

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Jasper County

Honorable Michael G. Nettles, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BILLY PHILLIPS,

APPELLANT

APPELLATE CASE NO 2016-000108

FINAL BRIEF OF APPELLANT

LAURA R. BAER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I.

Whether the trial court erred in admitting Appellant's first statement where he was the subject of custodial interrogation and his statements were not made freely and voluntarily because the investigators diluted the Miranda warnings, Appellant thought he was required to speak with the police under the terms of his probation, and Appellant was high on marijuana and drunk?

II.

Whether the trial court erred in admitting the DNA analyst's expert testimony regarding two items on which Appellant could not be excluded as a contributor where the danger of unfair prejudice, confusion of the issues, and misleading to the jury outweighed any probative value because the results were of such weak statistical significance?

STATEMENT OF THE CASE

On September 25, 2014, the Jasper County Grand Jury indicted Appellant Billy Phillips for the murder of Darius Woods ("Decedent") and possession of weapon during the commission of a violent crime. R. 650.

On January 11-14, 2016, Phillips proceeded to trial before the Honorable Michael G. Nettles and a jury. R. 1. Phillips was represented by Steven Plexico, and the state was represented by assistant solicitors Mary Jones and Lenore Masser. R. 1.

The jury returned a verdict of guilty. R. 633 – 634. Judge Nettles sentenced Phillips to current terms of forty years for murder and five years for the weapons offense. R. 640.

This appeal follows.

STATEMENT OF FACTS

Introduction

Appellant Phillips and Decedent were friends. R. 99, ll. 8-10. Decedent was known to sell marijuana from his home in Ridgeland, South Carolina, and carry large amounts of cash. R. 119, ll. 2-7; R. 119, ll. 20-24; R. 259, ll. 1-2; R. 305, ll. 8-25; R. 314, l. 2 – 315, l. 13; R. 320, ll. 14-15. On May 18, 2013, Decedent was shot twice with his own gun, a .38 special handgun, and died. R. 174, l. 22 – 176, l. 9; R. 518, l. 8 – 519, l. 4; R. 534, ll. 18-25. Phillips was picked up by an officer before 2:30 a.m. on May 19, 2013 and taken to the Ridgeland Police Department for questioning. R. 65, l. 25 – 67, l. 14; R. 351, ll. 12-23. Defense counsel challenged the admissibility of Phillip's first statement. R. 9 – 15; R. 45 – 53; R. 59 – 95. Phillips testified during the pre-trial suppression hearing that he was high, drunk, and thought that he was required to answer the investigators' questions because he was on probation. R. 84, l. 18 – 87, l. 24; R. 90, l. 22 – 91, l. 6.

Despite their repeated accusations, Phillips told the officers that he did not have anything to do with Woods' death and that he left him alive at approximately 9:30 p.m. He said that he was smoking marijuana in the Decedent's car while Decedent worked on fixing his tag light. Decedent had to pick up his roommate, Michelle, because she had some car trouble before and was then headed to a party in the Bluffton area at 10:00 p.m. State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation).¹ Following the Denno² hearing, the trial judge ruled that the statements were admissible, finding that Phillips was free to leave and made a knowing waiver of his

¹ State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation) is on file with this Court.

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

Miranda³ rights, though any references to probation, parole, or polygraphs should be redacted.

R. 91, l. 14 – 95, l. 17.

Approximately one week later, on May 24, 2013, Phillips spoke with officers again. He told them he was in the car smoking marijuana outside of Woods' house on the night that Woods was killed. He saw three men approach the house. One went inside and he heard a gunshot. The men noticed Phillips in the car as they were leaving and called him by his nickname "Dee." Phillips was scared and ran. He told police that he went to Mr. Hill's house, a place where people frequently hung out, and then to his mother's house. It was because Phillips was scared of the real assailants that he lied to police initially. R. 261, ll. 12-19; R. 385, l. 1 – 391, l. 5; R. 392, l. 5 – 393, l. 3.

Though investigators did not request a buccal swab from Phillips initially, they obtained one several months later. R. 234, ll. 18-23. Of the swabs submitted for DNA testing, Phillips could not be excluded as a contributor on two samples, Phillips was excluded as a contributor on all other samples, and two samples were not sufficient for testing. According to the South Carolina Law Enforcement Division ("SLED") analyst, the statistical probability of finding an unrelated individual who could have contributed to the mixture on the gun, i.e the "random match probability," was **one in two hundred** on the swab from the handgun grip and **one in two** on the swab from Decedent's right front pants pocket. Defense counsel objected to the admission of the DNA evidence, arguing that it would be confusing and misleading to the jury and improperly shift the burden of proof to the defense. R. 37 – 44; R. 654. The trial judge ruled that it was a factual issue for the jury to decide. R. 43, ll. 7-12; R. 44, ll. 21-24.

³ Miranda v. Arizona, 384 U.S. 436 (1966).

Voluntariness of Appellant's First Statement

At the Denno hearing, the trial judge heard testimony from Christopher McIntosh, an investigator with the Ridgeland Police Department, and from David Williams and Sean Harley, the SLED investigators who conducted Phillips' interrogation. Phillips also testified. The trial judge also viewed a portion of the video of the interrogation, though it is unclear from the record exactly how much he watched. R. 9, l. 13 – 15, l. 6; R. 59, l. 13 – 91, l. 11.

McIntosh claimed that Phillips came to the Ridgeland police station voluntarily. R. 62, ll. 19-22. However, on cross-examination he admitted that Phillips was driven to the police station by an officer Long, who did not testify at the pre-trial hearing or during Phillip's trial. McIntosh could not account for what was said to Phillips or whether Phillips was given a choice not to come to the station. R. 65, l. 25 – 67, l. 19. Phillip's interrogation took place in McIntosh's office, where McIntosh advised Phillips of his Miranda rights before leaving him with the SLED agents. R. 60, l. 13 – 62, l. 6; R. 63, ll. 1-25. The video of the interrogation shows Phillips telling the officers that he was headed to Waffle House as he enters the office. The following exchange then occurs between McIntosh and Phillips:

INV. MCINTOSH: Dee, let me, um read you something real quick before we start. You know what we want to talk to you about?

PHILLIPS: Yeah, about what happened at, at Ace house.

INV. MCINTOSH: Okay. Before we talk about that, I want to read you this, okay. You have the right to remain silent. **This don't mean you're in trouble or under arrest or anything, okay. But before we talk to anybody about anything, any possible witness, we have to read this. Just, State makes us do it, okay.** You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you're being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish. You

can decide that at any time to exercise these rights and not answer any questions or make any statements. Do you understand each of these rights?

PHILLIPS: Mmm-hmm.

INV. MCINTOSH: Okay. Having these rights in mind, do you wish to talk to us now?

PHILLIPS: Yeah, go ahead.

INV. MCINTOSH: Alright. Tell me what happened tonight.

State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation). McIntosh did not have Phillips sign a written waiver of rights.

Both SLED agents admitted knowing that Phillips had smoked marijuana and been drinking alcohol prior to their interrogation though they never asked him the exact amount that he consumed. The agents both claimed that Phillips did not seem impaired. Though the video of the interrogation does not show Phillips passing out drunk, he told the agents repeatedly that he had been smoking marijuana and drinking. In fact, when one of the agents said "You ain't been drunk. You high," Phillips corrected him by saying "No, I am. It's Saturday." When Phillips said that he is a happy drunk, the agent responded that he could tell. R. 69, l. 24 – 70, l. 7; R. 74, ll. 9-18; R. 76, l. 15 – 77, l. 5; R. 81, l. 6 – 83, l. 1; State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation).

Investigator Williams told Phillips that he was not under arrest when he asked and testified that Phillips was free to leave at any time. R. 71, ll. 2-7. Again, the video of the interrogation provides an accurate reflection of what transpired. It is true that the agents told Phillips that he was not under arrest, but they did not tell him that he was free to leave. In fact, when Phillips indicated that he was going to go to Waffle House since he was not under arrest, the agents told him that they were going to take him to his house to get his probation agent's

phone number first, as Phillips indicated that he would submit to a GSR test once he spoke to her. State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation).

Phillips testified that he was transported to the police station in the backseat of a police car and that he could not have gotten out of the car. R. 86, l. 21 – 87, l. 8. The officer let him out when they got to the police station and escorted back to meet with the SLED investigators. R. 87, ll. 9-17. He did not feel like he had the right to leave during their questioning. R. 87, ll. 18-24; R. 90, ll. 22-23. Prior to being picked up by the police, Phillips had consumed a few pints of alcohol at Mr. Wood's house and had smoked a total of seven or eight "blunts"⁴ throughout the day and was under the influence of those substances during his interrogation. R. 84, 20 – 85, l. 1; R. 86, ll. 14-20. During the interrogation, Phillips referenced drinking Paul Masson, a dark alcohol. State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation). If he had not been under the influence, Phillips testified that he would have requested a lawyer and not been so talkative. R. 86, ll. 14-20. Though Phillips admitted telling the agents that he was "good" and never said "I'm too high," those actions were themselves the product of his intoxication. R. 89, l. 5 – 90, l. 11. Ultimately, he spoke with the agents anyway because he thought that the terms of his probation required him to cooperate with law enforcement. R. 86, ll. 2-5.

After hearing the arguments of counsel, the trial judge ruled that Phillip's first statement was admissible. R. 91, l. 12 – 90, l. 11; R. 93, l. 12 – 95, l. 17. While the trial judge noted that Phillips was not under arrest, to the extent that there were implications of custody, he found that Phillips was given Miranda warnings and waived them. R. 93, ll. 12-17. The trial judge found that Phillips was not intoxicated based on his review of the video, in which the judge noted that

⁴ A "blunt" is a hollowed out cigar filled with marijuana. State v. Odom, 376 S.C. 330, 333 n. 1, 656 S.E.2d 748, 750 n. 1 (Ct. App. 2007).

Phillips was not unsteady on his feet, did not have slurred speech, and provided rational answers to the questions. R. 93, l. 18 – 94, l. 3. The trial judge further found that Phillips was not of tender years, had prior contacts with law enforcement, and was not of low intelligence. R. 94, ll. 4-10; R. 94, ll. 24-25. The trial judge placed specific emphasis on the fact that it was not intoxication that caused Phillips to speak with law enforcement, but rather because his probation required him to do so. Notably, Phillips asked to speak with his probation agent several times. R. 94, ll. 9-18. The trial judge further found that the interrogation was “only an hour-and-a-half,” Phillips was not denied food or breaks, and there were no threats made to him. R. 94, l. 25 – 95, l. 5. Based on that, the trial judge ruled that statement was voluntary and admissible. R. 95, ll. 2-17.

Varied Accounts of April 18, 2013

It was undisputed that Phillips was in and out of Decedent’s home throughout the day on Saturday, April 18, 2013. Reginald Green testified that the day prior, he and Phillips were at Decedent’s house playing games on Phillip’s PlayStation videogame console. When Phillips had to leave, he left his PlayStation and games behind. Green picked Phillips up from Decedent’s house in the late morning or early afternoon on the day of the shooting. He claimed that Phillips was upset because Decedent told him that his PlayStation and games were stolen. Phillips did not understand why Decedent would “play [him] like that.” R. 249, l. 7 – 251, l. 24. Though Green did not represent that Phillips made any threats to the Decedent, the State theorized that the PlayStation served as motive for Phillips to kill Decedent. R. 100, l. 2 – 101, l. 21; R. 557, l. 9 – 558, l. 9.

Donte Jenkins did not speak to police until October 6, 2015, over two years after Decedent’s death. Jenkins claimed that the Decedent’s mother, who died prior to Phillips trial,

asked him to wait to come forward while she conducted her own investigation. R. 271, ll. 20-25; R. 273, ll. 7 – 25. Jenkins said that he was at Decedent's house around dusk on the day of the shooting and let Phillips into the house. According to Jenkins, a Playstation was plugged into the television in the living room and Phillips walked straight past it. He said that when he left at approximately 9:15 p.m., Decedent was at the back of his car, working on a tag light with one car door open, and Phillips was still there. R. 265, l. 19 – 271, l. 15.

Taylor Cowherd testified that she stopped by Decedent's house at 9:26 p.m. on the day of the shooting. Though the porch light was out, Cowherd said she knew Phillips from around town and saw him standing on Decedent's porch. She claimed that he responded when she called him by his nickname "Dee." Decedent came out of the house and gave her ten dollars to take to his brother, who Cowherd was dating at the time. When she left at approximately 9:30 p.m., she said that Phillips was on the porch and Decedent was working on his car. R. 276, l. 1 – 280, l. 4. Cowherd admitted that she was unable to pick Phillips out of a six person photo array⁵ that included Phillips' picture. She excused her failure on the fact that she had only ever seen Phillips wearing glasses and that no one in the photo array was wearing glasses. R. 280, l. 9 – 281, l. 3. Cowherd admitted that she had previously told police that she saw Decedent get in his car and drive away as she was leaving but was unsure if Dee got in the car with him. However, she claimed at trial that Decedent only cranked the car but may have been just checking the tag light. R. 283, l. 6 – 284, l. 21.

⁵ When defense counsel requested a copy of the photo array shown to Cowherd during the pretrial hearing, the solicitor indicated that photo array was destroyed when Cowherd did not make a positive identification. Yet, Investigator McIntosh testified at trial that he provided a copy of the photo array to the solicitor's office. Regardless, the trial judge ruled that the defense could argue that Cowherd was unable to identify Phillips and that the state destroyed the array. He also excluded the evidence that Cowherd "identified" Phillips from a single photograph shown to her after the failed photo array. R. 27, l. 18 – 37, l. 10; R. 354, l. 24 – 355, l. 16. He further granted the defense's request for a spoliation charge. R. 548, l. 10 – 549, l. 5.

According to Shontay “Sunshine” McKeithan, she arrived at Decedent’s home at approximately 10:30 p.m. to buy marijuana. She sat outside listening to music and trying to reach Decedent on his cell phone for approximately ten minutes. Davonte Freeman walked up, claiming that he was also there to buy marijuana. They called Decedent’s cell phone again and could hear it ringing inside, but he did not answer. After Freeman knocked on the front door twice with no response, he went to the side door and went inside. R. 11, l. 16 – 113, l. 19; see also R. 130, l. 13 – 132, l. 23. While Freeman claimed he was inside for less than one minute, McKeithan said that he was inside for five to seven minutes. When Freeman finally emerged, he was holding a gun and said “Sunshine he dead. You’ve got to see him, like, he’s dead.” McKeithan told him to put the gun back and looked in the through the side door, where she immediately saw Decedent’s body. R. 112, ll. 11-18; R. 113, ll. 20 – 115, l. 2; R. 122, l. 20 – 125, l. 20.

Freeman can be heard in the background of McKeithan’s 911 call giving a false name of “Larry.” R. 110, ll. 2-4; R. 116, ll. 18-25; State’s Ex. 1 (CD 911 call).⁶ Freeman said he lied about his name because he thought there was a warrant for his arrest. R. 128, l. 16 – 129, l. 13. Freeman admitted that he picked up the gun, explaining that he smelled it “out of curiosity,” but denied taking it outside. He claimed that he placed it right back where he found it on Decedent’s stomach. R. 133, l. 11 – 134, l. 5; R. 136, ll. 12-25; R. 146, ll. 15-19; R. 148, ll. 11-14. Interestingly, Freeman testified that he resided with his brother, Wrenshad Anderson, in a home just minutes walking-distance from the Decedent’s home. R. 146, l. 23 – 147, l. 9. When Freeman was asked if he and his brother had “each other’s back,” he responded: “Yes, sir. Always. I’m my brother’s keeper.” R. 147, ll. 17-19.

