STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Williamsburg County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTHONY ANDERSON,

APPELLANT

APPELLATE CASE NO. 2019-001406

FINAL BRIEF OF APPELLANT

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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?

STATEMENT OF THE CASE

On June 5, 2011, a Williamsburg County grand jury indicted Appellant for two counts of murder and possession of a weapon during the commission of a violent crime in a single indictment (2011-GS-45-0140). R. 643 – R. 644. On August 5, 2013, Appellant was evaluated for competency. R. 6, ll. 17-19; R. 558. The state, represented by Kimberly V. Barr, called the case for trial before the Honorable Clifton Newman and a jury on May 12-14, 2014. R. 1. Steven S. McKenzie represented Appellant. R. 1. At the conclusion of the trial, the jury found Appellant guilty as charged. R. 515, ll. 12-22. Judge Newman sentenced Appellant to thirty years imprisonment for each count of murder and to five years imprisonment for the weapon. R. 527, ll. 3-8; R. 645 – R. 647. He ordered the five-year sentence to be served consecutively to the thirty-year sentences. R. 527, ll. 7-8; R. 645 – R. 647. Thereafter, Appellant timely filed new trial. R. 625. On August 7, 2019, Judge Newman convened a hearing on the motion. R. 528. At the conclusion of the hearing, Judge Newman denied Appellant's request for a new trial. R. 550, l. 8 – R. 557, l. 5. By an order filed August 16, 2019, Judge Newman formally denied the request. R. 640.

Appellant served his notice of appeal on August 20, 2019. This brief follows.

ARGUMENT

I. The trial judge erred 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.

Standard of review

"On appeal, the conclusion of the trial judge on issues of fact as to the voluntariness of a confession will not be disturbed unless so manifestly erroneous as to show an abuse of discretion." State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990); see also State v. Reed, 332 S.C. 35, 43, 503 S.E.2d 747, 751 (1998). Put another way, the reviewing court will reverse a trial judge's ruling on the voluntariness of the confession when the ruling is "so erroneous as to constitute an abuse of discretion." State v. Myers, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004). "In criminal cases, appellate courts are bound by fact finding in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law." State v. Asbury, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997).

Relevant facts

In 1995, Appellant was involved in a car accident. R. 11, ll. 1-4. He sustained a severe head injury as a result. R. 11, ll. 1-4. The MRI scan of his brain revealed a contusion and diffuse injury to his frontal lobes. R. 11, ll. 11-14. He was hospitalized for several weeks before he was transferred to a rehabilitation hospital for almost a year. R. 11, ll. 14-18. "[H]e had to learn to walk again, to talk again." R. 11, ll. 24-25. As a result of the brain injury, Appellant suffered from memory impairment. R. 16, ll. 16-21. Additionally, Appellant had auditory and

visual hallucinations as well as paranoid delusions. R. 17, l. 25 – R. 18, l. 2. In general, he was paranoid around people after he sustained the severe head injury. R. 18, ll. 4-5. More specifically, Appellant "thought that airplanes might be spying on him, … that people might be trying to mess with his food." R. 18, ll. 20-22. In relation to the competency evaluation, Dr. Richard Frierson diagnosed Appellant with a psychotic disorder due to his traumatic brain injury. R. 18, ll. 17-19. Further, Dr. Frierson diagnosed Appellant with depressive disorder due to traumatic brain injury and noted that he had been treated in the past for "periods of depression, depressed mood, feeling sad, low energy, troubles with sleeping, appetite." R. 19, ll. 1-7. In light of Appellant's memory problems and cognitive decline since the head injury, Dr. Frierson diagnosed him with a cognitive disorder not otherwise specified. R. 19, ll. 9-12.

Dr. Frierson explained that Appellant suffered damage to his frontal lobe, which is the area of the brain that modulates emotions, enables individuals to plan and sequence behavior, and controls the higher functioning of cognition. R. 31, ll. 1-10. Although Dr. Frierson ultimately determined Appellant was competent, he concluded Appellant lacked the capacity to conform his conduct to the requirements of the law. R. 19, l. 23 – R. 20, l. 3; Supp. R. 4, ll. 11-13.

On June 5, 2011, Neil Frebowitz with the Horry County Police Department interrogated Appellant. R. 40, ll. 2-14; State's Exhibit #52. Frebowitz advised Appellant of his rights. R. 41, l. 8 – R. 42, l. 19; R. 605; State's Exhibit #52. Frebowitz candidly admitted that although the advisement of rights form included checkmarks denoting an understanding of the rights and a desire to waive those rights, he was uncertain whether he or Appellant placed the checkmarks on the form. R. 47, l. 22 – R. 48, l. 2. Further, Frebowitz was forced to admit that prior to interrogating Appellant, he spoke to Appellant's mother who informed him that Appellant

suffered a severe brain injury in 1995 and took medication related to the brain injury. R. 48, l. 13 – R. 50, l. 4. Appellant's mother informed Frebowitz that Appellant was delusional when he arrived at her home, shortly before he was arrested and interrogated. R. 50, ll. 5-9. On this point, Appellant's mother provided Frebowitz with a bag full of medications for Appellant. R. 50, l. 10 – R. 51, l. 20. One of the medications was Risperdal, which Frebowitz knew was on an antipsychotic. R. 51, ll. 10-24.

Prior to trial, defense counsel filed a motion to suppress Appellant's statement to law enforcement. R. 615. The recording of the statement showed Frebowitz's interrogation consisted almost entirely of leading questions. State's Exhibit #52. For example, when discussing the gun, Frebowitz asked Appellant if the uncle had the gun or if it were some place in the house. State's Exhibit #52. Appellant chose the latter response. State's Exhibit #52. Aware that Appellant believed his grandmother had an insurance policy on him, but was refusing to provide him with details about it, Frebowitz asked Appellant if he "got more angry or something." State's Exhibit #52. Appellant simply agreed. State's Exhibit #52.

