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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2016-000868

THE STATE, ...Petitioner,

v.

MARSHELL HILL, ...Respondent.

APPENDIX

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARSHELL HILL,

APPELLANT

APPELLATE CASE NO 2016-000868

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in finding that Appellant was not in custody when he made an oral inculpatory statement, without the benefit of *Miranda* warnings, during a two hour interrogation at the law enforcement center when the police officers went to Appellant's house and drove him to the law enforcement center for the interrogation, the officers knew Appellant had been drinking and a reasonable person in Appellant's position would have thought that he was in custody and not free to leave?

2. Did the trial judge err in admitting Appellant's video recorded inculpatory custodial statement made following *Miranda* warnings but in violation of Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004), when the police initially interrogated Appellant, while in custody, without the benefit of *Miranda* warnings, for two hours, and when the police finally obtained an incriminating statement, the same police officers administered *Miranda* warnings and immediately continued the interrogation without a break?

STATEMENT OF THE CASE

In March of 2014, the Greenville County Grand Jury indicted Appellant Hill for murder, indictment #2014-GS-23-2209. On April 11, 2016, Appellant proceeded to jury trial before the Honorable Perry H. Gravely. Amanda Wicker and Teal Johnson represented Appellant at trial. Howard Steinberg prosecuted the case. The jury found Appellant guilty of the lesser included offense of voluntary manslaughter. Judge Gravely sentenced Appellant to twenty-two (22) years in prison. A timely notice of intent to appeal was served on April 21, 2016. This appeal follows.

STATEMENT OF FACTS

On the morning of August 14, 2013, Appellant found the deceased, Billy Patterson, in Appellant's backyard. The deceased appeared to be dead and Appellant asked his roommate, Michael Barksdale to call 911. (R. p. 188, lines 8-25). Officers Brandon Napolitano and Michael Dowey were some of the first officers who arrived on the scene and spoke with Appellant. (R. pp. 208-223). Two deputy coroners, Jeff Fowler and Mike Ellis also spoke with Appellant at the scene. (R. pp. 199-207). The investigators involved in the case, Michael Fortner and Antonio Bailey did not interview Appellant at the scene on August 14, 2013, because he was extremely intoxicated. (R. p. 351, lines 17-21; p. 311, lines 11-17). Appellant and the deceased were drinking buddies. (R. p. 9, lines 19-25).

The next day, August 15, 2013, Investigators Fortner and Bailey attended the autopsy of the deceased and learned that the deceased had been struck with a cylindrical type object similar to a broom or cane. (R. p. 312, line 8 – p. 313, lines 1-3; p. 352, line 25 – p. 353, lines 1-19). The investigators executed a search warrant of Appellant's house and seized a walking stick from Appellant's bedroom. (R. p. 312, lines 5-19; p. 354, line 1 – p. 355, 356, lines 1-6). The investigators drove Appellant from his house to the law enforcement center for an interview. (R. pp. 356-359; pp. 326-332). Investigators Fortner and Bailey admitted that Appellant told them that he had been drinking on August 15th when the officers took him to the law enforcement center for the interview. (R. p. 380, lines 16-20; p. 345, lines 18-24). Investigator Fortner typed Appellant's statements from the interview and labeled it as a victim/witness statement. (R. p. 332, lines 13-23).

After the statement was typed the two investigators stepped out of the room to discuss discrepancies between Appellant's statement and statements made by Barksdale, Appellant's roommate. (R. p. 360, lines 14-22; p. 333, lines 13-16). Barksdale told Investigator Bailey that Appellant was afraid of the deceased stealing from him. (R. p. 346, lines 14-22). The investigators returned to the room and Investigator Fortner asked Appellant if he hit the deceased because the deceased tried to steal Appellant's television. (R. p. 361, lines 18-20). According to Investigator Bailey, Appellant stated that he became angry when he saw the deceased with the television under his arm. (R. p. 333, lines 20-24). According to Investigator Fortner, Appellant admitted that, "I tapped him twice." (R. p. 361, lines 24-25). At this point the investigators moved Appellant to the City interview room across the hall and advised Appellant, for the first time, of his *Miranda* rights. (R. p. 338, line 3 – p. 339, 340, lines 1-23; p. 366, line 13 – pp. 367-370). According to Investigator Bailey, Appellant agreed to talk with the investigators but refused to sign the waiver of rights form. (R. p. 340, line 16 – p. 341, 342, lines 1-14). The interview was video recorded and admitted in evidence, over objection, at trial. (R. p. 375, line 12 – p. 376, line 1). Appellant challenges the admission of the oral statements made prior to *Miranda* in issue one and the admission of the video recorded statements made post *Miranda* in issue two.

ARGUMENTS

1. The trial judge erred in finding that Appellant was not in custody when he made an oral inculpatory statement, without the benefit of *Miranda* warnings, during a two hour interrogation at the law enforcement center when the police officers went to Appellant's house and drove him to the law enforcement center for the interrogation, the officers knew Appellant had been drinking and a reasonable person in Appellant's position would have thought that he was in custody and not free to leave.

Prior to trial the judge held a Jackson v. Denno hearing in regard to several statements made by Appellant. (R. pp. 7-69; pp. 133-200). Counsel for Appellant moved to suppress the statements made to law enforcement prior to *Miranda* warnings and moved to suppress the video recorded statements made after *Miranda* warnings pursuant to Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004) and State v. Navy, 386 S.C. 294, 302, 688 S.E.2d 838, 841 (2010). (R. pp. 147-163). The video recorded statement is addressed in issue two below. As to the statements made prior to *Miranda* warnings, the trial judge refers to a typed victim/witness statement, State's Exhibit #3, as statement number three and stated:

> All right. As to statement number three. I have reviewed State's Exhibit 3 and I don't believe that *Missouri v. Seibert* applies. For one thing, he does not really incriminate himself. He doesn't go, 'well I killed him' or something like that. I mean, I think that was merely a, you know, it's my understanding from the testimony that sometime afterwards, after he gave the statement the officers got together and said 'there's some inconsistencies here.' And that's when they turned it into a custodial interrogation. So I think statement number three was merely a witness statement, that he was not in custody and I'm going to allow that one in.

(R. p. 163, line 18 – p. 164, lines 1-9). The trial judge erred.

First, the trial judge did not allow the typed victim/witness statement in evidence.[1] (R. p. 362, lines 17-24). Appellant submits that this statement was made while in custody and despite the statement not being admitted in evidence, the State should not have been allowed to reference the statement in the State's case in chief. The critical statement, however, that should have been suppressed was the statement attributed to Appellant when the investigators returned to the room. After State's exhibit #3 was typed investigators Fortner and Bailey stepped out of the room to discuss discrepancies between Appellant's statement and statements made by Barksdale, Appellant's roommate. (R. p. 360, lines 14-22; p. 333, lines 13-16). The investigators returned to the room and Investigator Fortner asked Appellant if he hit the deceased because the deceased tried to steal Appellant's television. (R. p. 361, lines 18-20). According to Investigator Fortner, Appellant admitted that, "I tapped him twice." (R. p. 361, lines 24-25). At this point the investigators moved Appellant to the City interview room and advised Appellant, for the first time, of his *Miranda* rights. (R. p. 338, line 3 – p. 339, 340, lines 1-23; p. 366, line 13 – pp. 367-370). The interview became a custodial interrogation when Investigator Fortner asked Appellant if he hit the deceased because the deceased tried to steal Appellant's television. At this point in time the officers had attended the autopsy of the deceased and knew that the fatal injuries had been caused by a symmetrical object, possibly a broom or cane, they had executed a search warrant at Appellant's home and seized a walking stick from Appellant's bedroom and Appellant had given a statement inconsistent with the statement of the roommate. Appellant was not free to leave at this point.

[1] The transcript incorrectly notes that State's Exhibit #3, the victim/witness statement was admitted in evidence. (Tr. p. 3).

