STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Horry County

Robert E. Hood, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES ELBERT DANIELS, JR.

APPELLANT

APPELLATE CASE NO. 2018-001630

INITIAL BRIEF OF APPELLANT

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In violation of the Fifth and Fourteenth Amendments, did the trial judge err by admitting statements made by Appellant to law enforcement where the evidence demonstrated Appellant was in custody and the police used the unconstitutional "question-first" tactic to elicit incriminating statements from Appellant rendering any waiver of his rights involuntary and unknowing?

STATEMENT OF THE CASE

On April 23, 2015, an Horry County grand jury indicted Appellant for two counts of armed robbery (2015-GS-26-01752; -01766) and murder (2015-GS-26-1764). R. *(indictments). The two counts of armed robbery concerned the robbery of a Scotchman convenience store on Lake Arrowhead Road and of a Sunhouse convenience store on the corner of Oak Street and Cultra Road. The murder charge arose out of the robbery at the Sunhouse convenience store where the clerk was killed during the robbery. The state, represented by Jimmy A. Richardson, II, and Scott R. Hixson, called the case to trial before the Honorable Robert E. Hood and a jury on August 27-30, 2018. Tr. 1. Barbara W. Pratt represented Appellant. Tr. 1.

During deliberations, the jury requested clarification on several aspects of the law. Specifically, the jury wanted the judge to explain felony murder again, expressed "some confusion" regarding separating armed robbery and murder, and needed "clarification over the hand of one being the hand of many." Tr. 524, l. 25 – Tr. 525, l. 11; R. *(Court's Exhibit #3). In response, the judge provided the jurors with a written copy of his instruction. Tr. 525, l. 12 – Tr. 529, l. 8. Ultimately, the jury found Appellant guilty as charged. Tr. 530, l. 24 – Tr. 531, l. 8. Judge Hood sentenced Petitioner to life imprisonment without the possibility of parole. Tr. 542, ll. 1-5; R. *(sentence sheets).

On September 6, 2018, Appellant served his notice of appeal. This brief follows.

STANDARD OF REVIEW

"On appeal, the conclusion of the trial judge on issues of fact as to the voluntariness of a confession will not be disturbed unless so manifestly erroneous as to show an abuse of discretion." State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990); see also State v. Reed, 332 S.C. 35, 43, 503 S.E.2d 747, 751 (1998). Put another way, the reviewing court will reverse a trial judge's ruling on the voluntariness of the confession when the ruling is "so erroneous as to constitute an abuse of discretion." State v. Myers, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004). "In criminal cases, appellate courts are bound by fact finding in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law." State v. Asbury, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997). "Appellate review of whether a person is in custody is confined to a determination of whether the ruling by the trial judge is supported by the record." State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 409 (2003); see also State v. Easler, 322 S.C. 333, 342, 471 S.E.2d 745, 751 (1996).

STATEMENT OF FACTS

On January 2, 2015, the Sunhouse convenience store located at the corner of Red Bluff Road and Highway 905 in Horry County was robbed. Tr. 185, l. 20 – Tr. 186, l. 11. Bala Paruchuri was working at the time. Tr. 303, ll. 7-14. One of the robbers left the store with the cash drawer. Tr. 305, ll. 15-18.

On January 25, 2015, Barbara McDowell was working at the Scotchman convenience store on Lake Arrowhead Road. Tr. 146, ll. 11-12. It was an unusually quiet night, and no one entered the store close in time to the robbery. Tr. 158, ll. 1-11. Outside the window, she saw "two guys scrunched down." Tr. 147, ll. 17-23. Suddenly, the two were entering the store through the front door. Tr. 147, l. 25 – Tr. 148, l. 1. "One of the guys went straight behind the counter, and the other guy [went] straight towards [her]." Tr. 148, ll. 2-5. McDowell noticed the man who approached her had a gun. Tr. 148, ll. 9-17. McDowell emptied the two registers, providing the men with approximately $50. Tr. 149, ll. 1-19. One man also took Newport cigarettes. Tr. 150, l. 25 – Tr. 151, l. 7.

McDowell could not identify the two men because "[t]hey were totally covered." Tr. 156, l. 24. McDowell looked out the window to see if she could see a car, but she did not see anything. Tr. 155, l. 23 – Tr. 156, l. 13. McDowell explained that the store was on a cul-de-sac, so she watched for a car to drive down either side of the road, but there were no cars around. Tr. 156, ll. 8-13. As soon as the men left, McDowell pushed the panic button and the police arrived shortly thereafter. Tr. 155, ll. 21-22. When the police arrived at the Scotchman convenience store on Lake Arrowhead Road, the officers watched surveillance video capturing the robbery. Tr. 252, ll. 5-7.

