SLIP OPINION

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SUPREME COURT OF ARKANSAS

No. CR10-1036

Opinion Delivered September 22, 2011

CALVIN WASHINGTON, JR.
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT, NO. CR-2008-532-IV, HON. MARCIA R. HEARNSBERGER, JUDGE

AFFIRMED.

JIM GUNTER, Associate Justice

Appellant was convicted of capital murder and sentenced to life imprisonment without parole. On appeal, he argues that the circuit court erred in denying his motion to suppress the statement he gave to the police. Because this is a criminal appeal in which life imprisonment has been imposed, this court has jurisdiction pursuant to Arkansas Supreme Court Rule 1-2(a)(2) (2011). We affirm.

In a criminal information filed November 21, 2008, appellant was charged with capital murder in the death of Crystalle Jones. On February 17, 2009, appellant filed a motion to suppress a statement he gave to police on October 4, 2008, in which he admitted killing the victim. In his motion, appellant alleged that he had not been properly Mirandized and that he had not made a knowing, voluntary, and intelligent waiver of his rights. He further alleged that he was improperly induced by promises and threats to waive his rights and submit to questioning.

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A hearing on the motion to suppress was held on July 17, 2009. The State presented the testimony of Lieutenant Ron Martineau, an employee of the Garland County Sheriff's Office, who conducted the interview with appellant. Martineau testified that he and Scotty Dodd, from the Arkansas State Police, conducted an interview with appellant on the afternoon of October 4, 2008. Martineau testified that appellant was in custody at the time, and that prior to speaking with appellant, Martineau had advised appellant of his *Miranda* rights. Martineau testified that he read the *Miranda* warnings to appellant, had him initial next to each waiver and consent, and also had him sign the *Miranda* rights form at the bottom. According to Martineau, appellant indicated that he understood each of his rights and that he wanted to waive those rights and give a statement. Martineau and Dodd proceeded to ask appellant a series of questions, and as appellant answered, Martineau typed appellant's statement. Martineau testified that he went over the statement with appellant at the conclusion of typing it and that appellant could have made additions, deletions, or corrections but did not do so. Martineau testified that appellant placed his initials at the beginning of each paragraph and that he signed the bottom of the second page of the statement. On cross-examination, Martineau testified that, prior to taking the statement, he had advised appellant that he was charged with capital murder, but Martineau did not discuss the possible penalties for that crime with appellant. Martineau also testified that, during the review of appellant's *Miranda* rights, he did not recall appellant asking when he would get the chance to talk to a lawyer or mentioning the word "lawyer" at any time.

The defense then presented the testimony of appellant, who testified that he was

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arrested on October 4, 2008, in Malvern, Arkansas, and transported to the Garland County jail. He testified that after waiting approximately thirty minutes in a holding cell, he was taken to an office area by Martineau. He testified that before that day he had never been arrested nor had his rights read to him. He identified the *Miranda* rights form as the form that was filled out before he was questioned by Martineau. Appellant acknowledged that he had signed the form and that his initials were on the form, although he stated that he did not remember initialing the form. Appellant testified that Martineau read each right out loud and that, when Martineau said, "You have the right to request a lawyer of your choice," appellant asked him about a lawyer. According to appellant, he asked the officers when he would get a chance to see a lawyer, and the officers told him that he was not going to see one that day but that he might have a chance to get a public defender on Monday (October 4, 2008, was a Saturday). The following question and answer then occurred:

DEFENSE COUNSEL:	Calvin, did you understand that you had the right to ask for an attorney right then and that an attorney would be provided for you that day before you answered any questions?
APPELLANT:	Well this is my first time of getting in trouble of any kind and so I had really no fully [sic] understanding of that. Had I known, then I would have waited until I would've had a lawyer.

Appellant also testified that he was unaware of the possible penalties for capital murder when he signed the form. On cross-examination, appellant testified that he had gone to school through the twelfth grade and that he could read and write. When asked if he understood everything that was read to him by Martineau, appellant stated, "Well I understood, but I didn't fully understand about the lawyer." He again acknowledged that he had initialed at the

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end of each right on the *Miranda* rights form and signed the form. He also acknowledged that he had never told the questioning officers that he did not want to speak with them and that, on the contrary, he was very cooperative.

