STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

The State of South Carolina,

Petitioner,

vs.

Marshell Hill,

Respondent.

Opinion No. 5605 (S.C. Ct. App. filed Nov. 28, 2018)

Petition for Writ of Certiorari

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Because Respondent was not in custody when he made an unwarned admission and he retained a genuine choice to not make any further statements after being provided Miranda warnings, the Court of Appeals erred in finding "insufficient" evidence supported the trial court's ruling admitting the warned and unwarned statements. The Court of Appeals failed to apply the correct standard of review. Further, any error was harmless.

STATEMENT OF THE CASE

Respondent Hill was tried for murder on April 11, 2016, and convicted by a jury of voluntary manslaughter. The Honorable Perry H. Gravely sentenced Hill to twenty-two years' imprisonment. Hill appealed the conviction and sentence. Following briefs and oral argument, the Court of Appeals reversed the conviction and sentence in a published opinion on November 28, 2018. State v. Hill, ___ S.C. ___, 822 S.E.2d 344 (Ct. App. 2019). The State petitioned for rehearing on December 13, 2018. The Court of Appeals denied the petition for rehearing on January 17, 2019.

STATEMENT OF FACTS

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

Jackson v. Denno hearing

Deputy Brandon Napolitano responded to Hill's residence on August 14, 2013. Hill wore

boxer shorts and smelled of alcohol. Hill said he drank a pint of vodka. Hill was intoxicated. R. pp. 8-9. Hill explained the deceased, Billy, was a homeless man and Hill's drinking buddy. Hill was not in custody. Hill told him Billy was alive at 11 p.m., but he subsequently found Billy slumped over in a chair and not breathing. Deputy Napolitano also interviewed Hill's housemate. R. pp. 9-12.

Deputy Napolitano spoke with Hill again thirty or forty minutes later. Hill told Deputy Napolitano that Billy arrived at 9 p.m., scratched and bruised. According to Hill, Billy said he had trouble walking. Hill fetched Billy a glass of water. Hill subsequently found Billy slumped over at 11:52 p.m. Hill claimed they never had a verbal or physical altercation before. R. pp. 12-13.

Investigator Michael Downey secured the crime scene. Downey explained Hill was not a suspect, "I knew he was the resident is all I knew at that time." R. pp. 22-24 (direct quote, R. p. 24, lines 24-25). When Downey asked Hill what happened, Hill said he gave Billy "some shots" that night. Billy left but returned around midnight intoxicated. Billy grabbed the screen door and fell outside backwards. Hill claimed he checked on Billy at 6-7 a.m., then told his housemate, Barksdale, that Billy was not breathing. Investigator Downey explained he did not read Hill Miranda warnings because he was not a suspect. R. pp. 25-27. Hill was intoxicated, but walked to the patrol car under his own power. R. pp. 27-28. Hill did not challenge his statements to Investigator Downey or Deputy Napolitano.

Investigator Mike Fortner, the lead investigator, responded to the homicide scene on August 14. He determined Hill was too intoxicated to interview that day. Hill was transported to jail for an outstanding bench warrant, but was soon released. R. pp. 36-38. So Investigators Fortner and Bailey went to Hill's house the next day, and Hill agreed to ride with the investigators to the law

enforcement center. Hill was not in custody, but just a witness. R. pp. 38-39. Investigator Fortner admitted some suspicion, "Sure. I mean, we don't know who did it so everybody's a potential suspect. But we were interviewing him as a witness that day." R. p. 39, lines 15-21.

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

Investigators Fortner and Bailey interviewed Hill at a desk in an office with six desks. It was about thirty feet by twenty feet in size. Hill sat next to Investigator Fortner's desk. R. pp. 40-41. He did not give Hill Miranda warnings because "he was not in custody and I was interviewing him more as a witness, as somebody that might be able to provide some information as to what had taken place." R. p. 41, line 24 – p. 42, line 3. At the time, the Sheriff's Office at that location did not have video equipment and when they interviewed suspects as opposed to mere witnesses, the investigators were allowed to use the police department's interview rooms which were equipped with video recording equipment. R. pp. 41-42.