Appellant's statement was replete with references to his delusion regarding the insurance policy. State's Exhibit #52. Further, Appellant's statement jumped across topics, including his brief discussion of his marriage. State's Exhibit #52. During the interrogation, Appellant showed he was unaware of the repercussions of his waiver of his rights when he sought counseling for the crimes. State's Exhibit #52.

When the trial judge called Dr. Frierson as a witness, Dr. Frierson expressed no opinion regarding whether Appellant had the ability to understand the advisement of rights from Frebowitz. R. 85, ll. 7-13. Dr. Frierson conceded that it appeared from the transcript of the interrogation that Appellant appeared to understand the questions and giving answers to the

questions. R. 86, ll. 21-23. Yet, Dr. Frierson agreed that Appellant's interrogation included paranoia. R. 89, ll. 7-14.

At the conclusion of the hearing, defense counsel moved to exclude Appellant's statement based upon the totality of the circumstances, including his inability to knowingly, intelligently, and voluntarily waive his rights due to his traumatic brain injury and resulting mental illness and diminished cognitive abilities. R. 79, l. 16 – R. 83, l. 9. Counsel emphasized that Frebowitz was aware of Appellant's delusional disorder, including his prescribed medicine to treat psychosis. R. 79, l. 16 – R. 83, l. 9. Citing United States v. Cristobal, 293 F.3d 134 (4th Cir. 2002), counsel argued that because Frebowitz was aware of Appellant's mental health status, he was required to take extra precautions to ensure Appellant understood his rights, but he failed to do so. R. 79, l. 16 – R. 83, l. 9.

Ultimately, the trial judge found Appellant understood the rights that were explained to him and he wished to waive them. R. 90, ll. 11-18. The judge concluded Appellant's statement showed he "clearly understood all questions" and "gave appropriate responses such that he was communicating meaningfully with the officer." R. 90, ll. 18-22. While the judge thought there was "always a question" as to whether a person "had the mental ability to understand the implications" of an advisement of rights. R. 90, ll. 22-25. The judge noted that he did not find the medical testimony to be of much help in assessing whether Appellant understood his rights and the implication of waiving those rights. R. 90, l. 25 – R. 91, l. 2. The judge found that Appellant "sufficiently understood" the nature of the advisement of rights. R. 91, ll. 10-14. He further found Appellant made a free and voluntary statement. R. 91, ll. 14-19.

Discussion

In Jackson v. Denno, 378 U.S. 368, 376 (1964), the United States Supreme Court held that "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, without regard for the truth or falsity of the confession." To introduce a statement produced during custodial interrogation, the prosecution must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda v. Arizona, 384 U.S. 426 (1966). State v. Von Dohlen, 322 S.C. 234, 243, 471 S.E.2d 689, 694 (1996); State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009); State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007); State v. Compton, 366 S.C. 671, 680, 623 S.E.2d 661, 666 (Ct. App. 2005); State v. Crawley, 349 S.C. 459, 463, 562 S.E.2d 683, 685 (Ct. App. 2002).

It is not enough that the interrogator advised the suspect of his rights and the suspect made an uncoerced statement. The prosecution must show that the accused understood the rights. Berghuis v. Thompkins, 560 U.S. 370, 384 (2010) (citing Colorado v. Spring, 479 U.S. 564, 573-575 (1987); Connecticut v. Barrett, 479 U.S. 523, 530 (1987)). Thus, "[t]he waiver inquiry 'has two distinct dimensions': 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 'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" Id. at 382-383 (quoting Moran v. Burbine, 475 U.S. 421, 421 (1986)).

In South Carolina, a court must examine the totality of the circumstances surrounding the custodial statement. The examining court must answer the question: did totality of the circumstances surrounding the custodial statement defeat the defendant's will? State v. Moses, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct. App. 2010).

> Courts have recognized appropriate factors that may be considered in a totality of the circumstances analysis: background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations; isolation of a minor from his or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep.

Id. at 513-514, 702 S.E.2d at 401 (internal citations omitted). The test requires consideration of "'totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation.'" Dickerson v. United States, 530 U.S. 428, 434 (2000) (citations omitted).

Consideration of a person's mental capacity is an important factor in determining whether a statement to police was voluntary. State v. Callahan, 263 S.C. 35, 41, 208 S.E.2d 284, 286 (1974) (citing State v. Cain, 246 S.C. 536, 144 S.E.2d 905 (1965)).

> [A] person's capacity to make an informed waiver requires three abilities: an understanding of the words and phrases contained within the warnings, an accurate perception of their intended functions (e.g., that interrogation is adversarial, that an attorney is an advocate, that these rights trump police powers), and a capacity to reason about the likely consequences of the decision to waive or invoke these rights.

Saul M. Kassin, The Psychology of Confessions, 4 Ann. Rev. L. & Soc. Sci. 193, 199 (2008).

Cognitive impairment

In State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999), the South Carolina Supreme Court held that although Davis suffered from mild mental retardation with an IQ of 66, he had the capacity to make a knowing waiver of his constitutional rights to silence and counsel. After Davis's arrest, an officer read the standard Miranda warnings to Davis from a card. The officer testified he "read slowly, paused after each sentence, looked at Davis, and asked him to verbally indicate whether he understood what had been read to him." Davis responded affirmatively that he understood each of

his rights. When asked if he wanted a lawyer present, Davis stated he did not need a lawyer. The officer also "explained" that Davis could end the interrogation at any time. Davis indicated he understood this and agreed to give a taped statement. Due to a problem with the audio equipment, the officer asked Davis for a second statement. Again, the officers explained to Davis his constitutional rights and Davis waived those rights and provided a statement. Id. at 336, 422 S.E.2d at 140.

