

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Horry County

Honorable William A. McKinnon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHNATHAN LAMAR HILLARY,

APPELLANT.

APPELLATE CASE NO. 2019-001048

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1.

Where the police asked appellant if he thought a jury would “hesitate to stick a needle in his arm” for shooting a retired police officer, threatened him with the death penalty, and promised him help, including not hanging him “out to fucking dry,” did the trial court err in admitting appellant’s recorded interrogation because the police’s threats and promises coerced appellant into giving an involuntary statement?

2.

Did the trial court err, under Rule 404, SCRE, in admitting evidence of a robbery allegedly involving appellant that occurred over a month after the shooting in this case, in another county, and under different circumstances?

3.

Alternatively, whether appellant’s conviction for kidnapping should be vacated because he was also sentenced for murder, pursuant to S.C. Code Ann. § 16-3-910?

STATEMENT OF THE CASE

An Horry County grand jury indicted appellant Johnathan Lamar Hillary for murder, kidnapping, armed robbery, and a weapons charge and on June 10, 2019, he was tried before the Honorable William A. McKinnon and a jury. R. 1. Nancy Livesay and Jonathan Miles represented the State. R. 1. R. Scott Joye represented appellant. R. 1. The jury convicted appellant. R. 758, l. 14 – 759, l. 16. Judge McKinnon sentenced appellant to life imprisonment for murder and concurrent sentences on the other charges. R. 769, l. 17 – 770, l. 17. This appeal follows.

STANDARD OF REVIEW

The first two issues concerning the admission of evidence are governed by the abuse of discretion standard. “An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support.” State v. Arrowood, 375 S.C. 359, 366, 652 S.E.2d 438, 442 (Ct. App. 2007). The third issue should be reviewed *de novo* because it presents a question of law.

ARGUMENTS

1.

Where the police asked appellant if he thought a jury would “hesitate to stick a needle in his arm” for shooting a retired police officer, threatened him with the death penalty, and promised him help, including not hanging him “out to fucking dry,” the trial court erred in admitting appellant’s recorded interrogation because the police’s threats and promises coerced appellant into giving an involuntary statement.

Introduction

“[A] confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.” Bram v. United States, 168 U.S. 532, 542–43, 18 S. Ct. 183, 187, 42 L. Ed. 568 (1897). Despite this longstanding principle of Fifth Amendment jurisprudence, the police in this case twice threatened appellant Johnathan Lamar Hillary with the death penalty while simultaneously promising to help him. State’s Ex. 2, R. 774; State’s Ex. 3. Before the police made these threats, appellant denied knowing the decedent in this case, Timothy Buckley. State’s Ex. 2, R. 774; State’s Ex. 3. Shortly after hearing that a South Carolina jury would not “hesitate to put a needle in his arm,” Hillary asked the police if they could help him. State’s Ex. 2, R. 774; State’s Ex. 3.

The police suggested a possible homosexual encounter between Hillary and Buckley. State’s Ex. 2, R. 774; State’s Ex. 3. Hillary then gave the police a story about homosexual advances and threats with a pistol made by Buckley which culminated in Hillary having to defend himself. State’s Ex. 2, R. 774; State’s Ex. 3. At the Jackson v. Denno, 378 U.S. 368 (1964), hearing, Hillary testified that he made this story up because he was afraid and he thought

it was what the police wanted to hear. R. 74, l. 11 – 75, l. 7. The trial court erred in admitting appellant’s involuntary statement.

Timothy Buckley Disappears

After retiring as a New York police officer, Timothy Buckley moved his family to Myrtle Beach. R. 176, l. 6 – 177, l. 13. R. 185, l. 24 – 25. Buckley drove a black Ford F-150 pickup truck. R. 187, l. 25 – 24. He worked as a bell valet at a hotel. R. 188, l. 6 – 8. In addition to his house, Buckley kept a camper at Springmaid Pier as “a getaway place.” R. 203, l. 3 – 22.

On September 29, 2016, Buckley did not pick up his daughter from cheerleading practice. R. 188, l. 19 – 189, l. 15. R. 177, l. 14 – 17. His oldest daughter tried to call him, but Buckley did not answer, which was unusual. R. 189, l. 8 – 190, l. 4. Buckley’s daughter drove to the camper, but there was “no sign of him.” R. 189, l. 17 – 190, l. 4. She called the hotel where Buckley worked and learned he did not show up for his shift. R. 190, l. 5 – 13. She then called the police. R. 190, l. 5 – 13.