Trish Stull was working at the Sunhouse convenience store at Cultra Road and Oak Street on January 25, 2015. Tr. 163, ll. 2-6; Tr. 164, ll. 1-4. Two men robbed the store that evening shortly after the robbery of the Scotchman on Lake Arrowhead Road. Tr. 262, ll. 1-19. Officers who arrived at the store watched the surveillance video of the robbery. Tr. 263, ll. 24-25. According to an officer, two suspects entered the store and went behind the counter. Tr. 264, ll. 9-11. After "some shots fired in the store," including a shot that hit Stull, "[s]ome cash was taken, [and] a purse was taken from behind the counter." Tr. 264, ll. 11-14.

According to an officer who watched the videos from the robbery at the Sunhouse on Cultra Road and Oak Street and from the robbery at the Scotchman on Lake Arrowhead Road, there was "a clothing pattern" – "red pants and gray sweatshirt." Tr. 265, ll. 18-23. This led the officer to believe that the same individuals robbed both stores. Tr. 265, ll. 23-25; Tr. 382, ll. 19-24. This officer also had seen the video from the store on the corner of Highway 905 and Red Bluff Road and he believed he had "seen that same clothing attire in that store, not during the commission of the robbery, but earlier on in that store." Tr. 265, l. 25 – Tr. 266, l. 3.

While watching the video from the store on the corner of Highway 905 and Red Bluff Road, the officer saw "a vehicle of interest" and "a couple of subjects of interest." Tr. 286, ll. 14-22; Tr. 308, ll. 24-25. Specifically, "[a]pproximately 22 minutes prior to the robbery, a subject was in that store, oddly enough, wearing red pants and a ... dark color gray or something hooded sweatshirt, which appeared ... to be similar clothing to, to the Oak Street and Cultra Road and to the Lake Arrowhead and Kings Road" videos. Tr. 287, ll. 13-23. The officer also saw similar cars arrive at the Red Bluff Road store and the Cultra Road and Oak Street locations prior to the robberies. Tr. 293, l. 5 – Tr. 294, l. 8; Tr. 308, ll. 24-25. He believed this was a silver Chevy Malibu. Tr. 294, ll. 9-25.

A member of the Multidisciplinary Accident Investigation Team (MAIT) with the South Carolina Highway Patrol looked at the videos from the store on Red Bluff Road and the store on the corner of Oak Street and Cultra Road. Tr. 360, ll. 4-13. The MAIT officer advised the Horry County Police Department that the video showed "an '08 to a, to a 2012 Chevrolet Malibu." Tr. 360, ll. 14-21. SLED generated a list of registered owners of those cars in the area. Tr. 360, l. 22 – Tr. 361, l. 1.

SLED determined the three cartridge cases recovered from the Scotchman located at the corner of Red Bluff Road and Highway 905 following the incident on January 2, 2015, were fired by the same firearm. Tr. 198, l. 3 – Tr. 199, l. 25; Tr. 241, l. 13 – Tr. 242, l. 6. Additionally, SLED determined the two cartridge cases, which were recovered from the Sunhouse convenience store located on Cultra Road and Oak Street following the armed robbery on January 25, 2015, were fired by the same firearm. Tr. 181, l. 24 – Tr. 183, l. 19; Tr. 240, ll. 5-24. Then, SLED compared the cartridge cases from the incident on January 2, 2015, with the cartridge cases from the incident on January 25, 2015 at Cultra Road and Oak Street. Tr. 242, ll. 14-16. According to SLED, all five cartridge cases were fired by the same firearm. Tr. 242, ll. 17-25. Although SLED had no firearm to use for comparison, SLED determined the cartridges were "most likely" fired by a Hi-Point firearm. Tr. 243, l. 9 – Tr. 244, l. 6.

After developing Appellant as a suspect and learning that his girlfriend drove a silver Chevrolet Malibu, the police went to Appellant's home to interrogate him. Tr. 384, ll. 9-20; Tr. 410, ll. 13-22. Upon their arrival, the police saw a Chevy Malibu. Tr. 384, l. 24 – Tr. 385, l. 2. A search warrant was obtained and the Malibu was seized immediately by police. Tr. 412, ll. 12-

19.[1] The police then transported Appellant and his pregnant girlfriend to the West Precinct for a formal interrogation. Tr. 387, ll. 16-21; Tr. 388, ll. 12-14; Tr. 412, ll. 3-6. Despite considering Appellant a suspect, the police did not advise Appellant of his rights prior to the interrogation. Instead, the officer waited until "it became apparent ... that there was most likely further information that [Appellant] was going to provide that, that would cause [the officer] to place him under arrest." Tr. 389, l. 22 – Tr. 390, l. 4. Appellant identified McKinley Daniels, his brother, and Jerome Jenkins as individuals who entered all three stores and committed the armed robberies. Tr. 406, l. 8 – Tr. 408, l. 5. After Appellant was placed in jail, the police interrogated Appellant again. Tr. 391, ll. 2-11.

