STEPHEN JOSEPH DELASHMIT APPELLANT

VS. NO. 2007-KA-2130-SCT

STATE OF MISSISSIPPI APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATE CASES

STATE STATUTES

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STATEMENT OF ISSUES

I. DELASHMIT'S CONFESSION WAS PROPERLY ADMITTED.

II. DELASHMIT WAS NOT ENTITLED TO A LESSER OFFENSE INSTRUCTION ON MISDEMEANOR INDECENT EXPOSURE.

III. THE TRIAL COURT DID NOT IMPERMISSIBLY LIMIT DEFENSE COUNSEL'S CLOSING ARGUMENT.

way home from work. T. 321. Mallory observed a man in a small blue Nissan car pull up beside a little girl on a bike. T. 321. Mallory, who was on the phone with his wife, thought the encounter appeared suspicious, and turned around to ensure the little girl's safety. T. 321. When he returned to the cemetery, Mallory saw the little girl's bike lying on the ground, but the little girl was nowhere in sight. T. 322. Mallory also saw the blue Nissan speeding off, dispersing gravel. T. 322. Alarmed, Mallory followed the blue Nissan. T. 323. He pulled up next to the blue car and began questioning the driver, who was later identified as Stephen Delashmit. Mallory asked where the little girl was, and Delashmit initially replied that he did not know what Mallory was talking about. T. 323. Delashmit sped off, but Mallory continued following him and called 911 to report a possible kidnaping. T. 323-325.

Lee County Sheriff's Deputy Robbie Gwin was dispatched to Lee Memorial Cemetery regarding the possible abduction. T. 345. When he arrived at the scene, Gwin saw a little girl's bike on the ground. T. 354. A woman arrived on the scene and identified the bike as belonging to her eight-year-old daughter, Vanitie Bell. T. 355. Vanitie's mother was extremely distraught, as she did not know where her daughter was. T. 355. Mallory had also returned to the scene. T. 354. At some point thereafter, Vanitie arrived at the scene with an adult woman and told officers what had transpired between she and Delashmit. T. 162. According to Vanitie, she had stopped to fix the chain on her bike when she noticed a blue car pass by two or three times. T. 342. Delashmit eventually pulled up next to her and asked for directions. T. 342. Delashmit then offered Vanitie $50 to have sex with him. T. 342. Delashmit, who already had his pants unzipped, then raised his torso and exposed "his middle spot" to the eight-year-old girl. T. 343. Frightened, the little girl

and Vanitie described as a white male wearing glasses and a baseball cap who was driving a small blue Nissan car. T. 159, 346-47. Gwin received a call from Deputy Gary Turner who advised that he was familiar with an individual, Delashmit, in Nettleton that matched the description of the suspect and who was also known to be a registered sex offender. T. 159-160. Deputy Turner then went to Delashmit's parents' home, and the parents advised Turner that Delashmit was at work at Hickory Springs in Verona. T. 160. Delashmit's parents also told Turner that their son did in fact drive a blue Nissan car. T. 160. Thereafter, Gwin proceeded to Hickory Springs, where he saw the suspect vehicle in the parking lot. T. 161, 358. A supervisor located Delashmit and Gwin asked him to step outside and speak with him in the parking lot. T. 164, 359. Gwin advised Delashmit of his *Miranda* rights, and also informed him why law enforcement wished to speak with him at that time. T. 166, 359. Gwin then waited for Sheriff Jim Johnson to arrive. T. 167.

Upon arriving at the scene, Sheriff Johnson noticed an elderly couple in a van in the parking lot. T. 187. Sheriff Johnson introduced himself to the couple, who turned out to be Delashmit's parents. T. 187. Johnson also advised the parents that he was going to speak with their son. T. 187, 366. Upon approaching Delashmit, Johnson ensured that he had been read his *Miranda* rights and that he fully understood them. T. 186, 188, 367. Due to weather conditions, and because they were at Delashmit's workplace and Johnson thought he would not want "everybody and their brother to hear about it," Johnson asked Delashmit to speak with him in the back of Gwin's patrol car. T. 187, 200. Delashmit complied, and once seated in the car, Johnson again advised Delashmit of his Miranda rights. T. 188, 367. Delashmit admitted that he had solicited the little girl for sex and shown her his penis. T. 169, 189, 361, 378-79. Delashmit was then placed under arrest and

his *Miranda* rights, and Delashmit executed a waiver of rights form. T. 211-12. Delashmit again confessed to offering the eight-year-old girl $50 to have sex with him and admitted and demonstrated how he showed her his penis. T. 220, 404.