A forensic psychiatrist testified that he interviewed Davis in detail regarding his understanding each of the rights afforded to him pursuant to Miranda. Id. at 336-337, 422 S.E.2d at 140. The psychiatrist admitted Davis's understanding "would be on a different, less abstract, level from a person of average intelligence, but Davis's comprehension was adequate to enable Davis to knowingly and intelligently waive those rights." On the other hand, Davis presented experts who testified he lacked the mental ability to understand the implications of Miranda. Id. at 337, 422 S.E.2d at 140. The Supreme Court held "there was sufficient evidence on the record, both lay and expert, to support the trial judge's determination that Davis was competent to waive his Miranda rights." Id.

In striking contrast to the instant matter, the officers in State v. Jennings, 280 S.C. 62, 63-64, 309 S.E.2d 759, 760 (1983) were aware of the defendant's low intellectual functioning and exercised caution to be sure he understood their communications with him. Based upon law enforcement's careful questioning and the remaining circumstances, the Court found Jennings's statement was admissible. Jennings, 280 S.C. at 63-64, 309 S.E.2d at 760.

Numerous courts throughout the country have found statements to police inadmissible where the defendants lacked the ability to understand their rights and the implications of waiving such rights. In State v. Flower, 539 A.2d 1284 (N.J. Super. L. 1987), the New Jersey court found a

defendant's statement was inadmissible based on the testimony of three teachers who taught the defendant seven years earlier. The teachers testified the defendant had a second or third grade level vocabulary and required instructions in very basic terms. Due to his low level of functioning, he was unable to grasp abstract concepts. The teachers opined that he would not understand his Miranda rights even if explained to him.

Similarly, a psychiatrist and a psychologist testified that the defendant had a mental age of ten or eleven, required instructions to be given in a very slow and deliberate manner, and would not have been able to understand his rights unless they were very carefully explained to him. State v. Rossiter, 623 N.E.2d 645 (Ohio Ct. App. 1993). The defendant would do what he perceived an authority figure wanted him to do. Id. The court held the statement was inadmissible because the warnings had not been given slowly and carefully enough or with any consideration of the defendant's intellectual functioning, thereby preventing the defendant from making a knowing waiver. Id. A court found a defendant's statement inadmissible because she lacked the ability to comprehend her rights where she suffered from mild mental retardation and she functioned on the equivalent of an eight-year old child. People v. Daniels, 908 N.E.2d 1104 (Ill. App. 2009). Although the defendant understood some of his rights and he was the manager of a local restaurant, a trial court properly excluded a statement by a mentally impaired individual, whose IQ was 71, where the expert testified the individual suffered from depression, which would affect his IQ. Albarran v. State, 96 So. 3d 131 (Ala. Crim. App. 2011).

The Tennessee Supreme Court held a defendant did not knowingly and intelligently waive his rights before police interrogation, even though he appeared to understand his rights and was later found competent to stand trial because evidence showed that he was mentally retarded, with an IQ of 55, and functioned on the level of a child from six to nine years old. State v. Blackstock, 19

S.W.3d 200 (Tenn. 2000). In another case, the District Court for the Middle District of Alabama found a defendant's waiver of Miranda was not knowingly and intelligently given. United States v. Jennings, 491 F.Supp.2d 1072 (M.D. Ala. 2007). The defendant presented expert testimony that at the time of the interrogation, he did not understand the Miranda warnings. Id. at 1077-1078. The prosecution presented no evidence, "certainly no expert evidence," contrary to the defense expert. Id. at 1078.

The Ninth Circuit Court of Appeals held a defendant's confession was inadmissible based upon the totality of the circumstances, which included the defendant's intellectual disability. United States v. Preston, 751 F.3d 1008 (9th Cir. 2014). Two officers questioned the defendant outside his home for forty minutes. Id. at 1012. Shortly into the interrogation, the officers realized the defendant was mentally disabled, but continued the questioning anyway. Id. When the officers told the defendant they were investigating a crime occurring on a particular day, the defendant told the officers he was not in the area on that day. The officers rejected the defendant's contention repeatedly. Eventually, the defendant agreed. Id. The officers then set up two categories of people who commit sexual offenses, which was the type of crime being investigated, and asked the defendant what type of person he was. Id. at 1013. Despite the defendant's protestations that he was innocent, he eventually told the officers he had committed the acts. Id.

The officers told the defendant that they would return to question him until him told them what happened. Id. Twenty minutes into the interrogation, the defendant stated he was at home on the day in question. Then, the officers asked the defendant questions with two alternative answers – one less incriminating. The defendant chose the less incriminating answer each time. Id. at 1013-1014. At the end of the interrogation, the defendant signed a confession. Id. at 1014. Citing Miller v. Fenton, 474 U.S. 104, 110 (1985), the Ninth Circuit explained "the voluntariness inquiry 'is not

limited to instances in which the claim is that the police conduct was "inherently coercive."'" Preston, 751 F.3d at 1016. The Ninth Circuit emphasized that interrogation techniques may be improper only due to the particular circumstances of a case. Id. The Ninth Circuit further reiterated that its evaluation of the voluntariness of the confession was not a determination of whether the suspect told the truth because "[a]s important as it is that persons who have committed crimes be convicted, there are considerations which transcend the question of guilt or innocence." Id. at 1017-1018 (quoting Blackburn v. Alabama, 361 U.S. 199, 206 (1960)).