[1] A subsequent search of the Malibu revealed the presence of "a red, white and black headgear attire," which an officer opined was "similar to" what one of the individuals was wearing in the video of one of the armed robberies. Tr. 333, ll. 9-20.

ARGUMENT

In violation of the Fifth and Fourteenth Amendments, the trial judge erred by admitting statements made by Appellant to law enforcement where the evidence demonstrated Appellant was in custody and the police used the unconstitutional "question-first" tactic to elicit incriminating statements from Appellant rendering any waiver of his rights involuntary and unknowing.

Relevant facts

Prior to trial, defense counsel moved to exclude statements made by Appellant to police. Hrg. 5, ll. 8-13. Greg Lent was a Senior Detective with the Horry County Police Department. Hrg. 6, ll. 18-20. Lent had been in law enforcement for eleven years, and had been conducting investigations for almost seven years. Hrg. 60, ll. 7-8. The police determined Appellant was "a person of interest." Hrg. 7, ll. 5-9. According to Lent, Appellant was identified by another police officer as a person "inside the store prior to one of the armed robberies." Hrg. 7, ll. 13-21; Hrg. 8, ll. 1-19. The surveillance video from several robberies also allowed the police to identify a car in which Appellant was in when he visited the store, then the same car drove by the store several times, and the same car left the area after the armed robbery "at a decent rate of speed and running through a red light." Hrg. 10, l. 21 – Hrg. 11, l. 6; Hrg. 13, ll. 4-16. The other officer also indicated that Appellant's girlfriend had a car like the one in the video. Hrg. 33, ll. 14-16. Therefore, the police went to Appellant's home. Hrg. 7, ll. 10-12. In fact, Lent, Delpercio, "and a number of other detectives" went to Appellant's home around 8 p.m. Hrg. 14, l. 25 – Hrg. 15, l. 2; Hrg. 23, ll. 5-8; Hrg. 24, ll. 4-5. There were at least four police cars at Appellant's home. Hrg. 24, ll. 6-11.

Upon their arrival, the police saw a car in the yard that "looked to be the same vehicle" observed in the surveillance video. Hrg. 11, ll. 7-16; Hrg. 14, ll. 6-9. Apparently able to

establish probable cause to believe the car was involved in criminal activity, the police obtained a search warrant and seized and towed the car immediately. Hrg. 24, ll. 12-22; Hrg. 35, ll. 1-7. The police initially spoke to Appellant's pregnant girlfriend because Appellant was at work. Hrg. 14, ll. 4-11; Hrg. 25, ll. 18-24. From the girlfriend, the police learned she owned the car of interest and that Appellant "had control and would use her car." Hrg. 14, ll. 17-20. When Appellant arrived home from work, the police had his girlfriend in a police car. Hrg. 25, ll. 10-17. Lent then invited him to the precinct to speak with them. Hrg. 14, ll. 22-24. Appellant agreed. Hrg. 15, ll. 19-21. Additionally, the police invited Appellant's girlfriend to the precinct to speak with them. Hrg. 15, ll. 2-3. Lent claimed Appellant was not under arrest, not in custody, and voluntarily agreed to accompany the police to the station. Hrg. 15, ll. 12-21. However, the police refused to allow Appellant to drive himself to the precinct and required he go to the precinct in a police car. Hrg. 26, ll. 11-25; Hrg. 27, ll. 3-10.

At the station, Appellant met with the officers in an office, designed for two officers with two desks, at approximately 9:45 p.m. Hrg. 16, ll. 9-15; Hrg. 29, ll. 8-11. During this time, Appellant's girlfriend was in a different office where she met with Lent and others prior to the interrogation of Appellant. Hrg. 16, ll. 16-20. Lent and at least one other officer interrogated Appellant for over thirty minutes prior to advising him of his rights. Hrg. 18, ll. 7-18; Hrg. 28, ll. 21-23; Hrg. 30, ll. 1-3.; Hrg. 31, l. 9 – Hrg. 32, l. 1. Lent "wanted to find out … if he had access to the car, if he [were] even in the area or around, or would've been able to have been free on the dates when these crimes had been committed." Hrg. 19, ll. 8-11. Thus, he began asking Appellant about his work schedule. Hrg. 19, ll. 11-13. "His answers to those questions led [Lent] to believe that he would've been off work at the time these crimes were committed, and that he may - - or that he would've had access to [girlfriend]'s vehicle at the times those crimes

were committed." Hrg. 19, ll. 13-17. Further, Lent claimed Appellant's "body language" and "demeanor during the course of the interview led [him] to believe that once [he] had that information, that if [he] continued to speak to him, that there was a possibility other information would end up coming out, that he was possibly involved." Hrg. 19, ll. 17-22. Only then did Lent decide to advise Appellant of his rights. Hrg. 19, ll. 22-25.

