NO. COA14-542
NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

STATE OF NORTH CAROLINA

v. Lee County
No. 09 CRS 1227

JUAN CARLOS BENITEZ,
Defendant.

Appeal by defendant from judgment entered 20 May 2013 by Judge Douglas B. Sasser in Lee County Superior Court. Heard in the Court of Appeals 23 October 2014.

Attorney General Roy Cooper, by Assistant Attorney General Amy Kunstling Irene, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

GEER, Judge.

Defendant Juan Carlos Benitez appeals from a judgment entered pursuant to a plea agreement sentencing him to life imprisonment with the possibility of parole for first degree murder, but reserving his right to appeal the denial of his motion to suppress his confession. Defendant has also filed a motion for appropriate relief ("MAR") asserting that his trial

counsel provided ineffective assistance of counsel by failing to argue that his confession was inadmissible because it was not made in the presence of a statutory person as required by N.C. Gen. Stat. § 7B-2101(b) (2013). Defendant further contends that if the N.C. Gen. Stat. § 7B-2101(b) argument had been made, his motion to suppress would have been granted, and defendant would not have pled guilty to first degree murder.

We agree and allow defendant's MAR. Based on *State v. Oglesby*, 361 N.C. 550, 648 S.E.2d 819 (2007), we hold that defendant's uncle -- the person present during defendant's confession -- was not a required statutory person and, on this basis, the motion to suppress should have been granted. Further, because defendant has met his heavy burden of showing ineffective assistance of counsel, we vacate defendant's judgment and remand for the trial court to allow defendant to withdraw his guilty plea.

Facts

The State's evidence tends to show the following facts. Defendant was born on 3 October 1993 in El Salvador and is a native Spanish speaker. When he was about 12 years old, he came to live with his uncle, Jeremias Cruz, in Sanford, North Carolina. Mr. Cruz and defendant lived together in a mobile

home in Hart's Trailer Park, and defendant was enrolled in Lee County Middle School.

On 1 August 2007, defendant was staying with a friend, Antonio, and Antonio's family. That morning, defendant shot Antonio's mother, Piedad Visoso in the head and killed her. At around 9:40 p.m., Detective John Holly and Sheriff Tracy Carter with the Lee County Sheriff's Department ("LCSD") apprehended defendant and took him to his uncle's home where defendant was handcuffed and then helped the officers locate the gun close by in the woods. After that, defendant was taken to the LCSD office, around midnight, where he signed a form stating in effect that defendant had been informed of his "juvenile rights" and that he waived them. Defendant gave an incriminating statement in writing ("the LCSD statement").

In the LCSD statement, defendant explained that after watching a gang movie in Antonio's room, he felt like he wanted to kill somebody. He waited around in Antonio's room for about 10 minutes, grabbed a gun, and then put it in his pants pocket. He then went into the living room and kicked a toy car around for about two minutes next to the couch. When he remembered the movie, he pulled the gun out and shot Ms. Visoso in the head while she was sleeping on the couch.

After he reviewed and signed his statement, defendant was taken into the secure custody of the Cumberland County Detention Center and charged with first degree murder by a juvenile petition. On 14 August 2007, the Lee County Department of Social Services ("DSS") was appointed as defendant's legal guardian.

On 11 February 2008, defendant was evaluated by neuropsychologist Dr. Antonio E. Puente. Dr. Puente diagnosed defendant with "mild retardation." At a competency hearing on 12 June 2009 in district court, Dr. Puente along with Drs. David Bartholomew and Richard Rumor gave expert testimony as to defendant's competency to stand trial. Judge Addie M. Harris Rawls found that "[a]ll doctors agree that the Respondent could possibly be educated on the issues involving competency[,]" and "Respondent was found to be competent by Dr. David Bartholomew." Judge Rawls concluded that defendant was competent to stand trial.

On 10 July 2009, the district court found probable cause to charge defendant with first degree murder. Consequently, on 22 July 2009, defendant was bound over to superior court to be tried as an adult.