⁶ State’s Ex. 1 (CD 911 call) is on file with this Court.

Almost two and half years after Decedent's death, on September 29, 2015, Anderson came forward as a witness against Phillips. R. 309, ll. 6-11; R. 303, ll. 8-15. Anderson testified that on the night that Decedent died, Anderson got home from a party at 8:30 p.m. after which he walked to the Short Stop BP station. On his way home from the BP he saw Phillips, who "looked like he had something going on" and was fidgeting. He thought Phillips was either reaching for something around his waistline or trying to hide something. Anderson's account of the time when he saw Phillips varied, with him claiming that it was 8:40 p.m., 9:00 p.m., 9:40 p.m., or sometime before the BP closed at 10:00 p.m. He explained that he had gotten "drunk up" at a party beforehand and "didn't have no clock." R. 287, l. 5 – 288, l. 25; R. 291, l. 1 – 295, l. 10; R. 296, ll. 7-20; R. 298, l. 16 – 300, l. 25; R. 302, l. 2 – 303, l. 2; R. 304, ll. 12-24; R. 310, l. 6 – 311, l. 10. Anderson finally admitted: "I don't know what time it was." R. 307, ll. 7-8. Even so, Anderson said that he was sure that the time in his statement was correct because they went over "a time schedule" when he met with the officer and solicitor. R. 303, ll. 3-15.

Regardless, Anderson put himself in the vicinity of Decedent's home at the time he was likely shot. Notably, Paramedic Jessica Horton, who went to the crime scene once police secured it, testified that Decedent's body appeared to have been moved based on the location and pattern of the blood at the scene. She also said that the wounds appeared fresh. R. 175, l. 4 – 179, l. 24. Anderson admitted that the electricity had recently been cut off to the house where he and Freeman resided but claimed that he did not need Decedent's money. R. 296, ll. 24- 25; R. 301, l. 21 – 302, l. 1; R. 306, ll. 1-4. Anderson denied being concerned about rumors that his brother killed Decedent. R. 301, ll. 1-5. Officers failed to obtain a buccal swab from Anderson to use for DNA comparison. R. 362, ll. 5-8.

Though he was unsure of the time, Reginald Green, who had picked Phillips up from Decedent's house earlier in the day, got a call from Phillips later that night. Phillips offered to buy Green five dollars worth of gas if he would come pick him up and take him to the BP station. R. 253, l. 4 – 254, l. 9. Video surveillance showed Phillips buy three beers from the Taylors BP station at 10:43 p.m. While Investigator McIntosh claimed the footage showed Phillips with "a big wad of cash," such could hardly be determined from the low quality video. R. 347, l. 20 – 348, l. 14; R. 350, l. 20 – 351, l. 11; State's Ex. 54 (DVD of BP surveillance footage). Green admitted that Phillips spent approximately twenty dollars that night but said that Phillips had a regular job at Sea Pines, which could have been the source of his money. He said that Phillips was still upset about his stolen PlayStation and they smoked marijuana that Phillips brought. In total, they spent an hour and a half or so together before Green dropped Phillips off by the Bank of Walterboro before midnight. R. 254, l. 10 – 257, l. 5; R. 262, l. 1 – 263, l. 1; R. 264, ll. 2-6.

Dawn Childers was one of Decedent's girlfriends of approximately three months. Decedent was supposed to come to Beaufort for a pool party on the night that he died. R. 312, l. 18 – 314, l. 1. Childers admitted that she had sent Decedent some "ugly" text messages when she found out that he was seeing other women. R. 318, l. 2 – 319, l. 4. She also admitted that she and a friend of hers, Taurus Maymi, had seen Decedent's money box and that Maymi said that he should have robbed Decedent. R. 319, l. 25 – 320, l. 8.

DNA Evidence

The defense argued that the DNA evidence should be excluded pursuant to Rule 403, SCRE, and because it would result in improper burden shifting. R. 37, l. 17 – 40, l. 2. The solicitor said that on the sample taken from the murder weapon, the DNA was a mixture of three individuals. The Report indicated that Decedent, Phillips, and Jason Blessing (an officer who admitted contaminating the evidence), could not be excluded from contributing to this mixture, which she argued “means that their DNA is there.” R. 40, ll. 5-13. The solicitor confirmed that she was saying that Phillips’ DNA was on the weapon. R. 40, ll. 19-22. While she admitted that the probabilities were “not great,” she claimed that was a matter for cross-examination. R. 41, l. 6 – 42, l. 3. Defense counsel argued that the report simply did not say what the solicitor argued. R. 40, ll. 23-25. He pointed to the statistical probabilities in the results attached to Phillips, which were one in two hundred for the sample taken from the gun and one in two from the sample taken from the right front pants pocket of the victim. R. 42, l. 5 – 43, l. 6; R. 43, l. 15 – 44, l. 17. The trial judge ruled that it was factual issue to be decided by the jury and denied the motion to exclude the DNA evidence. R. 43, ll. 7-12; R. 44, ll. 21-24.

The State called Lilly Gallman as an expert in DNA analysis. R. 435, l. 6 – 478, l. 6. Gallman had a Bachelor’s of Science degree in biology and began working as a forensic DNA analyst at SLED in 1990. R. 435, ll. 9 – 436, l. 12. Defense counsel did not object to her expert qualification but renewed his prior objection to the admissibility of the DNA evidence. The trial judge told defense counsel that he was “protected on the record.” R. 436, ll. 16-18; R. 438, ll. 7-9; R. 442, ll. 1-11.

Gallman explained that “everyone’s DNA is unique except for identical twins.” R. 442, l. 21. Thus, she said that she can develop a DNA profile from evidence and then develop a DNA

profile from a known standard “to see whether it matches or does not match.” R. 442, l. 22 – 443, l. 3. She testified that a full DNA profile has sixteen numbers but sometimes you may be missing some numbers and only able to develop a partial profile. R. 443, ll. 7-22. The solicitor asked Gallman, using scissors as an example, “[i]f I had never touched the scissors *and did not leave any cells on it*, would the language be, could not be excluded, or would it be outright excluded?” R. 449, ll. 18-21 (emphasis added). Gallman responded: “It would be excluded.” R. 449, l. 22; see also R. 477, ll. 6-11.

Gallman tested two swabs from the handgun, eight swabs taken from Decedent’s jeans, three swabs taken from the wall and flooring of Decedent’s living room, and three swabs taken from the crime scene, two swabs taken from socks, and one swab from a piece of jewelry. All of the swabs were tested with the exception of one swab from the handgun and one swab from Decedent’s left rear pocket that were insufficient for reliable interpretation. R. 450, l. 22 – 451, l. 9; R. 459, ll. 2-8; R. 464, l. 4 – R. 471, l. 5; R. 475, l. 5 – R. 476, l. 8. Gallman had known DNA standards from Phillips, Davonte Freeman, Shontay McKeithan, Jason Blessing, and James Orr to use for comparison. R. 437, l. 16 – R. 440, l. 24; R. 445, l. 24 – 446, l. 13. Deputy Jason Blessing admitted that he contaminated the gun that was taken from the scene by picking it up with an inside-out pair of used gloves. Because of that contamination, he provided a DNA swab for testing several months after the incident. R. 166, l. 25 – 168, l. 6; R. 234, ll. 10-22.

Phillips could not be excluded as a contributor on only two of the swabs tested, one from the grip of the handgun and one from Decedent’s right front pants pocket. R. 450, l. 22 – 451, l. 9; R. 459, ll. 2-8; R. 464, l. 4 – 471, l. 5; R. 475, l. 5 – R. 476, l. 8. McKeithan and Freeman

were excluded as contributors to those swabs, as were Kevin Smith, Rhett Long, and James Orr.⁷

R. 451, ll. 10 – 452, l. 6. However, the DNA reports on one of the swabs taken from the handgun and on six of the eight swabs from Decedent's pants pockets, including the right front pocket, found DNA not attributable to the standards tested, i.e. of an unidentified person. R. 464, l. 13 – R. 471, l. 5. Gallman confirmed that she did not receive a buccal swab for Wrenshad Anderson to test as a standard, though she could have performed such testing within one week. R. 476, ll. 19-24. She also testified that exclusion of a person's brother as a contributor does not mean that the person would be excluded. R. 475, ll. 21-24.

The DNA profile obtained from swab of the handgun revealed a mixture of at least three individuals. Gallman compared that to the standards that she was given and determined that Decedent, Phillips, and Blessing could not be excluded. R. 446, l. 20 – 448, l. 25. The testing also revealed DNA not attributable to standards – of an unknown person – in the mixture from the handgun swab. R. 462, l. 25 – 463, l. 5. Regarding the statistical significance of the finding related to Phillips, she said:

Once I do the comparison, which is the very first step to determine whether the person can be included or excluded from a mixture, we are required to generate, give a statistical value to that particular mixture. We are required to tell you how often you would see this mixture in a population. So the next statement that's on my report is that the probability of randomly selecting an unrelated individual who could have contributed to this mixture is **approximately one in two hundred**. All the information is there, but based on our protocol some of the areas, out of the sixteen, could not be used to generate a statistic or give you a statistical value. So based on the information that I could use to generate a statistic, the value is one in two hundred.

R. 449, ll. 1-17 (emphasis added). Gallman agreed with the solicitor's interpretation that the one in two hundred statistic meant that "[i]f you were to take two hundred people and bring them into

⁷ Kevin Smith and Rhett Long appear to be officers with the Ridgeland Police Department. See R. 66, ll. 4-17; R. 150, l. 6 – 151, l. 20. There was no explanation during the trial of who James Orr was or why his buccal swab was submitted for testing.

this room . . . it [is] fair to say that one hundred and ninety-nine of them would be outright excluded." R. 453, ll. 2-7.

The following exchange regarding the statistics generated from the handgun swab occurred on cross-examination:

MR. PLEXICO: But you only had a partial DNA profile that matched his [Phillips'] entire profile. Right?

MS. GALLMAN: What I have is a mixture of at least three individuals that I compared to the standards and once I compared them, I could tell whether some person could be included or excluded.

MR. PLEXICO: Okay. And you could tell that because if it was a full match, you would have all sixteen categories. Correct?

MS. GALLMAN: I do have information at all sixteen areas from the chromosomes, but there's only limited information I could use to generate the statistics.

MR. PLEXICO: Okay. All right. **So you didn't have all of my client's DNA on that item #1.1 so that you could say it's him.** That would be one of those, it's him and exclude a billion other people, statistics. Got to be him, **because you didn't have enough of his DNA found -- that's similar to his found on that gun?**

MS. GALLMAN: (No verbal response)

MR. PLEXICO: If you found two out of sixteen, that would mean it was similar and the two you found, he's got those two, but he's also got another fourteen that may or may not match that you don't know about because it wasn't on the gun?

MS. GALLMAN: For item number #1.1, his DNA is at all sixteen areas from the chromosomes, but due to the fact that there are areas that I could not use to generate the frequency of that and to give you a statistical value, I had to put them out. I can only use -- excuse me. I don't want to tell you wrong. I believe I could only use five out of the sixteen. Let me make sure, now. I'm sorry. I could use -- **I could only use ten out of the sixteen to generate that particular number for item #1.1.**

R. 459, l. 24 – 461, l. 4. Gallman agreed that the population of the United States was approximately three hundred million but said that the statistics generated cannot be extrapolated over the general population. R. 454, l. 9 – 456, l. 6. When asked how many other Americans would match the partial DNA profile obtained the evidence and allegedly “matched” to Phillips, Gallman responded: “I don’t know. It’s not done like that.” R. 462, ll. 8-19. Nevertheless, Gallman agreed that she was not saying that she found Phillip’s DNA on the gun, but rather that it could not be excluded because it was a mixture of three people. R. 462, ll. 20-24. Even so, on redirect, Gallman said: “In order for me to say that someone is not excluded, the vast majority of their information has to be in that sample.” R. 478, ll. 1-3.

The DNA profile obtained from the swab of Decedent’s right front pocket also revealed a mixture of at least three individuals. Decedent and Phillips could not be excluded. R. 450, ll. 4-19; R. 452, ll. 7-22. Gallman testified: “[T]he next step is to give a statistical value to that mixture and the probability of randomly selecting an unrelated individual who could have contributed to this mixture is approximately **one in two**.” R. 452, l. 22 – 453, l. 1 (emphasis added); R. 453, ll. 13-24; R. 470, l. 6 – 471, l. 5. Again, Gallman admitted that her testing revealed DNA not attributable to standards – of an unknown person – in the mixture from Decedent’s right front pants pocket. R. 470, l. 6 – 471, l. 5.

Despite the low statistical significance and high random match probabilities, the solicitor argued to the jury that Phillips’ DNA was found on the gun and the pocket. R. 561, ll. 5-13; R. 571, ll. 10-13; R. 575, l. 23 – 576, l. 17; R. 578, ll. 1-8. The trial judge gave serious consideration to defense counsel’s motion for new trial, in which counsel reasserted his prior objections to the DNA testimony and argued that the jury must have misinterpreted the DNA testimony. The parties disputed what was actually the testimony of the DNA analyst and what

was the solicitor's "interpretation." While the trial judge characterized the expert's testimony as "logically inconsistent," he ultimately denied the motion for new trial finding that there was no contradictory expert testimony and that "the record will speak for itself" as to her actual testimony. R. 641, l. 8 – 644, l. 12.

ARGUMENT

- I. The trial court erred in admitting Appellant's first statement where he was the subject of custodial interrogation and his statements were not made freely and voluntarily because the investigators diluted the Miranda warnings, Appellant thought he was required to speak with the police under the terms of his probation, and Appellant was high on marijuana and drunk.**

Though not under formal arrest, Phillips was the subject of a custodial interrogation when he was questioned by investigators in the wee hours of the morning on April 19, 2013. Phillips was stopped by an officer on the road and told that investigators wanted to speak with him. The officer then drove Phillips to the police station in the back of a locked police car and escorted him to the investigator's office at the Ridgeland Police Department. The Miranda warnings read to Phillips were couched by telling him that he was not in any trouble and that the state "just makes" them read them. Additionally, the investigators were aware that Phillips consumed alcohol and marijuana and represented to them that he was drunk and high. Though the investigators began by building a rapport with Phillips and asking him about the timeline of the day, they soon turned to questions about whether Phillips "accidentally" shot Decedent and told him that he would submit to GSR testing and a polygraph examination if he were innocent. Further, the investigators denied Phillips the opportunity to leave when he requested to do so. State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation). Additionally, Phillips testified that the reason he spoke to investigators is that he thought he was required to do so as a term of his probation. R. 86, ll. 2-5. Phillips repeatedly asked to speak to his probation officer or to go home and get her phone number but was not permitted to do so. State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation).

In Jackson v. Denno, 378 U.S. 368, 376 (1964), the United States Supreme Court indicated "that a defendant in a criminal case is deprived of due process of law if his conviction

is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession.” Accordingly, a defendant has the right to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness. Id. at 376–77. “In order to introduce into evidence a confession arising from custodial interrogation, the State must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).” State v. Moses, 390 S.C. 502, 512, 702 S.E.2d 395, 400 (Ct. App. 2010).

