ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable D. Garrison Hill, Circuit Court Judge

THE STATE,

Respondent,

v.

JOHN CALVIN SLEDGE,

Appellant,

Appellate Case No. 2016-000641.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF THE ISSUES ON APPEAL

I. Whether the trial court erred in admitting the portions of the 911 call where the caller said that Appellant and his mother were fighting earlier in the evening and where the caller said that Appellant shot his mother because the statements were inadmissible hearsay and more prejudicial than probative?

II. Whether the trial court erred in admitting Appellant's statements to police where his statements were not free and voluntary based on a totality of the circumstances?

III. Whether the trial court erred in sentencing Appellant to five-years incarceration for possession of a weapon during the commission of a violent crime where Appellant was sentenced to life for murder and S.C. Code Ann. § 16-23-490 expressly provides that the five-year sentence "does not apply in cases where the death penalty or a life sentence without parole is impose for the violent crime?"

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

I. The trial court was correct to admit M.W.'s 911 call as an exception to the hearsay rule because M.W.'s statements concerning Appellant occurred immediately after his mother's shooting and during his immediate examination of the scene, wherein M.W. heard a gunshot, smelled gun smoke, emerged from his bedroom to find his mother's bloody body lying face down in the hallway bathroom, and called 911; the call was probative of motive, opportunity, and identity; and the call's admission was cumulative to M.W.'s trial testimony.

II. If found preserved for appellate review, no error occurred in the trial court's admitting Appellant's recorded statements because the *Denno* record, which includes recordings of both waivers, indicates that Appellant made both statements after exercising a knowing, intelligent, and voluntary waiver of his *Miranda* rights under the totality of the circumstances, and any alleged error in admitting those statements proves harmless as the statements had no impact on Appellant's case.

III. Appellant's convictions should be affirmed, but his five-year sentence for possession of a weapon during the commission of a violent crime should be vacated because it was issued in violation of S.C. Code Ann. § 16-23-490.

STATEMENT OF THE CASE

In June 2015, Appellant John Calvin Sledge was indicted by the Greenville County Grand Jury for the January 29, 2014, murder of wife Kimberly Sledge. (R. pp. 332-33). The two-count indictment included the separate offense of possession of a weapon during the commission of a violent crime. (*Id.*). Later, in February 2016, the Greenville County Grand Jury indicted Appellant for unlawful conduct toward a child concerning the same incident date. (Supp. R. pp. 1-2).

Charles Propst and Stuart Sarratt, Esquires, represented Appellant at a jury trial held March 14-16, 2016. (R. p. 1). The Honorable D. Garrison Hill presided. (*Id.*). Judy Munson and Brittany Scott of the Thirteenth Circuit Solicitor's Office prosecuted the case. (*Id.*).

A jury convicted Appellant for each charge and Judge Hill sentenced Appellant to life imprisonment for murder, five years for possession of a weapon during the commission of a violent crime, and ten years for unlawful conduct toward a child. (R. p. 328, lines 18-23; R. pp. 334-35; Supp. R. p. 3). This appeal follows. (R. pp. 330-31).

STATEMENT OF FACTS

Kimberly Sledge's son called 911 at 10:15, 10:16, and 10:17 PM on January 29, 2014. (R. p. 233, lines 11-13; R. p. 283, lines 7-9). The first two times, he hung up without speaking. (R. p. 62, lines 15-24). The third, he reported that his mother had been shot. (R. p. 283, lines 1-13). He could not tell where, he just knew she was covered in a bloody mess, he had heard a loud boom a few minutes earlier, and his stepfather was no longer in the house. (State's Exhibit 1).

Arriving shortly after dispatch and traversing a steep, iced-over driveway to enter the rural home, law enforcement found the ten-year old boy in his kitchen, standing in his pajamas, clutching his mother's bloodied cell phone. (R. p. 101, line 1 – p. 103, line 5). He was not injured, but a red smudge appeared across his face. (R. p. 103, lines 6-11). No one else was inside the home save for the boy ("M.W.") and his mother. (R. p. 101, lines 15-20). Snow on the ground outside informed law enforcement that no one had come and gone from the property except to play in the snow out back earlier that day. (R. p. 131, lines 8-18).

The boy's mother lay on the bathroom floor, victim to a fatal gunshot wound to the head. (R. p. 93, lines 17-21; R. p. 195, lines 14-18). The gunshot was fired at the back of the head from several feet away, nearly straight-on. (R. p. 186, line 21 – p. 187, line 2; R. p. 189, lines 18-23). The victim's blood-alcohol content was 0.192 percent. (R. p. 190, lines 12-14). The forensic pathologist determined the victim's manner of death to be homicide. (R. p. 195, lines 14-18). There were no other apparent injuries such as protruding broken bones. (R. p. 193, line 18 – p. 194, line 22).

Further evidence of the shooting included a hole through the vanity mirror caused by a high-speed projectile fragment. (R. p. 151, lines 11-18). Biological matter surrounded the damage. (R. p. 131, lines 21-25). A piece of metal and a single blonde hair rested nearby on the

bloodied vanity top. (R. p. 152, lines 9-11; R. p. 236, line 23 – p. 237, line 6). The projectile hole was deep enough to protrude into M.W.'s bathroom on the other side of the wall, where a lead projectile fragment was found on the ground next to the toilet. (R. p. 180, line 2 – p. 181, line 24).

On front porch, a sergeant processing the crime scene recovered a revolver in a storage case. (R. p. 135, lines 1-25). There were no signs of forced entry into the home. (R. p. 124, lines 1-8). Electronics and other valuables were left undisturbed inside the home. (R. p. 127, lines 1-7). In an otherwise orderly living room, the sofa was made up with sheets and pillows like a bed. (R. p. 126, lines 19-25).

Ballistics tests conducted with the .357 revolver located on the front porch and bullet fragments located at the scene of the shooting led to a few conclusions.[1] The spent casing recovered from the revolver's cylinder had been fired from that .357 caliber handgun. (R. p. 170, lines 9-15). The cartridges casings were not of .357 caliber, but were instead cartridges for a .38 special. (R. p. 170, lines 17-18). The State's ballistics analyst explained that .38 caliber cartridges can be fired from a .357 revolver. (R. p. 170, line 22 – p. 171, line 6). No conclusion could be drawn regarding whether the fired bullet core found at the scene came from the cartridge casing found in the revolver. (R. p. 178, line 15 – p. 179, line 16). The fired bullet core could only be identified as having the same general rifling characteristics as the revolver. (R. p. 174, line 18 – p. 176, line 7).

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[1] For ease of identification in the record, the revolver was entered into evidence as State's Exhibit 58. (R. p. 135, line 20 – p. 137, line 19). The cartridges and cartridge casing taken from the cylinder of the revolver and its storage case were entered into evidence as State's Exhibits 58A and 58B. (R. p. 137, line 21 – p. 138, line 25).

As the response to M.W.'s 911 call began, Appellant, riding along in his old Toyota SUV, was pulled over and taken into custody as a result of a BOLO issued on his car, which was not at the house. (R. p. 68, lines 1-25; R. p. 84, line 24 – p. 86, line 11). A partially consumed twelve pack of Natural Light beer sat his front passenger seat. (R. p. 86, lines 21-23). It was apparent to the officer Appellant had been drinking, but he was compliant. (R. p. 69, lines 2-23). Appellant was read his *Miranda*[2] rights and transported to the Sheriff's office downtown for questioning in relation to the incident at his home. (R. p. 70, line 1 – p. 72, line 18; State's Exhibit 7).