Hill offered an explanation for what happened and Investigator Fortner typed out a statement for Hill's signature. This was typed on a victim/witness form because Hill was not a suspect. The Sheriff's Office uses a different form for suspects. R. pp. 43-45. Investigators Fortner and Bailey left

the room to discuss Bailey's previous interview with Hill's housemate, Michael Barksdale. They noted discrepancies between the two housemates' version of events. R. p. 46. The investigators returned and asked Hill whether Billy tried to steal his television. Hill looked like he was about to cry. He "broke down" and said Billy tried to take his television so Hill "tapped" Billy twice. Investigator Fortner responded "all right" and promptly ended the interview. This was the first time Hill ever mentioned using any force on Billy. R. pp. 46-47.

Consequently, the investigators took Hill across the hallway to the Greenville City Police Department interview room and provided him Miranda warnings from their standard form for suspects. The reason was because Hill became a suspect and not merely a witness. Investigator Fortner also explained to Hill he would video-record the interview. R. pp. 47-48. Investigator Fortner explained Hill his Miranda rights and asked Hill to sign the form. Hill declined, advising Investigator Fortner he was concerned signing the form would affect his eligibility to receive disability payments. Hill indicated he wanted to talk with the officers though. After Investigator Fortner spoke on the phone with the prosecutor, the investigators proceeded with the interview without Hill signing the form. R. pp. 49-51; pp. 63-64. **Investigator Fortner testified Hill appeared capable of making his own decisions.** This is apparent from Hill's relaxed demeanor in the video and his determination to learn the State's evidence and craftily attempt to negotiate his release. After the interview, in which Hill admitted hitting Billy with a walking stick, the investigators arrested Hill. R. p. 53, p. 58; State's Exhibit No. 81.

Hill's testimony to support motion under castle doctrine

Hill claimed during his castle doctrine hearing that he asked Billy to leave and laid down his

bedroom. He returned to find Billy behind his television set. Hill was scared as Billy walked towards Hill and pushed Billy then swung his stick. R. p. 74. He wrestled with Billy until Billy grabbed the screen door, fell backwards, and tore the screen door of the hinges. Hill found Billy the next morning. R. pp. 72-77.

The suppression hearing continues the next day

The suppression hearing continued the next day when Investigator Bailey testified. He went to the crime scene and spoke to Hill briefly, but determined Hill was too intoxicated to interview. Hill was not a suspect in the crime that day. R. pp. 105-07. The investigators spoke with Hill the next day, at Hill's house. Hill was sober and he agreed to go with them to the police station. They agreed to give Hill a ride back home after the interview. Investigator Bailey explained they were just giving Hill a ride to the station, he was not in custody. R. pp. 107-08.

The interview took place in the shared office with six desks. After their initial interview with Hill, the investigators left the room to discuss some inconsistencies they noticed between Hill and Barksdale's version of events. They returned and asked Hill about his television. Hill's demeanor changed and he said Billy held television under his arm, that made Hill mad, and he hit Billy. He did not say what he hit Billy with. R. pp. 109-11. The investigators stopped to take Hill to the Greenville Police Department's interview room and advised Hill of his rights. R. p. 112. Investigator Bailey explained Hill told them he drank that day, but Hill did not appear to be drunk like the day before. R. pp. 117-18. Investigator Bailey testified Hill appeared to be sober. R. p. 129.

Hill testified during the suppression hearing. He claimed he drank a pint of vodka on the 15th before the investigators arrived. He claimed he did not feel like he could leave the station. R. p.

135. He also claimed when he told investigators he would speak "off the record," that meant what he said could not be held against him. R. pp. 134-37. On cross-examination, he was asked why he did not decline the investigators' request to go with them to the station. **He explained he thought it would be "rude or disappointing" to say no.** R. p. 138. He admitted he was mad about the television, explaining, "I didn't see why somebody that you helped would do something like that." R. p. 140, lines 12-16. Hill agreed he voluntarily gave his statement to officers at Investigator Fortner's desk. R. p. 140, lines 17-23. While Hill still claimed he wanted what he told officers to be "off the record," **Hill admitted he wanted them to hear what he had to say and agreed that when officers asked him if he wanted to talk, he emphatically said "yes."** R. p. 143, lines 6-20.

The following exchange occurred during direct examination:

> Q: And when Investigator Bailey, the gentleman who just testified a few minutes ago, when he walked out and came back in and said that you can speak as long as it's your decision and you don't have to sign the statement, did you realize it was still your decision?
>
> A: After I had said "off the record," (affirmative nod).