In the present case, the trial judge noted that Phillips was not under arrest and was free to leave, as he eventually did later on in the morning. It was on that basis only that the trial judge found that Phillips was not in custody. R. 93, ll. 12-17; R. 95, ll. 6-8. Thus, the trial judge ignored the body of case law related to the multitude of factors to be considered in determining whether a suspect was in custody, only one of which is whether he was placed under arrest. See, e.g., State v. Evans, 354 S.C. 579, 582 S.E.2d 407 (2003); State v. Navy, 386 S.C. 294, 301, 688 S.E.2d 838, 841 (2010).

Even so, the trial judge said that “given the facts of this case, if it was inferred that he [Phillips] was in custody, they gave Miranda warnings and he waived them.” R. 93, ll. 16-17. Thus, he did ultimately rule upon the validity of the Miranda waiver and voluntariness of Phillips’ statements and found that the State meet its burden for the admission of the statement into evidence. R. 93, l. 18 – 95, l. 17. However, this ruling was also error because the trial judge failed to give the proper consideration to the fact that the Miranda warnings were diluted, Phillips thought he was required to speak with investigators under the terms of his parole, and Phillips was under the influence of drugs and alcohol.

A. Custodial Interrogation

Phillips was in custody when he gave his first statement. “The purpose of the *Miranda* warnings is to apprise the defendant of [his or] her constitutional privilege to not incriminate [himself or] herself while in the custody of law enforcement.” Evans, 354 S.C. at 583, 582 S.E.2d at 410. “Law enforcement must state the *Miranda* warnings after a person has been taken into custody or otherwise deprived of his freedom of action in any way.” Id. at 583, 582 S.E.2d at 410 (internal quotations omitted). Custody occurs either upon formal arrest or under *any other circumstances where the suspect is deprived of his freedom of action in any significant way*. See Miranda, 384 U.S. at 444; Berkemer v. McCarty, 468 U.S. 420, 429 (1984). “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.” Evans, 354 S.C. at 583, 582 S.E.2d at 410. “The custodial determination is an objective analysis based on whether a reasonable person would have concluded that he was in police custody.” Id.

In State v. Williams, 405 S.C. 263, 276-77, 747 S.E.2d 194, 201 (Ct. App. 2013), this Court provided a long list of factors that courts have considered in determining whether an interrogation was “custodial,” including:

(1) whether the contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to interview; (2) whether the express purpose of the interview was to question the person as a witness or suspect; (3) where the interview took place; (4) whether the police informed the person he or she was under arrest or in custody; (5) whether they informed the person he or she could terminate the interview and leave at any time or whether the person’s conduct indicated an awareness of such freedom; (6) whether there were restrictions on the person’s freedom of movement during the interview; (7) how long the interrogation lasted; (8) how many police officers participated; (9) whether they dominated and controlled the course of the interrogation; (10) whether they manifested a belief that the person was culpable and they had the evidence to prove it;

(11) whether the police were aggressive, confrontational, or accusatory; (12) whether the police used interrogation techniques to pressure the suspect; and (13) whether the person was arrested at the end of the interrogation.

(emphasis added). “The formality of arrest is certainly not a prerequisite to a finding of custodial interrogation.” United States v. Longbehn, 850 F.2d 450, 452 (8th Cir. 1988) (internal quotations omitted).

In State v. Evans, 354 S.C. 579, 582 S.E.2d 407 (2003), our Supreme Court upheld the trial judge’s suppression of the defendant’s statement where the interview lasted three hours and officers challenged the defendant on the answers she gave such that she was in custody. In State v. Navy, 386 S.C. 294, 301, 688 S.E.2d 838, 841 (2010), our Supreme Court reversed the portion of this Court’s opinion that held that Navy’s first statement should have been suppressed from his trial for homicide by child abuse because he was in custody at the time of the statement and not Mirandized. Navy’s first statement was given to police at approximately 9:00 a.m. at the police station, after officers came to his home to ask him some additional questions. 386 S.C. at 297, 688 S.E.2d at 839. Navy was cooperative, saying that he wanted answers too, and officers agreed to have him back home in time for the visitation for his son, set for 1:00 p.m. that day. Id. He gave the officers an account of the events regarding his son’s death, which was largely consistent with his statement at the hospital the night before. Id. at 297-98, 688 S.E.2d at 839. The Supreme Court ruled that because it was “debatable whether a reasonable person would have believed himself to be in custody at the time the first statement was given” that “the trial court’s finding that respondent was not in custody should have been upheld as it is supported by the record.” Id. at 301, 688 S.E.2d at 841.

In the present case, the trial judge failed to engage in a proper examination of the factors relevant to whether Phillips was in custody. Had he done so, it would not have been “debatable”

whether Phillips was in custody. Phillips' contact with law enforcement was initiated by the police, not by Phillips, as Phillips was walking to Waffle House. He was driven to the police department in the backseat of a locked patrol car. The officer let him out the car when they got to the station and escorted him back to Investigator McIntosh's office to meet with the SLED investigators. R. 86, l. 21 – 87, l. 24; State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation).

While McIntosh told Phillips that he could exercise his rights "at any time," the SLED agents did not honor Phillips' request to leave made at approximately fifty minutes into the interrogation. At that point, McIntosh was no longer in the office where Phillips was being interrogated. Phillips asked if he was under arrest and the officers said "nope." Phillips said that he was going to go to the Waffle House right down the road because he was starving. Rather than let him leave, the SLED investigator responded: "We gonna to go the house first."⁸ State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation). Thus, while Phillips was ultimately released because law enforcement did not have probable cause for an arrest, they did not honor his right to terminate the questioning.

The SLED agents averred that the total interrogation lasted approximately one and half to two hours. However, it is notable that it was conducted in the middle of the night, starting sometime between 2:30 and 3:00 a.m. R. 70, ll. 8-10; R. 75, l. 23 – 76, l. 1; R. 78, ll. 9-10; R. 80, ll. 6-13; R. 85, l. 5. Further, if the first attempt to conduct a GSR test on Phillips occurred at 2:30 a.m. and the actual GSR test was not taken until 5:40 a.m., then the total interrogation time

⁸ Phillips was unwilling to submit to a voluntary gunshot residue ("GSR") test until first speaking with his probation agent, whose phone number was in his cell phone at home. State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation).

was over three hours, a significant difference from the investigators' testimony at the pre-trial hearing.⁹ R. 351, ll. 12-23; R. 509, ll. 2-12.

The interrogation started with three officers – one investigator from the Ridgeland Police Department and two SLED investigators. However, the majority of the interrogation was conducted by the two SLED agents, who dominated and controlled the course of the interrogation. While not a constitutional violation since it was not a request for an attorney, the denial of Phillips' requests to contact his probation agent is also relevant to the custody analysis. State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation).

While the investigators began by building a rapport with Phillips, their attitude later turned both aggressive and accusatory and utilized common investigative techniques to pressure Phillips into making inculpatory statements. They invited him to say that he accidentally shot Decedent. Later they told him that he had "something heavy on [his] heart" and that he would submit to the GSR testing and polygraph examination if he was not the shooter. The investigators further pressured Phillips into writing a statement, telling him what to include after deciding what he initially wrote was insufficient. They then asked Phillips if he remembered seeing Decedent lying on the floor and eventually handed him a picture of Decedent's dead body. State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation). Investigator Harley admitted that Phillips was horrified upon being shown the photograph of Decedent. R. 381, ll. 1-6. Based on these factors, Phillips was the subject of a custodial interrogation. The trial judges' reliance on only the fact that Phillips was not under arrest was error.

⁹ The GSR kit for Phillips was not analyzed because it was taken outside of the six hour window from the alleged time of the shooting. R. 506, l. 23 – 508, l. 13.

B. Dilution of *Miranda* Warnings and Involuntariness of Waiver

Phillips' waiver of his rights was not voluntary because the investigators diluted the Miranda warnings given to him, Phillips thought that he was required to speak with them under the terms of his probation, and Phillips was under the influence of drugs and alcohol. While these facts may not be dispositive standing alone, in combination they rendered Phillips' statement inadmissible. The trial judge's contrary findings were not supported by the evidence.

The United States Supreme Court has articulated two dimensions to the waiver inquiry: (1) "waiver must be voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and (2) "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Berghuis v. Thompkins, 560 U.S. 370, 382-83 (2010)). "Only if the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." Moran v. Burbine, 475 U.S. 412, 421 (1986).

i. Dilution of Miranda Warnings

The trial judge found that Phillips was advised of his Miranda rights. R. 93, l. 17; R. 95, ll. 2-4; R. 95, ll.10-11. At the beginning of the interrogation, Investigator McIntosh told Phillips that he was going to "read [him] something real quick before we start." McIntosh then told Phillips he had the right to remain silent, but before reading the remainder of his rights said: **"This don't mean you're in trouble or under arrest or anything, okay. But before we talk to anybody about anything, any possible witness, we have to read this. Just, State makes us do it."** It was after that attempt to downplay the seriousness of their interaction and

classification of Miranda as a mere formality that McIntosh read Phillips his Miranda rights. State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation).

"Courts have recognized a number of circumstances under which the police can impermissibly undermine the meaning or significance of the *Miranda* warnings and fail to reasonably convey their meaning, thus negating the validity of a suspect's waiver of his *Miranda* rights." State v. Meyer, 362 P.3d 745, 752 (Wash. 2015). Courts have held confessions inadmissible, for instance, in cases where the police "downplay the relevance of the warnings and their application to the current questioning." Id. (quoting Doody v. Schriro, 548 F.3d 847, 862–63 (9th Cir.2008) (Doody I)). In State v. Powell, 282 P.3d 845, 856 (Or. 2012), the Oregon Supreme Court upheld the suppression of the defendant's statement where "[t]he officer's comments, assuring defendant as she administered the *Miranda* warnings that they were just 'a matter of housekeeping' and just 'a formality' and that 'it's ultimately up to your company how they want to handle this' negated the dispelling effect that the warnings otherwise may have had." Here, the Miranda warning was likewise undermined by the investigator's statements to Phillips that he was not in any trouble and that this was just something that the state required them to do.

ii. Fifth Amendment Privilege Not Obviated by Probation

Additionally, Phillips testified that he spoke with the investigators because "[a]ccording to the stipulations of [his] probation, we have to cooperate with law enforcement if we get pulled over or if there is an investigation." R. 86, ll. 3-5. The trial judge found that, rather than intoxication, it was Phillips' condition of probation that caused him to speak to law enforcement. He further noted that Phillips asked to contact his probation officer several times throughout the interrogation. R. 94, ll. 10-18; State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation).

The Fifth Amendment guarantees that no person shall be compelled in any criminal case to be a witness against himself. U.S. CONST. amend. V. In Minnesota v. Murphy, 465 U.S. 420, 425 (1984), the United States Supreme Court wrote:

A state may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not give rise to a self-executing privilege. The result may be different if the questions put to the probationer, however relevant to his probationary status, call for answers that would incriminate him in a pending or later criminal prosecution. There is thus a substantial basis in our cases for concluding that if the state, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution.

Thus, a probationer does not forfeit his right against self-incrimination regarding an unrelated criminal investigation.

Here, the trial judge found that the probation condition was the determinative factor in Phillips' decision to speak with the investigators. Yet, he failed to properly weigh Phillips' belief that his probation *required* his cooperation against the voluntariness of the statement. In reality, Phillips' probation could not have required him to speak with law enforcement regarding Decedent.

iii. Intoxication a Relevant Factor to Voluntariness

The trial judge further erred in finding that Phillips was not intoxicated during his interrogation because he was steady on his feet, his speech was not slurred, and he was able to provide rational answers to the investigators' questions. R. 93, l. 18 – 94, l. 3. Among the factors to consider is the defendant's physical condition. Greenwald v. Wisconsin, 390 U.S. 519 (1968). Respondent will likely cite our Supreme Court's opinion in State v. Saxon, 261 S.C. 523, 529, 201 S.E.2d 114, 117 (1973), in which it held that "proof that an accused was intoxicated at the time he made a confession does not render the statement inadmissible as a

matter of law, unless the accused's intoxication was such that he did not realize what he was saying." However, even if Phillips' level of intoxication did not alone warrant the suppression of his statement, it was a relevant factor in determining voluntariness. See People v. Dale, 981 N.Y.S.2d 821, 823-24 (App. Div. 3d Dep't 2014) ("A defendant's intoxication at the time that he or she makes a statement while in police custody is one factor to be considered in determining voluntariness").

Here, the trial judge's finding that Phillips was not intoxicated was not supported by the evidence. The video of the interrogation reveals that Phillips told law enforcement several times that he had been smoking marijuana both with Decedent during the day and after he left the Decedent's house and that he drank Paul Wesson. The investigators made statements that the marijuana used by Phillips was "some good mix" and "Paul had you." Perhaps most telling was when one of the investigator told Phillips: **"You ain't drunk. You high."** Phillips corrected him, saying: **"No, I am. It's Saturday."** The investigator laughed while saying **"You puffin' and drinkin' at the same time."** While Phillips said "I'm good though," he had explained that he was a happy drunk and said that he can walk down the street without staggering and keep to himself. State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation). Thus, the video of the interrogation belied the investigators' testimony that they did not know that Phillips was high and drunk. See R. 74, l. 12-18; R. 81, l. 6 – 83, l. 1.

In summary, the trial judge erred in finding that Phillips was not in custody and that he validly waived his Miranda rights with respect to his first statement. Phillips was prejudiced by the admission of his first statement because, in this entirely circumstantial case, the solicitor was able to argue that his inconsistent statements to police were evidence of guilt. See R. 578, l. 9.

II. The trial court erred in admitting the DNA analyst's expert testimony regarding two items on which Appellant could not be excluded as a contributor where the danger of unfair prejudice, confusion of the issues, and misleading to the jury outweighed any probative value because they results were of such weak statistical significance.

Defense counsel argued for the exclusion of the DNA evidence¹⁰ with respect to two samples where Phillips could allegedly not be excluded as a contributor because, due to their weak statistical significance, their probative value was outweighed by danger of unfair prejudice, confusion of the issues, and misleading to the jury. He further argued that the evidence improperly shifted the burden of proof to the defendant to prove himself innocent. According to the State's DNA expert, Phillips DNA could not be excluded as a contributor to the mixtures of DNA from the swab of the handgun grip or the swab of Decedent's right front pants pocket. With respect to the gun, the probability of randomly selecting an unrelated individual who could have contributed to the mixture was one in two hundred. With respect to the pants pocket, the probability of randomly selecting an unrelated individual who could have contributed to the mixture was one in two.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. In United State v. Graves, 465 F.Supp. 2d 450 (E.D. Pa. 2006), the defendant moved to exclude DNA evidence from his trial for armed bank robbery. The government sought to introduce DNA analysis from an umbrella allegedly used and discarded by the robber and a pair of sneakers taken from Grave's girlfriend's residence that purportedly

¹⁰ For a discussion of nuclear DNA typing using the short tandem repeat multiplexing (STR) technique, see Erin Murphy, *The Art in the Science of DNA: A Layperson's Guide to the Subjectivity Inherent in Forensic DNA Typing*, 58 EMORY L.J. 489 (2008).

matched shoe prints from the teller counter. 465 F.Supp. 2d at 452-53. Grave's argued "because of the low statistical significance of the DNA evidence, its probative value is substantially outweighed by the danger of unfair prejudice and confusion of the issues under Rule 403, FRE." Id. at 457.

