No. COA 22-803 DISTRICT 13A

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

)

v. ) From Columbus County

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TUCKER RECTOR )

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**DEFENDANT-APPELLANT’S BRIEF**

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**ISSUES PRESENTED**

 I. Whether all statements made by Mr. Rector after he was handcuffed should have been suppressed because they were obtained in violation of his rights to silence and counsel?

II. Whether the trial court erred or committed plain error in its jury instructions on the defense of voluntary intoxication?

III. Whether the trial court erred in failing to consider whether the sentence of life without parole is cruel or unusual punishment in Tucker Rector’s individual case?

**STATEMENT OF THE CASE**

In June 2020, Tucker Rector was indicted by the Columbus County grand jury for first-degree murder, and in December 2020 he was indicted for robbery with a dangerous weapon. (Rpp 3-5) The prosecutor declared the case non-capital. (Rp 6) Mr. Rector was tried by a jury during the September 27, 2021 Criminal Session of the Superior Court, before the Honorable James G. Bell. On October 1, 2021, the jury found Mr. Rector guilty of both charges. (Rpp 70-71) On the same day, Judge Bell sentenced Mr. Rector to life in prison without parole and 64-89 months for robbery, to run concurrently. (Rpp 74-77) Mr. Rector entered notice of appeal in open court. (Rp 78)

**STATEMENT OF GROUNDS FOR APPELLATE REVIEW**

Mr. Rector appeals from a final judgment of the Superior Court of Columbus County. N.C.G.S. §§ 7A-27(b), 15A-1444(a).

**STATEMENT OF FACTS**

 At age 23, Tucker Rector was addicted to drugs and suffered from additional mental health conditions including PTSD. (T4 pp 533-35) He was staying in a small work shed owned by his grandfather, Sammie Jacobs. He did various construction and repair jobs and spent what he earned on drugs. (T4 pp 480-81, 528-30, 549) Earl Davis lived next door by himself. He was 82. (T2 pp 209-10) Tucker did odd jobs for Mr. Davis, helping him with his mobile home and around his property. (T4 p 482)

 On March 16, 2020, Mr. Davis’ family, who lived out of town, became concerned because he had not answered phone calls. They drove to his house that morning and arrived after 11:00 a.m. (T2 pp 216-17, 240) When they arrived, he wasn’t home, but they saw blood and felt something was wrong. They called 911. They saw Sammie and Tucker next door and went over to ask if they’d seen Mr. Davis. Tucker was behaving oddly. He was fidgety and talkative, rubbing his arms and legs, and standing very close to them. At one point he tried to comfort Mr. Davis’ granddaughter, who was crying, by rubbing her shoulders and back and saying he was sorry. She had to ask him to stop. (T2 pp 219-25, 241-44)

 Police arrived to investigate and found blood and body tissue inside a small shed just behind Mr. Davis’ back door. (T2 pp 225, 249-250) One of the officers who arrived, Sgt. Robert Creech, had known Tucker for years. He believed Tucker was generally a good kid. He knew Tucker had a drug problem. He had seen Tucker about a week earlier acting jumpy and nervous, making a lot of twitchy hand movements. Creech believed Tucker was high at that time. He had never known Tucker to be violent. He described Tucker’s behavior at the scene – Tucker offered to give fingerprints and a DNA sample and said he would do anything to help as long as he wasn’t considered a suspect. Creech found this comment odd and suspicious. (T2 pp 251-57)

 *Detective Rockenbach’s testimony*

 Lead Detective Paul Rockenbach responded to the scene at about 2:30 or 3:00 p.m. (T2 p 323) When he saw the amount of blood present he “knew … we were dealing with a homicide.” (T2 p 263) After being told of Tucker’s comments, Rockenbach asked Tucker to speak with him in the patrol car, and Tucker agreed. (T2 pp 268-69) Initially, Tucker denied any involvement or knowledge of what happened to Mr. Davis. Tucker said he had a drug problem, but that he was clean and taking Suboxone at that time. Following that interview, Tucker’s grandfather, Sammie, gave permission for officers to search the building where Tucker stayed. (T2 pp 270-75)

 Det. Rockenbach testified that, inside the house, they saw blood on a sheet and a pair of boots. Rockenbach moved everyone out of the building and handcuffed Tucker. Rockenbach testified the handcuffs were in part to hold Tucker because Rockenbach was “going to take him back to the office” for an interview. Rockenbach testified:

… I wanted to let him know that he was being detained because at this point in time me and him had to have a different conversation at our office, to sit down and actually kind of understand what’s going on here; why is there blood in your house? You know, I had questions.

(T2 pp 276-78, 325-26)

 Rockenbach escorted Tucker to his patrol car. Then, referring to the family of Earl Davis, Rockenbach said “something along the lines, ‘They need to find their grandfather. They need to know where his body is at.’” Tucker then agreed to take officers to the body and did so. This conversation was not recorded. (T2 pp 325-26)

 Tucker directed officers to Earl Davis’ body, about 8-9 miles from his house, in the woods around Green Swamp, down a logging path. Logs were piled on top of the body. (T2 pp 287-88) Tucker made statements to officers as they drove and after they arrived.[[1]](#footnote-1) (T2 p 282)

 A few minutes after other officers arrived to process the scene at Green Swamp, Det. Rockenbach drove Tucker, still in handcuffs, directly to the Sheriff’s office, and placed him in an interview room. (T2 p 290) At about 6:30 p.m., Rockenbach read *Miranda* warnings and Tucker signed the waiver sheet. (T2 pp 292-94) Tucker was further interviewed for about 40 minutes. (State’s Exh. 8) Rockenbach testified that they went over the same information that Tucker had already told them: “we kind of went over the whole what we had done prior to getting to the interview because we want – went through steps to understand that, you know, he took me there, this is where he showed me the body was, and this is where he took the body to.” (T2 p 298)

