Process, p. 2 *with* R. p. 392, lines 13-22, R. p. 393, line 8 – p. 394, line 7, *and* R. p. 397, lines 10-12).

Absent "**clearly** corroborating circumstances," a statement against interest should not be admitted. *See State v. Kinloch*, 338 S.C. at 389, 526 S.E.2d at 707 (emphasis in original) (trustworthiness of statement adversely affected when made after declarant smoked crack cocaine and when made months after victim's death). The reason for Hedman's generating the statement is wholly uncorroborated, and the statement's contents fail to establish "that the speaker had extensive knowledge of the details of the crime." *See State v. Wannamaker*, 346 S.C.

at 501, 552 S.E.2d at 287 (statement inadmissible where its making not clearly corroborated by roommate of declarant); *compare State v. McDonald*, 343 S.C. at 324-25, 540 S.E.2d at 466-67 (statement admissible where declarant placed at scene of the crime and declarant's statement corroborated by three other witnesses). Hedman may have accurately described the scene and the persons involved, but the aesthetics of Anderson's home fail to account for vacuous discrepancies between the statement, the evidence received as part of the investigation surrounding the shootings, and the specific conveniences Hedman stated he used while in Williamsburg County, but which did not exist there.

In this instance, the application of Rule 804(b)(3) aligns with limitations placed upon a defendant's introduction of third-party guilt. In order to be admissible, facts offered in support of a third-party guilt defense must "raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible." *State v. Gregory*, 198 S.C. 98, 98, 16 S.E.2d 532, 534 (1941) (quoting 16 C.J., Criminal Law § 1085 (1918)) (also citing 22 C.J.S., Criminal Law, § 622); *see also Holmes v. South Carolina*, 547 U.S. 319, 330, 126 S. Ct. 1727, 1734 (2006) (approving South Carolina's use of the *Gregory* rule). A criminal defendant's right to present evidence in furtherance of his defense "is not unlimited, but rather is subject to reasonable restrictions." *United States v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261 (1998). Evidence proffered in furtherance of third-party guilt must result in a "train of facts and circumstances" that "tends to clearly point out such other person as the guilty party." *Gregory, supra* (quoting 20 Am.Jur. Evid. § 265 (1939)). When the proffered evidence offers no reliable proof that the third party was involved, the court should exclude it. *State v. Swafford*, 375 S.C. 637, 642, 654 S.E.2d 297, 300 (Ct. App. 2007).

Anderson's proffer of Hedman's statement failed to meet the "formidable burden" Rule 804(b)(3), SCRE requires for the threshold of admission. *See State v. Staten*, 364 S.C. at 38-40, 610 S.E.2d at 839-40. A defendant is not permitted "to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty." *State v. Gregory*, 198 S.C. at 98, 16 S.E.2d at 535 (quoting 20 Am.Jur., Evid., *supra*).

CONCLUSION

For all of the foregoing reasons, Respondent submits that this Court affirm Appellant's convictions and sentence for murders of Rosa Lee and Theward McCray, and for possession of a weapon during the commission of a violent crime.

Respectfully submitted,

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Appeal from Williamsburg County
Clifton Newman, Circuit Court Judge

THE STATE, **Respondent,**

v.

ANTHONY ANDERSON, **Appellant**

Appellate Case No. 2019-001406.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 13th day of October, 2020.

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