Lent verbally advised Appellant of his rights rather than using a written warning and waiver because he "wanted to make things as smooth as possible." Hrg. 20, ll. 1-9. Lent emphasized that he was having a "conversation" with Appellant and he did not want that conversation interrupted by a formal, written advisement and waiver. Hrg. 20, ll. 1-9. Thereafter, Lent and the other officer continue to interrogate Appellant and extract incriminating statements from him. Hrg. 20, ll. 10-16. At the conclusion of the interrogation, the officers arrested Appellant. Hrg. 20, ll. 17-20.

At the pre-trial hearing, Lent claimed that if Appellant told the police he did not wish to speak to them or had requested to leave, then the police "would not've spoken to him or [the police] would've driven him home." Hrg. 30, ll. 8-12.

The following day, Lent got Appellant from the jail and interrogated him again. Hrg. 20, l. 22 – Hrg. 21, l. 4. According to Lent, "[t]here was another individual who was stating that somebody else had possibly been at the Conway store, the Sunhouse on Cultra and Oak Street." Hrg. 36, l. 24 – Hrg. 37, l. 1. Lent wanted to speak with Appellant "to clear up or just to confirm" what Appellant said "in the original statement." Hrg. 37, ll. 1-6. During the hearing, Lent conceded Appellant was "clearly in custody at that time." Hrg. 21, ll. 1-4; Hrg. 37, ll. 11-13. Lent advised Appellant of his rights and, according to Lent, Appellant waived his rights and provided an incriminating statement to police. Hrg. 21, ll. 5-8; Hrg. 37, ll. 18-21.

Relying upon Missouri v. Seibert, 542 U.S. 600 (2004) and State v. Navy, 386 S.C. 294, 688 S.E.2d 638 (2010), defense counsel moved to exclude his statements to police. Hrg. 42, ll. 11-18. Defense counsel explained that when Miranda warnings are provided during the interrogation, rather than at the beginning, the "warnings become less effective and really don't mean anything." Hrg. 42, l. 21 – Hrg. 43, l. 7. Further, defense counsel emphasized that in Navy, the Supreme Court focused on the detective's purpose during the interrogation – to obtain incriminating information. Hrg. 43, ll. 8-12. According to defense counsel, Appellant was in custody during the interrogation at the precinct based upon the totality of the circumstances – "taken from the house in a police car," the presence of at least four police cars and "lots of detectives," and the identification of Appellant and his brother by an officer as "possible suspects." Hrg. 44, ll. 1-17. Further, the police "had already determined to tow the vehicle," and apparently, had enough information to establish probable cause to support a search warrant for seizure of the car. Hrg. 44, ll. 18-23. The police refused to permit Appellant to drive himself to the police station; rather, the police insisted Appellant and his girlfriend, albeit in separate cars, be escorted to the police station in police cars. Hrg. 45, ll. 1-2. Quite simply, the police "intended at that point to [elicit] incriminating information from him." Hrg. 45, ll. 5-7.

As defense counsel explained, one-third of the interrogation occurred prior to law enforcement advising Appellant of his rights. Hrg. 45, ll. 8-11. Defense counsel also challenged Lent's after-the-fact claim that the police would have permitted Appellant to leave the precinct had he made such a request as the evidence demonstrated Appellant was not permitted to drive himself to the precinct, his pregnant girlfriend was transported and interrogated, and there was a heavy law enforcement presence at Appellant's home and at the precinct. Hrg. 45, ll. 15-24.

During the interrogation, Lent "very skillfully," pinned down Appellant regarding "some important incriminating information," such as Appellant's work schedule, his access and use of his girlfriend's car during the relevant time periods, and his presence at the Red Bluff store on the day of the robbery. Hrg. 46, ll. 1-16. Only after getting this critical incriminating information did Lent advise Appellant of his rights. Hrg. 46, ll. 16-23. Thereafter, Lent "boxe[d] him in from the information at the beginning" of the interrogation. Hrg. 48, ll. 15-18.