The Seventh Circuit Court of Appeals found a defendant's confession was involuntary after reviewing "the propriety of the officers' conduct and its psychological effect on the mind and will of the accused." United States v. Hull, 441 F.2d 308, 309 (7th Cir. 1971). The defendant had a full-scale IQ of 54 and the mental age of an eight or nine year old. He had completed the third grade and was illiterate. Id. He could follow instructions if they were repeated or paraphrased for him. Id. The Court explained the defendant was "mentally and emotionally handicapped" and "was subjected to a continuous series of intensive interrogations for nearly twelve hours." Id. at 312. The interrogators "played on his emotions" and he was "ill-equipped to combat" the interrogation. Id.

Psychotic disorder

The Superior Court of Pennsylvania affirmed a trial court's suppression of a statement where the defendant suffered from "chronic undifferentiated schizophrenia." Com. v. Cephas, 522 A.2d 63, 65 (Pa. Super. Ct. 1987). The appellate court held the record supported the trial court's finding that the defendant's mental illness prevented him from understanding his advisement of rights and rendered him incapable of making a knowing and intelligent waiver of his privilege against self-incrimination. Id. Both sides presented expert testimony on the subject, which created a credibility issue for the trial judge to resolve. Id.

Rejecting the state's argument that in the absence of misconduct on the part of government officials a statement by a defendant was admissible, the court explained that "federal law require[d] that a suppression court undertake a two step inquiry into the validity of a Miranda waiver." Id. at 65-66.

> The court must first determine whether the waiver was voluntary in the sense of being the result of an intentional choice on the part of a defendant who had not been subject to undue governmental pressure. The court must then focus on cognitive factors to determine if the waiver was knowing and intelligent – i.e. whether the defendant was aware of the nature of the choice that he made by giving up his Miranda rights.

Id.

"There is little doubt that mental illness can interfere with a defendant's ability to make a knowing and intelligent waiver of his Miranda rights." Miller v. Dugger, 838 F.2d 1530, 1539 (11th Cir. 1988). "If a defendant cannot understand the nature of his rights, he cannot waive them intelligently." Id. "A judge must give 'special attention' when confronted with a waiver of rights by a person who suffers from mental deficits." Com. v. Hilton, 823 N.E.2d 383, 392 (Mass. 2005). The Fourth Circuit Court of Appeals held a record contained sufficient evidence of a defendant's "mental condition, standing alone, … to determine that he could not have knowingly and intelligently waived his rights." Moore v. Ballone, 658 F.2d 218, 229 (4th Cir. 1981). "[A]ll the medical testimony concurred that he suffered from chronic schizophrenia." Id. The Court held that "[g]iven his mental history, and his lack of any experience with law enforcement procedures as would be derived from a criminal record, the evidence [was] overwhelming that any waive he gave the officers was invalid." Id.

Totality of the circumstances

The totality of the circumstances surrounding Appellant's interrogation require reversal of the trial court's finding that Appellant knowingly, intelligently, and voluntarily waived his rights

against self-incrimination and counsel. No one disputed Appellant suffered from a traumatic brain injury that manifested itself through (1) a mental illness of a psychotic disorder and (2) a cognitive disorder affecting Appellant's comprehension and memory. While Dr. Frierson offered no opinion on Appellant's ability to understand and appreciate the warnings, Dr. Frierson explained that Appellant suffered from severe cognitive deficits resulting from his traumatic brain injury. Appellant's psychosis and cognitive impairments were on full display during the video and audio recorded interrogation. The officer read the advisement of rights on the form to Appellant, but he failed to ensure Appellant actually understood those rights. Without question, the advisement of rights involves abstract concepts. While some may argue that advising a person of a right to silence is not abstract, one could hardly dispute that waiving such a right is not an abstract concept. Despite speaking very slowly at times, he stuttered. He repeatedly called the officer's attention to his delusion regarding the insurance policy. At times, Appellant's responses were non-sensical and showed he was not comprehending the officer's questions. When the officer left the room, Appellant fell asleep, which showed Appellant simply failed to understand his circumstances. Based upon the totality of the circumstances surrounding Appellant and the interrogation, the trial judge erred in admitting his statement into evidence.

II. The trial judge erred 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.

Standard of review

"An abuse of discretion standard is applied to a trial judge's ruling on the issue of whether a statement is admissible as a declaration against penal interest." State v. Kinloch, 338 S.C. 385, 388, 526 S.E.2d 705, 706 (2000). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Douglas, 369 S.C. 424, 429-430, 632 S.E.2d 845, 848 (2006).

Relevant facts

On December 29, 2012, Investigator Jeffrey Wiedrick interrogated Devin A. Hedman at the Livingston County Sheriff's Office in Geneseo, New York. R. 606. On that date, Hedman had been arrested for driving while under the influence. R. 606. During the booking process, he informed the officers that he wanted to confess to a double homicide. R. 606. Hedman explained that he was angry with Appellant, and in the summer of 2010, he went in search of Appellant to kill him. R. 606. Hedman's friend gave him a ride to the beginning of a dirt road where Appellant lived. R. 606. Hedman walked down the road toward Appellant's house, which he accurately described as "one story gray stone house." R. 606. He waited in the woods until dark. R. 606. Hedman heard Appellant arguing with his uncle. R. 606. Hedman entered

the house, where he noticed a shotgun near a woodburning stove. R. 606. He grabbed the gun and fired a shot at Appellant. R. 606.

