STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2009CP4600879

South Carolina State Of *vs.* Lauren O Thomas

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other:

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;

☐ Other: _____

IT IS ORDERED AND ADJUDGED: ☒ See attached order; ☐ Statement of Judgment by the Court:

Final Order On Appeal From Magistrate's Court

Dated at York, South Carolina, this 5th day of June, 2009.

Court Reporter:

s/Lee S. Alford

PRESIDING JUDGE - LEE S. ALFORD

This judgment was entered on the 22nd day of June, 2009, and a copy mailed first class this 22nd day of June, 2009, to attorneys of record or to parties (when appearing pro se) as follows:

Matthew W Shelton Assistant Solicitor 529 S Cherry Rd Rock Hill, SC 29732

ATTORNEY(S) FOR THE PLAINTIFF(S)

Michael Langford Brown Jr P.O. Box 1025 Rock Hill, SC 29731

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

David Hamilton - Clerk of Court

SCRCP APP-24/FORM 4

CPFORM4M

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE 16TH JUDICIAL CIRCUIT
COUNTY OF YORK	)	Case No.: 2009-CP-46-879
State of South Carolina,	)	
	)	
Appelant,	)	
	)	
v.	)	**FINAL ORDER ON APPEAL FROM MAGISTRATE'S COURT**
	)	
Lauren Thomas,	)	
	)	
Respondent.	)	
	)	

This matter is before the Court on appeal from York County Magistrate Court, Fort Mill Township. The trial court granted Defendant's motion to suppress evidence of field sobriety tests, arrest and the breath test result. The trial court ruled that the state failed to comply with the statutory requirement that a DUI suspect must be advised of his or her Miranda rights before field sobriety tests are administered or breath test given.

The State appeals on two grounds:

(1) That the Miranda warnings given by the arresting officer were adequate to comply with Miranda and

(2) That the required Miranda warnings in DUI cases are statutory rather than constitutional and the trial court was required to find that the Defendant was prejudiced by the failure to give a complete Miranda warning.

This Court agrees with the ruling of the trial court on these two issues and adopts the language of the trial court in its Return on Appeal.

The Defendant was advised of her Miranda rights three separate times. The language used by the arresting officer was the same on each occasion. He did not advise her that she had the right to have an attorney present during questioning and to exercise her Miranda rights to stop answering questions at any time and until her attorney was present. It is not clear when she would be entitled to have an attorney present. A significant part of Miranda rights were not given.

A "talismanic incantation" is not required. State v. Kennedy, 325 S.C. 295, 479 S.E.2d 838. State v. Singleton, 284 S.C. 388, 326 S.E.2d 153. However, the material factors must be included. See State v. Kennedy, *Id.*

The State next posits that this is a statutory rather than constitutional mandate which requires the trial court to find that the Defendant suffered prejudice before suppressing the evidence. This issue was not raised below nor ruled upon by the trial court and cannot be raised for the first time on appeal. Further, if the Defendant provided information at the request of the investigating officer which is then used against her in court, a presumption of prejudice would arise.

CONCLUSION

This Court finds the two grounds raised by the State on appeal to be without merit. The appeal is dismissed.

AND IT IS SO ORDERED!

Lee S. Alford
Resident 16th Circuit Judge

June 5, 2009

York, South Carolina.

#3

THE STATE OF SOUTH CAROLINA
In the Court of Common Pleas of York County

APPEAL FROM YORK COUNTY
Fort Mill Township Magistrate's Court

David S. Wood, Magistrate

09-CP46-879
Z254820

State of South Carolina, Appellant

v.

Lauren Thomas, Respondent.

RETURN

On January 29, 2007 Respondent was charged under S.C. Code § 56-5-2930 with Driving Under the Influence (DUI) by Lance Corporal R.S. Bennett of the Highway Patrol. At the incident site, the arresting officer, pursuant to S.C. Code 56-5-2953 (A) (1) (b), advised the Respondent that:

> "You have the right to remain silent and anything you say can and will be used against you in court. You have the right to have an attorney and if you cannot afford one, one will be appointed to you. Do you have any questions about that?" (Exhibit 2)

The State stipulated that during the contact between the Trooper and Respondent, the Trooper advised the Respondent in the same manner as above on the three separate occasions required by S.C. Code Ann. § 56-5-2953.

(1) before conducting Standardized Field Sobriety Tests, (2) before placing the Respondent under arrest and, (3) before offering the Respondent a breath test.

On motion of defense counsel, the Magistrate suppressed the Standardized Field Sobriety Tests and the breath test result based on the State's failure to comply with the General Assembly's unequivocal mandate to advise Respondent of his Miranda rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602.

The General Assembly did not mandate partial compliance with this statute, the General Assembly clearly states in SC Code Ann. §56-5-2953(A)(1)(b):

> "(1) The videotaping at the incident site *must*:
>
> (b) include the person being advised of his Miranda *rights* before any field sobriety tests are administered, if the tests are administered. (emphasis added)"

The tests were administered, the *Miranda* rights were not.

The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S.E.2d 203 (Ct. App.2002) (citing *State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000)). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999) cert denied as improvidently granted, *State v. Hudson*, 346 S.C. 139, 551 S.E.2d 253

(2001). The determination of legislative intent is a matter of law. Hudson, 336 S.C. 237, 519 S.E.2d 577.

The legislature's intent should be ascertained primarily from the plain language of the statute. Morgan at 366, 574 S.E.2d at 206. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation. Id. When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991). We should consider, not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. Whitner v. State, 328 S.C. 1, 492 S.E.2d 777 (1997). The terms must be construed in context and their meaning determined by looking at the other terms used in the statute. Hudson, 336 S.C. 237, 519 S.E.2d 577.