During the trial Appellant renewed the objection to the statement. (R. p. 313, lines 7-8). At this point the judge expressed some concern about the admission of the statement. The judge stated:

> I'm having some real concerns here because now the facts have come out a little bit different I guess than I recognized before. In that all of the statements were given after, you know, specifically statement number three, there was no *Miranda* warning given. Is that correct?

(R. p. 313, lines 18-25). After the prosecutor affirmed that *Miranda* warnings were not given prior to the "non-recorded statement" at the County, which consisted of both the typed statement and the oral statements, the judge stated:

> You know, and I guess – and during lunch I read the *State v. Navy* case. I mean, what I have a concern here is you have – somebody's seen the autopsy. They see a stick they seized from the Defendant's room, which they assume is the murder weapon.

(R. p. 314, lines 5-11). After hearing arguments from both sides the Judge ruled stating, "No, I think, I mean, I thought it was a –I think it's a very close call but I think *State v. Williams* does sway me that –the fact that it was not a custodial statement, so I'm going to stand by my previous ruling." (R. p. 327, lines 16-21). Appellant renewed the objection during Investigator Bailey's testimony (R. p. 328, lines 18-20) and during Investigator Fortner's testimony. (R. p. 356, lines 14-15; p. 361, lines 5-6). Appellant renewed the objection at the directed verdict stage and post-trial. (R. p. 387, lines 18-21; p. 432, lines 17-19). Appellant additionally renewed the object after the jury returned the verdict. (R. p. 514, lines 7-9).

The trial judge's finding that Appellant was not in custody when the investigators returned to the room and asked Appellant if he hit the deceased because the deceased tried to steal Appellant's television is not supported by the record. 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. Easler, 322 S.C. 333, 342, 471 S.E.2d 745, 751 (Ct.App.1996) aff'd as modified, 327 S.C. 121, 489 S.E.2d 617 (1997).

In State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 409–10 (2003), the South Carolina Supreme Court wrote:

> The purpose of the *Miranda* warnings is to apprise the defendant of her constitutional privilege to not incriminate herself while in the custody of law enforcement. Miranda, 384 U.S. at 444, 86 S.Ct. at 1612. Law enforcement must state the *Miranda* warnings "after a person has been taken into custody or otherwise deprived of his freedom of action in any way." *Id.* 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. Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984); United States v. Helmel, 769 F.2d 1306, 1320 (8th Cir.1985); Robert Kaupp v. Texas, 538U.S. 626, 123 S.Ct. 1843, 155 L.Ed.2d 814, 2003 WL 2010974 (2003). The custodial determination is an objective analysis based on whether a reasonable person would have concluded that he was in police custody. Bradley v. State, 316 S.C. 255, 257, 449 S.E.2d 492, 493–494 (1994); State v. Sprouse, 325 S.C. 275, 282, 478 S.E.2d 871, 875 (Ct.App.1996).

Viewing the totality of the circumstances, the investigators placed Appellant in a custodial interrogation setting warranting *Miranda* warnings. The failure to provide *Miranda* warnings required suppression of the statement, "I tapped him twice." In fact the judge noted earlier, "I mean, I think that was merely a, you know, it's my understanding from the testimony that sometime afterwards, **after** he gave the statement the officers got together and said 'there's some inconsistencies here.' **And that's when they turned it into a custodial interrogation.**" (R. p. 134, line 24 – p. 135, lines 1-6) (emphasis added).

As to the factors, the interrogation took place at the law enforcement center. The investigators drove Appellant from his house to the law enforcement center for an interview. (R. pp. 319-322; pp. 292-295). During the suppression hearing Investigator Fortner testified that he did not mirandize Appellant "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, lines 1-3). The purpose of the interview, however, changed when Investigator Fortner returned to the room and questioned Appellant about hitting the deceased. At this point in time the interview became a custodial interrogation. Appellant had been in a room at the law enforcement center with two investigators for approximately two hours. (R. p. 119, lines 1-11). Appellant was not free to leave. A reasonable person would have concluded that he was in police custody.

In State v. Navy, 386 S.C. 294, 298–99, 688 S.E.2d 838, 840 (2010), the South Carolina Court wrote:

> After he gave this first statement, the crying and upset respondent was informed, for the first time, that the child had been suffocated and that there was evidence of broken ribs. According to Investigator Smith, respondent was shocked and surprised by this information. Respondent asked if he were under arrest, and was told "No, we are just trying to get some answers." The officers engaged in follow-up questioning, asking specifically how respondent had comforted the crying child. At this juncture, the nature of the interrogation and respondent's status changed, and what had begun as a voluntary question and answer session matured into custodial interrogation. In response to these follow-up questions, respondent told the officers he had "popped" the child on the back rather than simply patted him, and that he may have "patted" the child on its mouth to stop the crying.

Navy was then mirandized and provided two additional written statements. The South Carolina Supreme Court found the second and third statements should have been suppressed pursuant to Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004). Appellant's post *Miranda* warnings video recorded statement, addressed in issue two, is analogous to the second and third statements the Court found should have been suppressed in Navy. Appellant's statement, "I tapped him twice," is analogous to Navy's statement that he had "popped" the child on the back and that he may have "patted" the child on its mouth to stop the crying. Investigator Fortner asking Appellant if he hit the deceased because the deceased tried to steal Appellant's

television began an unwarned custodial interrogation designed to elicit incriminating information.

The present case is distinguished from State v. Williams, 405 S.C. 263, 747 S.E.2d 194 (2013). In Williams the South Carolina Court of Appeals found that Williams was not in custody at the time he provided a statement to police prior to *Miranda* warnings. The Court in Williams noted:

> The trial court determined that based on "the method of arrival, the voluntary arrival, the agreement to participate, the accidental explanations, [and] the officer's testimony that the Defendant was free to leave," the oral statement was admissible because Williams was not in custody and therefore *Miranda* warnings were not required. The court noted it was making that decision based on an objective standard and not just the officer's subjective testimony that Williams was free to leave. The trial court found that "a reasonable person arriving voluntarily in a private vehicle, never requests any help, not under the influence, cooperating with the officers, wanting to clear it up, that a reasonable person would believe they were free to leave."

405 S.C. at 270–71, 747 S.E.2d at 198. In contrast, Appellant was picked up at his home and taken to the law enforcement center. Appellant advised the investigators that he had been drinking on August 15th when the officers picked him up and took him to the law enforcement center for the interview. There is no indication in the record that Appellant expressed an intention of "clearing things up" as Williams had. In the present case a reasonable person would have believed that he was in custody and not free to leave. The trial judge erred in finding that Appellant was not in custody. The statement, "I tapped him twice," should have been suppressed.

2. The trial judge erred in admitting Appellant's video recorded inculpatory custodial statement made following *Miranda* warnings but in violation of Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004), when the police initially interrogated Appellant, while in custody, without the benefit of *Miranda* warnings, for two hours, and when the police finally obtained an incriminating statement, the same police officers provided *Miranda* warnings and continued the interrogation without a break?

As discussed above, Counsel for Appellant moved to suppress the statements made to law enforcement prior to *Miranda* warnings and moved to suppress the video recorded statements made after *Miranda* warnings pursuant to Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004) and State v. Navy, 386 S.C. 294, 302, 688 S.E.2d 838, 841 (2010). (R. pp. 147-163). Based on the trial judge's ruling that Appellant was not in custody prior to *Miranda* warnings (although he stated that "I mean, I think that was merely a, you know, it's my understanding from the testimony that sometime afterwards, **after** he gave the statement the officers got together and said 'there's some inconsistencies here.' **And that's when they turned it into a custodial interrogation.**" (R. p. 163, line 24 – p. 164, lines 1-6)(emphasis added)), the trial judge found that Seibert did not apply. Appellant additionally argued that the video recorded statement, referred to by the trial judge as statement number four, State's Exhibit #81, should be suppressed because investigators knew Appellant had been drinking and Appellant refused to sign the waiver of rights form. (R. p. 158, lines 1-7). The trial judge refused to suppress the video recorded statement on these grounds as well. (R. p. 164, line 10 – p. 194, lines 1-4). The video recorded statement, State's Exhibit #81, should have been suppressed because it was obtained in violation of the rule announced in Seibert and Navy.