Dr. Puente evaluated defendant for a second time on 25 March 2011 and again diagnosed defendant with mild mental

retardation. On 31 January 2012, defendant filed a motion to suppress the statements he made in helping authorities locate the murder weapon. At another competency hearing, on 30 April 2012, this time before Judge C. Winston Gilchrist, Dr. Puente, Dr. Bartholomew, Dr. Rumor, and Dr. Thomas Harbin gave expert testimony as to defendant's competency to stand trial. Defendant introduced several exhibits, including school records. Judge Gilchrist found that defendant "does suffer from a mental illness or defect," but also that "Defendant has shown the ability to respond in a reasonable and rational manner." Judge Gilchrist concluded that defendant was competent to stand trial.

On 6 June 2012, defendant moved to suppress the LCSD statement. Defendant argued that this statement "was obtained as a result of substantial violations of the provisions of Chapter 15A and 7B 2101 *et seq.*, of the North Carolina General Statutes in that defendant did not knowingly, willingly, and understandingly waive his juvenile's rights." Judge Gilchrist denied defendant's motions to suppress in an order filed 18 December 2012.

In his order, Judge Gilchrist made the following findings of fact. Captain Holly with the LCSD was informed around 5:15 a.m. on 1 August 2007 that a juvenile named "Juan Carlos Benitez" was a suspect in the murder of Ms. Visoso. Using a

photograph they had obtained, Captain Holly and Sheriff Carter drove around the vicinity of Hart's Mobile Home Park and Dreamland Trailer Park looking for defendant. The officers were in an unmarked Ford F-150 dressed in casual clothes with badges around their necks and firearms on their side. Captain Holly and Sheriff Carter came upon a group of eight to 10 children around Hart's Mobile Home Park who knew defendant, informed the officers that defendant lived with his uncle at Lot 20 in Hart's Mobile Home Park, and told the officers that they had seen defendant riding his bicycle earlier.

Then, after seeing a Hispanic male teenager riding his bike -- who, unbeknownst to Captain Holly and Sheriff Carter, was defendant -- the two men stopped and motioned to defendant to come over. After defendant approached, Captain Holly asked him if he was "Juan," and defendant replied he was not "Juan." When asked where he lived, defendant stated that he lived in Dreamland Park. Captain Holly was unsure, according to the photograph, whether the teenager was defendant. Defendant stated that he had just seen "Juan" five minutes prior on a bicycle at The Pantry, a convenience store about 150 yards from where they were. Sheriff Carter asked defendant if defendant would help the officers try to find "Juan." Defendant agreed, put his bike in the bed of the truck, and got into the truck.

Defendant first took the officers to The Pantry, but they did not find "Juan" there. Defendant then directed the officers to a mobile home in Dreamland, where defendant claimed he lived with his parents. Sheriff Carter escorted defendant out of the truck and up to the front door of the mobile home and knocked. A Hispanic man answered the door and, when asked if defendant lived with him, he replied that he had never seen defendant before. The officers then took defendant to Lot 20 in Hart's Mobile Home Park where Mr. Cruz identified defendant as his nephew, Juan Carlos Benitez. At that point, defendant, who was sitting in the truck, was placed in handcuffs.

Captain Holly asked Mr. Cruz if he had ever seen defendant with a gun or where a gun that defendant had used that morning might be. After hearing this part of the conversation, defendant motioned to Captain Holly to come over to the truck. When Captain Holly approached, defendant said that he threw the gun in the woods. Captain Holly asked defendant where the gun was, and defendant replied, "I show you." Defendant directed Captain Holly to a place relatively close by in the woods and pointed to an object that Captain Holly identified as a pistol. Captain Holly then transported defendant to the LCSD office for questioning.