When a statute's language is plain and unambiguous, and conveys clear and definite meaning, there is no occasion for employing rules of statutory interpretation and a court has no right to look for or impose another meaning. City of Camden v. Brassell, 326 S.C. 556, 486 S.E.2d 492 (Ct. App. 1997). The statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. Id. Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law. Id.; City of Sumter Police Dep't v. One (1) 1992 Blue Mazda Truck, 330 S.C. 371, 498 S.E.2d 894 (Ct. App. 1998).

The General Assembly clearly and plainly states that the videotape must include the person being advised of his *Miranda* rights. "Rights" is plural. S.C. Code Ann. §56-5-2953 does not state "some of his *Miranda* rights" or "whichever *Miranda* rights the officer decides to include." *Miranda* rights, given the plain and ordinary meaning, can only mean all of those rights. There is no room for officer discretion as to which of the various and sundry *Miranda* rights are to be read to the suspect.

In *State v. Kennedy*, 325 S.C. 295, 479 S.E.2d 838, the Court of Appeals ruled that a defendant must be advised of the following:

> "He has the right to remain silent; anything he says can be used against him in a court of law; he has a right to the presence of an attorney; if he cannot afford an attorney, one will be appointed for him prior to any questioning, if he so desires; and he has the right to terminate the interrogation at any time and not answer any further questions."

The defendant in this case was not advised that she had the right to the presence of an attorney, that one would be appointed to her prior to any questioning, that she had the right to terminate the interrogation at any time and not answer any further questions.

The State argues in it's Notice of Appeal and Brief that the Trooper's warnings to the defendant were "very similar" to those endorsed by the United State Court of Appeals for the Fourth Circuit in *U.S. v. Frankson*, 83 F.3d 79. The rights endorsed in *Frankson* were as follows:

> "Now I want to advise you of your rights. First of all, you have the right to remain silent. Anything you say, do or write can and will be used against you. You have the right to an attorney, the Government will get one for you. I also explained to him he could answer some of my questions, all of my questions, or none of my questions. I also told him that while he was talking to me, he was free to stop talking to me at anytime."

The advisement by the Trooper was not even close to as thorough or complete as the rights endorsed in *Frankson*. Noticeably absent is the defendant's right to terminate the interrogation at any time and not to answer any further questions.

The statute does not call for an analysis based on custody or interrogation. If that was the case, then no Miranda warning would be necessary at such an early stage of a police investigation. Whether the suspect was in custody or being interrogated has no place in determining what rights the suspect should be advised of by the officer because the General Assembly specifically stated that the suspect must be advised of their *Miranda* rights at certain points during the investigation and arrest of an individual charged with DUI. No matter what *Miranda* has been interpreted to mean in the various federal courts, the General Assembly has the ability to afford suspects with more protection than the United States Constitution or the South Carolina Constitution.

The General Assembly mandated that a suspect be advised of his *Miranda* rights and the state failed to comply with the statute. Accordingly, short of dismissing the case, the evidence collected after the State failed to adequately

and fully advise the defendant of his *Miranda* rights was suppressed. The legislature has established a procedure that *must* be followed in the making if a DUI arrest. Here, the procedure was not followed.

The State's assertion that the lower court should have articulated whether or not there was unfair prejudice to the Respondent due to non-compliance with S.C. Code Ann. § 56-5-2953 is not properly before the Circuit Court. The State did not seek a post-judgment ruling from the court regarding that issue. In order to preserve an issue for appellate review, a party must file a motion to alter or amend the judgment when the party raises an issue to the lower court and the court fails to rule on that issue. No ruling was made on that issue during the lower court proceeding.

Respectfully,

David S. Wood
York County Magistrate Judge
114 Spring Street
Fort Mill, SC 29715

March 30, 2009

374 S.C. 12

The CITY OF ROCK HILL, Appellant,

v.

Cynthia A. SUCHENSKI, Respondent.

No. 26345.

Supreme Court of South Carolina.

Heard Jan. 4, 2007.

Decided June 18, 2007.

Rehearing Denied July 24, 2007.

Background: Defendant was convicted by jury in the Rock Hill Municipal Court of driving with an unlawful alcohol concentration (DUAC), and she appealed. The Circuit Court, York County, John C. Hayes, III, J., reversed. City appealed.

Holding: The Supreme Court, Manning, Acting Justice, held that dismissal of charge was appropriate remedy for arresting officer's failure to provide complete videotape from incident site, as required by statute.

Affirmed.

Burnett, J., dissented, with opinion.

1. **Criminal Law** ⇐260.13

In criminal appeals from municipal court, the circuit court does not conduct a de novo review. Code 1976, § 14-25-105.

2. **Criminal Law** ⇐1134(3)

In criminal cases, the appellate court reviews errors of law only.

3. **Criminal Law** ⇐1045

City failed to preserve for appellate review issue of whether trial court erred in determining city violated statute commanding arresting officer to videotape suspect during an arrest for driving under the influence (DUI); city, on appeal to circuit court from municipal court judgment convicting defendant of driving with an unlawful alcohol concentration (DUAC), reiterated its position that noncompliance with statute was excused by statutory exceptions, but circuit court, in affirming municipal court, omitted any mention of statutory exceptions, and city did not seek post-judgment ruling from circuit court on potential applicability of statutory exceptions. Code 1976, § 56-5-2953.

4. **Criminal Law** ⇐1028

Supreme Court cannot determine error regarding an issue not addressed by the circuit court.

5. **Criminal Law** ⇐700(8)

Dismissal of charge of driving with an unlawful alcohol concentration (DUAC) was appropriate remedy for arresting officer's failure to provide complete videotape from incident site, as required by statute, as violation of statute was not mitigated by any of the exceptions that excused compliance contained in statute. Code 1976, § 56-5-2953.

Harry P. Collins, of Rock Hill, for Appellant.

Thomas F. McDow, of Rock Hill, for Respondent.