The traffic stop began at 11:09 PM. (R. p. 234, lines 1-2). Forty-six minutes after arrest, at a few minutes to midnight, the patrol car stopped in an empty parking lot and met another law enforcement officer who swabbed Appellant's hands for gunshot reside. (State's Exhibit 7 at 46:30). Appellant consented to the test. (State's Exhibit 7 at 48:00). At this point, Appellant asked to urinate outside of the patrol car, outdoors. The request was politely declined by each law enforcement officer. (State's Exhibit 7 at 48:35, 50:00). During the transport Appellant volunteered information that he fired a weapon on Tuesday that week, and asked what was going on. He was told that his wife was injured and he was going to the station downtown, where other officers would talk to him about what was going on. (State's Exhibit 7 at 49:00).

Once Appellant arrived at the Greenville Police Department, a search warrant was executed as to his person and he was interviewed by two investigators. (R. p. 256, line 5 – p. 263, line 22). Before the interview, investigators Mirandized Appellant, who signed a waiver of rights form. (R. p. 258, line 1 – p. 261, line 7; R. p. 329; State's Exhibit 61). During the

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2 *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602 (1966).

interview, Appellant made no admissions regarding who bore responsibility for his wife's shooting. (State's Exhibit 61). He denied knowing anything about it. (R. p. 269, lines 18-24).

Appellant did speak to the investigators about an argument he had with his wife that night wherein she "slipped and fell and hit the couch" and accused Appellant of pushing her, so he went outside for a cigarette. He said he left to go buy some beer and "drive around the block" when he was pulled over. (State's Exhibit 61 at 11:55 to 12:49). Later, Appellant expounded upon his wife's tendencies to get mouthy at night. (R. p. 266, lines 16-24; State's Exhibit 61 at 34:20 to 35:50). This night in particular, he believed it was "her wine" that led to the bickering. (State's Exhibit 61 at 59:00). He revealed growing frustrations and opined that she was bipolar. (State's Exhibit 61 at 25:40 to 27:00). In regards to the argument they had that night, Appellant stated that he believed her arm hurt after she fell down. (State's Exhibit 61 at 42:00 to 43:05).

He also talked about having a great relationship with his wife and stepson. (R. p. 265, lines 5-25). He stated he owned a number of guns including a .357 Taurus handgun that he owned for home protection, but he also stated that he did not believe in handguns because they were "made for killing." (State's Exhibit 61 at 44:20 to 46:24). As the interview progressed, Appellant made a number of general contradictions. (R. p. 268, line 19 – p. 269, line 12; State's Exhibit 61 at 1:35:23 to 1:36:30). He presented a fixed opinion that his ten-year-old stepson was not a liar, but later stated his stepson must be lying regarding his recollection of that night's events. (State's Exhibit 61 at 1:31:18 to 1:32:52).

Around the same time, law enforcement was interviewing M.W. at another building. (R. p. 108, lines 5-25; R. p. 114, lines 1-20). Visibly upset, M.W. told law enforcement – as he testified at trial – that he heard his mom and stepdad arguing. (R. p. 111, lines 7-11; R. p. 277, lines 6-15). He went out to see what was going on and witnessed them physically struggling on

the living room floor in front of the fireplace. (R. p. 112, lines 5-9; R. p. 277, lines 16-24). He tried to intervene, but could not pull Appellant off of his mother. (R. p. 112, lines 12-13; R. p. 278, lines 6-19). M.W. went back to bed thereafter. (R. p. 112, lines 16-21; R. p. 278, lines 20-21).

At trial, M.W. testified that he was trying to go to sleep, but he heard his mother and stepfather arguing. (R. p. 277, lines 1-19). After he went into the living room and tried to intervene, his mother followed him into his bedroom to tell M.W. how angry Appellant was at her. (R. p. 277, line 20 – p. 279, line 22). Though not corroborated by the pathologist, M.W. said that it looked like a bone was sticking out of his mother's shoulder, but there was no blood. (R. p. 111, lines 14-22; R. p. 194, lines 5-8; R. p. 279, lines 7-18). M.W. testified that he tried to go back to sleep, but they were arguing, and then he heard a loud bang. (R. p. 280, line 12 – p. 281, line 5). He felt the house shake and smelled gun smoke. (R. p. 281, lines 5-24). Waiting an estimated five to ten minutes before emerging from his room, M.W. found his mother face first on the floor in the hallway bathroom.[3] (R. p. 282, lines 6-25). Appellant was not in the house when he came out of his bedroom. (R. p. 112, line 22 – p. 113, line 17; R. p. 282, lines 15-16).

A review of timestamps and gas station surveillance tapes shows that while M.W. began calling 911 at 10:15 PM and stayed on the line waiting for law enforcement to arrive at his home, Appellant was at a nearby Sphinx gas station purchasing beer at 10:27 PM. (R. p. 233, lines 11-25). Investigators estimated the travel time between Appellant's home and the Sphinx station at nine minutes – M.W. had called 911 ten minutes prior. (R. p. 236, lines 2-5; R. p. 282, line 6 – p. 283, line 9).

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[3] At trial, M.W.'s grandmother and guardian noted that since this incident, M.W. has had problems sleeping, stomachaches, and has had a hard time attending counseling. (R. p. 287, line 18 – p. 288, line 8).

ARGUMENT

I. The trial court was correct to admit M.W.'s 911 call as an exception to the hearsay rule because M.W.'s statements concerning Appellant occurred immediately after his mother's shooting and during his immediate examination of the scene, wherein M.W. heard a gunshot, smelled gun smoke, emerged from his bedroom to find his mother's bloody body lying face down in the hallway bathroom, and called 911; the call was probative of motive, opportunity, and identity; and the call's admission was cumulative to M.W.'s trial testimony.

Pre-trial, the parties sought a ruling regarding the admissibility of particular segments of M.W.'s 911 call, wherein he reported that his mother had been shot, referenced "fighting among" Appellant and the victim "prior to the shooting," and responded to the dispatcher's questions regarding who might have committed the act. (R. p. 15, line 12 – p. 16, line 15; State's Exhibit 1, Track 3 at 00:42 to 1:16 and 7:44 to 7:50). Specifically, Appellant's counsel requested suppression of particular statements within the 911 call which may otherwise fall under the excited utterance exception to the hearsay rule because they had "nothing to do with the stressful event that just took place, which [was] the child finding his mother on the floor in a pool of blood." (R. p. 16, lines 2-9). Instead, the defense argued, the reference to the fighting was a discussion of "a prior event that happened before this excited utterance even took place or could have taken place." (R. p. 16, lines 10-12).

The State countered that the 911 call "happened within the span of the murder" because the call took place approximately half an hour after M.W. witnessed his mother and stepfather fighting, and the call took place minutes after hearing the gunshot and emerging from his room to find his mother was the victim of a gunshot wound. (R. p. 17, line 1 – p. 18, line 1). According to the State, the excited utterance and present sense impression exceptions to the hearsay rule applied. (R. p. 17, lines 2-6). Additionally, the State noted that M.W. would be testifying to the same information at trial. (R. p. 16, line 23 – p. 17, line 8).

The court found the 911 call admissible, finding "no confrontation clause problem."[4] (R. p. 18, lines 2-4). The court then ruled that "as far as the part of the call that deals with the events leading up to the shooting," there were no issues regarding Rule 403, SCRE, that the call's "relevancy is high," and that "any confusion of the issues of unfair prejudice to the Defendant is vastly outweighed by the probative value of the call." (R. p. 18, lines 5-11). The trial court did not specifically speak to hearsay or to M.W.'s identifying Appellant as the perpetrator.