R. p. 144, lines 7-15.

Jury trial

Michael Barksdale was the State's first witness. At the time of trial he still was Hill's housemate and friend. R. p. 190; pp. 197-98. Barksdale knew Billy for about ten or twelve years. Billy was homeless, he was not violent, and Barksdale never knew him to steal. R. pp. 180-81. Barksdale testified Billy and Hill were friends and never had any past disputes. They drank together. R. p. 181. Most of the time, Hill walked with a cane. R. p. 182. Barksdale came home between ten and eleven p.m. Billy lay on the floor, face up, with a cut over his eye. No movement. R. pp. 183-

84. However, he saw Billy passed out before and even seeing a little blood did not alarm him. R. pp. 184-85. Hill explained Billy was in a fight and he came from up the street. R. pp. 185-86.

Barksdale said it was not normal for Billy to fight. Hill wanted Barksdale to put Billy on the porch, Barksdale told Hill to just let Billy sleep it off. Barksdale went to bed and did not see anyone when he went to the bathroom at 2 a.m. He assumed Billy left. R. p. 186-87. Then Hill woke him up later in the morning and said Billy was in the backyard and looked dead. Barksdale found Billy in the backyard deceased and called 911. R. p. 188; pp. 194-95.

Deputy Coroner Mike Ellis spoke to Hill to find out if Billy had any family members to contact. Hill said he and Billy had a verbal altercation and Billy ripped the screen door off. R. pp. 205-06. Deputy Napolitano testified when he arrived, Billy's lips were blue, flies were on his face, and he was not blinking. Billy had cuts and scratches and a swollen eye. Hill was intoxicated and not giving straight answers. Hill said he last saw Billy alive at 11 p.m. the previous night. R. pp. 210-12. Hill was not a suspect or in custody. Hill claimed Billy was scratched and bruised when he came to the house, and he did not mention any altercation with Billy. R. pp. 214-15.

Detective Michael Downey preserved the crime scene. He let Hill sit in the patrol car because it was a hot August day. Hill had been drinking, he was not a suspect. Hill said Billy was drinking with him, left, returned beat up, and grabbed the screen door as he fell. At six or seven in the morning, he went to check on Billy and Billy asked for water. Hill told Barksdale to call 911 after he realized Billy died. R. pp. 218-21. Officer Jonathan Hamilton responded to the crime scene and found Billy in the backyard. R p. 228. He found blood in the doorway, a transfer stain, and on the side porch. The storm door was detached. R. pp. 233-35; p. 239; p. 248.

Dr. James Fulcher performed the autopsy on Billy, who suffered multiple contusions and lacerations. Bruises on the upper extremities of his arms showed two parallel lines, indicating a tram track lesion. Dr. Fulcher explained this injury indicated Billy was struck by a cylindrical object. R. pp. 279-82. The right testicle was ruptured and destroyed. R. pp. 283-84. Tran track lesions appeared on both of Billy's thighs and above and around the base of the penis. The contusions in the web of the fingers were defensive injuries indicative of the victim trying to catch the cylindrical object with his hands. R. pp. 283-285. Billy's brain suffered blunt force trauma. R. p. 286. The spinal column was damaged. R. p. 290. At least twenty-three strikes came from cylindrical objects. R. pp. 287. Billy died from brain injuries. R. pp. 330-31.

Investigator Bailey provided jury testimony similar to his pre-trial testimony, noting Hill was too intoxicated to be interviewed on the 14th and was "very cooperative" on the 15th. R. pp. 311-12. Investigator Bailey further testified Hill did not hesitate to agree to ride with the investigators. He just asked to receive a ride back home. R. p. 330. Investigator Bailey testified they brought him to their office and typed up Hill's response on a victim/witness form. **He testified they lacked sufficient evidence to call Hill a suspect.** R. p. 331. Hill did not incriminate himself until the investigators briefly left the room and returned. At that point, Hill admitted he was angry when he saw Billy with his television set under his arm. R. p. 333-34.

Investigator Fortner testified he arrived at Hill's residence on the 14th, Barksdale was sober, but too intoxicated to interview. The television appeared fine. Nothing looked out of place although fresh blood was on the base board by the side door. R. pp. 349-51. Investigator Fortner did not know what type of weapon was used, he only knew from autopsy results that Billy was struck with a

cylindrical-type of object like a broom or shovel handle. Investigator Fortner understood Hill used a walking stick, although he never saw Hill using one and often saw Hill walking around the neighborhood without one. The investigators seized a broken handle and walking stick. R. pp. 353-55. When Hill was asked, he agreed without hesitation to go to the station. He appeared sober and he was not in custody. The investigators agreed to give him a ride back home. R. p. 357.

