ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable G. Edward Welmaker, Circuit Court Judge

Appellate Case No. 2013-001314

THE STATE,

Respondent,

v.

JAMES ALLEN JOHNSON,

Appellant.

FINAL BRIEF OF RESPONDENT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

The question of whether Appellant's statement was the result of a two-phase interrogation in violation of Miranda v. Arizona and Missouri v. Seibert was not raised to and ruled upon by the trial court and therefore is not preserved for review. If the question had been raised, evidence would support a finding that the trial judge properly admitted the voluntary confession where Appellant was not subjected to custodial interrogation prior to his incriminating statement, and Miranda rights were promptly given as soon as incriminating information was volunteered.

STATEMENT OF THE CASE

Appellant James Allen Johnson was indicted for homicide by child abuse (2011-GS-23-07262). He proceeded to a jury trial on June 3, 2013, before the Honorable G. Edward Welmaker. On June 5, 2013, the jury found Appellant guilty as indicted. (R. p. 588.) Appellant was sentenced by Judge Welmaker to imprisonment for a term of sixty-two years. (R. p. 595.) This appeal follows.

STATEMENT OF FACTS

On May 25, 2011, Emergency Services received a call stating that someone was choking. (R. p. 102.) A team of firefighters were the first responders to the scene. (R. p. 103.) When the firefighters arrived, there was a child lying on the floor, twenty-month old Victim. (R. p. 104.) The child's mother was doing chest compressions with the heel of her palm and Appellant was performing mouth-to-mouth rescue breathing on the child. (R. p. 104.) The firefighters immediately noticed bruising on the child's body and forehead. (R. p. 104, p. 122.) The child was pale, not breathing, and without a pulse. (R. p. 104.) They assembled a bag valve mask and started breathing for the child as well as performing chest compressions. (R. p. 109.) Appellant told the firefighters, "you can't go to the bathroom without watching your kids anymore," claiming the child had taken a drink, choked, and then vomited. (R. p. 109-110.) James Clardy, an EMS operator, also noted that the child had some very large bruises in various stages of healing on her face, bruises on the torso, and bruises on her legs and arms. (R. p. 149.) Responders noted that cardiac arrest was not normally an outcome for a child choking on tea. (R. pp. 134-135; p. 145.) Once the ambulance arrived, the responders moved the child to the ambulance and departed for the hospital. (R. p. 114; pp. 124-125; pp. 136-137.) The paramedics made the decision to take the child to the hospital in Greer because it was the closest facility. (R. p. 137-138) The child was subsequently transferred by helicopter to Greenville Memorial Hospital. (R. p. 141.)

Dr. Mary Croswell, an expert in pediatrics with a specialty in child abuse, examined Victim while she was hospitalized and described in detail the bruises on Victim's body, a total of twenty-eight bruises. (R. p. 335.) Victim had suffered five bruises on her forehead. (R. p. 327.) She was also bruised in the abdominal area, with one

bruise consistent with a bite mark. (R. p. 328.) Victim had a cluster of four bruises on her back and two bruises on her buttock. (R. p. 328.) Her arm was bruised and there was extensive bruising on her legs. (R. pp. 328-329.) Victim further had a bruise on her ear. (R. p. 328.) The bruising to Victim's ear, buttock, cheeks, nasal bridge, and abdomen was noted as atypical for accidental injury. (R. pp. 331-333.) Dr. Croswell further opined that the explanation given for the Victim's forehead bruises, that her two-year-old half-sister had hit her with Mardi Gras beads, was "atypical and unusual." (R. p. 335.) When Dr. Crosswell saw Victim the following day, Victim had been declared brain dead. (R. p. 336.)

The child was taken off life support on May 27, 2011, and died. (R. p. 244.) Dr. Michael Ward performed the autopsy on Victim. (R. pp. 449-450.) Dr. Ward testified as to the extensive bruises the child suffered. (R. pp. 452-453; pp. 457-459; pp. 462-464.) Dr. Ward also noted a torn frenulum inside the child's mouth, an injury indicating pressure had been applied to the mouth. (R. pp. 454-456.) Dr. Ward opined the cause of Victim's death was suffocation. (R. p. 460.) Dr. Ward elaborated that an object, most likely a hand, was placed over the mouth and nose, obstructing the airway which eventually caused an anoxic brain injury. (R. p. 460-461.) Dr. Ward explained the airway would have to be occluded for at least a minute for this injury and cardiac arrhythmia to occur. (R. p. 461.) It would be medically impossible for Victim to present in her condition if she took a sip of tea, choked and vomited. (R. p. 467; p. 470.) Dr. Ward noted that vomiting or spitting up fluid from the lungs is common when someone is suffocated, and in Victim's case she may have spit up blood from the torn frenulum in

her mouth.[1] (R. pp. 467-468.) Dr. Ward's final conclusion was the cause of death was anoxic brain injury due to suffocation, and the manner of death was homicide. (R. p. 466.)

