STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable Kristi Lea Harrington, Circuit Court Judge
Appellate Case No. 2012-213248

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

DENORRIS HALL,

APPELLANT.

INITIAL BRIEF OF RESPONDENT

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II. **The trial judge properly admitted Appellant's statement to police because there was no violation of Miranda or Seibert where Appellant was not in custody prior to the time the officers advised him of his rights.**

III. **The trial judge properly refused Appellant's request regarding closing argument where Appellant's equal protection challenge was without merit.**

STATEMENT OF THE CASE

Appellant was indicted in Charleston County in December 2010 for attempted murder and attempted armed robbery. On October 15-17, 2012, Appellant proceeded to trial before the Honorable Kristi Lea Harrington and a jury. The jury found Appellant guilty as indicted, and Judge Harrington sentenced Appellant to twenty years on each charge with the sentences to run concurrently. A timely notice of appeal was served and filed.

ARGUMENT

Background Facts

In the early morning hours of September 13, 2010, Appellant and his friend Herman Smith became bored and decided to go out. (R. p. 197-99). Before leaving, Smith grabbed his black .38 caliber revolver and Appellant grabbed his .25 caliber silver handgun. (R. p. 197-203; p. 214, lines 5-6). As the two men were walking over to the Three Dollar Lounge, Appellant spotted the victim walking alone near a credit union parking lot and decided to rob him. (R. p. 201-202). Appellant approached the victim at a fast pace, ahead of Smith, and asked the victim for a cigarette. (R. p. 110; p. 204). The victim gave Appellant a cigarette, but Appellant then grabbed the victim's hand, twisted it behind his back, and tried to "fish for" something in the victim's back pocket. (R. p. 110, lines 7-13). At that point the victim realized he was being "robbed or mugged" and he wrestled away. (R. p. 110, lines 13-15). As he wrestled away he noticed another man with Appellant. (R. p. 110, lines 15-16). This other man told Appellant to "shoot that bitch." (R. p. 112, lines 24-25; p. 206, lines). The victim ran across the street, but Appellant and Smith chased him and fired shots at the victim. (R. p. 110, lines 16-17; p. 206-207). In the process of being shot, the victim caught a glimpse of a silver handgun in Appellant's possession. (R. p. 110-12). The victim sustained two bullet wounds, one in his lung and one in his liver. (R. p. 113).

After being shot, the victim made it to the Three Dollar Lounge and convinced the security guard there to let the victim use his cell phone to call police. (R. p. 111, lines 2-5). The victim walked back over to his house since no one would give him a ride, and the police arrived shortly and an ambulance took the victim to the hospital. (R. p. 118-19).

The victim suffered a collapsed lung, and ten percent of his liver had to be removed due to the gunshot wounds. (R. p. 113). The victim stated he was in the hospital for about four weeks. (R. p. 131, lines 11-12).

Detective Evans of the North Charleston Police Department met with other officers at the crime scene around 7:00 am the next morning. (R. p. 281-82). Detective Evans noticed that the South Carolina Federal Credit Union had several exterior cameras, and he subsequently recovered videos of the crime from the security department at the credit union. (R. p. 282-84). However, officers were unable to identify the men in the video at that point. (R. p. 285). Officer Hill was able to recover two .25 caliber shell casings from the parking lot. Later, on September 16, Detective Patrick received a phone call that led to Appellant becoming a suspect. (R. p. 285, lines 17-24). Officers arranged an interview with Appellant and he ultimately provided a statement indicating he was present with Herman Smith when the crime occurred but did not participate in it. (R. p. 286-91). Herman Smith was arrested and ultimately decided to cooperate with police and testify at Appellant's trial. (R. p. 191-92; p. 270). At the time of Appellant's trial, Smith had already pled guilty to attempted murder and attempted armed robbery but was awaiting sentencing. (R. p. 191-92). Smith's trial testimony basically confirmed the victim's account of what happened and confirmed that although he was unsure whose bullets actually struck the victim, both he and Appellant were shooting at him. (See R. p. 199-261).

Videos from the credit union surveillance cameras were introduced at trial, as was Appellant's statement to police. (See State's Exhibits 2, 5, & 6). Appellant called three defense witnesses to testify on his behalf, including his mother, his godmother, and

Detective Patrick. Appellant elected not to testify at trial. (R. p. 431). After deliberating for about forty minutes, the jury returned guilty verdicts on both charges. (R. p. 495-97).

I. The trial judge properly denied Appellant's mistrial motion because there was no violation of Brady v. Maryland where evidence that the victim was able to make an in-court identification of Appellant was not favorable to Appellant, and where there was no suppression of documents or tangible evidence in violation of Rule 5, SCRCrimP.

Relevant Facts

After the victim testified about the relevant facts of the incident, the solicitor inquired whether or not the person who shot the victim was present in court and whether or not the victim recognized him. (R. p. 119, lines 1-5). The victim answered in the affirmative, and defense counsel objected, stating he had a matter of law. (R. p. 119, lines 3-8). At a bench conference, defense counsel indicated "[t]his is the first I've heard of any identification." (R. p. 119, lines 11-12). The solicitor pointed out that the victim had never told anyone that he was not able to identify the perpetrator and that the victim was never shown a photographic lineup because he had been in the hospital. (R. p. 119, lines 16-19). Defense counsel indicated he believed "it should be suppressed" because it was never disclosed to the defense. (R. p. 120, lines 5-6). The judge then excused the jury so she could further explore the matter. (R. p. 120, lines 7-12).