Hedman heard a woman gasp, leading him to believe he accidentally shot Appellant's grandmother through the wall. R. 606. Hedman then shot Appellant's uncle in his chest. R. 606. Hedman turned to shoot Appellant, but he realized Appellant had run out of the house. R. 606. Hedman looked for Appellant, but he was unable to locate him. R. 606. He threw the gun into some trees near a dumpster. R. 606. Thereafter, Hedman returned to New York. R. 606.

On the very same day that he received the confession, Investigator Wiedrick sent it via facsimile to Lieutenant Debra Collins. R. 385, l. 25 – R. 386, l. 7; R. 606. At some point, the state provided the confession to the defense as part of the discovery process. R. 409, ll. 9-15.

On August 29, 2013, defense counsel filed a motion to compel compulsory process. R. 606. In the motion, defense counsel sought the assistance of the state in compelling a witness to appear for Appellant's trial. R. 606. Specifically, counsel requested the appearance of Devin A. Hedman at the trial because Hedman confessed to the shootings to Investigator Jeffery Wiedrick of the Livingston County Sheriff's Office in New York. R. 606. Counsel was unable to locate Hedman for trial and argued the state was in a better position to produce him. R. 606.

In the altnerative, defense counsel sought to admit the statement from Hedman to Wiedrick. R. 606.

Near the beginning of trial, defense counsel informed the judge that he had filed a motion to compel compulsory process. R. 137, ll. 1-4. When he explained that he filed the motion with the court, the judge responded that he did not have a file. R. 137, ll. 3-5. As a result, trial counsel provided a copy of the motion to the judge. R. 137, l. 6. Trial counsel also provided a copy of his memorandum of law in support of his motion. R. 612. Thereafter, defense counsel

put forth his argument to compel the state to produce the witness or allow introduction of the statement. R. 137, ll. 6-22; R. 139, ll. 13-17; R. 139, l. 23 – R. 140, l. 2; R. 140, ll. 14-22.

The prosecutor opposed the motion. According to the prosecutor, Hedman was Appellant's relative. R. 137, l. 24 – R. 138, l. 1. Furthermore, the state claimed Hedman's "story was investigated by whatever appropriate law enforcement agency there in Livingston County, New York, and his statement was discredited in that at the time these murders were committed it was determined he was actually at work, and his wife verified that." R. 138, ll. 1-6. The state responded simply that it was "not required to get the defendant's witness here." R. 138, ll. 12-13.

The judge called the confession "something close to wild speculation that attempts to come close to what occurred in this case, but is not on point." R. 139, ll. 3-6; R. 140, ll. 7-10. Thereafter, the judge denied the request to admit the sworn confession "because the state cannot cross-examine the affidavit." R. 139, ll. 6-8. Further, the judge stated he was unaware of "any burden the state would have to require this person to be present." R. 139, ll. 9-11; R. 140, ll. 7-13. Thus, he denied both parts of the motion. R. 139, ll. 3-12; R. 140, ll. 23-24.

When the parties returned from lunch, defense counsel renewed his motion regarding Hedman's confession. R. 141, ll. 6-7. Counsel argued the confession was a statement against penal interest "made by the other nephew." R. 141, ll. 9-10. Counsel noted the confession contained details that were consistent with the state's theory of the case, including the fact that the murder weapon was a shotgun. R. 141, l. 24 – R. 142, l. 6. Further, the confession referred to the house as a one story, gray house, which was accurate. R. 142, ll. 11-12. The judge refused to entertain the motion at the time. R. 142, l. 23 – R. 143, l. 10.

At the conclusion of the state's case, defense counsel renewed his request for compulsory process, or, in the alternative, for admission of the statement as a statement against penal interest. R. 383, l. 10 – R. 384, l. 1; R. 384, ll. 15-23. In support of the motion, defense counsel proffered the testimony of two police officers. Lieutenant Debra Collins admitted that she received the fax from Investigator Wiedrick on December 29, 2012. R. 385, l. 25 – R. 386, l. 4. Initially, Collins indicated that she simply passed the confession along to Investigator Pamela Wrenn. R. 386, ll. 8-10; R. 386, ll. 15-17. When pressed, Collins called she talked to Investigator Wiedrick on the phone after receiving the fax. R. 386, ll. 18-21. Collins asked Wiedrick to talk to Hedman's wife to ask if Hedman were in Williamsburg County at the time of the shootings. R. 386, l. 25 – R. 387, l. 6. Wiedrick reported back that Hedman's wife indicated he did not leave New York and was at work. R. 387, ll. 8-10.

Collins admitted that no one from the local police department looked for the shotgun where Hedman claimed he threw it. R. 392, ll. 6-21. Collins claimed there was no need to look because Hedman referred to a dumpster and "there was no dumpster at the end of that road or on the side of the road." R. 393, ll. 11-12. Collins claimed she was aware there was no dumpster based upon a search conducted by the officers shortly after the shooting. R. 393, l. 6 – R.394, l. 14. Collins conducted no additional investigation into Hedman's confession because she simply took his wife's word for it – Hedman was not in South Carolina. R. 394, l. 22 – R. 395, l. 1.

Pamela Wrenn confirmed receiving the confession from Collins. R. 396, ll. 2-15. Wrenn conducted no additional investigation as she indicated it was Collins' responsibility to investigate the confession. R. 396, ll. 2-15. Wrenn considered it "frivolous information." R. 396, ll. 13-15. In fact, Wrenn had not even read the confession in detail. R. 397, l. 20 – R. 398, l. 2. Wrenn claimed there was no dumpster where Hedman indicated because the county had "open trash

sites or dump sites." R. 397, ll. 6-12. Yet, when she was questioned about the locations of those sites, she could not provide those locations. R. 397, ll. 13-15.