The government argued in Graves that the statistical significance went the weight of the evidence rather than its admissibility. Id. The DNA report regarding the sneakers indicated the presence of DNA from three or more individuals. Id. at 453-545. The probability of selecting an unrelated individual at random from the African American population who could be a potential contributor ("random match probability") to the mixture of DNA detected was 1 in 2,900 for the left sneaker and 1 in 3,600 for the right sneaker. Id. at 454. For the umbrella, the DNA report indicated the presence of DNA of more than one individual and listed a random match probability of approximately 1 in 2. Id.

In ruling that the DNA evidence related to the sneakers was admissible but that the DNA evidence regarding the umbrella was inadmissible, the Graves Court noted the Third Circuit Court of Appeals' recognition that "overtly probabilistic evidence is no less probative of legally material facts than other types of evidence." Id. at 457 (quoting United States v. Hannigan, 27 F.3d 890, 893 n. 3 (3rd Cir. 1994)). While the Graves Court recognized that some courts have admitted DNA evidence even when the statistical significance of the data was relatively low and the probability of a random match in the relevant population was rather high, it recognized the potential danger "for the jury to misconstrue the statistical significance of the DNA evidence." Id. at 458-59. The Graves court ruled that the sneaker DNA evidence was admissible because it had a far greater random match probability and in light of the safeguards of cross-examination, proper explanations, and clarifying jury instructions. Id. at 459. However, the Court ruled that

the umbrella evidence was inadmissible, writing: “In contrast, **even with appropriate safeguards, the minimal probative value of the umbrella DNA evidence-in which half of the relevant population cannot be excluded as a contributor to the DNA sample-is substantially outweighed by the danger of unfair prejudice and confusion of the issues.**” Id. (emphasis added).

In the present case, the random match probability for the handgun swab was 1 in 200 and for the pants pocket swab was 1 in 2. R. 449, ll. 1-17; R. 452, l. 22 – 453, l. 1; R. 453, ll. 13-24; R. 470, l. 6 – 471, l. 5. Thus, the random match probability for the handgun swab was far greater than the sneakers in Graves of 1 in 2,900 and 1 in 3,600. The random match probability for the pants pocket swab was the same as the umbrella excluded in Graves. As such, the DNA evidence was likewise of low statistical significance and minimal probative value, though the jury could hardly have realized that from the solicitor’s heavy reliance upon it in her closing argument. Its value did not outweigh the danger of unfair prejudice, confusion of the issues and its admission improperly shifted the burden to the defense. The jury was ultimately misled.

Additionally, it is notable that there was DNA of an unknown person on both of those swabs as well as on six other swabs from Decedent’s pants. R. 462, l. 25 – R. 471, l. 5. With respect to the handgun, Gallman testified that she could not exclude Decedent, who owned the gun; Blessing, who admitted to picking the gun up with an inside-out pair or used gloves; or Phillips from the mixture. However, there was also DNA not attributable to any of the standards. R. 446, l. 20 – 448, l. 25; R. 462, l. 25 – 463, l. 5. Gallman testified that she determined based on the evidence submitted that there were three contributors to DNA mixture. She specifically testified that her determination of the number of contributors was not based on the number of standards that she could exclude. R. 460, l. 10 – 462, l. 7. Thus, it would stand to reason that, if

the mixture was of only three people and includes unknown DNA, that only two of the three persons who could not be excluded could have actually contributed to the mixture on the handgun. This seems inconsistent with Gallman's testimony: "In order for me to say that someone is not excluded, the vast majority of their information has to be in that sample." R. 478, ll. 1-3.

With the DNA evidence admitted, the solicitor relied heavily upon it in her closing, arguing to the jury:

We also know that the Defendant's DNA cannot be excluded from inside that pocket. You saw the picture of Darius. You saw the picture of him with that gun, his gun on his stomach. I want you to look at that picture. His pocket is also pulled out. Somebody went through that pocket. Somebody went through both of his pockets and that was the Defendant. Remember the scissors example. If you don't touch it, you're excluded. If you don't touch it, you're excluded. Defendant was not excluded.

R. 561, ll. 5-13 (emphasis added).

Anything linking to him that could possibly be on that gun? **Well, we have his DNA on that gun. We know he touched it** and we know it wasn't because he was playing police. That's a story that does not make sense.

R. 571, ll. 10-13 (emphasis added).

I also want you to remember Lilly Gallman. She was the DNA expert. **And her testimony, while as streamlined as we tried to keep it, is confusing.** What I want you to remember though is, **I want you to remember the scissors analysis that Ms. Masser was able to talk to Ms. Gallman about. If you don't touch it, you are automatically excluded.** One hundred percent excluded. If you do not touch it, you are excluded. If I don't touch this notepad, I am excluded, but if I touch it, I can't be excluded. My cells have been left behind on this item. And why does it happen with the pockets of Darius' jeans that night? **The reason the Defendant cannot be excluded, his DNA cells are there is because he was going through them after he shot and killed him.** He didn't do Darius' laundry. There's no explanation for why else his DNA would be in there. He didn't wear these jeans. He was going through his dead friend's pockets to rob him after he murdered him. Look, it's pulled out. This pocket's empty. He went through this pocket first, felt nothing in there. The cash was in this pocket. He grabbed it. He left.

R. 575, l. 23 – 576, l. 16 (emphasis added).

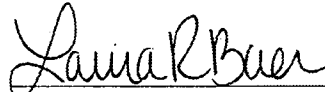
We also know that Defendant's DNA is on the murder weapon and inside Darius' pocket. Had his DNA not been there, he would have been excluded. If I don't touch this, my DNA is excluded. My DNA is not there. If I touch it. I cannot be excluded. Had he not touched the gun or the pocket, his DNA would not be there. And we know he touched the gun when he shot and killed Darius and we know he touched the pocket when he robbed him of his cash.

R. 578, ll. 1-8 (emphasis added). In addition to admitting that the DNA evidence was confusing, the solicitor overstated the evidence. The expert explicitly testified that she could not say that Phillips' DNA was on the handgun or pocket. R. 462, ll. 20-24. Rather, she could not exclude Phillips from the DNA mixtures on two of the swabs and provided random match probability statistics, which in this case were extraordinarily high. Notably, however, the solicitor made no mention of the statistics.

The trial judge erred in failing to exclude the DNA evidence with respect to the gun and the pants pocket. Defense counsel predicted that the evidence would be confusing and misleading to the jury, and it was. No counter-expert testimony was necessary for the judge to rule on the Rule 403 objection. Further, even if the evidentiary rules only required exclusion of the pants pocket swab with a one in two random match probability, the error in its admission was prejudicial to Phillips. He had provided the investigators with an explanation of why his DNA could have been on Decedent's gun but there was no innocent explanation for how his DNA would have gotten on the pocket of Decedent's pants.

CONCLUSION

Based on the foregoing, Appellant Billy Phillips respectfully requests that this Court reverse his convictions and remand his case for a new trial.



Laura R. Baer
Appellate Defender

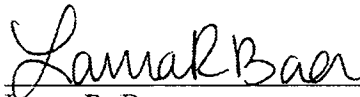
ATTORNEY FOR APPELLANT

This 25th day of April, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

April 25, 2017

A handwritten signature in cursive script, reading "Laura R. Baer", is written over a horizontal line.

Laura R. Baer
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Jasper County

Honorable Michael G. Nettles, Circuit Court Judge

THE STATE,

RESPONDENT,

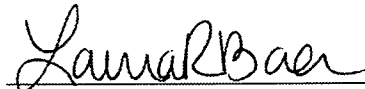
V.

BILLY PHILLIPS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Margaret G. Boykin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 25th day of April, 2017.



Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 25th day of April, 2017.

 (L.S)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Jasper County

Honorable Michael G. Nettles, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BILLY PHILLIPS,

APPELLANT,

Appellate Case No. 2016-000108

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

J. ROBERT BOLCHOZ
Chief Deputy Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MARGARET G. BOYKIN
Assistant Attorney General
S.C. Bar No. 101017
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-6305

ISAAC MCDUFFIE STONE, III
Solicitor, Fourteenth Circuit
P.O. Box 1880
Bluffton, SC 29910
(843) 255-5880

ATTORNEYS FOR RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

- I. Whether the trial court erred in admitting Appellant's first statement where he was the subject of custodial interrogation and his statements were not made freely and voluntarily because the investigators diluted the *Miranda* warnings, Appellant thought he was required to speak with the police under the terms of his probation, and Appellant was high on marijuana and drunk?
- II. Whether the trial court erred in admitting the DNA analyst's expert testimony regarding two items on which Appellant could not be excluded as a contributor where the danger of unfair prejudice, confusion of the issues, and misleading to the jury outweighed any probative value because the results were of such weak statistical significance?

RESPONDENT'S COUNTER STATEMENT OF ISSUES ON APPEAL

- I. Whether the trial court abused its discretion in ruling Appellant's first statement was admissible where Appellant was not in custody, and even though not required, proper *Miranda* warnings were given, and the totality of the circumstances demonstrate that Appellant made a knowing, voluntary waiver of his *Miranda* rights?
- II. Whether the trial court abused its discretion in admitting the DNA analyst's expert testimony regarding two items on which Appellant could not be excluded as a contributor where the admissible testimony was relevant and the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice, confusion, or misleading the jury?

RESPONDENT'S STATEMENT OF THE CASE

A Jasper County Grand Jury indicted Appellant, Billy Phillips, in September 2014 for the murder of Darius Woods (Indictment Number 2014-GS-27-0312) and in January 2015 for possession of a weapon during the commission of a violent crime (Indictment Number 2014-GS-27-0602).

On January 11, 2016, Appellant's case was called to trial before the Honorable Michael G. Nettles. (R.p. 1). Steven Plexico, Esquire, represented Appellant during the trial. (R.p. 1). Assistant Solicitors Mary C. Jones and Lenore Masser represented the State. (R.p. 1). On January 14, 2016, the jury returned verdicts of guilty on both charges. (R.p. 634, lines 2-11). Judge Nettles sentenced Appellant to incarceration for forty (40) years on the murder conviction and to incarceration for five (5) years on the weapons conviction. (R.p. 640, lines 8-22). The sentences were set to run concurrently. (R.p. 640, lines 8-22).

Appellant filed a timely notice of appeal. (Notice of Appeal).

RESPONDENT'S STATEMENT OF FACTS

On the evening of May 18, 2013, the victim, Darius Woods¹, was shot to death by his own gun at his home in Ridgeland, South Carolina. The State presented evidence at trial that Appellant², Billy Phillips, murdered the victim in order to obtain money, drugs, and a PlayStation video game.

Earlier that day, Reginald Green, a good friend of Appellant, was driving to a job interview when he saw Appellant on the victim's porch. (R.p. 248, lines 15-18; p. 249, lines 9-12). When Reginald pulled over to greet the two men, Appellant asked Reginald for a ride to the gas station. (R.p. 248, line 14- p. 249, line 20). While the two men were in the car, Appellant told Reginald that his PlayStation video game had been stolen from the victim's house. (R.p. 250, lines 7-14). Appellant explained that the victim had told him that his house was burglarized and the only thing that was stolen was the PlayStation that Appellant had taken to the victim's house the day before. (R.p. 250, line 7 – p. 251, line 6). Visibly upset and angry at the victim, Appellant exclaimed, "I can't believe he tried to play me like that." (R.p. 251, lines 19-20). Reginald dropped Appellant off at a gas station and did not hear from Appellant until later that night. (R.p. 252, line 21- p. 253, line 16). Between 10:00 to 10:30 p.m., Appellant called Reginald and offered to pay for gas if Reginald would take him to the gas station. (R.p. 253, lines 7-25). Reginald testified at trial that neither he nor Appellant had any money or marijuana earlier that day when they were together. (R.p. 252, lines 3-18; p. 254, lines 4-14). After picking up Appellant, the two men went to a gas station where Appellant paid for Reginald's gas and some cigars and beer. (R.p. 254, line 20- p. 255, line 4). They went back to Reginald's house and

¹ Throughout the trial testimony and Appellant's interviews, the victim is frequently referred to by his nickname "Ace". (R.p. 89, 99, 249-255, 264, 312, 358-59; State's Exhibit 58).

² Throughout the trial testimony and Appellants' interviews, Appellant is frequently referred to by his nickname "Dee". (R.p. 32-35, 52; 247-253, 277-283, 276-295, 333, 357; State's Exhibit 58).

smoked marijuana that Appellant had provided. (R.p. 255, lines 8-9). Appellant then began talking about his PlayStation again. (R.p. 255, lines 5-19). Reginald testified that Appellant was very upset and Appellant thought the victim's story was "BS". (R.p. 255, lines 8-19). Around midnight, Reginald dropped Appellant off at the Bank of Walterboro. (R.p. 256, lines 1-4). Reginald testified that Appellant was going to walk from the bank to a house across the street from where the victim lived. (R.p. 256, lines 5-9; p. 259, lines 3-11).

Donte Jenkins testified he went to the victim's house around dusk that evening. (R.p. 265, lines 21-25). Donte observed that a PlayStation was hooked up to a TV in the victim's den. (R.p. 266, line 16 – p. 267, line 1). Between twenty minutes to an hour later, Appellant came to the victim's front door. (R.p. 267, lines 21-23). Donte let Appellant inside the home and the two men walked through the den into the kitchen. (R.p. 268, line 1; p. 269, lines 16-25). Donte, Appellant, and the victim talked for a while in the kitchen and then decided to go outside so the victim could fix the tag light on his car. (R.p. 268, line 23 – p. 269, line 3; p. 270, lines 8-23). Donte left between 9:00 to 9:15 p.m., leaving behind only Appellant and the victim at the house. (R.p. 271, lines 7-15; p. 273, lines 7-10).

Taylor Cowherd testified she called the victim at 9:25 p.m. as she was driving to his house that night. (R.p. 276, lines 8-14). When she arrived, she saw Appellant, dressed in a dark t-shirt, standing on the victim's front porch. (R.p. 277, lines 3-4; p. 278, lines 18-20). Cowherd said to Appellant, "Hey what's up Dee. Is Darius inside?" (R.p. 278, lines 9-10). Appellant responded that he was inside and would be right out. (R.p. 278, line 10). The victim came outside and spoke to Taylor for a few minutes while he worked on his car. (R.p. 279, lines 9-22). Taylor left the house a few minutes later, leaving behind the victim working on his car and Appellant standing on the front porch. (R.p. 279, line 23 – p. 280, line 4).

Wrenshad Anderson testified that he saw Appellant, wearing a blue polo shirt, walking away from the direction of the victim's home sometime after 9:40 p.m. (R.p. 294, line 24- p. 295, line 10). He described Appellant's demeanor as fidgety, as if he was trying to hide something. (R.p. 292, lines 7-10).

