THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
R. Knox McMahon, Circuit Court Judge

THE STATE,

Respondent,

v.

DAVID RICHARD WALKER, JR.,

Appellant,

Appellate Case No. 2017-000550.

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

I. Whether Aiken County Sheriff's Deputy Kostyk conducted a valid Terry[2] stop upon Appellant—who Kostyk had reasonable articulable suspicion to believe may be casing a convenience store, who approached Kostyk with his hands behind his back before verbally responding to Kostyk, and who then responded he believed he had an outstanding warrant for murder—such that the trial court properly admitted Appellant's statement, recorded on Kostyk's in-car video, during the State's case-in-chief?

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

2 *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968).

STATEMENT OF THE CASE

In October 2015, the Lexington County Grand Jury indicted Appellant David Richard Walker, Jr. for the December 10, 2012, murder of Catherine "Carrie" Banty, who was his girlfriend and the mother of his child. (R. pp. 1196-97). Deputy Solicitor D. Shawn Graham prosecuted the case on behalf of the Eleventh Circuit Solicitor's Office along with Assistant Eleventh Circuit Solicitor Shannon Davis. (R. p. 1). Sarah H. Mauldin of the Eleventh Circuit Public Defender's Office initially represented Appellant on the charge until he moved to be relieved of counsel and to proceed *pro se.* (R. pp. 1198-99).

The circuit court conducted a hearing on March 25, 2015, pursuant to *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525 (1975). (*Id.*). The circuit court found Appellant competent to stand trial and competent to represent himself pursuant to *State v. Barnes*, 407 S.C. 27, 753 S.E.2d 545 (2010). (*Id*). The circuit court relieved Ms. Mauldin of counsel and ordered she serve as standby counsel for Appellant. (*Id.*).

After a series of pre-trial hearings, Appellant proceeded *pro se* to a jury trial held February 21 through March 1, 2017. The Honorable R. Knox McMahon presided. (R. p. 1). A jury convicted Appellant of the murder of Ms. Banty. (R. p. 1162, lines 8-11). Judge McMahon sentenced Appellant to fifty years' imprisonment with credit for time served. (R. p. 1195, lines 9-13).

This appeal follows. (R. p. 1200).

STATEMENT OF FACTS

According to forensic pathologist Dr. Janice Ross, Carrie Banty died as a result of asphyxiation due to manual strangulation. (R. p. 1030, lines 1-7). Petechial hemorrhages in the victim's eyes substantiated her finding. (R. p. 1026, line 17 – p. 1027, line 9). Dr. Ross also opined that a victim of strangulation would have sustained a significant consistent application of force for four to five minutes, and that it was not necessary to crush one's windpipe to cause death. (R. p. 1027, lines 7-9; R. p. 1028, lines 10-18; R. p. 1029, lines 18-25). In addition to biological evidence of strangulation, the victim had sustained a series of abrasions, marks, bruises and contusions to the bridge of her nose, her neck, chest, left shoulder, upper arm, forearm, knees, left ankle, and the tops of her feet. (R. p. 1019, lines 11-20). The victim also had internal bruising over her collarbones, anterior sternum, chest, and underneath the scalp over the top of her head "just to the right of the midline." (R. p. 1024, lines 16-20). These injuries "were approximately one and a half inches each in the greatest." (R. p. 1026, lines 11-12).

When scheduling the autopsy, Dr. Ross received information that a looped belt was found near the victim's body in a manner suggesting it may have been used as a tourniquet. (R. p. 1006, lines 1-8). Dr. Ross also notated the victim had two parallel, linear bruises on her upper arm which could be consistent with the belt or with the impression of two fingers, as well as what could be a needle puncture in the crux of her elbow. (R. p. 1015, line 24 – p. 1016, line 21). Law enforcement indeed recovered a looped belt by the body and an empty syringe from inside the herby curby trash can outside of the home. (R. p. 694, lines 13-17; R. p. 695, line 21 – p. 696, line 8). The residue inside the syringe tested positive for cocaine and a cutting agent. (R. p. 782, lines 16-23).

However, the postmortem toxicology screen performed on the victim came back negative. (R. p. 778, lines 12-24). She had not used any illicit or prescription drugs prior to her death. (R. p. 776, lines 4-22). In fact, the only positive screen on the victim's toxicology report was for ethanol, or alcohol, at a very low level of 0.016% grams per deciliter. (R. p. 779, lines 3-9). This amount, only slightly above the threshold of 0.010%, was "equivalent to about one beer or slightly less than one alcoholic beverage." (R. p. 779, lines 9-13). But the victim's ocular fluid tested negative for ethanol. (R. p. 780, line 25 – p. 781, line 1). In most cases, where there is a very low level of ethanol in the blood and no ethanol in the ocular fluid, the ethanol in the blood results from postmortem production due to decomposition. (R. p. 781, lines 1-9). Otherwise, the results of these screens indicate that the victim could have ingested one alcoholic beverage "almost immediately prior to death." (R. p. 781, lines 3-6).