Delashmit was ultimately tried and convicted by a Lee County Circuit Court jury for soliciting a child to engage in sexually explicit conduct in violation of Mississippi Code Annotated §97-5-33. C.P. 76. Delashmit was sentenced as a habitual offender to serve a term of life without the possibility of parole. C.P. 77.

under illegal arrest, at the time he gave the first statement to Sheriff Johnson. Rather, Delashmit was being briefly detained for investigatory purposes. Delashmit's second statement was also properly admitted. After being *Mirandized* and executing a waiver of rights form, Delashmit made an equivocal statement referencing a preference for an attorney. The statement was insufficient to invoke his right to counsel, and the subsequent confession was properly admitted at trial.

Delashmit was not entitled to a lesser offense instruction on indecent exposure. Although Delashmit indecently exposed himself to the child victim, in order to be entitled to the lesser offense instruction, a reasonable jury would have to find that he was not guilty of the crime charged. In light of the victim's testimony and Delashmit's two confessions, no reasonable jury could have found him guilty only of the lesser crime, and not guilty of the crime charged.

Finally, the trial court did not limit defense counsel's closing argument regarding reasonable doubt. Even if the court had limited defense counsel's closing argument, any resulting error would be harmless in light of the overwhelming proof of guilt.

Delashmit claims that both his confession to Sheriff Johnson and his confession to Investigator Finch should have been suppressed. The first confession, Delashmit claims, was made during the course of an illegal arrest, and should have been excluded as fruit of the poisonous tree. Delashmit claims that the second confession should have been excluded because it was taken after he invoked his right to counsel.

The First Confession

Delashmit claims that his first confession was given while under arrest, and that the arrest was illegal due to the lack of probable cause. The State counters that Delashmit was not under arrest at the time he confessed to Sheriff Johnson. Rather, Delashmit was being questioned merely as a suspect and was free to leave prior to confessing to the crime.

Although counsel opposite argues on appeal that Delashmit believed he was under arrest when he confessed to Johnson, Delashmit did not testify at the hearing and no evidence was presented at the hearing to support a finding that Delashmit was not free to leave prior to confessing to soliciting an eight-year-old for sex. In *Sills v. State*, 634 So.2d 124, 125-126 (Miss. 1994), the appellant argued that his confession should have been suppressed because it was obtained during an illegal arrest. This honorable Court responded as follows.

> If Sills wanted to claim his confession was a product of an illegal arrest, "it [was] incumbent upon him to assert this defense at the hearing and to offer some evidence in support of it." *Bevill v. State*, 556 So.2d 699, 709 (Miss.1990). Sills completely failed to make out a prima facie case of illegal detention and arrest. See *Butler v. State*, 212 So.2d 573, 577 (Miss.1968). Sills never claimed that this general allegation was the motivation for confessing to the crime. When the trial judge asked for the specific objection to the confession, defense counsel never argued that Sills was illegally arrested but, rather, argued that the confession was involuntarily given. In failing to do this, Sills abandoned this claim and forfeited his right to argue at

Id. at 125-26. Delashmit's argument at the suppression hearing was that his statement to Officer Johnson was involuntary. T. 227-28. He never argued that his confession was the result of an illegal arrest, and in accordance with *Sills*, this new argument should be barred.