When asked to explain his objection, defense counsel stated that he believed the State committed a Rule 5 and/or Brady violation by failing to disclose this information previously. (R. p. 120, line 22 – p. 121, line 2). The solicitor responded that "it's not Brady" because the evidence is not exculpatory, i.e., not favorable to the defendant. (R. p. 121, lines 22-25). Defense counsel then argued that "[a]nything that shows a witness has given inconsistent statement is Brady material" and that "nothing in [the victim's]

statement indicates that he could identify [Appellant]." (R. p. 122, lines 3-14). However, defense counsel was unable to explain to the judge how there was any inconsistency with the victim's prior statements where no one ever asked the victim whether or not he would be able to identify the perpetrator. (See R. p. 122-23).

At that point the judge allowed a proffer of the victim's testimony. The victim stated that the man who shot and robbed him on the date in question was present in the courtroom and was seated to the left of defense counsel. (R. p. 124, lines 7-14). On cross-examination, the victim testified he had never been shown a photograph of Appellant before and had never discussed what Appellant looked like with anyone before trial. (R. p. 124, line 21 – p. 125, line 2). He stated he gave descriptions of both perpetrators to the police after the incident when he was in the hospital. (R. p. 125, lines 3-12). The victim also testified that he knew Appellant shot him, but since he was shot twice, he was unsure if the other perpetrator - who also had a gun - shot him also. (R. p. 125, lines 13-22).

At the conclusion of the proffer, defense counsel moved for a continuance of trial "to be able to research to see if the State's disclosure during the trial of the possible identification without any pretrial disclosure violates [Appellant's] rights and a chance to research it since this is a complete surprise." (R. p. 127, lines 16-22). The judge indicated that the victim's testimony before the jury needed to be concluded but that she would revisit the issue the following morning. (R. p. 127-30). Thereafter, the jury returned to the courtroom and the victim identified Appellant in court as one of the men who shot him on the date in question. (R. p. 130, lines 10-20). He explained that Appellant was the first man he saw that night and that Appellant was the one armed with

a silver gun. (R. p. 130, line 21 – p. 131, line 4). The victim confirmed that "today is the first day [he had] seen [Appellant] since that night" but testified that the event "left a vivid picture" in his mind of what Appellant looked like. (R. p. 132, line 24 – p. 133, line 4). Subsequently, defense counsel cross-examined the victim regarding his recollection of events, his prior statement to police, and his in-court identification of Appellant. (R. p. 133-44).

The next morning, defense counsel made a motion for a mistrial based upon a violation of Appellant's "right to due process" by the State's calling the victim as a witness at trial and offering his identification of Appellant with no prior warning to the defense. (R. p. 161-62). Defense counsel argued this was a "structural error" and that the lack of this information "deprived [Appellant] of any opportunity to make a meaningful decision on plea offers. . . ." (R. p. 162, lines 6-10). In response to the judge's question regarding whether there was anything in the discovery indicating the victim could not identify Appellant, defense counsel indicated the discovery reflected only general descriptions of the perpetrators and that there was nothing in the discovery suggesting that the victim could identify Appellant. (R. p. 162-63). Defense counsel agreed with the judge that it would be "different" if the victim had in pretrial statements indicated that the perpetrator was a "white female." (R. p. 163, lines 6-8). However, defense counsel insisted that since in pretrial statements, the victim could only say the perpetrators were "two young black males in North Charleston[,] that's a lot of people, and without any significant description of the people it's just our conclusion that he could not identify anybody and [the solicitor] never said he could." (R. p. 163, lines 11-15). Defense counsel agreed with the judge that the pretrial descriptions were not "inconsistent" with

Appellant's appearance. (R. p. 163, line 19 – p. 164, line 4). However, defense counsel contended that the identification of Appellant as the shooter was a "complete ambush and a total surprise" and to bring out the victim's identification in the middle of trial "deprives [Appellant] of a complete right to a fair trial and due process." (R. p. 13-25).

After hearing the solicitor's request to deny Appellant's mistrial motion, the judge ruled that a Neil v. Biggers hearing was not required when there is a first-time in-court identification and stated she was denying a mistrial and allowing the in-court identification. (R. p. 166, line 23 – p. 167, line 12). She noted that Appellant's remedy was cross-examination and argument. (R. p. 7-8). In response, defense counsel requested a continuance "to be able to hire an expert witness on identification" to impeach the victim and to present a defense. (R. p. 167, lines 16-24). Counsel indicated he was requesting a continuance of thirty days because "a lot of the people we use live in Australia." (R. p. 168, lines 1-14). The solicitor objected, reiterating that the appropriate remedy was cross-examination. (R. p. 168, lines 17-24). The judge denied the continuance motion. (R. p. 169, lines 7-8). The judge never made a ruling regarding a violation of Brady v. Maryland or Rule 5, SCRCrimP. (See R. p. 120-69). The only other time this issue was mentioned was after the verdict was rendered, when defense counsel stated he was renewing his mistrial motion "based upon the reasons that we expressed before, the last minute disclosure and ambush of the eyewitness, Mr. Thomas, identifying [Appellant]." (R. p. 502, lines 1-4). The judge did not thereafter make a ruling regarding Rule 5 or Brady. (See R. p. 501-505). Defense counsel never objected to the lack of a ruling on Rule 5 and Brady issues and at no point did he request that the court make such a ruling. (See R. p. 120-69; p. 501-505).