Investigator Fortner described their office as a common area "where anybody and everybody would be at." No one else happened to be there at the time. R. p. 358, lines 9-13. Hill provided the investigators an explanation of what happened. They typed up a statement, but spoke with each other about some discrepancies. R. p. 360. They returned and Investigator Fortner asked Hill whether Billy possibly tried to take his television set and so Hill hit him. Hill's eyes welled up and his demeanor changed. He said "yeah" and said he "tapped him twice." R. p. 361, lines 11-25.

At that point, the investigators took Hill across the hallway of the law enforcement center to where the Greenville City investigators were located. They used the police department's interview room and video-recorded Hill's statement. R. p. 366, lines 9-24. The investigators went over an advisement of rights form with Miranda warnings. They explained Hill his rights, but he was hesitant to sign the form because he was concerned his disability would be curtailed. R. p. 369.

Hill's trial testimony

Hill testified that on the evening of the 13th, he drank with Billy. Hill asked Billy to leave, but let Billy stay after Barksdale returned home. Hill laid down in his bedroom, but returned to find Billy behind his television. He told Billy to leave, but Billy did not. Hill claimed he was scared as Billy approached him. So he hit Billy and pushed him out the side door. Billy grabbed the screen

door and tore the hinges off as he fell. Hill told Billy not to come back and slammed the door. R. pp. 402-08. Hill saw Billy the next morning when Hill fed his dog in the back yard. Billy asked for water and Hill obliged. R. p. 409. Hill later found Billy slumped over and discovered Billy was not breathing and realized Billy was dead. R. p. 409. Hill claimed he hit Billy to get Billy out of the house. R. p. 407, lines 16-18.

On cross-examination, Hill admitted he hit Billy: "I'm thinking myself it was one or two times. But like I said, the drinking was worser." R. p. 425, lines 1-3. Hill did not recall how many times he hit Billy after Billy put the television set down because "everything went blank." R. p. 425, lines 4-12. He hit Billy in the legs and waist at first. The prosecutor asked why he did not stop hitting Billy, Hill answered he did not remember. R. p. 425, line 13 – p. 426, line 13. When asked about whether he hit Billy in the eye, Hill answered, **"Anything is possible, sir, when you are mad."** R p. 426, line 18 – p. 427, line 1. He admitted being mad does not justify taking a human life. R. p. 427, lines 2-4. Hill admitted Billy never attacked him before and Billy never displayed any violence around him. R. p. 428, lines 11-13; p. 429, lines 22-23.

The prosecutor asked Billy, "And your fear – you think that your fear was totally justified or do you think now that maybe alcohol had something to do with your fear?" R. p. 429, lines 3-6. Hill answered, "I believe it was the alcohol and reefer, sir." R. p. 429, lines 3-8.

Hill claimed he was drunk both days he spoke with law enforcement. Tr. pp. 410-31. **Hill agreed he was not forced to go to the law enforcement center.** Hill admitted during the interview on the 15th that the investigators were polite and he did not feel threatened. Hill recalled Investigator Fortner asked a question about the television, but did not recall the exact question. He said he did

not recall whether he admitted to them in the office that he tapped Billy. R. pp. 418-19.

Hill agreed the investigators repeatedly told him he could end the interview at any time. He admitted the officers treated him fairly during the interview. R. pp. 419-20. He agreed the officers told him that they could not make any offers or try to pressure him. R. p. 420, lines 15-18. During sentencing, Hill told the trial court, "I'm just sorry it happened. Truly sorry." R. p. 518.

ARGUMENT

Because Respondent was not in custody when he made an unwarned admission and he retained a genuine choice to not make any further statements after being provided Miranda warnings, the Court of Appeals erred in finding "insufficient" evidence supported the trial court's ruling admitting the warned and unwarned statements. The Court of Appeals failed to apply the correct standard of review. Further, any error was harmless.

The Court of Appeals found both Hill's unwarned and warned verbal statements on August 15 should be suppressed because of his brief admission that he "tapped" Billy prior to being provided Miranda warnings. Because evidence supports the trial court's determination Hill was not in custody prior to receiving his Miranda warnings, the trial court did not err in admitting the warned and unwarned statements. Hill was not rendered in custody as a matter of law merely because he was interviewed at the investigators' office or because he was a possible suspect. Therefore, the trial court was not required to find the unwarned admission was the product of custodial interrogation. Further, Hill admitted the investigators told him they could not pressure him, he did not feel threatened, and the investigators treated him fairly: nothing in the record suggests that when he received Miranda warnings, he nonetheless believed he did not retain a choice to invoke his rights.