Appellant renewed the objection to the video recorded statement in the middle of the trial after the judge revisited his earlier ruling. (R. p. 328, lines 18-20). Appellant renewed the objection during Investigator Fortner's testimony. (R. p. 370, lines 17-18; p. 375, lines 23-25). Appellant renewed the objection at the directed verdict stage and post- trial. (R. p. 387, lines

18-21; p. 432, lines 17-19). Appellant additionally renewed the objection after the jury returned the verdict. (R. p. 477, lines 7-9).

In State v. Navy, 386 S.C. 294, 302, 688 S.E.2d 838, 841–42 (2010) the South Carolina Supreme Court wrote:

> In Seibert, the Court dealt with the police practice of questioning a suspect until incriminating information is elicited, then administering *Miranda* warnings. Following the warnings, the suspect is again questioned and the incriminating information re-elicited. The post-warning statement is then sought to be admitted. The factors to be considered in determining whether a constitutional violation occurred in this setting, according to the *Seibert* plurality opinion, are:
>
> 1) the completeness and detail of the question and answers in the first round of interrogation;
> 2) the timing and setting of the first questioning and the second;
> 3) the continuity of police personnel; and
> 4) the degree to which the interrogator's questions treated the second round as continuous with the first.

The Court in Navy found that the officer's actions violated Seibert writing:

> The officers began the questioning of respondent with knowledge that the child had been suffocated and with the intention of eliciting a confession. After respondent's first oral statement, the officers "sprang" the suffocation/healing rib fractures information on respondent, and began an unwarned custodial interrogation designed to elicit incriminating information, that is, questioning designed to have respondent admit to having hit the child and to having smothered him. Once those incriminating answers were given—i.e. after respondent admitted he had popped the child on the back and "patted" his mouth—respondent was permitted a supervised cigarette break, then given *Miranda* warnings, with interrogation by the same officer resuming immediately. Thus the four elements outlined in *Seibert* were met here. Moreover, none of the curative measures suggested by Justice Kennedy, i.e. an additional warning that the answers given after the first statement but before the administration of *Miranda* warnings may not be admissible,[4] a substantial break in time, or change of circumstances, occurred here.

386 S.C. at 303, 688 S.E.2d at 842.

In the present case Investigators questioned Appellant until incriminating information was elicited. Investigators then administered *Miranda* warnings and again questioned Appellant about the incriminating information. Investigator Fortner began an unwarned custodial

interrogation when he asked Appellant if he hit the deceased because the deceased tried to steal Appellant's television. The investigator asked the question knowing that a walking stick consistent with the murder weapon had been seized from Appellant's bedroom. Additionally, the investigators learned from Appellant's roommate that Appellant was afraid the deceased was stealing from him. (R. p. 346, lines 14-22). After Appellant admitted that he "tapped him twice" he was taken to a different room, mirandized and then re-interrogated immediately by the same investigators, Fortner and Bailey. There were no additional warnings. There was not a break in time or change of circumstance. As in Navy, the investigator's actions in the present case violate Seibert. The trial judge erred in refusing to suppress the video recorded statement, State's Exhibit #81. The error was not harmless.

CONCLUSION

Based on the above arguments, Appellant's conviction and sentence should be reversed and the case remanded for a new trial.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of August, 2017.

CERTIFICATE OF COUNSEL FOR APPELLANT

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

August 14th, 2017

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IN THE COURT OF APPEALS

Appeal from Greenville County
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The State of South Carolina,

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vs.

Marshell Hill,

Appellant.

Appellate Case No. 2016-000868

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STATEMENT OF ISSUE ON APPEAL

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

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

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

Jackson v. Denno hearing

Deputy Brandon Napolitano was the first responding deputy to Hill's residence on August 14, 2013. He testified Hill was wearing a tee shirt and boxer shorts, smelled of alcohol, and appeared intoxicated, nervous, and evasive. Hill told Napolitano he drank a pint of vodka. Deputy Napolitano confirmed Hill was pretty intoxicated. R. pp. 8-9. Hill explained the victim, Billy, was a homeless man and Hill's drinking buddy. Deputy Napolitano explained to the trial court Hill was not in

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

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

Investigator Michael Downey also responded to the residence on August 14, and secured the crime scene. Downey explained at that time, Hill was not a suspect, "I knew he was the resident is all I knew at that time." R. pp. 22-24 (direct quote, R. p. 24, lines 24-25). Downey explained Hill was not in custody. He spoke with Hill, asking what happened. Hill explained Billy lived in the community and he was friends with Billy. He gave Billy "some shots" and left at 9 p.m. Billy left and returned later, showing up intoxicated around midnight. He grabbed the screen door and fell outside backwards. Hill claimed he checked on Billy at 6-7 a.m., then went to his housemate, Barksdale, and told him Billy was not breathing. Investigator Downey explained he did not read Hill Miranda warnings because he was not a suspect. R. pp. 25-27. Investigator Downey explained he knew Hill was intoxicated, but he walked to the patrol car under his own power, although he may

have used a cane. Asked by defense counsel if Hill was "grossly intoxicated," Investigator Downey replied he was "intoxicated." R. pp. 27-28. Hill is not challenging his statement to Investigator Downey.

Investigator Mike Fortner, the lead investigator, responded to the homicide scene on August 14. He spoke briefly, enough to decide Hill was too intoxicated to speak with him that day about what happened. Investigator Fortner was aware that Hill was being taken into custody on another matter, and planned to speak with Hill the next day at jail, but Hill was released beforehand. R. pp. 36-38. So on August 15, he and Investigator Bailey went to Hill's house instead. Investigator Fortner asked Hill if he would come down to the station. Investigator Fortner testified Hill was just a witness at the time, he was not in custody. R. pp. 38-39. Investigator Fortner admitted he had some suspicions, but explained, "Sure. I mean, we don't know who did it so everybody's a potential suspect. But we were interviewing him as a witness that day." 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 advised the trial court that Hill was not under arrest when he asked Hill to ride to the law enforcement center. Hill agreed to ride with the officers to the station, but asked if they would bring him home. They promised they would. Investigator Fortner testified at that time they intended to bring him home after the interview. The interview was conducted at the station rather than at Hill's house so Investigator Fortner could type up a statement at his desk computer. R. pp. 40-41.

Investigator Fortner interviewed Hill at his desk in an office containing six desks instead of a dedicated interview room. Hill sat next to Investigator Fortner's desk. R. p. 41. He did not give Hill Miranda warnings. He explained, "I did not because he was not in custody and I was interviewing

him more as a witness, as somebody that might be able to provide some information as to what had taken place." R. p. 41, line 24 – p. 42, line 3.

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

Consequently, Investigator Fortner took Hill across the hallway to the Greenville City Police Department interview room and provided him Miranda warnings from their standard form. He explained the reason was because Hill was now a suspect and not merely a witness. Investigator Fortner also explained to Hill he was going to video record the interview. R. pp. 47-48. Investigator Fortner explained to Hill his rights pursuant to Miranda and requested he sign the form. Hill did not sign the form, advising Investigator Fortner that he was concerned signing the form would affect his eligibility to receive disability payments. Hill indicated he was willing to talk with the officers though. After checking with the prosecutor, the investigators proceeded with the interview without Hill signing the form. R. pp. 49-51; pp. 63-64. Investigator Fortner testified that Hill appeared capable of making his own decisions. After the interview, in which Hill admitted hitting Billy, the

investigators arrested Hill. R. p. 53, p. 58.