The victim was discovered midday on December 11, 2012, when she and Appellant's three-year-old daughter left their home and was found by a neighbor walking near the road, crying and wringing her hands. (R. p. 587, line 14 – p. 588, line 8). The neighbor, Eugene Ray, recognized the girl from one of the trailers at the top of the hill and stopped his truck to speak with her out of concern. The girl led him to her mother. (R. p. 588, line 1 – p. 589, line 25). The little girl thought her mother was dead, so Mr. Ray put the girl in his truck, gingerly entered the trailer, and found the victim lying near the end of the bed in a room down the hall. (R. p. 590, line 8 – p. 591, line 22). Mr. Ray, a CNA, could identify that the victim, without a pulse and cold to the touch, exhibited signs of lividity and rigor mortis. (R. p. 592, lines 1-8; R. p. 603, lines 19-

25). He saw bruises on her arms and face, but not a scratch or bruise on the child.[3] (R. p. 604, lines 4-6). He called 911. (R. p. 592, lines 12-15).

Law enforcement arrived and began working the scene. (R. p. 617, lines 2-21). It was a two-bedroom single-wide trailer with no signs of forced entry. (R. p. 619, lines 3-20). The victim lay face-down on the floor near the foot of a bed. Partially covered by a blanket, someone had colored on her skin with magic markers found in the bedroom. (R. p. 620, lines 5-11). Missing from the home was Appellant, whose ID was located in the pocket of a male's pair of pants and collected from the same room where the victim was located. (R. p. 687, lines 3-9). Other male clothing was located in the dresser in that bedroom, and a pair of men's shoes in the laundry room. (R. p. 687, line 14 – p. 688, line 17). A man's wallet and a wallet belonging to the victim were located inside the vehicle parked on the premises. (R. p. 698, lines 6-14).

Determining that Appellant lived at the victim's residence, being unable to locate him, and learning from his family that he may have discontinued use of some mental health medication, law enforcement entered him into the nationwide NCIC database as a missing and/or endangered person. (R. p. 718, line 1 – p. 719, line 22).

The State presented testimony at trial tending to establish Appellant's whereabouts before and after the victim was discovered by Mr. Ray. Records of Appellant's cell phone data usage were consistent with use of the phone at Appellant's residence and at Lexington Medical Center

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[3] A victim's advocate who tended to the child after she was found by Mr. Ray similarly testified that the child had no bruises, cuts, or scrapes. (R. p. 714, lines 12-24). Relevant to Appellant's version of events, the victim's stepmother testified at trial that she never witnessed the victim abuse or even so much as discipline her daughter. She described her stepdaughter as a wuss when it came to the child. (R. p. 793, line 15 – p. 794, line 25).

from December 7, 2012, until 11:10 PM on December 10, when the phone was apparently turned off. (R. p. 726, lines 22-23; R. p. 735, line 19 – p. 743, line 25).

Also during this time frame, one of the victim's co-workers testified that for two consecutive days, she noticed the victim crying upon her arrival at work. This occurred on December 8 and 9. (R. p. 751, lines 8-20; R. p. 754, lines 6-12). On the eighth, the co-worker conversed with the victim, advising her that she didn't need to be with Appellant. (R. p. 751, line 24 – p. 752, line 3). In the early morning hours of December 9, Appellant was admitted to Lexington Medical Center at 12:06 AM. He was discharged just a couple of hours later at 2:47 AM. (R. p. 726, line 7 – p. 727, line 8).

Appellant resurfaced days later in Aiken County. Around 11:00 PM on December 17, 2012, a Sheriff's Deputy on road patrol noticed Appellant sitting underneath a metal awning at a small business across the street from a convenience store that was frequently targeted for robberies during the holiday season. (R. p. 935, line 23 – p. 937, line 12). Having reason to believe Appellant may be casing the convenience store, the Deputy, James Kostyk, pulled into the parking lot of the business and approached Appellant. (R. p. 937, lines 10-23). Kostyk's body mic and in-car video captured the exchange which was played for the jury. (R. p. 938, line 3 – p. 930, line 18; State's Exhibit 45). Kostyk asked Appellant who he was. Instead of giving a verbal response, Appellant walked towards Kostyk and put his hands behind his back. (R. p. 941, line 24 – p. 942, line 7). Considering the response unusual, Kostyk patted down Appellant for safety. (R. p. 942, lines 7-12). He asked Appellant for identifying information and then asked if he had any warrants. (R. p. 942, line 17 – p. 943, line 4). Appellant answered he did have a warrant and that it was for murder. (R. p. 943, lines 6-10).

As Kostyk testified to and as is exhibited in the video and audio recording of the exchange, Kostyk had Appellant lean against the hood of his patrol car in order to retain a position of bodily advantage if it became necessary to defend himself against Appellant. Kostyk did this after Appellant said he probably had a warrant. (State's Exhibit 45 at 1:30 – 2:08; R. p. 945, lines 5-11). He then asked Appellant, "Whaddya think you got a warrant for, Bud?" Appellant answered, "Murder." (State's Exhibit 45 at 2:43 – 2:51). At that point, Kostyk handcuffed Appellant and had him sit inside the patrol car. (R. p. 945, lines 12-17; State's Exhibit 2 at 2:50 – 4:05[4]).

Kostyk contacted dispatch to corroborate the biographical information Appellant provided and learned that Appellant was listed as a missing and endangered person. (R. p. 943, line 11 – p. 944, line 2). Kostyk transported Appellant to Aiken Regional Medical Center for a mental evaluation. (R. p. 945, lines 18-25). The hospital did not admit him for psychiatric or medical treatment, and Kostyk offered Appellant a ride to Lexington County. (R. p. 946, lines 15-24). Kostyk took Appellant as far as he could into Lexington County, which was an I-20 truck stop at Exit 44. They met an officer from Lexington County Sheriff's Office and Kostyk left. (R. p. 947, lines 1-24).