Even though Delashmit did not argue illegal arrest at the suppression hearing, the undisputed evidence presented at the hearing was that Delashmit was merely a suspect and was free to leave prior to confessing to solicitation of a child. Deputy Gwin testified that Delashmit was merely a suspect at the time he was questioned about the incident, and that he was not under arrest until after admitting to the crime being investigated. T. 167, 171. Sheriff Johnson also testified that Delashmit was only temporarily detained for investigatory purposes and was not arrested until after the confession. T. 190. Again, no evidence presented at the hearing contradicted Gwin and Johnson's testimony. Delashmit claims on appeal that he was not free to leave because he could not have gotten out of the patrol car without being let out. A similar argument was made in *Estes v. State*, 533 So.2d 437 (Miss. 1988), where the appellant claimed that evidence should have been suppressed because it was obtained through an illegal arrest. In *Estes*, the appellant claimed that he was under arrest and not free to leave because he was sitting in the back of a patrol car which could not be opened from the inside. *Id.* at 441. This Court determined that the appellant was not under arrest because he was not ordered to get into the police car, rather he voluntarily got into the car for questioning. *Id.* Such is the case at hand. Johnson testified that he asked Delashmit to speak with him in Gwin's patrol car "due to weather conditions," and because they were at Delashmit's place of employment and Johnson "didn't figure he wanted everybody and their brother to hear about it." T. 187, 200. Delashmit voluntarily spoke with Johnson in Gwin's vehicle. He was clearly not under

Assuming for the sake of argument only that Delashmit was under arrest at the time he confessed, ample probable cause existed to support any such arrest. Probable cause to make a warrantless arrest is "determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act. The determination depends upon the particular evidence and circumstances of the individual cases." *Jackson v. State*, 845 So.2d 727, 729 (¶6) (Miss. Ct. App. 2003) (quoting *Smith v. State*, 386 So.2d 1117, 1119 (Miss. 1980)). Based on information from Mallory and the victim, officers knew that they were looking for a sexual predator who was a white male wearing glasses and a baseball cap who drove a small blue Nissan car. T. 158-59, 322, 325, 346-47. Upon receiving this information, Deputy Turner advised that he was familiar with a registered sex offender who matched that physical description. When Deputy Turner went to Delashmit's parent's house, they confirmed that their son did in fact drive a small blue Nissan car. T. 160. The parents also told Deputy Turner that their son was at work at Hickory Springs, which is located in the Industrial Park in Verona, and which also happened to be the location where Mallory confronted Delashmit. T. 158, 160. Further, before being questioned, Delashmit's supervisor brought out Delashmit's belongings, which included a baseball cap and jacket. Delashmit first denied that the items the supervisor brought out belonged to him, but later asked if he could put on his jacket because it was cold. T. 164-65, 362. Considering the totality of the circumstances, the investigating officers certainly had probable cause to believe that Delashmit was the man who solicited Vanitie for sex. Although the State insists that Delashmit was only briefly detained for investigatory purposes at the time he spoke with Sheriff Johnson, he could have been lawfully arrested prior to the confession.

his rights, and Delashmit signed a waiver of rights form. T. 211-12. During the subsequent interview, the following exchange occurred.

Fincher:	This is a statement of your rights and you understand what your rights are?
Delashmit:	Yes, mam [sic].
Fincher:	You're willing to make a statement and answer questions without a lawyer present at this time?
Delashmit:	I prefer a lawyer.
Fincher:	You prefer to have an attorney?
Delashmit:	Well...but I will...you know...I will go ahead.
Fincher:	No. You have to tell me you're willing to talk to me.
Delashmit:	I'm willing to talk to you.
Fincher:	Without an attorney at this time?
Delashmit:	Without an attorney.
Fincher:	Okay. Do you understand and know what you're doing?
Delashmit:	Yes, mam [sic].
Fincher:	Are you on any kind of medication?
Delashmit:	Uh..not presently.
Fincher:	Has there been any promises or threats made to you?
Delashmit:	No, mam [sic], it hasn't.
Fincher:	Again, I'm going to ask you...do you want an attorney at this time or do you want to talk to me?

it right there. And you said you prefer to have an attorney, again, I want to emphasize..are you willing to talk to me without an attorney?

Delashmit: Yes, mam [sic].

C.P. 45-46. Delashmit claims that the confession which followed the above exchange should have been suppressed because it was taken after he asserted his right to an attorney.