Acting Justice MANNING:

This is an appeal from the Rock Hill municipal court. Cynthia Suchenski (respondent) was found guilty of driving with an unlawful alcohol concentration (DUAC), and the circuit court reversed her conviction based on the City of Rock Hill's (City's) failure to comply with S.C.Code Ann. § 56-5-2953 (2006), which requires the arresting officer to provide videotaping of the incident site. We affirm.

FACTS

Respondent was arrested for driving under the influence (DUI) and was later charged with DUAC. At the incident site, the arresting officer did not videotape the entire arrest as required by § 56-5-2953 because the officer's camera ran out of tape. The videotaping began upon activation of the officer's blue lights and recorded two field sobriety tests and the *Miranda* warnings, but the tape stopped before the officer administered a third field sobriety test and before respondent was arrested.

At trial, respondent moved to dismiss the charges due to the officer's failure to provide a complete videotape from the incident site. The officer testified that a tape had never ended during an arrest before and that he turned on his blue lights and assumed the

videotape was running as usual. The officer stated he did not know the tape was about to expire. The municipal court denied the motion pursuant to the statute on the grounds of exigent circumstances. The municipal court also cited *State v. Huntley*, 349 S.C. 1, 562 S.E.2d 472 (2002), and *State v. Mabe*, 306 S.C. 355, 412 S.E.2d 386 (1991), in support of its denial of respondent's motion to dismiss.

The case was tried before a jury, and respondent was found guilty. Respondent appealed her conviction, and the circuit court reversed, holding that respondent's motion to dismiss should have been granted. The circuit court distinguished *Huntley* and *Mabe*, the two cases relied upon by the municipal court in denying respondent's motion to dismiss. However, the circuit court did not address the finding of the municipal court that exigent circumstances excused compliance with the statute and simply held that the City violated the videotaping statute.

ISSUE

Did the circuit court err in reversing respondent's conviction and dismissing the DUAC charge?

ANALYSIS

[1, 2] In criminal appeals from municipal court, the circuit court does not conduct a de novo review. S.C.Code Ann. § 14-25-105 (Supp.2006); *State v. Landis*, 362 S.C. 97, 606 S.E.2d 503 (Ct.App.2004). In criminal cases, the appellate court reviews errors of law only. *State v. Cutter*, 261 S.C. 140, 199 S.E.2d 61 (1973). Therefore, our scope of review is limited to correcting the circuit court's order for errors of law.

[3] The City first argues that the circuit court erred by determining the City violated S.C.Code Ann. § 56-5-2953. This issue is not preserved.

Section 56-5-2953 commands the arresting officer to videotape the individual during a DUI arrest. Subsection (A) of the statute outlines the requirements for videotaping at the incident site and at the breath test site. Subsection (B) of the statute provides exceptions that excuse compliance with the statute.[1] In this case, both parties agreed that the arresting officer failed to comply with the requirements of subsection (A), but the municipal court denied respondent's motion to dismiss due to an exception in subsection (B).

On appeal to the circuit court, the City reiterated its position that noncompliance was excused pursuant to § 56-5-2953(B). However, the circuit court's order did not address or even mention the exceptions in subsection (B). The circuit court simply concluded, "Here, the legislature has established a procedure that *must* be followed in the making of a DUI arrest. Here, the procedure was not followed." While the circuit court correctly applied subsection (A) of the statute, it omitted any mention of subsection (B) of § 56-5-2953.

[4] The City did not seek a post-judgment ruling from the circuit court on the potential applicability of § 56-5-2953(B). This precludes our review of the applicability of the subsection (B) exceptions, as we may only review the circuit court's order for errors of law. We cannot determine error regarding an issue not addressed by the circuit court. *See Williams v. Williams*, 329 S.C. 569, 579, 496 S.E.2d 23, 29 (Ct.App. 1998), *rev'd on other grounds*, 335 S.C. 3-6, 517 S.E.2d 689 (1999) ("The circuit court has the authority to hear motions to alter or amend the judgment when it sits in an appellate capacity, and these motions are required in order to preserve issues for further review by the Court of Appeals or the Supreme Court in cases where the circuit court fails to address an issue raised by a party."); *United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 413 S.E.2d 866 (Ct.App.1992) (circuit court sitting on appeal did not address an issue and Wal-Mart made no motion pursuant to Rule 59(e), SCRCP, to have the court rule on the issue; thus the allegation was not preserved for further review by the Court of Appeals).

[5] The City next contends that, per *Huntley*, a violation of the videotaping statute should not result in dismissal of a charge

1. Respondent argues the applicable statutory subsection states, "Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the videotape based upon the totality of the circumstances."

when there was no showing of prejudice to the defendant. We disagree.

Under § 56-5-2953, a violation of the statute, with no mention of prejudice, may result in dismissal of the charges. The statute provides, "Failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if [exceptions apply] . . ." (emphasis added). Conversely, failure to produce videotapes would be a ground for dismissal if no exceptions apply.

The circuit court found *Huntley* to be inapposite, and we agree. The statute at issue in *Huntley* was the implied consent statute which required a simulator test before administration of a breath test. That statute, S.C.Code Ann. § 56-5-2950 (2006), is silent as to the remedy for noncompliance, whereas the statute in this case provides for dismissal of charges when the statute is inexcusably violated.

CONCLUSION

The City failed to seek a ruling in the circuit court in regards to the applicability of the exceptions for noncompliance found in § 56-5-2953(B). Accordingly, that issue is not properly before us. Finally, dismissal of the DUAC charge is an appropriate remedy provided by § 56-5-2953 where a violation of subsection (A) is not mitigated by subsection (B) exceptions.

AFFIRMED.

MOORE, ACJ, WALLER, J., and Acting Justice JAMES W. JOHNSON, JR., concur. BURNETT, J., dissenting in a separate opinion.

BURNETT, J., dissenting:

I respectfully dissent. In my opinion, the issue of whether the circuit erred by determining the City violated S.C.Code Ann. § 56-5-2953 is preserved.