In rebuttal, the State presented the testimony of Scotty Dodd, a special agent with the Arkansas State Police. He testified that he responded to a call regarding a shooting incident on October 4, 2008, and that he assisted investigators at the scene of the crime. He testified that the police were notified that a suspect had been apprehended in Malvern and that he went to the Garland County Sheriff's Office to wait for the suspect's arrival. He testified that Martineau brought the suspect, appellant, into Martineau's office for questioning and that Martineau read appellant his *Miranda* rights at that time. Dodd testified that, during the reading of the *Miranda* rights, appellant had no "major questions" and that he had not mentioned an attorney. Dodd testified that if appellant had mentioned an attorney, then they would have stopped the questioning. Dodd testified that appellant waived each and every one of his rights and that appellant was cooperative in giving a statement and signing the statement. According to Dodd, appellant was "very concerned. He was very remorseful—very sorry during the statement. He kept saying that he was sorry for what he did." On cross-examination, Dodd testified that neither he nor Martineau had advised appellant of the potential penalties for capital murder.

The court found the statement admissible and denied the motion to suppress, finding that appellant's statement was knowingly, voluntarily, and intelligently made by appellant with a full and complete understanding of his constitutional rights and the consequences of waiving

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those rights. However, the court then allowed the defense to present further argument. The defense argued to the court that there were two officers testifying that an attorney was not mentioned, and appellant testifying that an attorney was mentioned, and because both sides had an interest in the statement being either suppressed or not suppressed, the testimony was "a wash." The defense also argued that appellant could not have made a knowing and intelligent waiver of his rights without knowing that he was facing a potential death sentence.

The court then made the following ruling:

> Okay, well it's been testified that the Defendant went through this rights form with the officers. He said that he can read, write, and understand English. It says that he's been advised of his rights, that he understands them, that by giving a statement and answering questions he waives his rights, and that he waives his right to have an attorney, and that he could request an attorney at any time.
>
> I don't consider it to be a wash between the interests of Lieutenant Martineau and Special Agent Scotty Dodd. I consider their testimony to be convincing to the Court that in fact Mr. Washington, who was very cooperative in every way by his own admission, gave a willing statement to the police about what happened, that he was in fact remorseful and sorry for the events that had taken place, and that goes along with his ability and desire to give a statement to the police, and therefore I give more weight to the testimony of Lieutenant Martineau and Special Agent Scotty Dodd when it comes to the question of his waiver of his right to remain silent and the waiver of his right to have an attorney present.
>
> By his own admission he was advised of the charge of capital murder before he gave the statement and before he was advised of his rights and stated that he knew what he was charged with. And by his statement to the police, he obviously cooperated in giving facts that go along with that charge of capital murder.
>
> So the Court will stand on its earlier ruling.

The defense asked that its objection to the statement be shown as a continuing objection, and the defense continued to object throughout the jury trial held April 21–23, 2010. The jury found appellant guilty of capital murder, and he was sentenced to life imprisonment without parole. Appellant filed a timely notice of appeal on May 12, 2010.

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On appeal, appellant argues that the circuit court erred in denying his motion to suppress his statement to police. A statement made while in custody is presumptively involuntary, and the burden is on the State to prove by a preponderance of the evidence that a custodial statement was given voluntarily and was knowingly and intelligently made. *Harper v. State*, 359 Ark. 142, 194 S.W.3d 730 (2004). In reviewing a circuit court's refusal to suppress a confession, we make an independent determination based upon the totality of the circumstances, and we will reverse only when the circuit judge's finding of voluntariness is clearly against the preponderance of the evidence. *Id.* Issues regarding the credibility of witnesses testifying at a suppression hearing are within the province of the circuit court. *Koster v. State*, 374 Ark. 74, 286 S.W.3d 152 (2008). Any conflicts in the testimony are for the circuit court to resolve, as it is in a superior position to determine the credibility of the witnesses. *Id.*

In this case, appellant argues that his question of "when he would get a chance to see a lawyer" reflected a past tense usage of the question that clearly indicated his intention to invoke his right to an attorney. We are unable to reach the merits of this argument, however, because the circuit court's ruling was based on a finding that the officers' testimony was more convincing and entitled to more weight, and both officers testified that appellant did not question them about when he would see an attorney. Thus, based on a review of the totality of the circumstances, and bearing in mind that issues of credibility are within the province of the circuit court, we hold that the court's finding of voluntariness was not clearly against the preponderance of the evidence.

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We note that neither appellant nor the State complied with Arkansas Supreme Court Rule 4-3(i) (2011), which requires appellant to "abstract, or include in the Addendum, as appropriate, all rulings adverse to [the appellant] made by the circuit court on all objections, motions and requests made by either party" and requires the State to "make certain and certify that all of those objections have been abstracted." Notwithstanding the parties' noncompliance, the record in this case has been reviewed for all objections, motions, and requests made by either party, which were decided adversely to appellant, and no prejudicial error has been found. *See, e.g.*, *Banks v. State*, 2010 Ark. 108, ___ S.W.3d ___.

Affirmed.