There is no question that when a defendant clearly and unambiguously asserts his right to an attorney, all questioning must cease. *Grayson v. State*, 806 So.2d 241, 247(¶ 11) (Miss. 2001) (citing *Edwards v. Arizona*, 451 U.S. 477, 484 (1981)). "[H]owever, an ambiguous mention of possibly speaking with one's attorney is insufficient to trigger the right to counsel." *Id.* In *Davis v. United States*, 512 U.S. 452, 459 (1994), the United States Supreme Court found that a suspect's statement, "Maybe I should talk to a lawyer," was ambiguous or equivocal and an insufficient assertion of the right to counsel. "[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning." *Id.* Similarly, the Mississippi Court of Appeals held that a suspect's statement, "I probably need to talk to a lawyer," was likewise an insufficient assertion of the right to counsel. *Scott v. State*, 947 So.2d 341, 343 -344 (¶¶7-15) (Miss. Ct. App. 2006). The *Scott* Court found that the statement was merely an acknowledgment that the defendant was in a considerable amount of trouble. *Id.* The Court also opined that the Scott's action of speaking with law enforcement at great lengths after making the comment was also an indication that he was not asserting his right to counsel. *Id.*

In the case *sub judice*, Delashmit's statement that he would prefer an attorney was certainly not an unequivocal assertion. To prefer is simply to like better or best. Such a statement is akin to

sought clarification of the ambiguous statement. T. 218-219. Fincher further testified that Delashmit sounded like he was asking a question, not stating a fact. T. 223. In light of the circumstances, it is wholly reasonable that Fincher understood only that the suspect might have been attempting to invoke the right to counsel, which, in accordance with *Davis,* did not require her to cease the interrogation. As such, the trial court properly found that the second confession was also admissible.

Delashmit argues that the trial court erred in refusing two proposed instructions on indecent exposure. It is true that a defendant may be entitled to a lesser offense instruction "regarding any offense carrying a lesser punishment if the lesser offense arises out of a nucleus of operative fact common with the factual scenario giving rise to the charge laid in the indictment." *Phillipson v. State*, 943 So.2d 670, 672 (¶7) (Miss. 2006). However, a defendant is not entitled to a lesser offense instruction where no reasonable jury could find the defendant guilty of the lesser offense while at the same time not guilty of the crime charged. *McGowan v. State*, 541 So.2d 1027, 1029 (Miss. 1989). Although a reasonable jury could have found Delashmit guilty of indecent exposure, no reasonable jury could have found him not guilty of solicitation of a minor for sex. The eight-year-old victim testified that Delashmit offered her $50 to have sex with him. T. 343. Delashmit gave two confessions admitting that he offered the victim $50 to have sex with him. T. 361, 378, 404. No evidence was presented at trial to contradict the fact that Delashmit solicited a minor for sex. Therefore, in accordance with *McGowan*, Delashmit was not entitled to a lesser offense instruction.

In his final assignment of error, Delashmit claims that the trial court erred in preventing him from making a closing argument on reasonable doubt. In his brief, Delashmit quotes the portion of defense counsel's closing argument to which the State objected, but fails to include the final word from the trial court on the matter. Following the State's objection, the following exchange occurred between defense counsel and the trial court.

> MR. DANIELS: Objection to trying to define reasonable doubt to the jury, Your Honor.
>
> THE COURT: Yes, sir. You cannot define, that, Counsel. It's for the jury to determine. All right, you may proceed.
>
> MR. HELMERT: Your Honor, I --
>
> THE COURT: Go ahead, but you can't tell them what it is. There's no definition to prove as to what reasonable doubt is.
>
> MR. HELMERT: Your Honor, I'm not asking the Court to sanction what I'm -- I'm not asking the Court to instruct that. I'm asking to argue on behalf of my client.
>
> THE COURT: All right. Go ahead.

T. 444. A plain reading of the above exchange shows that defense counsel had convinced the trial court that his argument was proper, whether it was or not, and the trial court gave him the "go ahead." For whatever reason, defense counsel chose not to continue the line of argument in which he had been engaged prior to the objection.

Further, even had the trial court erred in any way by limiting the content of defense counsel's closing argument, any such error would be harmless in light of the overwhelming proof of guilt, as even errors of constitutional proportion may be harmless where evidence of guilt is overwhelming. *Debrow v. State*, 972 So.2d 550, 554 (¶15) (Miss. 2007) (citing *Thomas v. State*, 711 So.2d 867, 872

conviction and sentence.

Respectfully submitted,

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hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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