Standard of Review

"The admission or exclusion of evidence falls within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion," which occurs "when the trial court's decision is based on an error of law or upon factual findings that are without evidentiary support." *State v. McEachern*, 399 S.C. 125, 136-37, 731 S.E.2d 604, 609-10 (Ct. App. 2012).

M.W.'s Statements to the 911 Dispatcher Fall Under Exceptions to the Hearsay Rule

"Hearsay is a statement, which may be written, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted." *In re Care & Treatment of Harvey,* 355 S.C. 53, 61, 584 S.E.2d 893, 897 (2003) (citing Rule 801, SCRE). "Hearsay is not admissible unless there is an applicable exception." *Id.* at 61-62, 584 S.E.2d at

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[4] In regards to issue preservation, Respondent believes this ruling encapsulates a finding that a hearsay exception applied to the 911 call, although the court neither expounds upon its basis for the application of any hearsay exception nor delineates which hearsay exception it applied. The admissibility of a statement under an exception to the hearsay rule is necessarily tied to the Confrontation Clause. *State v. Dennis*, 337 S.C. 275, 286, 523 S.E.2d 173, 178 (1999) ("An incriminating statement admissible under an exception to the hearsay rule also is admissible under the Confrontation Clause only if it bears adequate 'indicia of reliability.' The indicia of reliability requirement is met when the hearsay statement falls within a firmly rooted hearsay exception.").

897 (citing Rule 803, SCRE). Exceptions exist when a hearsay statement qualifies as an excited utterance or present sense impression. Rule 803(1)-(2), SCRE.

a. Excited Utterance

"The rules of evidence define excited utterance as a 'statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.'" *State v. Ladner*, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007) (quoting Rule 803(2), SCRE). An excited utterance (1) "must relate to a startling event or condition; (2) . . . must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition." *Id.* The court must consider the totality of the circumstances surrounding the declarant's statement in its application. *Id.* "The rationale for the [excited utterance] exception lies in the special reliability accorded to a statement uttered in spontaneous excitement which suspends the declarant's powers of reflection and fabrication." *State v. Blackburn,* 271 S.C. 324, 327, 247 S.E.2d 334, 336 (1978).

A victim's statements to law enforcement or to a 911 dispatcher immediately following a traumatic event constitute a standard application of the excited utterance exception. *State v. Burdette*, 335 S.C. 34, 41-43, 515 S.E.2d 525, 529-30 (1999). Temporally, our courts have recognized that the excited utterance exception may apply after the startling event occurs. *Id.* at 43-44, 515 S.E.2d at 530; *Cf. State v. Blackburn, supra* (statement given one hour post-event would qualify as an excited utterance, but was ultimately inadmissible because it offered a reason for the event and did not provide a factual account of how it occurred); *State v. Washington*, 379 S.C. 120, 665 S.E.2d 602 (2008) (statements made during formal police interview and occurring after a 90-minute interval not an excited utterance). "Even statements after extended periods of time can be considered an excited utterance as long as they were made

under continuing stress." *State v. Sims*, 348 S.C. 16, 21–22, 558 S.E.2d 518, 521 (2002).

In *Sims*, a five-year-old boy was found crying outside his mother's apartment; his mother was found inside lying in a pool of blood, near death. *Id.* at 18-19, 558 S.E.2d at 520. Law enforcement was allowed to testify as to what the boy said when they found him, which included the boy's rendition of whom he believed was responsible for his mother's injuries. *Id.* The trial court correctly noted that the conditions in which the boy was discovered lent credibility to the resulting statements in a manner which overrode the general protections against hearsay: the boy was five years old, saw his mother lying in a pool of blood, possibly watched his mother being attacked in the middle of the night, and was found crying on the ground hours later outside of his apartment by a neighbor. *Id.* at 20-21, 558 S.E.2d at 521. In affirming the trial court's application of the excited utterance exception to the hearsay rule, our Supreme Court cited to a number of other jurisdictions who have treated a similar factual scenario and laid out specific considerations which are particularly applicable to the case *sub judice*:

> Other factors useful in determining whether a statement qualifies as an excited utterance include the declarant's demeanor, the declarant's age, and the severity of the startling event. Clearly, the son's age and the severity of the startling event are factors that weigh in favor of finding his statement to be an excited utterance.

Id. at 22, 558 S.E.2d at 521.

The statements at focus as excited utterances in *Sims* nearly identically reflect the statements made by M.W. Our child victim[5] initially identified the person he believed to be responsible for this mother's shooting to the 911 dispatcher in response to the dispatcher's question. (State's Exhibit 1, Track 3 at 00:42 to 1:16). Later, he answered another question by the dispatcher when he said that his mother and stepfather "were arguin'" prior to the shooting.

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[5] Appellant was convicted of unlawful conduct toward a child and sentenced to ten years on that charge alone. (R. p. 328, lines 22-23).

(State's Exhibit 1, Track 3 at 7:44 to 7:50). Both statements were provided as a direct response to the dispatcher's inquiries. (*Id.*). The *Sims* court found that although, as here, "the son's statement was in response to a question, under the circumstances presented, [that] fact does not prevent his answer from being an excited utterance." *State v. Sims, supra* at 25, n. 1, 558 S.E.2d at 523, n.1.

Of considerable import, M.W's statements were spawned by a course of events which can certainly be characterized as startling for a ten-year-old boy. M.W. fell asleep after witnessing a physical altercation between his mother and stepfather, woke up to a gunshot and the smell of gun powder, then mustered up the courage to leave his bedroom, only to find his mother lying face down in a pool of blood in their hallway bathroom. (R. p. 277, line 6 – p. 282, line 25). The time between the gunshot and the 911 call constitutes a startling event on its own—during those five to ten minutes, M.W. waited in his room likely wondering what had occurred and whether he was in danger. M.W. then pulled his mother's bloodied phone from near her person and called 911. (State's Exhibit 1, Track 3). Moreover, M.W.'s discourse with the 911 dispatcher demonstrates that during the course of the twenty-plus minute phone call, he was asked to check on his dead or dying mother's status, and did so. (State's Exhibit 1, Track 3 at 3:25 to 4:36, and 6:00 to 7:18). He intermittently broke down throughout the phone call. (State's Exhibit 1, Track 3).

Based on the cause for and the progression of the phone call, there exists no question that M.W. spoke to the 911 dispatcher while undergoing a continuingly startling event, that his statements related to that event, and that the stress experienced by M.W. was caused by the event. The 911 call evidences a ten-year-old boy mentally and visually processing the scene and status of his mother's injury, including his realization that his stepfather was no longer at the home. (*See* State's Exhibit 1, Track 3 at 1:35 to 1:37 (spontaneously stating "I think my dad just

ran off")). At no time during the call did M.W.'s stress of excitement wane. The dispatcher continued to engage M.W. in stressful inquiries, such as whether his mother was able to speak to him and was breathing, and by telling him to hide in the event that his stepdad returned. (State's Exhibit 1, Track 3). The entirety of the trauma indicative in this exchange was causally related to the events M.W. witnessed that night: trying to intervene in his parent's physical fighting, hearing the gunshot, and discovering his mother's body.