Issue Preservation

Appellant now argues the trial judge erred in denying his mistrial motion because the State violated Appellant's "due process rights under Rule 5 and Brady v. Maryland." (See Brief of Appellant, p. 2). This issue is not preserved for appellate review. "Our law is clear that a party must make a contemporaneous objection that is *ruled upon by the trial judge* to preserve an issue for appellate review." State v. Sheppard, 391 S.C. 415, 420-21, 706 S.E.2d 16, 19 (2011) (emphasis added). "To be preserved for appellate review, an issue must be both presented to *and passed upon* by the trial court." State v. Watts, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996) (emphasis added). "If the issue is raised but not ruled on, it is not preserved for appeal." Id.; see State v. Hudgins, 319 S.C. 233, 236, 460 S.E.2d 388, 390 (1995) (although appellant objected, the trial judge did not rule on the objection and appellant did not object further or request curative instructions; therefore, this issue was not preserved for review), *overruled on other grounds by* State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998); State v. Clute, 324 S.C. 584, 591, 480 S.E.2d 85, 88 (Ct. App. 1996) ("Moreover, after the trial court ruled that Clute was not in custody for purposes of Miranda, Clute failed to request a specific ruling as to the voluntariness issue pursuant to Jackson v. Denno. The [voluntariness] issue is therefore not preserved for appeal."), *overruled on other grounds by* State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); see also Atlantic Coast Builders and Contractors, LLC v. Lewis, 398 S.C. 323, 730 S.E.2d 282 (2012) (pointing out that "error preservation has been a critical part of appellate practice in this State for a long time, serving to ensure . . . that we do not reach issues which were not ruled upon by the trial court"); State v. Gee, 262 S.C. 373, 379, 204 S.E.2d 727, 729 (1974) ("Only matter that has been ruled on

below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction rather than being a reviewing court. Since the trial judge was not requested to rule upon the foregoing question, and made no ruling thereabout, it is not properly before this Court for consideration.") (citations omitted); Harkins v. Greenville County, 340 S.C. 606, 620, 533 S.E.2d 886, 893 (2000) ("In order to be preserved for review, the lower court must rule upon the issue."); Townsend v. City of Dillon, 326 S.C. 244, 247, 486 S.E.2d 95, 97 (1997) (an issue not ruled on by the trial judge is not preserved for appeal); Town of Mount Pleasant v. Jones, 335 S.C. 295, 305, 516 S.E.2d 468, 474 (Ct. App. 1999) ("Because the municipal court judge and the circuit court judge specifically declined to rule on this issue, it is not properly before us for appellate review.").

Here, Appellant failed to secure a ruling on his Rule 5 and Brady issues. (See R. p. 120-69; p. 501-505). Accordingly, the Rule 5 and Brady issues raised on appeal are not preserved for review, and these issues should be dismissed on error preservation grounds.

Discussion

Even if the Rule 5 and Brady issues had been properly preserved, the trial judge did not err by denying Appellant's mistrial motion because the State committed no Rule 5 or Brady violation. In Brady v. Maryland, the United States Supreme Court instructed that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where evidence is material to either guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). The South Carolina Supreme Court has stated that the requirements for a Brady violation are as follows: (1) the evidence was favorable to the accused, (2) the evidence was in the

possession of or known to the prosecution, (3) the evidence was suppressed by the prosecution, and (4) the evidence was material to guilt or punishment." Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999).

In this case, the fact that the victim was able to identify Appellant in court was obviously not favorable to Appellant in any manner. See State v. Anderson, Op. No. 5196 (S.C. Ct. App. filed Feb. 12, 2014) (Shearouse Adv. Sh. No. 6 at 17) ("Favorable evidence is either favorable exculpatory evidence or favorable impeachment evidence.") (citing United States v. Bagley, 473 U.S. 667, 676 (1963)); State v. Carlson, 363 S.C. 586, 609, 611 S.E.2d 283, 295 (Ct. App. 2005) ("Exculpatory evidence is that which creates a reasonable doubt about the defendant's guilt.") (citation omitted). Therefore, the State did not violate Brady by failing to apprise Appellant of this information prior to trial.[1] Appellant's argument that had he been aware of the possible identification, he "could have had the opportunity to hire an expert and more properly develop his cross-examination thus affording [him] a more complete defense" is misplaced because prosecutors are under no duty to report all information that they learn about their witnesses, even if the defense might have found such information helpful in preparing its case.[2] U.S. v. Agurs, 427 U.S. 97, 109-10 (1976); Weatherford v. Bursey, 429 U.S. 545, 559-61 (1977).

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[1] Even if the information had been favorable (although clearly it was not), Appellant still received the information in time for use at trial. (See R. p. 133-45; p. 165, lines 10-20). See State v. Carlson, 363 S.C. at 610, 611 S.E.2d at 295 ("Courts have held that when defense counsel is given the opportunity to review and use the inconsistent statement in cross-examination, as was done here, there is no reasonable probability the outcome of the trial would have been different."); State v. Kennerly, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct. App. 1998) ("In a Brady analysis, information is not deemed "material" if the defense discovers the information in time to adequately use it at trial.").

[2] Significantly, the facts of the case as reflected in the discovery showed that the perpetrators were not wearing masks; therefore Appellant should have anticipated that the victim might be able to identify him upon seeing him in court.