 Det. Rockenbach said Tucker gave multiple versions of an encounter between himself and Earl Davis, parts of which “made absolutely no sense.” (T2 pp 296-98) The interrogation video shows Tucker answering questions and telling a contradictory, convoluted story. He said he went over to check on Earl that Sunday morning, that they argued about whether Earl had given Tucker a .22 gun, and that Earl fell. He said Earl was injured, twitching and unable to speak. Tucker said alternately that he shot Earl, that Earl shot himself and that he and Earl both were holding the gun, with various details changing. (State’s Exh. 8)

 Rockenbach testified Tucker showed “no signs” of impairment during the interview, nor during the interactions in the car, nor at the scene. He said Tucker was scared but “certainly in his right mind.” (T2 pp 294-96) The video shows Tucker speaking haltingly with long pauses, with markedly slow, slurred speech.

 *Other State’s evidence*

 The pathologist who conducted the autopsy testified Mr. Davis died of a gunshot wound to the head. He also had possible neck compression, superficial bruises and scrapes which probably occurred after death, and spinal column blunt force injuries that may have occurred in a struggle before death or in moving the body just after death. (T3 pp 441-44)

 A .22 handgun, which Mr. Davis’ family testified was his, was found in a recliner seat in Sammie’s building where Tucker stayed. A 20-gauge shot gun was found under Tucker’s mattress, along with an empty Valium bottle with a partially legible label with a name beginning ‘Ed’. (T2 pp 309-10) Mr. Davis’ daughter recognized the guns as her dad’s. (T3 pp 409-10)

 The State introduced a jail phone call between Tucker and his grandfather recorded May 12, 2020. (T2 pp 316, 319; State’s Exh. 11) In the recording, Sammie was trying to reassure Tucker and they were discussing Bible figures who had made terrible mistakes. Tucker was regretful. He said, “I just done a lot of things in my life with anger… that’s what got me here was just that flip decision, that anger, that flipped switch.” (Exh. 11 at 3:20)[[2]](#footnote-2)

 *Voluntary intoxication evidence*

 Tucker’s family testified about his drug use and history. His mother testified that Tucker’s drug problem started when he was about 14 years old. She believed his drug use was his response to growing up watching her be abused by his father. This testimony was interrupted by the prosecutor. The court sustained the objection, cutting short further evidence of Tucker’s drug history. Tucker’s mother was allowed only to say he used drugs in response to emotional difficulty and he had received some treatment. (T4 pp 510-14)

Tucker’s grandfather testified he knew Tucker had a drug problem and had been in rehab, both inpatient and outpatient. He had never seen Tucker be violent. (T4 pp 478-80) On Saturday, March 14, there was a family birthday party. Tucker was there and seemed to be on drugs – he was jittery. On the evening of Sunday, March 15, Sammie picked up Tucker and brought him to Sammie’s house. Tucker was “definitely out of it that night.” He was stumbling, and he dropped dishes two or three times. Sammie asked Tucker if he was all right and Tucker said he was ‘hurting.’ Sammie dropped Tucker home around 9:00 p.m. (T4 pp 486-88) Sammie testified after watching the interrogation video that Tucker “was so inebriated in that interview until you wouldn’t – he was so spaced out in that interview until – he wasn’t making any sense of anything.” (T4 p 500)

 Tucker testified that, on the weekend of March 14-15, 2020, he took meth, heroin, crack and Xanax. In total he spent $300 on drugs that weekend, everything he had. (T4 pp 526-29) He testified that for him, the high from meth usually lasted about 24 hours. He used meth on Friday, Saturday and Sunday. He testified he used heroin on Saturday, and that high usually lasted six to eight hours. He said he smoked crack on Sunday. That high lasted only about 30 minutes. He said that mixing drugs together is called a “speed ball” and that the mixture intensifies the high. (T4 pp 530-33)

 Tucker testified that he had prescriptions for Suboxone for heroin withdrawal, Vyvanse for ADHD, Seroquel for PTSD, and Zoloft for bipolar, schizophrenia and depression, but he had run out of all of it. (T4 pp 533-35)

He testified it took him 37 days after going to jail to detox from the drugs; he remembered being unable to eat solid food during that period. He came fully down from the high in jail, probably two or three days after the interview. (T4 pp 536, 544) He testified he had never seen himself high until he watched the video of himself being interviewed by Det. Rockenbach. He testified he was high during the interview and had no memory of it. (T4 pp 537-38, 543)

 Tucker admitted to killing Earl Davis but did not remember doing it. (T4 p 539) He remembered only bits and pieces – driving Earl’s truck, but not specifically where he was driving to or when it was that he was driving. He did not remember any kind of altercation. (T4 pp 543, 546, 548) He remembered taking Mr. Davis’ Valium from his house and then taking the pills, but that happened before this weekend. (T4 p 551) He said he “must have taken” the shotgun but did not remember going in the house. (T4 p 544)

 *Motion to suppress*

 Mid-trial, the defense moved to suppress the “discussion and related exhibits with Mr. Rockenbach at the grave site and everything else subsequent to what he talked about.” (T2 p 282) The trial court summarily denied the motion. (T2 p 286) After further testimony, the defense renewed the motion to suppress all of the statements made after the initial failure to give *Miranda* warnings in the police car. (T2 pp 327-29) The trial court again denied the motion, making no oral findings or conclusions. (T2 pp 327-31) Two days later, the trial court filed a written order concluding:

1. That the Defendant was in custody at the time he led Detective Paul Rockenbach to the body of Edward Earl Davis.
2. That the State did not illicit [sic] any response to custodial interrogation through Detective Paul Rockenbach.
3. That the body and all derivative evidence from its discovery would have been inevitably discovered based on the interview of the Defendant after waiving his rights under Miranda.

