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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
G. Edward Welmaker, Circuit Court Judge

THE STATE,

Respondent,

vs.

JAMES ALLEN JOHNSON,

Petitioner.

Appellate Case No. 2016-000072

BRIEF OF RESPONDENT

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PETITIONER'S QUESTION PRESENTED

I. Did the Court of Appeals err in holding an issue was raised differently on appeal than at trial, and, therefore, not preserved where the trial judge ruled without hearing or taking any argument from the parties and the issue raised on appeal was the legal issue obviously raised by the evidence at the pre-trial *Jackson v. Denno*¹ hearing?

II. Did the Court of Appeals err in upholding the admission of a statement spawned from a two-phase interrogation of a mentally retarded suspect who did not receive Miranda² warnings until after he made incriminating statements, violating state law, the Fifth Amendment, *Miranda*, and *Missouri v. Seibert*?³

COUNTER STATEMENT OF QUESTIONS PRESENTED

I. Did the Court of Appeals err in finding the question of whether Petitioner'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 not preserved for review?

II. Did the Court of Appeal err in finding the trial judge did not abuse his discretion when he admitted a voluntary confession where Petitioner was not subjected to custodial interrogation prior to his incriminating statement, and *Miranda* rights were promptly given as soon as incriminating information was volunteered?

¹ *Jackson v. Denno*. 378 U.S. 368 (1964).

² *Miranda v. Arizona*. 384 U.S. 436 (1966).

³ *Missouri v. Seibert*. 542 U.S. 600 (2004).

STATEMENT OF THE CASE

Petitioner 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 Petitioner guilty as indicted. (R. p. 588.) Petitioner was sentenced by Judge Welmaker to imprisonment for a term of sixty-two years. (R. p. 595.) Petitioner appealed his conviction to the South Carolina Court of Appeals and his conviction was affirmed in an unpublished opinion. (2015-UP-378, filed July 29, 2015.) Petitioner filed a Petition for Rehearing on August 12, 2015, which was denied on December 16, 2015.

Petitioner then filed a Petition for Writ of Certiorari on January 29, 2016. The State made its Return to the Petition on February 23, 2016. By order dated December 2, 2016, the Supreme Court granted certiorari and ordered the parties to dispense with briefing. Petitioner filed his Brief of Petitioner on January 3, 2017, and the State now files the Brief of Respondent.

STATEMENT OF FACTS

On May 25, 2011, Emergency Services received a call stating that someone was choking, and a team of firefighters was the first responders to the scene. (R. pp. 102-103.) When the firefighters arrived, a twenty month old child (Victim) was lying on the floor. (R. p. 104.) The child's mother was doing chest compressions with the heel of her palm and Petitioner 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.) Petitioner 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. Crosswell 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. (R. pp. 449-450.) Dr. Ward testified 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.⁴ (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.)

⁴ 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

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 Petitioner 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 Petitioner 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. 419.) She was then awoken by Petitioner 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 Petitioner's. (R. p. 273; p. 275.) Sprouse was ultimately arrested for homicide by child abuse and accessory after the fact. (R.

carpeting. (R. p. 157-158; 196.)

p. 434.)

Petitioner 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. Petitioner was in the living room. When Mathias asked Sprouse what happened, Petitioner 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 Petitioner 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 Petitioner what happened, Petitioner 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.) Petitioner stated he then saw Victim lying on the floor with Sprouse attempting CPR. (R. p. 25; p. 345.) At the hospital, Petitioner 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.) Petitioner spoke casually with Miller in his office and ultimately provided a statement. (R. pp. 402-404.) Petitioner 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. Petitioner stated that when he came out of the bathroom, Victim was on her back and Sprouse was attempting CPR. Petitioner 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, Petitioner 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, Petitioner 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.) Petitioner also noted an incident a week earlier in which law enforcement came to the house because Victim's half-sister was outside unsupervised. Petitioner claimed to have been in the bathroom during this incident as well. (R. p. 410.) After providing the statement, Miller drove Petitioner 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.)

Petitioner next spoke to police a week later, on June 2. (R. p. 25.) Two deputies transported Petitioner to the law enforcement center, and Autrey and Miller met Petitioner there. (R. p. 26; p. 356-357; pp. 420-421.) Officers advised Petitioner that they were "interviewing everybody that was associated with the case,"⁵ and he did not have to come with them.⁶ (R. p. 443; pp. 550-551.) Miller testified that Petitioner was not in custody at this time. (R. pp. 421-422.) Petitioner appeared to recognize Miller from their previous conversation. (R. p. 422.) Petitioner was present freely and voluntarily and was advised that he was there because the police needed more information to determine what happened. (R. p. 422.) Petitioner did not appear to be under the influence of drugs or alcohol at the time of the interview, and Petitioner 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 Petitioner's breath, nor did they notice the dilated pupils or bloodshot eyes that would indicate drug use. (R. p. 377, p. 423; p. 443.) Petitioner was not slurring his speech nor was he unsteady on

⁵ The same day Miller also obtained additional statements from Crystal Inman, the woman Petitioner and Sprouse lived with at the time, and Sprouse. (R. p. 416-p.420.)

⁶ Petitioner claimed police said he had to go with them. Petitioner 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, Petitioner's brother denied that he was present when police arrived,

his feet. (R. p. 377; p. 423.)

The initial conversation was casual. (R. p. 51; p. 424.) Officers informed Petitioner that Sprouse now claimed Petitioner was the one in the den with the child at the time of the incident. (R. p. 52; p. 425.) Petitioner 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.) Petitioner and Miller talked for a while about his dislike for Victim's father. (R. p. 425.) After an hour, Miller asked Petitioner if he would like anything to eat or drink. (R. p. 425.) Petitioner refused Miller's offer. (R. p. 425.) Miller asked Petitioner if he would like to use the restroom, and Petitioner replied that he would. (R. p. 425.) Miller testified that the only public restroom is downstairs and is a long walk, so he took Petitioner to the employee restroom. (R. p. 425-426.) Miller accompanied Petitioner 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 Petitioner if he was being truthful. (R. p. 427.) Petitioner "continued talking about how he wanted the child to have help, he wanted to help, wanted peace." (R. p. 28; p. 360.) Petitioner then bent over in his chair and started sobbing. (R. p. 427.) Petitioner stated, "accidents happen. He said he wishes that she never went away." (R. p. 29; p. 362; p. 426.) Miller asked Petitioner, "Tell me what you're talking about." (R. p. 427.) Petitioner 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.) Petitioner then stated that he tried to get Victim to stop crying but she would not. (R. p. 427.) Petitioner 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.) Petitioner stated when she

stating he was at the store at the time. (R. p. 544.)

stopped crying is when Victim stopped breathing. (R. p. 428.) Petitioner then demonstrated covering the victim's mouth and nose. (R. p. 428.) Upon this admission, Petitioner 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 Petitioner'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 Petitioner of his rights. (R. p. 428.) Miller advised Petitioner of each line, one at a time, and that it was his choice to waive his rights or not. (R. p. 53; p. 429.) Petitioner 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.) Petitioner 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.) Petitioner was read his rights again. (R. p. 431.) Petitioner then provided a written statement. (R. p. 33; pp. 368-370.)

Petitioner gave Autrey permission to type his statement. (R. p. 431.) In his statement, Petitioner 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 Petitioner's statement was typed, and Petitioner had an opportunity to read over it. (R. p. 432.) Petitioner 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.) Petitioner was in custody at this point. (R. p. 432.) Following this statement, a warrant was obtained for Petitioner's arrest. (R. p. 372; p.

433.) During arrest and booking, Petitioner “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.)

Petitioner recalled speaking with Miller on May 25 and recalled giving a statement that day. (R. pp. 492-494; p. 506-507.) However, Petitioner maintained he could not remember the entire interaction with officers on June 2. (R. p. 67; pp. 494-495.) Petitioner 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.) Petitioner claimed to have taken about ten Xanax before police arrived and to have taken three more while in the bathroom at the police station.⁷ (R. pp. 68-69.) Petitioner 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.) Petitioner 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.)

Before the jury, Petitioner reverted to his original story. Petitioner 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.) Petitioner testified he called 9-1-1 and attempted to help with CPR. (R. pp. 486-487.) Petitioner 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.)

⁷ Miller accompanied Petitioner to the restroom but noted no unusual actions. (R. p. 426.)

In addition to statements given to police, Petitioner and Sprouse were placed together for transport from prison to Family Court on one occasion. During that transport, after the court appearance, Petitioner 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.)

ARGUMENT

I. The Court of Appeals correctly found the question of whether Petitioner'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 was not preserved for review.

Petitioner contends the trial judge erred in admitting his incriminating statements to officers at the law enforcement center. Petitioner asserts that since Petitioner 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, Petitioner's argument was not raised to and ruled upon by the trial judge and is therefore not preserved for appellate review. Second, Petitioner was not in custody at the time he made the incriminating statements, nor was Petitioner subjected to an interrogation. The trial judge committed no error in admitting Petitioner's statements. Petitioner's conviction should be affirmed.

Petitioner failed to preserve his argument for appellate review. Regarding admissibility of statements, Petitioner 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. Witnesses were called to testify as to the circumstances surrounding Petitioner's various statements:

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

(R. pp. 18-86.) The cross-examination and evidence Petitioner presented at this hearing focused on his alleged gross intoxication on June 2. (R. p. 61; pp. 66-85.) After the State and Petitioner

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, Petitioner'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 Petitioner'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.

Petitioner failed to articulate with any specificity the nature of his objection to the admission of the statement at trial; therefore Petitioner's argument is not preserved for appellate review. If any argument could be inferred from the testimony presented at the *Jackson* 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* 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, Petitioner 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* 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 Petitioner'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 Petitioner 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). The Court of Appeals' reliance on *Freiburger* for this proposition was entirely on point.

II. The Court of Appeals properly found the trial judge did not abuse his discretion when he admitted a voluntary confession where Petitioner was not subjected to custodial interrogation prior to his incriminating statement, and *Miranda* rights were promptly given as soon as incriminating information was volunteered.

Even if this Court finds that the issue of whether Petitioner's statements were admitted in violation of *Miranda* or *Seibert* to be preserved, evidence would support a finding of admissibility by the trial court. Petitioner was not in custody nor were the statements made as a result of an interrogation. Petitioner's statements were made voluntarily to police as part of their investigation, Petitioner 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 Petitioner's position would believe he was free to leave at any time. Therefore, Petitioner 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).

As the Court of Appeals correctly noted, 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 (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.

Petitioner 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 (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, Petitioner was not subjected to custodial interrogation at the law enforcement center. On June 2, Petitioner was asked to come speak with law enforcement as police were interviewing everyone associated with the case. Petitioner agreed. He was offered the option of riding with someone else or riding with officers, and he volunteered to ride with officers. Petitioner asked about a ride home afterward, and Wilson promised a return ride home as well. (R. p. 551.) Wilson was not tasked with arresting Petitioner or taking him into custody. At the time of the interview, Petitioner was as much a witness as a potential suspect. (R. pp. 63-64.) Petitioner 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.) Petitioner was at no point threatened with arrest nor were references made to consequences if he was not forthright. During the interview, Petitioner 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 Petitioner's version of events. Miller's question asking whether Petitioner was telling the truth about being in the room could just as easily elicited a response that Petitioner saw Sprouse do something to the child. This question is indicative that Petitioner was being treated as a witness – merely asking Petitioner if he was present in no way implicates a belief that he was a criminal actor. However, Petitioner leaned over in his chair and started sobbing. Petitioner 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 Petitioner gave Investigator Miller a lengthy account of the events leading up to Victim's death and his role in it. Petitioner'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 Petitioner to “tell [him] more what [he's] talking about” (which appears to have led to Petitioner rendering a narrative) and asked for a demonstration of how Petitioner covered Victim's mouth before halting the interview and reading *Miranda* rights. (R. pp. 427-428.) Petitioner volunteered his statement to police, which is not barred by the Fifth Amendment.

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

Petitioner 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 Petitioner maintained his innocence and (2) the portion of the interview where Petitioner 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 Petitioner does not argue to be an unconstitutional encounter. In both encounters, Petitioner was picked up from his location by law enforcement and transported to the law enforcement center. No one accompanied Petitioner on either occasion. On both occasions, Petitioner 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, Petitioner was given a ride back to the hospital. Based on his own prior experience, it would seem that Petitioner 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).

Petitioner would liken his case to *Evans*, 354 S.C. 579. In *Evans*, 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.'" *Id.* 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. *Id.* 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 during the interview were denied. *Id.*

Petitioner’s case is distinguishable from *Evans*. While officers did escort Petitioner 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 Petitioner 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 Petitioner’s case is also much different. Miller’s single sympathetic response was followed by Petitioner’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, Petitioner 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).

Petitioner would also have his case paralleled with *Navy*, 386 S.C. 294. In *Navy*, 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* 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 Petitioner. Further, where in *Navy* officers followed the “sprung” information of how the child died with follow up questions regarding Navy’s conduct, in the present case officers Petitioner 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, Petitioner told his story. There is no evidence of ongoing, pointed questions which would indicate interrogation in this case as there was in *Navy*. Miller ceased the interview and provided *Miranda* rights as soon as Petitioner appeared to incriminate himself (R. p. 53); in contrast, the officers in *Navy* 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 Petitioner’s.

Where Petitioner paints Miller’s sympathetic response as an interrogation tactic, Miller’s single sympathetic response to Petitioner’s doleful expression that “accidents happen sometimes,” is more human than tactical. (R. p. 427.) The testimony actually differentiates Miller’s sympathetic response to Petitioner’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. Petitioner’s experience certainly did not amount to a coercive, police-dominated encounter.

Finally, while evidence was presented that Petitioner 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 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 Petitioner competent to stand trial noted Petitioner'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 Petitioner 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, Petitioner'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 Petitioner did not constitute a custodial interrogation, and the police were under no obligation to give Petitioner his *Miranda* warnings until Petitioner's incriminating statements led police to place him in custody. Accordingly, the trial court was properly within its discretion to admit Appellant's statements to law enforcement. Petitioner's conviction and sentence should be affirmed.

CONCLUSION

For all of the foregoing reasons, Respondent submits this Court should either dismiss certiorari as improvidently granted or affirm the decision of the Court of Appeals.

Respectfully submitted,

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February 2, 2017

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

Appellate Case No. 2016-000072

THE STATE,

Respondent,

v.

JAMES ALLEN JOHNSON,

Petitioner.

PROOF OF SERVICE

I, Susannah R. Cole, certify that I have served the within Brief of Respondent, with proof of service, on Petitioner 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 3rd day of February, 2017.



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