During this exchange and transport which began on December 17, 2012, and extended into the early morning hours of December 18, there were no warrants issued for Appellant's

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[4] In an exercise of trial strategy and after an *in limine* discussion with the court, Appellant insisted on publishing the entirety of Kostyk's in-car video to the jury during his cross-examination of the witness. (R. p. 951, line 1 – p. 960, line 13; State's Exhibit 2). Originally, State's Exhibit 2 was offered during the *Denno* hearing as a pre-trial exhibit and the State did not intend to publish the entire video to the jury in its case-in-chief. (R. p. 951, lines 7-9; R. p. 364, lines 4-24; R. p. 513, line 9 – p. 515, line 15).

arrest. Appellant was not in custody. (R. p. 946, lines 11-17). He was not handcuffed when Kostyk left Appellant with a Lexington Deputy. (R. p. 947, line 23 – p. 948, line 1).

Law enforcement arrested Appellant for the murder of Carrie Banty on March 4, 2013. (R. p. 723, lines 20-21). At trial, a former cellmate of Appellant testified that Appellant told him he had killed the mother of his child. (R. p. 930, lines 9-21).

Appellant's Presentation at Trial

Appellant delivered an opening statement informing the jury he planned to produce a defense of accident.[5] (R. p. 574, line 3 – p. 576, line 7). Also in his opening statement, Appellant narrated the events leading up to the victim's death, stating he periodically choked the victim five times on the night of her death as a result of a physical fight wherein Appellant felt the need to assert self-defense. (R. p. 576, line 8 – p. 582, line 5). Appellant did not testify and did not present any witnesses at trial. (R. p. 1084, line 4 – p. 1094, line 25; R. p. 1099, lines 11-25). At the trial's conclusion, Appellant did not seek a jury instruction on self-defense.[6] He sought an instruction on involuntary manslaughter. (R. p. 1095, lines 5-22). The trial court denied the request to charge upon the basis that no evidence supported that instruction. (R. p. 1097, line 20 – p. 1099, line 9). In his closing argument, Appellant argued that the facts presented by the State at trial did not meet the elements of murder. (R. p. 1119, line 8 – p. 1142, line 12).

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[5] Inaccurately transcribed as "incident." (R. p. 575, line 19 – p. 576, line 4); *State v. Goodson*, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994) (elements of accident defense).

[6] Pre-trial, Appellant sought immunity under the Protection of Persons and Property Act, S.C. Code Ann. § 16-11-440. Appellant testified on his own behalf at his immunity hearing, delivering a detailed, line-by-line account of his version of the events before, during, and after the murder. (R. pp. 18-168). Appellant's motion was denied upon the basis that there was "no corroboration by a single witness called [by the State] as to any aspect of the defendant's testimony." (R. p. 543, line 19 – p. 545, line 14).

STANDARD OF REVIEW

"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). In Fourth Amendment cases, "an appellate court may reverse only when the trial court's decision is clear error" and not "simply because it may have decided the case differently." *State v. Corley*, 383 S.C. 232, 239, 679 S.E.2d 187, 191 (Ct. App. 2009), *aff'd as modified*, 392 S.C. 125, 708 S.E.2d 217 (2011). This standard binds the appellate court to the lower court's "fact finding in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law." *State v. Asbury,* 328 S.C. 187, 493 S.E.2d 349 (1997).

ARGUMENT

I. If found preserved for review, the record supports the trial court's admission of the in-car video of Aiken Deputy Kostyk's initial interactions with Appellant because the *Denno* record established that Kostyk lawfully engaged Appellant in a Terry stop supported by articulable facts amounting to reasonable suspicion, where Appellant appeared to Kostyk to be casing a convenience store, where Appellant approached Kostyk with his hands behind his back before verbally responding to Kostyk, and where Appellant then stated he believed he had an outstanding warrant for murder.

A. Introduction

This issue before this Court is limited to the admissibility of the in-car video of Aiken County Sheriff's Deputy Kostyk. The video clip is nearly 3 minutes long. (State's Exhibit 45). Testimony on this issue was presented at various points pre-trial. Appellant sought an immunity hearing at which he testified on his own behalf and addressed his impression of his interaction with Kostyk. (R. p. 53, lines 11-20; R. p. 129, line 2 – p. 139, line 18). Appellant also called Kostyk to testify at the immunity hearing and asked him questions concerning the Terry stop at

issue on appeal. (R. p. 271, line 6 – p. 285, line 25). Later, the State initiated a *Denno*[7] hearing during which Kostyk testified a second time. (R. p. 346, line 9 – p. 372, line 23). The trial court made clear that it would consider all of the testimony presented during the immunity hearing as well as the *Denno* hearing prior to ruling on the admissibility of Kostyk's in-car video (or any of Appellant's statements subject to the *Denno* hearing[8]). (R. p. 154, line 3 – p. 155, line 23; R. p. 157, lines 17-23; R. p. 291, line 23 – p. 292, line 9).

Integral to the issue on appeal is the State's framing of the portion of the in-car video it sought to introduce during its case-in-chief. (*See* State's Exhibit 45; R. p. 364, lines 4-24). As direct evidence, the prosecution sought to introduce the video only up "to the part where he's asked about warrants and [Appellant initially said] murder warrants." (R. p. 363, lines 14-16; R. p. 513, lines 13-16). The following portion of the video, the State clarified, was being vetted only for impeachment.[9] (R. p. 363, lines 16-20, quoting State's Exhibit 2). The State argued that in

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

8 Appellant additionally sought suppression of statements made at a later point in State's Exhibit 2, after he asked for an attorney, as well as a series of other statements made to officers from other jurisdictions on the same night and carrying over to the next day. (R. p. 539, line 20 – p. 543, line 20). While the Court ruled these additional statements admissible for the purposes sought, (*Id.*), none of these additional statements were introduced by the State at trial. While the State enunciated an intention to reserve the remainder of Appellant's statements for impeachment, Appellant did not testify. The trial court indicated that a portion of the Aiken County in-car video prior to the attorney request was admissible only for impeachment. (R. p. 543, lines 2-3).