(Rp 23) The trial court made no findings about several relevant factors that inform whether the *Miranda* waiver was knowing and intelligent; it did not address Tucker’s age or experience, his intoxication or impairment, nor most of the circumstances surrounding the interactions between Tucker and Det. Rockenbach. (Rpp 22-23)

 *Charge conference and jury instructions*

 Tucker’s defense was that impairment from using multiple drugs prevented him from forming the specific intent to commit the offenses. (T5 pp 603-12) He requested an instruction on voluntary intoxication. (T4 p 567) The trial court did not give that instruction as to robbery with a dangerous weapon, which was the offense underlying felony murder. (Rpp 56-58; T5 pp 625-27) The trial court did give an instruction on voluntary intoxication as to the murder charge. That instruction used the word “drugged” which could have been misleading, as explained further below. Defense counsel twice asked for an explanatory instruction to clear up the misleading language, but the court did not give it. (Rpp 58-66; T4 pp 584-86; T5 pp 627-35, 637)

 *Sentence*

 Prior to trial, the defense filed a motion challenging the imposition of a mandatory life-without-parole sentence under the federal and state constitutions. The motion presented research showing people’s brains are not fully formed until age 25 and argued that evolving standards of decency require consideration of the possibility of parole for young adult offenders. The motion requested a hearing and opportunity to present evidence should Tucker be convicted of first-degree murder. (Rpp 35-50)

 After the conviction, counsel renewed the motion and asked the court to consider the motion in spite of the mandatory life sentence imposed by our statutes. The trial court did not acknowledge or address the motion, other than to impose a sentence of life-without-parole. (T5 pp 660-62)

**ARGUMENT**

I. ALL STATEMENTS MADE BY MR. RECTOR AFTER HE WAS HANDCUFFED SHOULD HAVE BEEN SUPPRESSED BECAUSE THEY WERE OBTAINED IN VIOLATION OF HIS RIGHTS TO SILENCE AND COUNSEL.

 After seeing what looked like blood in the house where Tucker Rector stayed, Detective Rockenbach handcuffed Tucker and told him he was going to be interviewed in relation to the death of Mr. Davis. Mr. Davis’ family was present. Rockenbach told Tucker that the family was upset and needed to know where the body was. Tucker then agreed to show officers the body. Taking Tucker’s directions, officers drove where he told them to go, then followed him through the woods to the body. Along the way, Tucker answered questions about what happened. From there, officers took Tucker to the Sheriff’s office and went over the same information in a recorded statement, after giving *Miranda* warnings.

 All statements from the time Tucker was handcuffed and asked where the body was should have been suppressed. His initial statements were obtained in violation of *Miranda*, and his subsequent waiver of *Miranda* rights was not knowing and intelligent under the totality of circumstances. New trial is required. U.S. Const. amend. V; *Miranda v. Arizona*, 384 U.S. 436 (1966); *Missouri v. Seibert*, 542 U.S. 600 (2004); *State v. Johnson*, 371 N.C. 870, 875 (2018).

 *Standard of review*

 Denial of a motion to suppress evidence is reviewed to determine whether competent evidence supports the trial court’s findings of fact and whether the findings of fact support the conclusions of law. *State v. Biber*, 365 N.C. 162, 167-68 (2011). Conclusions of law must correctly apply relevant legal principles to the facts found and are reviewed de novo on appeal. *Id*. at 161. Determinations regarding the voluntariness of a defendant’s waiver of his *Miranda* rights are conclusions of law reviewed de novo. *State v. Knight*, 369 N.C. 640, 646 (2017).

1. Applicable law.

 *Miranda rights*

 The Fifth Amendment to the United States Constitution guarantees that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. The privilege against self-incrimination is “fulfilled only when the person is guaranteed the right ‘to remain silent unless he chooses to speak in the unfettered exercise of his own will.’” *Miranda*, 384 U.S. at 460 (quoting *Malloy v. Hogan*, 378 U.S. 1, 8 (1964)). Accordingly, the State is prohibited from using any statements resulting from a custodial interrogation of a defendant unless, prior to questioning, the defendant was advised of his right to remain silent; that any statement could be introduced as evidence against him; that he had the right to have counsel present during questioning; and that, if he could not afford an attorney, one would be appointed for him. *State v. Simpson*, 314 N.C. 359, 367 (1985) (citing *Miranda*, 384 U.S. at 444)).

 Custodial interrogation is defined as “questioning initiated by law enforcement officers after a person has been taken into custody or deprived of his freedom of action in any significant way.” *Miranda*, 384 U.S. at 444. Whether a person is in custody is determined objectively under all the circumstances; application of handcuffs that restrict freedom of movement is one such objective measure. *State v. Buchanan*, 353 N.C. 332, 339 (2001).

 While direct questioning by law enforcement is certainly interrogation, the definition is more broad: *Miranda* applies “whenever a person in custody is subjected to either express questioning or its functional equivalent.” *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). Interrogation “includes ‘any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.’” *State v. Golphin*, 352 N.C. 364, 406 (2000) (quoting *Innis*, 446 U.S. at 301).

 A defendant may waive his *Miranda* rights. The State bears the burden of showing that the waiver was knowingly, intelligently, and voluntarily made. *Id*.

A court’s waiver inquiry has two distinct dimensions. First, a court must determine whether the waiver was ‘voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception.’ Second, a court must determine that the waiver was knowing and intelligent – that is, that it was ‘made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.’

*State v. Knight*, 369 N.C. 640, 643-44 (2017) (citing *Moran v. Burbine*, 475 U.S. 412, 421 (1986)).