In order to preserve an issue for appellate review, a party must file a motion to alter or amend the judgment when the party raises an issue to the lower court and the court fails to rule upon the issue. *E.g., Elam v. South Carolina Dep't of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004); *Wm. A.L.C. v. Town of Mt. Pleasant*, 358 S.C. 406, 526 S.E.2d 716 (2000); *see also* Rules 52(b) and 59(e), SCRCP. However, a motion to alter or amend the judgment under Rule 59(e) was not necessary in this case. Appellant's failure to move to seek a ruling from the lower court on the applicability of S.C.Code Ann. § 56-5-2953(B) (2006) does not violate the long-established preservation requirements.

Both parties argued the applicability of subsections (A) and (B) extensively in their briefs and at the hearing before the lower court. The lower court's determination hinged on whether subsection (B) provided an excuse for the violation of subsection (A). The lower court determined no exception in subsection (B) applied. Although the lower court's order only addressed subsection (A), the fact that subsection (B) did not apply was implicit in the order and, therefore, preserved for review.

A preservation issue did not arise when the lower court implicitly ruled in the negative that no exception applied, as opposed to alternatively ruling in the positive that an exception applied. For preservation purposes, it was unnecessary for the lower court to rule upon an exception when no such exception applied. Hence, despite the fact the entire opinion addressed only subsection (A), Appellant was free to argue on appeal an exception in subsection (B) applied.

Section 56-5-2953(B), states, in pertinent part:

> Failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the videotape equipment at the time of the arrest . . . was in an inoperable condition, . . . or in the alternative . . . it was physically impossible to produce the videotape because the person needed emergency medical treatment, or exigent circumstances existed.

(emphasis added). In the instant case, the videotape began upon activation of the officer's blue lights and recorded two field sobriety tests and the *Miranda* warnings. The tape stopped before the officer administered a third field sobriety test and a "walk and

turn" test, and before Respondent was arrested. The officer testified he assumed the videotape was running as usual and did not know the tape had expired prematurely. The municipal court correctly denied Respondent's motion to dismiss based on the "exigent circumstances" exception in subsection (B).

Because it was unnecessary for Appellant to make a motion pursuant to Rule 59(e), the issue of whether subsection (B) applied is preserved for review. Accordingly, I would reverse the lower court and reinstate the decision of the municipal court.

374 S.C. 68

The ATWOOD AGENCY, d/b/a Atwood Vacations and d/b/a RE/MAX Low-country Realty, Respondent,

v.

John T. BLACK, Jr., David Lybrand, Elaine Shaw, and Edisto Sales and Rental Realty, Inc., Appellants.

No. 26348.

Supreme Court of South Carolina.

Heard March 6, 2007.

Decided June 25, 2007.

Rehearing Denied July 26, 2007.

Background: Employer, which operated vacation rental business, brought action for misappropriation of trade secrets after former employee took position with competitor. Employer filed motion for a temporary injunction to restrain former employee and other employees of competitor from contacting and contracting with any vacation renter or homeowner of employer. The Circuit Court, Charleston County, Kenneth G. Goode, J., 2005 WL 5168759, granted employer's motion and set security bond at $250. Former employee, competitor, and its employees appealed.

Holdings: The Supreme Court, Moore, J., held that:

(1) information regarding vacation home renters and homeowners, which was available from sources other than plaintiff, was not protected as a trade secret under South Carolina Trade Secrets Act, and

(2) order requiring only a nominal security bond did not satisfy civil procedure rule governing restraining orders and temporary injunctions.

Reversed and remanded.

Pleicones, J., filed an opinion concurring in part, in which Burnett, J., joined.

1. Appeal and Error ⇐100(1)

An order granting a temporary injunction is directly appealable.

2. Antitrust and Trade Regulation ⇐420

Information regarding vacation home renters and homeowners, which was available from sources other than operator of vacation rental business, was not protected as a trade secret under South Carolina Trade Secrets Act; a list of all the homeowners in community and their contact information was a matter of public record available at town hall, and homeowners sometimes knew their renters or kept a guestbook where renters provided personal contact information. Code 1976, § 39-8-20(5).

3. Appeal and Error ⇐954(1)

Injunction ⇐135

Temporary injunctive relief rests within the sound discretion of the trial judge and will not be overturned unless the order is clearly erroneous.

4. Injunction ⇐144

The facts alleged on a motion for temporary injunctive relief must be sufficient to support a temporary injunction, and the injunction must be reasonably necessary to protect the rights of the moving party.

5. Injunction ⇐151

On a motion for temporary injunctive relief, the merits of the underlying case are to be considered only to the extent necessary to determine whether there has been a prima facie showing to support a temporary injunction.

LEXSEE 325 S.C. 295

The State, Respondent, v. Robert A. Kennedy, Appellant.

Opinion No. 2595

COURT OF APPEALS OF SOUTH CAROLINA

325 S.C. 295; 479 S.E.2d 838; 1996 S.C. App. LEXIS 171

November 7, 1996, Heard
November 25, 1996, Filed

SUBSEQUENT HISTORY: [***1] Rehearing Denied January 24, 1997.

PRIOR HISTORY: Appeal From Kershaw County. Jackson V. Gregory, Circuit Court Judge.

DISPOSITION: AFFIRMED

COUNSEL: Tara Dawn Shurling; Oliver W. Johnson, III; and South Carolina Office of Appellate Defense, all of Columbia, for Appellant.

Attorney General Charles Molony Condon, Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Solicitor Warren B. Giese, all of Columbia, for Respondent.

JUDGES: ANDERSON, J. CURETON and GOOLSBY, JJ., concur.