Appellant also contends that the State violated Rule 5, SCRCrimP, by failing to disclose the information about the victim's ability to identify him in court, although Appellant has failed to explain, either at trial or on appeal, exactly how Rule 5 was violated. (See Brief of Appellant, p. 2-5). See State v. Hill, 394 S.C. 280, 297, 715 S.E.2d 368, 377-78 (Ct. App. 2011) (an issue will be deemed abandoned on appeal if it is argued in a short, conclusory manner without supporting authority). In any event, Appellant's argument regarding Rule 5 is without merit. The rules encompassed in Brady and Rule 5 are separate and impose different duties. State v. Kennerly, 331 S.C. 442, 452, 503 S.E.2d 214, 219 (Ct. App. 1998). "Therefore, [a] separate analysis must be used to determine if either has been violated." Id. "The Brady disclosure rule is grounded in the defendant's fundamental right to a fair trial mandated by the Due Process Clause of the Fifth and Fourteenth Amendments." Id. at 452, 503 S.E.2d at 219-220. "The requirements of Rule 5, as opposed to the constitutional dictates of Brady, are judicially created discovery mechanisms for use in criminal proceedings." Id. at 453, 503 S.E.2d at 220. "A violation of Rule 5 is not reversible unless prejudice is shown." State v. Landon, 370 S.C. 103, 108, 634 S.E.2d 660, 663 (2006).

Rule 5(a)(1)(C), SCRCrimP, "Documents and Tangible Objects," states as follows:

> Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.

Thus, this section of Rule 5 encompasses only written and tangible materials, as opposed to information known to prosecutors but that is not documented in some way. In Appellant's case, there were no written or tangible materials indicating that the victim could identify Appellant in court. (See R. p. 119-27; p. 165). Indeed, since there were no pre-trial show-ups or lineups, the victim could not have known whether or not he would be able to identify Appellant until he arrived in court for trial. (See R. p. 121, line 16 – p. 122, line 2; p. 292, lines 3-9; p. 307). Therefore, the State committed no Rule 5 violation.

In sum, because there was no Brady or Rule 5 violation, the trial judge properly denied Appellant's motion for mistrial. See State v. Wasson, 299 S.C. 508, 510, 386 S.C. 255, 256 (1989) (the party seeking a mistrial must show both error and prejudice in order to be entitled to a mistrial); State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627-628 (2000) (the grant or denial of a mistrial lies within the sound discretion of the trial court, and the ruling will not be disturbed on appeal absent an abuse of discretion or an error of law).

II. The trial judge properly admitted Appellant's statement to police because there was no violation of Miranda or Seibert where Appellant was not in custody prior to the time the officers advised him of his rights.

Relevant Facts

After Appellant was developed as a suspect following an anonymous tip to police, Detective Patrick obtained Appellant's phone number, made phone contact with Appellant, and arranged to meet with him the next day. (R. p. 66-67; p. 285-86). The following day Detective Patrick picked up Appellant and transported him to the North Charleston City Hall for an interview. (R. p. 57, lines 20-23; p. 66-67). Initially, around 11:00 am, Sergeant Hill began interviewing Appellant with regard to a separate incident,

and Appellant agreed to provide a written statement regarding that incident. (R. p. 56-57; p. 67; p. 71, line 23). Near the end of the interview regarding the other incident, the officers inquired as to what Appellant had been doing recently, and Appellant indicated that around the time of the victim's shooting he had been crossing the street going to the Three Dollar Lounge. (R. p. 58; p. 67-68). At that point, at 11:07 am, officers decided to stop the interview and Mirandize Appellant. (R. p. 58; p. 67-68; p. 73, line 8). Sergeant Hill provided Appellant his Miranda rights at 11:10 am, and Appellant agreed to waive his rights and provide a statement. (R. p. 52-56; p. 62-63; see State's Exhibit #2, Written Statement of Appellant). Appellant's written statement was commenced around 11:13 or 11:14 am, after the advisement of rights form had been completed. (R. p. 73, lines 11-17). Appellant was not handcuffed at this time and was free to leave if he wished to do so. (R. p. 59-61). However, Appellant never asked to stop the interview and, in fact, he was very cooperative with the officers. (R. p. 69, lines 12-18).

Following a pre-trial Jackson v. Denno[3] hearing, defense counsel moved to suppress Appellant's written statement. He argued the statement was inadmissible under Missouri v. Seibert[4] and that the statement was the inadmissible poisonous fruit of a Fourth Amendment violation. After considering the arguments of the defense and the State, the trial judge denied Appellant's motion to suppress. (See R. p. 74-82; p. 87, line 21 – p. 89, line 8). Subsequently, during trial, Appellant's written statement was admitted into evidence over defense counsel's objection as State's Exhibit # 2. (See R. p. 288-91).

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[3] 378 U.S. 368 (1964).
[4] 542 U.S. 600 (2004).

Discussion

Appellant argues on appeal that the trial judge should have suppressed his written statement because the officers violated both Miranda and Missouri v. Seibert. Initially, Appellant's brief fails to explain in precise terms how Seibert applies or how it was violated. (See Brief of Appellant, p. 6-7). See State v. Jones, 392 S.C. 647, 655, 709 S.E.2d 696, 700 (Ct. App. 2011) ("An issue is . . . deemed abandoned if the argument in the brief is merely conclusory.") (citation omitted); State v. Tyndall, 336 S.C. 8, 16-17, 518 S.E.2d 278, 282-83 (Ct. App. 1999) (argument was deemed abandoned where a single conclusory statement in the appellant's brief left un-argued the purported error being raised); cf. State v. Hill, 394 S.C. 280, 296-97, 715 S.E.2d 368, 377-78 (Ct. App. 2011) ("The mere fact that Hill cited to Brady does not provide this court with any guidance as to why the State should be deemed to have withheld material impeachment evidence entitling Hill to a mistrial.").