The Victim's mother, Georgia Ann Sprouse ("Sprouse"), gave several different accounts of what happened. (R. p. 413.) Sprouse admitted giving investigators three different accounts of the events leading to Victim's hospitalization. (R. pp. 279-281.) Sprouse initially claimed her daughter choked while drinking a glass of tea. (R. p. 280.) Sprouse told Officer Carl Mathias ("Mathias") that her daughter was drinking tea, started choking, and threw up. (R. p. 157.) Sprouse also told Officer Kevin Azzara that the Victim walked to a table where there was a glass of tea, took a drink, and started choking. (R. p. 165.) Sprouse maintained that story while at the hospital, telling doctors, DSS workers, and law enforcement officers that Victim choked on tea. (R. p. 280.) In this initial version of events, Sprouse placed Appellant in the bathroom when Victim began choking. (R. p. 277; p. 375.) Sprouse's story changed slightly the following days, May 26-27. (R. p. 280; p. 348-349.) Sprouse amended her story to say she was in the kitchen at the time Victim allegedly started choking on the tea. (R. p. 280; pp. 287-288; pp. 348-349; p. 413.) Sprouse also claimed Appellant was in the living room with Victim at the time she allegedly started choking on the tea. (R p. 413.) On June 2, Sprouse was confronted by investigators who stated that Sprouse's story was not making sense and that she needed to tell the truth. (R. p. 356, p. 419.) Sprouse told the investigators that on the day of the incident, she smoked marijuana and went to sleep. (R. pp. 353-356; p.

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[1] It was also noted that Victim had worn an outfit with a green bow earlier in the day, Victim was wearing only a diaper when paramedics arrived (R p 135, pp 196-196) The clothing was later found in the home and was stained (R p 392-395, p 397-398) There was also a small stain on the carpeting (R p 157-158, 196)

419.) She was then awoken by Appellant who told her that Victim was not breathing. (R. pp. 353-356; p. 419.) Following her statement, officers gave Sprouse a ride back to the mortuary. (R. p. 420.) Sprouse testified at trial that this third account of the events of May 25th was in fact the truth. (R. pp. 269-275, pp. 279-281.) Sprouse also claimed that the story about choking on tea was Appellant's. (R. p. 273; p. 275.) Sprouse was ultimately arrested for homicide by child abuse and accessory after the fact. (R. p. 434.)

Appellant also spun a variety of tales for law enforcement. Mathias arrived on scene as a first responder on May 25. He arrived as the child was being moved to the ambulance. (R. p. 156.) Mathias encountered Sprouse in the front yard and came inside with her. Appellant was in the living room. When Mathias asked Sprouse what happened, Appellant volunteered that he was in the bathroom and did not know what had happened. Sprouse explained that Victim had choked on tea. (R. pp. 19-21; pp. 156-158.)

Later that day, Investigator Jennings Autrey ("Autrey") and Investigator Christopher Miller ("Miller") proceeded to the hospital for an update on Victim's medical condition. (R. p. 23; p. 341.) They spoke with Appellant and the others present to collect personal information and get a preliminary understanding of the events. (R. p. 24; pp. 344-348; 401.) When Autrey asked Appellant what happened, Appellant replied that he was in the bathroom and heard Sprouse call for help and tell him to call 9-1-1. (R. p. 24; pp. 344-346.) Appellant stated he then saw Victim lying on the floor with Sprouse attempting CPR. (R. p. 25; p. 345.) At the hospital, Appellant agreed to ride with Miller to the law enforcement center. (R. pp. 401-402.) He was not in custody and was being treated as a witness. (R. pp. p. 45; p. 48; pp. 401-402; p. 439.) Appellant spoke casually with Miller in his office and ultimately provided a statement. (R. pp. 402-404.) Appellant maintained that he went to the bathroom, leaving Sprouse, Victim, and two other children

in the living room. He then heard Sprouse yelling that Victim was not breathing. Appellant stated that when he came out of the bathroom, Victim was on her back and Sprouse was attempting CPR. Appellant claimed Sprouse told him Victim choked on tea, and while he performed CPR on Victim tea came up. (R. pp. 404-406.) In this statement, Appellant also explained the bruises on Victim's face as the result of falls and being struck with Mardi Gras beads by her half-sister. (R. p. 407-408.) In response to additional questions from Miller, Appellant also stated that both children were fussy and that there were also toys in the room which Victim could have choked on. (R. pp. 408-409.) Appellant also noted an incident a week earlier in which law enforcement came to the house because Victim's half-sister was outside unsupervised. Appellant claimed to have been in the bathroom during this incident as well. (R. p. 410.) After providing the statement, Miller drove Appellant back to the hospital. (R. p. 49; p. 412.) The interview lasted around an hour and a half to two hours including the ride. (R. p. 49.)