After arriving at the LCSD office, Detective Clint Babb met with defendant, Celinda Carney, a Spanish language interpreter, and Mr. Cruz, who, the trial court's order found, "was the Defendant's custodian." Defendant was "duly advised of his juvenile rights in the presence of his uncle and the juvenile rights were interpreted by Celinda Carney." The LCSD retained Ms. Carney to translate for this occasion, although she had never interpreted in a criminal matter before. Detective Babb and Ms. Carney testified that defendant understood all questions and each right read to him. On a form waiver for juvenile rights, defendant initialed beside each right, and at the bottom of the form he agreed to waive his juvenile rights. Neither defendant nor Mr. Cruz indicated any lack of understanding of what was being said during this process.

As defendant began answering Detective Babb's questions, defendant said that he would only tell Ms. Carney what really happened. When Ms. Carney relayed this to Detective Babb, Detective Babb told Ms. Carney to tell defendant that anything defendant told Ms. Carney she would tell to Detective Babb. Although Ms. Carney conveyed this information to defendant, defendant agreed to tell his story to Ms. Carney. Detective Babb then left the interview room, and defendant then gave the LCSD statement to Ms. Carney which was later reduced to writing.

Detective Babb and Ms. Carney each went over the statement with defendant, and defendant affirmed it. Defendant then signed the written statement. Mr. Cruz was with defendant when defendant was interrogated and when defendant gave, reviewed, and signed his statement. The trial court found that defendant was never threatened, coerced, or harassed and that all conversations were held with a conversational tone devoid of yelling. Further, there was no indication from any witness that defendant was confused or did not understand what he was being asked or instructed.

Based on these findings of fact, the trial court made the following conclusions of law.

> 1. That the Defendant's statements regarding the location of the gun were not in response to interrogation on behalf of any officer and therefore juvenile Miranda rights were not required prior to the Defendant's statements regarding the location of the firearm.
>
> 2. That furthermore, any statements made by or to law enforcement officers regarding the location of the firearm are proper under the public safety exception and were justified due to overriding considerations of public safety and therefore no Miranda would be required.
>
> 3. That the juvenile was properly advised of his juvenile Miranda rights pursuant to N.C.G.S. 7B-2101 and Defendant did based upon the totality of the

> circumstances, knowingly, willingly, voluntarily and understandingly waive his juvenile rights prior to custodial interrogation of the Defendant.
>
> 4. That none of the Defendant's constitutional rights were violated in connection with his detention, interrogation or statements.
>
> 5. That the statements made by the Defendant were freely, voluntarily, and understandingly made.

On 20 May 2013, defendant accepted a plea offer from the State that allowed defendant to plead guilty to first degree murder with a sentence of life imprisonment with the possibility of parole. The plea agreement preserved defendant's rights to appeal the denial of his competency motions as well as the denial of his motions to suppress. That same day, a judgment was entered accordingly. Defendant gave notice of appeal, and on 11 July 2014, defendant filed a petition for writ of certiorari. On 7 October 2014, defendant also filed an MAR with this Court.

Discussion

On appeal, defendant contends only that the trial court erred in denying his motion to suppress. "'The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions

of law.'" *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012) (quoting *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011)).

Defendant first argues that the trial court erred in denying his motion to suppress the LCSD statement because his rights under N.C. Gen. Stat. § 7B-2101(b) were violated. N.C. Gen. Stat. § 7B-2101(b) provides: "When the juvenile is less than 14 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian, or attorney. If an attorney is not present, the parent, guardian, or custodian as well as the juvenile must be advised of the juvenile's rights as set out in subsection (a) of this section; however, a parent, guardian, or custodian may not waive any right on behalf of the juvenile." Since defendant was only 13 years old at the time he gave the LCSD statement, that statement is admissible only if the statement was made in the presence of defendant's "parent, guardian, custodian, or attorney." *Id.*

The State contends that defendant did not preserve this issue for appellate review because he did not raise it below. We agree that defense counsel's general argument that the statement was obtained in violation of N.C. Gen. Stat. § 7B-2101

and was not the result of a knowing, willing, and understanding waiver of his juvenile rights was not sufficient to preserve the specific issue of the lack of any parent, guardian, or custodian. *See State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988) ("'[W]hen there is an objection to the admission of a confession or a motion to suppress a confession, counsel *must specifically state* to the court before voir dire evidence is received the basis for his motion to suppress[.]' . . . Defendant may not swap horses after trial in order to obtain a thoroughbred upon appeal." (emphasis added) (quoting *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982)).

