STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County
Honorable Kristi Lea Harrington, Circuit Court Judge
Appellate Case Tracking No. 2015-002121

The State, Respondent,

vs.

Joseph Umphlett, Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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II. The trial court did not err in admitting Appellant's statements into evidence.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

Officers were dispatched to the Economy Inn hotel in order to conduct a welfare check regarding children staying at the hotel after a call to dispatch from the children's grandmother. (T.52; 82; 237; R. 15; 45; 182). The grandmother called because she was "very worried, very concerned" about the grandchildren living in the conditions they were in at the motel. (T.233; 235; R. 178; 180). The report also indicated possible drug activity going on in the hotel room where the children were suspected of staying. (T.324; R. 213).

Officer Williams, Corporal Henderson, and Officer Oswald responded to the location. (T.52; 81-82; R. 15; 44-45). Officer Williams knocked on the door and after a period of time Appellant responded through the window. (T.330; R. 219). Officer Williams asked the occupants to open the door and they opened the door. (T.52-53; 83; 331; R. 15-16; 46; 220). Immediately upon opening the door the officers smelled marijuana. (T.53; 83; R. 16; 46). Officer Williams requested consent to search which was denied except Appellant agreed the officers could get the marijuana from the nightstand. (T.53; 83; R. 16; 46). Thereafter, Appellant was read his Miranda[1] warnings prior to any statements being taken. (T.54; 84; 89; R. 17; 47; 52).

The officers conducted a quick search and protective sweep of the hotel room. They were looking for the children as well as securing the scene. (T.335-336; R. 224-225). After further discussion with Appellant, the officers obtained a search warrant for the hotel room. (Court Exhibit 1; R. 589-595). The search yielded roughly 7 ounces or 193.71 grams of methamphetamine. (T.766; R. 541).

Sergeant Thompson arrived after the other officers and met with Officer Williams. He indicated he met with Officer Williams about three doors down from Appellant and Appellant's

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

girlfriend's hotel room. Even at that location, he could smell the marijuana from the hotel room. (T.106; R. 69). Sergeant Thompson then met with Appellant. Appellant admitted he had been read his Miranda warnings. (T.108-109; 112; R.) 71-72; 75. After speaking with Appellant, Sergeant Thompson had Appellant give a written statement. (T.115-117; State's Exhibit 60, Defendant's Statement; R. 78-80; 602). In his statement Appellant admitted there was 7 ounces of methamphetamine, several grams of marijuana, a drug called Molly, a couple ecstasy pills, and a couple firearms present in the hotel room. (State's Exhibit 60; R. 602). His statement tracks what was found during the analysis of the items taken during the execution of the search warrant. He further admits in his statement: "It is all mine and only mine." (State's Exhibit 60; R. 602). Appellant's girlfriend acknowledged she only knew about the marijuana and one handgun and not the remaining drugs or other items. (T.549; R. 419).

ARGUMENT

I. The trial court did not err in refusing to suppress the evidence seized during the execution of a search warrant obtained after the officers conducted a child welfare check and smelled marijuana immediately upon Appellant's opening the door to the hotel room. Further, the issue is not preserved for review on appeal because the drugs and other items were admitted without objection.

Appellant contends the trial court erred in refusing to suppress the evidence seized upon the execution of the search warrant obtained for the hotel room. He maintains the search warrant and evidence seized was the fruit of the poisonous tree because law enforcement conducted a prior unlawful, warrantless search of the room. First, the issue is not preserved because the evidence was admitted without objection. Additionally, the trial court properly refused to suppress the evidence because the search warrant was properly obtained after the officers conducted a child welfare check and smelled marijuana immediately upon Appellant's opening the door to the hotel room.

Preservation

Initially, the issue regarding admission of the drugs is not preserved because Appellant did not object at the time of the admission of the evidence he sought to suppress during the pre-trial *in limine* hearing. The drug analyst reports as well as the drugs themselves were admitted without objection. (T.773; R. 544). "Generally, a motion *in limine* is not a final determination; a contemporaneous objection must be made when the evidence is introduced." State v. Wiles, 383 S.C. 151, 156, 679 S.E.2d 172, 175 (2009). Accordingly, the issue is not preserved for review.