Hill's testimony to support motion under castle doctrine

Hill testified during his motion under the castle doctrine. He testified Billy arrived around dark. Hill asked him to leave when Hill became too intoxicated and wanted to lay down. Billy did not leave, however, and Hill laid down in his bedroom. The next time he saw Billy, Billy was behind his television and Hill startled him. Billy threw his hands up and walked towards Hill. R. p. 74. Hill claimed he was scared and asked him to leave. He then pushed Billy and swung at him with his stick. R. p. 75. He wrestled with Billy at the door, and Billy grabbed the screen door and fell backwards down the steps, tearing the screen door of the hinges. Hill went inside the house and did not see Billy until the next morning. Billy said he fell down and could not move and asked for a glass of water. 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, determining it was not appropriate to interview Hill because he was too intoxicated. Nonetheless, Hill advised him that Billy broke the storm door, pulling it off its frame. Hill was not a suspect in the crime that day. R. pp. 105-07.

The investigators spoke with Hill the next day, August 15, at Hill's house. Hill was sober. They asked him to come to the police station and he agreed. They agreed to give Hill a ride back home after the interview. Investigator Bailey explained they were just giving Hill a ride to the station, he was not in custody. R. pp. 107-08.

The interview took place in what Bailey called the investigation room. It was an office with six desks and six chairs. After their initial interview with Hill, the investigators left the room to

discuss some inconsistencies they noticed between Hill and Barksdale's version of events. They returned and asked Hill about his television. Hill's demeanor changed and he said Billy was holding his television under his arm, that made Hill real mad, and he hit Billy. R. pp. 109-10.

At that point the investigators took Hill to the Greenville Police Department's interview room and advised Hill of his rights. R. p. 112. During cross-examination, Investigator Bailey agreed that the second interview occurred two hours later. R. p. 119, lines 5-11. Hill did not want to sign the form. He appeared sober. R. p. 113. On cross-examination, Investigator Bailey explained Hill told them he was drinking that day, but Hill did not appear to be drunk like the day before. R. pp. 117-18. Asked on redirect whether Hill was sober or drunk, Investigator Bailey answered he appeared 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 that 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 got mad about the television, and explained he was mad because, "I didn't see why somebody that you helped would do something like that." 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. Hill agreed that before that day, he had heard the warnings that "you have the right to remain silent" and "anything you say can and will be used against you in a court of law," as well as the warning "you have a right to an attorney." R. p. 142, line 9 – p. 143, line 5. While Hill still claimed he wanted what he told officers to be "off the record,"

Hill admitted he wanted them to hear what he had to say and agreed that when officers asked him if he wanted to talk, he emphatically said "yes." 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).**
>
> Q: Yes, sir. Well, let's go to that. Is that where your issue is here today? You're saying you understood your rights.
>
> A: Yes.
>
> Q: And you're saying you were not pressured. But you're saying your issue is the words on the record. Is that what your concern is here?
>
> A: I said off the record.

R. p. 144, lines 7-24.

Jury trial

Michael Barksdale was the State's first witness. At the time of trial he still was Hill's housemate and Hill's friend. R. p. 190; pp. 197-98. Barksdale knew Billy, for about ten to twelve years. Billy was homeless. Billy was not violent, and Barksdale never knew him to steal. R. pp. 180-81. Barksdale testified Billy and Hill were friends and they 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 sometime between ten and eleven p.m. on August 13. At the time, the storm door looked fine. Billy was laying on the floor, face up, he had a cut over his eye. No movement. R. pp. 183-84. This was not especially troubling, however, because he had seen Billy

passed out before. The fact that he saw a little blood did not change his mind. R. pp. 184-85.

Hill sat in the same room – the living room. Hill explained Billy was in a fight and he came from up the street. R. pp. 185-86. Barksdale told the jury it was not normal that Billy would be in a fight. Hill wanted Barksdale to put Billy on the porch, Barksdale told Hill to just let Billy sleep it off. Then Barksdale went to bed. R. pp. 186-87. He got up to go to the bathroom at 2 a.m. and did not see anybody. He assumed Billy was gone. R. p. 187. Then Hill woke him up later in the morning and said Billy was back, he was in the backyard, and he looked dead. Barksdale jumped up and found Billy in the backyard and Billy was dead. Barksdale called 911 even though Hill owned a cellphone. R. p. 188; pp. 194-95.

Deputy Coroner Jeff Fowler testified Hill told him Billy was his drinking buddy. Hill told him Billy got in a fight and Billy ripped the screen door off the hinges. He claimed Billy left the house mad. R. pp. 200-03. Deputy Coroner Mike Ellis explained they were talking to Hill to determine if Billy had any family members they could contact. Hill said that he and Billy had a verbal altercation and Billy ripped the screen door off. R. pp. 205-06.

Deputy Napolitano arrived at the scene when EMS was already present. He described Billy's lips as blue, flies were on his face, and he was not blinking. Billy had cuts and scratches and a swollen eye. Hill was intoxicated and not giving straight answers. Hill said he last saw Billy alive at 11 p.m. the previous night. R. pp. 210-12. Hill was not a suspect, he was not in custody. Hill claimed Billy already had scratches and bruises when he came to the house. He did not say he had an altercation with Billy. R. pp. 214-15.

Detective Michael Downey was at the house to preserve the crime scene. He let Hill sit in the patrol car because it was a hot August day. Hill had been drinking, he was not a suspect. Hill

said Billy was drinking with him, left, returned beat up, and grabbed the screen door as he fell. At six or seven in the morning, he went to check on Billy and Billy asked for water. Hill told Barksdale to call 911 after he realized Billy died. R. pp. 218-21.

Officer Jonathan Hamilton responded to the crime scene and found Billy in the corner of the backyard. R p. 228. He observed blood in the doorway and noticed the storm door was detached. R. pp. 233-35. There was also blood on the side porch. R. p. 239. The blood on the door was a transfer stain. R. p. 248. Officer Hamilton testified Hill's pants appeared to be ripped. R. p. 255. Officer Hamilton attended the autopsy and observed that bruising on Billy appeared to be made by a cylindrical object. R. p. 260.

Dr. James Fulcher was qualified as an expert in pathology and testified about the results of the autopsy he performed on Billy. Billy suffered multiple contusions and lacerations. He suffered a black eye. There was a one inch contusion on the posterior of his scalp. Bruises on the upper extremities of his arms showed two parallel lines, indicating a tram track lesion. Dr. Fulcher explained this injury indicated Billy was struck by a cylindrical object. R. pp. 279-82.

The right testicle was ruptured; Dr. Fulcher testified it was actually destroyed. R. pp. 283-84. Tran track lesions appeared on both of Billy's thighs. The entire anterior leg was highly damaged. Tran track lesions also appeared above and around the base of the penis. There were contusions in the web of the fingers. Dr. Fulcher testified these contusions were defensive injuries indicative of the victim trying to catch the cylindrical object with his hands. R. pp. 283-285. The base of Billy's brain suffered blunt force trauma. R. p. 286. The spinal column was also damaged. R. p. 290. At least twenty-three strikes came from cylindrical objects. R. pp. 287. Dr. Fulcher determined Billy died from the injuries to his brain. Billy's blood/alcohol concentration was .338. R. pp. 330-31.

Investigator Bailey provided testimony to the jury similar to his pre-trial testimony, noting Hill was too intoxicated to be interviewed on the 14th and he was "very cooperative" with law enforcement on the 15th. R. pp. 311-12. Investigator Bailey further testified Hill did not hesitate in agreeing to ride with the investigators to the law enforcement center. He just placed a condition that he receive a ride back home. R. p. 330. Investigator Bailey testified they brought him to their office with the six desks and typed up his response on a victim/witness form. He testified they did not have sufficient evidence to call Hill a suspect at that point. R. p. 331. Closely tracking his pre-trial testimony, Investigator Bailey testified Hill did not incriminate himself until the investigators briefly left the room and returned. At that point, he admitted he became angry with Billy when he came out of his room and saw Billy with his television set under his arm. R. p. 333-34.

Investigator Fortner testified he arrived at Hill's residence around 12:30 p.m. on the 14th. Barksdale was sober, but Hill was not. The television appeared fine. While Investigator Fortner saw blood inside the house, nothing looked out of place. He observed blood on the base board by the side door. The blood seemed relatively fresh. Investigator Fortner decided not to speak with Hill because he was too intoxicated. R. pp. 349-51. Investigator Fortner found out the autopsy results and was advised that Billy was struck with a cylindrical type of object like a broom handle or shovel handle. Investigator Fortner had seen Hill using a walking stick, although he was quick to point out he had seen Hill walking around the neighborhood without a walking stick. R. pp. 353-55. Hill agreed to go to the station, without hesitation. He appeared sober and was not under arrest. The investigators agreed to give him a ride back home. R. p. 357.