OPINION BY: ANDERSON

OPINION

[**839] [*297] **ANDERSON, J.:** Robert A. Kennedy (Kennedy) was charged with first degree burglary and second degree arson in connection with the burning of Nancy Powell's residence. At trial, Kennedy moved to suppress statements he made to police officers subsequent to his arrest. After holding a *Jackson v. Denno* [1] hearing, the trial court denied the motion. Although Kennedy was acquitted of first degree burglary, the jury found him guilty of second degree arson. Kennedy appeals. We affirm.

1 *378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964).*

[***2] **FACTS/PROCEDURAL BACKGROUND**

On November 7, 1992, at approximately 7:15 p.m., C. Ray Miles noticed fresh tire tracks in the woods near some property he owned in Kershaw County. Miles thought poachers might be on his property so he called the Sheriff's Department. Kirk Corley, a county constable, and Charles B. Thompson, Jr., a conservation officer, were dispatched.

The three individuals found a blue truck with a Kansas license plate parked in a secluded spot in the woods. As they attempted to locate the owner, Robert Kennedy ran out of the woods from the driveway of a home owned by Nancy Powell. When questioned as to his reason for parking his truck on private property, Kennedy nervously explained he was looking for a dog he hit with his truck. He then changed his story and said he had driven there to meet a woman. He said he parked the truck as he did to prevent it from being vandalized. Kennedy produced identification and informed the men he was [*298] stationed at Fort Jackson. After Kennedy left, the three men investigated the area and found the Powell house fully engulfed in flames. SLED Agent Charles Huggins, a member of the arson team, conducted a fire cause [***3] and origin investigation and opined the fire was intentionally set.

Kennedy was later arrested and charged with first degree burglary and second degree arson. At Kennedy's trial, an *in camera* hearing was held pursuant to *Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964)*, to determine the admissibility of statements made by Kennedy.

***Jackson v. Denno* Hearing**

Witnesses for the State were: Steven Vincent, Charles Huggins, David Thomley, and Jerry Horton. Additionally, Kennedy testified at the hearing.

EVIDENCE OF THE STATE

(Vincent, Huggins & Thomley)

Steven Vincent, an investigator with the Kershaw County Sheriff's Department on November 7, 1992, responded to the scene of the fire and received information regarding Kennedy. That same evening, Vincent, accompanied by Investigator David Thomley, drove to Fort Jackson and attempted to locate Kennedy. However, he was off base on a four day leave.

On the following Monday, Vincent, SLED Agent Charles Huggins, and investigator David Thomley returned to Fort Jackson with two warrants [***4] for criminal trespass. The officers arrested Kennedy and Vincent advised him of his *Miranda* rights.

At that time, Kennedy said, "I do not understand, sir." When Vincent asked him what he did not understand, Kennedy stated he did not understand why the officers wanted to talk to him. Vincent explained to Kennedy he wanted to speak to him about another crime that occurred the night of the trespass. Kennedy responded "he just did [**840] not understand." While being questioned, Kennedy stated, "I don't have anything to say." Vincent made no threats, promises, or offers of leniency to Kennedy.

[*299] Thomley drove Kennedy to the Kershaw County Sheriff's Department from Fort Jackson. During the trip, Thomley and Kennedy engaged in "small talk." Thomley denied, however, the two discussed Kennedy's criminal charges. Upon arrival at the Sheriff's office, Thomley took Kennedy to his office. After removing Kennedy's handcuffs, the two men engaged in more "small talk."

Thomley asked Kennedy whether he understood his rights and the charges against him. Kennedy told Thomley he understood his rights, but was unclear about the criminal trespassing charges. Thereafter, Thomley explained [***5] the trespassing charges. Thomley then asked Kennedy if he understood why arson was being investigated and Kennedy indicated he did not understand. Thomley explained the statutes regarding arson and burglary as well as the matters which implicated Kennedy regarding those charges and the penalties attached to each. Thomley further explained the court had discretion concerning whether to sentence a defendant to probation or the maximum penalty. He indicated to Kennedy that officers had little control over recommendations, which were essentially matters within the solicitor's control. Kennedy asked to speak to the solicitor. Thomley permitted Kennedy to make several phone calls while in his office.

Around 8:00 that night, Vincent spoke with Thomley and learned Kennedy was in Thomley's office, but had nothing to say about the offenses. Thomley informed Vincent that Kennedy "wants to talk to the solicitor." Vincent contacted Assistant Solicitor Glenn Rogers, who stated he would talk with Kennedy the next morning.

The next day Vincent, along with Huggins, Thomley, and Rogers, spoke to Kennedy in a large room used as the Sheriffs business office. Huggins advised Kennedy of his rights and [***6] Kennedy indicated his understanding. He executed a written waiver of his rights and did not appear to be under the influence of drugs, alcohol, or mental infirmity.

Kennedy wanted to talk with Thomley and Rogers alone, so Vincent and Huggins left the room. Rogers then asked Kennedy what he wanted to talk to him about. Kennedy inquired, "What if I ask for an attorney?" Solicitor Rogers immediately left the room. Thomley responded, "If you want [*300] an attorney, okay. But Solicitor Rogers is not going to talk to you this morning." However, Kennedy did not ask to speak to an attorney. Kennedy specifically stated, "No, call [Solicitor Rogers] back in here. Let's go ahead and get this over with."

Upon Rogers' return, Kennedy stated, "Okay, I did it." He claimed he entered the Powell residence through the back door. Thomley indicated Kennedy did not ask for food or state he was hungry, tired, or thirsty at the time he gave his statement. Further, Thomley never advised Kennedy he would not get a deal if he did not talk.

Within fifteen to thirty minutes, Vincent and Huggins reentered the room at Thomley's request. Huggins again advised Kennedy of his rights and Kennedy indicated [***7] he understood his rights. At that time, Kennedy gave a statement in which he admitted setting the fire. Vincent took notes during the statement and Huggins wrote the statement at Kennedy's request.