Further, Appellant has waived any objection he had to the admissibility of the evidence. When the State sought to admit both the marijuana and the methamphetamine seized, as well as the drug reports resulting from the seizure, Appellant's counsel specifically indicated: "Without

any objection." (T.764; 773; R. 539; 544). This acted as an express waiver of all previous objections. As a result, any prior objection to the admissibility of the evidence seized based on the search warrant being invalid was waived. See Burke v. AnMed Health, 393 S.C. 48, 55, 710 S.E.2d 84, 88 (Ct. App. 2011) ("When a party states to the trial court that it has no objection to the introduction of evidence, even though the party previously made a motion to exclude the evidence, the issue raised in the previous motion is not preserved for appellate review."); State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) ("Dicapua's sole objection to the videotape came in the form of a motion *in limine* to suppress the videotape because of its lack of audio. Once the State moved to enter the videotape into evidence and publish it to the jury, however, Dicapua's counsel specifically stated he had 'no objection.' We find this amounted to a waiver of any issue Dicapua had with the videotape.").

Additionally, the only objection to the firearms admission was based on the failure to present a chain of custody for the firearms and not based on anything related to the validity of the search warrant. (T.573-579; 595-596; 598; R. 420-426; 431-432; 434). A party cannot raise one issue at trial and another issue on appeal. As a result any objection to the admissibility of the firearms based on the search warrant is waived and the issue is not preserved for review on appeal. See e.g., State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010) ("For an issue to be properly preserved it has to be raised to and ruled on by the trial court."); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal).

Merits

On the merits, the trial court did not err in refusing to suppress the evidence seized because the officers obtained a valid warrant which was not the fruit of the poisonous tree based

on an unlawful, warrantless search. The officers' actions in entering the hotel room upon the smell of marijuana and to complete the child welfare check were entirely reasonable and were not unlawful, warrantless searches of the hotel room.

A trial court's Fourth Amendment suppression ruling must be affirmed if supported by any evidence, and an appellate court may reverse only when there is clear error. State v. Taylor, 401 S.C. 104, 108, 736 S.E.2d 663, 665 (2013); see also, State v. Abdullah, 357 S.C. 344, 349, 592 S.E.2d 344, 347 (Ct. App. 2004) ("On appeal from a suppression hearing, this court is bound by the circuit court's factual findings if any evidence supports the findings."). The appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009).

It is the "basic rule that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" Arizona v. Gant, 556 U.S. 332, 338 (2009) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)). However, because the ultimate touchstone of the Fourth Amendment is "reasonableness," the warrant requirement is subject to certain exceptions. State v. Herring, 387 S.C. 201, 210, 692 S.E.2d 490, 494 (2009). South Carolina courts have recognized several exceptions to the warrant requirement, including: (1) search incident to a lawful arrest; (2) "hot pursuit"; (3) stop and frisk; (4) the automobile exception; (5) the "plain view" doctrine; and (6) consent. State v. Bailey, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981). Additionally, exigent circumstances can justify a warrantless search of a home which would otherwise be unreasonable. Herring, 387 S.C. at 209, 692 S.E.2d at 494.

First, officers are allowed to attempt contact with an individual at a hotel room, or any residence, for the purpose of conducting a welfare check. This Court recently upheld the validity of law enforcement conducting a welfare check. See State v. Counts, 413 S.C. 153, 174 n.7, 776 S.E.2d 59, 71 n.7 (2015) ("In the instance of a 'welfare check,' the implicit license to approach a home as referenced in Florida v. Jardines, —— U.S. ——, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013) is applicable.").

Once Appellant opened the door, officers immediately smelled marijuana. (T.53; 83; 106; R. 16; 46; 69). The smell of marijuana provided the requisite probable cause to obtain the search warrant in this case. See State v. Lane, 271 S.C. 68, 72, 245 S.E.2d 114, 116 (1978) ("From the record it is evident that **the odor emanating from the packages alone was a sufficient basis to establish probable cause** as to their contents when it is considered that an officer of the law, familiar with the odor of marijuana, believed the odor being emitted was that of marijuana." (emphasis added)); see also United States v. Humphries, 372 F.3d 653, 658 (4th Cir. 2004) ("We have repeatedly held that the odor of marijuana alone can provide probable cause to believe that marijuana is present in a particular place. . . . While smelling marijuana does not assure that marijuana is still present, the odor certainly provides probable cause to believe that it is. Thus, when marijuana is believed to be present in an automobile based on the odor emanating therefrom, we have found probable cause to search the automobile, and when the odor of marijuana emanates from an apartment, we have found that there is 'almost certainly' probable cause to search the apartment.").