Specifically as to the passage of time between M.W.'s statement that his mother and stepfather had argued and his actually witnessing their physical altercation on the living room floor, that statement is likewise admissible. The passage of time is not a dispositive factor. "Even statements after extended periods of time can be considered an excited utterance as long as they were made under continuing stress." *State v. Sims,* 348 S.C. at 21-22, 558 S.E.2d at 521. Temporally, the string of events between the argument and the 911 call were continuous. M.W. was trying to go to sleep, but his mother and stepfather were being loud, so he went into the living room and witnessed them engaged in a physical altercation. (R. p. 277, lines 13-24). M.W.'s mom followed M.W. to his bedroom and when she left, M.W. tried to go back to sleep over their arguing. (R. p. 279, line 1– p. 281, line 1). Then M.W. heard the bang of a gunshot. He waited in his room for a few minutes before emerging to find his mother's body extending into the hallway. (R. p. 281, line 2 – p. 282, line 25). Appellant was not in the house. (R. p. 282, lines 15-16). Then he called 911. (R. p. 283, lines 1-9). Given this timeline as testified to by M.W. at trial, there was no time for the stress of the argument or the shooting to dissolve prior to M.W.'s making these challenged statements.

b. Present Sense Impression

"There are three elements to the foundation for the admission of a hearsay statement as a

present sense impression: (1) the statement must describe or explain an event or condition; (2) the statement must be contemporaneous with the event; and (3) the declarant must have personally perceived the event." *State v. Hendricks*, 408 S.C. 525, 533, 759 S.E.2d 434, 438 (Ct. App. 2014). The present sense impression exception applies to statements made "immediately" thereafter an event transpires. Rule 803(1), SCRE. "Our courts have not delineated a time frame that would constitute 'immediately thereafter.'" *State v. Parvin*, 413 S.C. 497, 503, 777 S.E.2d 1, 4 (Ct. App. 2015), *reh'g denied* (Oct. 8, 2015) (finding error in application of present sense impression exception because the record was devoid of temporal association regarding the statements); *see also State v. Garcia*, 334 S.C. 71, 77 n.4, 512 S.E.2d 507, 510 n.4 (1999) (same).

As is characteristic of 911 calls, M.W.'s discussion with the dispatcher describes the conditions before him. *State v. Hendricks, supra.* It is not disputed that M.W. did not witness the shooting. *See State v. Davis,* 371 S.C. 170, 180 n.9, 638 S.E.2d 57, 63 n.9 (2006) (present sense impression inapplicable where declarant did not perceive event explained in the hearsay statement); *see also State v. Hendricks, supra* (same). However, his statements to the 911 dispatcher occurred "immediately thereafter" the stressful event. *See generally State v. Parvin, supra.* His first action after emerging from his bedroom and discovering his mother's bloodied body was to call for help. (R. p. 282, line 4 – p. 283, line 9). As established above, M.W. was trying to go to sleep when he heard, then witnessed, their argument. (R. p. 277, lines 13-24). M.W. went back to his bedroom, his mother followed, and M.W. tried to go back to sleep but "there was arguing." (R. p. 279, line 1– p. 281, line 1). M.W. heard the gunshot, waited in his room, and emerged to discover his mother's body. (R. p. 281, line 2 – p. 282, line 25). Then he called 911. (R. p. 283, lines 1-9). Regardless of whether it is believed that M.W. fell asleep at

some point between hearing the argument and then the gunshot, his statements to the dispatcher were made "immediately thereafter" the chain of events culminating in the gunshot.

Moreover, the statements by M.W. constitute a present sense impression in that M.W. relayed things *heard*. His auditory perceptions still constitute an explanation of an event or condition made during the perception of that event or condition, regardless of whether M.W. also had visual perceptions of the same. *See* Rule 803(1), SCRE. The phone call is a rendering of M.W.'s immediate impressions of what occurred in the home. (State's Exhibit 1, Track 3). The totality of the 911 call evidences a ten-year-old boy processing the scene of his mother's murder, including his preceding auditory perceptions. As to M.W.'s telling the 911 dispatcher that Appellant shot his mother, the call demonstrates that the boy piecemealed together the situation which had evolved in his home and responded to the dispatcher's questions. There is no indication that he previously digested the identity of the shooter. (*See* State's Exhibit 1, Track 3 at 1:35 to 1:37 (spontaneously stating "I think my dad just ran off")). The ten-year-old did personally perceive the argument, then went to bed, was awoken by the gunshot, and immediately called 911. (R. p. 277, line 13 – p. 283, line 9). Moreover, M.W. did not volunteer to the dispatcher that he witnessed any argument, he only responded to the dispatcher when prompted, thus heightening the statement's indicia of reliability. *See State v. Ladner*, 373 S.C. at 111, 644 S.E.2d at 688 (under certain circumstances a hearsay statement is accompanied by a particularized guarantee of trustworthiness to render it admissible).

The 403 analysis was appropriate

In order for evidence falling under a hearsay exception to be admissible, it must be relevant to the determination of the existence of any fact of consequence at trial, and the probative value must substantially outweigh the danger of unfair prejudice. Rules 401-403,

SCRE. "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." *State v. Cheeseboro,* 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001). "All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be avoided." *State v. Gilchrist,* 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (brackets and internal quotation marks omitted).

The Court conducted a Rule 403, SCRE analysis, accurately finding the 911 call more probative than prejudicial. (R. p. 18, lines 5-11). The information contained within the recording is highly probative. As previously stated, the call evidences the ten-year-old victim's description of the scene his stepfather left behind. The call aids the jury in establishing the identity of the parties to the action, and the accused's presence or absence in the home at the time of the murder. It aids in establishing motive, identity and opportunity. M.W. reveals that no one but he, his mother, and his stepfather were at home, his mother had been shot, he heard it happen, his stepfather is no longer at home, and his stepfather and mother were arguing earlier. (State's Exhibit 1, Track 3). Moreover, the call is not prejudicial in that it does not depict a wholly panic-stricken child victim or accusatory statements which may incite passion in the jury. Rather, M.W. presents as a coherent, courageous child reporting on the tragic events in his home and directly responding to the dispatcher. He only intermittently breaks down. (State's Exhibit 1, Track 3).

Any Hearsay is Harmless Due to Cumulative Nature of the Testimony at Issue

"Improperly admitted hearsay which is merely cumulative to other properly admitted evidence may be harmless error." *Taylor v. Medenica*, 324 S.C. 200, 214, 479 S.E.2d 35, 42 (1996). As can be determined from earlier analysis, M.W. testified in a manner wholly

cumulative to the information contained in the 911 call.[6] (*Compare* R. p. 271, line 16 – p. 286, line 9 *and* State's Exhibit 1, Track 3). In fact, M.W. testified in greater detail at trial in regards to the argument he heard and witnessed between his mother and stepfather. (R. p. 276, line 1 – p. 281, line 5). During the 911 call, he merely affirmatively answered the 911 dispatcher's question as to whether an argument had occurred. (State's Exhibit 1, Track 3 at 7:44 to 7:50). At trial, M.W. testified as a critical witness piecing together and corroborating much of the circumstantial evidence presented up to that point. As such, any error in the earlier introduction of the 911 recording proves cumulative and harmless.

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[6] With one exception: at trial, M.W. did not state that Appellant shot his mom. That would have constituted an inadmissible opinion on the ultimate issue in the context of live witness testimony. Rule 704, SCRE.

II. If found preserved for appellate review, no error occurred in the trial court's admitting Appellant's recorded statements because the *Denno* record, which includes recordings of both waivers, indicates that Appellant made both statements after exercising a knowing, intelligent, and voluntary waiver of his *Miranda* rights under the totality of the circumstances, and any alleged error in admitting those statements proves harmless as the statements had no impact on Appellant's case.