Regardless, Appellant's arguments are without merit. The State may not use statements stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. Miranda v. Arizona, 384 U.S. 436, 444 (1966). "Custodial interrogation" involves questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. State v. Williams, 405 S.C. 263, 272, 747 S.E.2d 194, 199 (Ct. App. 2013). A person is "in custody" when his freedom has been restricted. Id. (citation omitted). Whether a person is "in custody" is determined by an examination of the totality of the circumstances, such as the location, purpose, and length of the interrogation, and whether the suspect was free

to leave the place of questioning. State v. Navy, 386 S.C. 294, 301, 688 S.E.2d 838, 841 (2010). "To determine whether a suspect was in custody for the purposes of Miranda, the [United States] Supreme Court has asked whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." Williams, 405 S.C. at 273, 747 S.E. at 199 (citing Maryland v. Shatzer, 559 U.S. 98, 112 (2010). When it is "debatable" whether or not a reasonable person would have believed himself to be in custody at the time the statement was given, a trial court's finding that a person was not in custody must be upheld. Id.

In Appellant's case, Miranda was not violated because Appellant was not in custody before he was given his Miranda warnings. See State v. Doby, 273 S.C. 704, 707, 258 S.E.2d 896, 899 (1979) (Miranda applies only where there has been such a restriction on a person's freedom as to render him in custody). After having a telephone conversation with Detective Patrick, Appellant voluntarily agreed to meet with police the next day to be interviewed. The fact that Appellant's interview was conducted at the North Charleston City Hall did not render it a custodial interrogation. Id. at 708, 258 S.E.2d at 899. "Rather, the fact appellant voluntarily agreed to accompany the investigators to their office and answer questions without being placed under arrest indicates a non-custodial situation." Id. (citations omitted). The purpose of the interview was to obtain information about another incident in which Appellant may have been involved and to investigate the anonymous tip implicating Appellant in the crime against the victim in this case. However, contrary to Appellant's implication on page 7 of his Brief, the fact that the police secretly considered Appellant a "suspect" is not relevant for purposes of Miranda. Williams, 405 S.C. at 273, 747 S.E. at 199 (citing Stansbury v.

California, 511 U.S. 318, 324–26 (1994)). More importantly, the mere fact that officers decided to provide Appellant with his Miranda rights did not convert the otherwise noncustodial situation into custodial interrogation. Doby at 708, 258 S.E.2d at 899.

Appellant had been at City Hall for less than fifteen minutes when he decided to provide a statement regarding this incident and, significantly, about seven minutes of this time was spent discussing an entirely separate incident. Cf. State v. Navy, 386 S.C. at 297, 688 S.E.2d at 839 (noting that the defendant remained in the presence of police for about four hours) & State v. Evans, 354 S.C. 579, 584, 582 S.E.2d 407, 410 (2003) (the defendant had been subjected to a "lengthy" interview where it lasted three hours). Most significantly, the uncontradicted testimony in the record indicated that Appellant was free to leave if he chose to do so.[5] (See R. p. 59-61; p. 69, lines 12-18). Appellant never requested that the interview stop and he was very cooperative. Furthermore, there is no evidence Appellant was upset during the interview and no evidence the officers were confrontational with Appellant or that they challenged his responses to their questions. See Williams, 405 S.C. at 277-78, 747 S.E. at 202. In sum, because there was no formal arrest and no restraint on Appellant's freedom of movement to the degree associated with a formal arrest, Appellant was not in custody and Miranda did not apply.

Appellant also claims that the State violated Missouri v. Seibert, 542 U.S. 600 (2004). In Seibert, the police **arrested** the defendant at 3:00 am and took her to the police station for an interview. Seibert at 604. The arresting officer deliberately

[5] Appellant did not testify in the pre-trial hearing. (See R. p. 74, lines 8-9). See State v. Dye, 384 S.C. 42, 48-49, 81 S.E.2d 23, 27 (Ct. App. 2009) (citation omitted) (because no competing testimony was introduced to contradict the officer's statements, the circuit court was free to accept the officer's version of events); State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001) (pointing out that the appellant did not testify at the Jackson v. Denno hearing and his attorney's questions did not constitute evidence; therefore, there was no evidence in the record to contradict the officers' version of events).

refrained from providing Miranda warnings and left the defendant alone in an interview room. Id. After fifteen to twenty minutes, a different officer arrived and questioned the defendant for thirty to forty minutes while squeezing her arm and encouraging her to admit her role in the crime. Id. at 604-605. After the defendant finally admitted her guilt, she was permitted a twenty-minute coffee and smoke break. Id. Following this break, the officer turned on a tape recorder, gave the defendant her Miranda warnings, and obtained a signed waiver of those rights. Id. He then resumed questioning by confronting the defendant with the incriminating statements she made prior to the break and basically rehashed all of the same incriminating information. Id.

The United States Supreme Court held that the "question-first" procedure employed by the police in Seibert's case was constitutionally infirm because the "midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with Miranda's constitutional requirement." Id. at 604. In reaching this conclusion, the Court pointed out the following relevant factors that bear upon whether "midstream" Miranda warnings could be effective enough to accomplish their object:

(1) The completeness and detail of the questions and answers in the first round of interrogation;

(2) The overlapping content of the two statements;

(3) The timing and setting of the first and the second rounds of interrogation;

(4) The continuity of police personnel; and

(5) The degree to which the interrogator's questions treated the second round as continuous with the first.