Furthermore, once the officers observed the smell of marijuana coming from the hotel room, the officers were justified under the circumstances in entering the hotel room, locating and detaining the occupants, and securing the premises to prevent the destruction of evidence and to

ensure there were no hidden threats to the officers' or the public's safety. See United States v. Cephas, 254 F.3d 488, 496 (4th Cir. 2001) (ruling an officer's warrantless entry into an apartment was justified by exigent circumstances, namely the prevention of the destruction of evidence, after he smelled the odor of marijuana coming from the apartment); United States v. Grissett, 925 F.2d 776, 778 (4th Cir. 1991) (finding exigent circumstances justified the warrantless entry of a motel room after officers smelled the odor of marijuana through the open motel room door).

In this case, there was the added exigency of verifying whether children were present in the hotel given the presence of children's clothing and toys indicating children may have been staying at the hotel. (T.123-124; 334; R. 86-87; 223). An "exigent circumstance" exists when "real immediate and serious consequence" could occur if the police delay their action in order to obtain a warrant. Welsh v. Wisconsin, 466 U.S. 740, 751 (1984) (citations omitted). "The rationale underpinning the exigent circumstances doctrine is that when faced with an immediate and credible threat or danger, it is inherently reasonable to permit police to act without a warrant." United States v. Yengel, 711 F.3d 392, 396 (4th Cir. 2013). "One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury. 'The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.'" Brigham City, Utah v. Stuart, 547 U.S. 398, 403 (2006) (citing Mincey v. Arizona, 437 U.S. 385, 393-394 (1978)). As a result, the officers acted reasonable in entering the hotel room, detaining its occupants, and conducting a protective sweep of the room.

Even assuming for argument, the officers were not allowed to enter the premises to verify whether children were present or based on the smell of marijuana, the search warrant was still

validly obtained based on the probable cause established by the smell of marijuana and the search warrant did not rely on any information obtained from the entry of the officers into the hotel room. The case of State v. Lane is highly instructive. In Lane, law enforcement officers were notified by a deliveryman about two packages giving off a suspicious odor. Id., 271 S.C. at 70, 245 S.E.2d at 115. The officers recognized the odor coming from the packages as the odor of marijuana, opened one of the packages, and discovered marijuana inside. Id. The officers then resealed the opened package, left the packages with the deliveryman to be delivered as scheduled, and obtained a search warrant for the delivery location. Id. After the packages were delivered, the officers executed the search warrant and discovered marijuana in both packages. Id. at 70-71, 245 S.E.2d at 115. During trial, the marijuana recovered from the package opened without a warrant was ruled inadmissible because the trial judge determined the officers had neither a warrant nor exigent circumstances when they opened the package and discovered the marijuana inside. Id. at 71, 245 S.E.2d at 115. However, the trial judge admitted the other package into evidence because it was opened only after the warrant was obtained. Id. at 71, 245 S.E.2d at 115-116. Subsequently, Lane was convicted and appealed, arguing the search of the second package was the fruit of the warrantless and illegal search of the first package. Id. at 71, 245 S.E.2d at 116.

On appeal, the South Carolina Supreme Court in Lane noted the search of the second package would only have been unlawful if the search warrant relied upon in the search of this package was the product of the earlier unlawful search of the first package. Id. Based on the fact probable cause for the search warrant was established prior to the warrantless search, the Court found the search warrant was not the tainted product of the initial unlawful search, holding:

> From the record it is evident that **the odor emanating from the packages alone was a sufficient basis to establish probable cause** as to their contents when it is considered that an officer of the law, familiar with the odor of marijuana, believed the odor being emitted was that of marijuana.