 Whether a waiver is knowingly and intelligently made depends on the specific facts and circumstances of each case. Factors to be considered include: “(1) a defendant’s familiarity with the criminal justice system, (2) the length of a defendant’s interrogation, (3) the amount of time a defendant was without sleep, (4) whether a defendant was held incommunicado, (5) whether threats of violence were made against a defendant, (6) whether promises were made to a defendant to obtain a statement, (7) whether a defendant was deprived of food, and (8) a defendant’s age and mental condition.” *State v. Kemmerlin*, 356 N.C. 446, 458 (2002). “The presence or absence of any one of these factors is not determinative.” *Id*.

 *Question first, warn later*

 Officers may not intentionally obtain a confession without *Miranda* warnings and then offer post-confession *Miranda* warnings and reinterview the accused on the same matter. Confessions obtained through such a method are inadmissible. *Missouri v. Seibert*, 542 U.S. 600, 604 (2004). This question-first-and-warn-later technique circumvents *Miranda.*  *Id*. at 618.

 The question-first technique results in a suspect being coerced into self-incrimination without understanding he had the right not to speak. *Johnson*, 371 N.C. at 875. “*Miranda* warnings must be given in a manner that meaningfully apprises the interviewee of his choice to give an admissible statement or stop talking before he is taken into custody and questioned.” *Id.*

When a defendant asserts that his or her *Miranda* rights have been violated as a result of successive rounds of custodial interrogation, some portion of which was unwarned, the question for the court is whether the warnings effectively apprised him of his rights and whether he made a voluntary, knowing, and intelligent waiver of his right to remain silent. Whether a defendant made prewarning inculpatory statements may be a factor that affects that analysis, but it does not change the nature of the question to be asked.

*Id.*, 371 N.C. at 876-77.

 *Preservation*

 Trial counsel moved to suppress all of Tucker’s statements because he should have received *Miranda* warnings when he was handcuffed and questioned about the body. (T2 pp 281-82) Counsel argued the fact that Tucker later got *Miranda* warnings did not resolve the problem, asserting that Tucker did not have the opportunity to hear and fully appreciate his *Miranda* rights at the time that he made initial statements. (T2 p 284) Counsel summed up the problem of *Miranda* warnings that come too late – “sign this waiver and tell me what you already told me.” (T2 p 286)

 Counsel later renewed its motion to suppress, noting additional evidence that Tucker was impaired and that the detective had used psychological coercion. Counsel argued that everything said after the handcuffs and the unwarned statement was fruit of the poisonous tree. (T2 pp 327-31) The *Miranda/Seibert* issue is therefore preserved.

1. Mr. Rector’s statements must be suppressed because they were obtained without a knowing, intelligent waiver of his *Miranda* rights.

 The full circumstances here show that Tucker’s waiver of his *Miranda* rights was invalid. Once he was handcuffed, Tucker was in custody, as found by the trial court. (Rp 22, finding 9, conclusion 1) Tucker was not given *Miranda* warnings until after he had shown officers where the body was located. (Rp 22, findings 11-12) The State apparently understood that the unwarned statements were inadmissible and did not offer them into evidence. (T2 p 282) Everything Tucker said to officers before being warned, including giving them directions to the body, should have been excluded. *Miranda*, 384 U.S. at 444; *Simpson*, 314 N.C. at 367.

 Further, the statements Tucker made after the *Miranda* warnings were inadmissible because the *Miranda* waiver was not knowing and intelligent under the totality of circumstances, explained further below. *Knight,* 369 N.C. at 643.

 *Impairment and inexperience*

 Intoxication is a mental condition that affects whether a waiver is knowing and voluntary. *State v. Sisk*, 2022-NCCOA-483, ¶ 19 (citing *Knight*, 369 N.C. at 650); *Kemmerlin*, 356 N.C. at 458 (mental condition of defendant is a factor in evaluating knowing waiver); *State v. McKoy*, 323 N.C. 1, 22 (1988) (“intoxication is a circumstance critical to the issue of voluntariness.”) Tucker’s speech and manner in the video display impairment. Although officers generally testified they did not think Tucker was impaired, their opinions do not erase the objective evidence of the recorded interrogation. Tucker’s slow, slurred, halting speech strongly suggests impairment.[[3]](#footnote-3) Sgt. Creech, who had known Tucker for years, testified he knew Tucker had a drug problem. Creech had seen Tucker about a week earlier acting jumpy and nervous, making a lot of twitchy hand movements. Creech believed Tucker was high at that time. Creech also noted that Tucker’s comments at the scene on March 16 were odd. (T2 pp 251-57)

 Indeed, Tucker’s words and behavior support impairment. Mr. Davis’ family said Tucker was behaving oddly, and officers said Tucker made unusual comments about submitting to a DNA test if they would not consider him a suspect. In the recorded interrogation, Tucker told rambling, changing stories and denied things he had just said. As Det. Rockenbach testified, at least one story Tucker told “made absolutely no sense.” (T2 pp 297) Importantly, as argued by counsel, the interrogation recording began three or four hours after officers were first called to the scene; Tucker was likely even more impaired when he first spoke to Det. Rockenbach and revealed incriminating information. (T2 p 330)

 In addition to his impairment, Tucker was a young man and his only prior record was a misdemeanor DWI. (Rpp 72-73 ) Relative inexperience with the law surrounding the rights to silence and counsel is a factor weighing against knowing and intelligent waiver. *Kemmerlin*, 356 N.C. at 458. Tucker was also in custody and handcuffed throughout the time he gave statements. Being in custody is a strong factor weighing against voluntariness. *Miranda*, 384 U.S. at 478 (“when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized.”) Being in handcuffs by itself does not invalidate waiver, but it adds to the coercive nature of the interrogation.

 One additional factor shown on the video supports an unknowing waiver: Det. Rockenbach reads the *Miranda* warnings at a remarkably fast speed. (State’s Exh. 8, at about 2:00 into the recording) Tucker’s slurred, confusing and halting speech demonstrate slow mental processing. That observable condition, combined with his inexperience, increases the likelihood that he did not waive his rights to silence and counsel “with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” *Knight*, 369 N.C. at 643-44.