Buckley’s family continued to search for him after calling the police. R. 190, l. 16 – 191, l. 6. Two friends of Buckley’s from New York drove to Myrtle Beach to assist in the search. R. 206, l. 10 – 207, l. 16. By the time the friends arrived, a hurricane was approaching and they only had a single afternoon to search. R. 208, l. 2 – 209, l. 11. Despite their abbreviated search window, the two friends found Buckley’s truck in downtown Myrtle Beach. R. 207, l. 2 – 210, l. 13. After calling the police, the friends looked inside the truck and saw a large amount of blood, which turned out to be Buckley’s, inside the truck only on the passenger’s side. R. 215, l. 10 – 216, l. 2. R. 257, l. 19 – 20. The crime scene investigator found no bullet holes in the truck. R. 237, l. 17 – 18. Mud was on the truck’s side. R. 238, l. 2 – 6.

The truck was found on October 5, 2016. R. 288, l. 4 – 5. Over a month later, students at a motorsports academy found Buckley’s body. R. 265, l. 14 - 268, l. 16. The body was found in a wooded area at the end of a dirt road off Highway 501. R. 342, l. 9 – 345, l. 6. The area was on the Conway side of the intracoastal waterway near an outlet mall on Highway 501. R. 265, l. 17 – 267, l. 10. The autopsy revealed Buckley died from a gunshot wound to the back of the head. R. 565, l. 16 – 22. The police also found a bullet hole in the back armpit area of a t-shirt found with Buckley’s body. R. 286, l. 10 – 20. R. 641, l. 5 – 8. Despite the t-shirt’s deteriorated condition, gunshot residue was found at the hole. R. 638, l. 7 – 643, l. 13.

The Investigation Leads Police to Bernithia Young and Cell Phone Records

Using a dystopian array of technological surveillance, the police were able to track the movements of Buckley’s truck and a suspect. Special cameras called License Plate Readers (LPRs) “are at the entry points to the city” of Myrtle Beach. R. 339, l. 11 – 340, l. 11. The LPR cameras are “up high” and linked to a separate computer system that reads the characters on all license plates and logs them. R. 311, l. 10 – 312, l. 11. R. 339, l. 15 – 340, l. 11. The computer also keeps a photo of the license tag so comparisons can be made later if needed. R. 311, l. 10 - 312, l. 3. The officer who testified said that additional tag readers were located on Highway 501, “throughout the state,” and that SLED maintains an “LPR database.” R. 341, l. 13 – 17.

The LPR system told police that Buckley’s truck entered the city at 5:18AM on September 29, 2016, on Highway 501. R. 309, l. 21 – 310, l. 9. The police then used the city’s vast array of surveillance cameras to find and track the truck. R. 311, l. 3 – 325, l. 13. When asked by the solicitor if Myrtle Beach “has video cameras everywhere,” the officer responded, “Practically, yes.” R. 311, l. 7 – 9.

The cameras showed Buckley's truck enter the city and pull into the parking lot of a motel. R. 320, l. 11 – 20. The truck did not park at the motel, and left followed by a white sedan to the place where Buckley's truck was found by his friends. R. 320, l. 11 – 322, l. 11. A black male then "emerges" and gets into the white sedan. R. 322, l. 12 – 324, l. 19. The cameras showed the white sedan travel to the 1000 block of Ocean Boulevard where several motels were located. R. 324, l. 20 – 326, l. 20. The surveillance system was not sufficiently comprehensive to locate Buckley in his truck late on September 28 or in the early morning hours of September 29. R. 332, l. 19 – 22. R. 337, l. 14 – 339, l. 17.

A woman named Bernithia Young stayed at the Ocean Plaza Hotel on the night of September 28, departing on September 29. R. 346, l. 5 – 14. She listed a white Chevrolet Impala as her car on the registration form. R. 346, l. 5 – 14. Young stayed at various hotels managed by the same group as the owners of the Ocean Plaza during September. R. 347, l. 22 – 353, l. 22. On the night Buckley disappeared, Young listed Fernando Cannon as her guest at the Ocean Plaza. R. 349, l. 7 – 11. Appellant Hillary was listed as her guest nearly two weeks earlier, on September 13. R. 348, ll. 16 – 22. The police introduced camera footage from the hotels showing a black male in the Ocean Plaza parking garage at 6:20AM on September 29. R. 354, l. 9 – 355, l. 15. They also introduced a short video taken from Young's phone that the hotel manager verified was taken inside one of their hotels that showed Young and a black male.¹ R. 356, l. 4 – 358, l. 8.