Id. at 72, 245 S.E.2d at 116 (emphasis added). Because the odor of marijuana alone established a probable cause basis for the issuance of the search warrant, the Court found there was an independent basis justifying the search and seizure of the package not related to the unlawful search of the other package. Id. The Court instructed:

> While the knowledge of the contents of the first package increased the probability that marijuana was in the second package, the fact remains that prior probable cause existed independently of the knowledge subsequently gained from an opening of the first package. Probable cause having existed prior to the opening of the first package, the warrant cannot be deemed a product of the illegal search of package number one nor can the search and seizure of package number two pursuant to the warrant be deemed a product of the illegal search of package number one.

Id. Therefore, Lane's conviction was affirmed. Id. at 74, 245 S.E.2d at 117.

As in Lane, probable cause existed as soon as the officer smelled marijuana. The warrant in the instant case cannot be considered fruit of the poisonous tree even if the officers' entry into the hotel room were unlawful because the search warrant did not in any way rely on information obtained during the entry and was fully supported by probable cause based on the smell of marijuana. Therefore, like the warrant in Lane, the search warrant subsequently issued in Appellant's case was not the product of any illegal law enforcement action regardless of whether the officers' entry into the apartment was lawful or unlawful. See Nix v. Williams, 467 U.S. 431, 443 (1984) ("The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation."); see also United States v. Dessesaure, 429 F.3d 359, 370 (1st Cir. 2005) (reversing the suppression of evidence seized during a search based on a search warrant where "[t]he facts gathered legally, without

resort to the facts gathered illegally, provided an independent and adequate source for the warrant application."). Accordingly, the trial court did not err in denying Appellant's motion to suppress evidence obtained as a result of the execution of the validly obtained search warrant.

II. The trial court did not err in admitting Appellant's statements into evidence.

Appellant maintains the trial court erred in admitting his statement regarding marijuana made to officers after they made entry into his hotel room and his statements, both oral and written, to Detective Thompson regarding ownership of the drugs and weapons found. He maintains the marijuana statement was given prior to required Miranda warnings being read. Next, he asserts the statements regarding ownership of the drugs and weapons were the result of police threats and were not voluntarily made. (See State's Exhibit 60, Defendant's Statement; R. 602). First, several of the arguments raised on appeal are not properly preserved for review by the Court. Additionally, any statement given regarding the marijuana was non-custodial and merely part of the investigation conducted by the officers. Even if in custody, the officers testified Officer Williams read Appellant his Miranda warnings shortly after they entered his hotel. Finally, the statements given regarding ownership of the drugs were not the result of police threats or coercion, but were properly found by the trial court to be knowing and voluntary.

Preservation

Initially, many of the contested statements were not objected to at trial, and therefore, any issues related to the statements are not preserved for review on appeal. Prior to trial, the trial court conducted a Jackson v. Denno[2] hearing to determine whether Appellant's statements were knowing and voluntary. At the hearing, Appellant never challenged the validity of the first statement regarding the presence of the marijuana, but instead focused on the remaining statements where Appellant claimed ownership of the drugs and items in the hotel room. As a result, he cannot now raise an issue regarding custodial interrogation. See State v. Haselden, 353

[2] Jackson v. Denno, 378 U.S. 368 (1964)

S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal).

Additionally, even if his arguments in the pre-trial *in limine* hearing could be construed as raising the issue he now raises on appeal, they are still not preserved because he did not object when the testimony was actually presented at trial. When Officer Williams testified at trial regarding his initial contact with Appellant, he indicated he read Appellant his Miranda rights, he asked Appellant about what was going on, and Appellant indicated it was a "small cigar or a joint" in the room. (T. 337; R. 226). Appellant failed to object. Later in the testimony by Officer Williams, he provided more details about the questioning and Appellant's response including Appellant identifying the drawer containing the marijuana. Again, Appellant's counsel did not object. (T.343-344; R. 232-233). Accordingly, any issue related to Appellant's initial statement regarding the presence of marijuana is not preserved for review on appeal. See State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005) (to preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court), see also, State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) (holding ordinarily an evidentiary ruling *in limine* is not final and an objection contemporaneous with the evidence's admission is required to preserve the issue for appeal). If a party fails to properly object, the party is procedurally barred from raising the issue on appeal. State v. Johnson, 363 S.C. at 58-59, 609 S.E.2d at 523.