After a *Denno*[7] hearing wherein Appellant's arresting officer and interrogator testified, and wherein the videos of both arrest and interrogation were published to the trial court, the court found Appellant's statements made to both law enforcement officers voluntary and admissible based on the totality of the circumstances presented. (R. p. 18, line 13 – p. 43, line 20; *see* State's Exhibits 7 and 61). The *Denno* record indicates that the trial court observed the relevant portion of each lengthy video in open court prior to making its ruling. (R. p. 28, lines 2-8; R. p. 33, lines 23-24). The court detailed the basis for its finding:

> The Defendant was Mirandized twice.
>
> And . . . based on the content of the video and the testimony of the officer, I find him to be credible and understood his situation. It was clearly and carefully explained to him what his rights were. He acknowledged those rights in writing.
>
> The video shows, at least, as far as the interview room setting is concerned[,] that it was not a hostile atmosphere. The Defendant was paying close attention to what the officer said, based on the audio of the initial advisement under *Miranda*. And the encounter with Officer May, he, also, clearly apprehended what was occurring.
>
> Although there is evidence of his intoxication, I don't find that it was to such an extent that it erased his ability to understand, . . . process information and make rational decisions. I don't find any evidence of coercion or pressure to the extent that would find that the Defendant's will was overborne.
>
> I understand the incident regarding the access to the restroom, and his using the restroom. But I don't find that that by itself interfered with the voluntariness of the statement or his knowing and intelligent waiver of his rights under *Miranda*.
>
> I don't find anything in the record that would show me that the statements he gave

[7] *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774 (1964).

> were not the product of his free and voluntary choice. I don't have any information about his educational background, but he appeared to be in physical and mental health sufficient to give a statement.
>
> Again, the intoxication he may have been experiencing did not seem to and I find did not interfere with his understanding of his rights. I find that there was no pressure exerted on him or coercion.
>
> And, again, the State has proven beyond a reasonable doubt that the waivers were freely and voluntarily made. So I don't find there's any impediment to their being admitted into evidence.

(R. p. 42, line 5 – p. 43, line 20).

Issue Preservation: Issue Only Preserved as to In-Car Video

When a court rules *in limine*, an objection contemporaneous to the introduction of the evidence is required for proper issue preservation. *State v. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001). Appellant did renew his objection to the admissibility of the in-car recording of Appellant's arrest and transport to the police station. (R. p. 72, lines 1-11). That issue is thus preserved for appellate review.

However, Appellant did not renew his voluntariness objection at the time Appellant's recorded interrogation was introduced at trial. (R. p. 261, lines 9-17). In fact, Appellate counsel responded to the State's moving that video into evidence "[w]ithout objection." (R. p. 261, line 11). As a result, the present issue is only partially proper before this Court. *State v. Carlson,* 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) ("A party cannot complain of an error which his own conduct induced.").

In any event, the recordings demonstrate Petitioner made each statement to law enforcement in a knowing and voluntary manner, and suppression of these recordings – which do not include any confession to the crimes charged – was not appropriate under the totality of the circumstances.

Standard of Review

If this Court finds the issue preserved in whole or in part, the trial court's finding of voluntariness will not be disturbed on appeal unless so "manifestly erroneous as to constitute an abuse of discretion." *State v. Arrowood,* 375 S.C. 359, 365, 652 S.E.2d 438, 441 (Ct. App. 2007); *see State v. Myers,* 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004). This standard binds the appellate court to the lower court's "fact finding in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law." *State v. Asbury,* 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997).

"When reviewing a trial court's ruling concerning voluntariness, this Court does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence." *State v. Saltz,* 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001). Similarly, when a determination regarding the voluntariness of a defendant's confession comes down to a question of credibility, the trial court's credibility finding should not be disturbed absent an abuse of discretion. *State v. McClure,* 312 S.C. 369, 371-72, 440 S.E.2d 404, 405-06 (1994).

Standard Governing Admissibility

A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his or her rights under *Miranda. Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602 (1966). "If a suspect is advised of his *Miranda* rights, but chooses to make a statement, the burden is on the State to prove by a preponderance of the evidence that his rights were voluntarily waived." *State v. Arrowood,* 375 S.C. at 366-67, 652 S.E.2d at 442; *State v. Saltz,* 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001).

"In South Carolina, the test for determining whether a defendant's confession was given freely, knowingly, and voluntarily focuses upon whether the defendant's will was overborne by the totality of the circumstances surrounding the confession." *State v. Moses,* 390 S.C. 502, 513, 702 S.E.2d 395, 401 (2010) (quoting *Berghuis v. Thompkins,* 560 U.S. 370, 382, 130 S.Ct. 2250, 2260 (2010)). "If a suspect's will is overborne and his capacity for self-determination critically impaired, use of the resulting confession offends due process." *State v. Saltz, supra* (citing *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041 (1973)). Accordingly, "the waiver must be 'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" *State v. Moses, supra.*

The factors to be considered when making a voluntariness determination have ben oft-examined and broadly defined by our courts. They include, but are not limited to the: "youth of the accused, his lack of education or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep." *State v. Pittman,* 373 S.C. 527, 647 S.E.2d 144 (2007) (citing *Schneckloth v. Bustamonte, supra*)). Looking further, our courts have considered the accused's background, experience, conduct, age, maturity, physical condition, mental health, misrepresentations by law enforcement, isolation of a minor from a parent, direct or indirect promises (however slight), repeated and prolonged questioning, and exertion of improper influence. *State v. Moses,* 390 S.C. at 513-14, 702 S.E.2d at 401.

"Coercive police activity is a necessary predicate to finding a confession is not voluntary within the meaning of the Due Process Clause of the Fourteenth Amendment." *State v. Salisbury,* 330 S.C. 250, 272, 498 S.E.2d 655, 666-67 (Ct. App. 1998), *aff'd as modified on other grounds*

343 S.C. 520, 541 S.E.2d 247 (2001) (citing *Colorado v. Connelly,* 479 U.S. 157, 167, 107 S.Ct. 515, 521–22 (1986); *State v. Linnen,* 278 S.C. 175, 293 S.E.2d 851 (1982)). "The signing of the waiver form alone is not conclusive; the State still has the burden of showing the waiver was voluntary." *State v. Doby,* 273 S.C. 704, 708, 258 S.E.2d 896, 899 (1979). The fact that a defendant was questioned by an officer in a custodial setting does not render his statement involuntary—the relevant inquiry concerns the circumstances surrounding the waiver. *See id.*

This Record Supports the Finding of a Knowing, Voluntary Waiver

First it is to be noted that Appellant made no confession in the totality of the statements introduced. Rather, Petitioner was audio-recorded in the patrol car volunteering non-inculpatory statements and responding to his arresting officer on his own accord. (State's Exhibit 7). Then, in a video-recorded interrogation room, Petitioner completed a waiver of rights form and responded to questioning for two and a half hours regarding his activities that day and his knowledge concerning his wife's death. (State's Exhibit 61).[8] At no time did Appellant confess any involvement in her fate, and at no time was Appellant subject to coercive forces causing him to engage in his fluid communications with law enforcement.

1. The Dash-Cam Video

Based upon Master Deputy Robert May's testimony and the in-car video, Appellant's exchanges with law enforcement at the time of his arrest appear knowingly volunteered. Appellant's arrest occurred a few minutes after 11:00 PM when he was pulled over and ordered,

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[8] This is the redacted video recording of Appellant's interrogation introduced before the jury at trial. Court's Exhibit 2 is the unredacted version heard by the trial court at the time of the *Denno* hearing; however, the versions are identical insofar as Appellant's waiver. After the *Denno* hearing and in consideration of *State v. Brewer*, 411 S.C. 401, 768 S.E.2d 656 (2015), the parties redacted hearsay statements made at latter parts of the recorded session and not subject to any issue on appeal. (R. p. 43, line 23 - p. 46, line 18; R. p. 196, line 16 – p. 211, line 10; R. p. 217, lines 2-11).

with vulgarity, to put his hands outside of his vehicle. (State's Exhibit 7, 0:00 to 0:30). Appellant complied by stepping out of the vehicle and placing himself on the ground without hesitation. (*Id.*). He acted on his own accord. (*Id.*). Deputy May recounted the same, testifying during the *Denno* hearing that although Appellant appeared intoxicated, he appeared to understand the Deputy's words and instructions, and he got out of the car and onto the ground on his own will. (R. p. 22, lines 6-18; R. p. 27, lines 4-11). Appellant did not ask for anything at the time of arrest. (R. p. 22, lines 19-21). It was inherent from the totality of the circumstances that Appellant had been taken into custody and was not free to leave. However, the circumstances of his detainment were not rendered abnormally coercive by the officer's initial demand for Appellant to show his hands.