After proffering the testimony, defense counsel moved to compel the state to present the witness, or in the alternative, to admit the confession. R. 399, l. 24 – R. 400, l. 2. The judge was unmoved, however, commenting, "Oh yeah, I wouldn't waste the time if proffering their testimony for me to give an advance ruling or advisory opinion. I thought you had some other purpose in asking these people to testify or call them as a witness." R. 400, ll. 10-14. Failing to acknowledge his pre-trial ruling on the matter, the judge indicated that defense counsel was "assuming or presuming" that the court would not allow the confession to be admitted. R. 406, l. 15 – R. 407, l. 7. Thereafter, the judge admonished defense counsel for not presenting any corroborating evidence. R. 407, ll. 8-9. The judge noted that "law enforcement was convinced [the confession] was untrustworthy, not true, and did not happen." R. 407, ll. 8-12. Yet again, the judge asserted that he was not ruling on the motion to admit the confession because he would be issuing an advisory ruling if he did so. R. 407, ll. 12-15.

Turning to the motion to compel the presence of the witness, the judge alleged that defense counsel "first mentioned not before the trial, but midway through the state's case." R. 407, ll. 16-20. The record showed counsel verbally informed the judge of his motion, which was filed in August 2013, prior to the start of the trial and when the parties were discussing the state's motion to admit Appellant's statement. R. 408, l. 4. The judge countered that defense counsel had not brought the matter to the attention of the judge. R. 411, l. 24 – R. 412, l. 1. Defense counsel noted that when the motion was discussed the prior day, the judge indicated he did not "even have a copy of the file, of the Clerk's file." R. 412, ll. 2-6. The judge maintained that even after the state's case-in-chief, he "still" did not have a copy of the file. R. 412, l. 7. When

defense counsel questioned how he could advise a sitting judge of a pending motion other than by filing it with the Clerk of Court, the judge stated, "By speaking." R. 412, l. 8-11.

The judge then declared that "the compulsory process that exists in this state would appear to be some effort under rule 19-9-70 to seek to have a witness after establishing materiality of why you need the witness to have the court address the issue." R. 422, ll. 17-21. The judge claimed "none" of that "was done in this case." R. 422, l. 22. The court even claimed defense counsel "did not seek any assistance from the court with regard to producing this witness." R. 422, ll. 22-25. Further, the judge maintained that the burden was not on the state to produce the witness. R. 422, l. 25 – R. 423, l. 1. Ultimately, the judge ruled:

> So with regard to the motion to compel the attendance of the witness that was introduced, brought to the court's attention yesterday, not to seek the court to have the witness produced but to allow the introduction of a voluntary statement that was given to law enforcement in the state of New York. It was not timely presented yesterday in that it was presented in the middle of testimony by a witness as a means of allowing hearsay or introducing a, introducing the defense during the course of the state's case as I saw, recall being attempted. We're now preparing to move forward in [the] defense's case. The defense has the right to present whatever defense that might be appropriate, and I'll rule on matters regarding introduction of evidence as a proffer. The court will not give any advice as to means of preventing any evidence by any party.

R. 423, l. 16 – R. 424, l. 8. When counsel noted that his motion was filed almost a year prior to the calling of the case for trial and that he orally advised the court of his motion during the early part of the trial, the judge informed him that it was "not appropriate for the record; the record is clear." R. 424, ll. 10-15.

In the defense case-in-chief, counsel called Collins as a witness. She admitted she received the fax from the investigator in New York. R. 426, ll. 4-7. She then had a conversation with the investigator. R. 426, ll. 14-17. Subsequently, she gave the file to Wrenn to be placed into the case file. R. 426, ll. 18-21. When defense counsel moved to admit the confession, the

state objected "based on hearsay and lack of foundation." R. 427, ll. 23-24. Without explanation, the judge sustained the objection. R. 427, l. 25.

Although the judge earlier stated that he had ruled on the motion and there was no need to address the matter further, the judge returned to address the issues. R. 424, ll. 14-19; R. 458, l. 21 – R. 460, l. 13. Finally, the judge acknowledged that "criminal defendants have a right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before the jury evidence that might influence the determination of guilt." R. 459, ll. 1-5. The judge noted that "[i]n order for there to be a compulsory process violation there must be some plausible showing that the testimony of the absent [witness] would be both material and favorable to the defendant." R. 459, ll. 9-13. The judge "interpret[ed] that to be exculpatory in nature." R. 459, ll. 13-14. The judge found that "despite the state having some burden to assist where there's otherwise be exculpatory evidence, that this matter was not brought to the court's attention in a timely fashion. And in addition thereto, the evidence is not exculpatory based on its untrustworthiness as presented in the evidence in this case." R. 460, ll. 10-13.

Turning to counsel's alternative request to admit the statement, the judge remarked "that a defendant seeking to offer hearsay statement against interest bears a formidable burden of establishing that corroborating circumstances clearly indicate the trustworthiness of the statement." R. 459, ll. 20-25. According to the judge, "[e]xculpatory evidence that is not corroborated and with other evidence that clearly shows its trustworthiness is excluded." R. 459, l. 25 – R. 460, l. 2. The judge found "that the defendant did not show that this attempt to offer hearsay statements, that the statement offered, attempted to be offered is trustworthy." R. 460, ll. 3-6.