Regarding the statements in which Appellant claimed ownership of the items and drugs, the issue is not properly preserved for review on appeal as it relates to his oral statements. Sergeant Thompson testified he made contact with Appellant when Appellant was already sitting in the patrol car. He testified he asked Appellant if he had been Mirandized and Appellant indicated he was given his Miranda warnings. Sergeant Thompson then asked Appellant if he

was willing to talk and had a conversation with Appellant. (T.696-697; R. 483-484). During the conversation Appellant told Sergeant Thompson "there was seven ounces of methamphetamine, in ice form, inside the hotel room; as well as a gun that was inside of a safe; some marijuana; a drug called Molly, which is basically a powder form of MDMA or ecstacy [sic]; and that there was also pills of ecstacy [sic] inside the room." (T.697; R. 484). Sergeant Thompson then provided more specifics of his conversation with Appellant. (T.697-699; R. 484-486). Appellant never objected to the testimony by Sergeant Thompson. As a result, the issue is not properly preserved for review on appeal as it relates to the oral statements provided by Appellant to Sergeant Thompson. See Forrester, 343 S.C. at 642, 541 S.E.2d at 840 (holding ordinarily an evidentiary ruling *in limine* is not final and an objection contemporaneous with the evidence's admission is required to preserve the issue for appeal). The only issue properly preserved for review on appeal relates to Appellant's written statement given to Sergeant Thompson.

Merits

Even though the vast majority of Appellant's arguments on appeal are not preserved for review by this Court, the State will separately address each statement. In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

The circuit court must examine the totality of circumstances surrounding the statement and determine whether the State has carried its burden of proving the statement was given

voluntarily. State v. Miller, 375 S.C. 370, 382, 652 S.E.2d 444, 450 (Ct. App. 2007). The trial court's factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion. State v. Kennedy, 333 S.C. 426, 429, 510 S.E.2d 714, 715 (1998). When reviewing a trial court's ruling concerning voluntariness, the appellate court does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence. State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001).

A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his rights under Miranda. In order to introduce into evidence a confession, the State must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and, if the result of custodial interrogation, was taken in compliance with Miranda v. Arizona, 384 U.S. 436 (1966); see also, State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009). To determine the voluntariness of a statement, the circuit court must first conduct an evidentiary hearing, outside the presence of the jury, where the State must show the statement was voluntarily made by a preponderance of the evidence. State v. Simmons, 384 S.C. 145, 162, 682 S.E.2d 19, 28 (Ct. App. 2009). "The trial judge's determination of the voluntariness of a statement must be made on the basis of the totality of the circumstances, including the background, experience, and conduct of the accused." State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001) (citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973)).

In Miranda v. Arizona, the United States Supreme Court (USSC) created procedural safeguards to protect an individual's right against compelled self-incrimination, holding:

> [W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is

> subjected to questioning . . . [h]e must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Miranda, 384 U.S. 436, 478–79. Failure to comply with these constitutional safeguards renders the person's statements inadmissible against that person. Id. The USSC has embraced a flexible approach regarding Miranda warnings whereby courts consider the totality of the circumstances. See Wyrick v. Fields, 459 U.S. 42, 47–49 (1982).

Initial Statement Regarding Marijuana

Appellant contends the trial court erred in admitting his initial statement acknowledging the presence and location of marijuana in the hotel room. He asserts he was in custody and Miranda warnings were not given prior to the statement. The evidence suggests he was not in custody and the questioning was merely part of the officers' investigation. Further, even if in custody the evidence in the record supports the fact he was given his Miranda warnings prior to the questioning.

First, Appellant was not in custody during the questioning. Miranda's requirements are only triggered when an individual is subjected to custodial interrogation. See Miranda, 384 U.S. at 444 ("[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean 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."). "It is settled that the safeguards prescribed by Miranda become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" Berkemer v. McCarty,

468 U.S. 420, 440 (1984) (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983)). The opinion in Miranda further explains: "Our decision is not intended to hamper the traditional function of police officers in investigating crime. . . . General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding." Miranda, 384 U.S. at 477 (internal citations omitted).