The police learned that Young and Hillary worked as motel housekeepers for a staffing agency in Myrtle Beach during the month of September 2016. R. 368, l. 21 – 384. They told the staffing agency they had just moved from Georgia and were looking for work. R. 371, l.

¹ Young did not testify at appellant's trial.

2 – 9. Hillary gave an address of a hotel on Highway 501 that was in the vicinity where Buckley’s body was found. R. 371, l. 18 – 373, l. 15. The police also obtained Georgia cell phone numbers that Young and Hillary gave the staffing agency. R. 380, l. 20 – 381, l. 6.

Atlanta police went to a townhouse where they found Young, Hillary, and another man. R. 583, l. 2 – 584, l. 23. In the apartment, the police found a 9mm semiautomatic handgun and a revolver that belonged to Buckley. R. 585, l. 1 – 6. R. 587, l. 2 – 9. R. 589, l. 4 – 22. The police also found credit cards and IDs belonging to other people, including a man named Bocar Bah. R. 594, l. 21 – 595, l. 11. As will be explained in more detail in Issue 2 of this brief, the State called Bocar Bah to testify that he was the victim of a robbery allegedly perpetrated by Young and Hillary in November 2016 in Summerville. R. 655, l. 4 – 658, l. 19.

The Myrtle Beach police went to Atlanta and spoke to Young. R. 415, l. 6 – 11. They obtained Young’s cell phone. R. 415, l. 9 – 14. Phone records showed multiple communications between Young and Hillary during the early morning hours of September 28-29. R. 428, l. 14 – 433, l. 19. Hillary called Young, then the communications switched to text messages, and then back to phone calls. R. 433, l. 12 – 19. The State used a cell phone records analyst to compare the phone records of Buckley, Young, and Hillary and cell phone towers to conclude that their cell phones were in the same vicinity in Myrtle Beach on September 29 and that Buckley and Hillary’s phones moved in a similar pattern to the area where Buckley’s body was found that morning. State’s Ex. 187.

The Interrogation of Hillary in Atlanta

Horry County police officers Gregory Lent and David Dudley traveled to Atlanta to interrogate Hillary. R. 22, l. 24 – 23, l. 13. The audio, but not the video, of the interrogation was recorded. State's Ex. 2. A transcript of the interrogation was prepared and used by the parties and the trial judge during the Denno hearing. R. 774; State's Ex. 3. While the transcript is accurate, it does not convey the emotion or the long pauses by Hillary that are present on the audio. State's Ex. 2, R. 744; State's Ex. 3.

Hillary was shackled throughout the interrogation. R. 23, l. 21 – 25, l. 4. The police read Hillary his rights. State's Ex. 2, R. 744; State's Ex. 3. They asked him what he knew about somebody getting killed and Hillary said he did not know anything. State's Ex. 2, R. 777; State's Exhibit 3. The police told Hillary that Young was scared and knew "enough to put you in a corner." State's Ex. 2, R.779; State's Ex. 3.

Hillary then told police that he had been in a truck twice in Myrtle Beach. State's Ex. 2, R. 780 – 789; State's Ex. 3. Hillary said the first time was when a white male who was a "meth head" pulled up to him looking for drugs. State's Ex. 2, R. 780 – 789; State's Ex. 3. The meth head had a beard and wild hair and smelled like alcohol. State's Ex. 2, R. 780 – 789; State's Ex. 3. Hillary gave him some bath salts, tricking him into thinking they were drugs in exchange for borrowing his truck. State's Ex. 2, R. 780 – 789; State's Ex. 3. When the meth head started calling Hillary repeatedly, he abandoned the black "bossman truck" and called Young to come pick him up. State's Ex. 2, R. 780 – 789; State's Ex. 3. The other time was when a white man named John, in a white truck, spoke to Hillary on the boulevard and took him to a bar and bought him something to eat. State's Ex. 2, R. 786; State's Ex. 3.

The police then told Hillary there were cameras everywhere in Myrtle Beach and there were “lots of things that we figured out.” State’s Ex. 2, R. 793; State’s Ex. 3. They told him the best thing for him was not to play games and to be honest because things were about to get “a lot more serious for you.” State’s Ex. 2, R. 793 – 794; State’s Ex. 3. They showed Hillary a picture of Buckley, who was bald, and Hillary said Buckley was not the meth head he saw in the black truck. State’s Ex. 2, R. 794 – 795; State’s Ex. 3.