Discussion

Hearsay

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Generally, hearsay is not admissible. Rule 802, SCRE. However, the South Carolina Rules of Evidence permit hearsay "if the declarant is unavailable as a witness" and the "statement which was at the time of its making … so far tended to subject the declarant to civil or criminal liability … that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." Rule 804(b)(3), SCRE. However, "[a] statement tending the expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." Rule 804(b)(3), SCRE. "'Unavailability of a witness' includes situations in which the declarant … is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means." Rule 804(a)(5), SCRE. "To bring evidence within [the Rule 804(b)(3), SCRE] exception, Defendant 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, 466 (2000).

Although the Court refused to adopt a specific test to determine whether a statement has been sufficiently corroborated, the Court made clear that "the corroboration requirement contained in Rule 804(b)(3) goes not to the truth of the statements' contents, but rather to the

making of the statement." State v. McDonald, 343 S.C. 319, 324, 540 S.E.2d 464, 466 (2000). Further, the Court recognized that "[i]n many instances, it is not possible to separate these two considerations in analyzing the matter of corroboration." Id.

In State v. Doctor, 306 S.C. 527, 413 S.E.2d 36 (1992), the South Carolina Supreme Court examined this issue. At Doctor's trial, an individual testified that Doctor and two other boys approached him in a shopping mall parking lot and demanded his keys. State v. Doctor, 306 S.C. 527, 528, 413 S.E.2d 36, 37 (1992). When the individual refused, Doctor pointed a gun at his head. Id. The individual handed over his keys and the three young men drove away in the car. Id. At the trial, Doctor called a sixteen-year old boy to testify. Id. He admitted that he and two other minors committed the theft, and denied that Doctor was involved. Id. According to the boy, he and two others found the keys on the floorboard and did not use a gun. Id. The boy had plead nolo contendere to the crime in Family Court. Id.

The defense also called two minors to testify, who were implicated by the sixteen-year old. Id. at 529, 413 S.E.2d at 37. Both asserted their Fifth Amendment privilege against crimination. Id. The defense then proffered the testimony of his investigator, who stated that "both the nontestifying minors, separately and in the presence of family members, confessed to the theft." Id. According to the investigator, the confessions "were identical in detail to the in-court confession of the testifying minor." Id. Nevertheless, the judge excluded the investigator's testimony as hearsay. Id.

The Court held the two minors were made unavailable by their assertion of their privilege against self-incrimination. Id. at 530, 413 S.E.2d at 38. Further, the Court held the statements were sufficiently corroborated in that all three minors related identical versions of the crime. Id. Finally, the two out-of-court confessions were further corroborated by the testimony of the three

witnesses who saw the three confessing minors in the car without Doctor prior to the removal of the stereo. Id.

Additionally, the Court rejected the state's argument that the exclusion of the testimony by the investigator was harmless error as it was merely cumulative of the testifying minor's confession. Id. The Court noted that it was the "redundancy of the details" that made the testimony so valuable to the defendant. Id. The testifying minor's testimony was contradicted by the alleged victim's testimony, and the testifying minor's credibility was attacked on cross-examination by the state. Id. "When a witness' testimony is disputed or his credibility called into question, other testimony verifying the facts or opinions given by the witness is not merely cumulative." Id.

In another similar case, the South Carolina Supreme Court reversed a trial judge's exclusion of statements by two witnesses that tended to exculpate the defendant in State v. McDonald, 343 S.C. 319, 324-325, 540 S.E.2d 464, 466-467 (2000). Hawkins and Thorson were in the driveway of a residence when a group of men approached them. Id. at 321, 540 S.E.2d at 464. Thorson claimed McDonald, "who was not wearing a mask, approached the car from the rear, brandished a sawed-off shotgun and placed it to Thorson's head, demanding money." Id. at 321, 540 S.E.2d at 465. Thorson claimed "the gun fired," killing Hawkins. Id. Thorson sped away. Id. Robert Jackson also claimed that McDonald fired the fatal shot; however, he indicated McDonald was wearing a black mask and he was able to identify him by his clothing. Id. Robert Jackson and Thorson agreed that McPhail was present at the scene. Id.

Timmy Jackson testified that immediately after hearing a gunshot, he saw McPhail standing near the car with a sawed-off shotgun. Id. at 322, 540 S.E.2d at 465. Timmy Jackson also testified that McDonald was not at the scene immediately after the shooting. Id. When the

defense called McPhail to testify, he asserted his Fifth Amendment privilege. Id. Thereafter, the defense proffered testimony from Timmy Jackson that McPhail told him that he shot Hawkins because he refused to hand over his money. Id. The trial judge excluded the testimony, finding it was inadmissible testimony. Id.

In addition to Timmy Jackson's testimony, the defense proffered the testimony of (1) an individual who claimed McPhail admitting shooting Hawkins because he refused to pay for drugs and (2) a fellow who was in jail at the same time as McPhail and overheard McPhail tell an unidentified person that he shot the deceased and that McDonald was not involved. The trial judge excluded the testimony of these individuals on the basis of hearsay as well. Id.

The Court reversed the trial judge and held "the statements purportedly made by McPhail [were] clearly corroborated and should have been admitted at trial." Id. at 324, 540 S.E.2d at 466. The Court explained that Timmy Jackson and Gary Hawkins indicated the motive for the shooting was the failure of the deceased to provide McPhail with money, which was the substantially same as the testimony from Thorson and Robert Jackson. Id. "The content of the statements indicates that the speaker had extensive knowledge of details of the crime." Id. Further, even the state's witnesses placed McPhail at the scene of the crime and Timmy Jackson placed a sawed-off shotgun in McPhail's hand within seconds of the shooting. Id. Finally, "three different witnesses claim[ed] to have heard McPhail make similar statements on three separate occasions." Id. at 325, 540 S.E.2d at 466-467. The Court held the statements were sufficiently corroborated; therefore, the trial court's suppression of the statements was an abuse of discretion as it was controlled by an error of law. Id. at 325, 540 S.E.2d at 467.