The officers were seeking to conduct a welfare check and verify whether children were present in the hotel room. Further, they were seeking information regarding the odor of marijuana. At the time of the initial questioning, Appellant was not in custody or its functional equivalent. Instead, he was merely being asked investigatory questions to assist the officers in determining the nature of the situation in the hotel room.

Even if the officer suspected Appellant was guilty of a crime at the time of their initial questions, it did not render him in custody and require Miranda warnings be given. "[P]olice officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'" Oregon v. Mathiason, 429 U.S. 492, 495 (1977). As a result, Miranda was not required when the officers questioned Appellant about the children and the smell of marijuana because he was not in custody at the time.

Assuming for sake of argument Appellant was in custody, the record supports the trial court's finding that Miranda warnings were properly given to Appellant. First, Officer Williams and Officer Henderson both testified Appellant was given his Miranda warnings. (T.53-54; 84; 89; R. 16-17; 47; 52). The only question asked of Appellant prior to Miranda was whether the

officers could have consent to search the room. Otherwise, Officer Williams specifically testified he Mirandized Appellant prior to taking any statements from him. (T.54; R. 17). Officer Henderson also testified Appellant was Mirandized prior to any statement being taken from him and within minutes of making contact. (T.84; 88-89; R. 47; 51-52). Finally, Sergeant Thompson testified he was informed Appellant had been Mirandized by Officer Williams. Sergeant Thompson also asked Appellant, who admitted he had been previously Mirandized. (T.107; 108-109; 112; R. 70; 71-72; 75).

Appellant did not testify or put up evidence at the Jackson v. Denno hearing. After the hearing, the trial court allowed both parties to present argument regarding the statement. The trial court found Miranda was properly read and the statement given was voluntary. (T.146-147; R. 109-110). While Appellant's counsel may have a different opinion regarding the evidence and may wish this Court agree with his version of events, this Court is not to reweigh the evidence but only to determine whether there is evidence to support the trial court's conclusion the statement was knowing and voluntary and was given after the appropriate warnings were read. The testimony of all three officers involved in this case supports the trial court's determination. Accordingly, this Court should find the initial statement was properly admitted.

Statements to Thompson

Appellant contends the trial court erred in admitting oral and written statements made by Appellant to Sergeant Thompson because they were coerced. He asserts Appellant made the statements after a promise not to arrest his girlfriend if he stated all the drugs and firearms were his. The testimony by Sergeant Thompson specifically belies any allegation and supports the findings by the trial court.

"[T]he confession may not be 'extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of improper influence.'" State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 246 (1990) (quoting Hutto v. Ross, 429 U.S. 28, 30 (1976) (brackets in original)). "A police threat to arrest family members unless a defendant confesses to a crime could render the defendant's confession involuntary if it in fact occurred." State v. Thompson, 413 S.C. 590, 608, 776 S.E.2d 413, 423 (Ct. App. 2015) (citing State v. McClure, 312 S.C. 369, 371, 440 S.E.2d 404, 405 (Ct. App. 1994)). This Court in Thompson continued:

> However, the question of the voluntariness of such a confession can come down to a question of credibility, which may be resolved by the trial court in favor of the officers. On appeal, the conclusion of the trial [court] on issues of fact as to the voluntariness of a confession will not be disturbed unless so manifestly erroneous as to show an abuse of discretion. When reviewing a trial court's ruling concerning voluntariness, [the appellate court] does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence.

Id. (Internal citations and quotation marks omitted).

First, both Officer Williams and Officer Henderson testified Appellant was read Miranda warnings. (T.54; 84; 89; R. 17; 47; 52). They both indicated Appellant was not threatened, they did not make any promises, and he was not tricked into giving the statements. (T.58-59; 88; R. 21-22; 51).

Additionally, Sergeant Thompson verified Appellant received Miranda warnings prior to speaking with him. (T.107; 108-110; R. 70; 71-73). Sergeant Thompson specifically indicated he did not make any threats or promises to Appellant. He also indicated he did not witness any officers make any misrepresentations or promises to Appellant. (T.112; R.75). Sergeant

Thompson further indicated he did not make any threats or promises to Appellant in order for Appellant to write a written statement. (T.115; R. 78).