Defendant argues, however, that the issue involves a statutory mandate entitling him to raise the issue for the first time on appeal. *See State v. Hucks*, 323 N.C. 574, 579, 374 S.E.2d 240, 244 (1988) (holding that in some instances trial court's failure to act pursuant to statutorily-mandated duty is error that need not be preserved for appeal by objection or argument). We need not address that issue since defendant has filed an MAR in this Court asserting that trial counsel's failure to raise this issue below constitutes ineffective assistance of counsel. As this Court explained in *State v. Barnett*, 113 N.C. App. 69, 78, 437 S.E.2d 711, 717 (1993) (quoting *State v. Watkins*, 89 N.C. App. 599, 608, 366 S.E.2d

876, 881 (1988), "N.C. Gen. Stat. § 15A-1418(a) provides that [an MAR] on grounds found in N.C. Gen. Stat. § 15A-1415 may be made in the appellate division when a case is in the appellate division for review. One ground found in Section 15A-1415(b), '[t]he conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina,' includes defendant's claim of ineffective assistance of counsel."

Here, there is no question that this case is properly before this Court for appellate review. The State does not dispute that defendant properly preserved his right to appeal the denial of his motion to suppress and that, in addition to the argument regarding N.C. Gen. Stat. § 7B-2101(b), defendant has also argued, as he did below, that his waiver was not knowing, willing, and understanding in light of the totality of the circumstances. Further, defendant's ineffective assistance of counsel ("IAC") claim falls within N.C. Gen. Stat. § 15A-1415(b) (2013), as acknowledged by *Barnett*. Defendant's MAR asserting his IAC claim is, therefore, properly before this Court.

N.C. Gen. Stat. § 15A-1418(b) (2013) provides: "When a motion for appropriate relief is made in the appellate division, the appellate court must decide whether the motion may be

determined on the basis of the materials before it, whether it is necessary to remand the case to the trial division for taking evidence or conducting other proceedings, or, for claims of factual innocence, whether to refer the case for further investigation to the North Carolina Innocence Inquiry Commission established by Article 92 of Chapter 15A of the General Statutes. If the appellate court does not remand the case for proceedings on the motion, it may determine the motion in conjunction with the appeal and enter its ruling on the motion with its determination of the case."

Based on our review of the record, we believe that the MAR may be determined on the basis of the materials before us and that it is not necessary to remand the case to the trial division. We note that the State's claim that the issue of the presence of a parent, attorney, custodian, or guardian was not before the trial court is not entirely correct. It is apparent that the trial court was aware of the issue because it specifically found: "Lee County Detective Clint Babb met with Defendant's uncle Jeremiah Cruz who was the Defendant's custodian, the Defendant, and Spanish interpreter Celinda Carney at the Lee County Sheriff's Office." The court further emphasized that "[d]efendant who was 13 years old at the time was duly advised of his juvenile rights in the presence of his

uncle . . . ." The record also contains ample evidence regarding this issue, and the record does not suggest that any further evidence is necessary to resolve the question whether the State complied with defendant's rights under N.C. Gen. Stat. § 7B-2101(b). *See* N.C. Gen. Stat. § 15A-1418 Official Commentary ("Since 'legal' grounds for relief can as well be decided by the appellate court as the trial court, it is appropriate to authorize the making of the motion in the appellate division. . . . It is possible that some factual matters could be decided as well in the appellate division.").

To prevail on an IAC claim,

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable*."

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052, 2064 (1984)).

In his MAR, defendant contends that his trial counsel rendered IAC because an objectively reasonable attorney would have argued that no statutory person was present under N.C. Gen.

Stat. § 7B-2101(b) when defendant was interrogated. In turn, defendant contends that had his counsel made this argument, the trial court would have been obligated to suppress the LCSD statement and, further, defendant would not have pled guilty to first degree murder.