Officer Lent began using profanity, telling him, “We’re not just here ‘cause we pulled your name out of a fucking hat. And we’re not just here on a fucking whim” State’s Ex. 2, R. 796; State’s Ex. 3. They repeatedly responded to Hillary’s answers by saying “Bullshit.” State’s Ex. 2, R. 796 – 800; State’s Ex. 3. Officer Lent said Young’s “ass is getting shipped back to South Carolina, too. Ok. She’s being charged with an accessory to murder. . . . So she’s looking at 20-30 years with you. So she’s not going to cover up your bullshit.” State’s Ex. 2, R. 797; State’s Ex. 3. The police lied and said they had Hillary’s “DNA all over the truck.” State’s Ex. 2, R. 797; State’s Ex. 3. When Hillary said he knew nothing about a murder, Officer Lent said, “That’s a fucking lie.” State’s Ex. 2, R. 798; State’s Ex. 3.

Hillary kept telling the police about the meth head, saying, “I gave the man the dummy dope and he gave me the truck and I rolled around.” State’s Ex. 2, R. 800; State’s Ex. 3. At this point, Officer Lent responded by threatening Hillary with the death penalty for the first time, saying, “Let him go back to South Carolina and he can tell it to a jury when they give him the death penalty.” State’s Ex. 2 (approx 36:38), R. 800; State’s Ex. 3.

Hillary continued to deny any involvement. State’s Ex. 2, R. 800-802; State’s Ex. 3. The police continued to respond, “Bullshit.” State’s Ex. 2, R. 800 – 802; State’s Ex. 3. Hillary said, “I just drove around,” and Officer Lent said, “It’s bullshit. You’re not helping yourself. If you

want to sit in here, this is fine. You can tell us this and when we stand up in court and we testify and we say, you know what, he didn't give two shits. He just fucking lied in there." State's Ex. 2, R. 802; State's Ex. 3. He then suggested to Hillary, "You'd have a better shot coming in here and saying you know what. Someone tried to rob me. Someone tried hurting me and I had to do what I had to do to defend myself. But you're coming in here and honestly you're acting like an asshole." State's Ex. 2 (approx. 38:42), R. 802; State's Ex. 3.

The police kept accusing Hillary of lying. State's Ex. 2, R. 802 – 804; State's Ex. 3. Officer Dudley told Hillary, "We, we can't help you if we don't hear your side of the story, John." State's Ex. 2 (approx. 41:37), R. 802; State's Ex. 3. Officer Lent then told Hillary that Buckley "was a police officer. For 30 fucking years, John." State's Ex. 2, R. 805; State's Ex. 3. Hillary says, dejectedly, "He was a cop." State's Ex. 2 (approx. 43:00), R. 805; State's Ex. 3. Officer Lent continues in a raised voice, "He was a cop. So guess what, not only are you looking at a murder rap. Now you're looking at a murder rap of a cop. How does that feel buddy? Because things change then, don't they?" State's Ex. 2 (approx. 40:07), R. 805; State's Ex. 3.

With a raised voice and using expletives, Officer Lent tells Hillary he has phone records and cameras showing Hillary everywhere. State's Ex. 2, R. 805 – 806; State's Ex. 3. He then tells Hillary about Buckley's gun, saying, "His fucking gun is in your shit." State's Ex. 2, R. 806; State's Ex. 3. Hillary says he does not know where Lent found the gun. State's Ex. 2, R. 806; State's Ex. 3. Officer Lent tells Hillary, "I'm asking you to provide some story that might just save your ass." State's Ex. 2 (approx. 45:20), R. 807; State's Ex. 3.

Then, for the second time, the police threaten Hillary with the death penalty. State's Ex. 2, R. 807; State's Ex. 3. Officer Dudley says, "Let's put it like this. When a jury sees you driving around with the truck for hours with blood on the inside with no remorse for what you

did, you think they're going to hesitate to put a needle in your arm." State's Ex. 2 (approx. 43:30), R. 807; State's Ex. 3. Officer Lent says "You better start talking. Go ahead, I don't care. Roll around in your head. Come up with a, come up with a lie." State's Ex. 2, R. 807; State's Ex. 3.