 *Question first, warn later*

 Det. Rockenbach’s custodial interrogation in the car, without *Miranda* warnings, tainted the later custodial interrogation at the sheriff’s office. “The object of question-first is to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed.” *Seibert*, 542 U.S. at 612. Our courts have articulated the question under review in this context is whether, “under the totality of the circumstances, the warnings so given could function effectively to apprise the suspect that he had a real choice to either give an admissible statement or stop talking.” *Johnson*, 371 N.C. at 876.

 The belated *Miranda* warnings to Tucker did not “meaningfully apprise” him of his “choice to give an admissible statement or stop talking before he [was] taken into custody and questioned.” *Johnson*, 371 N.C. at 875. By the time Tucker was read his *Miranda* warnings, he had not only confessed to an encounter with Mr. Davis but also led officers to the body. At that point, it is unreasonable to infer that Tucker understood he could refuse to talk further. And it is unreasonable to infer that he understood his prior statements would not have been admissible due to the *Miranda* violation.  *See Seibert*, 542 U.S. at 613 (“[T]elling a suspect that ‘anything you say can and will be used against you,’ without expressly excepting the statement just given, could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail.”). As far as Tucker knew, it was too late to take back what he’d said. He did not knowingly and intelligently choose whether to speak with the detective. As counsel aptly stated, Tucker was told: “sign this waiver and tell me what you already told me.” (T2 p 286)

 *Emotional coercion*

 Another factor in deciding whether a waiver was a free and deliberate choice is the use of coercion. *Knight*, 369 N.C. at 643. An officer’s comments exerting psychological pressure is one form of coercion. *See Brewer v. Williams*, 430 U.S. 387 (1977) (holding officer’s comments about a victim’s need for a “Christian burial” were “tantamount to interrogation” in context of interrogation after invoking the right to counsel). By discussing the child-victim’s right to a decent Christian burial, the detective in *Brewer* “deliberately and designedly set out to elicit information from [the defendant] just as surely as – and perhaps more effectively than – if he had formally interrogated him.” *Id*. at 399-400. By analogy, it was equally coercive here when Det. Rockenbach told Tucker he needed to tell where the body was, for Mr. Davis’ family. According to Det. Rockenbach’s own uncontroverted testimony, the question about locating the body for the family is what led Tucker to agree to reveal his involvement in the case. Even in the recorded interview hours later, Tucker tearfully referenced the need for Mr. Davis to have a proper burial multiple times during his recorded interview. (See State’s Exh. 8, approx. 25:50 into the recording).

 Under the totality of the circumstances, Tucker Rector did not knowingly and intelligently waive his rights to silence and counsel. All of his statements after he was handcuffed should have been suppressed.

1. The trial court’s findings and conclusions were inadequate and its ultimate ruling incorrect and unsupported.

 The trial court did not address many of the necessary legal questions before it, nor did the court make necessary findings of fact relevant to the issues. Crucially, the trial court did not make factual findings about the conversation between Det. Rockenbach and Tucker Rector after he was handcuffed. The court’s fact findings are not materially incorrect, so far as they go, but the findings skip the key interaction, which would logically have come between paragraphs 9 and 10:

 9. That Detective Paul Rockenbach placed the Defendant into handcuffs at the time that the blood was found.

 10. That the Defendant then lead [sic] Detective Rockenbach to the body of Edward Earl Davis several miles from his residence.

(Rp 22) There was evidence from which the trial court could have made the relevant findings. Det. Rockenbach testified about his conversation that elicited Tucker’s confession. Rockenbach testified he told Tucker he was “going to take him back to the office” for an interview; that Tucker was being detained; and that the detective had questions about the blood in Tucker’s house. (T2 pp 276-78, 325-26) And Rockenbach testified he told Tucker “something along the lines” that the family “need to find their grandfather. They need to know where his body is at.” (T2 pp 325-26) The trial court’s order ignored this evidence.

 Neither did the trial court make findings about relevant factors that inform whether the *Miranda* waiver was knowing and intelligent. It did not address Tucker’s age or experience, his intoxication or impairment, nor other circumstances surrounding the interactions between Tucker and Det. Rockenbach. (Rpp 22-23)

 The trial court’s first legal conclusion, that Mr. Rector was in custody, was correct and supported. (Rp 22) Its second and third conclusions were inapposite and confusing:

 2. That the State did not illicit [sic] any response to custodial interrogation through Detective Paul Rockenbach.

 3. That the body and all derivative evidence from its discovery would have been inevitably discovered based on the interview of the Defendant after waiving his rights under *Miranda*.

(Rp 23) These conclusions simply do not address the questions at hand.

 This Court may draw its own inferences and find facts based on the largely uncontroverted evidence before it; reverse the trial court’s denial of the motion to suppress both the pre- and post-*Miranda* statements; and remand for a new trial. Alternatively, this Court may remand for a hearing and detailed findings on the motion to suppress. *See, State v. Santillan*, 259 N.C. App. 394, 400 (2018) (remanding for findings); *State v. Ingram*, 242 N.C. App. 173, 184 (2015) (same).

 Finally, the admission of Tucker’s statements was not harmless. Constitutional error is presumed prejudicial, and to overcome that presumption the State must show the error was harmless beyond a reasonable doubt. *See State v. Autry*, 321 N.C. 392, 399-400 (1988). If none of Tucker’s statements were admitted at trial, the State would have only circumstantial evidence of his involvement. The State presented no eyewitnesses. The State presented no physical evidence showing Tucker’s DNA at the scene or on the shotgun. A videotaped confession is powerful evidence for a jury. This jury, after having deliberated for two hours, asked to watch the video. After seeing it, they reached a verdict in 22 minutes. (T5 pp 641-45) The absence of any statement from Tucker would have changed the balance of evidence and created more reason for doubt.