Due process requires the suppression of an involuntary confession regardless of the truth or

falsity of the confession. Jackson v. Denno, 378 U.S. 368, 376 (1964). Based on the Fifth Amendment's protection against self-incrimination, the United States Supreme Court announced, "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards. . . ." Miranda v. Arizona, 384 U.S. 436, 444 (1966). Before the accused is subjected to custodial interrogation, he or she must be informed of the right to remain silent; any statement made may be used as evidence against him or her; the right to the presence of an attorney; and if he or she cannot afford an attorney one will be appointed prior to questioning. State v. Kennedy, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct. App.1996) *aff'd as modified* 333 S.C. 426, 510 S.E.2d 714 (1998).

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

"To determine whether a suspect is in custody, the trial court must examine the totality of the circumstances, which include factors such as the place, purpose, and length of interrogation, as well as whether the suspect was free to leave the place of questioning." State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 410 (2003). The appropriate inquiry involves objectively viewing the

circumstances to determine whether a reasonable person in the suspect's position would have understood himself to be in custody. State v. Easler, 327 S.C. 121, 128, 489 S.E.2d 617, 621 (1997).

The Court of Appeals failed to apply the proper standard of review. While the Court of Appeals cited State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 409 (2003) to acknowledge it must determine if the trial court's ruling is supported by the record, it concluded as follows: "**From our perspective**, however, the trial court's rulings find **insufficient** support in the record." Hill, 822 S.E.2d at 350 (emphasis added). This is improper because the standard is not whether evidence is *sufficient* to support the trial court's ruling but whether **any evidence** supports the trial court's ruling. "When reviewing a trial court's ruling concerning voluntariness, [a reviewing court] does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported **by any evidence**." State v. Saltz, 346 S.C. 114, 135, 551 S.E.2d 240, 252 (emphasis added); State v. McClure, 312 S.C. 369, 371-72, 440 S.E.2d 404, 405-06 (Ct. App. 1994) (noting the question of the voluntariness of a confession can come down to a question of credibility, which the trial court may resolve in favor of the officers). This Court stated the standard another way, finding if it is debatable whether a reasonable person would feel free to leave, the trial court's ruling must be upheld. State v. Navy, 386 S.C. 294, 301, 688 S.E.2d 838, 841 (2010) ("In our opinion, **it is debatable** whether a reasonable person would have believed himself to be in custody at the time the first statement was given, and thus the trial court's finding that respondent was not in custody should have been upheld as it is supported by the record.").

The Court of Appeals' patent misunderstanding of the proper standard of review ignores the

trial court's superior position to determine the witness's demeanor and credibility than this Court could from the cold record. See Von Moltke v. Fillies, 332 U.S. 708, 740 (1948) ("The aid to the ascertainment of the truth to be derived from the trial court's impartial observation of the witnesses should not be dissipated in the process of review. His appraisal of the living record is entitled to proportionately more, rather than less, reliance the further the reviewing court is removed from the scene of the trial.").

The Court of Appeals simply failed to give proper deference to the trial court's ability to observe witnesses. For instance, the Court of Appeals surmised that Hill's sobriety in the video is questionable. However, the trial court, unlike the Court of Appeals, was able to observe Hill testify in two pretrial hearings and compare it to Hill's demeanor in the video before ruling. Both interviewing officers testified Hill was not intoxicated, and they already saw him the day before when he was actually intoxicated. R. p. 40, p. 60, pp. 117-18; p. 129. The trial court noted their testimony in his ruling. After watching the video **and** seeing Hill testify, the trial court found the video did not indicate he was intoxicated. R. p. 164. Of course, a statement is not inadmissible as a matter of law merely because the accused might be intoxicated when making a statement unless the accused is so intoxicated he cannot comprehend the meaning and effect of his words. State v. Saxon, 261 S.C. 523, 201 S.E.2d 114 (1973).

The Court of Appeals cited LaFave's criminal procedure treatise for the proposition that if a police officer's invitation is conditioned on the police escorting the defendant to the police station, it is more likely the setting is custodial. However, while law enforcement asked Hill if they could bring him to the police station, no evidence supports that the invitation was "conditioned" on the

investigators accompanying Hill. No evidence supports a belief that Hill could not choose to use his own means to go to the law enforcement center. Note that Hill walked home from the law enforcement center when released from jail. R. p. 137, lines 19-23. Further, the investigators agreed to provide him transportation back home when he asked. Hill admitted the reason he agreed to the interview is **he did not want to be rude or disappoint the investigators.** This testimony establishes he understood he could choose to decline the investigators' request and contradicts the Court of Appeals' conclusion of custody.