Additionally, defense counsel noted the deficiencies in how Lent advised Appellant of his rights and the alleged waiver of those rights. Lent did not obtain use a written advisement or obtain a written waiver despite being in a police station where such documents were readily available. Hrg. 48, ll. 20-25. Further, when Lent advised Appellant of his rights, he made a joke about it by referring to "a dead midget." Hrg. 48, l. 25 – Hrg. 49, l. 2. Lent never obtained Appellant's assent that he understood his rights as Lent read them "very quickly" and "very lightly." Hrg. 49, ll. 4-11. Defense counsel argued Miranda was "given as a throw away." Hrg. 50, ll. 4-6. Further, Appellant never indicated he agreed to waive his rights – there was no evidence Appellant gave a non-verbal response. Hrg. 51, ll. 1-9.

Specifically addressing the Seibert factors, defense counsel argued "the timing and setting of the first question" were "exactly the same" as was the personnel. Hrg. 50, ll. 18-22. Additionally, the detectives treated the second round of questioning as continuous with the first. Hrg. 50, ll. 23-25. Finally, defense counsel argued the statement elicited from Appellant from Lent the following day must be excluded because it was tainted by the initial interrogation without Miranda warnings and the question-first tactic employed by police. Hrg. 51, l. 10 – Hrg. 52, l. 12.

Upon hearing defense counsel's argument regarding no evidence of non-verbal responses from Appellant when Lent advised him of his rights, the state was permitted to recall Lent as a witness. Lent then claimed that during the advisement of rights, Appellant "was nodding and agreeing, yes, I understand, I understand. He nodded throughout the entire reading of Miranda to him." Hrg. 59, ll. 11-18.

Contrary to the evidence presented, the trial judge found that when the police went to Appellant's home, "the only thing they kn[e]w about [Appellant]" was that he "was in a store that was robbed prior to the robbery taking place." Hrg. 65, ll. 6-14. Although another officer told Lent that Appellant's girlfriend drove a silver Malibu, the judge indicated the police "didn't know they were gonna find a silver Malibu" when they arrived. Hrg. 65, ll. 14-20. The trial judge found that Appellant "voluntarily" left wherever he was and went home, knowing the police were there. Hrg. 66, ll. 7-9. He also determined Appellant and his girlfriend agreed to the officers' invitation to go to the precinct for questioning. Hrg. 66, ll. 14-16. The judge found "no evidence they were under arrest." Hrg. 67, ll. 8-9. He placed emphasis on Lent's claims that Appellant "was free to leave." Hrg. 67, ll. 13-14.

The trial judge was convinced that because Appellant did not confess to committing criminal acts during the first thirty minutes of the interrogation, which occurred prior to the advisement of rights, that his statement was admissible. Hrg. 67, ll. 15-22. The judge erroneously characterized the information provided by Appellant as innocuous. Hrg. 67, l. 22 – Hrg. 68, l. 7; Hrg. 68, ll. 17-24. According to the judge, "at some point in time, a bell [went] off in Detective Lent's head," and Lent determined that "based upon a bunch of different factors, this may turn into something else," and he chose to advise Appellant of his rights. Hrg. 68, l. 24 – Hrg. 69, l. 2.

Ultimately, the judge concluded Appellant was "given the appropriate Miranda warnings," and that based on the additional testimony from Lent, Appellant "agree[d] and [went] along with after acknowledgment of his constitutional rights with the decision to continue to talk to law enforcement." Hrg. 69, ll. 14-22. The judge found no "Seibert violation" and no "Miranda violation." Hrg. 69, ll. 22-24. He specifically found Appellant was not in custody for the first thirty-one minutes of the interrogation based upon the totality of the circumstances, which included being at a police precinct instead of headquarters or the jail, not being in handcuffs, not having been forced to be there, no indication by Appellant that he wanted an attorney, no denial of creature comforts, no threats, and no intimidation. Hrg. 70, l. 20 – Hrg. 71, l. 13. He further found Appellant made the statements "freely, voluntarily, knowingly, and intelligently," "after having been advised and waived his constitutional rights." Hrg. 72, ll. 13-20.[2]

Discussion

In Jackson v. Denno, 378 U.S. 368, 376 (1964), the United States Supreme Court held that "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." To introduce a statement produced during custodial interrogation, the prosecution must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda v. Arizona, 384 U.S. 426 (1966). State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009); State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007). In Miranda v. Arizona, 384 U.S. 436, 444 (1966), the United States Supreme Court held "the prosecution may not use statements, whether exculpatory or inculpatory,

[2] During the trial, defense counsel renewed her objection to the admissibility of Appellant's statements to law enforcement. Tr. 393, ll. 20-24.

stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."

The Court explained that "custodial interrogation" meant "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." Id. Thereafter, the Court required that

> [p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.

Id. This is because "in-custody interrogation[s]" place "inherently compelling pressures" on the persons interrogated. Id. at 467.