9 The State later clarified that it did not seek to introduce any further portion of State's Exhibit 2 during its case-in-chief, or even for impeachment should the opportunity arise:

> Once past that, Your Honor, he's placed into handcuffs at that point, and we move into the next question, which is something like you, you've murdered somebody, and the testimony from Sergeant Kostyk is yes. The State would claim that that is an impeachable, that it would not be used in its case in chief, but [for] impeachment purposes 'cause [Kostyk's] response is you murdered somebody and [Appellant's] answer was yes. And then it's I said yes, sir. Although there could be a question of voluntariness after that point, there's nothing the State

this initial portion of the video, Kostyk did not engage Appellant in anything other than investigative detention. And, the State posited, the questions Kostyk asked Appellant during this time frame were permissible of a Terry stop, being that they were administrative questions rather than investigatory. (R. p. 513, line 9 – p. 514, line 8).

In favor of suppression, Appellant argued that the entire Terry stop was inaccurate and invalid, intimating he was in custody at the time Kostyk asked him the question about any outstanding warrants. R. p. 524, line 24 – p. 525, line 3). Appellant furthered that the officer did not have valid articulable facts to initiate a Terry stop upon Appellant. (R. p. 527, lines 3-12). Appellant argued the Terry stop occurred in violation of his Fourth Amendment rights. (R. p. 528, lines 9-17; R. p. 529, line 15 – p. 531, line 20). Also, that Kostyk was overly aggressive when he conducted the Terry stop. (R. p. 528, line 18 – p. 529, line 14).

In addition to these legal arguments, the trial court's ruling included consideration of the following: the testimony of all of the individuals who testified during the *Denno* hearing, Appellant's testimony, and the in-car video as contained in State's Exhibit 2. (R. p. 532, lines 3-6; R. p. 537, line 10 – p. 538, line 5). The trial court conducted a comparative analysis of *Terry v. Ohio*, *infra*, with statements made by Appellant to Kostyk prior to Appellant's request for counsel. (R. p. 538, lines 6-12).

The court found the Terry stop valid, further remarking that Kostyk's observations and view "track[ed] the same as Detective McFadden's did in *Terry v. Ohio.*" (R. p. 538, lines 6-12). The court found "that at no time during the period of time at which certain identifying information was given and questions were asked to Mr. Walker by the Aiken deputy was Mr.

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wants to use.

(R. p. 514, line 14 – p. 515, line 2).

Walker in custody." (R. p. 538, lines 13-16). The court's reasoning made specific reference to the conditions upon which Kostyk encountered Appellant:

> As far as that tape is concerned that it was perhaps not a roadside but a closed -- a parking lot at a closed business with a garage type area, open garage type area, with a couple of picnic tables then a darkened location where the officer observed Mr. Walker, and then his attention is continually peaked, and then even more so upon him driving up and Mr. Walker coming towards him.
>
> He asked – he, quite frankly, if you view that tape even up to the point of when he is handcuffed, Mr. Walker is handcuffed, the officer treats Mr. Walker very respectfully, calls him by his first name, David, of course has him identify himself, which Mr. Walker does. The officer senses are – I think he testified he was an eight-year veteran and a supervisor, road patrol deputy supervisor with Aiken County. He observed his behavior, searched him for weapons. He has him get in a position of, I guess I would call it, I don't recall the officer's exact terminology, of inferiority, I guess, of where he's leaving on the front of the patrol car and his body weight is more on the patrol car and his feet are further back away. That would have been a front leaning position. And the officer barely has his hands on him at that point, and is talking into a [ ] shoulder microphone trying to get some information.
>
> When he asked him about warrants, do you have any warrants, and Mr. Walker kind of turns his head to the right and answers yes or maybe. And he says well what for? And he says murder. The officer's kind of surprised. Murder? Huh? Or huh, murder? And they attempt to continue to gain some information.

(R. p. 538, line 16 – p. 539, line 19).

Once ruled admissible, the State introduced as evidence a truncated version of State's Exhibit 2, entered into evidence and published as State's Exhibit 45, which includes only the portion sought for introduction in the case-in-chief. (R. p. 939, lines 13-24).

B. The issue on appeal is unpreserved because Appellant renewed his objection to admission of the in-car video on a different basis than offered at the time of his original objection.

When a court rules upon the admissibility of a piece of evidence *in limine*, proper issue preservation requires an objection contemporaneous to its introduction. *State v. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001). A motion to exclude evidence made at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination. *Id.* The moving party must make a contemporaneous objection when the evidence is offered for introduction before the jury. *State v. Simpson*, 325 S.C. 37, 479 S.E.2d 57 (1996).

The aggrieved party must also consistently object to the challenged evidence upon the same legal basis in order to preserve the objection for appellate review. "A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). "[A]n objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge." *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001).