Officer Lent then suggests a story for Hillary. State's Ex. 2, R. 807 – 808; State's Ex. 3. He says maybe Buckley was "looking to buy some dope. Maybe he rode up on you. Maybe he thought you were working the street. Maybe he rolled up on you looking for sex." State's Ex. 2, R. 807; State's Ex. 3. Officer Lent suggests that Buckley may have made a racist comment, or that maybe a gun went off accidentally. State's Ex. 2, R. 807 – 808; State's Ex. 3.

Hillary asks twice then if the police are "really going to try to help me." State's Ex. 2 (approx. 49:47), R. 808; State's Ex. 3. After Officer Lent tells Hillary that Buckley's family is probably burying his remains in a small cardboard box, Officer Dudley says, "You tell us the truth and we'll help you. We ain't going to hang you out to fucking dry." State's Ex. 2 (approx. 50:16), R. 808; State's Ex. 3. An audible sigh is heard. State's Ex. 2 (approx. 50:22). There is a long pause and a sniffle can be heard. State's Ex. 2 (approx. 50:34). Hillary somberly says that he is not a bad person. State's Ex. 2, R. 808; State's Ex. 3. A chair moves and there is another pause. State's Ex. 2 (approx. 51:08), R. 808 – 809; State's Ex. 3.

Hillary then, in a continued somber tone, tells the police a "scenario" in the abstract about getting a ride from a man who makes unwanted sexual advances. State's Ex. 2 (approx. 51:18), R. 809; State's Ex. 3. The man pulls up into a dark area and a fight occurs after another unwanted sexual advance. State's Ex. 2, R. 809; State's Ex. 3. The man pulls a pistol, there's a fight, the pistol is wrenched from the man's hands and after trying to escape, the pistol is used in

self-defense. State's Ex. 2, R. 808; State's Ex. 3. Hillary then repeatedly says he had to defend himself, he panicked. State's Ex. 2, R. 808 – 810; State's Ex. 3.

Hillary stops at one point and says, "I need y'all help." State's Ex. 2, R. 814; State's Ex. 3. He says, "I didn't even know he was an officer." State's Ex. 2, R. 814; State's Ex. 3. After finishing the story and a long pause, Hillary asks, "I mean, how are y'all going to be able to help me?" State's Ex. 2 (approx. 1:07:40), R. 819; State's Ex. 3. After elaborating further, Hillary asks, "you think I have a chance for real?" and "You think them folk is going to understand this." State's Ex. 2 (approx. 1:26:45), R. 828; State's Ex. 3.

The Denno Hearing and the Trial Judge's Ruling

At the pretrial Denno hearing, Officer Lent explained that he did not threaten Hillary with the death penalty and said "[A]ny time we interview anybody accused of a crime we're going to explain to them what the possible punishment is for that crime." R. 43, l. 6 – 19. Officer Lent said Hillary's demeanor did not change after Hillary was asked whether a jury would hesitate to put a needle in his arm. R. 44, l. 3 – 14. Officer Lent then confirmed for the trial judge that execution in South Carolina is carried out by lethal injection. R. 44, l. 15 – 23. He denied promising to help Hillary avoid the death penalty. R. 47, l. 1 – 8.

On cross-examination, when asked whether the police were even implying that they would seek the death penalty, Officer Lent replied, "We were stating what a possible punishment was for the crime of murder." R. 59, l. 2 – 17. When asked how Hillary interpreted the statement that they would not hang him "out to fucking dry," Officer Lent said, "I think that he thought that we would go to the Solicitor's office and explain to them about his truthfulness and level of cooperation." R. 63, l. 10 – 64, l. 18.

Hillary testified at the Denno hearing that he gave the statement because he was scared. R. 74, l. 9 – 22. He said the police told him he “needed to tell them something to help” him from “getting the death penalty.” R. 74, l. 23 – 75, l. 2. He was “intimidated” and “in a room secluded from cameras and anybody at Atlanta PD.” R. 75, l. 15 – 23. He relied on the officers to help him avoid the death penalty and “made up a scenario about self defense” after the police told him to make up a story. R. 76, l. 3 – 23. On cross-examination, Hillary explained that the police “told me the scenario.” R. 83, l. 11 – 16. Given that the decedent was a white cop, Hillary was also afraid of racial prejudice against him as a young black male. R. 83, l. 17 – 85, l. 9.