In contrast, the South Carolina Supreme Court affirmed a trial judge's exclusion of a co-defendant's statements admitting to shooting a police officer where the statements lacked

corroborating evidence of trustworthiness. State v. Forney, 321 S.C. 353, 359, 468 S.E.2d 641, 644-645 (1996). Three of the incriminating statements made by the co-defendant were to jailhouse informants. Id. The Court held these statements did "not clearly indicate they were trustworthy." Id. at 359, 468 S.E.2d at 645. Two other statements, one given to an investigating officer and one to a prison guard, did not exculpate Forney. Id. at 360, 468 S.E.2d at 645. Rather, these statements only inculpated the co-defendant. Id.

The trial judge erred in failing to admit Hedman's confession to a police officer where the evidence demonstrated Hedman was unavailable, his statement was against his penal interests, and his confession was clearly corroborated by the circumstances. Hedman was unavailable pursuant to Rule 804(a)(5), SCRE, because he was in New York and not subject to South Carolina's jurisdiction. As the statement showed, Hedman was in the custody for police officials in Livingston County, New York, when he confessed. Thereafter, defense counsel was unable to locate him. Appellant was unable to procure Hedman's presence and testimony at his trial through the service of a subpoena because Hedman was beyond the powers of the subpoena and defense counsel could not find him.

Additionally, the circumstances surrounding the giving of the confession were clearly corroborative of the confession's trustworthiness. Significantly, Hedman provided his confession to a member of law enforcement. He was well aware of the consequences of providing an inculpatory statement to police, particularly one in which he confessed to a "double homicide." See R. *(motion to compel). The officer advised Hedman of his rights and warned him that what he said could be used against him; yet, Hedman chose to waive those rights and confess to a "double homicide." See R. *(motion to compel). The trial judge erred when he evaluated the corroboration requirement contained in Rule 804(b)(3), SCRE, by assessing the

truth of the statement, instead of examining the making of the statement. This was evident in the trial judge's repeated reference to what he called "wild speculation" in the confession. However, as trial counsel noted Hedman's confession contained information that was corroborative of itself. Hedman accurately described the people in the house. Hedman accurately described the house. Hedman accurately described the murder weapon as a shot gun. Hedman accurately described the location of the fatal wound to McCray – his chest. He accurately described the location of the shooting – the living room. Further, McCray stated on the 911 call that his nephew was the shooter, and it was undisputed that Hedman was McCray's nephew, just as Appellant was his nephew. See State's Exhibit #1. Thus, the confession was corroborated by other evidence presented by the state.

Properly analyzing the circumstances surrounding the statement required admission of Hedman's confession in light of him confessing to the police after being advised of his rights and providing a confession that was corroborated by other evidence presented in the state's case. Importantly, Hedman signed his statement "under penalty of perjury." While the state and the trial judge emphasized that Hedman had not provided an "affidavit," both neglected to place any significance to the fact that Hedman made the confession with the knowledge that it could be used against him and that if the confession were false, he could be prosecuted for perjury. The magnitude of Hedman confessing while aware of the possibility of a prosecution for a false confession cannot be overstated. The trial judge erred by suppressing Hedman's confession to the murders.

Foundation

The proponent of evidence must satisfy "[t]he requirement of authentication or identification as a condition precedent to admissibility." Rule 901(a), SCRE. See also State v.

Brown, 424 S.C. 479, 488, 818 S.E.2d 735, 740 (2018) (stating "[i]t is black letter law that evidence must be authenticated or identified in order to be admissible"). This requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Id. While the burden is not high, the proponent must offer a satisfactory foundation to permit the jury to conclude the evidence is authentic. Deep Keel, LLC v. Atlantic Private Equity Group, LLC, 413 S.C. 58, 64-65, 773 S.E.2d 607, 610 (Ct. App. 2015) (citing United States v. Hassan, 742 F.3d 104, 133 (4th Cir. 2014)).

One way to authenticate a document is by providing "[e]vidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept." Rule 901(b)(7), SCRE. "A public record or report under this provision only requires that the document be produced and maintained in a public office. The fact that the general public does not have access to the document … does not negate this method of authentication." State v. Anderson, 386 S.C. 120, 130 n.10, 687 S.E.2d 35, 40 n.10 (2009). Another way to authenticate a writing is through the business records exception. Rule 901(b)(6), SCRE. This requires showing the document was "made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make" the document all as shown by the testimony of the custodian or other qualified witness. Rule 901(b)(6), SCRE.

According to the face of the confession, it was prepared at the time that Hedman confessed to the shooting deaths to the police officer in Livingston County. Without question, the police are in the business of interrogating individuals regarding criminal activity. Further,

the police are in the business of maintaining records of those interrogations. Thus, the evidence supported that the confession was authenticated as a business record. Additionally, the confession indicated that it was maintained by the Livingston County Sheriff's Office, a public office. Further, the testimony of the two South Carolina officers showed the confession was maintained by the Williamsburg County Sheriff's Office as part of the case file of the investigation into the shooting deaths. Accordingly, the confession was authenticated as a public record. The trial judge erred in sustaining the state's objection to "foundation" when defense counsel moved to admit Hedman's confession into evidence.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial.

s/*Susan B. Hackett*
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ATTORNEY FOR APPELLANT

This 15th day of October, 2020.

CERTIFICATE OF COUNSEL

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

October 15, 2020

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