Id. at 615. In Seibert's case, the unwarned interrogation occurred in the station house, and the questioning was "systematic, exhaustive, and managed with psychological skill." Id. In fact, when the police were finished with this first round, "there was little, if anything, of incriminating potential left to be said." Id. at 616. The warned phase of the questioning proceeded after only a short break and took place in the same location. Id. The same officer conducted the first and second rounds of questioning. Id. The officer did not advise Seibert that her prior statement might be inadmissible in court and in fact made the second round of questioning seem like two sessions that were parts of a "continuum"; under these circumstances it would be "unnatural" to refuse to repeat during the second round what had already been said before. Id. at 616-17. Accordingly, the Court found that a statement repeated after Miranda warnings in such circumstances is inadmissible. Id. at 617.

Initially, in Appellant's case, Seibert was not applicable because Appellant was not formally arrested nor was he in custody, as discussed above. However, even assuming Appellant was in custody, Seibert was not implicated under the facts of Appellant's case. The "first round" of Appellant's interview lasted approximately seven minutes and was focused almost entirely on a totally separate matter. The only questions asked regarding the incident involved in this case came at the end, when Appellant was writing out his statement regarding the separate matter. The questions were broad, simply inquiring as to Appellant's recent activities, and Appellant's response was limited to indicating he was in the general vicinity of the crime around the time it occurred – a statement that was not necessarily incriminating.

The "first round" questioning was not "systematic, exhaustive, and managed with psychological skill" as it was in Seibert, and Appellant's response did not leave "little, if anything, of incriminating potential left to be said." Seibert at 615-16. The first and second rounds of questions were not part of a "continuum" since the first round dealt almost entirely with a separate incident, and it would not be "unnatural" for Appellant to invoke his Miranda rights during the second round since the second round involved a new topic of discussion that had not been fully hashed out before Miranda warnings were given. Cf. Oregon v. Elstad, 470 U.S. 298 (1985). In sum, there was no reason to believe the Miranda rights given to Appellant were not fully effective to accomplish their objective. Accordingly, the trial judge properly denied Appellant's motion to suppress his statement to police.

III. The trial judge properly refused Appellant's request regarding closing argument where Appellant's equal protection challenge was without merit.

Appellant argues on appeal that his equal protection rights were violated when the trial judge denied his request to make the last closing argument to the jury.[6] (See Brief of Appellant, p. 7). Initially, although Appellant's brief mentions the 6th Amendment and the 14th Amendment, it fails to explain in precise terms how equal protection was implicated or how Appellant's equal protection rights were violated, and Appellant fails to cite any relevant precedent supporting his position.[7] (See Brief of Appellant, p. 7-8).

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[6] Below, defense counsel requested that the State open in full on the law *and* the facts, the defense argue, then the State make a reply to the defense's argument. (See R. p. 442, line 8 – p. 443, line 9).

[7] The 6th Amendment states as follows: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." The Sixth Amendment does not include an equal protection component. See U.S. Const. amend. VI. Notably, no issue regarding the 6th Amendment right to due process is properly before this Court inasmuch as defense

See State v. Jones, 392 S.C. 647, 655, 709 S.E.2d 696, 700 (Ct. App. 2011) (short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review) (citation omitted); State v. Tyndall, 336 S.C. 8, 16-17, 518 S.E.2d 278, 282-83 (Ct. App. 1999) (argument was deemed abandoned where a single conclusory statement in the appellant's brief left un-argued the purported error being raised).

In any event, Appellant's equal protection argument is without merit. Historically, the right to the final closing argument has followed the party with the burden of proof. Stein Closing Arguments § 1:6: Right to open and close; order of argument (2011-2012 ed.) ("Generally, the right to make opening and closing follows the person having the burden of proof."). In criminal trials in South Carolina, a solicitor is entitled to open and close the closing arguments to the jury unless the defendant has not offered any evidence. State v. Rodgers, 269 S.C. 22, 24, 235 S.E.2d 808, 809 (1977). The initial closing argument must include a discussion of the law if demanded by the defendant; however, the solicitor is not required to open his initial closing with any argument on the facts although he may do so as a matter of discretion. State v. Lee, 255 S.C. 309, 318, 178 S.E.2d 652, 656 (1971); Rodgers, 269 S.C. at 25, 235 S.E.2d at 809. Where a defendant calls no witnesses and offers no evidence in his behalf, his counsel is entitled to have the concluding argument to the jury."[8] State v. Mouzon, 326 S.C. 199,

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counsel's argument to the trial judge was limited to the issue of equal protection (see R. p. 442-43) and since Appellant's issue statement is likewise confined to the issue of equal protection. (See Brief of Appellant, p. 7). See Rule 208(b)(1)(B), SCACR, ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.").

[8] The only difference is in capital cases where, per statute, the defense has the final closing. See S.C. Code § 16-3-28 ("Notwithstanding any other provision of law, in any criminal trial where the maximum penalty is death or in a separate sentencing proceeding following such trial, the defendant and his counsel shall have the right to make the last argument."). Of course, Appellant's case was not a capital case.

203, 485 S.E.2d 918, 921 (1997); see also State v. Crowe, 258 S.C. 258, 268, 188 S.E.2d 379, 384, *cert. denied*, 409 U.S. 1077 (1972); State v. Gellis, 155 S.E. 849, 855 (1930); State v. Huckie, 22 S.C. 298 (1885).