Huggins essentially corroborated the testimony of Vincent and denied Kennedy stated, "I think I need a lawyer." Thomley's testimony replicates substantial portions of the testimony of both Vincent and Huggins.

ROBERT ALAN MARTIN KENNEDY

On the day of his arrest, prior to meeting with Huggins, Thomley, and Vincent, Kennedy consulted a lawyer at Fort Jackson who advised him to invoke his right to remain silent. Vincent read the criminal trespass warrants and advised Kennedy of his rights. When Vincent asked whether he understood [**841] his rights, Kennedy asserted, "I ain't got nothing to say." He admitted he understood his *Miranda* rights, but did not understand the discussion concerning countersigning the warrants.

Upon arriving at the Kershaw County Detention Center, Kennedy was taken to Thomley's office. Ken-

nedy testified Thomley expressed to him the seriousness of burglary and arson charges and read the sentence for each. Kennedy told Thomley, "I ain't got nothing [***8] to say," and asked to make several phone calls, which he was permitted to do.

[*301] When Thomley arrived at the detention center the next morning, he indicated to Kennedy the Solicitor was willing to speak with him. At that time, Kennedy told Thomley, "look, I did it."

At the Sheriff's office, Huggins advised Kennedy of his rights. Kennedy testified that in response to Huggins stating they were not offering Kennedy a deal, he then said, "Well, I think I need a lawyer." He stated Solicitor Rogers then left the room, but Huggins remained. Although he admitted he signed the waiver of rights form once, Kennedy claimed he refused to sign it a second time.

While alone in the room with Kennedy, Thomley said, "Look, everything we talked about, the only way we can help you out, that's the guy you need to talk to." When Kennedy asked him about an attorney, Thomley responded he would have to wait until one was assigned to his case. Kennedy admitted that when he asked how to obtain a lawyer, he was advised by Thomley he could either hire one or receive a public defender after a financial check to determine Kennedy's indigency status. Kennedy understood an attorney would not be appointed [***9] immediately and that he would have to wait until one could be appointed.

Upon questioning by the court, Kennedy admitted he decided to talk to officers rather than waiting for appointment of counsel. He stated Thomley advised him the only way he would be released from jail would be through a bail hearing.

Kennedy identified his signatures and initials on each page of his statement. He claimed that at the time he provided his statement he was tired, hungry, depressed, and frustrated. On cross examination, he admitted he never asked to use the telephone book to locate an attorney to represent him and did not again try to contact the J.A.G. officer he had consulted earlier.

The jury acquitted Kennedy of the first degree burglary charge, but found him guilty of second degree arson.

ISSUES

I. Did the trial court err in denying Kennedy's motion to suppress statements made by him to the police?

[*302] II. Was the trial court's malice instruction erroneous?

III. Did the trial court err by considering improper factors in determining the appropriate sentence?

STANDARD OF PROOF

In *State v. Washington, 296 S.C. 54, 370 S.E.2d 611 (1988)*, [***10] our Supreme Court annunciated the standard of proof applicable in a *Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964)*, hearing to determine admissibility of a statement.

> "It has been uniformly held, a confession may be introduced upon proof of its voluntariness *by a preponderance of the evidence." State v. Smith, 268 S.C. 349, 354, 234 S.E.2d 19, 21 (1977)*(Emphasis supplied).
>
> "The burden is on the State to prove *by a preponderance of the evidence* that his rights were voluntarily waived." *State v. Neeley, 271 S.C. 33, 40, 244 S.E.2d 522, 526 (1978)*(Emphasis supplied).
>
> "The prosecution must prove . . . by a preponderance of the evidence that the confession was voluntary." *Lego v. Twomey, 404 U.S. 477, 489, 92 S. Ct. 619, 627, 30 L. Ed. 2d 618, 627 (1972)*(Emphasis supplied). [**842]
>
> . . . .

Where voluntariness [***11] of a statement is at issue the trial judge must make an initial determination based upon the preponderance standard. If the statement is found to have been given voluntarily, it is then submitted to the jury, where its voluntariness must be established beyond a reasonable doubt.

Washington, 296 S.C. at 55-56, 370 S.E.2d at 612 (emphasis in original).

LAW/ANALYSIS

THE *MIRANDA* RULE

A statement, whether exculpatory or inculpatory, obtained as a result of custodial interrogation is inadmissible unless the person was advised of and voluntarily waived his rights under *Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)*. The purpose of *Miranda* is to prevent "government [*303] officials from using the coercive nature of confinement to extract confessions that would not be given in an unre-

strained environment." *Arizona v. Mauro, 481 U.S. 520, 529-30, 107 S. Ct. 1931, 95 L. Ed. 2d 458 (1987).* [***12]

Miranda Warnings

A suspect in custody may not be subjected to interrogation unless he is informed that: he has the right to remain silent; anything he says can be used against him in a court of law; he has a right to the presence of an attorney; if he cannot afford an attorney, one will be appointed for him prior to any questioning, if he so desires; and he has the right to terminate the interrogation at any time and not to answer any further questions. *Miranda, supra.*

It is sufficient if the warnings reasonably convey to a suspect his rights as required by *Miranda. Duckworth v. Eagan, 492 U.S. 195, 109 S. Ct. 2875, 106 L. Ed. 2d 166 (1989).* A "talismanic incantation" is not required. *State v. Singleton, 284 S.C. 388, 326 S.E.2d 153, cert. denied, 471 U.S. 1111, 105 S. Ct. 2346, 85 L. Ed. 2d 863 (1985), overruled* [***13] *in regard to the doctrine of in favorem vitae by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)* (omission of phrase "in court" did not render warning inadequate).