At the beginning of the Denno hearing, defense counsel gave the trial court a summary of his argument about the threats of the death penalty. R. 17, l. 12 – 20, l. 6. Judge McKinnon interrupted and asked, “Isn’t that a permissible threat; though? I mean, the, the police can’t threaten to beat you or whatever, but can’t they threaten you with the legal punishment for murder?” R. 20, l. 7 – 10. Defense counsel cited several cases regarding coercive police conduct, including State v. Peake, 291 S.C. 138, 352 S.E.2d 487 (1987), in which a statement was held involuntary because it was induced by a promise not to seek the death penalty. R. 20, l. 11 – 21, l. 11.

The court then heard the testimony of Officer Lent, the audio recording of the statement, and the testimony of Hillary. R. 21, l. 12 – 92, l. 9. Defense counsel argued that Hillary’s statement was coerced and induced by the combination of twice threatening the death penalty for killing a police officer combined with promises to help him. R. 92, l. 10 – 101, l. 19. Only after the threats and promises did appellant alter his story to fit the suggested self-defense/homosexual

encounter narrative. R. 92, l. 10 – 101, l. 19. The State argued no promises were made and nothing was connected to the death penalty. R. 92, l. 10 – 101, l. 19.

Judge McKinnon ruled the statement was voluntary and the references to the death penalty were with regard to its possible imposition by a jury, not because the officers would “manipulate the system.” R. 101, l. 20 – 103, l. 1. The court also found that no expressed promise of leniency was made and that appellant was “clearly not expecting any kind of help from the officers.” R. 101, l. 20 – 103, l. 1. The trial judge made no credibility findings regarding either Officer Lent or Hillary. R. 101, l. 20 – 103, l. 1. Appellant renewed his objection to the admission of the statement during the trial. R. 454, l. 23 – 455, l. 20. R. 465, l. 7 – 10. When appellant renewed his objection at the close of the trial, the judge said that officers are permitted “to correctly state the maximum penalty for an offense, and I don’t think that qualifies as a threat. . . .”² R. 701, l. 15 – 702, l. 10.

Discussion

The police coerced Hillary into making a statement with the combination of twice threatening the death penalty and offering him help. Hillary’s statement was involuntary and its admission was error. See U.S. Const. amend. V (providing that no person “shall be compelled in any criminal case to be a witness against himself”). As correctly argued below, and as can be heard on the audiotape of the interrogation, the threats and promises were closely connected in time and implication by the police and directly resulted in Hillary changing his story.

Hillary is twice threatened with the death penalty. He then asks if the police officers really can help him. The police then say they will not hang him “out to fucking dry.” A long

² For the murder of a police officer to qualify as an aggravating factor to seek the death penalty, the officer must be performing his official duties. See S.C. Code Ann. § 16-3-20(C)(a)(7).

pause follows and possibly a snuffle by Hillary. His voice audibly changes. Then Hillary gives a story which only minutes earlier was suggested by the police.

In Peake, the officer admitted that he gave the defendant a “guarantee” not to seek the death penalty in exchange for a statement. Peake at 139, 352 S.E.2d at 488. Such admissions by the police are rare, and here the police rotely denied any threats or express promises. But Peake shows the power of threatening the death penalty, especially when combined with a promise of help. Officer Dudley telling Hillary he would get a needle in his arm can be nothing but a threat. The police imply help and appellant specifically asks for help. Avoiding the exact language used by the police in Peake will not fool this Court.

At the State’s urging, the trial judge concluded that no express promise of leniency was made. He also ruled that the threat of the death penalty loomed not from the officers sitting in the room with the shackled Hillary, but from some hypothetical future jury. Such rulings are not founded on any reasonable interpretation of the audiotape. The police repeatedly cursed at Hillary and raised their voices. Far from matter-of-factly informing Hillary of the possible punishments for murder, the police instead told him he would have a needle stuck in his arm. If the police did not intend this as a threat, then Officer Lent would not have asked Hillary, “How does that feel, buddy?” after informing him that Buckley was a cop and telling him that “things change then.” If, as in State v. Hook, 348 S.C. 401, 559 S.E.2d 856 (Ct. App. 2001), the power of a threat to revoke probation was sufficient to render a confession involuntary, the threat of lethal injection is also sufficient.