On cross-examination, Appellant's counsel attempted to get Sergeant Thompson to acknowledge promising not to arrest Appellant's girlfriend if Appellant gave a statement admitting all drugs belonged to him. Sergeant Thompson explained: "As far as if he gave a statement, not arresting her? No. . . . I believe [Appellant] did ask us not to arrest her and I told him that if we found that she wasn't involved in it, that we would not." (T.125; R. 88). After further questioning by Appellant's counsel including attempts to twist Sergeant Thompson's testimony, Sergeant Thompson explained very clearly:

> I believe you're twisting around what I'm saying.
>
> What I'm saying is when we asked him for a statement, he provided the statement saying that everything was his.
>
> He asked us not to arrest her and I told him that if we investigated and find that she's not involved in the drugs, then we wouldn't arrest her.

(T.126; R. 89). During redirect, everything was again clarified:

> Q. So he gave you a written statement, correct?
>
> A. First he gave an oral statement just telling us about the things in there. But that's when I wanted him to write it down.
>
> Q. And subsequent to that is when you had the conversation about whether or not [Appellant's girlfriend] would be arrested?
>
> A. He was asking us not to arrest her because he was saying everything was his, or claiming ownership.
>
> Q. That was after the written statement?
>
> A. Yes.

(T.139-140; R. 102-103).

The trial court specifically concluded:

> The fact that what I perceive that [Appellant's counsel] on behalf of the defendant, is making the assumption that the statement was given as a promise that charges would not be brought against [Appellant's girlfriend]. The statement by [Sergeant] Thompson indicated that if we found that she was not involved, that we would not press charges, **not** that if you gave the statement . . . acknowledging that all the drugs were yours, that we wouldn't press charges.
> Based upon the totality of the circumstances, again, I do not find that there was any coercive police conduct, and based upon the totality of the circumstances, I find that the statements were freely and voluntarily given and they will not be suppressed.

(T.146-147; R. 109-110) (emphasis added).[3] The trial court's findings are supported by the record and this Court should affirm the decision to admit both the oral and written statements given to Sergeant Thompson.

Finally, even if the only preserved issue—the admittance of the written statement—could somehow be considered error, it is clearly harmless in light of the information provided in the oral statement to Sergeant Thompson which was never objected to by Appellant. See State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) ("Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained."); State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (any error in admission of evidence cumulative to other un-objected to evidence is harmless).

[3] Appellant mischaracterizes the findings by the trial court to seem to indicate she acknowledged that Appellant claiming ownership of the drugs was a prerequisite to his girlfriend not being arrested. (App. Br. 10-11). The actual statement by the trial court is provided above and clearly indicates exactly the opposite of Appellant's characterization.

CONCLUSION

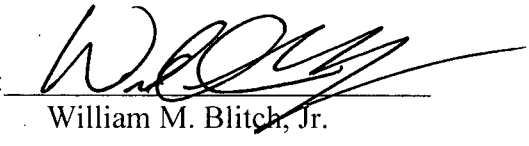
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

SCARLETT WILSON
Solicitor, Ninth Judicial Circuit

BY: 
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ATTORNEYS FOR RESPONDENT

October 24, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
OCT 24 2016
SC Court of Appeals

Appeal from Berkeley County
Honorable Kristi Lea Harrington, Circuit Court Judge
Appellate Case Tracking No. 2015-002121

The State, Respondent,

vs.

Joseph Umphlett, 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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ATTORNEYS FOR RESPONDENT

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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Respondent on Appellant by depositing copies of the same in the United States mail, postage prepaid, addressed to:

John H. Strom, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 24th day of October, 2016.

Sally Ellison

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RE: State v. Joseph Umphlett
Appellate Case Tracking No. 2015-002121

Dear Mr. Strom:

I am enclosing copies of the Final Brief of Respondent in the above-referenced case. If you have any questions, please do not hesitate to contact me.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General
S.C. Bar No. 15608

Enclosures

cc: Honorable Jenny A. Kitchings (original and 10 copies enclosed)
Victim Services

Hand Delivery
SC COURT OF APPEALS

Please return <u>extra</u> copy to AG's Office