Sometime after 10:00 p.m., Shontay McKeithan arrived at the victim's home to purchase marijuana. (R.p. 112, line 4; p. 113, lines 7-11). While sitting in her car, she called the victim's phone but he did not answer. (R.p. 111, lines 24-25). About ten minutes later, Davonte Freeman arrived at the victim's home to buy marijuana. (R.p. 112, lines 2-4; p. 113, lines 5-6; p. 131, lines 4-5). Shontay told Davonte that the victim was not answering his phone. (R.p. 112, lines 5-6). Davonte proceeded to call the victim while Shontay got out of her car and walked to the front door of the house. (R.p. 112, lines 7-8). As she stood in front of the door, she heard the victim's cellphone ringing. (R.p. 112, line 9). They also observed that the victim's car doors were open with the lights turned on. (R.p. 131, lines 15-22). The two became concerned so Davonte walked to the side door and entered the victim's house. (R.p. 112, lines 11-12; p. 113 lines 20-25; p. 132, lines 14-23). Davonte testified that upon entering the house he saw the deceased victim on the floor. (R.p. 133, lines 13-24). He testified the victim was lying on his back with his gun on his stomach and his pants pockets inside out. (R.p. 133, lines 21-22; p. 135, lines 18-23). Davonte became panic-stricken and picked up the gun. (R.p. 136, lines 14-18). Davonte testified that he put the gun back exactly where he found it on the victim. (R.p. 148, lines 11-19). After looking around the house to see if anyone else was inside, Davonte ran outside and told Shontay to call the police. (R.p. 137, lines 17-23). Shontay then called 911. (R.p. 114, line 25). Shontay testified that in the time Devonte entered and left the house she did not hear any gun shots, only the sound of the victim's phone ringing. (R.p. 114, lines 4-10).

Officers with the Ridgeland Police Department and Jasper County Sheriff's Office responded to the victim's house and began processing the crime scene. (R.p. 154, lines 10-25). Officer Jason Blessing retrieved the gun off the victim's stomach and secured it in his patrol vehicle. (R.p. 157, lines 19-21; p. 166, line 21 – p. 167, line 18). The victim's gun was then sent to the South Carolina Law Enforcement Division (SLED) for processing. (R.p. 157, line 24 – p. 158, line 7). During the search of the victim's home, officers did not find any money, marijuana, or the PlayStation. (R.p. 367, lines 14-20). However, at trial, multiple witnesses testified that the victim sold marijuana out of his house. (R.p. 119, lines 5-7; p. 142, lines 3-5; p. 261, lines 6-11; p. 273, lines 3-6; p. 314, lines 2-4). Furthermore, the victim's girlfriend testified that the victim often would carry approximately eight hundred dollars in his pants pocket. (R.p. 215, lines 2-13).

During the investigation, Investigator Chris McIntosh, with the Ridgeland Police Department, obtained video surveillance from the gas station where Appellant and Reginald had purchased the gas, cigars, and beer. (R.p. 343, line 11 – p. 344 line 17). The video depicted Appellant entering the gas station at 10:43 p.m. and pulling out from his pocket a "pretty big fold of cash" to pay for his items. (R.p. 345, line 20 - p. 348 line 14). Additionally, Investigator McIntosh conducted a search of Appellant's home and located a dark blue polo shirt that matched the description of the shirt Appellant was wearing earlier in the night. (R.p. 362, lines 15-19).

Dr. Nicholas Batalis, an expert in forensic pathology, performed the autopsy on the victim on May 21, 2013. (R.p. 523, line 20 - p. 524, line 6). Dr. Batalis testified that the victim had been shot twice, once in the neck and once in the back of the head. (R.p. 525, lines 12-14). The wound to the head was a contact shot, meaning that the gun was pressed up against the skin at the time of firing. (R.p. 533, line 18 – p. 534, line 17). Dr. Batalis testified he was able to

recover a bullet and jacket from the gunshot wound to the head. (R.p. 532, lines 10-11). Dr. Batalis concluded that the cause of death was two gunshot wounds and the manner of death was homicide. (R.p. 534, line 18-25).

Michelle Eichenmiller, a firearms expert at SLED, compared the victim's Ruger .38 special revolver to the projectiles recovered from the autopsy. (R.p. 513, line 4 - p. 517, line 25). Eichenmiller testified she was able to determine that the projectiles recovered from the autopsy were indeed fired from the victim's gun. (R.p. 518, line 8 - p. 519, line 4).

Lilly Gallman, a forensic analyst at SLED, performed the DNA analysis of several of items taken from the crime scene and autopsy. (R.p. 435-453). Gallman testified the swab from the victim's gun resulted in a mixed profile containing the DNA of at least three individuals. (R.p. 446, line 23 - p. 447, line 2). Gallman explained that Appellant, Officer Jason Blessing, and the victim could not be excluded as contributors to the mixed DNA sample. (R.p. 447, line 24 - p. 448, line 3). She testified the statistical probability of randomly selecting an unrelated individual who could have contributed to the mixture was one in two hundred. (R.p. 449, lines 9-2). Gallman then testified the swab taken from the right front pocket of the victim's blue jeans resulted in a mixed profile of at least three individuals. (R.p. 450, lines 4-17). She expounded the victim and Appellant could not be excluded as contributors to the mixed DNA sample. (R.p. 450, lines 17-19). Gallman then testified the statistical probability of randomly selecting an unrelated individual who could have contributed to the mixture was one in two. (R.p. 452, line 19 - p. 453, line 1).

Investigators interviewed Appellant twice—and he gave two vastly different stories. Following a thorough *Jackson v. Denno*³ hearing, both of the Appellant's statements were introduced to the jury at trial. (R.p. 45-53, 55-96). The recorded May 19, 2013 interview was

³ *Jackson v. Denno*, 378 U.S. 368 (1964)

admitted into evidence and played for the jury. (R.p. 373, lines 13-24; State's Exhibit 58). The May 24, 2013 interview was testified to by Officer John Burnett. (R.p. 382-392). During his first statement, Appellant denied being at the victim's house when he was killed. (State's Exhibit 58). In his second statement, Appellant told officers that he was outside in the victim's car when three unknown men went inside the victim's home and killed him. (R.p. 388, line 20 – p. 391, line 5).

ARGUMENT

- I. **The trial court did not abuse its discretion in ruling Appellant's first statement was admissible where Appellant was given proper *Miranda* warnings, even though they were not required because Appellant was not in custody at the time of his statement, and the totality of the circumstances demonstrate that Appellant made a knowing, voluntary waiver of his *Miranda* rights.**

Appellant maintains the trial court erred by admitting his May 19, 2013 statement into evidence. Appellant argues that *Miranda* warnings were required because he was in custody at the time of the statement. Furthermore, Appellant asserts that his statement was not voluntarily made because the officers diluted the importance of the warnings, Appellant believed he was required to speak due to the terms of his probation, and Appellant was intoxicated at the time of the interview. Notwithstanding Appellant's argument to the contrary, Respondent submits that the trial judge did not abuse his discretion in holding that Appellant's statement was admissible. First, Appellant's statement was non-custodial. Second, even if viewed as custodial, Appellant was properly advised of his *Miranda* rights, which he knowingly and voluntarily waived. Finally, even if viewed as error to admit Appellant's statement, it was harmless beyond a reasonable doubt.

How the Issue Was Raised at Trial: Jackson v. Denno⁴ Hearing

Investigator Christopher McIntosh, of the Ridgeland Police Department, interviewed Appellant during the early morning hours of May 19, 2013. (R.p. 60, lines 4-24). The recorded interview took place in McIntosh's office at the police department. (R.p. 61, lines 7-8; State's Ex. 58). According to McIntosh, Appellant did not appear to be under the influence of any substances or have any mental defects that impaired his ability to understand his rights. (R.p. 61, lines 9-15). McIntosh testified Appellant was not under arrest at the time of the interview and

⁴ *Jackson v. Denno*, 378 U.S. 368 (1964)

was free to leave at any time. (R.p. 62, lines 15-18). Furthermore, Appellant was never denied breaks during the interview nor was he threatened or promised leniency in exchange for talking with the police. (R.p. 62, lines 7-14). Before beginning the interview, McIntosh read Appellant his *Miranda* rights from a form provided by the police department. (R.p. 63, lines 1-8, State's Ex. 58). Appellant then waived his rights and said he wished to speak with officers. (R.p. 63, line 25- p. 64, line 2). A few minutes into the interview, McIntosh had to leave to gather paperwork for a search warrant. (R.p. 61, line 22- p. 62, line 4). The two other officers in the interview, SLED Agents David Williams and Shaun Harley, continued the interview with Appellant. (R.p. 62, lines 5-6).

Agent David Williams testified that Appellant was advised he was not under arrest during the questioning at the police station. (R.p. 71, lines 1-7). According to Williams, Appellant was not denied any breaks during the hour and a half interview. (R.p. 70, lines 8-15). Appellant was free to leave at any time and did in fact leave after the interview concluded. (R.p. 71, lines 6-7; p. 72, lines 8-10). After waiving his *Miranda* rights, Appellant voluntarily spoke with Williams regarding the investigation and never asked for an attorney. (R.p. 71, lines 15-25). Even though Appellant admitted to smoking marijuana earlier in the night, Williams observed that Appellant's ability to understand and rationalize was not impaired. (R.p. 69, line 19- p. 70, line 7).

Agent Shaun Harley testified Appellant understood the purpose of the interview was to discuss the murder of Darius Woods. (R.p. 76, lines 6-14). Appellant told Harley that he had smoked some blunts⁵ and drank Paul Masson earlier that night. Upon learning that Appellant had smoked marijuana and drank alcohol, Harley asked Appellant several times if he understood the nature of the interview. (R.p. 76, line 24 – p. 77, line 2). Appellant responded that "he

⁵ Investigator Hurley explained that a "blunt" is commonly known to contain marijuana for smoking. (R.p. 76, lines 20-21).

understood and he was okay”. (R.p. 77, lines 2-3). Indeed, Harley testified that Appellant appeared to understand all of his questions and did not have any visible mental or physical defects. (R.p. 77, lines 19-25). Additionally, Harley testified Appellant gave rational answers to the questions posed by officers. (R.p. 80, lines 14-18).

Appellant testified at the *Jackson v. Denno* hearing and admitted to smoking marijuana and drinking alcohol the night of the murder. (R.p. 84, line 20 – p. 86, line 1). He claimed that he spoke to officers because he was under the influence. (R.p. 86, lines 6-9). However, on cross examination Appellant admitted that he had been arrested numerous times on unrelated charges and thus was aware of police procedures. (R.p. 88, line 15 – p. 89, line 4). Moreover, Appellant conceded that he talked to the officers voluntarily and understood the nature of their questions. (R.p. 90, lines 12-19).

The Trial Court’s Finding of Admissibility

The trial judge reviewed the recorded interview and heard arguments from both the State and defense regarding the statement’s admissibility. Following defense counsel’s argument the statement should be excluded because Appellant was too intoxicated to rationally exercise his rights, the trial court ruled Appellant’s statement on May 19, 2013 was admissible. Specifically, the court held:

“With regard to the issue of whether or not he was in custody, clearly, he was not in custody because he was released and free to go after he voluntarily gave an interview, however, in the event, given the facts of the case, if it was inferred that he was in custody, they gave *Miranda* warnings and he waived them.

I’ve had an opportunity to review the Defendant’s demeanor on the video and it appears to me as he was walking in that he was not unsteady on his feet, he did not have slurred speech. He appeared to listen to the questions and gave very rational answers. I noticed on the video that he had sort of a stammer, which caused me some pause, but as he testified from the witness stand, he had that very same stammer. His demeanor seemed to be exactly the same on the witness stand as it did on the video. The video will speak for itself and it is there for appellate review. My observation is that he was not intoxicated.

With regard to the voluntariness, clearly, he's not of tender years. Once again, he's an older gentleman. No one has said exactly how old he is, but he's not of tender age. He's served some time in federal prison. He's had a number of criminal convictions. Throughout those criminal procedures he's spoken with law enforcement. He's indicated that was indeed the case. I think it's particularly important to note that in order to say that the statement was involuntary because he was intoxicated, he seemed to indicate that it was the drugs that allowed him to speak with law enforcement, that is not his testimony at all. The reason why he did it was that his probation required that he do that. He did have the wherewithal, the presence of mind to ask for his probation agent. He had a very rational discussion with regard to that.

With regard to the issue of intoxication and how that affects voluntariness, I'm going to make a ruling on that. Ultimately, it is a factual question for the jury and he will be allowed to present any arguments consistent with involuntariness, consistent with intoxication. He can do that with or without his testimony during trial. There's been no testimony about any low intelligence. The interview was only an hour-and-a-half, which I found reasonable. I understand he was not denied access to food or breaks. It's clear the officers have testified and I've seen on the video that he was given his *Miranda* warnings and he waived those. There were no threats given. He was free to leave because he was, indeed, not arrested. In the event that he were to make the determination that he was under arrest, even though he left thereafter, he waived his *Miranda* rights. I believe that based on what I've heard and based on the officer's testimony and what I've seen on the video, he was given his *Miranda* rights, he understood his *Miranda* rights, and he waived the *Miranda* rights and I specifically find that the statement was freely and voluntarily given. However, once again, that's a question of law that's been put before me. I find that it is admissible, however those issues are questions of fact that can be presented to the jury and I will give you wide latitude in that regard."

(R.p. 93, line 12 - p. 95, line 17).

Standard of Review

The admission or exclusion of evidence rests on the sound discretion of the trial judge and will not be reversed absent an abuse of discretion. *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). An abuse of discretion occurs when the conclusions of the trial court are based on an error of law. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a

showing of probable prejudice. *State v. Kelley*, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995); *see also State v. Navy*, 386 S.C. 294, 301, 688 S.E.2d 838, 841 (2010) (stating appellate courts must uphold the trial court's findings regarding whether a defendant was in custody when statements were made if the trial judge's ruling is supported by the record).

In criminal cases, the appellate court sits to review errors of law only. *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); *State v. Butler*, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). The conclusion of the trial judge on issues of fact as to the voluntariness of a confession will not be disturbed unless the conclusion was so manifestly erroneous as to show an abuse of discretion. *State v. Livingston*, 223 S.C. 1, 6, 73 S.E.2d 850, 852 (1952); *see also State v. Rochester*, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990). The standard of review is limited to determining whether the trial court's ruling is supported by **any evidence**. *State v. Breeze*, 379 S.C. 538, 543, 665 S.E.2d 247, 250 (Ct. App. 2008) (emphasis added); *See also State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001) ("On review, we are limited to determining whether the trial judge abused his discretion.... This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence.").

Discussion

Appellant Not in Custody

The State may not use statements stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Accordingly, *Miranda's* requirements are only triggered when an individual is subjected to "custodial interrogation". *Id.*

"Custodial interrogation" involves 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). A person is "in custody" when his freedom has been restricted. *Id.* Whether a person is "in custody" is determined by an examination of the totality of the circumstances, such as the location, purpose, and length of the interrogation, and whether the suspect was free to leave the place of questioning. *State v. Navy*, 386 S.C. 294, 301, 688 S.E.2d 838, 841 (2010). "To determine whether a suspect was in custody for the purposes of *Miranda*, the [United States] Supreme Court has asked whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Williams*, 405 S.C. at 273, 747 S.E. at 199 (citing *Maryland v. Shatzer*, 559 U.S. 98, 112 (2010)).