In their office, Hill provided the investigators an explanation of what happened. They typed up a statement, but spoke with themselves and noted some discrepancies. R. p. 360. Returning to

the office, Investigator Fortner asked Hill whether Billy was possibly trying to take his television set and so Hill hit him. Hill's eyes welled up and his demeanor changed. He said "yeah" and said he "tapped him twice." 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 it would result in his disability being curtailed. R. p. 369.

Hill's trial testimony

Hill testified he was on disability for a hip operation. On the 13th, Billy came over and they drank together. Hill asked Billy to leave, but he did not want to go. Hill let Billy stay after Barksdale returned home. Billy was still sitting in a chair when Hill laid down in his bedroom. The next time he saw Billy, Billy was behind his television. He told Billy to leave, but Billy did not. Hill claimed he became scared when Billy started approaching him. So he hit Billy and pushed him out the side door. Billy grabbed the screen door and tore the hinges off when he fell. Hill told Billy not to come back and slammed the door. R. pp. 402-08. Hill testified he drank some more because he "kind of was shook up." R. p. 408, lines 9-12. The next time he saw Billy was when he fed his dog in the back yard. Billy was still alive, he asked for water and Hill brought him some. R. p. 409. Hill came back out later and Billy was slumped over. He checked to see if Billy was breathing and realized Billy was dead. R. p. 409. Hill claimed on direct his purpose in hitting Billy was to get Billy out of the house. R. p. 407, lines 16-18.

On cross-examination, the prosecutor asked Hill how many times he hit Billy. Hill answered, "I'm thinking myself it was one or two times. But like I said, the drinking was worser." R. p. 425, lines 1-3. Hill admitted Billy moved away from the television when he hit him. He could not recall how many times he hit Billy after Billy put the television set down because "everything went blank." R. p. 425, lines 4-12. He explained he hit Billy in the legs and waist at first. The prosecutor asked him why he did not stop hitting Billy and Hill answered he did not remember. R. p. 425, line 13 – p. 426, line 13. Hill admitted he could have hit Billy in the eye and asked if he admitted that in the videotape. Hill answered, **"Anything is possible, sir, when you are mad."** 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. R. p. 428, lines 11-13. He admitted Billy never displayed any violence around him. R. 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 Hill asked a question about the television, but did not recall the exact question. He claimed he did not recall whether he admitted to them in the office that he tapped Billy. R. pp. 418-19.

He admitted to having heard the Miranda warnings all his life on TV. The investigators repeatedly told him he could end the interview at any time. He admitted that the officers treated him fairly during the interview. 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

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

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

Due process requires the suppression of an involuntary confession, regardless of the truth or falsity of the confession. Jackson v. Denno, 378 U.S. 368, 376 (1964). Based on the Fifth Amendment's protection against self-incrimination, the United States Supreme Court announced, "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards...." Miranda v. Arizona, 384 U.S. 436, 444 (1966). Before the accused is subjected to custodial interrogation, he or she must be informed of the right to remain silent; any statement made may be used as evidence against him or her; the right to the presence of an attorney; and if he or she cannot

afford an attorney one will be appointed prior to questioning. State v. Kennedy, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct. App.1996) *aff'd as modified* 333 S.C. 426, 510 S.E.2d 714 (1998).

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

"To determine whether a suspect is in custody, the trial court must examine the totality of the circumstances, which include factors such as the place, purpose, and length of interrogation, as well as whether the suspect was free to leave the place of questioning." State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 410 (2003). The appropriate inquiry involves objectively viewing the circumstances to determine whether a reasonable person in the suspect's position would have understood himself to be in custody. State v. Easler, 327 S.C. 121, 128, 489 S.E.2d 617, 621 (1997).

"Appellate review of whether a person is in custody is confined to a determination of whether the ruling by the trial [court] is supported by the record." Evans, 354 S.C. at 583, 582 S.E.2d at 409. Even if it is debatable whether a reasonable person would have believed himself to be in custody at the time he made the first statement, this Court must uphold the trial judge's finding that the defendant was not in custody where it is supported by the record. See State v. Navy, 386 S.C. 294, 301, 688 S.E.2d 838, 841 (2010) ("In our opinion, it is debatable whether a reasonable person would

have believed himself to be in custody at the time the first statement was given, and thus the trial court's finding that respondent was not in custody should have been upheld as it is supported by the record.").

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

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

Additionally, merely because the interview took place in the investigator's office is not determinative of custody. Williams, supra (citing State v. Doby, 273 S.C. 704, 708, 258 S.E.2d 896,

899 (1979) ("Rather the fact that appellant voluntarily agreed to accompany the investigators to their office and answer questions without being placed under arrest indicates a non-custodial situation."));
Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (finding warnings are not required merely because questioning takes place at the station house or because the person questioned is the one police suspect); State v. Jones, 570 S.E.2d 128 (N.C. Ct. App. 2002) (facts supporting finding that the sixteen year old boy with mild mental retardation was not in custody included that he voluntarily accompanied police, was interviewed in a comfortable office, was not restrained in any way, and was interviewed four days earlier and allowed to leave).

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

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

However, Hill was not in custody prior to Miranda warnings being provided. His argument is based on the premise that he was a suspect in the homicide. The mere fact that a person is a suspect

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

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

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

Relying on Seibert, the South Carolina Supreme Court found both statements should be

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

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

Further, while the investigators in the present case were aware Billy died from a beating administered with a cylindrical object, they were unaware of who committed the homicide or even what kind of cylindrical object was used in the homicide. So Hill did not become a suspect until his admission, and the investigators promptly ended questioning until they brought him to the interview room and provided Miranda warnings. But see Stansbury, at 324 ("It is well settled then, that a police officer's subjective view that the individual under questioning is a suspect, if undisclosed, does not bear upon the question of whether the individual is in custody for purposes of Miranda.").

Also, unlike Navy, Hill was not upset during the interview until the last question broke open his hidden remorse, the interview was not lengthy, and the investigators did not call his version of

events into doubt. Williams, at 278, 747 S.E.2d at 202 (distinguishing Navy, and noting "[h]ere, the record demonstrates Williams was not upset and the officers were not confrontational towards him."). Indeed, Hill admitted he was treated fairly when he was interviewed, the investigators were polite, and he did not feel threatened. R. pp. 418-20.

Miranda warnings were effective

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

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

Siebert, at 615.

In the instant case, Hill provided a narrative recited by the investigators in State's Exhibit

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

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

In Terry, the Eighth Circuit concluded Seibert was not violated because no evidence indicated

law enforcement used coercive or threatening tactics at either the unwarned or warned interview, and there was no evidence law enforcement engaged in a deliberate strategy to undermine Miranda warnings. Id. at 582. The Terry court noted that after a single initial question, the agent terminated the unwarned interview because he felt Terry was too intoxicated. He interviewed Terry the next day after giving Miranda warnings. Id. at 579. The Terry court concluded, "we believe that a reasonable person in Mr. Terry's shoes would have understood the Miranda warnings that he was given as conveying a message that he retained a genuine choice about continuing to talk." Id. at 582.

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

Instead, Hill's own testimony indicates he adamantly desired to speak with the investigators and he realized the decision to speak was his own decision. R. p. 143; lines 6-20; p. 144, lines 7-24. Therefore, even assuming the first statement was custodial, the trial court did not err in admitting the subsequent warned statement into evidence because the investigators' and Hill's testimony shows that Hill believed he retained a genuine choice about continuing to talk. Terry, supra; Seibert, supra.