CUSTODY REQUIREMENT

Miranda warnings are required for official interrogations only when a suspect "has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda, 384 U.S. at 444.*

INTERROGATION REQUIREMENT

The special procedural safeguards outlined in *Miranda* are not required if a suspect is simply taken into custody, but only if a suspect in custody is subjected to interrogation; interrogation is either express questioning or its functional equivalent. It includes words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response. *Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).* [***14] *See also State v. Franklin, 299 S.C. 133, 382 S.E.2d 911 (1989).*

[*304] **SIXTH AMENDMENT RIGHT TO COUNSEL**

Academically, it is important to recognize the distinction between Sixth Amendment right to counsel and Fifth Amendment right to speak to counsel. In *State v. Register,* S.C. , *476 S.E.2d 153 (1996),* our Supreme Court explicated:

> The Sixth Amendment right to counsel attaches when adversarial judicial proceedings have been initiated and at all critical stages. *Compare Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977) with Michigan v. Jackson, 475 U.S. 625, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986).* Hence, the right to counsel in judicial proceedings is distinguished from the Fifth Amendment *Miranda-Edwards* right to speak with counsel upon request in a *custodial* setting. *McNeil v. Wisconsin, 501 U.S. 171, 111 S. Ct. 2204, 115 L. Ed. 2d 158* [**843] *(1991);* [***15] *State v. Wilder, 306 S.C. 535, 413 S.E.2d 323 (1991).* The Sixth Amendment right does not attach simply because the defendant has been arrested or because the investigation has focused on him. *Hoffa v. United States, 385 U.S. 293, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966).* Further, the Sixth Amendment right attaches only "post-indictment", at least in the questioning/statement setting. *See Michigan v. Harvey, 494 U.S. 344, 110 S. Ct. 1176, 108 L. Ed. 2d 293 (1990).*
>
> *Register,* S.C. at , *476 S.E.2d at 157.*

VOLUNTARINESS OF STATEMENT

In *State v. Franklin, 299 S.C. 133, 382 S.E.2d 911 (1989),* our Supreme Court discussed the voluntariness requirement:

> The test of admissibility of a statement is voluntariness. If a defendant was advised of his *Miranda* rights, but nevertheless chose to [***16] make a statement, the "burden is on the State to prove by a *preponderance of the evidence* that his rights were voluntarily waived." *State v. Washington, 296 S.C. 54, 370 S.E.2d 611 (1988)*(emphasis in original); *State v. Neeley, 271 S.C. 33, 244 S.E.2d 522 (1978).* The State bears this burden of proof even where a defendant has signed a waiver of rights form. . . . The trial judge's determination of the voluntariness of a statement must be made on the basis of the totality of the circumstances, including the background, experience and conduct of the accused. [*305] *State v. Linnen, 278 S.C. 175, 293 S.E.2d 851 (1982).* The trial judge's resolution of the issue

> will not be disturbed absent an error of law. *State v. Atchison, 268 S.C. 588, 235 S.E.2d 294, cert. denied, 434 U.S. 894, 98 S. Ct. 273, 54 L. Ed. 2d 181 (1977).* [***17]

Franklin, 299 S.C. at 137-38, 382 S.E.2d at 913-14.

Once *Miranda* rights are validly and voluntarily waived, the waiver continues until such time as the individual being questioned revokes the waiver or circumstances are such that his will is overborne and his capacity for self-determination is critically impaired. *State v. Moultrie, 273 S.C. 60, 254 S.E.2d 294 (1979).* If his will is overborne and his capacity for self-determination critically impaired, use of the resulting confession offends due process. *Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).* In determining whether an individual's will was overborne, "the Court has assessed the totality of all the surrounding circumstances--both the characteristics of the accused and the details of the interrogation." *Id. at 226.* Important factors for consideration [***18] include the individual's education, youth, low intelligence, receipt of *Miranda* warnings, repeated and prolonged nature of the questioning, and physical abuse. *Schneckloth, supra.*

The trial court's "determination of the voluntariness of a statement will not be disturbed unless so manifestly erroneous as to show an abuse of discretion amounting to an error of law." *State v. McLeod, 303 S.C. 420, 423, 401 S.E.2d 175, 177 (1991), overruled on other grounds by State v. Evans, 307 S.C. 477, 415 S.E.2d 816 (1992).* "The test for determining the admissibility of a statement is whether it was knowingly, intelligently, and voluntarily given under the totality of the circumstances." *State v. Peake, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987). See also State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990)* [***19] (trial judge's determination of whether statement was knowingly, intelligently and voluntarily made requires examination of totality of circumstances surrounding waiver). "A statement induced by a promise of leniency is involuntary only if so connected with the inducement as to be a consequence of the promise." *Peake, 291 S.C. at 139, 352 S.E.2d at 488.*

[*306] In *State v. Doby, 273 S.C. 704, 258 S.E.2d 896 (1979)*, our Supreme Court addressed the voluntariness requirement of a waiver of rights:

> The signing of the waiver form alone is not conclusive; the State still has the burden of showing the waiver was voluntary. [**844] This requires an examination of the totality of the circumstances surrounding the waiver, including the background, experience, and conduct of the accused. (citations omitted).

Doby, 273 S.C. at 708, 258 S.E.2d at 899.

DISCUSSION

On appeal, Kennedy argues his statements were taken in violation of his right against [***20] self-incrimination under the *Fifth* and *Fourteenth Amendments to the United States Constitution*, as well as *Article I, § 12 of the South Carolina Constitution*. Additionally, Kennedy asserts the statements were in violation of his right to counsel as protected by the *Fifth, Sixth*, and *Fourteenth Amendments to the United States Constitution*, as well as *Article I, § 12 of the South Carolina Constitution*.

The evidence in this case establishes Kennedy was over thirty years old; had graduated from high school and attended a semester and a half of college; had been in the military for over ten years; attended additional educational courses while in the military, such as a leadership development course and the United States Army Drill Sergeant School; was a drill sergeant in the military; was not a man of limited mental or physical ability or experience; and had been trained by the military in interrogation tactics and permissible responses. He was articulate and able to read and write. Kennedy communicated well with the law enforcement officers, who all testified Kennedy appeared to understand the questions asked of him. In addition, Vincent, Thomley, and Huggins all testified no promises [***21] or threats were made to Kennedy. They further testified Kennedy was not under the influence of alcohol or drugs. Prior to his arrest, Kennedy consulted a J.A.G. attorney, who advised Kennedy to immediately invoke his right to remain silent upon questioning. He was advised [*307] of his *Miranda* rights upon arrest and at least two times thereafter.