Appellant next spoke to police a week later, on June 2. (R. p. 25.) Two deputies transported Appellant to the law enforcement center, and Autrey and Miller met Appellant there. (R. p. 26; p. 356-357; pp. 420-421.) Officers advised Appellant that they were "interviewing everybody that was associated with the case,"[2] and he did not have to come with them.[3] (R. p. 443; pp. 550-551.) Miller testified that Appellant was not in custody at this time. (R. pp. 421-422.) Appellant appeared to recognize Miller from their previous conversation. (R. p. 422.) Appellant was present freely and voluntarily and was advised that he was there because the police needed more information to determine what

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[2] The same day Miller also obtained additional statements from Crystal Inman, the woman Appellant and Sprouse lived with at the time, and Sprouse (R p 416-p 420)

[3] Appellant claimed police said he had to go with them Appellant testified that his brother was in the yard when this occurred and could have given him a ride, but officers insisted he come with them (R. pp 516-517) However, Appellant's brother denied that he was present when police arrived, stating he was at the store at the time (R p 544)

happened. (R. p. 422.) Appellant did not appear to be under the influence of drugs or alcohol at the time of the interview, and Appellant himself denied any drug use at the time. (R. pp. 35-36; p. 38; p. 358-359; p. 369; p. 423; p. 431; p. 443.) Officers did not notice any smell of alcohol on Appellant's breath, nor did they notice the dilated pupils or bloodshot eyes that would indicate drug use. (R. p. 377, p. 423; p. 443.) Appellant was not slurring his speech nor was he unsteady on his feet. (R. p. 377; p. 423.)

The initial conversation was casual. (R. p. 51; p. 424.) Officers informed Appellant that Sprouse now claimed Appellant was the one in the den with the child at the time of the incident. (R. p. 52; p. 425.) Appellant repeated his prior story, calmly relating that he was in the bathroom when he heard Sprouse's cries for help. (R. p. 27-28; p. 359; p. 425.) Appellant and Miller talked for a while about his dislike for Victim's father. (R. p. 425.) After an hour, Miller asked Appellant if he would like anything to eat or drink. (R. p. 425.) Appellant refused Miller's offer. (R. p. 425.) Miller asked Appellant if he would like to use the restroom, and Appellant replied that he would. (R425. p. 425.) Miller testified that the only public restroom is downstairs and is a long walk, so he took Appellant to the employee restroom. (R. p. 425-426.) Miller accompanied Appellant to the employee restroom because it is not open to the public. (R. p. 426.) As a policy, non-employees are not allowed to go to the employee restroom unescorted. (R. p. 426.)

After returning from the bathroom, Miller asked Appellant if he was being truthful. (R. p. 427.) Appellant "continued talking about how he wanted the child to have help, he wanted to help, wanted peace." (R. p. 28; p. 360.) Appellant then bent over in his chair and started sobbing. (R. p. 427.) Appellant stated, "accidents happen. He said he wishes that she never went away." (R. p. 29; p. 362; p. 426.) Miller asked Appellant, "Tell me what you're talking about." (R. p. 427.) Appellant then told Investigator Miller

that he got angry at Victim and threw a toy across the room at her. (R. p. 29; p. 362; p. 427.) Appellant then stated that he tried to get Victim to stop crying but she would not. (R. p. 427.) Appellant told Miller he was afraid the crying was going to wake Sprouse so he held his hand over the victim's mouth until she stopped crying. (R. pp. 427-428.) Appellant stated when she stopped crying is when Victim stopped breathing. (R. p. 428.) Appellant then demonstrated covering the victim's mouth and nose. (R. p. 428.) Upon this admission, Appellant confessed Sprouse was in bed at the time, and he made up the story about Victim choking on tea because he was scared. (R. p. 29; p. 362.)

Miller testified that at this point, Applicant was no longer free to leave, and Miller read Applicant his Miranda rights. (R. pp. 29-32; p. 53; pp. 362-368; p. 428.) Approximately one and a half hours had passed prior to Appellant's admission and rights warning. (R. p. 38; pp. 371-372; p. 374; p. 422; p. 431; p. 440.) Miller followed his normal procedure for advising Appellant of his rights. (R. p. 428.) Miller advised Appellant of each line, one at a time, and that it was his choice to waive his rights or not. (R. p. 53; p. 429.) Appellant initialed each line on the form saying he understood the rights he had been advised of. (R. p. 429; R. p. 600, Court's Exhibit 1.) Appellant then signed the waiver of rights form saying that he wished to talk to investigators even though he didn't have to. (R. p. 430.) Conversation resumed. (R. p. 431.) Investigators then began drafting a suspect defendant's statement. (R. p. 431.) Appellant was read his rights again. (R. p. 431.) Appellant then provided a written statement. (R. p. 33; pp. 368-370.)