The Supreme Court concluded "the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." Rhode Island v. Innis, 446 U.S. 291, 300-301 (1980). According to the Court, "[t]he latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police." Id. at 301. "[T]he definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." Id. at 302 (emphasis in original). The determination of whether a person is "in custody" for Miranda purposes requires "[t]wo discrete inquiries": "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." Thompson v. Keohane, 516 U.S. 99, 112 (1995). "In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but the ultimate inquiry is simply whether there [was] a formal arrest or restraint on freedom of

movement of the degree associated with a formal arrest." Stansbury v. California, 511 U.S. 318, 322 (1994) (internal quotations omitted).

"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 custodial determination is an objective analysis based on whether a reasonable person would have concluded that he was in police custody." Id.

In Evans, the defendant went to the police station accompanied by her family. Id. at 581, 582 S.E.2d at 408. Two police officers took the defendant "into a back office to take her statement." The officers never advised the defendant of her Miranda rights. Id. at 581, 582 S.E.2d at 409. The police knew that the deadly fire they were investigating started with an accelerant. Id. at 581 n.2, 582 S.E.2d at 408 n.2. The police told the defendant they did not believe her explanations for the fire. Id. at 581, 582 S.E.2d at 409. The two policemen left the room and sent in a female SLED agent, who used a sympathy tactic. Id. The two women were in the room for at least forty-five minutes. Id. at 582, 582 S.E.2d at 409. The SLED agent followed the defendant to the bathroom and waited outside the door. Id.

The Evans Court found that the defendant was in custody even though she was not formally arrested until shortly after making the statement. Id. at 584, 582 S.E.2d at 410. When analyzing whether the defendant was free to leave, the Court emphasized that the SLED agent accompanied her to the restroom and waited outside the door. Id. The Court was also persuaded that the defendant was "in custody" because she was interviewed in a back office in the police station, her cousin was not allowed to go into the interview room, and the interview lasted three hours. Finally,

the officers' purpose of the interview changed from a routine inquiry to questioning of a suspect when the female officer entered the interrogation room. Id.

In Missouri v. Seibert, 542 U.S. 600 (2004), the United States Supreme Court confronted a case very similar to the one presented in the instant matter. Officers awakened Seibert at 3 a.m. and transported her to the police station. There, an officer questioned Seibert for thirty to forty minutes without giving her Miranda warnings. During this discussion, the officer obtained an admission from Seibert that she knew a mentally-ill teenager living with her family was meant to die in a house fire, which was set to cover up the death of Seibert's disabled child. After obtaining this admission, the officer permitted Seibert a twenty-minute break. Id. at 604-605.

The officer then turned on a tape recorder and gave Seibert the Miranda warnings. He also obtained a written waiver of those rights from her. The officer resumed questioning of Seibert by confronting her with her prewarning statements. Again, the officer obtained the answer he wanted – that Seibert knew the teenager was supposed to die in the fire. Id. at 605.

At trial, the officer testified that he used an interrogation technique in which he questioned the witness first, then gave the warnings, and then repeated the questioning until he got the answer that the witness had already provided once. Id. at 605-606. The trial judge suppressed Seibert's prewarning statements, but admitted the postwarning statements. Id. at 606. The United States Supreme Court held this was in error.

The Court explained "[t]he object of question-first is to render Miranda warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed." Id. at 611. Thus, the "threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as Miranda requires." Id. at 611-612. The Court held "when Miranda warnings are

inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'" Id. at 613-614 (quoting Moran v. Burbine, 475 U.S. 421, 424 (1986)).

The facts presented in Seibert were that the unwarned interrogation was conducted in the police station, and "the questioning was systematic, exhaustive, and managed with psychological skill." Officers paused only for twenty minutes before resuming questioning and providing the required warnings. Officers "said nothing to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details of the inculpatory statement previously elicited." Through the style of questioning employed which included repeated references to prior responses, the officers fostered the impression that further questioning was a mere continuation of the earlier questions. Id. at 616. Thus, "these circumstances must be seen as challenging the comprehensibility and efficacy of the Miranda warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk." Id. at 617.

Our Supreme Court confronted this issue in State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010). After the death of Navy's son, he gave a statement at the hospital to police, but was very upset and officers thought the statement was incomplete. Officers learned from the pathologist that the cause of death was smothering or suffocation. Id. at 297, 688 S.E.2d at 839. The following day, officers went to Navy's home with the intent of transporting him to the sheriff's office for further questioning. Thereafter, Navy gave a statement in which he described noticing the child having breathing problems and his ensuing panic. Id. at 297-298, 688 S.E.2d at 839.