Although Kennedy stated he did not understand why the officers wanted to talk to him, he never indicated he did not understand his *Miranda* rights. When Kennedy said he had nothing to say, questioning ceased and Thomley drove Kennedy to Kershaw County.

Kennedy was allowed at least thirteen long distance phone calls to numerous family members prior to giving his statement. These family members advised Kennedy not to say anything to the officers. Kennedy did not attempt to contact the J.A.G. lawyer or any other attorney during this period of time. He also did not request assistance in contacting an attorney. While in Thomley's office, Kennedy said he did not understand the charges against him; however, he specifically testified he understood his rights.

When Thomley arrived at the jail the morning after Kennedy's arrest, [***22] Kennedy voluntarily stated, "I did it." This oral admission was not in response to any interrogation by Thomley, but was voluntary on Kennedy's part. See *Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980)*. Volunteered statements of any kind are not barred by the Fifth Amendment. *Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)*.

In *Michigan v. Mosley, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975)*, the United States Supreme Court amplified:

> [A] blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests. Clearly, therefore, [***23] neither this passage nor any other passage in the *Miranda* opinion can sensibly be read to create a *per se* proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent (footnote omitted). [**845]
>
> [*308] A reasonable and faithful interpretation of the *Miranda* opinion must rest on the intention of the Court in that case to adopt "fully effective means. . . to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored . . . ." The critical safeguard identified in the passage at issue is a person's "right to cut off questioning." Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* [***24] on whether his "right to cut off questioning" was "scrupulously honored." (citations omitted).

Mosley, 423 U.S. at 102-04.

If an accused requests counsel after receiving *Miranda* warnings, he should not be subjected to further interrogation outside counsel's presence unless the accused initiates further communication with law enforcement officers. *Smith v. Illinois, 469 U.S. 91, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984)*. In *Davis v. United States, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994)*, the Court instructed:

> Rather, the suspect must unambiguously request counsel. As we have observed, "a statement either is such an assertion of the right to counsel or it is not." *Smith v. Illinois, 469 U.S. at 97-98, 105 S. Ct. 490, 83 L. Ed. 2d 488*. . . . Although a suspect need [***25] not "speak with the discrimination of an Oxford don," . . . he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect. See *Moran v. Burbine, 475 U.S. 412, 433, n.4, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986)*("the interrogation must cease until an attorney is present *only* if the individual states that he wants an attorney"). . . .
>
> We decline petitioner's invitation to extend *Edwards* and require law enforcement officers to cease questioning immediately [*309] upon the making of an ambiguous or equivocal reference to an attorney. The rationale underlying *Edwards* is that the police must respect a suspect's wishes regarding his right to have an attorney present during custodial interrogation. But when the officers conducting the questioning reasonably do not know whether or not the suspect wants a lawyer, [***26] a rule requiring the immediate cessation of questioning "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity . . . ." (citations omitted).

Davis, 114 S. Ct. at 2355-56 (holding the statement "maybe I should talk to a lawyer," was not a request for counsel and did not require that interrogation cease).

While meeting with Thomley and Solicitor Rogers, Kennedy inquired, "What if I ask for an attorney?" We hold this ambiguous statement is not an invocation of Kennedy's right to counsel. Therefore, the officers were not required to stop questioning Kennedy.

Nevertheless, even if this statement invoked Kennedy's right to counsel, Kennedy thereafter waived this right when he initiated further discussions with the officers and later knowingly and intelligently waived his rights. *See Smith v. Illinois, 469 U.S. 91, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984)*. See also *Oregon v. Bradshaw, 462 U.S. 1039, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983)* [***27] (the Court held a statement from an accused such as, "Well, what is going to happen to me now," was sufficient "initiation" by the accused to warrant further communication by law enforcement officers although the accused had earlier invoked his right to counsel).

The evidence presented during the *Jackson v. Denno* hearing supports the trial [**846] court's conclusion the State met its burden of establishing by a preponderance of the evidence that the statements were freely and voluntarily given.

JURY INSTRUCTION ON MALICE

Kennedy contends the trial judge's instruction on malice created a rebuttable presumption of malice. Because Kennedy did not object to the trial judge's instruction, this issue is not preserved. *State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)*.

[*310] IMPROPER SENTENCING CONSIDERATIONS

Kennedy maintains the trial court erred by improperly considering Kennedy's exercise of his constitutional right to a jury trial as an influential factor in determining the appropriate sentence. Because Kennedy did not object to the sentence, this issue is not preserved. [***28] *See Torrence, supra.*

CONCLUSION

Reviewing the record under the totality of circumstances test, we conclude the trial judge did not err in ruling Kennedy's statements were admissible. The State met its burden by a preponderance of the evidence in establishing Kennedy's statements were freely and voluntarily given without coercion, duress, or pressure. Further, the record establishes Kennedy voluntarily, knowingly, and intelligently waived his *Miranda* rights. In summary, there was no violation of Kennedy's right against self-incrimination under the *Fifth* and *Fourteenth Amendments to the United States Constitution*, as well as *Article I, § 12 of the South Carolina Constitution*. Moreover, there was no violation of his right to counsel as protected by the *Fifth*, *Sixth*, and *Fourteenth Amendments to the United States Constitution*, as well as *Article I, § 12 of the South Carolina Constitution*.

Therefore, we find Kennedy's statements were properly admitted.

AFFIRMED.

CURETON and GOOLSBY, JJ., concur.

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