Appellant gave Autrey permission to type his statement. (R. p. 431.) In his statement, Appellant went through the events of the day, including his confession to holding his hands over Victim's mouth until she stopped breathing. (R. p. 431.) After

Appellant's statement was typed, and Appellant had an opportunity to read over it. (R. p. 432.) Appellant initialed at the beginning and end of each paragraph before signing the statement. (R. p. 432.) Miller estimated that it took an additional hour to complete the written statement. (R. p. 444.) Appellant was in custody at this point. (R. p. 432.) Following this statement, a warrant was obtained for Appellant's arrest. (R. p. 372; p. 433.) During arrest and booking, Appellant "continued to say things...about wishing God had never created him, that he did not deserve to live...that he would never kill himself, but he knew someone in jail would kill him because of what he'd done. ..." (R. p. 433.)

Appellant recalled speaking with Miller on May 25 and recalled giving a statement that day. (R. pp. 492-494; p. 506-507.) However, Appellant maintained he could not remember the entire interaction with officers on June 2. (R. p. 67; pp. 494-495.) Appellant claimed that on June 2, before officers came to pick him up, he "was smoking a little bit of reefer, and I had some Xanaxes." (R. p. 68; pp 495-496.) Appellant claimed to have taken about ten Xanax before police arrived and to have taken three more while in the bathroom at the police station.[4] (R. pp. 68-69.) Appellant seemed to remember certain things about the interview (e.g., leaving marijuana at his friend's house before going to the police station, the ride to the police station, being told that Sprouse had resumed a relationship with someone else, going to the bathroom) but was consistently hazy on receiving Miranda warnings and providing incriminating details. (R. pp. 69-72; pp. 74-75; pp. 78-79; pp. 494-495; p. 497-503; 519-519.) Appellant speculated that if he had said such incriminating things he must have done so to defend Sprouse since she could be pregnant with his child. (R. p. 503-504.)

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[4] Miller accompanied Appellant to the restroom but noted no unusual actions (R p 426)

Before the jury, Appellant reverted to his original story. Appellant testified that he was in the bathroom for two to three minutes when Sprouse called out for help, and he emerged to find Victim laying in the living room, already discolored. (R. p. 485-486; p. 488.) Appellant testified he called 9-1-1and attempted to help with CPR. (R. pp. 486-487.) Appellant also reported that at the time he and Sprouse smoked marijuana on a daily basis, and Sprouse was hiding marijuana while he called 9-1-1. (R. p. 485; pp. 488-489.)

In addition to statements given to police, Appellant and Sprouse were placed together for transport from prison to Family Court on one occasion. During that transport, after the court appearance, Appellant told Sprouse, "he was sorry for what he had did. That he did not mean to... he was sorry and that he hoped [she] would forgive him and so on and so on." (R. pp. 310-311.)

The State also presented evidence from Crystal Inman, the woman they lived with at the time, who felt Appellant favored Victim's older half-sister. (R. p. 187-188.) She recalled Appellant at the hospital saying that Victim would "just fall and fall, all the time." (R. p. 203.) Sprouse described a series of bruises Victim sustained while in Appellant's care which Appellant attributed to various incidents – being hit by her 2-year-old sister, falling on a stepping stone or tripping in a bedroom. Sprouse also believed Appellant tended to favor Victim's older half-sister. (R. p. 267.) Sprouse revealed that Appellant did not get along with Victim's father. (R. p. 311.)

ARGUMENT

The question of whether Appellant's statement was the result of a two-phase interrogation in violation of Miranda v. Arizona and Missouri v. Seibert was not raised to and ruled upon by the trial court and therefore is not preserved for review. If the question had been raised, evidence would support a finding that the trial judge properly admitted the voluntary confession where Appellant was not subjected to custodial interrogation prior to his incriminating statement, and Miranda rights were promptly given as soon as incriminating information was volunteered.

Appellant contends the trial judge erred in admitting his incriminating statements to officers at the law enforcement center. Appellant asserts that since Appellant did not receive Miranda warnings until after he made incriminating statements, his statement was obtained as part of a two-phase interrogation in violation of Miranda and Missouri v. Seibert. First, Appellant's argument was not raised to and ruled upon by the trial judge and is therefore not preserved for appellate review. Second, Appellant was not in custody at the time he made the incriminating statements, nor was Appellant subjected to an interrogation. The trial judge committed no error in admitting Appellant's statements. Appellant's conviction should be affirmed.