In determining the effectiveness of trial counsel, this Court asks whether the record reveals that "'a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse.'" *State v. Pemberton*, ___ N.C. App. ___, ___, 743 S.E.2d 719, 725 (2013) (quoting *Massaro v. United States*, 538 U.S. 500, 505, 155 L. Ed. 2d 714, 720, 123 S. Ct. 1690, 1694 (2003)). "[I]n evaluating ineffective assistance claims stemming from challenges to strategic and tactical decisions made prior to and during trial, a defendant's trial counsel 'is given wide latitude . . . and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear.'" *Id.* at ___, 743 S.E.2d at 724 (quoting *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001)).

Here, in his MAR, defendant included an affidavit from his trial counsel acknowledging that his sole strategy in the trial court was to suppress defendant's LCSD statement and that his failure to argue that "no 'parent, guardian, custodian, or

attorney' was present at the interrogation at the Lee County Sheriff's Department was not a strategic decision on the part of counsel, but was the result of an oversight." We hold that with this affidavit, defendant has met his burden of showing that his trial counsel's performance was deficient. *See State v. Gerald*, ___ N.C. App. ___, ___, 742 S.E.2d 280, 284 (2013) (concluding defendant met his IAC burden showing deficient counsel when defendant's MAR on direct appeal included affidavit from trial counsel stating that he had no "'strategic or tactical reason for not challenging the constitutionality of the warrantless entry into [Defendant's] home'"). Indeed, we cannot conceive of any possible strategic reason for this omission under the circumstances of this case.

When a defendant brings an IAC claim following entry of a guilty plea, "'[f]or a defendant to show that ineffective counsel was harmful, he must show that there is a reasonable probability that, but for counsel's error, he would not have entered a plea of guilty.'" *State v. Tinney*, ___ N.C. App. ___, ___, 748 S.E.2d 730, 737 (2013) (quoting *State v. Russell*, 92 N.C. App. 639, 644, 376 S.E.2d 458, 461 (1989)). However, "'[a] mere allegation" that defendant would not have accepted the plea offer "is insufficient to establish prejudice.'" *State v. Goforth*, 130 N.C. App. 603, 605, 503 S.E.2d 676, 678 (1998)

(quoting *Barker v. United States*, 7 F.3d 629, 633 (7th Cir. 1993)).

Defendant's prejudice argument first depends on whether the trial court should have granted his motion to suppress because his LCSD statement was obtained in violation of N.C. Gen. Stat. § 7B-2101(b). Our initial inquiry into any prejudice by the trial counsel's IAC is whether the State could have met its burden in showing that a statutory person was present when defendant was undergoing custodial interrogation.

There is no dispute that neither a parent nor an attorney was present at the time of the custodial interrogation. In addition, the State concedes that the trial court erred in finding that defendant's uncle was his "custodian" because, when defendant was interrogated, that term applied only to individuals meeting the requirements of N.C. Gen. Stat. § 7B-101(8) (2007). *See State v. Jones*, 147 N.C. App. 527, 534, 556 S.E.2d 647, 649 (2001) (holding that aunt was not "custodian").

Nevertheless, the State contends that the order denying the motion to suppress may be upheld on the alternative basis that Mr. Cruz was defendant's "guardian" under N.C. Gen. Stat. § 7B-2101(b) when defendant made his incriminating statement. *See State v. Bone*, 354 N.C. 1, 8, 550 S.E.2d 482, 486 (2001) ("'The question for review is whether the ruling of the trial court was

correct and not whether the reason given therefor is sound or tenable. The crucial inquiry for this Court is admissibility[.]'" (quoting *State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650 (1987))).