Moreover, an issue will be precluded from appellate review when the substance of the objection at trial does not comport with the specific issue raised on appeal. *State v. Dickman*, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000); *State v. Tucker*, 319 S.C. 425, 462 S.E.2d 263 (1995). "A party may not argue one ground at trial and an alternate ground on appeal." *State v. Dunbar*, *supra*; *State v. Prioleau*, *supra.*

Also relevant to the preservation issue in this case is the standard governing *pro se* representation. "A *pro se* litigant who knowingly elects to represent himself assumes full responsibility for complying with substantive and procedural requirements of the law." *State v.*

Burton, 356 S.C. 259, 265 n.5, 589 S.E.2d 6, 9 n.5 (2003); *see State v. Porter*, 389 S.C. 27, 38 and n.7, 698 S.E.2d 237, 243 and n.7 (Ct. App. 2010) (addressing issue preservation by *pro se* litigant with standby counsel). Where a *pro se* litigant fails to properly motion for suppression before the trial court, the issue will not be preserved for appellate review. *State v. Burton*, *supra* at 265, 589 S.E.2d at 9 (suppression issue not preserved for appeal where *pro se* defendant objected to the evidence only at the time he moved for a directed verdict). It follows that an issue cannot be preserved for review where the legal doctrine forming the basis for the *in limine* objection is not the same legal doctrine cited when the objection is renewed contemporaneous to the introduction of the challenged evidence at trial. *Id.*; *State v. Dunbar*, *supra*; *State v. Prioleau*, *supra.*

In this case, Appellant renewed his objection on an alternative basis than was previously argued. Pre-trial, Appellant objected to the validity of the Terry stop and posited that Kostyk acted aggressively, engaging Appellant in custodial interrogation such that the in-car video was not admissible. (R. p. 524, line 24 – p. 525, line 3; R. p. 528, line 18 – p. 529, line 14). He also argued that there existed no grounds for investigative detention such that Kostyk stopped him in violation of the Fourth Amendment. (R. p. 527, lines 3-12; R. p. 528, lines 9-17; R. p. 529, line 15 – p. 531, line 20). But when the State sought to introduce the in-car video at trial, Appellant objected on the basis of relevance. (R. p. 938, line 10 – p. 939, line 12).

Appellant did not present the same legal bases for objection when the in-car video was introduced at trial. Because Appellant cannot argue one issue at trial and another on appeal, Appellant failed to preserve the issue presented for appellate review. *State v. Burton, supra*; *State v. Dunbar*, *supra*; *State v. Prioleau*, *supra.*

C. *Kostyk articulated particularized facts in support of reasonable suspicion justifying a Terry stop of Appellant and Kostyk's testimony is corroborated by his in-car video such that the record supports the trial court's admission of Appellant's statements made at the time Kostyk came upon Appellant.*

"The Fourth Amendment applies to all seizures of a person, including only a brief detention." *State v. Anderson*, 415 S.C. 441, 447, 783 S.E.2d 51, 54 (2016). A person "can be seized under the Fourth Amendment without being arrested under state law," and not all seizures constitute unlawful detention under the Fourth Amendment to the United States Constitution. *State v. Brannon*, 388 S.C. 498, 503, 697 S.E.2d 593, 596 (2010) (citing *Terry v. Ohio*, 392 U.S. 1, 16, 88 S.Ct. 1868, 1877 (1968)). A Fourth Amendment seizure not amounting to an arrest may occur "when a reasonable person, in view of all the circumstances of a particular case, would not believe he was free to leave." *Id.* (citing *Michigan v. Chesternut*, 486 U.S. 567, 573, 108 S.Ct. 1975, 1979 (1988)). These brief detentions by a deputy are justified and proper within the boundaries of the Fourth Amendment under certain circumstances.

"A police officer may stop and briefly detain and question a person for investigative purposes, without treading upon his Fourth Amendment rights, when the officer has a reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is involved in criminal activity." *State v. Woodruff*, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct. App. 2001). An officer's determination of the existence of reasonable suspicion requires consideration of the "whole picture" upon which the detainment is based. *Id.* "And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, *supra* at 21, 88 S. Ct. at 1880; *State v. Woodruff, supra* (reasonable suspicion "requires a particularized and objective basis that would lead one to suspect another of

criminal activity"). The analysis considers the totality of the circumstances. *State v. Culbreath*, 300 S.C. 232, 236, 387 S.E.2d 255, 257 (1990), *abrogated on other grounds by Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301 (1990).

If during the stop "the officer's suspicions are confirmed or further aroused, the stop then may be prolonged and the scope enlarged." *Id.*; *State v. Corley*, 383 S.C. 232, 240, 679 S.E.2d 187, 191 (Ct. App. 2009), *aff'd as modified*, 392 S.C. 125, 708 S.E.2d 217 (2011) (modified to determination that the vehicle stop was justified based on presence of reasonable suspicion, not probable cause). An officer may question the individual engaged in the investigative detention so long as the scope and duration of the stop remains "strictly tied to and justified by the circumstances that rendered its initiation proper." *State v. Corley*, *supra* at 241, 679 S.E.2d at 192; *Cf. State v. Woodruff, supra* at 546, 544 S.E.2d 290 ("Generally, the decision to stop an automobile is reasonable where the police have probable cause to believe a traffic violation has occurred.").