A. The issue is not preserved for appellate review as the argument presented on appeal was neither raised to nor ruled upon by the trial court.

Appellant failed to preserve his argument for appellate review. Regarding admissibility of statements, Appellant simply stated that a motion pursuant to Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), needed to be heard.[5] Witnesses were called to testify as to the circumstances surrounding Appellant's various statements:

- Appellant's unsolicited statement to Deputy Mathias at the home on May 25.

[5] It may be noted that testimony by psychiatrist Dr Richard Frierson was offered as part of a competency hearing, a matter framed for the court as separate from the Jackson, 378 U S 368 hearing (R pp 7-8)

- Appellant's verbal statement to Investigator Autrey at the hospital on May 25.
- Appellant's written statement taken the evening of May 25 by Investigator Miller.
- Appellant's statements taken on June 2.

(R. pp. 18-86.) The cross-examination and evidence Appellant presented at this hearing focused on his alleged gross intoxication on June 2. (R. p. 61; pp. 66-85.) After the State and Appellant presented witnesses, no arguments were made. The trial court found:

> All right. I've reviewed my notes and looked at the evidence on the Jackson, 378 U.S. 368 hearing. Obviously at this stage it's based upon a preponderance of the evidence. In weighing all the testimony, what I've heard, I find the statement was freely and voluntarily given, all the statements. And they will be admissible. Of course, I'll instruct the jury that they make the ultimate decision as to the value of any statements that are given. But I believe that weighing all the evidence I've heard that they were freely and voluntarily made by Mr. Johnson in the course of the investigation by the officers.

(R. pp. 85-86.) Again, no arguments or exceptions were made following this pronouncement.

When the incriminating portions of the June 2 statements were admitted at trial, Appellant's only objections were:

- "I would take this opportunity at this point to renew my objection ---" (R. p. 360, lines 18-19.) (Objection made when Autrey began relating the incriminating portion of Appellant's oral statement on June 2.)
- "Subject to my previous objections in the *Jackson Denno* hearing." (R. p. 366, lines 19-20.) (Objection made when written statement taken June 2 was offered.)

Neither of these objections clarified the matter.

Appellant failed to articulate with any specificity the nature of his objection to the admission of the statement at trial; therefore Appellant's argument is not preserved for appellate review. If any argument could be inferred from the testimony presented at the Jackson, 378 U.S. 368 hearing, it would seem to be that the incriminating portion of his June 2 statement was involuntary because he was grossly intoxicated. The trial court cannot be left to guess what argument that a defendant is making; neither can a defendant claim to have raised every foreseeable argument regarding admissibility of statements by virtue of a request for a Jackson, 378 U.S. 368 hearing. While a party need not use the exact name of a legal doctrine in the trial court in order to preserve it for appellate review, it must be clear that an argument has been made on such ground. State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003). Here, Appellant made no argument as to the basis for suppression of his statements. Moreover, the objections that were offered when the evidence was introduced provided no specific grounds, only referring nebulously back to the Jackson, 378 U.S. 368 hearing. Finally, no objection was made when Miller began relating the incriminating verbal portion of the June 2 statement. (R. p. 427-432.)

The ground raised in support of a claim of error on appeal must be the same ground offered in support of the objection at trial. State v. Smith, 337 S.C. 27, 34, 522 S.E.2d 598, 601 (1999); State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001). A party cannot argue one ground below then argue another on appeal. State v. Hudgins, 319 S.C. 233, 237, 460 S.E.2d 388, 390-391 (1995) overruled by State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998). Trial counsel failed to put on the record that Appellant's statements were inadmissible due to a violation of Miranda or Seibert. The trial court's general ruling clearly did not address this argument. State v. Clute, 324 S.C. 584, 480

S.E.2d 85 (Ct. App. 1996) overruled by State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000)(issue not preserved where appellant failed to request a specific ruling).

For all these reasons, the argument advanced on appeal was not raised and ruled on below and therefore was not preserved for review by this court. State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005).

B. Had the argument been raised to the trial court, evidence supports a finding that the statements were admissible. Appellant was not subject to custodial interrogation prior to volunteering incriminating information, and Miranda rights were read immediately thereafter.

Even if this Court finds that the issue of whether Appellant's statements were admitted in violation of Miranda or Seibert to be preserved, evidence would support a finding of admissibility by the trial court. Appellant was not in custody nor were the statements made as a result of an interrogation. Appellant's statements were made voluntarily to police as part of their investigation, Appellant was under no obligation to speak with the police, and his freedom of action was not restrained. Under the totality of the circumstances, a reasonable person in Appellant's position would believe he was free to leave at any time. Therefore, Appellant was not in custody for Miranda purposes, and the officers were allowed to speak with him without reading him his constitutional rights. Seibert mandates that officers may not conduct a custodial interrogation before providing Miranda warnings and then re-elicit the same information after providing warnings. Seibert does not require police to anticipate when, during the course of a non-custodial interview, the interviewee may suddenly change course and blurt something incriminating.