Finally, any error was harmless. Hill testified at trial and effectively admitted on cross-

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

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

CONCLUSION

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

Respectfully submitted,

ALAN WILSON

CONCLUSION

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

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

August 30, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

The State of South Carolina,

Respondent,

vs.

Marshell Hill,

Appellant.

Appellate Case No. 2016-000868

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from 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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Appeal From Greenville County
Perry H. Gravely, Circuit Court Judge

Opinion No. 5605
Heard September 19, 2018 – Filed November 28, 2018

REVERSED AND REMANDED

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Deputy Attorney General David A. Spencer, both of Columbia; and Solicitor William Walter Wilkins, III, of Greenville, all for Respondent.

HILL, J.: Marshell Hill appeals his voluntary manslaughter conviction, contending the trial court erred by admitting several statements the State obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), into evidence. We reverse and remand.

I.

Around midday on August 14, 2013, Greenville County Sheriff's officers responded to a 911 call by Michael Barksdale from his home in the Judson Mill community. The first responding officer found Billy Patterson deceased outside the home. The officers interviewed Barksdale and spoke with his roommate, Hill, but deemed Hill too intoxicated to be questioned. Officers observed that Hill, who is disabled due to a hip injury, relied on a cane to walk. Hill repeatedly volunteered that Patterson had ripped off the screen door of the home. The officers photographed the scene and retrieved several samples of blood evidence from the patio, screen door, and other areas. After the officers determined Hill had an outstanding bench warrant for failure to appear, he was arrested and transported to the Law Enforcement Center (LEC).

The next morning, Lead Investigator Fortner, along with Investigator Bailey, attended Patterson's autopsy and learned the cause of death was blunt force trauma caused by repeated blows from a cylindrical object such as a broom handle or cane. The Investigators went to sign Hill out of detention to question him, only to discover he had been released earlier that morning. They then obtained a search warrant for Barksdale's house and drove there to execute it. Hill was there when they arrived, having walked home from the LEC. Hill testified he had consumed "over a pint" since returning home. During the search, the Investigators seized a wooden cane from Hill's bedroom. They then asked Hill to accompany them to the LEC so they could speak with him, promising to drive him back home later. Hill agreed.

The record is murky, but it appears the group arrived at the LEC around 3:00 p.m. The Investigators escorted Hill to a common work area for the homicide division, furnished with six desks and numerous chairs. No other people were present. Hill had not been handcuffed or advised he was in (or not in) custody. Rather than recording the interview, the Investigators typed a summary of Hill's statement on a "victim/witness" form, which reflected a time of 3:27 p.m. Hill explained in the statement that Patterson, a friend, came to Hill's house around 6 p.m, and they began drinking and watching television. Patterson later became unable to move, so Hill told him to lie on the floor. A few hours later, around 11 p.m., Barksdale came in from work and advised Hill to let Patterson "sleep it off." Soon thereafter, Patterson stood up and announced he was leaving but fell while holding the screen door, taking it to the ground with him. Hill and Barksdale managed to get Patterson back inside, where he slept a few more hours before leaving. Later in the night, Hill heard his dog barking, went outside, and saw Patterson sitting in the backyard next to the house. Hill came outside again around 9 or 10 a.m. and noticed Patterson now had an injury to his eye and black and blue marks on his back. Hill gave Patterson some

water. Around 11 a.m. or noon, Hill found Patterson had no pulse and asked Barksdale to call 911.

After Hill gave this statement, the Investigators left the room to confer, focusing on how Hill's version conflicted with Barksdale's. Fortner then resumed his questioning of Hill, recalling:

> So we went back and talked with Mr. Hill. I brought up the television set. It was pretty obvious that he liked his television. He spoke about it that day while we were there and he had mentioned something about it during the course of our interview. So then I asked him if Mr. Patterson had maybe tried to steal his television while he was there? And I could tell by his actions . . . he actually looked like he was about to cry. And he broke down and said that yes that he did. And then that he had tapped him twice.

At this point, the Investigators took Hill across the hall to a video interview room. The video, admitted as a State's exhibit, begins at 5:17 p.m. and runs forty-six minutes. The video shows Hill, whose sobriety was questionable, initialed but did not sign a set of warnings printed on a Waiver of Rights form. When asked by the Investigators if he could read the warnings, he explained he did not have his glasses. When Hill remarked the Investigators had "already told him" he could not go home, Bailey responded "we 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 Investigators advised Hill they could not talk any further with him about what happened unless he signed the form, but the statement they wanted from him was "no more than what you've already said." They assured Hill they would not throw him any "curveballs." When Hill commented that by signing the form he would be "signing his rights away," the Investigators advised he was not signing his rights away, just "waiving" them by "setting them aside," and that "your rights are still there." They told him he was "probably going to jail tonight." Hill commented "my cane must have matched the bruises." Hill then agreed to talk provided it was "off the record," a condition never clarified. Bailey left the room and called an assistant solicitor for an opinion on Hill's refusal to sign the form. Upon his return, he informed Hill the solicitor "said we can talk with you without you signing this," but there is no confirmation Hill understood the significance of the development. At the Investigators' prodding, Hill confessed he hit Patterson numerous times with his cane when he caught Patterson trying to steal his television.

After a *Jackson v. Denno*, 378 U.S. 368 (1964), hearing, the trial court observed the Investigators' questioning of Hill "turned" custodial after they conferred about the inconsistent evidence. The trial court, however, denied Hill's motion to suppress his statements. During Fortner's direct examination, Hill again objected to the admission of his statements made at the LEC. After hearing extensive arguments outside the jury's presence, the trial court concluded it was "a very close call" but again denied Hill's motion to suppress, finding Hill was not in custody when he gave the statements before being taken to the video interview room, where he voluntarily waived his *Miranda* rights.

II.

Hill appeals the trial court's admission of two of his statements: his first confession that he "tapped" Patterson twice and his second confession captured on video. According to Hill, the first statement was inadmissible because it was the product of a custodial interrogation conducted without the required *Miranda* warnings. He claims the second confession, although made after he was given *Miranda* warnings, was excludable because it was procured in violation of *Miranda* by the Investigators' use of the "question first" method forbidden by *Missouri v. Seibert*, 542 U.S. 600 (2004), and *State v. Navy*, 386 S.C. 294, 688 S.E.2d 838 (2010).

Statements made by a defendant during a custodial interrogation are inadmissible unless preceded by warnings from law enforcement informing the defendant of his *Miranda* rights. *See Berghuis v. Thompkins*, 560 U.S. 370, 380 (2010). The State bears the burden of proving the defendant was properly advised of his *Miranda* rights, voluntarily waived them, and freely made the statement. *See J.D.B. v. North Carolina*, 564 U.S. 261, 269-70 (2011). We review a trial court's custody ruling to determine if it is supported by the record. *See State v. Evans*, 354 S.C. 579, 583, 582 S.E.2d 407, 409 (2003).

A. The First Statement and Whether Hill Was In Custody

We first address Hill's statement that he "tapped" Patterson twice. There is no dispute Hill gave this statement while being interrogated without the benefit of *Miranda*, so the only issue is whether he was in custody when he made it.

A person is in custody if formally arrested or deprived of his freedom of action to a significant degree. *See Miranda*, 384 U.S. at 444; *Stansbury v. California*, 511 U.S. 318, 322 (1994). We must decide if a reasonable person—faced with the same circumstances confronting Hill—would have felt free to leave. *See Yarborough v. Alvarado*, 541 U.S. 652, 662 (2004). Hill testified he believed he was not free to

leave, but his subjective view is as weightless as the Investigator's conclusory testimony that Hill was not in custody. *See J.D.B*, 564 U.S. at 271 (the subjective views of investigating officers and person being questioned are irrelevant). Our inquiry is objective, centering on whether one in Hill's position would have believed he was free to stop the questioning and depart. *See id.* It entails reconstructing the circumstances of the interrogation, such as the time, place, purpose, and length of the questioning. *Evans*, 354 S.C. at 583, 582 S.E.2d at 410. Other factors include the use or absence of physical restraints, the statements made by the police, and whether the defendant was released at the end of the encounter. *Howes v. Fields*, 565 U.S. 499, 509 (2012).