Afterwards, officers informed Navy that the child had suffocated and that there was evidence of broken ribs. Navy inquired if he was under arrest and was told he was not. The officers then engaged in follow-up questioning. "At this juncture, the nature of the interrogation and [Navy]'s status changed, and what had begun as a voluntary question and answer session matured into custodial interrogation." In this first statement, Navy admitted to popping the child on the back and possibly patting the child on the mouth. After this statement, Navy received another smoke break. Id. at 298-299, 688 S.E.2d at 840.

Officers then advised Navy of his Miranda warnings. Thereafter, Navy gave his second statement, this time in writing. The statement mirrored the first except Navy admitted to placing his hand over the child's mouth to stop the crying multiple times, including possibly covering the nose area as well, popping the child on the back causing the child to cry out real loud, and feeling frustrated because the child was crying. Id. at 299-300, 688 S.E.2d at 840.

Officers contacted the pathologist who stated the description provided by Navy in his second statement could not have caused the child's death. In response to this information, Officers obtained a third written statement from Navy. Navy then admitted that he could have held his hand over the child's nose and mouth for longer than he first said, perhaps a minute or two. Id. at 300, 688 S.E.2d at 840-841.

The Court held the first statement was admissible because the record contained evidence to support the trial judge's finding that Navy was not in custody. According to the court, it was "debatable whether a reasonable person would have believed himself to be in custody at the time the first statement was given." Id. at 301, 688 S.E.2d 841.

However, the second and third statements were inadmissible as they were obtained in violation of the rule announced in Seibert. Courts examine four factors to determine whether a

constitutional violation occurred in this setting, including (1) the completeness and detail of the questions and answers in the first interrogation; (2) the timing and setting of the first and second interrogations; (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. Navy, 386 S.C. at 302, 688 S.E.2d at 841-842.

The Court found the officers initiated the questioning with the knowledge of the cause of death and with the intention of eliciting a confession. After obtaining Navy's first statement, officers introduced the suffocation and healing rib information to Navy. Then, officers "began an unwarned custodial interrogation designed to elicit incriminating information." After receiving those incriminating statements, officers permitted Navy a break, and then gave him his Miranda warnings. The interrogation resumed with the same officers immediately. The officers made no attempt to cure by warning Navy that his statement made prior to the administration of the warnings may not be admissible or by providing a substantial break in time or change in circumstances. The Court found all four Seibert factors met. Navy, 386 S.C. at 303, 688 S.E.2d at 842.

Recently, this Court reversed a conviction where the trial court erroneously admitted the defendant's statement based upon the officers engaging in "question-first" tactics to obtain a confession. State v. Hill, 425 S.C. 374, 822 S.E.2d 344 (Ct. App. 2018). When officers arrived at the scene where an individual had died, the officers determined that Hill, who was present at the scene, was too intoxicated to question. Id. at 377, 822 S.E.2d at 346. The following day, the police learned the deceased died as a result of blunt force trauma caused by an object such as a broom handle or cane. Id. The officers remembered that Hill used a cane to walk. Id. Thus, the officers decided to question Hill about the death. Id. When the police asked Hill to accompany them to the

law enforcement center for questioning with a promise to drive him home later, Hill agreed. Id. at 378, 822 S.E.2d at 346.

Hill and the officers were in "a common work area," which was "furnished with six desks and numerous chairs." Id. "Hill had not been handcuffed or advised he was in (or not in) custody." Id. The police then questioned Hill regarding Patterson's death. Id. Hill did not provide any incriminating information. Id. at 378, 822 S.E.2d at 346-347. After the officers conferred, one asked Hill a direct question about his television set. Id. at 378, 822 S.E.2d at 347. Hill then told police that the deceased tried to steal his television and that Hill "tapped him twice" as a result. Id.

Thereafter, the officers took Hill across the hall to an interview room. Id. at 379, 822 S.E.2d at 847. Hill "initialed but did not sign a set of warnings printed on a Waiver of Rights form." Id. Although Hill indicated the officers told him he could not go home, an officer stated he was told the police could not make that decision until they found out what he had to say. Id. Hill was advised the police "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 [he] already said.'" Id. Further, the officers indicated Hill would not be "signing his rights away"; rather, he would be "'waiving' them by 'setting them aside." Id. Eventually, the police agreed to speak to Hill without him signing the form. Id. "At the Investigators' prodding, Hill confessed he hit [the deceased] numerous times with his cane when he caught [the deceased] trying to steal his television." Id.