In criminal cases, appellate courts suit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The reviewing court is bound by

the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but instead, simply determines whether the trial judge's ruling is supported by any evidence. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827 (2001) A.E.2d 827, 829 (2001).

The admission or exclusion of evidence rests on the sound discretion of the trial judge and will not be reversed absent an abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). "A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995); see also State v. Navy, 386 S.C. 294, 301, 688 S.E.2d 838, 841 (2010)(stating appellate courts must uphold the trial court's findings regarding whether a defendant was in custody when statements were made if the trial judge's ruling is supported by the record).

Under Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), prior to custodial interrogation, a suspect must be warned he has a right to remain silent, any of his statements may be used against him, and he has a right to an attorney. However, these requirements only apply to situations involving custodial interrogation and were not intended to interfere with the traditional function of law enforcement officers in investigating crimes. Id. at 477. "Miranda warnings are required for official interrogations only when a suspect 'has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" State v. Easler, 327 S.C. 121, 127, 489

S.E.2d 617, 621 (1997)(quoting Miranda, 384 U.S. at 444). Thus, custodial interrogations are made up of two key components- custody and interrogation. State v. Whitner, 380 S.C. 513, 518, 670 S.E.2d 655, 658 (Ct. App. 2008).

"To determine whether a suspect is in custody, the trial court must examine the totality of the circumstances, which include factors such as the place, purpose, and length of interrogation, as well as whether the suspect was free to leave the place of questioning." State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 410 (2003). The appropriate inquiry involves objectively viewing the circumstances to determine whether a reasonable person in the suspect's position would have understood himself to be in custody. Easler, 327 S.C. at 128.

Appellant was also not subjected to the "interrogation" prong of the custodial interrogation. "Interrogation can be either express questioning or its functional equivalent and includes words or actions on the part of the police (other than those normally attendant to arrest and custody) the police should know are reasonably likely to illicit an incriminating response." Id.; see Rhode Island v. Innis, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980)("[T]he term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response.") The requirement for Miranda warnings does not apply to voluntary statements which are not the product of interrogation. State v. Sprouse, 325 S.C. 275, 282, 478 S.E.2d 871, 875 (Ct. App. 1996). "Volunteered statements of any kind are not barred by the Fifth Amendment[.]" Miranda, 384 U.S. at 478.

In the case sub judice, examining the totality of the circumstances, Appellant was not subjected to custodial interrogation at the law enforcement center. On June 2,

Appellant was asked to come speak with law enforcement as police were interviewing everyone associated with the case.[6] Appellant agreed. He was offered the option of riding with someone else or riding with officers, and he volunteered to ride with officers. Appellant asked about a ride home afterward, and Wilson promised a return ride home as well.[7] (R. p. 551.) Wilson was not tasked with arresting Appellant or taking him into custody. At the time of the interview, Appellant was as much a witness as a potential suspect. (R. pp. 63-64.) Appellant was expressly advised that the purpose of the interview was to get more information, "that it was just another questioning." (R. p. 50; p. 422.) Appellant was at no point threatened with arrest nor were references made to consequences if he was not forthright. During the interview, Appellant initially repeated his original version of events to officers. There is no evidence that officers challenged him during this rendition.

Even when officers informed him of Sprouse's most recent statement, there is no evidence that officers did so in a manner so as to suggest disbelief in Appellant's version of events. Miller's question asking whether Appellant was telling the truth about being in the room could just as easily elicited a response that Appellant saw Sprouse do something to the child. This question is indicative that Appellant was being treated as a witness – merely asking Appellant if he was present in no way implicates a belief that he was a criminal actor. However, Appellant leaned over in his chair and started sobbing. Appellant then stated that "accidents happen sometimes." (R. p. 427.) Investigator Miller said, "tell me what you're talking about." (R. p. 427.) At this point Appellant gave

[6] Inman and Sprouse had also been interviewed on June 2 They were not in custody and no arrests were made

[7] As noted previously, Appellant claimed he had been ordered to come with police when his brother could have taken him (R pp 516-517) However, Appellant's brother denied that he was present when police arrived, stating he was at the store at the time (R p 544)

Investigator Miller a lengthy account of the events leading up to Victim's death and his role in it. Appellant's incriminating statement was given, not in response to an interrogation, but as a voluntary statement to police when clarifying the events of the day and what happened to Victim. There is no evidence that officers engaged in complete and detailed questions regarding the incriminating information before providing Miranda warnings. The only testimony is that Miller asked Appellant to "tell [him] more what [he's] talking about" (which appears to have led to Appellant rendering a narrative) and asked for a demonstration of how Appellant covered Victim's mouth before halting the interview and reading Miranda rights. (R. pp. 427-428.) Appellant volunteered his statement to police, which is not barred by the Fifth Amendment.