The arresting officers handcuffed Appellant and lifted him from his position on the ground. (State's Exhibit 7 at 0:40 to 1:00). No unwarranted force was used at any time by any party to the arrest, although an officer at one point remarked, "He's being cooperative now." (State's Exhibit 7 at 1:45). Then, Appellant was placed inside the patrol car, at which point he indicated he wanted to speak to law enforcement. Appellant did begin to speak, and Deputy May responded that he would talk to him "in just a second, [he] just [had] to read [Appellant] something"—his *Miranda* warnings. (State's Exhibit 7 at 2:42 to 3:25). Appellant continued to volunteer information unintelligible to the audio recording, and was interrupted by the Deputy's *Miranda* warnings. (State's Exhibit 7 at 3:25 to 4:28 ("I left and . . . had a few beers, and. . ."); (R. p. 21, lines 7-19).

The *Miranda* warnings ended with Deputy May asking if Appellant wished to speak with him, to which Appellant immediately answered, "Why?" (State's Exhibit 7 at 4:31). Appellant continues to ask why, but also says he would like to speak. (State's Exhibit 7 at 4:33 to At 4:50).

The following exchange occurred:

Deputy May: You said you wish to speak, correct?

Appellant: I'd like to know what's going on.

Deputy May: Well, you're being detained right now, ok, because there's some people over at your house investigating a crime scene

Appellant: A crime scene? . . . Why? . . .

Deputy May: You don't know why? Ok, what were you doing before you left?

(State's Exhibit 7 at 4:44 to 5:13).

Appellant then launches into a brief narrative divulging what he did at his home that day.[9] The Deputy follows-up at a few points in the conversation before he abruptly stops conversing with Appellant, stating, "We'll talk to you in just a second."[10] (State's Exhibit 7 at 5:14 to 6:40). At this point it appears that another officer may instruct Deputy May not to ask any further questions. (State's Exhibit 7 at 7:11). Any custodial interrogation comes to a halt and Appellant is transported to the police station, during which time Appellant initiates non-consequential conversation with Deputy May a few times during the commute. (State's Exhibit 7). Including the commute downtown, Appellant remained detained in the patrol car for an hour and a half. (*Id.*).

While a lot transpires in the first seven minutes of Appellant's detainment, the circumstances of his conversing with law enforcement post-*Miranda* warnings are not the result of coercion, but of choice. A voluntary waiver need not be express. *State v. Kennedy*, 333 S.C.

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[9] This information is cumulative to that given during his interrogation at the police station. (*See* State's Exhibit 61).

[10] A similar explanation is given at latter points during the commute as Appellant continues to ask either what is going on or if his family is ok. (State's Exhibit 7).

426, 429, 510 S.E.2d 714, 715 (1998). Moreover, any time a defendant initiates further discussion, he implicitly waives his *Miranda* rights. *Id.* at 430-31, 510 S.E.2d at 716 (citing *Edwards v. Arizona*, 451 U.S. 477, 845, 101 S.Ct. 1880, 1885 (1981)). "Volunteered statements, whether exculpatory or inculpatory, stemming from custodial interrogation or spontaneously offered up, are not barred by the Fifth Amendment." *State v. Miller*, 375 S.C. 370, 380, 652 S.E.2d 444, 449 (Ct. App. 2007) (quoting *State v. Hook*, 348 S.C. 401, 409-10, 559 S.E.2d 856, 860 (Ct. App. 2001), *aff'd as modified*, 356 S.C. 421, 590 S.E.2d 25 (2003)).

Here, Appellant began speaking with law enforcement prior to receiving his *Miranda* rights, and continued speaking in the same manner afterward without hesitation. Appellant made an additional implicit waiver of his right to remain silent each time he initiated conversation with or questioned the officer. *State v. Miller, supra.* Indicators of voluntariness include: Appellant's initiating discussion with Deputy May before and after receipt of his *Miranda* rights; the Deputy's interruption of that conversation for the purposes of Mirandizing Appellant; no repeated or prolonged questioning; law enforcement's respect for answering Appellant's questions without enticing Appellant to make additional, potentially inculpatory, statements; no urgency on the part of law enforcement to elicit information; no utilization of trickery or threats regarding the circumstances of Appellant's wife and stepson as a means of inducing Appellant to speak; and both parties' maintenance of an even-handed, non-threatening tone during conversation. (State's Exhibit 7).

In support of coercion, Appellant's brief points to his admitted consumption of alcohol at the time of arrest. (Br. of Appellant at 22). As to any extent of inebriation prior to apprehension, Appellant's intoxication does not negate a *Miranda* waiver so long as the totality of the circumstances still point to voluntariness. *See State v. Easler*, 322 S.C. 333, 342, 471 S.E.2d 745,

751 (Ct. App. 1996) (holding DUI arrest resulting in volunteered, noncustodial statements did not require *Miranda* warnings); *see also State v. Kerr*, 330 S.C. 132, 147, 498 S.E.2d 212, 219 (Ct. App. 1998) (DUI defendant found to have volunteered non-custodial statement that did not necessitate *Miranda* warnings). Appellant's alcohol consumption is merely one in the totality of factors considered. *Id.* To that end, Appellant appeared on the video to have complete physical, emotional, and intellectual dominion at all points during and after his arrest. Appellant retained control of his faculties and did not act inhibited. (State's Exhibit 7).

The evidence supports the trial court's finding. Considering the totality of the circumstances, Appellant's post-arrest statements appearing on the dash-cam video constitute a voluntary waiver and a series of volunteered statements prior to which Appellant was duly Mirandized.

2. The Interrogation Room

Much like the dash-cam video, Appellant continued to engage in a fluid conversation with law enforcement inside the interrogation room, speaking for nearly two and a half hours. (State's Exhibit 61[11]). This time, when Mirandized, Appellant made an unequivocal waiver that can only be viewed as knowing and voluntary.

The video recording of Appellant's interview is beneficial, but not necessary, to the voluntariness determination. Investigator Ramon Rivera provided testimony indicating of a knowing waiver. He testified that he read Appellant his *Miranda* warnings directly from the Waiver of Rights form. (R. p. 31, lines 8-25; R. p. 329). Rivera stated that Appellant could read, but that he did not have his glasses. (R. p. 32, lines 9-11). According to Rivera, Appellant did not

[11] The interview composes two files on the exhibit disc. Unless otherwise stated, each reference herein refers to the first file, which is the larger portion of Appellant's lengthy interview and which contains the express waiver.

ask for or question anything at this time and appeared to understand the purpose of the waiver form. (R. p. 32, lines 2-20). Regardless, Rivera explained to Appellant the meaning of coercion as it was used in the waiver because, according to Rivera, "[a] lot of people have the problem with the [meaning of] the word." (R. p. 33, lines 1-6). Rivera asked another time if Appellant wanted to speak with him having been read his rights, and Appellant signed the waiver indicating he did. (R. p. 33, lines 8-16). According to Rivera, in making his waiver, Appellant said, "I have nothing to hide." (R. p. 32, lines 21-23).