The Court of Appeals overlooks that merely because the interview took place in the investigator's office is not determinative of custody. State v. Williams, 405 S.C. 263, 747 S.E.2d 194 (Ct. App. 2013) (citing State v. Doby, 273 S.C. 704, 708, 258 S.E.2d 896, 899 (1979) ("Rather the fact that appellant voluntarily agreed to accompany the investigators to their office and answer questions without being placed under arrest indicates a non-custodial situation.")); Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (finding warnings are not required merely because questioning takes place at the station house or because the person questioned is the one police suspect). Note the trial court relied on Williams in its ruling. R. p. 364. Also note in Doby, this Court observed the interrogation occurred during normal business hours and "[t]he actual oral confession was made in only two hours." Doby, at 709, 258 S.E.2d at 899.

Facts support the trial court's determination that Hill was not in custody prior to his admission. The record fairly shows Hill was treated like a cooperating witness, not a suspect, when he was interviewed in an office described as a common area. Hill agreed he was not forced to go to the law enforcement center, the investigators were polite, and he did not feel threatened. Hill did

not even recall the question about the television. R. pp. 418-19. No evidence indicates he was intentionally "isolated" as the Court of Appeals complains, and his statement was taken on a victim/witness form, not an advice of rights form. He was not restrained while being interviewed in the investigators' office.

The Court of Appeals concluded, however, that the questioning turned into custodial interrogation because he became a suspect. In Missouri v. Seibert, 542 U.S. 600, 604 (2004), the United States Supreme Court addressed a police procedure where first a suspect **in custody** was questioned until officers elicited an incriminating statement, and thereafter, officers administered Miranda warnings and elicited the incriminating information again. The United States Supreme Court found the procedure unsound and found the subsequent Mirandized statement should be suppressed because the procedure of eliciting an unwarned admission and then a duplicate unwarned admission rendered ineffective the purpose of providing Miranda warnings.

However, Hill was not in custody prior to Miranda warnings being provided. First, merely because a person is a suspect in a crime does not turn a non-custodial interview into custodial interrogation. Beckwith v. United States, 425 U.S. 341, 347 (1976) (finding that although the "focus" of the investigation may have been on Beckwith at the time of the interview, Beckwith was not in custody and Miranda was not implicated); Minnesota v. Murphy, 465 U.S. 420, 431 (1984) (noting even if the person interviewed is the focus of the investigation, Miranda warnings are still not required in non-custodial situations).

The Court of Appeals relied on this Court's decision in State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010). However, Navy is readily distinguishable. In Navy, the defendant was

administering CPR on his less-than-two-year-old son when EMS arrived at his house. He was distraught when he gave his first statement to law enforcement at the hospital. Law enforcement was prompted to interview the defendant several days later after meeting with the pathologist who determined the child died by suffocation or smothering. The defendant agreed to come to the station although he was upset and crying at the home and he continued upset and crying throughout the four hours from when he left the house until he gave a post-Miranda statement. Id. at 296, 688 S.E.2d at 839.

The defendant gave another statement before he was told the child was suffocated and also had healing broken ribs. The defendant asked if he was under arrest and told he was not, but the officers said they were trying to get some answers. Officers asked several follow-up questions and the defendant admitted he may have popped the child and may have covered his mouth to stop the child from crying. After a smoking break, the defendant was given Miranda warnings and gave a statement that was similar to the first un-Mirandized statement. Id. at 297-99, 688 S.E.2d at 839-40.

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

This case differs significantly from Navy because law enforcement did not begin questioning

with the intent of eliciting a confession, they did not confront Hill with any evidence during the pre-Miranda interview, and did not pose a series of questions like what was described in Navy, but merely asked a single question which happened to evoke an immediate admission. The investigators promptly ended questioning.