Furthermore, the mere fact that an interview takes place at a police station and by the initiation of officers does not render it a custodial interrogation. *Williams*, 405 S.C. at 275, 747 S.E.2d at 200; *see also Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) ("[P]olice officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect."). "Rather, the fact a defendant voluntarily agreed to accompany investigators to their office and answer questions without being placed under arrest indicates a non-custodial situation." *State v. Doby*, 273 S.C. 704, 708, 258 S.E.2d 896, 899 (1979). Additionally, the fact that *Miranda* warnings are given does not convert a noncustodial situation into a custodial one. *Id.*

"Appellate review of whether a person is in custody is confined to a determination of whether the ruling by the trial judge is supported by the record." *State v. Evans*, 354 S.C. 579,

583, 582 S.E.2d 407, 409 (2003). Here, the trial court properly held and the record clearly supports that Appellant was not in custody or its functional equivalent during the May 19, 2013 interview. The record demonstrates that Appellant voluntarily came to police department to talk with law enforcement. Investigator McIntosh testified at trial, "He came of his own accord. He was given a ride by Officer Long, who encountered him at the Green and Main Street intersection." (R.p. 328, lines 23-25). Moreover, Appellant was asked at the *Jackson v. Denno* hearing, "So, you were there voluntarily." Appellant responded, "Yes." (R.p. 90, lines 12-13). Furthermore, Appellant was not under arrest at the time of the questioning. At the *Jackson v. Denno* hearing, the officers who participated in the interview testified that Appellant was not under arrest. (R.p. 62, lines 15-18; p. 71, lines 1-7). In fact, Appellant was not arrested for the murder of Darius Woods until April or May of 2014. (R.p. 233, lines 19-21). Also, Appellant knew that he was not under arrest at the time of the interview. While reading Appellant his *Miranda* rights, Investigator McIntosh informed Appellant he was not "in trouble or under arrest or anything". (State's Ex. 58 at 00:45). The interview lasted only an hour and a half. (R.p. 70, lines 8-10). Appellant was free to leave at any time and did in fact leave after the interview concluded. (R.p. 71, lines 6-7; p. 72, lines 8-10). Appellant was informed about the nature of the interview and he voluntarily agreed to discuss the matter with officers. (R.p. 76, lines 6-14). From a review of the recorded interview, it appears that Appellant was not handcuffed or shackled. (State's Ex. 58). Thus, Appellant's freedom of movement had not been restricted. *State v. Caulder*, 287 S.C. 507, 515, 339 S.E.2d 876,881 (Ct. App. 1986). Based upon the aforementioned reasons, a reasonable person would not have believed he was in custody during the interview. The record supports the trial court's ruling that Appellant was not in custody because he voluntarily participated in the interview and he was not "deprived of his freedom of

action in any significant way". *Williams*, 405 S.C. at 272, 747 S.E.2d 199. Therefore, Appellant was not in custody and *Miranda* did not apply.

Under the Totality of the Circumstances, Appellant Made a Knowing and Voluntary Waiver of His *Miranda* Rights.

Assuming for sake of argument Appellant was in custody, the record supports the trial court's finding that *Miranda* warnings were properly given and waived. The Supreme Court has long recognized that one may waive one's constitutional rights upon proper warnings:

... we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

Miranda v. Arizona, 384 U.S. 436, 478-479 (1966). However, establishing whether a defendant received the *Miranda* warnings is only one part of the process to determine the correctness of the waiver – the inquiry is divided into two separate parts:

First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

Moran v. Burbine, 475 U.S. 412, 421 (1986); *See also Miranda*, 384 U.S. at 445 ("The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.").

“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 (Ct.App. 2010). Factors to consider include “background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations; isolation of a minor from his or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep.” *Id.* 390 S.C. at 513-514, 702 S.E.2d at 401. Other courts have also specifically considered and noted prior interaction with law enforcement and exposure to one’s constitutional rights as points supportive of knowledge and understanding. *See, for example, United States v. Pruden*, 398 F.3d 241, 246 (3rd Cir. 2005) (“Pruden was familiar with his rights, having been involved in the justice system on numerous previous occasions.”); *United States v. Robinson*, 404 F.3d 850, 861 (4th Cir. 2005) (“Robinson had, on two prior occasions, been read his Miranda rights and waived them.”). Again, no one point is dispositive: “Only if the ‘totality of the circumstances surrounding the interrogation’ reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.” *Moran v. Burbine*, 475 U.S. at 421.

Diluted Warnings

Appellant claims his waiver of rights was not voluntary because the investigators diluted the *Miranda* warnings. Specifically, Appellant argues that Investigator McIntosh’s statements “this don’t mean you are in trouble or under arrest or anything” and “the State makes us do it”

undermined Appellant's *Miranda* warnings and portrayed them as "mere formality". However, a review of the recorded interview clearly shows that Investigator McIntosh properly conveyed Appellant's *Miranda* rights to him. Moments after arriving at the police station, the following took place between Appellant and Investigator McIntosh:

McIntosh: Let me read you something...real quick...before we talk.

McIntosh: You know what we want to talk to you about?

Appellant: Yeah about what happened at Ace house.

McIntosh: OK. Before we talk about that I want to read you this ok?

McIntosh: You have the right to remain silent. This don't mean you are in trouble or under arrest or anything ok but before we talk to anybody about anything any possible witnesses we have to read this, State makes us do it ok.

You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer one will be appointed to represent you before any questioning if you wish. You can decide at any time to exercise these rights and not answer any questions nor make any statements. Do you understand each of these rights?

Appellant: Uh huh.

McIntosh: OK. Having these rights in mind do you wish to talk to us now?

Appellant: Yeah go ahead.

(State's Ex. 58 at 00:17-01:15).

It is sufficient if the warnings reasonably convey to a suspect his rights as required by *Miranda*. *State v. Easter*, 471 S.E.2d 745, 749 (S.C. App. 1996), *aff'd* as modified, 489 S.E.2d 617 (S.C. 1997). A "talismanic incantation" is not required. *California v. Prysock*, 453 U.S. 355, 101 S.Ct. 2806, 69 L.Ed.2d 696 (1981). Courts in various jurisdictions have found statements similar to Investigator McIntosh's to be proper and in no way diminutive to the importance of a

suspect's *Miranda* rights. The Supreme Court of Colorado held that an officer's statement to a suspect that advising someone of their *Miranda* rights was "pretty standard in these types of cases" in no way diminished the significance of the waiver nor reduced the recitation to a mere formality. *People v. Thames*, 344 P.3d 891, 898 (Colo. 2015). Moreover, the Court found such a statement "highlighted the importance of these rights and that they should be taken seriously". *Id.*

In *Malloch v. State*, 980 N.E.2d 887, 899 (2012), before reading the suspect his *Miranda* rights, the detective stated, "Okay, just to let you know, you're not under arrest, you came here voluntarily, but since we're here at the Sheriff's Department I have to read you this form in here." The Indiana Court of Appeals held the statement was not an improper characterization of *Miranda* warnings and the detective was simply informing the suspect of his rights even though he was not under arrest. *Id.* at 900.

The California Supreme Court reached a similar conclusion in *People v. Musselwhite*, 954 P.2d 475 (Cal. 1998). In that case, prior to reading the suspect his *Miranda* rights, the detective stated, "what we'd like to do is just go ahead and advise you of your rights before we even get started and that way, that there's no problem with any of it." *Id.* at 487. The Supreme Court held the detective's statement did not trivialize the importance of the *Miranda* warnings, but, in fact, "was an accurate statement of the office of the constitutionality derived *Miranda* warning". *Id.*

Contrary to Appellant's argument, *State v. Powell*, 282 P.3d 845 (Or. 2012) is not analogous to the case at hand. *Powell* dealt with an initial, coerced confession and a second confession after the suspect had been given *Miranda* warnings. Under that scenario, the court explained the second statement must be excluded unless the improper coercion that compelled

the first set of statements had been dispelled before the second set of statements were made. The Court held the officer's comments that *Miranda* warnings were "just a matter of housekeeping" and "a formality" negated the dispelling effect that the warnings may have had. Since the coercive effect of the prior inducement was not dispelled, the second statement was not admissible. Appellant's case is not one of a prior coerced confession. Proper *Miranda* warnings were given to Appellant at the onset of the first interview. Additionally, Investigator McIntosh never used the term "formality" to refer to Appellant's rights. Investigator McIntosh simply explained to Appellant that he was not under arrest, and, out of abundance of caution, he was going to inform Appellant of his constitutional rights. Furthermore, Appellant testified at the *Jackson v. Denno* hearing that he was familiar with police procedures as he had been arrested numerous times. (R.p. 88, line 15 – p. 89, line 4). Respondent submits Appellant was fully aware of the meaning and importance of his *Miranda* rights as he had been read his rights in prior police encounters.

Appellant's *Miranda* warnings were not diluted or undermined by Investigator McIntosh's statements in any way. Indeed, Investigator McIntosh's challenged statements further highlighted the importance of Appellant's rights. *People v. Thames*, 344 P.3d at 898. Appellant's *Miranda* rights were reasonably and effectively conveyed to him. *State v. Easler*, 471 S.E.2d at 749. Therefore, Appellant made a knowing and voluntary waiver of his rights.

Condition of Probation

Appellant next argues his statements on May 19, 2013 were involuntarily made because he believed he was required to speak with investigators due to the conditions of his probation. Appellant's argument is without merit as he was not "compelled" to speak with investigators nor was he threatened with a revocation of his probation if he failed to do so.

The Fifth Amendment to the United States Constitution provides, in relevant part, that no person “shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. The Fifth Amendment does not operate as a blanket prohibition against the taking of any and all statements made by criminal defendants to law enforcement officials. *State v. Hook*, 559 S.E.2d 856, 860 (S.C. App. 2001), *aff’d as modified*, 590 S.E.2d 25 (S.C. 2003). Volunteered statements, whether exculpatory or inculpatory, stemming from custodial interrogation or spontaneously offered up, are not barred by the Fifth Amendment. *State v. Kennedy*, 325 S.C. 295, 307, 479 S.E.2d 838, 844 (Ct.App.1996) (citing *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)). “The [Fifth] Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been ‘compelled’ within the meaning of the Amendment.” *United States v. Monia*, 317 U.S. 424, 427, 63 S.Ct. 409, 410, 87 L.Ed. 376 (1943) (footnote omitted). Therefore, if a witness “makes disclosures instead of claiming the privilege, the government has not ‘compelled’ him to incriminate himself.” *Garner v. United States*, 424 U.S. 648, 654, 96 S.Ct. 1178, 1182, 47 L.Ed.2d 370 (1976). In considering whether a statement was compelled or voluntarily given, the court must determine the existence or nonexistence of coercive police activity. *State v. Linnen*, 278 S.C. 175, 293 S.E.2d 851 (1982)(statements were given freely and voluntarily, and were therefore admissible, even though interrogating officers encouraged the statements, where officers were not coercive or threatening and statements were not procured by improper influence).

Appellant cites to *Minnesota v. Murphy*, 465 U.S. 420 (1984) to argue his statements were involuntary because he felt he was required to speak with investigators as a condition of his

probation. In addressing a probationer's Fifth Amendment right against self-incrimination, the United States Supreme Court held:

A state may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not give rise to a self-executing privilege. The result may be different if the questions put to the probationer, however relevant to his probationary status, call for answers that would incriminate him in a pending or later criminal prosecution. There is thus a substantial basis in our cases for concluding that if the state, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution.

Id. at 425.

Here, the investigator's never stated or implied that Appellant was in jeopardy of having his probation revoked if he invoked his Fifth Amendment right against self-incrimination. Furthermore, Appellant was not required to appear at the police station as a condition of his probation. Appellant voluntarily agreed to speak with investigators and was free to leave at any time. Even if Appellant subjectively believed that he was required to speak with investigators regarding matters unrelated to his probation, that belief would be unreasonable. *Murphy* noted that even if *Murphy* did harbor a belief that his probation might be revoked for exercising the Fifth Amendment privilege, his belief would not have been reasonable in light of the many decisions that have made clear that the State could not constitutionally carry out a threat to revoke probation for legitimately exercising the Fifth Amendment privilege. *Id.* Therefore, in the case at hand, Appellant's status as a probationer has no bearing on the voluntariness of his statements. Thus, as Appellant did not invoke his Fifth Amendment right against self-incrimination and investigators did not coerce or compel him to speak with them, his statements were voluntarily made.

Intoxication

Appellant claims his intoxication precluded his knowing waiver of rights. Appellant's argument is without merit. Intoxication is one factor to be considered by the trial court in determining voluntariness and validity of a waiver of *Miranda* rights. However, the influence of intoxicants alone does not invalidate a knowing, intelligent, and voluntary waiver.

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).

In *State v. Saxon*, 261 S.C. 523, 201 S.E.2d 114 (1973), the Supreme Court found the following:

The fact that one is intoxicated at the time a confession is made does not necessarily render him incapable of comprehending the meaning and effect of his words. Therefore, proof that an accused was intoxicated at the time he made a confession does not render the statement inadmissible as a matter of law, unless the accused's intoxication was such that he did not realize what he was saying.

Id., 261 S.C. at 529, 201 S.E.2d at 117. 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.* A defendant must be impaired to a substantial degree to overcome his ability to knowingly and intelligently waive his privilege against self-incrimination. The mere fact of drug or alcohol use does not preclude a finding of a knowing and voluntary waiver of rights. *See United States v. Phillips*, 506 F.3d 685 (8th Cir. 2007) (waiver was voluntary despite defendant's claimed intoxication from four ecstasy pills and a cup of brandy).

In the instant case, all three investigators who conducted the interview on May 19, 2013, testified Appellant did not appear under the influence of any intoxicants. (R.p. 61, lines 9-15; p. 69, lines 19-23; p. 77, lines 19-25). Investigator Williams testified he would not have questioned Appellant if he felt Appellant was under the influence or lacked the ability to understand. (R.p.

232, lines 16-19). Even though Appellant admitted to the investigators he had smoked marijuana and drank alcohol earlier that night, the investigators testified Appellant's ability to understand and rationalize was not impaired. (R.p. 69, line 19- p. 70, line 7). In fact, upon asking Appellant if he understood the nature of the questioning, Appellant responded that "he understood and he was okay". (R.p. 77, lines 2-3). Moreover, Appellant testified that he talked to the officers voluntarily and understood the nature of their questions. (R.p. 90, lines 12-19). Additionally, in ruling that Appellant was not intoxicated, the trial judge compared Appellant's demeanor on the witness stand to that in the interview and found Appellant's demeanor had not changed. (R.p. 93, line 18 – p. 94, line 3). The trial judge also found Appellant appeared to listen to the questions posed to him and respond with rational answers. (R.p. 93, lines 21-22).

Therefore, the recorded interview and witness testimony established that Appellant, if impaired at all, was not impaired to such a degree that his statements were rendered involuntary at the time they were made. Accordingly, Appellant's claim of intoxication is without support and the trial judge did not err in declining to exclude Appellant's statements due to alleged intoxication.

Other Factors Considered

The trial judge properly considered the totality of the circumstances in determining whether the State met its burden of proving Appellant's confessions were knowingly and voluntarily given. In addition to considering Appellant's alleged intoxication, the trial judge also analyzed other factors in determining Appellant's waiver was voluntary. First, as to background and experience, Appellant testified at the *Jackson v. Denno* hearing that he was familiar with police procedures as he had been arrested numerous times. (R.p. 88, line 15 – p. 89, line 4); See *United States v. Pruden*, 398 F.3d at 246. Second, the trial judge opined that Appellant was "not

of tender years” and was “an older gentleman”. (R.p. 94, lines 4-6). Third, Appellant’s interview lasted only one hour and a half. (R.p. 72, lines 6-7). Fourth, regarding promises or threats made by police, no such conduct was present in Appellant’s case. (R.p. 62, lines 7-14). Lastly, Appellant was never denied breaks and was free to leave at any time. (R.p. 70, lines 8-15).