In addition to Rivera's testimony, the form shows that Appellant initialed next to each paragraph and signed the waiver, which states in part:

> I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

(R. p. 329).

Prior to this waiver and interview, Investigator Rivera testified that Appellant had a search warrant served on his person. (R. p. 31, lines 4-7). Rivera recalled that Appellant asked to use the restroom prior to being ushered into the interview room, and Rivera "told him [he] would be right back with him" within five minutes, as Rivera was gathering the search warrants. (R. p. 30, lines 20-25). When Rivera returned he asked Appellant if he "still" needed to use the restroom and Appellant answered no. (R. p. 31, lines 1-3). On cross-examination, Rivera testified that he separated from Appellant for no more than "a few minutes." (R. p. 36, lines 10-18; R. p. 37, lines 19-22).

Also clear from cross-examination are the conditions of Appellant's detention in the interview room. He was outfitted with a chain belt and handcuffs, escorted by two uniformed

deputies, and stripped and photographed as a condition of the search warrant executed on his person. (R. p. 36, lines 11-25). During the interview, one other investigator remained in the interrogation room alongside Appellant and Rivera. (R. p. 37, line 23 – p. 38, line 3). Appellant had not been charged with anything at the time of his waiver. (R. p. 38, lines 10-19).

The circumstances of Appellant's subjection to a search warrant and his soiling himself do not outweigh the voluntariness of Appellant's express waiver. Any embarrassment caused by the execution of a search warrant, and by soiling himself, was no longer present at the time of the interview. Any female officer present during the photographing and intake process was not part of the interview. Throughout the interview, Appellant spoke freely to two plainclothes male investigators. (State's Exhibit 61). Moreover, embarrassment caused by the intake process does not equate with undue coercive forces. In making its ruling, the court additionally benefitted from its observation of Appellant in the interrogation room video recording. (State's Exhibit 61).

Of particular import, the recording of Appellant's waiver indicates that he deliberately waived his *Miranda* rights after an attentive question and answer series with the investigators. The recording began immediately prior to Investigator Rivera's entry into the interview room. (R. p. 38, lines 4-9). At this time, Investigator Rivera introduces himself and the reason for Appellant's interrogation to him, informing him immediately that he must advise Appellant of his rights. (State's Exhibit 61, 0:00 to 1:05). Appellant then questions the investigator regarding the circumstances of his detention. He asks, "you said homicide [investigator]?" (State's Exhibit 61 at 1:18). He also asks, as he did of his arresting officer, whether his child and wife are ok. (State's Exhibit 61 at 1:21 to 1:38). Appellant tells Rivera, in response to a question, that he had a couple of beers three to four hours prior and that other than a steroid to treat a condition on his hands, he did not take any legal or illegal drugs. (State's Exhibit 61 at 1:52 to 2:22).

Rivera begins to read Appellant his rights. Appellant interjects that he can read, but that he does not have his glasses, and therefore could not make out the small writing; however, Appellant indicated he understood the purpose of the paper when he read aloud the title "waiver of rights." (State's Exhibit 61 at 2:23 to 2:48). As Investigator Rivera complied with Appellant's inhibited eyesight by reading the rights to Appellant, Appellant can be seen paying attention to each line. He answered with an emphasized, "Yessir," signifying that he understood those rights. (State's Exhibit 61 at 2:50 to 3:22). Rivera frees a hand for Appellant to initial and sign, and Appellant does so, but not after having Rivera read aloud the waiver of rights paragraph because, as Appellant mentions for a second time, he did not have his glasses. (State's Exhibit 61 at 3:23 to 4:04).

As Rivera again reads the rights aloud, Appellant can be seen slowly shaking his head in agreement with the language of the waiver. When Rivera reaches the portion that states "no promises or threats have been made to me and no pressure or coercion of any kind has been used against me," Appellant interjects with, "Correct." (State's Exhibit 61 at 4:20). Appellant can be seen in the video continuing to pay close attention to each portion of this waiver. His body language indicates that he is intently focused in on the form on the table in front of him. (State's Exhibit 61 at 4:05 to 4:27).

Next, Rivera asks Appellant if he understands what coercion means, and Appellant makes eye contact with Rivera saying, "Coercion? Explain." (State's Exhibit 61 at 4:27 to 4:33). As Investigator Rivera states that coercion means he is not tricking him into doing or signing anything, Appellant can be heard denying the use of any coercion. (State's Exhibit 61 at 4:34 to 4:48). Appellant signs the waiver, concluding his waiver by stating, as Rivera recounted, "I ain't got nothin' to hide, sir." (State's Exhibit 61 at 4:56). Rivera responds, "I appreciate that."

(State's Exhibit 61 at 4:58). This final statement alone evidences a knowing decision to sign the waiver of rights and speak with law enforcement albeit being informed of his rights to do otherwise. Based upon his own representations on video, Appellant made a waiver that can only be described as express.

In addition to the self-confidence evident in Appellant's waiver, no coercive forces were present in the investigators' even, professional tone used in addressing the waiver with him. They answered his questions, explained anything Appellant asked them to, and did not rush or force his signature. (State's Exhibit 61). Appellant did not ask for anything from the investigators during this time, nor during his interview.[12] (*Id.*). Nothing indicates that his will was overborne. By all indications, Appellant was fully aware that he was being detained and questioned, and willingly cooperated. And, while testimony shows that Appellant did urinate on himself prior to interrogation, (R. p. 37, lines 5-22), testimony also shows that he was unattended for no more than a few minutes during which this likely occurred. At no time during questioning was Appellant denied the opportunity to use the restroom by his interrogator. (R. p. 31, lines 1-3). More importantly, Appellant was not denigrated at the time of interrogation by being made to remain in soiled clothing. He wore a dry jumpsuit, and appeared to sit in a clean interview room. (State's Exhibit 61). Moreover, there are valid reasons not to allow Appellant to use the restroom prior to the completion of any search warrant being executed as to his person, such as spoliation of gunshot residue or DNA evidence before law enforcement could collect it pursuant to a valid warrant.

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[12] In fact, Appellant asked for one thing only during the interview. Towards the conclusion, he jokingly asks to go outside and smoke, appearing to anticipate that his request would be denied. His tone and language reflects that he felt the request improper given the custodial setting. (State's Exhibit 61 at 30:48 (second file on the disc)).

Again, the record supports the trial court's finding. Considering the totality of the circumstances, Appellant made a knowing and voluntary waiver, consciously deciding to engage in a lengthy interview with law enforcement. Perhaps most telling of voluntariness is Appellant's expression that he understood coercion and simultaneous denial that any was being used to tempt his signature on the waiver form.

As to both waivers, Appellant posits that the trial court only considered the circumstances surrounding Petitioner's statement in a piecemeal fashion, thus ignoring the totality of the circumstances lending to Appellant's waiver and applying the improper test. (Br. of Appellant, p. 19). But the record reflects the trial court found "that, based on all the circumstances, the Defendant, Mr. John Calvin Sledge, did voluntarily waive his rights against self-incrimination." (R. p. 42, lines 5-6). Though the trial court ruled that the statements were voluntary "beyond a reasonable doubt," the court verbalized that applied the proper test and a more stringent standard than required. (R. p. 43, lines 17-18). As delineated, the evidence supports its conclusion.