Further, while the investigators in the present case were aware Billy died from a beating administered with a cylindrical object, they were unaware of who committed the homicide or even what kind of cylindrical object was used in the homicide. Note Billy's corpse was found outside the house – anyone roaming the neighborhood was a potential suspect. But the investigators would be remiss not to interview Hill, Investigator Fortner noted, "Mr. Hill was being looked at as a witness at . . . since he was at home when this all took place." R. p. 358, line 24 – p. 359, line 1. So Hill did not become a suspect until his admission, and the investigators promptly ended questioning until they brought him to the interview room and provided Miranda warnings. But see Stansbury, at 324 ("It is well settled then, that a police officer's subjective view that the individual under questioning is a suspect, if undisclosed, does not bear upon the question of whether the individual is in custody for purposes of Miranda.").

Also, unlike Navy, Hill was not upset during the interview until the last question broke open his hidden remorse, the interview was not lengthy, and the investigators did not call his version of events into doubt. Williams, at 278, 747 S.E.2d at 202 (distinguishing Navy, and noting "[h]ere, the record demonstrates Williams was not upset and the officers were not confrontational towards him."). Indeed, Hill admitted he was treated fairly when he was interviewed, the investigators were polite, and he did not feel threatened. R. pp. 418-20.

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

In further derogation of the proper standard of review, the Court of Appeals drew its own factual conclusion about Investigator Bailey's comment during the videotaped interview that, "[W]e didn't' tell you you couldn't go home; we told you we could not make that decision until we find out what you have to tell us." The Court of Appeals concluded this referred to a pre-Miranda conversation. Undoubtedly it was, but it most likely was a reference to a conversation that occurred **after** the investigators ceased questioning because Hill admitted to "tapping" Billy. The Court of Appeals concluded, "From this statement alone, it can be inferred a reasonable person would have concluded he was not free to leave." Hill, supra. Hill was not free to leave **after** admitting he tapped Billy twice, but no evidence shows this conversation occurred **before** Hill's admission. Evidence of this prior conversation, without more information about when it occurred, is not dispositive as the Court of Appeals suggests. The Court of Appeals made its own finding of fact, despite the requirement for reviewing courts to give deference to the trial court.

Miranda warnings were effective

Further, even if Hill was considered to be in custody at some point prior to being provided Miranda warnings, the recitation of Miranda warnings remained sufficient to accomplish their objective. Siebert, a plurality opinion, found the "question-first" procedure employed by the police in

Seibert constitutionally infirm because the "midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with Miranda's constitutional requirement." Seibert, at 604. In Seibert, the law enforcement aim was to gather a full confession prior to warnings and then seek for the interviewee to recite the same confession again after warnings – "a police strategy adapted to undermine the Miranda warnings." Seibert at 616 (noting ". . . the questioning was systematic, exhaustive, and managed with psychological skill. When the police were finished there was little if anything, of incriminating potential left unsaid"). In contrast, Oregon v. Elstad, 470 U.S. 298, 311-14 (1985) rejected a "cat out of the bag" theory that would require suppression of a full warned statement due to a short admission obtained "in arguably innocent neglect of Miranda . . ." See Seibert, at 615 (analyzing and distinguishing Elstad).

Justice Kennedy, in his concurrence, opined:

> In my view, Elstad was correct in its reasoning and its result. Elstad reflects a balanced and pragmatic approach to enforcement of the Miranda warning. An officer may not realize that a suspect is in custody and warnings are required. . . . Skilled investigators often interview suspects multiple times, and good police work may involve referring to prior statements to test their veracity or to refresh recollection. In light of these realities, it would be extravagant to treat the presence of one statement that cannot be admitted under Miranda as sufficient reason to prohibit subsequent statements preceded by a proper warning. . . . That approach would serve neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence would be served by suppression of the testimony.

Seibert, at 620 (J. Kennedy, concurring) (citing Elstad, at 308-09) (internal citation, ellipses, and internal quotation marks omitted).

Seibert recognized suppression of a warned statement following an unwarned custodial

statement may not be warranted if "midstream" Miranda warnings could be effective enough to accomplish their objective, and offered relevant factors to determine if midstream warnings were effective to accomplish their objective:

> (1) The completeness and detail of the questions and answers in the first round of interrogation;
>
> (2) The overlapping content of the two statements;
>
> (3) The timing and setting of the first and the second rounds of interrogation;
>
> (4) The continuity of police personnel; and
>
> (5) The degree to which the interrogator's questions treated the second round as continuous with the first.

Siebert, at 615. Siebert's test, rather than a broad sweeping rule of exclusion, is consistent with the recognition that generally, "Once warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to authorities." Elstad, at 309.