Since the officer is investigating whether criminal activity is afoot, the officer may take steps during the brief detainment to investigate the circumstances provoking suspicion. "Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." *Berkemer v. McCarty*, 468 U.S. 420, 439, 104 S. Ct. 3138, 3150 (1984). Additionally, "the taking of standard identification information does not violate *Miranda*" when done during a Terry stop. *United States v. Taylor*, 799 F.2d 126, 128 (4th Cir. 1986). If, during the Terry stop, the suspect gives incriminating information in response to a ministerial question, suppression is not required because "the officers had no reasonable expectation that their questions would be likely to elicit such information." *Id.*

When engaged in a Terry stop based upon articulable facts supporting reasonable suspicion, the suspect is not considered to be "in custody" or to have unwittingly subscribed to "custodial interrogation" for Fourth Amendment purposes—even if few persons would feel free to either depart from the situation or disobey the officer. *State v. Corley*, *supra* at 243, 679 S.E.2d at 187 (citing *United States v. Sullivan*, 138 F.3d 126, 130 (4th Cir. 1998)). *Miranda* is not required by this situation. *Id.* "The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that Terry stops are subject to the dictates of *Miranda*." *Berkemer v. McCarty*, *supra* at 440, 104 S. Ct. at 3150.

Particular attention to the facts justifying the stop in *Terry v. Ohio* aids in the disposition of the case at bar. In *Terry*, the United States Supreme Court defined the parameters of an investigative detention, thereafter dubbed a Terry stop. 392 U.S. 1, 88 S.Ct. 1868. An officer in plainclothes was on mid-afternoon patrol when he noticed Terry, Chilton, and Katz in a manner that tipped his suspicions. *Id.* at 5, 88 S.Ct. at 1871. For 30 years the officer had been assigned to the vicinity, patrolling for shoplifters and pickpockets. *Id.* The officer observed Terry, Chilton, and Katz casing a store on the block where they stood: they were "pacing, peering and conferring" near a store window in a repetitive series of actions that aroused the officer's suspicions and made him fear they may have a gun. *Id.* at 6, 88 S.Ct. 1872. The officer, intending to investigate their intentions, approached the three men, identified his occupation, and asked their names. *Id.* He conducted a frisk of Terry and felt a pistol in an overcoat pocket. Upon this discovery, the officer ordered all three men into the storefront next to which they stood, had each turn and place his hands on the wall, and frisked each of the three men. *Id.* at 7, 88 S.Ct. at 1872. Seizing each of two guns located between the three men, the officer called for the men to be taken to the station for formal charges. *Id.* The Court held the investigative detention permissible

on these facts, "justified in part upon the notion that a 'stop' and a 'frisk' amount to a mere 'minor inconvenience and petty indignity,' which can properly be imposed upon the citizen in the interest of effective law enforcement on the basis of a police officer's suspicion." *Id.* at 10111, 88 S. Ct. at 1874.

The issue before this Court is whether Kostyk conducted a valid investigatory stop within the parameters of *Terry v. Ohio* when he approached Appellant and engaged him in a brief series of biographical and investigatory questions. Unlike many cases after *Terry*, the case at bar does not analyze a traffic stop. Rather, Appellant was engaged in an investigative detention because, like Terry, Chilton, and Katz, it appeared he could be casing a convenience store in an area known for elevated crime during the winter holiday season. Turning to the facts before this Court, Kostyk's *Denno* testimony supports the trial court's admission of Appellant's initial statements from the Terry stop, as does his in-car video. *State v. Evans*, 354 S.C. at 583, 582 S.E.2d at 409 (2003) ("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."). Appellant's pre-trial assertions are simply not corroborated by the video evidence.

The Testimony

While testifying in furtherance of his immunity hearing, Appellant represented that Kostyk "did some unlawful tactics" and apprehended him that night in Aiken County. (R. p. 53, lines 12-14; R. p. 129, lines 2-4). He testified that Kostyk came upon him "very aggressively and very hostile . . ." and questioned him prior to "issuing [his] rights." (R. p. 130, line 6 – p. 131, line 13). Appellant testified that Kostyk forced him to remain in the patrol car and interrogated him for the duration of their interaction, even after Appellant stated he wanted a lawyer. Appellant expressed he was never free to leave the custody of this officer. (R. p. 133, line 14 – p.

139, line 18). Appellant testified that Kostyk arrested him for murder. (R. p. 135, lines 18-20). Appellant claimed that Kostyk's in-car video of this interaction had been tampered with. (R. p. 131, line 21 – p. 133, line 5).

Appellant called Kostyk to testify during his immunity hearing, but elicited testimony concerning the validity of the Terry stop. (R. p. 273, line 9 – p. 280, line 21). Kostyk disagreed with Appellant's characterization of their interaction, with Kostyk testifying that Appellant was not under arrest and in fact had no outstanding warrants at the time of the Terry stop. (R. p. 279, line 18 – p. 280, line 14).

The State called Kostyk to testify at the inception of the *Denno* hearing and Kostyk articulated the circumstances pertaining to his investigative detention of Appellant. (R. p. 346). Kostyk, a Staff Sergeant with the Aiken County Sheriff's Office, was on road patrol in the Western end of Aiken County on December 17, 2012. He was road patrol supervisor. (R. p. 346, lines 9-22). Kostyk was aware that Aiken County experienced an uptick in armed robberies and other crime during this time of year. (R. p. 347, lines 4-7). That night, Kostyk was specifically surveilling a convenience store in the event of a robbery. (R. p. 347, lines 8-10). It was during this time Kostyk noticed Appellant. He sat across the street at a grocery store adjacent to a 24-hour convenience store. (R. p. 348, lines 3-4). Appellant "was concealing himself under an awning and he appeared to be watching the convenience store." (R. p. 347, lines 11-15). It was almost 11:00 PM. (R. p. 347, lines 17-21). Because the store at which he sat was closed, Appellant had no reason to be there. (R. p. 347, lines 22-25). These observations drew Kostyk's attention. (R. p. 347, line 12).