In a case with a strikingly similar factual scenario, a Florida appellate court reversed a conviction because of a coercive police confession obtained with threats of the death penalty. Bussey v. State, 184 So.3d 1138 (Fla. Ct. App. 2015). Just like in appellant’s case, the police in

Bussey traveled to Georgia to interrogate a murder suspect and the interview was recorded. Id. at 1140. The police repeatedly mentioned the death penalty and simultaneously suggested the murder might have been an accident or mistake. Id. at 1142-45. Just like in appellant's case, the trial court in Bussey found the police made no promises and merely informed the defendant of the possible penalty for murder. Id. at 1140-41. The Bussey appellate court rejected the contrived interpretation and recognized the threats for what they were, stating, "we cannot conclude that the detectives were merely informing Bussey of the penalties he faced for the possible charges in the case." Id. at 1145.

In State v. Corns, 310 S.C. 546, 426 S.E.2d 324 (Ct. App. 1992), despite the police officer's testimony that he made no threats nor intimidated the defendant and the trial judge's similar holding, the Court held that informing the defendant that the police had a warrant for his wife's arrest and that his children could be taken by DSS was improperly coercive and the statement should have been suppressed. The Corns Court also noted the defendant's change in demeanor after hearing these threats. Corns at 549, 426 S.E.2d at 325. Like in Corns, appellant's voice noticeably changes and he begins asking for help before giving his statement. Furthermore, the police lied about having appellant's DNA in Buckley's truck and courts consider the misrepresentation of evidence as a factor weighing against the admissibility of a confession. See State v. Johnson, 422 S.C. 439, 455-56, 812 S.E.2d 739, 747-48 (Ct. App. 2018).

Furthermore, allowing such findings to stand invites mischief from the police by allowing them to imply threats and imply leniency, but avoid the Fifth Amendment as long as they made no explicit promise. Courts would have to turn a blind eye to police coercion. The threats and promises made by the officers in this case were far from "slight." See State v. Rochester, 301

S.C. 196, 391 S.E.2d 244 (1990) (stating that a “confession may not be “extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of improper influence.”) quoting Hutto v. Ross, 429 U.S. 28, 30 (1976). This statement was powerful evidence that a jury could not ignore and shored up the circumstantial technological evidence produced by the State. See State v. Young, 420 S.C. 608, 626, 803 S.E.2d 888, 898 (Ct. App. 2017) (“We are also mindful that a confession (sometimes called “the Queen of proofs”) is among the most explosive and incriminating of evidence, and often profoundly impacts the jury.”) This Court should reverse.

2.

The trial court erred, under Rule 404, SCRE, in admitting evidence of a robbery allegedly involving appellant that occurred over a month after the shooting in this case, in another county, and under different circumstances.

The State filed a pre-trial “Motion to Introduce Subsequent Bad Acts.” R. 849. Judge McKinnon heard the motion following the Denno hearing and took testimony from the State’s witness, Bocar Bah. R. 118, l. 6 – 161, l. 23. Bah was a truck driver from Memphis. R. 128, l. 7 – 12. His driver’s license was found at the Atlanta apartment with Young, Hillary, and another man. R. 594, l. 21 – 595, l. 11.

Bah met Young at a truck stop on Interstate 20 in South Carolina. R. 128, l. 13 – 19. Bah bought Young’s snacks at the store and the two exchanged phone numbers. R. 128, l. 21 – 129, l. 4. Bah, who was married with children, kept in touch with Young and they planned to meet the next time he was in South Carolina. R. 653, l. 20 – 23. R. 131, l. 1 – 15.

Bah parked his rig at Walmart in Summerville and got into Young’s car. R. 131, l. 1 – 133, l. 3. They first went to a gas station where Bah bought Young some wine. R. 132, l. 6 –

18. They next went to a hotel to get a room. R. 131, l. 1 – 133, l. 3. Bah noticed Young was texting as they pulled into the hotel parking lot. R. 134, l. 15 – 135, l. 4. She directed Bah where to park. R. 132, l. 18 – 133, l. 3.

When Bah opened the door, a black male he later identified as Hillary in a lineup pointed a gun at him and took his wallet. R. 133, l. 4 – 14. The man told Young, “You’re going to take me out of here,” and she said she would not make any trouble. R. 134, l. 4 – 12. The man and Young then drove off together. R. 134, l. 4 – 14. Bah then went to a woman who was standing outside and told her to call the police. R. 136, l. 16 – 20.