In this case, Appellant chose to present three defense witnesses. (See R. p. 348-429). Therefore, under longstanding state procedure, Appellant was not entitled to have last closing argument to the jury nor was he entitled to require the solicitor to open on both the facts and the law. Appellant asserts that the trial judge's adherence to the longstanding practice in South Carolina violated his equal protection rights. Under the Equal Protection Clause of the 14th Amendment, no person in the United States shall be denied "the equal protection of the laws." U.S. Const. amend. XIV. "The *sine qua non* of an equal protection claim is a showing that similarly situated persons received disparate treatment." Grant v. S.C. Coastal Council, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995). Where an alleged equal protection violation does not implicate a suspect class or abridge a fundamental right, the "rational basis" test is used. Town of Hollywood v. Floyd, 403 S.C. 466, 480, 744 S.E.2d 161, 168 (2013) (citations omitted); see also Curtis v. State, 345 S.C. 557, 574, 549 S.E.2d 591, 600 (2001) ("This case does not involve a suspect classification or a fundamental right, so the question under equal protection analysis is whether the legislation is rationally related to a legitimate state purpose."). "To prevail under the rational basis standard, a claimant must show similarly situated persons received disparate treatment, and that the disparate treatment did not bear a rational relationship to a legitimate government purpose." Town of Hollywood, 403 S.C. at 480, 744 S.E.2d at 168 (citations omitted). The classification will be upheld if there is "any reasonably conceivable state of facts" that would provide a rational basis

for it. F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 313 (1993). The fact that a classification may result in some inequity does not render it unconstitutional under the equal protection clause. Curtis at 574, 549 S.E.2d at 600 (citations omitted).

Appellant's equal protection claim is necessarily premised upon the assumption that defendants who call witnesses and those who do not are similarly situated. (See R. p. 442, lines 14-19). In rejecting a similar equal protection challenge, the Florida Supreme Court explained why, in reality, this is not at all the case:

> In all criminal proceedings, the prosecution takes the offensive at the outset, building through its witnesses a "case" for defendant's guilt. In most instances, defense counsel is limited to the defensive tactic of cross-examination to show the weakness of the State's evidence, and to create a reasonable doubt in the minds of the jury. Occasionally the defense will be in a position to take the offensive itself by calling witnesses to build its own case for innocence. In those instances where such an offensive tactic is possible, the defense receives a more balanced exposure before the jury, and is more adequately able to offset the impression created in the minds of the jurors by the prosecution's presentation. But what of those situations where the circumstances do not give the defendant the option of presenting his own case? In our judgment it was precisely to counterbalance the weight of the State's offensive in such cases that the Legislature, and later this Court, created an exception to the common law rule that the party with the burden of proof is entitled to the concluding argument before the jury. As we view the Rule, it is intended as an aid to those defendants entitled to avail themselves of it, rather than as a limitation upon those desiring to call defense witnesses. Accordingly, it is our opinion that, because there is a rational basis for the distinction created by the Rule, it is not discriminatory and thus not violative of the Fourteenth Amendment guarantee of equal protection of the laws.

Preston v. State, 260 So.2d 501, 504 (Fla. 1972).[9]

As explained in Preston, defendants who choose to present evidence and those

[9] In 2007, Florida changed its rules to eliminate a defendant's right to make a final closing argument. See In re Amendments to the Florida Rules of Criminal Procedure–Final Arguments, 957 So.2d 1164 (Fla. 2007). Florida's new rule provides, in pertinent part, as follows: "In all criminal trials, excluding the sentencing phase of a capital case, at the close of all the evidence, the prosecuting attorney shall be entitled to an initial closing argument and a rebuttal closing argument before the jury or the court sitting without a jury." Id. at 1167.

who do not are not similarly situated. Further, there is a rational basis for the distinctions created by our state's practice regarding the order of closing arguments; that is, allowing a defendant who decides to present no evidence the opportunity to "counterbalance the weight of the State's offensive." Preston at 504. Significantly, Appellant did **not** lose his right to make a closing argument; rather, he merely chose to forfeit the opportunity to present his argument last. See Herring v. New York, 422 U.S. 853, 857-64 (1975) (a *total denial* of the opportunity to present a closing argument to the trier of fact is a denial of the basic right of the accused to make his defense).

The United States Supreme Court has consistently held that the states are free to shape their own rules of procedure. See, e.g., U.S. v. Scheffer, 523 U.S. 303, 316 (1998) ("[W]e thus stressed that the ruling did not 'signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures.'") (quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973)); see also Hale v. U.S., 410 F.2d 147, 152 (5th Cir.), *cert. denied*, 396 U.S. 902 (1969) ("The order and extent of the argument is entirely within the discretion of the trial court."). The order of closing arguments is a matter of state procedural preference which does not offend equal protection or any other constitutional right.[10] The trial judge

[10] Notably, our state's Proposed Rules of Criminal Practice illustrate our court's intention to codify the current practice from common law into a rule of court. See Proposed South Carolina Criminal Rules, Rule 140, http://www.sccourts.org/whatsnew/SouthCarolinaCriminalRulesWithRule106Change.pdf (last visited Feb. 24, 2014). Proposed Rule 140(b) states: "The State shall have the right to open and close if the defense has introduced any evidence, but may waive opening. If the defense has not introduced any evidence, the State shall have only one argument and the defense shall have the right to present the last argument." Id. The notes accompanying this proposed rule explain as follows: "This is a new rule but is in conformity with existing practice. However, the antiquated practice that gives the defense the option of requiring the State to open on the law is excluded." Id. The South Carolina Supreme Court solicited written comments on the proposed rules and scheduled a public hearing on that matter for January 5, 2010. See Request for Written Comments and Notice of Public Hearing on Proposed South Carolina Criminal Rules, dated Dec. 2, 2009, http://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=602 (last visited Feb. 24, 2014). It is noteworthy that no written comments were submitted in opposition to the

and the parties below had the right to rely on well-established precedent and longstanding practice – a practice that never deprives any defendant of the opportunity to present a closing argument. That practice was followed in Appellant's case and there was no error.