Kostyk "watched him for awhile." (R. p. 348, line 10). When the circumstances aroused Kostyk's suspicions enough he notified another deputy that he was going to make contact and

approached Appellant. (R. p. 348, lines 11-13). Kostyk, in his patrol car, approached Appellant and asked him what he was doing. (R. p. 348, lines 14-17). "He didn't really respond, other than he walked toward me." (R. p. 351, lines 24-25). "He was putting his arms behind his back before I even asked him to do anything." (R. p. 352, lines 1-2).

As a result Appellant's approaching him, which Kostyk characterized as odd, Kostyk "motioned for him to turn around to see if he had any weapon on him that I could see from a distance." (R. p. 348, lines 19-21). According to Kostyk, this would be a normal request based upon Appellant's response, or lack thereof. (R. p. 348, lies 22-25). Kostyk "had him spin around" so Kostyk could physically pat him down to check for a weapon. Kostyk found none. (R. p. 352, lines 2-5). Appellant was not in custody and the maneuver was for officer safety. (R. p. 349, lines 1-4).

Kostyk still believed Appellant was behaving oddly, so he "asked him if he had a warrant or something and [Appellant] responded that he did." (R. p. 352, lines 5-7). Kostyk testified this would be a routine question to ask in a situation where the suspect's behavior was concerning him. (R. p. 352, lines 8-10). As a result of Appellant answering "yes," Kostyk asked Appellant to put his hands on the hood of the patrol car and directed Appellant to shift his feet backwards to put him "off balance for [Kostyk's] safety." (R. p. 352, lines 16-20). Appellant complied. (R. p. 352, lines 12-17).

At this time, Appellant not in custody, but "was being detained to . . . verify what he had told" Kostyk. (R. p. 352, lines 21-23). The purpose of the detention at that point was to see "if he had a warrant." R. p. 352, lines 23-24). Kostyk also asked Appellant his name and date of birth in order to relay that additional information to dispatch. (R. p. 353, lines 1-2). "While [Kostyk] was waiting for the response to come back, [Kostyk] asked him what he thought he had a warrant

for and he responded for murder." (R. p. 353, lines 3-5). This exchange took place within the first two minutes of coming into contact with Appellant. (R. p. 355, lines 18-20; State's Exhibit 45)

Appellant appeared to comprehend Kostyk and did not smell as if he had been drinking. (R. p. 349, lines 16-21). Appellant briefly, curtly, responded to Kostyk's questions. (R. p. 349, lines 19-23). Kostyk issued no threats or promises and Appellant's responses were voluntary. (R. p. 350, lines 2-8). Kostyk disagreed with Appellant's interpretation that Kostyk acted in an aggressive and threatening manner. (R. p. 357, lines 4-16).

Kostyk's interaction with Appellant was caught on his in-car camera from the inception of the approach. (R. p. 350, lines 14-21). The in-car video demonstrates no aggressive or threatening behavior on the part of either Kostyk or Appellant. (State's Exhibits 2 and 45). At no point did Appellant ask Kostyk to let him go, and at no point was Appellant taken under arrest or informed he was in fact in custody. (R. p. 359, line 22 – p. 360, line 1). Kostyk did not place Appellant under arrest. (R. p. 360, lines 2-3). The in-car video corroborates the events as testified to by Kostyk as relevant to the *Denno* hearing.[10] (R. p. 361, lines 11-25; State's Exhibit 45; State's Exhibit 2 at 0:00-2:51).

[10] State's Exhibit 2 contains the entirety of the in-car video, also free of threats or aggression; however, as previously denoted, the State sought only to introduce the portion of the video as shown in State's Exhibit 45 at trial. (R. p. 363, line 14 – p. 364, line 24). Thus, Respondent has limited its analysis to the portion of the video sought to be introduced in its case-in-chief, which is the same portion of the video that was in fact published and accompanied by trial testimony from Kostyk. (R. p. 940, line 12 – p. 945, line 17).

Discussion

The trial court properly admitted the Terry stop and Appellant's statements to Kostyk as demonstrated in State's Exhibit 45. Kostyk at no point engaged Appellant in any communication amounting to custodial interrogation. Kostyk conducted a textbook Terry stop. As in *Terry*, Kostyk was examining an area which was, at this time of year, known to have an uptick of criminal activity. Appellant sat underneath an awning on the site of a closed mom-and-pop store. It was dark outside. Appellant was alone. It was nearly 11:00 PM. The store was dark. There was no reason for Appellant to be sitting out underneath the awning of the closed retail store. The facts and circumstances make it reasonable that Kostyk would approach Appellant to investigate whether criminal activity was indeed afoot. *Terry v. Ohio*, 392 U.S. at 21-22, 88 S.Ct. at 1880.

The fact that Kostyk was in a darkened patrol car across the way observing Appellant, and the remaining surroundings, is of no consequence. His actions in this regard are no different than that of the plainclothes officer in *Terry*. 392 U.S. at 5-6, 88 S.Ct. at 1871-72. As a result, the initiation of the Terry stop was justified by the circumstances: based upon his experience as a road patrol supervisor with the Aiken County Sheriff's Department, Kostyk had reasonable, articulable suspicion enough to address with Appellant whether he may be casing the convenience store across the street. *Id.* at 21, 88 S. Ct. at 1880; *State v. Woodruff*, 344 S.C. at 546, 544 S.E.2d at 295.

Kostyk's encounter with Appellant evolved in a manner justifying the inquiries made. Kostyk can be heard asking Appellant for information on six discrete points: (1) What are you doing, guy? (2) Do you have any ID on you? (3) What's your name? (4) What's your birthdate? (5) You got any warrants? (6) What do you think you got a warrant for, bud? (State's Exhibit 45). The record bears out that each of these questions either fall into the purely ministerial

category or constitute investigatory questions whose reasonableness is borne out by Kostyk's articulation of reasonable suspicion. Both categories are permissible during a Terry stop as questions meant to confirm or dispel Kostyk's suspicions. *Berkemer v. McCarty*, 468 U.S. at 439, 104 S. Ct. at 3150.

Kostyk had no reason to believe the suspect would put his hands behind his back in response to Kostyk's asking him what he was doing. This gesture by Appellant was in and of itself an incriminating physical response. It signaled that he was potentially a wanted man. It was then reasonable to then ask Appellant if he had any warrants, particularly when he had not verbally responded to Kostyk at this point. *United States v. Taylor*, 799 F.2d at 128. Kostyk's questions serviced the particular circumstances giving rise to the continuation of the investigative detention. *State v. Corley*, 383 S.C. at 240, 679 S.E.2d at 191. Suppression is not required in this circumstance, where the scope of Kostyk's questioning was tailored to the circumstances arousing his suspicion. *State v. Culbreath*, 300 S.C. at 236, 387 S.E.2d at 257. Further, Kostyk did not prolong the encounter or exceed the scope of the investigative detention when he asked Appellant what his warrant may be for. Rather, this was a reasonable follow-up question meant to garner information that Kostyk could compare with information he may receive from dispatch. Kostyk needed this information for the purpose of confirming or corroborating Appellant's announcement and for the purpose of determining whether the Terry stop should cease or shift gears. *Bekemer v. McCarty*, 468 U.S. at 439-40, 104 S.Ct. at 3150.

Kostyk also applied no physical or psychological force which would drag the investigative detention into the realm of a custodial interrogation. *United States v. Sullivan*, 138 F.3d at 132. Only when a person "is detained 'to a degree associated with formal arrest' will he be entitled to the *Miranda* protections for in-custody interrogations." *Id.* at 130 (quoting

Berkemer v. McCarty, *supra* at 440, 104 S.Ct. at 3150). The exchange did not occur in secret but rather in an open parking lot. Appellant was never placed under arrest, nor informed of any charges or ongoing investigations. Appellant did not actually have any pending charges or warrants at the time. The fact that Kostyk conducted a pat-down of Appellant and placed him in a secure position on the hood of the car is not dispositive of whether Appellant was in custody in this particular case. In conjunction with a valid investigative detention, an officer may conduct a Terry frisk of the individual to ascertain whether they may harbor a weapon that may be used against them, regardless of whether the officer is "'absolutely certain that the individual is armed.'" *Milledge v. State*, 422 S.C. 366, 375-76, 811 S.E.2d 796, 801 (2018) (quoting *Terry v. Ohio*, *supra* at 27, 88 S.Ct. at 1883).

"[T]he prevailing justification for conducting a Terry frisk is not simply crime prevention, but the more immediate need of assuring officer safety." *Milledge v. State*, 422 S.C. at 376, 811 S.E.2d at 801 (2018) (finding an order for a driver to exit the vehicle during a lawful Terry stop a de minimis intrusion). Of import, Appellant had already answered that he believed he had an outstanding warrant when Kostyk sought to position his hands on the hood of the car. Kostyk positioned Appellant in this manner at this time purely to maintain his safety while he contacted dispatch to confirm or deny whether Appellant was in fact subject to arrest. On this point, one could observe Kostyk to have followed Appellant's own lead based on the information Appellant gave him.

At no time were the conditions of this appellant's detainment sufficient for the court to determine Kostyk placed Appellant custody, acted in an overtly aggressive or threating manner, interrogated Appellant, or that the circumstances lending to the Terry stop were insufficient to warrant the continuation of the investigative detention. *Miranda* was not required as Appellant

contends.

CONCLUSION

Because the issue presented by Appellant is not preserved for this Court's review and, in the alternative, because Kostyk's initial interaction with Appellant as exhibited in State's Exhibit 45 does not amount to custodial interrogation, Respondent respectfully submits that this Court should affirm Appellant's conviction for murder.

Respectfully submitted,

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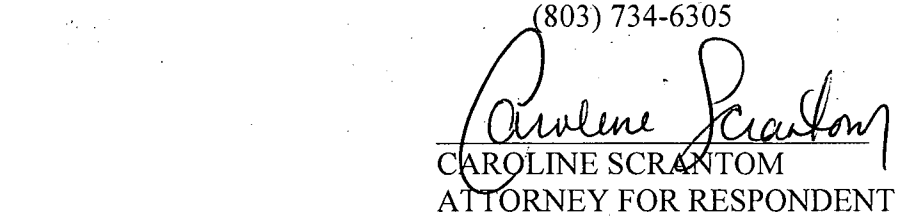

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July 19, 2018
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
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SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
R. Knox McMahon, Circuit Court Judge

THE STATE,

Respondent,

v.

DAVID RICHARD WALKER, JR.,

Appellant,

Appellate Case No. 2017-000550.

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."

Respectfully submitted,

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