Accordingly, Respondent submits under the totality of circumstances Appellant’s waiver of his *Miranda* rights was clearly voluntary.

Harmless Error

Even assuming *arguendo*, Appellant was in custody and his statement was admitted in violation of *Miranda*, its admission was harmless beyond a reasonable doubt. *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246 (1991) (holding error in admission of involuntary confession is subject to harmless error analysis). In *State v. Easler*, our Supreme Court intimated that any error in the failure to suppress a statement allegedly taken in violation of *Miranda* is subject to a harmless error analysis. 327 S.C. 121, 129, 489 S.E.2d 617, 621–22 (1997); *see also State v. Newell*, 303 S.C. 471, 477, 401 S.E.2d 420, 424 (Ct.App.1991) (finding failure to suppress evidence for *Miranda* violation harmless where record contained overwhelming evidence of guilt); *State v. Lynch*, 375 S.C. 628, 636, 654 S.E.2d 292, 296 (Ct.App.2007) (“The failure to suppress evidence for possible *Miranda* violations is harmless if the record contains sufficient evidence to prove guilt beyond a reasonable doubt.”)

Here, considering the entire record on appeal, any error in admitting Appellant’s statements to investigators on May 19, 2013, was harmless beyond a reasonable doubt. Through the testimony of Taylor Cowherd and Shontay McKeithan, the State established that the victim was killed sometime between 9:25 p.m. and 10:00 p.m. on May 18, 2013. (R.p. 112, line 4; p. 113, lines 7-11; p. 276, lines 8-14). Cowherd’s testimony placed Appellant alone with the victim

within the timeframe of the murder. (R.p. 280 lines 1-2). The State established through the testimony of Reginald Green that Appellant was upset with the victim for lying to him about the Playstation video game. (R.p. 250, line 7 – p. 251, line 20). Also through Reginald, the State was able to establish that Appellant did not have any money or drugs on him earlier in the afternoon. (R.p. 252, lines 3-18; p. 254, lines 4-14). However, through Reginald's testimony and video surveillance, the State was able to prove that Appellant possessed a large amount of money and marijuana after the victim was murdered. (R.p. 255, lines 8-9; p. 345, line 20 - p. 348 line 14). Donte Jenkins testified that he observed a Playstation at the victim's home the night of the murder. (R.p. 266, line 16 – p. 267, line 1). However, officers testified that no such Playstation was located during the search of the victim's home. (R.p. 367, lines 14-20). Donte also testified he left the victim's house between 9:00 to 9:15 p.m., leaving behind only Appellant and the victim at the house. (R.p. 271, lines 7-15; p. 273, lines 7-10). Wrenshad Anderson testified he observed Appellant walking down the street the night of the murder acting strange, as if he was trying to hide something. (R.p. 292, lines 7-10). Investigator McIntosh presented evidence of surveillance footage from a local gas station that showed Appellant carrying a large sum of money a short time after the victim was killed. (R.p. 345, line 20 - p. 348 line 14). Witnesses testified the victim carried a large amount of money in his pocket. (R.p. 215, lines 2-13). Officers testified no money was found on the victim or in his house. (R.p. 367, lines 14-20). The State was able to establish the victim was killed by his own gun. (R.p. 518, line 8 - p. 519, line 4). Appellant admitted to handling this weapon the night of the murder. (State's Ex. 58). The State established through DNA testing that Appellant could not be excluded as a contributor to the DNA found on the victim's gun and pants pocket. (R.p. 447, line 25 – p. 448, line 3; p. 450, lines 17-19).

The State's case against Appellant was compelling. Even excluding Appellant's statement to police, the record supports the jury's verdict of murder beyond of reasonable doubt. Hence, while Respondent submits the trial court's ruling was not error, any alleged error would be harmless beyond a reasonable doubt.

In sum, Appellant's May 19, 2013 statement was properly admitted. Appellant was not in custody at the time of the interview and thus *Miranda* warnings were not needed. However, out of an abundance of caution, investigators properly advised Appellant of his *Miranda* rights. Under the totality of circumstances, Appellant's waiver of his *Miranda* rights was voluntarily and knowingly made. Additionally, even if the admission of the statement was to be viewed as error, it would be harmless as there was overwhelming evidence of Appellant's guilt. Therefore, the trial court did not abuse its discretion in ruling Appellant's May 19, 2013 statement was admissible. Consequently, this issue is without merit and must be dismissed.

II. The trial court did not abuse its discretion in admitting the DNA analyst's expert testimony regarding two items on which Appellant could not be excluded as a contributor because the admissible testimony was relevant and the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice, confusion, or misleading the jury.

Appellant contends the trial court erred in admitting the DNA analyst's expert testimony regarding two items of evidence on which Appellant could not be excluded as a contributor. Specifically, Appellant asserts the DNA results were of such "weak statistical significance" that the danger of unfair prejudice, confusion of the issues, and misleading the jury outweighed the probative value of the expert's testimony. Appellant's argument is without merit. Not only was the expert testimony relevant, its probative value was not substantially outweighed by the danger of unfair prejudice, confusion, or misleading. Additionally, the admissible statistical values associated with the two challenged samples were factors for the jury to weigh and consider. Accordingly, the trial judge did not abuse his discretion in admitting the DNA analyst's expert testimony. This issue must be dismissed.

Relevant Facts and Proceedings

Motion to Suppress DNA Evidence

Before jury selection, Appellant made a motion to suppress the DNA evidence found on the victim's clothing and gun. (R.p. 37, line 17-p. 38, line 17). Appellant argued the evidence was not relevant and improperly shifted the burden of proof from the State to Appellant. (R.p. 38, lines 9-17). Specifically, Appellant claimed it was burden shifting because he could not overcome the negative implications from evidence and testimony that indicated Appellant could not be excluded as a contributor to the DNA mixtures but other people could be excluded. (R.p. 43, lines 1-6). Appellant argued the low probabilities associated with the DNA results rendered the introduction of the evidence meaningless. (R.p. 43, lines 19-25).

In response, the State argued the DNA evidence was admissible and did not improperly shift the burden of proof. (R.p. 41, line 21 - p. 42, line 3). The State asserted Appellant would be able to cross-examine the DNA analyst regarding her testing and probability determination. (R.p. 41, lines 24-25; p. 44, lines 3-11, 18-20). The State maintained that while the probabilities were not high, the numbers were still relevant. (R.p. 42, lines 1-3; p. 44, lines 7-11). Additionally, the State argued the probabilities that Appellant could not be excluded from the DNA mixtures were purely factual issues for the jury to consider and thus would be admissible evidence. (R.p. 41, lines 16-18; p. 44, lines 18-20).

In denying Appellant's motion to suppress the evidence, the trial judge held the statistical probabilities relating to the DNA samples were factual issues for the jury. (R.p. 43, lines 7-12; p. 44, lines 21-24). Accordingly, the judge found the probabilities went to the weight of the evidence, not its admissibility. *Id.*

During the forensic analyst's testimony at trial, Appellant renewed his objection to the testimony regarding the DNA evidence. (R.p. 438, lines 7-8). The trial judge noted that Appellant was protected for the record. (R.p. 438, line 9). When the State sought to introduce the DNA samples into evidence, Appellant again renewed his objection. (R.p. 441, line 23 - p. 442, line 3). The judge overruled the objection and allowed the evidence to be admitted. (R.p. 442, lines 4-5).

DNA Testimony at Trial

Lilly Gallman, a forensic DNA analyst with SLED, testified at trial. (R.p. 435-478). Gallman testified that she had been employed at SLED for twenty-six years and had attended numerous courses concerning DNA and genetics. (R.p. 435, lines 11-25). After Gallman explained that she had testified as an expert in DNA analysis over sixty times in court, the State offered Gallman as an expert in DNA analysis. (R.p. 436, lines 3-8). Appellant posed no

objections or further questions regarding Gallman's qualification. (R.p. 436, lines 16-18).

Thereafter, the trial judge gave the following instruction to the jury:

"Madam Forelady, ladies and gentlemen of the jury, ordinarily when witnesses testify, lay witnesses, they're only allowed to testify as to things they saw, heard, and felt. There's an exception to that rule when an individual is qualified as an expert because of their education and training in a certain field of study, and if I rule that they are indeed an expert, they're not only allowed to testify as to things they saw, heard and felt, but they will be able to render opinions in their field of study. Just by virtue of the fact that a person is an expert doesn't mean that you have to believe their testimony. It's evidence for you to consider and give it the weight you think it deserves and evaluate it like all other evidence."

(R.p. 436, line 19 – p. 437, line 6) (emphasis added).

Gallman testified that she received a number of items of evidence regarding Appellant's case, which she analyzed, including: swabs from the floor and wall of the victim's home, swabs from the victim's pants pockets, and swabs from the handle of the murder weapon. (R.p. 439, line 1 – p. 440, line 24). Additionally, she received and analyzed known DNA samples from the following people: Shontay McKeithan, Davonte Freeman, Jason Blessing, James Orr, Appellant, and the victim. (R.p. 445, line 24 – p. 446, line 12). Gallman explained her process was to first develop a DNA profile from the crime scene evidence then compare that profile to the known DNA standards. (R.p. 445, lines 7-9). Gallman testified that she was able to develop full profiles of all the known DNA standards that she tested. (R.p. 445, line 24 – p. 446, line 13).

Of particular relevance to the current allegation, Gallman testified she analyzed a swab from the handgun and developed a DNA profile that was a mixture of at least three individuals. (R.p. 446, line 14 – p. 447, line 2). Gallman then explained her next step in the process as follows:

"The next process, once I develop a DNA profile from the evidence and then from the standard, I compare the DNA profile from the standards for the individuals that I had the evidence to, to tell whether this person could be included or excluded from the sample."

(R.p. 447, lines 15-19). She testified that from the mixture of at least three individuals, Jason Blessing, Appellant, and the victim could not be excluded as contributors. (R.p. 447, line 24 – p. 448, line 3). Gallman explained the amount of DNA of each individual person in the sample was even, meaning no person was considered a major contributor. (R.p. 448, lines 20-25). In describing the statistic associated with the gun sample, Gallman testified:

Once I do the comparison, which is the very first step to determine whether the person can be included or excluded from a mixture, we are required to generate, give a statistical value to that particular mixture. We are required to tell you how often you would see this mixture in a population. So the next statement that's on my report is that the probability of randomly selecting an unrelated individual who could have contributed to this mixture is approximately one in two hundred. All the information is there, but based on our protocol some of the areas, out of the sixteen, could not be used to generate a statistic or give you a statistical value. So based on the information that I could use to generate a statistic, the value is one in two hundred.

(R.p. 449, lines 4-17) (emphasis added). Gallman testified the individuals that were completely excluded as contributors to the DNA mixture on the gun were: Shontay McKeithan, Davonte Freeman, Kevin Smith, Rhett Long, and James Orr. (R.p. 451, lines 17-19).

Next, Gallman testified about a swab taken from the victim's right front pocket of his blue jeans. (R.p. 450, lines 4-10). Her finding was a mixed sample containing the DNA of at least three individuals, in which Appellant and the victim could not be excluded as contributors. (R.p. 450, lines 15-19). Gallman testified the probability of randomly selecting an unrelated individual who could have contributed to the mixture was approximately **one in two**. (R.p. 452, line 19 – p. 453, line 1). She testified the individuals that were completely excluded as contributors to the DNA mixture on the pants pocket were: Shontay McKeithan, Davonte Freeman, Kevin Smith, Jason Bless, Rhett Long, and James Orr. (R.p. 452, lines 7-9).

During rigorous cross-examination, Gallman explained her statistics are based on databases that are generated from different populations and she uses the most conservative. (R.p.

455, lines 1-3). When asked about the amount of Appellant's DNA in the mixture from the gun and how she determined the statistic associated with the mixture, Gallman explained:

"[H]is DNA is at all sixteen areas from the chromosomes, but due to the fact that there are areas that I could not use to generate the frequency of that and to give you a statistical value, I had to put them out. I can only use – excuse me. I don't want to tell you wrong. I believe I could only use five out of sixteen. Let me make sure, now. I'm sorry. I could use – I could only use ten out of the sixteen to generate that particular number for item 1.1."

(R.p. 460, line 21 – p. 461, line 4)(emphasis added). Gallman then testified her conclusion that there were at least three individuals in the gun mixture was based on the evidence, not in the amount of people that she could exclude as contributors. (R.p. 461, lines 14-19).

On re-direct examination, Gallman testified that the vast majority of Appellant's numbers matched the sample taken from the right front pants pocket. (R.p. 477, lines 12-16). She expounded, "In order for me to say that someone is not excluded, the vast majority of their information has to be in that sample." (R.p. 478, lines 1-3).

Standard of Review

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). An abuse of discretion occurs when the conclusions of the trial court are based on an error of law or lack evidentiary support. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice. *State v. Kelley*, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995). The standard of review is limited to determining whether the trial court's ruling is supported by any evidence. *State v. Breeze*, 379 S.C. at 543, 665 S.E.2d at 250. Likewise, the decision as to whether to admit or exclude expert testimony rests within the trial judge's sound discretion and

will not be reversed on appeal absent a prejudicial abuse of that discretion. *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006); *see State v. White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009) (“A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion.”).

Discussion

Appellant argues the expert testimony regarding the DNA results should have been excluded under S.C. Rule of Evidence 403. Particularly, Appellant contends the probative value of the weak statistical DNA results are outweighed by the danger of unfair prejudice, confusion of the issues, and misleading to the jury. However, Respondent submits the testimony was relevant to the issue of Appellant’s guilt and it was not unfairly prejudicial, confusing, or misleading.

Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE. The trial court has broad discretion in determining the relevancy of evidence and its decision to admit or exclude evidence will not be reversed on appeal absent an abuse of that discretion and a showing of prejudice. *State v. Holder*, 382 S.C. 278, 288, 676 S.E.2d 690, 696 (2009); *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading to the jury.” Rule 403, SCRE; *see also State v. Cooley*, 342 S.C. 63, 69, 536 S.E.2d 666, 669 (2000) (although evidence is relevant, it should be excluded where danger of unfair prejudice substantially outweighs its probative value). “Unfair prejudice means an undue tendency to suggest decision on an improper basis.” *State v. Tynes*, 402 S.C.211 740 S.E.2d 512 (Ct. App. 2013); *see also State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). “All evidence is

meant to be prejudicial; it is only unfair prejudice which must be [scrutinized under Rule 403].” *State v. Lee*, 399 S.C. 521, at 529, 732 S.E.2d 225, at 229 (Ct. App. 2012) (quotation marks and citations omitted).

A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. *State v. Horton*, 359 S.C. 555, 598 S.E.2d 279 (Ct. App. 2004); *State v. Adams*, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). The appellate court will review a trial judge's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment. *State v. Hamilton*, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001); *State v. McLeod*, 362 S.C. 73, 606 S.E.2d 215 (Ct. App. 2004). Rule 403's prohibition against evidence that is prejudicial or misleading to the jury directly relates to the limitations on the admissibility of DNA evidence.

In South Carolina, DNA evidence may be admitted in judicial proceedings in the same manner as other scientific evidence, such as fingerprint analysis and blood tests. *State v. Ford*, 301 S.C. 485, 392 S.E.2d 781 (1990). In order for the evidence to be admissible, the trial judge must find the scientific evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable. *State v. Ramsey*, 345 S.C. 607, 614, 550 S.E.2d 294, 298 (S.C. 2001). Further, even if the evidence is admissible, the trial judge must determine if its probative value is outweighed by its prejudicial effect under Rule 403. Once the evidence is admitted under these standards, the jury may give it such weight as it deems appropriate. *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999).

Likewise, population frequency statistics for DNA test results are admissible. *State v. Register*, 323 S.C. 471, 481, 476 S.E.2d 153, 159 (1996); *State v. Dinkins*, 319 S.C. 415, 418,

462 S.E.2d 59, 60 (1995). In explaining why DNA probability statistics are admissible, the *Dinkins* Court stated:

“[V]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.” *Daubert*, 509 U.S. at —, 113 S.Ct. at 2798. In this case, the DNA population frequency statistics assist the jury in determining whether appellant was the attacker. The jury should be allowed to make its own determination as to whether it believes the statistics are reliable. The jury is free to believe or disbelieve the experts and the statistics. Therefore, we hold DNA population frequency statistics are admissible.”

319 S.C. at 418, 462 S.E.2d at 60. The Court concluded that DNA population frequency statistics, as with DNA test results, are subject to attack for relevancy and prejudice. *Id.*

Numerous jurisdictions have found statistical probabilities of nonexclusion DNA evidence, even if low, are admissible and relevant. *See e.g. People v. Smith*, 978 N.E.2d 324 (Ill. App. 1st Dist. 2012) (holding that DNA expert testimony that the probability of inclusion for the partial profile on the gun was 1 out of 11 and so defendant could not be excluded from a group of 600 million people as possible contributors to the DNA mixture was properly admitted and the weight of this testimony was a matter for the jury to decide)(emphasis added); *United States v. McCluskey*, 954 F.Supp.2d 1224, 1273 (D.N.M.2013) (holding that nonexclusion DNA matches with random match probabilities of 1:9268, 1:21, 1:12 admissible and not substantially outweighed by any prejudicial effects)(emphasis added); *State v. Brochu*, 183 Vt. 269, 949 A.2d 1035, 1048–49 (2008) (upheld admission of 1 in 12 match probability where probative value was not outweighed by prejudicial effect)(emphasis added).

The United States Supreme Court in *McDaniel v. Brown*, 558 U.S. 120 (2010) found that DNA statistical probabilities were powerful pieces of inculpatory evidence for a jury to consider. In that case, the State's evidence at Brown's trial reflected essentially "a 1 in 6,500 chance that one brother would match," while the habeas defense expert whittled the figure to as low as "1 in

66." *Id.* at 132 (emphasis added). The Supreme Court found "[e]ven under [the habeas defense expert's] odds, a rational jury could consider the DNA evidence to be powerful evidence of guilt." *Id.*

Likewise, the United States District Court for the District of Columbia explained that nonexclusion DNA evidence "remains probative, and helps to corroborate other evidence and support the Government's case as to the identity of the relevant perpetrators." *United States v. Morrow*, 374 F.Supp.2d 51, 65 (D.D.C.2005). In *Morrow*, the court found admissible DNA evidence "ranging from a 1:12 probability of selecting an unrelated individual in the relevant population to a 1:1 probability of selecting an unrelated individual." *Id.* at 62 (emphasis added). The Court emphasized, "[E]xclusion of conclusions based on sound methodology is not the proper course; rather, '[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burdens of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'" *Id.* at 64 (quoting *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)).

Similarly, the Massachusetts Supreme Court has held that low statistical DNA evidence is admissible and relevant. *Commonwealth v. O'Laughlin*, 446 Mass. 188 (2006). In *O'Laughlin*, the Court considered whether DNA evidence was admissible in which "one in two of any randomly selected individuals could have been the contributor". *Id.* at 208 (emphasis added). The Court held the DNA evidence was admissible and the probative value of the evidence was for the jury to decide. *Id.* The Court noted, "Evidence is not rendered prejudicial merely because it is inconclusive [and] it is for the jury to determine the probative value to be accorded relevant evidence." *Id.*

Furthermore, while not specifically addressing the issue at hand, the South Carolina Supreme Court has found similar DNA statistical probabilities relevant and probative. *State v. Primus*, 349 S.C. 576, 587, 564 S.E.2d 103, 109 (2002), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 106, 610 S.E.2d 494, 501 (2005). In referring to a statistical probability of 1 in 174, the Court stated, “[w]hile this probability is not nearly as definitive as that which has been offered in other trials, it is nonetheless highly persuasive, especially when combined with other evidence of [the defendant’s] guilt.” *Id.* at 588 (emphasis added).

Much like the aforementioned cases, the statistical nonexclusion probabilities associated with Appellant’s case are certainly relevant and the probative value is not outweighed by any prejudicial effect. Not only does the evidence validate the State’s theory that Appellant murdered the victim; it also corroborates the testimony from multiple witnesses that place Appellant at the scene of the crime. *Morrow*, 374 F.Supp.2d at 65 (DNA evidence “remains probative, and helps to corroborate other evidence and support the Government’s case as to the identity of the relevant perpetrators.”). Furthermore, the DNA sample taken from the gun supports Appellant’s own statement that he held the gun on the day the victim was killed. (State’s Ex. 58). Moreover, the statistical numbers of **one in two hundred** and **one in two** were not confusing or misleading to the jury because Gallman adequately explained their significance. (R.p. 449, lines 4-17; p. 455, lines 1-3; p. 460, line 21 – p. 461, line 4). Additionally, Appellant was given ample opportunity during cross-examination and closing argument to challenge and rebut the DNA evidence. (R.pp. 453-476; 583-608). In fact, Appellant used cross-examination of Gallman to introduce testimony about DNA that was not attributable to a known standard. From that testimony, Appellant was able to insinuate that someone other than Appellant could have committed the murder. *Daubert*, 113 S.Ct. at 2798 (“[V]igorous cross-examination, presentation of contrary evidence, and careful

instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”). Moreover, the jury was adequately informed by the trial judge that an expert’s opinion testimony should be given the weight they see fit. Thus, the statistical numbers associated with the two samples were probative factors to be considered by the jury in weighing all of the evidence and testimony at trial. *See O’Laughlin*, 446 Mass. At 208 (“Evidence is not rendered prejudicial merely because it is inconclusive [and] it is for the jury to determine the probative value to be accorded relevant evidence.”); *Smith*, 978 N.E.2d at 346. Accordingly, the trial judge correctly held the statistical probabilities relating to the DNA samples were factual issues for the jury. (R.p. 43, lines 7-12; p. 44, lines 21-24). Therefore, the trial court did not abuse its discretion in admitting the DNA analyst’s expert testimony regarding two items on which Appellant could not be excluded as a contributor.

In addition to arguing the testimony should be excluded as unfairly prejudicial, Appellant asserts the Assistant Solicitor overstated the evidence in her closing argument. As an initial matter, Appellant’s challenge to the Assistant Solicitor’s closing argument is wholly unpreserved for appellate review. An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review. *See State v. Walker*, 366 S.C. 643, 660, 623 S.E.2d 122, 130 (Ct.App.2005). “Arguments not raised to or ruled upon by the trial court are not preserved for appellate review.” *State v. Carlson*, 363 S.C. 586, 597, 611 S.E.2d 283, 288 (Ct.App.2005). Appellant posed no objections during or after the Assistant Solicitor’s closing argument. Therefore, Appellant’s challenge to portions of the closing argument is procedurally barred from review. Regardless, Appellant’s argument is without merit.

In presenting a closing argument to the jury, a solicitor—and any other party—must confine the argument to the evidence in the record and the inferences to be drawn from that

evidence. *State v. Tubbs*, 333 S.C. 316, 321, 509 S.E.2d 815, 818 (1999). However, the solicitor is unquestionably permitted in a closing argument to state and discuss the State's version of the testimony, to comment on the weight given to such testimony, and to point out the matters that the jury should and should not consider in arriving at a verdict. *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002); see *State v. Durden*, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975) (“[The prosecuting attorney] may argue with reference to any matters which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider.” (citations omitted)); *Randall v. State*, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004) (“A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony.”).

Here, the Assistant Solicitor's statements during her closing argument regarding Appellant's DNA being found on the gun and pants pocket were reasonable inferences from all of the evidence presented at trial. Numerous witnesses placed Appellant at the scene of the crime within the time frame that the victim was murdered. After the victim was killed, Appellant was captured on video surveillance carrying a large sum of money that he did not have earlier that day. Moreover, Appellant himself admitted to being at the victim's house on the incident date. Additionally, Appellant admitted to holding the victim's gun the day the victim was murdered. Furthermore, Gallman testified the samples from the gun and right front pocket of the victim's pants contained all sixteen numbers from Appellant's DNA profile. (R.p. 449, lines 12-15; p. 460, line 21; p. 477, lines 12-16). Therefore, when taking the totality of the evidence into consideration, the Assistant Solicitor's remarks were reasonable inferences from the evidence and within the permissible bounds of fair argument.

Additionally, even if the Assistant Solicitor's remarks were to be viewed as improper, there would be no error because the trial judge properly explained the significance of closing arguments to the jury. Before the parties gave their closing arguments, the trial judge instructed the jury that closing arguments should not be considered as evidence. Specifically, the trial judge stated:

"However, this is closing argument and these presentations would be truly argumentative in nature because at this point in time, you have heard all of the evidence and these very fine lawyers will have an opportunity to point to the evidence that supports their relative positions. What they have to say is not evidence."

(R.p. 555, line 23 – p. 556, line 3)(emphasis added). Thus, the jury was well aware that the State's closing argument was not evidence of the case, but rather represented the State's theory of the case based on reasonable inferences from the evidence introduced at trial.

Harmless Error

Even if this Court were to find an abuse of discretion, any error in admitting the DNA expert testimony was harmless beyond a reasonable doubt because the jury considered substantial corroborating evidence properly admitted at trial. *See State v. Livingston*, 282 S.C. 1, 6, 317 S.E.2d 129, 132 (1984) (holding an error admitting evidence is harmless beyond a reasonable doubt where guilt is proven by other competent evidence, such that the error could not have reasonably affected the verdict); *see also State v. Baccus*, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006) ("When guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, this Court will not set aside a conviction for insubstantial errors not affecting the result."). In *Baccus*, the Supreme Court found the trial court's error in admitting the DNA to be harmless. 367 S.C. at 56, 625 S.E.2d at 224. As the court indicated, however, the other evidence in the case conclusively proved the defendant guilty.

The State presented the testimony of [the victim's friend] who overheard Appellant tell the victim he was going to kill her and who overheard a pop and clicking sound. Additionally, the State presented evidence that Appellant's fingerprints matched fingerprints on the window sill of the broken window in the victim's bedroom. Also, [a DNA analyst] testified the blood sample collected from Appellant on the night of his arrest matched the blood found on the swabs and cuttings from the door, blind, and sheet in the victim's house. Therefore, the blood evidence drawn pursuant to the court order which should have been excluded was cumulative.

367 S.C. at 55, 625 S.E.2d at 223–24.

Here, Respondent submits any error was harmless. DNA evidence is not generally dispositive in any case; rather, one must look at the whole of the evidence and the particulars of the case. The South Carolina Supreme Court has noted that "the presence or absence of DNA evidence does not taint the remainder of the evidence in the record, nor does it overwhelm the jury's ability to make credibility determinations and decide whether a defendant is guilty." *State v. Jenkins*, 412 S.C. 643, 773 S.E.2d 906 (2015). In the case at hand, the evidence was not crucial to the State's case in the sense that it was not the only evidence placing Appellant at the scene and identifying him as the perpetrator. Testimony from Taylor Cowherd, Donte Jenkins, and Wrenshad Anderson placed Appellant at the crime scene within the timeframe of the murder. (R.p. 271, lines 7-15; p. 273, lines 7-10; p. 280, lines 1-1; p. 292, lines 7-10). The State established Appellant's motive through the testimony of Reginald Green by showing that Appellant was upset with the victim for lying to him about the Playstation video game. (R.p. 250, line 7 – p. 251, line 20). Also, the State was able to establish that Appellant did not have any money or drugs earlier in the afternoon but possessed money and drugs after the victim was killed. (R.p. 252, lines 3-18; p. 254, lines 4-14; p. 255, lines 8-9; p. 345, line 20 - p. 348 line 14). Investigator McIntosh presented evidence of surveillance footage from a local gas station that showed Appellant carrying a large sum of money a short time after the victim was killed. (R.p.

345, line 20 - p. 348 line 14). Furthermore, Appellant admitted to handling the gun that was used to kill the victim. (State's Ex. 58). Thus, when viewing the record as a whole, the additional DNA evidence Appellant would have excluded is merely cumulative.

Accordingly, while Respondent submits the trial judge did not abuse his discretion in admitting Gallman's testimony regarding two DNA samples from which Appellant could not be excluded as a contributor, any alleged error was harmless beyond a reasonable doubt.

CONCLUSION

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

Respectfully submitted,

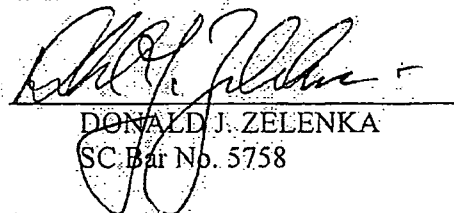
ALAN WILSON
Attorney General

J. ROBERT BOLCHOZ
Chief Deputy Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MARGARET G. BOYKIN
Assistant Attorney General

BY:



DONALD J. ZELENKA
SC Bar No. 5758

South Carolina Office of Attorney General
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-6305

ATTORNEY FOR RESPONDENT

April 21, 2017

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IN THE COURT OF APPEALS

Appeal from Jasper County

Honorable Michael G. Nettles, Circuit Court Judge

THE STATE,

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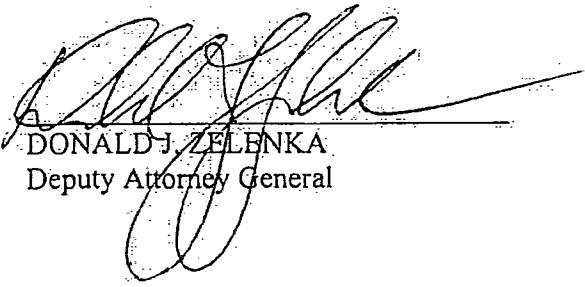
BILLY PHILLIPS,

APPELLANT,

Appellate Case No. 2016-000108

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."



DONALD J. ZELENSKA
Deputy Attorney General

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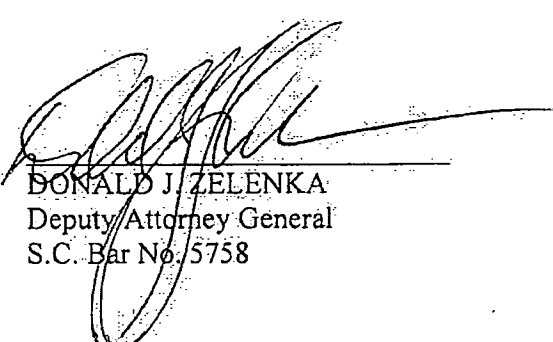
CERTIFICATE OF SERVICE

I, Donald J. Zelenka, counsel for the Respondent, certify that I have served the within Final Brief of Respondent on Appellant by depositing copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney of record:

Laura Ruth Baer, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589

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

This 21st day of April, 2017.



DONALD J. ZELENKA
Deputy Attorney General
S.C. Bar No. 5758