The robbery of Bah happened in November 2016, nearly five weeks after Buckley disappeared. R. 655, l. 4 – 6. R. 160, l. 12 – 13. The State argued that evidence of Bah’s robbery was so similar to their theory of Buckley’s disappearance that it was admissible as a common scheme or plan under Rule 404, SCRE. R. 118, l. 6 – 161, l. 23. Appellant argued the two incidents were not at all similar, were too far apart, and Rule 404 and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) prohibited admission. R. 118, l. 6 – 161, l. 23. Judge McKinnon allowed the evidence, finding a logical connection and that it was evidence of motive or intent. R. 161, l. 3 – 23. Appellant made proper objections during the trial to preserve the issue. R. 590, l. 18 – 594, l. 4. R. 597, l. 18 – 598, l. 17. R. 649, l. 9 – 653, l. 7. R. 661, ll. 7 – 16. R. 663, ll. 8 – 11 (trial judge recognizes a “continuing objection to the Rule 404 issue”). R. 700, ll. 3 – 9.

The trial court erred in admitting this highly prejudicial propensity evidence under Rule 404(b) because it lacked the necessary connection or similarity to the circumstances of Buckley’s death. Unconnected events that bear only a general similarity are not admissible under Lyle or Rule 404(b). See State v. Parker, 315 S.C. 230, 433 S.E.2d 831 (1993). In Parker,

the defendant was accused of beating another boy to death in a mall parking lot with a baseball bat. Parker at 232, 433 S.E.2d at 831-32. Evidence of another fight involving the defendant in the same parking lot was admitted. Id. The Court engaged in a lengthy discussion of Lyle evidence and stated that if the acts were of “such a close similarity,” then the probative value would “overrule” the prejudicial effect. Id. Ultimately, the Court held the acts only bore a general similarity, but that it was harmless error to admit them. Id.

In State v. Cope, 405 S.C. 317, 748 S.E.2d 194 (2013), the issue was whether the co-defendant committed the rape and murder of Cope’s daughter by himself or with Cope. Id. at 335, 748 S.E.2d at 203 (majority); Id. at 354, 748 S.E.2d 213-14 (Kittredge, J., dissenting). Cope is a difficult case in which the defendant sought to offer evidence that his co-defendant committed other assaults after breaking into other women’s homes. The Court concluded the crimes were not sufficiently similar for admission. Id. at 337-38, 748 S.E.2d at 204-05. The first dissimilarity noted by the Court was that the crimes occurred after the event in the Cope case and that they involved adults, not children. Id.

A single dissimilarity stands out as dispositive in appellant’s case—the lack of any involvement of Young with Buckley. No evidence showed that Young ever communicated with Buckley. The cell phone evidence that placed appellant near the location where Buckley’s body was found did not place Young at that scene. Young’s involvement was limited to picking up appellant after he called her upon returning to the beach. Nothing showed that she lured Buckley anywhere as Bah claimed. Like in Cope, the Bah robbery also occurred long after Buckley’s death—five weeks later in a different county. This evidence fails the requirement of having a close similarity and it was error to admit it as a common scheme or plan. This Court should reverse.

3.

Alternatively, appellant's conviction for kidnapping should be vacated because he was also sentenced for murder, pursuant to S.C. Code Ann. § 16-3-910.

The trial court sentenced appellant to life imprisonment for murder and a concurrent sentence of thirty years for kidnapping. R. 769, l. 17 – 770, l. 17. The kidnapping sentence is error under section 16-3-910, which provides, in relevant part, that a person “upon conviction, must be imprisoned for a period not to exceed thirty years unless sentenced for murder.” S.C. Code Ann. § 16-3-910. South Carolina's appellate courts have not hesitated to summarily vacate kidnapping sentences when a defendant is also sentenced for murder. See Owens v. State, 331 S.C. 582, 585, 503 S.E.2d 462, 463 (1998) (citing numerous examples). Appellant's kidnapping sentence should be vacated if he is not granted a new trial.

CONCLUSION

For the foregoing reasons, appellant's convictions should be reversed and he should be granted a new trial. Alternatively, his kidnapping sentence should be vacated.

This 13th day of January, 2021.

s/David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

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SC Court of Appeals

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.”

January 13, 2021.

s/David Alexander
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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Honorable William A. McKinnon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHNATHAN LAMAR HILLARY,

APPELLANT.

APPELLATE CASE NO. 2019-001048

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon both Melody J. Brown, Esquire, and Anthony Mabry, Esquire, at the primary e-mail addresses listed in the Attorney Information System (AIS), this 13th day of January, 2021.

s/David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT