STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable Perry H. Gravely, Circuit Court Judge

The State of South Carolina,

Respondent,

vs.

Marshell Hill,

Appellant.

Appellate Case No. 2016-000868

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit

305 East North Street
Greenville, SC 29601
(864) 467-8282

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

STATEMENT OF ISSUE ON APPEAL

The trial court did not err in admitting Appellant's unwarned and warned statements into evidence because Appellant was not in custody when making the unwarned admission and Appellant retained a genuine choice to not make any further statements after Appellant was provided Miranda warnings. Further, any error was harmless because Appellant admitted at trial that his "fear" of Victim was caused by his own alcohol and drug use and the evidence was overwhelming that he did not act in self-defense.

STATEMENT OF THE CASE

Appellant Hill was tried for murder on April 11, 2016 and convicted by a jury of voluntary manslaughter. The Honorable Perry H. Gravely sentenced Hill to twenty-two years' imprisonment.

STATEMENT OF FACTS

Law enforcement responded to Hill's residence on August 14, 2013, after his housemate called 911 to report they found the victim, Billy, deceased in their backyard. Hill gave several statements to law enforcement and the deputy coroners that day. None of those statements are being challenged on appeal. Instead, Hill challenges law enforcement interviews on the following day, August 15th, that he made to law enforcement at the law enforcement center.

Jackson v. Denno hearing

Deputy Bradon Napolitano was the first responding deputy to Hill's residence on August 14, 2013. He testified Hill was wearing a tee shirt and boxer shorts, smelled of alcohol, and appeared intoxicated, nervous, and evasive. Hill told Napolitano he drank a pint of vodka. Deputy Napolitano confirmed Hill was pretty intoxicated. Tr. pp. 8-9. Hill explained the victim, Billy, was a homeless

man and Hill's drinking buddy. Deputy Napolitano explained to the trial court Hill was not in custody or handcuffs, and there was no reason for him to be in custody. Hill told him Billy was alive at 11 p.m., but subsequently, when Hill was taking care of his dog, he found Billy in a chair, slumped over and not breathing. Hill's housemate was also in the house and Deputy Napolitano interviewed him. Tr. pp. 9-12.

Deputy Napolitano was occupied with other tasks at the crime scene but about thirty or forty minutes later spoke with Hill again outside another officer's patrol car and then inside the patrol car after Deputy Napolitano asked Hill if he wanted to sit in the patrol car. Hill told Deputy Napolitano that Billy came to the incident location at 9 p.m. Hill claimed he saw scratches and bruises on Billy. Hill claimed he did not know how Billy got them. According to Hill, Billy said he was having trouble walking. Hill fetched Billy a glass of water. Hill subsequently found Billy slumped over at 11:52 p.m. Hill claimed the two of them never had a verbal or physical altercation before. Tr. pp. 12-13. Hill is not challenging any of his statements to Deputy Napolitano.

Investigator Michael Downey also responded to the residence on August 14, and secured the crime scene. Downey explained at that time, Hill was not a suspect, "I knew he was the resident is all I knew at that time." Tr. pp. 22-24 (direct quote, tr. p. 24, lines 24-25). Downey explained Hill was not in custody. He spoke with Hill, asking what happened. Hill explained Billy lived in the community and he was friends with Billy. He gave Billy "some shots" and left at 9 p.m. Billy left and returned later, showing up intoxicated around midnight. He grabbed the screen door and fell outside backwards. Hill claimed he checked on Billy at 6-7 a.m., then went to his housemate, Barksdale, and told him Billy was not breathing. Investigator Downey explained he did not read Hill

Miranda warnings because he was not a suspect. Tr. pp. 25-27. Investigator Downey explained he knew Hill was intoxicated, but he walked to the patrol car under his own power, although he may have used a cane. Asked by defense counsel if Hill was "grossly intoxicated," Investigator Downey replied he was "intoxicated." Tr. pp. 27-28. Hill is not challenging his statement to Investigator Downey.

Investigator Mike Fortner, the lead investigator, responded to the homicide scene on August 14. He spoke briefly, enough to decide Hill was too intoxicated to speak with him that day about what happened. Investigator Fortner was aware that Hill was being taken into custody on another matter, and planned to speak with Hill the next day at jail, but Hill was released beforehand. Tr. pp. 36-38. So on August 15, he and Investigator Bailey went to Hill's house instead. Investigator Fortner asked Hill if he would come down to the station. Investigator Fortner testified Hill was just a witness at the time, he was not in custody. Tr. pp. 38-39. Investigator Fortner admitted he had some suspicions, but explained, "Sure. I mean, we don't know who did it so everybody's a potential suspect. But we were interviewing him as a witness that day." Tr. p. 39, lines 15-21.

Investigator Fortner testified Hill was sober on the 15th, although Hill told officers he had a little bit to drink. Tr. p. 40, p. 60. Hill told officers he was willing to talk with them. Investigator Fortner advised the trial court that Hill was not under arrest when he asked Hill to ride to the law enforcement center. Hill agreed to ride with the officers to the station, but asked if they would bring him home. They promised they would. Investigator Fortner testified at that time they intended to bring him home after the interview. The interview was conducted at the station rather than at Hill's house so Investigator Fortner could type up a statement at his desk computer. Tr. pp. 40-41.

Investigator Fortner interviewed Hill at his desk in an office containing six desks instead of a dedicated interview room. Hill sat next to Investigator Fortner's desk. Tr. p. 41. He did not give Hill Miranda warnings. He explained, "I did not because he was not in custody and I was interviewing him more as a witness, as somebody that might be able to provide some information as to what had taken place." Tr. p. 41, line 24 – p. 42, line 3.

Hill offered an explanation for what happened. Investigator Fortner typed out a statement for Hill's signature reflecting this version of events. This was typed on a victim/witness form because Hill was not a suspect. The Sheriff's Office uses a different form for suspects. Tr. pp. 43-45. Investigator Fortner then left the room and spoke with Investigator Bailey, who previously interviewed Barksdale. They noted discrepancies between the two housemates' version of events. Tr. p. 46. Investigator Fortner returned to his office and asked Hill whether Billy tried to steal his television. The questioned appeared to bother Hill, he looked like he was about to cry. Hill "broke down" and said Billy tried to take his television so Hill "tapped" Billy twice. Investigator Fornter responded "all right" and ended the interview. This was the first time Hill ever mentioned using any force on Billy. Tr. pp. 46-47

Consequently, Investigator Fortner took Hill across the hallway to the Greenville City Police Department interview room and provided him Miranda warnings from their standard form. He explained the reason was because Hill was now a suspect and not merely a witness. Investigator Fortner also explained to Hill he was going to video record the interview. Tr. pp. 47-48. Investigator Fortner explained to Hill his rights pursuant to Miranda and requested he sign the form. Hill did not sign the form, advising Investigator Fortner that he was concerned signing the form

would affect his eligibility to receive disability payments. Hill indicated he was willing to talk with the officers though. After checking with the prosecutor, the investigators proceeded with the interview without Hill signing the form. Tr. pp. 49-51; pp. 63-64. Investigator Fortner testified that Hill appeared capable of making his own decisions. After the interview, in which Hill admitted hitting Billy, the investigators arrested Hill. Tr. p. 53, p. 58.

Hill's testimony to support motion under castle doctrine

Hill testified during his motion under the castle doctrine. He testified Billy arrived around dark. Hill asked him to leave when Hill became too intoxicated and wanted to lay down. Billy did not leave, however, and Hill laid down in his bedroom. The next time he saw Billy, Billy was behind his television and Hill startled him. Billy threw his hands up and walked towards Hill. Tr. p. 103. Hill claimed he was scared and asked him to leave. He then pushed Billy and swung at him with his stick. Tr. p. 104. He wrestled with Billy at the door, and Billy grabbed the screen door and fell backwards down the steps, tearing the screen door of the hinges. Hill went inside the house and did not see Billy until the next morning. Billy said he fell down and could not move and asked for a glass of water. Tr. pp. 101-06.

The suppression hearing continues the next day

The suppression hearing continued the next day when Investigator Bailey testified. He went to the crime scene and spoke to Hill briefly, determining it was not appropriate to interview Hill because he was too intoxicated. Nonetheless, Hill advised him that Billy broke the storm door, pulling it off its frame. Hill was not a suspect in the crime that day. Tr. pp. 134-136.

The investigators spoke with Hill the next day, August 15, at Hill's house. Hill was sober.

They asked him to come to the police station and he agreed. They agreed to give Hill a ride back home after the interview. Investigator Bailey explained they were just giving Hill a ride to the station, he was not in custody. Tr. pp. 136-37.

The interview took place in what Bailey called the investigation room. It was an office with six desks and six chairs. After their initial interview with Hill, the investigators left the room to discuss some inconsistencies they noticed between Hill and Barksdale's version of events. They returned and asked Hill about his television. Hill's demeanor changed and he said Billy was holding his television under his arm, that made Hill real mad, and he hit Billy. Tr. pp. 138-39.

At that point the investigators took Hill to the Greenville Police Department's interview room and advised Hill of his rights. Tr. p. 141. During cross-examination, Investigator Bailey agreed that the second interview occurred two hours later. Tr. p. 148, lines 5-11. Hill did not want to sign the form. He appeared sober. Tr. p. 142. On cross-examination, Investigator Bailey explained Hill told them he was drinking that day, but Hill did not appear to be drunk like the day before. Tr. pp. 146-47. Asked on redirect whether Hill was sober or drunk, Investigator Bailey answered he appeared sober. Tr. p. 158.

Hill testified during the suppression hearing. He claimed he drank a pint of vodka on the 15th before the investigators arrived. He claimed he did not feel like he could leave the station. Tr. p. 164. He also claimed that when he told investigators he would speak "off the record," that meant what he said could not be held against him. Tr. pp. 163-66. On cross-examination, he was asked why he did not decline the investigators' request to go with them to the station. He explained he thought it would be "rude or disappointing" to say no. Tr. p. 167. He admitted he got mad about the

television, and explained he was mad because, "I didn't see why somebody that you helped would do something like that." Tr. p. 169, lines 12-16. Hill agreed he voluntarily gave his statement to officers at Investigator Fortner's desk. Tr. p. 169, lines 17-23. Hill agreed that before that day, he had heard the warnings that "you have the right to remain silent" and "anything you say can and will be used against you in a court of law," as well as the warning "you have a right to an attorney." Tr. p. 171, line 9 – p. 172, line 5. While Hill still claimed he wanted what he told officers to be "off the record," **Hill admitted he wanted them to hear what he had to say and agreed that when officers asked him if he wanted to talk, he emphatically said "yes."** Tr. p. 172, lines 6-20.

The following exchange occurred during direct examination:

> Q: And when Investigator Bailey, the gentleman who just testified a few minutes ago, when he walked out and came back in and said that you can speak as long as it's your decision and you don't have to sign the statement, **did you realize it was still your decision?**
>
> A: **After I had said "off the record," (affirmative nod).**
>
> Q: Yes, sir. Well, let's go to that. Is that where your issue is here today? You're saying you understood your rights.
>
> A: Yes.
>
> Q: And you're saying you were not pressured. But you're saying your issue is the words on the record. Is that what your concern is here?
>
> A: I said off the record.

Tr. p. 173, lines 7-24.

Jury trial

Michael Barksdale was the State's first witness. At the time of trial he still was Hill's housemate and Hill's friend. Tr. p. 227; pp. 234-35. Barksdale knew Billy, for about ten to twelve

years. Billy was homeless. Billy was not violent, and Barksdale never knew him to steal. Tr. pp. 217-18. Barksdale testified Billy and Hill were friends and they never had any past disputes. They drank together. Tr. p. 218. Most of the time, Hill walked with a cane. Tr. p. 219.

Barksdale came home sometime between ten and eleven p.m. on August 13. At the time, the storm door looked fine. Billy was laying on the floor, face up, he had a cut over his eye. No movement. Tr. pp. 220-21. This was not especially troubling, however, because he had seen Billy passed out before. The fact that he saw a little blood did not change his mind. Tr. pp. 221-22.

Hill sat in the same room – the living room. Hill explained Billy was in a fight and he came from up the street. Tr. pp. 222-23. Barksdale told the jury it was not normal that Billy would be in a fight. Hill wanted Barksdale to put Billy on the porch, Barksdale told Hill to just let Billy sleep it off. Then Barksdale went to bed. Tr. pp. 223-24. He got up to go to the bathroom at 2 a.m. and did not see anybody. He assumed Billy was gone. Tr. p. 224. Then Hill woke him up later in the morning and said Billy was back, he was in the backyard, and he looked dead. Barksdale jumped up and found Billy in the backyard and Billy was dead. Barksdale called 911 even though Hill owned a cellphone. Tr. p. 225; pp. 231-32.

Deputy Coroner Jeff Fowler testified Hill told him Billy was his drinking buddy. Hill told him Billy got in a fight and Billy ripped the screen door off the hinges. He claimed Billy left the house mad. Tr. pp. 237-240. Deputy Coroner Mike Ellis explained they were talking to Hill to determine if Billy had any family members they could contact. Hill said that he and Billy had a verbal altercation and Billy ripped the screen door off. Tr. pp. 242-43.

Deputy Napolitano arrived at the scene when EMS was already present. He described Billy's

lips as blue, flies were on his face, and he was not blinking. Billy had cuts and scratches and a swollen eye. Hill was intoxicated and not giving straight answers. Hill said he last saw Billy alive at 11 p.m. the previous night. Tr. pp. 247-49. Hill was not a suspect, he was not in custody. Hill claimed Billy already had scratches and bruises when he came to the house. He did not say he had an altercation with Billy. Tr. pp. 251-52.

Detective Michael Downey was at the house to preserve the crime scene. He let Hill sit in the patrol car because it was a hot August day. Hill had been drinking, he was not a suspect. Hill said Billy was drinking with him, left, returned beat up, and grabbed the screen door as he fell. At six or seven in the morning, he went to check on Billy and Billy asked for water. Hill told Barksdale to call 911 after he realized Billy died. Tr. pp. 255-58.

Officer Jonathan Hamilton responded to the crime scene and found Billy in the corner of the backyard. Tr. p. 265. He observed blood in the doorway and noticed the storm door was detached. Tr. pp. 270-72. There was also blood on the side porch. Tr. p. 276. The blood on the door was a transfer stain. Tr. p. 285. Officer Hamilton testified Hill's pants appeared to be ripped. Tr. p. 292. Officer Hamilton attended the autopsy and observed that bruising on Billy appeared to be made by a cylindrical object. Tr. p. 297.

Dr. James Fulcher was qualified as an expert in pathology and testified about the results of the autopsy he performed on Billy. Billy suffered multiple contusions and lacerations. He suffered a black eye. There was a one inch contusion on the posterior of his scalp. Bruises on the upper extremities of his arms showed two parallel lines, indicating a tram track lesion. Dr. Fulcher explained this injury indicated Billy was struck by a cylindrical object. Tr. pp. 316-319.

The right testicle was ruptured; Dr. Fulcher testified it was actually destroyed. Tr. pp. 320-21. Tran track lesions appeared on both of Billy's thighs. The entire anterior leg was highly damaged. Tran track lesions also appeared above and around the base of the penis. There were contusions in the web of the fingers. Dr. Fulcher testified these contusions were defensive injuries indicative of the victim trying to catch the cylindrical object with his hands. Tr. pp. 320-22. The base of Billy's brain suffered blunt force trauma. Tr. p. 323. The spinal column was also damaged. Tr. p. 327. At least twenty-three strikes came from cylindrical objects. Tr. pp. 324. Dr. Fulcher determined Billy died from the injuries to his brain. Billy's blood/alcohol concentration was .338. Tr. pp. 330-31.

Investigator Bailey provided testimony to the jury similar to his pre-trial testimony, noting Hill was too intoxicated to be interviewed on the 14th and he was "very cooperative" with law enforcement on the 15th. Tr. pp. 348-49. Investigator Bailey further testified Hill did not hesitate in agreeing to ride with the investigators to the law enforcement center. He just placed a condition that he receive a ride back home. Tr. p. 367. Investigator Bailey testified they brought him to their office with the six desks and typed up his response on a victim/witness form. He testified they did not have sufficient evidence to call Hill a suspect at that point. Tr. p. 368. Closely tracking his pre-trial testimony, Investigator Bailey testified Hill did not incriminate himself until the investigators briefly left the room and returned. At that point, he admitted he became angry with Billy when he came out of his room and saw Billy with his television set under his arm. Tr. p. 370-71.

Investigator Fortner testified he arrived at Hill's residence around 12:30 p.m. on the 14th. Barksdale was sober, but Hill was not. The television appeared fine. While Investigator Fortner saw

blood inside the house, nothing looked out of place. He observed blood on the base board by the side door. The blood seemed relatively fresh. Investigator Fortner decided not to speak with Hill because he was too intoxicated. Tr. pp. 386-88. Investigator Fortner found out the autopsy results and was advised that Billy was struck with a cylindrical type of object like a broom handle or shovel handle. Investigator Fortner had seen Hill using a walking stick, although he was quick to point out he had seen Hill walking around the neighborhood without a walking stick. Tr. pp. 390-92. Hill agreed to go to the station, without hesitation. He appeared sober and was not under arrest. The investigators agreed to give him a ride back home. Tr. p. 394.

In their office, Hill provided the investigators an explanation of what happened. They typed up a statement, but spoke with themselves and noted some discrepancies. Tr. p. 397. Returning to the office, Investigator Fortner asked Hill whether Billy was possibly trying to take his television set and so Hill hit him. Hill's eyes welled up and his demeanor changed. He said "yeah" and said he "tapped him twice." Tr. p. 398, lines 11-25.

At that point, the investigators took Hill across the hallway of the law enforcement center to where the Greenville City investigators were located. They used the police department's interview room and video recorded Hill's statement. Tr. p. 403, lines 9-24. The investigators went over an advisement of rights form with Miranda warnings. They explained Hill his rights, but he was hesitant to sign the form because he was concerned it would result in his disability being curtailed. Tr. p. 406.

Hill's trial testimony

Hill testified he was on disability for a hip operation. On the 13th, Billy came over and they

drank together. Hill asked Billy to leave, but he did not want to go. Hill let Billy stay after Barksdale returned home. Billy was still sitting in a chair when Hill laid down in his bedroom. The next time he saw Billy, Billy was behind his television. He told Billy to leave, but Billy did not. Hill claimed he became scared when Billy started approaching him. So he hit Billy and pushed him out the side door. Billy grabbed the screen door and tore the hinges off when he fell. Hill told Billy not to come back and slammed the door. Tr. pp. 439-45. Hill testified he drank some more because he "kind of was shook up." Tr. p. 445, lines 9-12. The next time he saw Billy was when he fed his dog in the back yard. Billy was still alive, he asked for water and Hill brought him some. Tr. p. 446. Hill came back out later and Billy was slumped over. He checked to see if Billy was breathing and realized Billy was dead. Tr. p. 446. Hill claimed on direct his purpose in hitting Billy was to get Billy out of the house. Tr. p. 444, lines 16-18.

On cross-examination, the prosecutor asked Hill how many times he hit Billy. Hill answered, "I'm thinking myself it was one or two times. But like I said, the drinking was worser." Tr. p. 462, lines 1-3. Hill admitted Billy moved away from the television when he hit him. He could not recall how many times he hit Billy after Billy put the television set down because "everything went blank." Tr. p. 462, lines 4-12. He explained he hit Billy in the legs and waist at first. The prosecutor asked him why he did not stop hitting Billy and Hill answered he did not remember. Tr. p. 462, line 13 – p. 463, line 13. Hill admitted he could have hit Billy in the eye and asked if he admitted that in the videotape. Hill answered, **"Anything is possible, sir, when you are mad."** Tr. p. 463, line 18 – p. 464, line 1. He admitted being mad does not justify taking a human life. Tr. p. 464, lines 2-4.

Hill admitted Billy never attacked him before. Tr. p. 465, lines 11-13. He admitted Billy

never displayed any violence around him. Tr. p. 466, lines 22-23. The prosecutor asked Billy, "And your fear – you think that your fear was totally justified or do you think now that maybe alcohol had something to do with your fear?" Tr. p. 466, lines 3-6. Hill answered, "I believe it was the alcohol and reefer, sir." Tr. p. 466, lines 3-8.

Hill claimed he was drunk both days he spoke with law enforcement. Tr. pp. 447-78. Hill agreed he was not forced to go to the law enforcement center. Hill admitted during the interview on the 15th that the investigators were polite and he did not feel threatened. Hill recalled Investigator Hill asked a question about the television, but did not recall the exact question. He claimed he did not recall whether he admitted to them in the office that he tapped Billy. Tr. pp. 455-56.

He admitted to having heard the Miranda warnings all his life on TV. The investigators repeatedly told him he could end the interview at any time. He admitted that the officers treated him fairly during the interview. Tr. pp. 456-57. He agreed the officers told him that they could not make any offers or try to pressure him. Tr. p. 457, lines 15-18. During sentencing, Hill told the trial court, "I'm just sorry it happened. Truly sorry." Tr. p. 555.

ARGUMENT

The trial court did not err in admitting Appellant's unwarned and warned statements into evidence because Appellant was not in custody when making the unwarned admission and Appellant retained a genuine choice to not make any further statements after Appellant was provided Miranda warnings. Further, any error was harmless because Appellant admitted at trial that his "fear" of Victim was caused by his own alcohol and drug use and the evidence was overwhelming that he did not act in self-defense. (Appellant's issues 1&2).

Hill claims both his unwarned and warned statements on August 15 should be suppressed because he gave an incriminating statement before he was provided Miranda warnings. Because Hill was not in custody prior to receiving his Miranda warnings, the trial court did not err in admitting the warned and unwarned statements. Hill's arguments overlook the fact that merely because he was a suspect in the homicide does not render him in custody. Further, when Hill testified at trial, he admitted the investigators advised him they could not pressure him, he did not feel threatened, and the investigators treated him fairly: nothing in the record suggests that when he received Miranda warnings, he would nonetheless believe he did not have a choice to invoke his rights.

Due process requires the suppression of an involuntary confession, regardless of the truth or falsity of the confession. Jackson v. Denno, 378 U.S. 368, 376 (1964). Based on the Fifth Amendment's protection against self-incrimination, the United States Supreme Court announced, "[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. . . ." Miranda v. Arizona, 384 U.S. 436, 444 (1966). Before the accused is subjected to custodial interrogation, he or she must be informed of the right to remain silent; any statement made may be

used as evidence against him or her; the right to the presence of an attorney; and if he or she cannot afford an attorney one will be appointed prior to questioning. State v. Kennedy, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct. App.1996) *aff'd as modified* 333 S.C. 426, 510 S.E.2d 714 (1998).

"Custodial interrogation entails questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." State v. Williams, 405 S.C. 263, 272, 747 S.E.2d 194, 199 (Ct. App. 2013). "An officer's obligation to administer Miranda warnings attaches, however, 'only where there has been such a restriction on a person's freedom as to render him "in custody."'" Stansbury v. California, 511 U.S. 318, 322 (1994) (quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977)). Miranda's requirements apply only to custodial interrogation and were not intended to interfere with the traditional function of law enforcement officers in investigating crimes. Miranda, 384 U.S. at 477.

"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. State v. Easler, 327 S.C. 121, 128, 489 S.E.2d 617, 621 (1997).

"Appellate review of whether a person is in custody is confined to a determination of whether the ruling by the trial [court] is supported by the record." Evans, 354 S.C. at 583, 582 S.E.2d at 409. Even if it is debatable whether a reasonable person would have believed himself to be in custody at the time he made the first statement, this Court must uphold the trial judge's finding that the

defendant was not in custody where it is supported by the record. See State v. Navy, 386 S.C. 294, 301, 688 S.E.2d 838, 841 (2010) ("In our opinion, it is debatable whether a reasonable person would have believed himself to be in custody at the time the first statement was given, and thus the trial court's finding that respondent was not in custody should have been upheld as it is supported by the record.").

Hill claimed he was intoxicated when he gave statements to law enforcement. However, both investigators testified that he was sober when they interviewed him. Their credibility on this point is bolstered by the fact they withheld interviewing him the prior day because he was grossly intoxicated. Further, evidence of possible intoxication alone is insufficient to require a statement to be excluded. "Proof of accused's intoxication short of rendering him unconscious of what he is saying, does not require, in every case, that statements he made while in that condition be excluded from evidence." State v. Collins, 266 S.C. 566, 573, 225 S.E.2d 189, 193 (1976). A statement is not inadmissible as a matter of law merely because the accused might be intoxicated when making a statement unless the accused is so intoxicated he cannot comprehend the meaning and effect of his words. State v. Saxon, 261 S.C. 523, 201 S.E.2d 114 (1973). Evidence of intoxication will only go to the weight and credibility of the confession, but does not require the confession be excluded from evidence. Id.

Further, Hill's resistance to signing the waiver form does not affect the admissibility of the statement where he understood the warnings law enforcement carefully explained to him. North Carolina v. Butler, 441 U.S. 369, 373-74 (1979) (finding an express statement of waiver is not required to find a statement is voluntary; appellant refused to sign waiver form but indicated he was

willing to cooperate).

Additionally, merely because the interview took place in the investigator's office is not determinative of custody. Williams, supra (citing State v. Doby, 273 S.C. 704, 708, 258 S.E.2d 896, 899 (1979) ("Rather the fact that appellant voluntarily agreed to accompany the investigators to their office and answer questions without being placed under arrest indicates a non-custodial situation.")); Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (finding warnings are not required merely because questioning takes place at the station house or because the person questioned is the one police suspect); State v. Jones, 570 S.E.2d 128 (N.C. Ct. App. 2002) (facts supporting finding that the sixteen 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 was interviewed four days earlier and allowed to leave).

Instead, the record shows Hill was treated like a cooperating witness, not a suspect, when he was interviewed in an office with six desks rather than a secluded interview room, and his statement was taken on a victim/witness form, not an advice of rights form. He was not restrained while being interviewed in the investigators' office.

Hill's primary argument, however, is that the questioning turned into custodial interrogation because he became a suspect. In Missouri v. Seibert, 542 U.S. 600, 604 (2004), the United States Supreme Court addressed a police procedure where first a suspect **in custody** was questioned until officers elicited an incriminating statement, and thereafter, officers administered Miranda warnings and elicited the incriminating information again. The United States Supreme Court found the procedure unsound and found the subsequent Mirandized statement should be suppressed because

the procedure of eliciting an unwarned admission and then a duplicate unwarned admission rendered ineffective the purpose of providing Miranda warnings.

However, Hill was not in custody prior to Miranda warnings being provided. His argument is based on the premise that he was a suspect in the homicide. The mere fact that a person is a suspect in a crime does not turn a non-custodial interview into custodial interrogation. Beckwith v. United States, 425 U.S. 341, 347 (1976) (finding that although the "focus" of the investigation may have been on Beckwith at the time of the interview, Beckwith was not in custody and Miranda was not implicated); Minnesota v. Murphy, 465 U.S. 420, 431 (1984) (noting that even if the person interviewed is the focus of the investigation, Miranda warnings are still not required in non-custodial situations and the questioning probation officer's knowledge and intent had no bearing on the outcome of the case).

Hill relies primarily on the South Carolina Supreme Court's decision in State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010). In Navy, the defendant was administering CPR on his less-than-two-year-old son when EMS arrived at his house. He was distraught when he gave his first statement to law enforcement at the hospital. Law enforcement was prompted to interview the defendant several days later after meeting with the pathologist who determined the child died by suffocation or smothering. The defendant agreed to come to the station although he was upset and crying at the home and he continued upset and crying throughout the four hours from when he left the house until he gave a post-Miranda statement. Id. at 296, 688 S.E.2d at 839.

The defendant gave another statement before he was told the child was suffocated and also had healing broken ribs. The defendant asked if he was under arrest and told he was not, but the

officers said they were trying to get some answers. Officers asked several follow-up questions and the defendant said he may have popped the child and may have covered his mouth to stop the child from crying. After a smoking break, the defendant was given Miranda warnings and gave a statement that was similar to the first un-Mirandized statement. Id. at 297-99, 688 S.E.2d at 839-40.

Relying on Seibert, the South Carolina Supreme Court found both statements should be suppressed because before Miranda warnings were provided because: (1) the officers began questioning the defendant aware the child was suffocated and with the intention of eliciting a confession; (2) the officers "sprang" the information about the child's suffocation and healing rib fractures on defendant; and (3) the officers then began "an unwarned custodial interrogation designed to elicit incriminating information . . . ." Navy, 386 S.C. at 303, 688 S.E.2d at 842. Additionally, the Supreme Court noted officers questioned the defendant nearly three hours before administering warnings. Id.

This case differs significantly from Navy because law enforcement did not begin questioning with the intent of eliciting a confession, they did not "spring" any information on Hill during the pre-Miranda interview, and did not pose a series of questions like what was described in Navy, but merely asked a single question which evoked an immediate admission. The immediate admission triggered the investigators to immediately end questioning without seeking any further clarification from Hill.

Further, while the investigators in the present case were aware Billy died from a beating administered with a cylindrical object, they were unaware of who committed the homicide or even what kind of cylindrical object was used in the homicide. So Hill did not become a suspect until his

admission, and the investigators promptly ended questioning until they brought him to the interview room and provided Miranda warnings. But see Stansbury, at 324 ("It is well settled then, that a police officer's subjective view that the individual under questioning is a suspect, if undisclosed, does not bear upon the question of whether the individual is in custody for purposes of Miranda.").

Also, unlike Navy, Hill was not upset during the interview until the last question broke open his hidden remorse, the interview was not lengthy, and the investigators did not call his version of events into doubt. Williams, at 278, 747 S.E.2d at 202 (distinguishing Navy, and noting "[h]ere, the record demonstrates Williams was not upset and the officers were not confrontational towards him."). Indeed, Hill admitted he was treated fairly when he was interviewed, the investigators were polite, and he did not feel threatened. Tr. pp. 455-57.

Miranda warnings were effective

Further, even if Hill was considered to be in custody at some point prior to being provided Miranda warnings, the recitation of Miranda warnings remained sufficient to accomplish their objective. Siebert found the "question-first" procedure employed by the police in Seibert constitutionally infirm because the "midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with Miranda's constitutional requirement." Seibert, at 604. In reaching this conclusion, the Court pointed out the following relevant factors that bear upon whether "midstream" Miranda warnings could be effective enough to accomplish their objective:

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

(2) The overlapping content of the two statements;

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

(4) The continuity of police personnel; and

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

Siebert, at 615.

In the instant case, Hill provided a narrative recited by the investigators in State's Exhibit Three. They left Hill to discuss the discrepancies between Hill and Barksdale's accounts. They returned, and the record reflects only one question was asked – whether he might have hit Billy because Billy tried to take his television set. Hill answered that he may have popped him twice. Accordingly, the questioning prior to the warnings was not detailed or complete in the slightest. See Seibert at 616 (noting ". . . the questioning was systematic, exhaustive, and managed with psychological skill. When the police were finished there was little if anything, of incriminating potential left unsaid"). Further, due to the absence of any detail, there is little overlap between the statements. See United States v. Gonzalez-Lauzan, 437 F.3d 1128, 1138 (11th Cir. 2006) ("Given that Gonzalez-Lauzan made only a single brief incriminating statement in the prewarning stage of the interview, the complete interrogation of Gonzalez-Lauzan that followed the warnings bore little resemblance to his prewarning statement."). The setting changed as well. After being questioned in an open office with no recording devices, Hill was taken to a designated interview room where his interview was recorded. The interrogation in the interview room did occur close in time to the first interview and involved the same personnel, but importantly, the investigators treated the second interview much differently, evidenced by using a witness form for the first interview and an

advisement of rights form to conduct the second interview.

The Eighth Circuit noted that in Siebert, the plurality opinion written by Justice Souter "described the controlling question as whether 'a reasonable person in the suspect's shoes' would have understood the Miranda warnings as conveying a message that the suspect retained a genuine choice about continuing to talk." United States v. Terry, 400 F.3d 575 (8th Cir. 2005) (quoting Seibert at 602.).

In Terry, the Eighth Circuit concluded Seibert was not violated because no evidence indicated law enforcement used coercive or threatening tactics at either the unwarned or warned interview, and there was no evidence law enforcement engaged in a deliberate strategy to undermine Miranda warnings. Id. at 582. The Terry court noted that after a single initial question, the agent terminated the unwarned interview because he felt Terry was too intoxicated. He interviewed Terry the next day after giving Miranda warnings. Id. at 579. The Terry court concluded, "we believe that a reasonable person in Mr. Terry's shoes would have understood the Miranda warnings that he was given as conveying a message that he retained a genuine choice about continuing to talk." Id. at 582.

In the instant case, Hill agreed he understood his rights, the investigators were polite with him, and they advised him he could end the interview at any time and they were not allowed to pressure him. Tr. pp. 456-57. Hill's testimony also shows his prior unwarned statement did not have the effect of making him feel obligated or trapped into providing further post-Miranda statements because Hill testified he did not recall the exact question about the television and did not recall whether he told the investigators he tapped Billy during his unwarned interview in the investigators' office. Tr. pp. 455-56. His inability to recall these specifics of his interview in the investigators'

office shows that the admission was not memorable and played no role in his decision to continue cooperating with law enforcement after he was provided Miranda warnings.

Instead, Hill's own testimony indicates he adamantly desired to speak with the investigators and he realized the decision to speak was his own decision. Tr. p. 172; lines 6-20; p. 173, lines 7-24. Therefore, even assuming the first statement was custodial, the trial court did not err in admitting the subsequent warned statement into evidence because the investigators' and Hill's testimony shows that Hill believed he retained a genuine choice about continuing to talk. Terry, supra; Seibert, supra.

Finally, any error was harmless. Hill testified at trial and effectively admitted on cross-examination to hitting Billy in anger and admitted his fear was not totally justified, but was tainted by alcohol and reefer. State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984) (explaining the elements of self-defense, including the third element: if a defendant's self-defense claim is based upon his belief of imminent danger, evidence must show a reasonably prudent man of ordinary firmness and courage would have entertained the same belief). Further, the injuries make clear that this was not a self-defense case, as the injuries prove that the force used was too excessive to be justified by self-defense. State v. Wood, 1 S.C.L. 351 (1794) ("[T]he degree of resistance ought to be in proportion to the nature of the injury offered; that it be sufficient to ward off such injury, and no more. For the moment a man disarms or puts it out of the power of the aggressor from doing further injury, he ought to desist from using further violence; and if he does commit any further outrage, he, in his turn, then becomes the aggressor.").

Accordingly, any error is harmless beyond a reasonable doubt. The harmless error doctrine preserves the central purpose of a criminal trial, which is to decide the factual question of a

defendant's guilt or innocence. State v. Rivera, 402 S.C. 225, 246, 741 S.E.2d 694, 705 (2013) (citing Arizona v. Fulminante, 499 U.S. 279, 306-08 (1991)); State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial).

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit

BY: _____
DAVID SPENCER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

July 14, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenville County
The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No: 2016-000868

THE STATE,

Respondent,

v.

MARSHELL HILL,

Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the Initial Brief and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record Kathrine H. Hudgins, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589.

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

This 14th day of July, 2017.

Anne Mueller

Anne A. Mueller
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

July 14, 2017

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29201

Re: The State v. Marshell Hill
Appellate Case No: 2016-000868

Dear Ms. Kitchings:

Enclosed please find an original and one (1) copy of the Initial Brief and Designation of Matter, including proof of service, in the above-referenced case.

Sincerely,

David Spencer
Assistant Attorney General
S.C. Bar No: 68571

DS/aam
Enclosures

cc: Kathrine H. Hudgins (with two copies)
Ms. Trisha Allen