 Further, had the statements not been admitted, Tucker might have chosen not to testify. *See* *State v. McDaniel*, 274 N.C. 574, 579 (1968) (a defendant does not waive his objection to illegally-obtained confessions by later offering evidence addressing the same). The defense could have gone an entirely different direction. The State cannot show beyond a reasonable doubt a different result would not have occurred without the statements.

 United States citizens are guaranteed the right to remain silent unless they “choose to speak in the unfettered exercise of [their] own will.” *Miranda*. For the violation of his right to silence, and his right to counsel, Tucker Rector must receive a new trial, or, in the alternative, a remand for a full suppression hearing with thorough findings and conclusions.

II. THE TRIAL COURT ERRED AND COMMITTED PLAIN ERROR IN ITS JURY INSTRUCTIONS ON THE DEFENSE OF VOLUNTARY INTOXICATION.

Mr. Rector’s entire defense was that impairment from using multiple drugs prevented him from forming the specific intent to commit the offenses. He requested an instruction on voluntary intoxication. The trial court did not give that instruction as to robbery with a dangerous weapon, which was the offense underlying felony murder. The trial court did give an instruction on voluntary intoxication as to the murder charge, but the instruction was misleading. Defense counsel twice asked for an explanatory instruction to clear up the misleading language, but the court did not give it. These instructional errors were prejudicial and require a new trial.

*Standard of review*

 A trial court’s decisions regarding jury instructions are reviewed de novo. *State v. Osorio,* 196 N.C. App. 458, 466 (2009). In de novo review, the appellate court considers the matter anew and freely substitutes its own judgment for that of the lower court. *State v. Williams,* 362 N.C. 628 (2008).

Unpreserved instruction errors are reviewed for plain error. *State v. Lawrence*, 365 N.C. 506, 518 (2012).

1. Applicable law.

 The primary purpose of jury instructions is “to give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict.” *State v. Williams*, 280 N.C. 132, 136 (1971). “This Court reviews jury instructions contextually and in their entirety.” “The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed.” *State v. Cornell*, 222 N.C. App. 184, 190-91 (2012) (cleaned up).

 Failure to instruct on all substantive or material features of a case is error. [*State v. Ward*, 300 N.C. 150, 155 (1980)](https://advance.lexis.com/search/?pdmfid=1000516&crid=1a50f0a9-9b56-45be-9eff-e00e221181a5&pdsearchterms=167+n.c.+app.+710&pdstartin=hlct%3A1%3A1&pdpsf=jur%3A1%3A56&ecomp=qk3g&prid=35454a4f-b531-412d-8ca1-8ed7e5d2e3fe). Any defense raised by the evidence is deemed a substantial feature of the case and requires an instruction. [*State v. Hudgins*, 167 N.C. App. 705, 708 (2005)](https://advance.lexis.com/search/?pdmfid=1000516&crid=1a50f0a9-9b56-45be-9eff-e00e221181a5&pdsearchterms=167+n.c.+app.+710&pdstartin=hlct%3A1%3A1&pdpsf=jur%3A1%3A56&ecomp=qk3g&prid=35454a4f-b531-412d-8ca1-8ed7e5d2e3fe). A defendant is entitled to instructions on voluntary intoxication when there is substantial evidence that the defendant was so intoxicated that he or she could not form the requisite intent. *State v. Mash*, 323 N.C. 339, 346 (1988). “When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence in the light most favorable to defendant.” *Id*. at 348.

1. The trial court erred or plainly erred in failing to instruct on voluntary intoxication for the specific intent crime of robbery.

 *Preservation*

 During the charge conference, defense counsel requested pattern jury instruction 305.10, the general instruction for voluntary intoxication. The trial court said instead it would give pattern 305.11, voluntary intoxication for premeditated murder.[[4]](#footnote-4) Defense counsel responded, “305.11 then, I apologize.” (T4 pp 567-69) There was no other discussion about giving the voluntary intoxication instruction for robbery, or for felony murder based on robbery.

 Counsel’s request was adequate to put the trial court on notice that a general instruction on voluntary intoxication was appropriate, and the error is preserved. *State v. Hooper*, 2022-NCSC-114, ¶ 26. To show prejudice from this error, Mr. Rector must show only a reasonable possibility the jury would have reached a different verdict. N.C.G.S. § 15A-1443(a). In the alternative, the failure to give the instruction was plain error, requiring a showing that the jury would probably have reached a different verdict. *Lawrence*, 365 N.C. at 518.

 Premeditated murder is a specific intent crime. Robbery with a dangerous weapon is likewise a specific intent crime. The felony murder conviction in this case relied on robbery as the sole underlying offense. (Rpp 61-62; T5 pp 630-31) Because there was evidence to support it, a voluntary intoxication instruction should have been given in conjunction with robbery as a stand-alone offense and as the sole basis for felony murder. *See State v. Golden*, 143 N.C. App. 426, 430 (2001).