Appellant points to several conditions concerning the general fact that Appellant was detained at the time he made his statement.[13] (*See* Br. of Appellant pp. 21-23). Many of the factors concerning Appellant's interrogation cited to in support of coercion are not coercive interrogation tactics, but rather indicative of the fact that he was subject to custodial interrogation. "The purpose of *Miranda* warnings is to apprise a defendant of the constitutional

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[13] To include: he was pulled over by police and ordered out of his vehicle; handcuffed; detained in the back of a patrol car; swabbed for gunshot residue tests en route to a downtown police station; searched and made to change into an orange jumpsuit upon arrival at the police station; informed he was being questioned as part of a homicide investigation; and questioned by law enforcement for approximately two and a half hours while partially handcuffed. (*See* Br. of Appellant pp. 21-23).

privilege not to incriminate oneself while in the custody of law enforcement." *State v. Medley*, 417 S.C. 18, 24–25, 787 S.E.2d 847, 850–51 (Ct. App. 2016) (citing *State v. Evans*, 354 S.C. 579, 583, 582 S.E.2d 407, 409 (2003)). The fact that Appellant was handcuffed and not free to leave renders the requirement that a waiver be obtained before continuing to question him, it does not by itself render the following waiver involuntarily made.

The dispositive inquiry in this case is whether the circumstances of the detainment were unduly coercive at the time Appellant made his waiver, such that the waiver could not have been the result of his own free will. At no time were the conditions of this appellant's detainment sufficient for the court to find he succumbed to coercive forces. For one thing, the length of Appellant's detention alone is not coercive because Appellant was in the patrol car for one and a half hours, largely for transport downtown. Then he actively spoke to investigators for two and a half hours. During the remaining hour, Appellant was subject to a search warrant on his person. Additionally, there is no suggestion in the record that Appellant's will was worn down by improper interrogation tactics, too-lengthy questioning, or any type of deceit. He was informed of the reason for his being questioned. Law enforcement never enticed Appellant to speak with them in order to find out the fate of his wife or family. Appellant was not induced to confess, nor did he. No application of physical or psychological force appears in the record.

At no time were the conditions of this appellant's detainment sufficient for the court to find he succumbed to coercive forces. To the extent that this claim is preserved for appellate review, Appellant was merely detained, transported, and interrogated after the presentation and acceptance of a two proper *Miranda* waivers.

Should the Court Find these Statements Admitted in Error, Harmless Error Applies

"[A]ny error in the failure to suppress a statement allegedly taken in violation of *Miranda*

is subject to a harmless error analysis." *State v. White*, 410 S.C. 56, 59, 762 S.E.2d 726, 728 (Ct. App. 2014). "The failure to suppress evidence for possible Miranda violations is harmless if the record contains sufficient evidence to prove guilt beyond a reasonable doubt." *State v. Lynch,* 375 S.C. 628, 636, 654 S.E.2d 292, 296 (Ct. App. 2007).

In Appellant's case, any error in the trial court's admission of both the in-car video and interrogation recording cannot be said to have contributed to the verdict obtained. The circumstantial evidence was strong and, when taken together, pointed conclusively to Appellant's guilt. *See State v. Logan,* 405 S.C. 83, 99, 747 S.E.2d 444, 452 (2013). As premised by the State at trial, the home contained three individuals prior to the shooting; but afterwards, one was dead, one was missing, and only the son remained. The son, hearing the gunshot and emerging from his room minutes later, worked to retrieve help for his mother, who he had witnessed physically fighting with Appellant less than an hour before. (R. p. 112, lines 5-9; R. p. 277, lines 16-24; R. p. 283, lines 1-13). He called 911 beginning at 10:15 PM. (R. p. 233, lines 11-13; R. p. 283, lines 7-9). Appellant, missing from the home at the time M.W. discovered his mother and called 911, was captured on surveillance video about ten minutes later at 10:27 PM. (R. p. 233, lines 11-25; R. p. 281, line 5 – p. 283, line 9). He was at a convenience store located about a ten minute drive away. (R. p. 236, lines 2-5). No evidence demonstrated that any other party came or went from the home. (R. p. 131, lines 8-18). There were no indications of theft. (R. p. 127, lines 1-7). A .357 revolver leaded with compatible .38 special cartridges was found on the front porch of the home. (R. p. 170, lines 9-18). It had one empty, fired cartridge case in its cylinder. (R. p. 169, lines 18-22). The empty casing had been fired from that gun. (R. p. 170, lines 9-15). The bullet core found near the body had the same general rifling characteristics as the revolver, but was not conclusively related. (R. p. 174, line 18 – p. 176, line 7). According to

the totality of the evidence, Appellant was the only other person present in the home who could have committed the criminal act.[14]

Beyond a reasonable doubt, had the trial court found the recorded statements involuntary and inadmissible, the outcome of Appellant's trial would not differ. The evidence presented the jury with two options regarding credibility and guilt: during deliberations, the jury would either find M.W.'s account credible and find Appellant guilty based upon the circumstantial evidence presented, or they would acquit upon a finding of reasonable doubt, implicitly finding credible Appellant's interactions with law enforcement. The jury sided with M.W.'s testimony and the circumstantial evidence in this case.

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[14] Because the shot was fired straight-on from several feet away, the death was not the result of suicide. (*See* R. p. 186, line 21 – p. 187, line 2; R. p. 189, lines 18-23). Likewise, M.W., a young boy, could not have fired the gun straight-on at the height of an adult.

III. Appellant's five-year sentence for possession of a weapon during the commission of a violent crime should be vacated because it was issued in violation of S.C. Code Ann. § 16-23-490, but the conviction should be affirmed.

A conviction for possession of a weapon during the commission of a violent crime carries a five year penalty "in addition to the punishment provided for the principal crime." S.C. Code Ann. § 16-23-490. "This five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime." *Id.*

Appellant was found guilty of murder, unlawful conduct toward a child, and possession of a weapon during the commission of a violent crime. (R. p. 324, lines 4-13). The court sentenced Appellant to life. (R. p. 328, lines 18-20; R. p. 334). The life sentence does not carry the possibility of parole. S.C. Code Ann. § 16-3-20(A). The court then sentenced Appellant to five years for the weapons charge. (R. p. 328, lines 20-22; R. p. 335). Appellant made no objection to the sentence for the weapons charge.[15] (R. p. 328).

Appellant having been inappropriately sentenced for the weapons charge in addition to receipt of a life sentence without parole, Respondent respectfully asks this Court to vacate the five-year sentence. *State v. Owens*, 378 S.C. 636, 637 n.1, 664 S.E.2d 80, 80 n.1 (2008), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). The conviction, however, should be affirmed for the remainder of the reasons reflected within this brief in response.[16] *State v. Palmer*, 415 S.C. 502, 525, 783 S.E.2d 823, 835 (Ct. App. 2016) (affirming conviction and vacating illegal sentence for weapon charge where defendant also sentenced to life for murder).

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[15] Appellant also received ten years for unlawful conduct toward a child. (R. p. 328, lines 22-23; Supp. R. p. 3).

[16] As noted in Appellant's brief, this issue was not preserved by objection at the time of sentencing; however, Respondent concedes that Applicant is entitled to the proper sentence regardless of the failure to preserve this issue for appellate review.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should affirm the Appellant's convictions for murder, unlawful conduct towards a child, and possession of a weapon during the commission of a violent crime, and vacate Appellant's five-year sentence for the latter charge.

Respectfully submitted,

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July 13, 2017
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable D. Garrison Hill, Circuit Court Judge

THE STATE,

Respondent,

v.

JOHN CALVIN SLEDGE,

Appellant

Appellate Case No. 2016-000641.

CERTIFICATE OF COMPLIANCE

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

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