Hill agreed to accompany the Investigators to the LEC, testifying he felt he had no choice, and it would have been "rude or disappointing" to refuse their invitation to transport him. Not every questioning at the police station is custodial, *see California v. Beheler*, 463 U.S. 1121, 1125 (1983); *State v. Williams*, 405 S.C. 263, 275, 747 S.E.2d 194, 200 (Ct. App. 2013), even if police view the person questioned as a suspect, *see Oregon v. Matthiason*, 429 U.S. 492, 495 (1977). But if the "invitation" is conditioned on the police escorting the defendant to the station, "a finding of custody is much more likely." 2 LaFave, et al., *Criminal Procedure* § 6.6(d) (4th ed. 2017). And if the police convey to the defendant that he is a suspect—by doubting his version of the events or presenting alternate versions based on other evidence they have collected—the atmosphere of the interrogation can objectively change to the point a reasonable person would think his freedom was restricted. *See Stansbury*, 511 U.S. at 325 (officer's view of an interviewee's culpability may bear on the custody analysis if manifested by word or deed to interviewee "and would have affected how a reasonable person in that position would perceive his or her freedom to leave").

Hill was isolated with the Investigators while at the LEC. He was not physically restrained but had only been released from jail a few hours earlier. There is no evidence the Investigators told Hill he could end the questioning at any time and leave. *See Yarborough*, 541 U.S. at 665 (facts that interview occurred at police station, lasted two hours, and defendant was never told he was free to leave "weigh in favor of the view that [the defendant] was in custody"). Bailey's testimony that Hill was told several times he could stop the questioning at any time was unspecific and appears to refer to the statements he made to Hill to that effect on the video after *Miranda* warnings were administered. In the video, Bailey also mentions an earlier, pre-*Miranda* exchange with Hill, stating "we 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." From this statement alone, it can be can be inferred a reasonable person would have concluded he was not free to leave.

Also striking is the distinct change in the purpose of the questioning. The State emphasizes Hill's initial statement at the LEC was memorialized on a "victim/witness" form, which it contends corroborates Hill was not in custody. But Hill does not challenge this statement; he even agreed he gave it voluntarily. Instead, he challenges what happened after the Investigators left the room to discuss the inconsistencies between Hill's version and Barksdale's and returned to extend the interrogation to pursue their hunch about Hill's possessive relationship with his television. Of course, the Investigators also knew from the autopsy that the cane they had seized from Hill could be the murder weapon. The video revealed the Investigators had earlier told Hill "we know what happened," and Fortner testified he was trained to confront witnesses with available evidence. This shift in investigatory purpose and technique echoes what occurred in *Navy*, where it marked the point the court found the defendant was in custody. 386 S.C. at 298, 688 S.E.2d at 840 (officer's follow-up questioning of suspect was informed by their knowledge of autopsy results, and "[a]t this juncture, the nature of the interrogation and respondent's status changed, and what had begun as a voluntary question and answer session matured into custodial interrogation"); *see also Evans*, 354 S.C. at 584, 582 S.E.2d at 410 (affirming custody finding, noting circuit court was "most concerned" by the change in purpose of questioning from routine to confrontational). Here, we agree with the trial court's initial instinct: when the Investigators realized Hill's statements conflicted with Barksdale's, "that is when they turned it into a custodial investigation."

The more than two hour length of the first unwarned questioning also points to a finding of custody. *Compare Evans*, 354 S.C. at 584, 582 S.E.2d at 410 (three hours; custody), *with Williams*, 405 S.C. at 275, 747 S.E.2d at 200 (fifteen to twenty minutes; no custody), *and Mathiason*, 429 U.S. at 495 (thirty minutes; no custody).

Viewing all these circumstances together and considering how a reasonable person would have perceived their impact on his freedom of movement, we conclude they add up to a finding that Hill was in custody when he stated he "tapped" Patterson twice. *See J.D.B.*, 564 U.S. at 270-71, 279.

B. The Second Statement and *Missouri v. Seibert*

We next consider whether Hill's video confession made after he was given *Miranda* warnings was admissible. Hill argues it was not, relying on *Seibert*, which involved the police strategy of "question first": questioning an unwarned suspect until he confesses, then delivering the *Miranda* warnings "midstream," and having the suspect repeat the confession. *Seibert*, 542 U.S. at 609-15. *Seibert* deemed this tactic undermined *Miranda*'s goal of reducing the risk of involuntary confessions procured by improper police pressure. *Id.* at 616-17. *Miranda* warnings were designed to ensure one being interrogated while in police custody is not only informed of his rights but informed under circumstances "allowing for a real choice between talking and remaining silent." *Id.* at 609. The "question first" tactic subverts this goal because one who is warned of his right to remain silent after he has already confessed is unlikely to think he retains a real choice to remain silent, making the midstream warnings meaningless. *Id.* at 612-14.

Deciding whether *Seibert* applies involves comparing the circumstances of the first and second questioning, including the completeness and detail of the questions and answers in the first round, the timing and setting of the first and second rounds, the continuity of police personnel, and the degree the police treated the second round as continuous with the first. *Id.* at 615. These factors aid in determining whether the midstream warnings could be effective or just reduce *Miranda* to a shibboleth.

The first and second interrogations of Hill were similar. The same Investigators conducted the second round, which was held in a room across the hall from where the first round had just ended. The Investigators treated the rounds as continuous, even telling Hill they only wanted him to tell them "no more than what you've already said." *See id.* at 616-17 ("The impression that the further questioning was a mere continuation of the earlier questions and responses was fostered by references back to the confession already given. It would have been reasonable to regard the two sessions as part of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before."); *see also id.* at 621 (Kennedy, J., concurring) ("Reference to the prewarning statement was an implicit suggestion that the mere repetition of the earlier statement was not independently incriminating. The implicit suggestion was false."). We cannot suspend reality and find the *Miranda* warnings effective at the late stage they were given.

Navy made clear *Seibert* did not rest on whether the police deliberately used the "question first" tactic. *Navy*, 386 S.C. at 304, 688 S.E.2d at 842. Here, there is no direct evidence the Investigators set out to skirt *Miranda*, and it would be naïve to think we would find some. *Seibert*, 542 U.S. at 616 n. 6 (noting evidence of intent will rarely surface, "so the focus is on facts apart from intent that show the question-first practice at work"). However, this is not a situation like *Oregon v.*

Elstad, 470 U.S. 298, 301, 312-13 (1985), where a defendant's unwarned inculpatory statement—uttered in response to an arresting officer's offhand comment that he "felt" the defendant was involved in a burglary—did not render later *Miranda* warnings given to the defendant at the station ineffective. Here, we do not have a *Miranda* mistake made in the heat of arrest but a calculated investigatory interview structured by veteran homicide investigators who at times pitched Hill doubletalk. Justice Kennedy's concurrence in *Seibert* ventured such a *Miranda* breach could be cured if there was a substantial break in the time and environment of the first and second interviews, or if the defendant was advised his first confession could not be used against him. *Seibert*, 542 U.S. at 622. Neither occurred here.

We therefore hold *Seibert* requires exclusion of Hill's post-*Miranda* statements. *See Berkemer v. McCarty*, 468 U.S. 420, 437 (1984) ("Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated.").

III.

As the trial court conscientiously recognized, the issues here are close, and they were not presented to the trial court in the most ideal or conspicuous form. From our perspective, however, the trial court's rulings find insufficient support in the record. We therefore hold the trial court erred by not excluding Hill's first and second confessions from evidence.

REVERSED AND REMANDED.

KONDUROS and MCDONALD, JJ., concur.

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Appellate Case No. 2016-000868

STATE'S PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, the Petitioner State now requests a rehearing on the following points that this Court may have overlooked or misapprehended. In so doing, the State maintains all its prior arguments as set out in its brief of respondent.

I.