 The trial court correctly found the evidence supported voluntary intoxication. Tucker testified to his weekend-long, multi-drug ingestion. He testified he barely remembered most of the weekend, was still high for 2-3 days afterward, and went through detox for over a month in jail. He testified to a long history of addiction. His family corroborated this history and described his severe impairment on the evening before the shooting. Under *Golden* and general principles requiring instruction on a supported defense, the trial court was required to give a voluntary intoxication instruction for robbery, and by extension for felony murder, but the trial court failed to do so. (Rpp 56-66; T5 pp 625-35)

 The error was prejudicial. The case for robbery was weaker than the case for murder. While the jury might have drawn inferences leading to a conclusion that a robbery occurred, the evidence also fits with a sudden argument between neighbors, rather than a planned robbery. The guns and the Valium bottle were the only items potentially taken at the time of the shooting. Tucker testified he took the Valium bottle on some prior day. And removing the guns from the scene after the fact is different than planning to steal them. There is no evidence Tucker brought a gun. With Tucker’s severe drug haze added to the mix as the jury considered its verdict, it is both possible and probable the jury would have had doubt about a *specific intent* to commit robbery with a dangerous weapon. Making a decision to do some act is not the same as forming specific intent: “The ability to choose is not necessarily inconsistent with a diminished capacity defense in that the mere decision to commit an act does not satisfy the test for specific intent.” *State v. Roache*, 358 N.C. 243, 282 (2004); *see also State v. Keel*, 333 N.C. 52, 58 (1992) (holding that “the State must show more than an intentional act by the defendant” in order to prove specific intent).

 Accordingly, there is a reasonable possibility – and under plain error, it is probable – that the jury would have been unable to reach a verdict or acquitted Tucker on this charge. This is particularly true in light of the flaw in the voluntary intoxication instruction argued in Section C below. A different result on the robbery verdict would have carried over to the theory of felony murder. This error requires a new trial on both robbery and murder on the theory of felony murder.

1. The voluntary intoxication instruction given with the premeditated murder charge was incorrect and misleading.

 *Instructions and preservation*

 The pattern jury instruction provides options for how to describe a defendant’s diminished intent as follows:

You may find there is evidence which tends to show that the defendant was [intoxicated] [drugged] [lacked mental capacity] at the time of the acts alleged in this case.

…

[I]f you find that the defendant [was intoxicated] [was drugged] [lacked mental capacity], you should consider whether this condition affected the defendant’s ability to formulate the specific intent which is required for conviction of first degree murder….

(See App. 1-2) During the charge conference, defense counsel and the prosecutor first asked the court to use the term “intoxication.” Defense counsel thought the term “drugged” sounded like someone else drugged the defendant. The prosecutor agreed with this point. But, after further discussion, defense counsel agreed the court could use the term “drugged” as in the pattern, so long as the court clarified for the jury what “drugged” meant. (T4 pp 584-86)

In its charge to the jury, the court fully instructed on all aspects of first- and second-degree murder, including premeditated murder and felony murder, and including mandates for those offenses, before ever mentioning the voluntary intoxication defense.[[5]](#footnote-5) (Rpp 58-65; T5 pp 627-34)

After completing the instruction on all murder elements, the trial court then instructed on intent, and in the course of that instruction said the following:

Definition of intent. Intent is a mental attitude seldom provable by direct evidence. It is most -- it must ordinarily be proved by circumstances from which it may be inferred. You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw therefrom.

All right. You may find there is evidence that tends to show that the defendant was drugged at the time of the acts alleged in this case. Generally, a voluntary drug condition is not a legal excuse for a crime. However, if you find the defendant was drugged, you should consider whether this condition affected the defendant’s ability to formulate the specific intent which is required for a conviction of first-degree murder. In order for you to find the defendant guilty of first-degree murder, you must find beyond a reasonable doubt that the defendant killed the deceased with malice and in execution of an actual specific intent to kill formed after premeditation and deliberation. If that was a result of a drug condition, the defendant did not have the specific intent to kill the deceased formed after premeditation and deliberation, the defendant is not guilty of first-degree murder.

Therefore, I charge you that if upon considering the evidence with respect to the defendant’s drug condition you have a reasonable doubt as to whether the defendant formulated the specific intent required for conviction of first-degree murder you will not return a verdict of guilty of first-degree murder.

(Rpp 65-66; T5 pp 634-35)

 At the close of instructions, defense counsel again asked: “Can we just say something to the jury just for clarification that ‘drugged’ means that if he took drugs and not somebody drugged him?” The prosecutor objected and felt the pattern was sufficient. The trial court agreed, and defense counsel responded, “Okay. That’s fine.” (T5 p 637)

 Counsel’s request to clarify the definition of “drugged” was sufficient to preserve the instruction errors. *Hooper*, 2022-NCSC-114, ¶26. To show prejudice from this error, Mr. Rector must show only a reasonable possibility the jury would have reached a different verdict. N.C.G.S. § 15A-1443(a). In the alternative, the failure to give the instruction was plain error, requiring a showing that the jury would probably have reached a different verdict. *Lawrence*, 365 N.C. at 518.

The terms “drug condition” and “drugged” could have been misunderstood by the jury. In plain language, “drug condition” could suggest a generalized addiction to drugs, as opposed to a specific occurrence of drug use that leads to inability to form specific intent to do a particular act. And in plain language, being “drugged” suggests that the person was given drugs by someone else, or that the person was involuntarily drugged. If any juror was misled or misunderstood the instructions in these or other ways, then a new is trial required.

 The fact that the pattern instruction lists “drugged” as an option does not excuse the error. A pattern instruction is not always sufficient, and the existence of a pattern instruction should not be the end of the analysis. The pattern does not cover every potential point of law arising from every potential set of circumstances. *See State v. Ferebee,* 137 N.C. App. 710, 714 (2000) (“pattern instructions, which have neither the force nor effect of the law, may be erroneous and need alteration to conform with the law.”) Here, defense counsel, and even the prosecutor, alerted the trial court that the jury could be misled by the pattern.

It is both possible and probable that the jury did not clearly understand voluntary intoxication in the context of this case and that it was misled by the terms “drugged” and “drug condition.” They would likely have failed to agree or imposed a lesser verdict had the jury fully understood that Tucker’s impairment from a large quantity of drugs could be considered in deciding whether he was able to form the specific intent to commit premeditated murder (or, as in Section B above, to commit robbery with a dangerous weapon, had the instruction been given there.)