The parties disagree over the definition of "guardian." Unlike the term "custodian," which has a straightforward definition in N.C. Gen. Stat. § 7B-101(8) (2013), "guardian" is not defined in the Juvenile Code. Our Supreme Court, however, construed that term in *Oglesby*, 361 N.C. at 555-56, 648 S.E.2d at 822. The Court, in holding that the defendant's aunt was not a "guardian" within the meaning of N.C. Gen. Stat. § 7B-2101, held:

> Clearly, defendant was entitled by N.C.G.S. § 7B-2101(a)(3) to have a "parent, guardian, or custodian" present during his interrogation. However, an "aunt" is not an enumerated relation in the statute, and *an interpretation of the term "guardian" to encompass anything other than a relationship established by legal process would unjustifiably expand the plain and unambiguous meaning of the word. See Black's Law Dictionary* 566 (abr. 7th ed. 2000) (defining "guardian" as "[o]ne who has the *legal* authority and duty to care for another's person or property" (emphasis added)). We are bound by well-accepted rules of statutory construction to give effect to this plain and unambiguous meaning and we therefore decline any attempt to ascertain a contrary legislative intent.

361 N.C. at 555-56, 648 S.E.2d at 822 (emphasis added).

The State points out that this Court had previously relied upon the same definition of "guardian" in *Black's Legal Dictionary* in construing "guardian" as used in N.C. Gen. Stat. § 7B-2101(b) and held that the "[l]egal authority [described by *Black's*] is not exclusively court-appointed authority, but is rather any authority conferred by the government upon an individual." *Jones*, 147 N.C. App. at 540, 556 S.E.2d at 652. However, we agree with a prior panel's conclusion in dicta that *Oglesby* implicitly overruled *Jones*.

This Court explained in *In re M.L.T.H.*, 200 N.C. App. 476, 486 n.6, 685 S.E.2d 117, 124 n.6 (2009):

> In []*Jones*, 147 N.C. App. [at] 538, 556 S.E.2d [at] 651[], . . . this court held that [the] presence of a thirteen year old defendant's aunt satisfied the requirements of N.C. Gen. Stat. § 7A-595, because the defendant lived with his aunt, "was dependent upon her for room, board, education, and clothing", and the aunt was "defendant's guardian within the spirit and intent of N.C.G.S. § 7A-595 . . . ." However, the aunt was not the defendant's legally appointed guardian or custodian. *Id.* at 539, 556 S.E.2d at 652. The North Carolina Supreme Court in *State v. Oglesby* expressly held that a person in the position of a guardian could *not* be treated as a guardian for purposes of N.C. Gen. Stat. § 7B-2101, impliedly overruling []*Jones*.

In *Oglesby*, the Supreme Court did not simply reference "legal authority," but rather narrowed the necessary inquiry to whether the relationship was one "established by legal process."

361 N.C. at 555, 648 S.E.2d at 822. We believe that the Supreme Court's requirement of "legal process" necessarily means that the individual's authority was established through a court proceeding. *Black's Law Dictionary* 1325 (9th ed. 2009) defines "legal process" as "[p]rocess validly issued." More generally, "process" is defined as "[t]he proceedings in any action or prosecution." *Id.*

We need not decide precisely what the Supreme Court meant by "legal process." We believe that, at a minimum, the legal authority held by a guardian, within the meaning of N.C. Gen. Stat. § 7B-2101(b), requires authority gained through some legal proceeding and not authority recognized by some government body, as held in *Jones*, 147 N.C. App. at 540, 556 S.E.2d at 652.

The State, however, points to the Supreme Court's description of the facts, after its holding defining "guardian": "From the testimony of defendant's aunt, it is apparent that she never had custody of defendant, that defendant had only stayed with her on occasion but not for any considerable length of time, and that she had never signed any school papers for him." *Oglesby*, 361 N.C. at 556, 648 S.E.2d at 822. The State argues that this description of the evidence indicates that the Court intended, like *Jones*, to allow legal authority short of that granted in a legal proceeding. We disagree. A description of

evidence cannot override an explicit holding. Moreover, we note that Justice Timmons-Goodson's dissent in *Oglesby* expressly pointed out that the majority opinion was construing N.C. Gen. Stat. § 7B-2101(b) more "narrowly" than this Court had in *Jones*. 361 N.C. at 558, 648 S.E.2d at 823 (Timmons-Goodson, J., dissenting).