The primary question in this case is whether Judge Graveley's finding that Hill was not in custody when he admitted to "tapping" Billy is supported by **any** evidence. If the answer is yes, then the statements were properly admitted. This Court found the trial court erred in admitting Hill's pre-Miranda statement because he was in custody and the subsequent Mirandized statement because it was taken in violation of Missouri v. Seibert, 542 U.S. 600 (2004).

However, this Court failed to apply the proper standard of review and give proper deference to the trial court that was able to observe the witnesses, including Hill, as he testified in two different pre-trial hearings and before the jury.

In the second paragraph of section II of its opinion, this Court 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. This Court concluded with its holding: "**From our perspective**, however, the trial court's rulings find **insufficient** support in the record." Hill, supra (emphasis added). This 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."). Further, the determination is not whether evidence is *sufficient* to support the trial court's ruling but whether **any evidence** that supports the trial court's ruling.

"When reviewing a trial [court's] ruling concerning voluntariness, the appellate court does not re-evaluate the facts based on its own view of the preponderance of evidence, but simply determines whether the trial [court's] ruling is supported **by any evidence.**" State v. Miller, 375 S.C. 370, 378-79, 652 S.E.2d 444, 448 (Ct. App. 2007) (emphasis added); State v. Parker, 381 S.C. 68, 74, 671 S.E.2d 6119, 622 (Ct. App. 2008) (same); 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); see State v. Navy, 386 S.C. 294, 301, 688 S.E.2d 838, 841 (2010) ("In our opinion, **it is debatable** whether a reasonable person would have believed himself to be in custody at the time the first statement was given, and thus the trial court's finding that respondent was not in custody should have been upheld as it is supported by the record.").

This Court further failed to give proper deference to the trial court's ability to observe witnesses. Gavin v. State, 473 So.2d 952, 955 (1985) ("even if we wanted to be fact finders, our capacity for such is limited in that we have only a cold, printed record to review. The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire") (cited with approval, Clemmons v. Mississippi, 494 U.S. 738, 766, 110 S.Ct. 1441 (1990) (Blackmun, J., dissenting)). For instance, this Court surmises that in the video, Hill's sobriety is questionable. However, the trial court, unlike this Court, had the ability to observe Hill testify in two pretrial hearings and compare it to Hill's demeanor in the video. Further, 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.

Evidence supports the trial court's determination that Hill was not in custody when he admitted to "tapping" Billy during the unwarned interview. In addition to ample evidence supporting the trial court's determination Hill was not intoxicated, the investigators testified that when they picked Hill up from his house, he was not under arrest. He agreed to go to the station

after being promised a return trip. Their intention at the time was to bring him back home. Tr. pp. 40-41; pp. 107-08. Investigator Fortner testified he did not give Miranda warnings because Hill was not in custody and he was interviewed as a witness, someone "that might be able to provide some information as to what had taken place." R. p. 41, line 24 – p. 42, line 3. During the suppression hearing, Hill agreed he voluntarily gave his statement to officers at Investigator Fortner's desk. R. p. 140, lines 17-23. Hill agreed during trial that the officers treated him fairly during the interview. R. pp. 419-20.

This Court noted Investigator Bailey's comment during the videotaped interview, "we 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." This Court concluded it was a reference 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 when he admitted to "tapping" Billy. This court concludes, "From this statement alone, it can be inferred a reasonable person would have concluded he was not free to leave." Hill, supra. Certainly Hill was not free to leave **after** admitting he tapped Billy twice, but there is no evidence this conversation occurred before Hill's admission. Evidence of this prior conversation, without more information about when it actually might have occurred, is not dispositive as this Court suggests. This Court made its own finding of fact, despite the requirement of reviewing courts to give deference to the trial court.

This Court cites 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 police station. 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. See generally INS v. Delgado, 466 U.S. 210, 216 (1984) (Noting in review of a fourth amendment issue that: "While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response.").

As this Court notes, not all questioning at a police station, even if the person is a suspect, is custodial. 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 that in Doby, the Supreme 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.

In the instant case, the trial court could reasonably believe the pre-warned statement was not custodial as two investigators testified Hill was not intoxicated, they testified he was not in custody, and they agreed to his request for a ride back from the station after the interview. Further, Hill admitted the reason he agreed to the interview was he did not want to disappoint the

investigators. That suggests Hill was aware or believed he could turn down the investigators and further establishes the non-custodial nature of the interview.

This Court also found that the investigators changed their "purpose" and "technique" when they returned to the interview room after discussing inconsistencies between what they were told by Hill and another witness, Barksdale. However, there was no testimony or evidence the investigators changed their "purpose" or "technique." The purpose, determining what happened to Billy, had not changed. They still did not know what happened to Billy and were trying to find out from a witness with possible knowledge who gave information different from another witness with knowledge. Further, there was no intricate "technique" involved. Investigator Fortner merely asked a question based on a hunch and not actual evidence. This is an important distinction between this case and Navy. In Navy, the upset and crying defendant was confronted with evidence. Hill was not confronted with any evidence. Indeed, Hill made calculated attempts during the interview to discover the investigator's evidence and his laid back demeanor in the video stands in sharp contrast to the facts of Navy. Therefore, the trial court did not err in concluding, after careful consideration, that the instant case bore more similarity to Williams than Navy, especially after the trial court had the opportunity to determine the demeanor and credibility of the witnesses before him.

This Court should grant the rehearing because evidence supports the trial court's ruling finding the statement was not custodial.

II.

Further, even if Hill was considered to be in custody at some point prior to being provided Miranda warnings, the recitation of Miranda warnings remained sufficient to

accomplish their objective. Siebert found the "question-first" procedure employed by the police in Seibert constitutionally infirm because the "midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with Miranda's constitutional requirement." Missouri v. Seibert, 542 U.S. 600, 604 (2004). In reaching this conclusion, the Court pointed out the following relevant factors that bear upon whether "midstream" Miranda warnings could be effective enough to accomplish their objective:

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

(2) The overlapping content of the two statements;

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

(4) The continuity of police personnel; and

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

Siebert, at 615.

In the instant case, Hill provided a narrative recited by the investigators in State's Exhibit Three. They left Hill to discuss the discrepancies between Hill and Barksdale's accounts. They returned, and the record reflects only one question was asked – whether he might have hit Billy because Billy tried to take his television set. Hill answered that he may have popped him twice. This Court elevates a reasonable business practice – not just a law enforcement practice – of asking follow-up questions to the status of a special law enforcement technique. The trial court was not required to assume a surreptitious intent by the investigators when they sought to sort out discrepancies between two witnesses.

Further, due to the absence of any detail, there is little overlap between the statements.

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 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 have the effect of making him feel obligated or trapped into providing further post-Miranda statements because Hill testified he did not recall the exact question about the television and did not recall whether he told the investigators he tapped Billy during his unwarned interview in the investigators' office. R. pp. 418-19. His inability to recall these specifics of his interview in the investigators' office shows that the admission was not memorable and played no role in his decision to continue cooperating with law enforcement after he was provided Miranda warnings.

Instead, Hill's own testimony indicates he adamantly desired to speak with the investigators and he realized the decision to speak was his own decision. R. p. 143; lines 6-20; p.

144, lines 7-24. Therefore, even assuming the first statement was custodial, the trial court did not err in admitting the subsequent warned statement into evidence because the investigators' and Hill's testimony shows that Hill believed he retained a genuine choice about continuing to talk. Terry, supra; Seibert, supra.

III.

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

Accordingly, any error is harmless beyond a reasonable doubt. The harmless error doctrine preserves the central purpose of a criminal trial, which is to decide the factual question of a defendant's guilt or innocence. State v. Rivera, 402 S.C. 225, 246, 741 S.E.2d 694, 705

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

WHEREFORE, the State requests this Court to grant the petition for rehearing and affirm the convictions and sentences.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER/RESPONDENT

December 13, 2018

The South Carolina Court of Appeals

The State, Respondent,

v.

Marshell Hill, Appellant.

Appellate Case No. 2016-000868

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc: Alan McCrory Wilson, Esquire
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The Honorable Perry H. Gravely

FILED
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