Regarding the murder charge, the evidence supported a lack of intent to kill Mr. Davis. Tucker had no history of violence. He had a relationship with Earl Davis. Tucker and his family put on convincing evidence of his serious drug addiction. The objective evidence showed he was under the influence of impairing substances. He appeared quite impaired on the video in his manner, speech, and in the sometimes nonsensical content of his words. His actions after the shooting also supported impairment. He apparently attempted to clean up but did a pathetic job; officers saw immediately there had been a death. Instead of running away or hiding, he stayed at the scene, made inappropriate comments, and made himself a suspect instantly by asking officers not to consider him a suspect.

The evidence of impairment was strong. The jury could have found that this encounter began with an argument, and that Tucker reacted suddenly and violently, rather than with full deliberation and specific intent to kill. Accordingly, Mr. Rector is entitled to a new trial decided by an accurately-instructed jury.

III. THE TRIAL COURT ERRED IN FAILING TO CONSIDER WHETHER THE SENTENCE OF LIFE WITHOUT PAROLE IS CRUEL OR UNUSUAL PUNISHMENT IN TUCKER RECTOR’S INDIVIDUAL CASE.

*Standard of review*

Constitutional issues are reviewed de novo. *State v. Ramseur*, 374 N.C. 658, 665 (2020).

Individual defendants may raise as-applied challenges to extreme sentences. *Jones v. Mississippi*, 141 S.Ct. 1307, 1337 n.15 (2021) (recognizing possibility of an “as-applied Eighth Amendment claim of disproportionality”); *State v. Kelliher*, 2022-NCSC-77, ¶ 103 (Newby, C.J., dissenting) (recognizing as-applied challenges to sentencing statutes). North Carolina’s statute on sentencing for first-degree murder committed by people 18 and older allows only one option: life without the possibility of parole. N.C.G.S. § 14-17.

Prior to trial, the defense filed a motion challenging under the federal and state constitutions the life-without-parole sentence mandated by N.C.G.S. § 14-17. The motion cited developmental research showing that human brains are not fully developed until age 25 and argued that evolving standards of decency require consideration of the possibility of parole for offenders up to age 25. The motion requested a hearing and opportunity to present evidence in the event of a first-degree murder conviction. (Rpp 35-50)

After the verdict, counsel renewed the motion and asked the court to consider the motion in spite of the mandatory life sentence imposed by our statutes. (T5 p 660) The trial court did not acknowledge or address the motion, other than to impose a sentence of life-without-parole. (T5 pp 660-62)

Offenders under age 18 are precluded from receiving mandatory life without parole under the federal and state constitutions. *Miller v. Alabama*, 567 U.S. 460 (2012); *Montgomery v. Louisiana,* 577 U.S. 190 (2016); *State v.* *James,* 371 N.C. 77 (2018); *Kelliher*, 2022-NCSC-77. As argued in the pretrial motion, the reasoning behind prohibiting mandatory life sentences for offenders under age 18 logically applies to offenders up to age 25. (See Rpp 35-50)

Trial courts may consider as-applied constitutional challenges in the first instance. *See, e.g., State v. Packingham*, 368 N.C. 380 (2015), *reversed on other grounds*, 137 S.Ct. 1730, 198 L.Ed.2d 273 (2017) (trial court made initial ruling on as-applied challenge, including findings on relevant factors); *State v. Britt*, 363 N.C. 546 (2009) (as-applied challenge to firearm possession statute, initially raised and ruled upon in trial court); *Baysden v. State*, 217 N.C. App. 20 (2011) (same).

Imposing mandatory life in prison upon Mr. Rector, meaning that he could spend another five or six or seven decades in prison with no chance of release, is cruel and/or unusual punishment in violation of the Eighth Amendment and Article I, Section 27 of the North Carolina Constitution. He asks this Court to remand for a full hearing on his as-applied constitutional challenge to the imposition of this mandatory sentence, at which he can present evidence of individual factors mitigating his culpability and demonstrating his capacity for change.

**CONCLUSION**

For the *Miranda* violation, Mr. Rector is entitled to a new trial, or a remand for findings after a suppression hearing. For the errors in jury instruction, Mr. Rector is entitled to a new trial. For the failure to consider his constitutional sentencing claim, Mr. Rector is entitled to remand for a hearing.

Respectfully submitted this 5th day of December, 2022.

Electronically submitted

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**CERTIFICATION OF WORD COUNT**

Pursuant to Appellate Rule 28(j), I certify that this Brief is set in proportional type, Century Schoolbook 13 point, and contains fewer than 8,750 words.

Electronically submitted

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**CERTIFICATE OF SERVICE**

I certify this Brief was served today by electronic mail to counsel of record at the following address:

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 This 5th day of December, 2022.

 Electronically submitted

 Kathryn L. VandenBerg

No. COA 22-803 DISTRICT 13A

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

)

v. ) From Columbus County

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TUCKER RECTOR )

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**APPENDIX**

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N.C. Pattern Jury Instruction 305.10 Appx. 1-2

N.C. Pattern Jury Instruction 305.11 Appx. 3-4

1. The State did not attempt to introduce these statements at trial. [↑](#footnote-ref-1)
2. The recording is not entirely clear – this is a transcription by undersigned counsel. [↑](#footnote-ref-2)
3. Later in the trial, Tucker Rector’s own testimony about the drugs he had taken and about his history of drug addiction, along with supporting testimony of his mother and grandfather, further evidenced impairment. (See pp 7-9, supra) [↑](#footnote-ref-3)
4. The pattern instructions are included in the Appendix, pp 1-4. [↑](#footnote-ref-4)
5. At the charge conference the court said it would cover the voluntary intoxication defense when it defined intent for first-degree murder, and that it would then repeat the intoxication instruction at the end of the murder instructions. (T4 p 584) That did not happen. [↑](#footnote-ref-5)