Appellant was not handcuffed or restrained in any way. Appellant could have ceased the interview with police at any time. Miller testified that Appellant elected to talk to police freely and voluntarily. Seeing as Appellant was free to go and volunteered to answer police questions to aid in the investigation, it is clear that Appellant was not in custody.

Appellant points to the solicitor's questioning of Wilson about "two phases" of the interview as damning evidence that a Seibert two-phase tactic was employed. (R. pp. 554-555.) The "two phases" referred to by Wilson were (1) the portion of the interview where the Appellant maintained his innocence and (2) the portion of the interview where Appellant gave an inculpatory statement. In contrast, the two phase tactic deplored in Seibert involves inculpatory statements in both phases – an unwarned inculpatory statement followed by a warned inculpatory statement.

Moreover, the circumstances of June 2 closely mirror those of May 25, a circumstance Appellant does not argue to be an unconstitutional encounter. In both

encounters, Appellant was picked up from his location by law enforcement and transported to the law enforcement center. No one accompanied Appellant on either occasion. On both occasions, Appellant spoke to Miller in the same office for the same amount of time, about an hour and a half. Miller described the June 2 interview as "pretty much the same conversation [as before]." (R. p. 425.) On May 25, Appellant was given a ride back to the hospital. Based on his own prior experience, it would seem that Appellant would have no reason to believe he was in custody. See State v. Jones, 153 N.C. App. 358, 570 S.E.2d 128 (2002)(facts supporting finding 16 year-old boy with mild mental retardation was not in custody included that he voluntarily accompanied police, was interviewed in a comfortable office, was not restrained in any way, and had been interviewed four days before and allowed to leave).

Appellant would liken his case to Evans, 354 S.C. 579. In Evans, 354 S.C. 579, after an extensive three-hour unwarned interview in which agents repeatedly told Evans they did not believe her various explanations, Evans was reduced to sobbing, asking agents "'to get her some help.'" Evans, 354 S.C. 579. At that point agents "determined that the interview was bearing fruit" and decided to have another agent, a female, come in to talk to Evans, 354 S.C. at 582. The agent then interviewed Evans for an additional forty-five minutes to an hour, sympathizing with Evans on topics such as "female problems," her deceased mother, and religion. Id. at 581-582. Evans was escorted to the restroom by the female agent twice. Evans finally told the female agent that she started the fire in her home, at which point the original interviewing agents returned to the room, and Evans repeated the statement three more times before it was written on a "voluntary statement form." Id. at 582. Evans' cousin's three requests to see Evans, 354 S.C. 579 during the interview were denied. Id.

Appellant's case is distinguishable from Evans. While officers did escort Appellant to the restroom, it was because he was taken to the more convenient employee restroom which was in a controlled area. In such a case, it would be unreasonable for Appellant to expect that he would be allowed to roam freely in a restricted area of the police station. See Howes v. Fields, 132 S. Ct. 1181, 182 L. Ed. 2d 17 (2012)(respondent, an inmate in prison, was not allowed to leave conference room by himself to return to cell but under no circumstances could he have reasonably expected to roam freely). The evidence regarding the officers' purpose in Appellant's case is also much different. Miller's single sympathetic response was followed by Appellant's confession after a much shorter time frame; there was no coordinated effort to elicit a confession. Miller's short, sympathetic, "tell me what you're talking about," in no way compares to the Evans agent's lengthy, far-ranging sympathetic discussion. In contrast to the several hours Evans was interviewed, Appellant was interviewed for an hour and a half or two hours before giving his statement (less than half the time of Evans' interview). Further, while the interview was conducted in an office in the police station, this fact alone is not determinative. State v. Williams, 405 S.C. 263, 747 S.E.2d 194 (Ct. App. 2013), reh'g denied (Sept. 19, 2013).

Appellant would also have his case paralleled with Navy, 386 S.C. 294. In Navy, 386 S.C. 294, the accused provided a statement at the hospital on the day the child was hospitalized. A few days later, the accused was picked up from home and transported to the police station around 9:00 am. Navy gave his first oral statement at 9:50 am, a statement largely consistent with the first story he gave at the hospital. Officers then proceeded to inform Navy that the child died from suffocation and broken ribs. They followed this revelation with detailed questioning, "asking specifically how respondent

had comforted the crying child." Navy, 386 S.C. 294. As a result of the follow-up questions, officers elicited "that he had 'popped' the child on the back" and "that he may have 'patted' the child on its mouth to stop the crying." Id. at 298-299. Only after this targeted questioning was Navy given Miranda warnings at 11:35 am. Navy then provided a written statement at 11:40 am. In this statement, officers continued asking questions targeted at eliciting further details about how Navy harmed the child. Police then consulted the pathologist with the details provided in Navy's second statement. Upon being told that Navy's story could not have caused the child's death as he would have had to hold his hand over the child's mouth for at least a minute, officers returned for a third statement at 12:25 pm. In this third statement, officers asked specific questions about how long Navy had his hand over the child's mouth and nose. The Court found that evidence supported the trial court's ruling that the first statement was admissible. In suppressing the second and third statements, the Court found:

> The officers began the questioning of respondent with knowledge that the child had been suffocated and with the intention of eliciting a confession. After respondent's first oral statement, the officers "sprang" the suffocation/healing rib fractures information on respondent, and began an unwarned custodial interrogation designed to elicit incriminating information, that is, questioning designed to have respondent admit to having hit the child and to having smothered him. "

Navy, 386 S.C. 294.

Where officers in Navy, 386 S.C. 294 conducted questioning aimed at a confession, the officers here did not. Though aware of the autopsy findings, there is no evidence that these findings were shared with Appellant. Further, where in Navy, 386 S.C. 294 officers followed the "sprung" information of how the child died with follow up questions regarding Navy's conduct, in the present case officers Appellant responded to

information that Sprouse now claimed he was in the room by "bending over in his chair" and "sobbing a little bit" and the words, "accidents happen sometimes." (R. p. 427.) When Miller asked what he meant by that, Appellant told his story.[8] There is no evidence of ongoing, pointed questions which would indicate interrogation in this case as there was in Navy, 386 S.C. 294. Miller ceased the interview and provided Miranda rights as soon as Appellant appeared to incriminate himself (R. p. 53); in contrast, the officers in Navy, 386 S.C. 294 continued to press Navy about his actions even after he made an admission which could incriminate him and pressed him on his conduct before Mirandizing him. Navy's encounter also lasted much longer than Appellant's.

Where Appellant paints Miller's sympathetic response as an interrogation tactic, Miller's single sympathetic response to Appellant's doleful expression that "accidents happen sometimes," is more human than tactical. (R. p. 427.) The testimony actually differentiates Miller's sympathetic response to Appellant's disconsolation from even simple interrogation tactics such as "good cop, bad cop," let alone more sophisticated interrogation methods. (R. p. 56, line 12 – p. 57, line 4.) Talking to someone "really nicely" and having a sympathetic response to a show of emotion are not tactical maneuvers; rather this is how we would expect law enforcement professionals to speak to witnesses or any other civilian they encounter. Appellant's experience certainly did not amount to a coercive, police-dominated encounter.

Finally, while evidence was presented that Appellant has an intellectual disability (R.p. 12, p. 14), there was no evidence that this disability made him unable to comprehend the circumstances of the interview. Certainly there has been no blanket rule

[8] In Appellant's trial testimony, it appears that blame being placed on Appellant would come as no "sprung" surprise Appellant testified that in the time period after May 25, "Everybody was blaming me for what happened," and Sprouse refused to communicate with him. (R p 510, p 512.)

indicating that persons with intellectual disabilities are incapable of understanding whether they are in custody, and no showing was made that this defendant specifically had any such deficit of understanding. Indeed, the psychiatrist who found Appellant competent to stand trial noted Appellant's basic understanding of the court and particularly his ability to give "rational reasons why he believes, particularly his second statement, should not be admitted into evidence." (R. p. 13.) There is no evidence that officers should have been objectively aware of any disability. There is no evidence that Appellant had difficulty conversing with officers, and he represented to them that he had a 12th grade education and could read and write. (R. p. 599, State's Exhibit 41.) In fact, Appellant's argument seemed to be that he understood his situation on May 25, but was hampered by his illicit drug use, not his intellectual disability, on June 2.

In sum, the police interview with Appellant did not constitute a custodial interrogation, and the police were under no obligation to give Appellant his Miranda warnings until Appellant's incriminating statements led police to place him in custody. Accordingly, Appellant's conviction and sentence should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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October 22, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable G. Edward Welmaker, Circuit Court Judge

Appellate Case No. 2013-001314

THE STATE,

Respondent,

v.

JAMES ALLEN JOHNSON,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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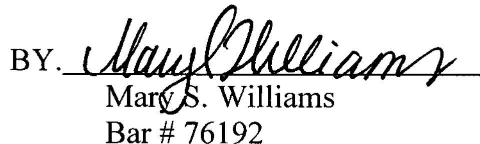
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PROOF OF SERVICE

I, Ellen DuBois, certify that I have served the within Final Brief of Respondent, with proof of service, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.

This 22nd day of October, 2014.

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