In the instant case, Hill provided a narrative recited by the investigators in State's Exhibit Three. The investigators left Hill to discuss the discrepancies between Hill and Barksdale's accounts. They returned, and the record reflects the additional, short inquiry was whether Hill might have hit Billy because Billy tried to take his television set. Hill answered he may have "tapped" Billy twice. He did not say what tapping meant or say he used his cane. Accordingly, the questioning prior to the warnings was hardly systematic or complete. See Seibert at 616 (noting ". . . the questioning was systematic, exhaustive, and managed with psychological skill. When the police were finished there was little if anything, of incriminating potential left unsaid"); Id. at 606 ("[The officer] acknowledged that Seibert's ultimate statement was 'largely a repeat of information . . .

obtained' prior to the warning."). Further, the absence of any detail leaves little overlap between the statements. See United States v. Gonzalez-Lauzan, 437 F.3d 1128, 1138 (11th Cir. 2006) ("Given that Gonzalez-Lauzan made only a single brief incriminating statement in the prewarning stage of the interview, the complete interrogation of Gonzalez-Lauzan that followed the warnings bore little resemblance to his prewarning statement."). The setting changed as well. After being questioned in an open office with no recording devices, Hill was taken to a designated interview room where his interview was recorded. The interrogation in the interview room did occur close in time to the first interview and involved the same personnel, but importantly, the investigators treated the second interview much differently, evidenced by using a witness form for the first interview and an advisement of rights form to conduct the second interview.

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

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

have understood the Miranda warnings that he was given as conveying a message that he retained a genuine choice about continuing to talk." Id. at 582.

In Elstad, citing Miranda, the Court noted the risk that Miranda warnings may inhibit persons from giving information, so the warnings are required only when a person is in custody. Elstad, at 309 (citing Miranda at 478). "Unfortunately, the task of defining 'custody' is a slippery one, and policemen investigating serious crimes cannot realistically be expected to make no errors whatsoever." Elstad, at 309 (quoting Michigan v. Tucker, 417 U.S. 433, 446 (1974)) (brackets and internal quotation marks removed). "When neither the initial nor the subsequent admission is coerced, little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder." Elstad, at 312.

In the instant case, Hill agreed he understood his rights, the investigators were polite with him, and they advised him he could end the interview at any time and they were not allowed to pressure him. R. pp. 419-20. Hill's testimony also shows his prior unwarned statement did not make him feel obligated or trapped into providing further post-Miranda statements because Hill testified he did not recall the exact question about the television and did not recall whether he told the investigators he tapped Billy during his unwarned interview in the investigators' office. R. pp. 418-19. His inability to recall these specifics of his interview in the investigators' office shows the admission was not memorable and played no role in his decision to continue cooperating with law enforcement after he was provided Miranda warnings.

Instead, Hill's own testimony shows he adamantly wanted to speak with the investigators and he knew he retained the right to decide whether or not to speak. R. p. 143; lines 6-20; p. 144, lines 7-

24. Indeed, Hill confirmed the murder weapon was his walking stick for the first time in response to the investigators admonition that they could only speak with him after he signed the waiver form. State's Exhibit No. 81 ("So my cane must have left some of those bruises on him?"). Clearly that was a volunteered statement. Therefore, even assuming the first statement was custodial, the trial court did not err in admitting the subsequent warned statement into evidence because the investigators' and Hill's testimony shows the videotaped interview was a distinct event in which Hill believed he retained a genuine choice about continuing to talk. Terry, supra; Seibert, supra; Elstad, supra.

Harmless error

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

Accordingly, any error is harmless beyond a reasonable doubt. The harmless error doctrine preserves the central purpose of a criminal trial, which is to decide the factual question of a defendant's guilt or innocence. State v. Rivera, 402 S.C. 225, 246, 741 S.E.2d 694, 705 (2013) (citing Arizona v. Fulminante, 499 U.S. 279, 306-08 (1991)); State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial).

CONCLUSION

For all of the foregoing reasons, this Court should grant the petition for writ of certiorari and affirm the conviction and sentence. Should this Court grant the State's writ, Petitioner respectfully requests permission to brief the issues herein.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

February 19, 2019

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

Appellate Case No: 2016-000868

THE STATE, Petitioner,

v.

MARSHELL HILL, Respondent.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Petition for Writ of Certiorari and Appendix on Respondent by delivering two copies of each of the same addressed to his attorney of record, Kathrine H. Hudgins, Esquire, S. C. Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.
This 19th day of February, 2019.

Anne Mueller

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