Consequently, we hold that *Oglesby* requires, at a minimum, that a "guardian" under N.C. Gen. Stat. § 7B-2101(b) must have legal authority over the juvenile as a result of a legal proceeding. The record contains no evidence that defendant's uncle had obtained legal authority over defendant through any legal proceeding of any type. *Cf. In re T.B.*, 200 N.C. App. 739, 743-44, 685 S.E.2d 529, 532-33 (2009) (finding no evidence of legal award of custody where respondent did not provide "a copy of an order awarding custody, either legal or physical," "there [wa]s no order nor any inferences [of] any award of custody of [juvenile] to [respondent]," and evidence that respondent was acting as custodian *in loco parentis* was relevant to separate inquiry under definition of "custodian"). At most, the record suggests that Mr. Cruz was listed on or signed several of defendant's school documents as his parent, guardian, or custodian and that defendant had lived with Mr. Cruz for at least a year. That evidence is not sufficient to support a

determination that Mr. Cruz was defendant's guardian for purposes of N.C. Gen. Stat. § 7B-2101(b).

Therefore, if trial counsel had argued in support of his motion to suppress that no statutory person was present during defendant's interrogation, the trial court would have been obligated to suppress the LCSD statement. *See* N.C. Gen. Stat. § 7B-2101(b) (providing that "no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of" statutory person).

The second part of our prejudice inquiry is whether there was a reasonable probability that defendant would not have pled guilty to first degree murder had the motion to suppress been granted. In support of the prejudice prong, defendant contends that he would not have entered into the plea agreement for first degree murder if the LCSD statement had been suppressed because that statement was the only evidence of premeditation and deliberation. Without the LCSD statement, the State's forecasted evidence placed defendant at the scene of the crime with access to the murder weapon. The forecasted evidence also showed that Ms. Visoso was shot in the back of the head while lying on a couch and that defendant led the officers to the murder weapon after being picked up by law enforcement officers.

We agree that in the absence of the LCSD statement, defendant could have more effectively argued that he was guilty of only a lesser degree of murder, such as second degree murder and involuntary manslaughter. Although the forecasted evidence could support a jury conviction of first degree murder, it could also have supported a lesser degree of murder. The transcript from the 10 May 2013 hearing shows that defendant intended to use the defense of accident at trial, which the LCSD statement would have almost certainly defeated.

That transcript also shows that defendant initially rejected the State's plea offer of life with the possibility of parole for first degree murder, even after he indicated he understood that if he was found guilty by a jury, the State would seek a sentence of life without parole. Subsequently, in a plea that preserved defendant's right to appeal the denial of his motion to suppress, defendant agreed to plead guilty to first degree murder with a sentence of life imprisonment with the possibility of parole. If defendant prevailed on appeal in challenging the denial of his motion to suppress, his plea would necessarily be vacated. Consequently, we hold that the record before us demonstrates a reasonable probability that defendant would not have pled guilty to first degree murder had the motion to suppress the LCSD statement been granted. *See State v.*

Moser, 20 Neb. App. 209, 224, 822 N.W.2d 424, 435 (2012) ("The State argues that . . . Moser has not shown any prejudice because of his desire to accept the plea offer before it was withdrawn and because he received the benefit of the dismissal of the charge of [felonious possession of a firearm]. The weakness of this argument by the State, however, is that Moser *arguably was interested* in the plea only after being advised that he did not have a defense to the stop of his vehicle. . . . [W]e conclude that Moser has established a reasonable probability that he would not have entered a plea[.]" (emphasis added)).

We, therefore, reverse the decision of the trial court in denying defendant's suppression order, and we remand with instructions to set aside defendant's conviction, to allow defendant to withdraw his guilty plea, and for further proceedings thereafter. *Id.* at 225, 822 N.W.2d at 436. Because of our resolution of this issue, we need not address defendant's remaining arguments.

Reversed and remanded; judgment vacated.

Judges STROUD and BELL concur.

Report per Rule 30(e).