In any event, even if the order of argument in Appellant's case is deemed error, the error was harmless under the facts of Appellant's case. Our Supreme Court has previously concluded that denial of the right to last closing argument "is not the kind of error that would affect the entire conduct of the trial from beginning to end" and is "subject [to a] harmless error analysis." State v. Mouzon, 326 S.C. 199, 485 S.E.2d 918 (1997). In Mouzon, the Supreme Court concluded that, pursuant to state procedure, the defendant was entitled to the right to last closing because he in fact did not present evidence. Further, the court concluded the error was not harmless as Mouzon concentrated "on the murder charge and was acquitted of murder; he did not focus on the conspiracy charge and was convicted." 326 S.C. at 205, 485 S.E.2d at 922. The court noted that the prosecution "devoted a significant amount of attention to the issues of drug dealing and conspiracy. If Mouzon had been allowed to argue last, then he could have more adequately addressed the issue of conspiracy to distribute crack cocaine." Id.

Appellant's case is distinguishable from Mouzon. First, according to well-settled state procedural practice, Appellant lost the opportunity to present the last argument when he introduced evidence in the form of three defense witnesses. Second, the focus in Appellant's case remained on one event – the armed robbery and attempted murder that occurred within the same time frame. Third, and perhaps most significantly, defense

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proposed rule on closing arguments in criminal cases. See Comments Received by Supreme Court on Proposed South Carolina Criminal Rules, dated Dec. 31, 2009, http://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=612 (last visited Feb. 24, 2014).

counsel failed to proffer a proposed "rebuttal" argument to illustrate how his closing argument would have been different had the solicitor opened in full prior to the defense argument. (See R. p. 442-44). In sum, Appellant failed to demonstrate prejudice even assuming the trial judge erred. See State v. Hariott, 210 S.C. 290, 298, 42 S.E.2d 385, 388 (1947) ("It is a rule of practically universal application in appellate procedure that an accused cannot avail himself of error as a ground for reversal where the error has not been prejudicial to him."); see also Smith v. State, 375 S.C. 507, 523, 654 S.E.2d 523, 532 (2007) (finding errors in closing argument "do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument.").

CONCLUSION

For the reasons discussed above, Respondent requests that this Court affirm Appellant's convictions and sentences.

Respectfully submitted,

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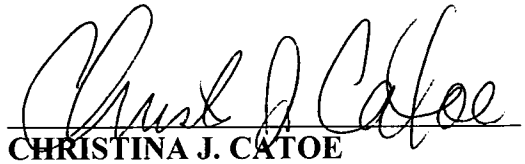
Attorney General

CHRISTINA J. CATOE
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit



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ATTORNEYS FOR RESPONDENT

March 20, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable Kristi Lea Harrington, Circuit Court Judge
Appellate Case No. 2012-213248

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

DENORRIS HALL,

APPELLANT.

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

The Respondent submits that the following should be included in the Record on Appeal:

(1) Trial Transcript, p. 1-518;
(2) Indictments; and
(3) State's Exhibit # 1, # 2, # 5, and # 6.

ALL DOCUMENTS DESIGNATED SHOULD BE REDACTED IN ACCORDANCE WITH THE SOUTH CAROLINA SUPREME COURT ORDER ON PERSONAL DATA IDENTIFIERS.

The undersigned hereby certifies this Designation contains no matter that is irrelevant to this appeal.

CHRISTINA J. CATOE

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March 20, 2014

STATE OF SOUTH CAROLINA

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Appeal from Charleston County
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THE STATE OF SOUTH CAROLINA,

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v.

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AFFIDAVIT OF SERVICE

The undersigned attorney hereby certifies that the **Initial Brief of Respondent** and **Designation of Matter** in the above-referenced case has been served upon **Tiffany Freeman Hendricks**, Sowell Gray Stepp & Laffitte, L.L.C., 1310 Gadsden Street, Columbia, South Carolina, 29201, and **Robert M. Dudek**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **20th** day of **March, 2014.**

CHRISTINA J. CAVOE
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SWORN to before me this 20th day of March, 2014.

Notary Public for South Carolina.
My Commission Expires: 7/18/2017

ALAN WILSON
ATTORNEY GENERAL

March 20, 2014

The Honorable Jenny A. Kitchings
Clerk of Court, S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: State of South Carolina v. Denorris Hall
Appellate Case No. 2012-213248

Dear Ms. Kitchings:

Enclosed please find the **Initial Brief of Respondent,** along with the **Designation of Matter** and **Affidavit of Service,** in the above-referenced appeal, which I am serving on opposing counsel today.

Thank you for your attention to this matter, and please do not hesitate to contact me at (803) 734-3713 should there be any questions or concerns.

Sincerely,

Christina J. Catoe
Assistant Attorney General
SC Bar No. 73562

cc: Tiffany F. Hendricks, Esquire
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