STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2016-001123

THE STATE, ...RESPONDENT,

v.

TIMOTHY EMMENUEL GREENE,.....APPELLANT.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

The trial court properly declined to suppress Appellant's first statement because he was not in custody at the time of questioning.

STATEMENT OF THE CASE

Appellant was indicted during the October 2015 term of the York County Grand Jury for possession of a controlled substance and possession of marijuana. (*Indictments) He proceeded to a jury trial May 17, 2016, before the Honorable John C. Hayes, III. He was convicted as charged. Judge Hayes sentenced him to one year's imprisonment suspended upon service of thirty days to be served on the weekend and two years' probation for each conviction, to run concurrently.

STATEMENT OF FACTS

Officers arrived at Timothy Greene's (Appellant) home to serve outstanding warrants on his brother, Cameron Greene. (Tr.48.) After Cameron's arrest, officers requested and were given consent to search the home.[1] (Tr.49.) During the search of Appellant's room, Officer Mark Suchenski discovered marijuana and three pills of alprazolam.[2] (Tr.49–50.) Officer Suchenski informed Officer David Vaughn of his discovery, and Officer Vaughn asked Appellant whether the drugs were his; Appellant answered in the affirmative. (Tr.62.) Accordingly, Officer Vaughn placed him under arrest and read him his *Miranda*[3] rights. (Tr.62.) Appellant acknowledged he understood his rights and agreed to answer the officer's questions. (Tr.64.) Officer Vaughn then asked whether the drugs discovered in his room were his, and Appellant responded in the affirmative. (Tr.64.)

Appellant was charged with possession of marijuana and possession of a controlled substance. (Tr.11.) He proceeded to trial before the Honorable John C. Hayes, III. Prior to trial, Appellant requested a *Jackson v. Denno*[4] hearing to determine the admissibility of his statements. The sole witness at the hearing was Officer Vaughn, who testified Appellant was not threatened, there were no weapons drawn, and he was in the company of the rest of the occupants of the home when he claimed ownership of the drugs. (Tr.32.) He further testified that Appellant was free to leave until he confessed that the drugs were his. (Tr.32.) Still, Appellant argued that there were "questions about whether he was truly free to leave" when he was initially asked whether the drugs were his and thus he should not have been asked without

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[1] The officers received verbal consent and also written consent signed by all the residents of the home: Cameron, Appellant, and Appellant's girlfriend, Tiffany Poole. (Tr.59, 66.)
[2] Alprazolam is the generic term for Xanax. (Tr.11.) Although throughout the record it is often transcribed as "Panax," the State believes this distinct nomenclature is a typographical error.
[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).
[4] 378 U.S. 368 (1964).

the benefit of *Miranda*. (Tr.33.) Accordingly, he argued both his pre-*Miranda* and post-*Miranda* statements should be suppressed. (Tr.33.) The trial court noted that the only testimony presented was that he was free to leave and defense counsel agreed that the testimony indicated he was not in custody. (Tr.34.) As a result, the trial court ultimately concluded the evidence preponderated in favor of a finding that it was freely and voluntarily given and thus admissible. (Tr.34–35.)

At trial, Officer Suchenski testified first about receiving consent to search and his discovery of the narcotics in Appellant's room. The State then called Officer Vaughn who explained, without objection, that he asked Appellant whether the drugs were his and Appellant admitted they were. (Tr.62.) Appellant was then arrested and Mirandized, after which he agreed to continue his discourse with the officers. (Tr.64.) When Officer Vaughn asked whether the drugs were his, Appellant again answered yes. (Tr.64.) The State also presented the testimony of the chemist who analyzed the retrieved substances and she determined the pills contained alprazolam and the other substance was marijuana. (Tr.80–81.) Both substances were entered into evidence without objection. (Tr.81–82.)

At the close of the State's evidence, Appellant moved for a directed verdict, which was denied. (Tr.84.) Appellant did not testify in his own defense but offered the testimony of his girlfriend, Poole. She claimed that when an officer asked if the drugs belonged to Appellant, he denied it and only confessed after the officer threatened to arrest everyone in the house unless someone claimed them. (Tr.91.)

The jury ultimately found Appellant guilty as charged and the trial court sentenced him for each conviction to one year's imprisonment, suspended on service of thirty days on the weekend and two years' probation, to run concurrently. (Tr.118, 123.)

ARGUMENT

The trial court properly declined to suppress Appellant's first statement because he was not in custody at the time of questioning.

Appellant asserts the trial court erred in denying his motion to suppress the initial incriminating statement he made in his home because the police failed to Mirandize him prior to questioning. Because Appellant was not in custody at the time of questioning, his statement was not obtained in violation of the law and was therefore admissible.

Initially, Appellant failed to preserve this argument because he did not contemporaneously object to the admission of the statement. *See State v. Atieh*, 397 S.C. 641, 646, 725 S.E.2d 730, 733 (Ct. App. 2012) ("A ruling *in limine* is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review."). Although this rule is relaxed where no intervening evidence is offered between the motion *in limine* and the admission of the evidence at trial, here the statements were not offered immediately after the ruling. *State v. Moses*, 390 S.C. 502, 511, 702 S.E.2d 395, 400 (Ct. App. 2010) (acknowledging that a party need not renew its objection if the trial "court makes a ruling on the admission of evidence *immediately prior* to the evidence at issue being introduced," but finding in the instant case intervening evidence was presented and therefore counsel was required to renew the objection). Accordingly, because Officer Vaughn testified about Appellant's statement after Officer Suchenski testified, Appellant was required to renew his objection to preserve the issue for appellate review. Regardless, Appellant's argument fails on the merits.

By way of clarification, Appellant's argument is premised on a misunderstanding of the facts. Although Appellant asserts he was handcuffed and arrested (and thus in custody) prior to the initial questioning, that scenario is simply not borne out by the record. During the *Denno*

hearing, Officer Vaughn's testimony was perhaps inarticulate at times; however, on cross-examination he clarified the chain of events:

> Officer Vaughn: After he said that's his bedroom we found drugs. We ask if the drugs were his at that point he would be detained because of the drugs.
>
> Defense Counsel: Okay. So you find the drugs in his bedroom you ask him if their [sic] his and he says yes. Then you Mirandize --
>
> Officer Vaughn: I place him under arrest then I Mirandize him.
>
> Defense Counsel: Okay. You place him under arrest Mirandized him and ask him again. So was he free to leave between when you found them and when you first ask him whether those were his drugs?
>
> Officer Vaughn: He could.
>
> Defense Counsel: Okay. And you would let him go at that point?
>
> Officer Vaughn: Yes.

(Tr.32.) Further when the trial court asked defense counsel if the testimony indicated Appellant was not in custody, she concurred; she did not contend Appellant was arrested or otherwise restrained. Additionally, Officer Vaughn's testimony at trial simplified this timeline: "At this point I ask[ed Appellant if the drugs were his]. He says yes. I sequently [sic] placed him under arrest; I read him his Miranda rights. And I ask him were the drugs his that Officer Suchenski found in the bedroom. He advised yes they were." (Tr.62.) Officer Vaughn explicitly described how he handcuffed and placed Appellant under arrest subsequent to the initial statement. Appellant's characterization of the facts is therefore unsupported and his claim of legal error must necessarily fail. The record demonstrates Appellant was not handcuffed until he was arrested—which occurred after he admitted the drugs were his. At any rate, analyzing admissibility under the facts presented to the trial court, the statement was properly admitted.

The admission or exclusion of evidence rests in the sound discretion of the trial court 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).

The Fifth Amendment to the United States Constitution guarantees "[n]o person shall be compelled in any criminal case to be a witness against himself." Giving effect to this right, the United States Supreme Court established certain procedural safeguards in *Miranda*, requiring law enforcement to apprise a criminal suspect of his constitutional rights prior to commencing a custodial interrogation. *Duckworth v. Eagan*, 492 U.S. 195, 201 (1989). Pursuant to *Miranda*, prior to a 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. The State is thus prohibited from using statements made without the benefit of these safeguards against a defendant, the rationale being that the nature of a custodial interrogation is inherently coercive and any statement made is done so involuntarily. *Miranda*, 384 U.S. at 444.

As such, the inquiry into whether a *Miranda* violation has occurred requires a determination of whether the questioning was in the nature of interrogation and whether the defendant was in custody. *State v. Whitner*, 380 S.C. 513, 518, 670 S.E.2d 655, 658 (Ct. App. 2008). "Interrogation is defined as express questioning, or its functional equivalent which includes 'words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response.'" *State v. Sims*, 304 S.C. 409, 416–17, 405 S.E.2d 377, 381 (1991) (quoting *Rhode Island v. Innis,* 446 U.S. 291, 301 (1980)). Determining whether a defendant was in custody requires a review of the totality of the circumstances, including the location, purpose, and length

of interrogation, and whether the defendant was free to leave. *State v. Navy*, 386 S.C. 294, 301, 688 S.E.2d 838, 841 (2010). Succinctly, the inquiry encompasses whether the defendant suffered a deprivation of freedom akin to a formal arrest. *State v. Easler*, 327 S.C. 121, 127, 489 S.E.2d 617, 621 (1997). Review of the totality of the circumstances is objective in nature and requires the court to consider if a reasonable person would have believed he was in custody. *Navy*, 386 S.C. at 301, 688 S.E.2d at 841.

Here, Appellant was not in custody and therefore it was unnecessary for Officer Vaughn to apprise him of his *Miranda* rights before his initial statement. Appellant was in his home, not physically restrained, and awaiting the termination of a search to which he had consented.

The United States Court of Appeals for the Fourth Circuit considered a similar factual scenario in *United States v. Parker*, 262 F.3d 415 (4th Cir. 2001). In that case, ATF agents observed Kymberli Parker delivering ammunition to her brother, a convicted felon, in violation of 18 U.S.C. § 922(d)(1). *Id.* at 417. ATF agents arrived at her home the morning after the incident and, initially mistaking her grandmother for her, handcuffed her grandmother at gunpoint. *Id.* Realizing the mistake, the agents then obtained consent to enter the home and ultimately to search it, which revealed no contraband. *Id.* at 417–18. Parker eventually joined her grandfather and aunt with the agents in the kitchen. *Id.* at 418. After twenty minutes, two agents requested to speak with Parker alone, interviewing her for roughly thirty minutes. *Id.* During this time, the door was closed or partially closed, but Parker's aunt entered the room twice to speak with her. *Id.* Parker was not handcuffed and was told she was not under arrest; she was never Mirandized. *Id.* However, she eventually signed a statement written by law enforcement confessing to knowingly providing a convicted felon with ammunition. *Id.* At trial, she moved to suppress the statement, which the district court denied, holding Parker was not in custody so as to require a *Miranda* warning. *Id.* On appeal, the Fourth Circuit affirmed,

emphasizing that Parker's freedom of action was not curtailed to the degree associated with a formal arrest so as to implicate *Miranda*. *Id.* at 419. Specifically, the Fourth Circuit noted that Parker was not under arrest nor was she handcuffed or otherwise restrained, the agents did not draw their weapons in her presence, she was in her own home with family members able to come in the room to speak with her when requested, and she was never told she was not free to leave. *Id.* Acknowledging the objective nature of this inquiry, the court gave no credence to the testimony of an agent who claimed Parker would have been arrested if she attempted to end the interview or leave the home, instead noting that an agent's "unarticulated views" at the time of Parker's questioning have little bearing on the inquiry. *Id.*

Here, Appellant similarly did not experience restraint to the degree of an arrest. To the contrary, he was in his own home, he was not handcuffed, the officers did not have their weapons drawn, he was never told he was not free to leave, he was not isolated from the rest of the occupants, and the "interrogation" at issue lasted the time it takes to articulate a single question. Appellant permitted the officers into his home and consented to the search. He cannot reasonably claim that waiting in his house during the course of a voluntary search was a restriction of freedom. The discovery of contraband alone did not transform sitting in his living room to being detained to a degree associated with a formal arrest. Although the fact that the officers knew the bedroom belonged to Appellant may suggest the single question asked was interrogative, the nature of the questioning is a separate prong of the *Miranda* analysis. Interrogation will not convert an underlying non-custodial event to a custodial event; otherwise the *Miranda* analysis would be reduced to a single inquiry into the question asked. Instead, there must be level of restriction akin to formal arrest. However, as previously discussed, it was not until Appellant admitted the drugs were his that he was arrested and handcuffed—at which point he was properly Mirandized before further questioning. Undoubtedly Appellant may have felt

uncomfortable that the officers he invited into his home discovered contraband, but absent threats, coercions, or physical restraints, Appellant was not in custody for the purposes of *Miranda.*

In any event, Appellant fails to challenge the statement he gave following his *Miranda* warning, and therefore his prior statement is merely cumulative and any error in its admission is harmless. *State v. Blackburn*, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) ("Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence."). His appeal challenges a single statement on the basis that the State failed to adduce evidence the confession as obtained "at a time when [Appellant] was free to leave, when the incriminating question of whether the drugs belonged to him came after he was arrested but prior to being administered any *Miranda* warning." (Appellant's Statement of Issue on Appeal). This contention entirely ignores the existence of a similar statement inarguably obtained after Appellant was apprised of his rights pursuant to *Miranda.* Accordingly, any error in the admission of the prior statement could not prejudice him.

CONCLUSION

Based on the foregoing, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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RE: State v. Timothy Emmenuel Greene
Appellate Case No. 2016-001123

Dear Mr. Gilliam:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Ranee Saunders
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S.C. Bar # 100073

RS/kc
Enclosures

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