On appeal, Hill challenged the admissibility of his first statement that he "tapped" the deceased twice and of his second statement that he hit the deceased numerous times. Id. at 380, 822 S.E.2d at 347. This Court explain that the admissibility of the first statement turned on whether Hill was "in custody," which would require advisement of his rights. Id. at 380, 822 S.E.2d at 348. The question presented required this Court to determine "if a reasonable person – faced with the same

circumstances confronting Hill – would have felt free to leave." Id. at 380-381, 822 S.E.2d at 348. This Court determined Hill's subjective belief that he was not free to leave was "as weightless as the Investigator's conclusory testimony that Hill was not in custody." Id. at 381, 822 S.E.2d at 348. This Court examined "the time, place, purpose, and length of the questioning," as well as "the use or absence of physical restraints, the statements made by police, and whether the defendant was released at the end of the encounter." Id.

After explaining that "if the 'invitation' is conditioned on the police escorting the defendant to the station, a finding of custody is much more likely," and that "if the police convey to the defendant that he is a suspect – by doubting his version of 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 is restricted," this Court noted Hill was isolated with the investigators, not physically restrained, and was not told he could end the questioning and leave at any time. Id. at 381-382, 822 S.E.2d at 348 (internal quotations omitted). Specifically, this Court noted that one officer told Hill the decision of whether he could go home could only be made when the police found out what he had to say and that such a statement "alone" could lead a reasonable person to conclude he was not free to leave. Id. at 382, 822 S.E.2d at 348-349.

Further, this Court examined the "distinct change in the purpose of the questioning," which was "striking." Id. at 382, 822 S.E.2d at 349. According to this Court, "[t]his shift in investigatory purpose and technique echoe[d] what occurred in Navy, where it marked the point the court found the defendant was in custody." Id. This Court concluded that when the investigators realized Hill's statements conflicted with other evidence known to the police, the interaction turned into custodial interrogation. Id. at 383, 822 S.E.2d at 349. Additionally, the two hour length of the first unwarned

questioning militated in favor of a finding of custody. Id. Viewing all of the circumstances together, this Court concluded Hill was in custody when he told the police he "tapped" the deceased twice. Id.

Turning to the admissibility of Hill's statement that occurred after he was advised of his rights, this Court initially noted the first and second interrogations of Hill were similar as they involved the same police officers and occurred in a room just across the hall from where the first interrogation occurred. Id. at 383-384, 822 S.E.2d at 349-350. In fact, the police treated the interrogations as continuous. Id. at 384, 822 S.E.2d at 350. This Court concluded it could not "suspend reality and find the Miranda warnings effective at the late stage they were given." Id. While this Court did not find the investigators "set out to skirt Miranda," this Court explained the interrogations were "a calculated investigatory interview structured by veteran homicide investigators who at times pitched Hill doubletalk." Id. at 384-385, 822 S.E.2d at 350. Thus, this Court concluded Hill's second statement to police, which occurred after the advisement of rights, was inadmissible. Id. at 385, 822 S.E.2d at 350.

At first blush, Lent's questioning of Appellant during the first half hour of the interrogation appears innocuous. State's Exhibit #167. However, Lent skillfully elicited incriminating information from Appellant. State's Exhibit #167. Initially, Lent obtained admissions from Appellant that his car was broken during January 2015, and he used his girlfriend's car during that time. State's Exhibit #167. This was important because his girlfriend's car "matched" the car at the scene of the robberies according to the surveillance videos. State's Exhibit #167. In short, Appellant had access to a car like the one at the crime scenes during the relevant time periods. State's Exhibit #167. Next, Lent got Appellant's work schedule. State's Exhibit #167. This was important as well because it showed Appellant did not have a workplace alibi for the dates and

times that the crimes were committed. State's Exhibit #167. Then, Lent zeroed in on January 2, 2015, the day of the Red Bluff robbery. State's Exhibit #167. He got Appellant to explain his whereabouts and conduct on that day. State's Exhibit #167. Only after Appellant told Lent that his brother was McKinley James and that Appellant went to the store to buy a soda on Red Bluff Road on January 2 did Lent advise Appellant of his rights. State's Exhibit #167.

When Lent advised Appellant of his rights, he did so orally, without the benefit of a written advisement. State's Exhibit #167. He told Appellant the two were going to have a "serious talk," that he did not know if Appellant would tell him there was a "dead midget buried in the backyard," and, as a result, he was "afraid of what would come out." State's Exhibit #167. He noted that people sometimes say "off-the-wall and crazy stuff." State's Exhibit #167. He advised Appellant of his rights to "cover" all of them. State's Exhibit #167. When he told Appellant that what he said could be used against him in a court of law, he said "like you got a dead midget." State's Exhibit #167. Although he asked if Appellant understood his rights and if he had questions, the audio tape shows no response from Appellant. State's Exhibit #167. Of course, Lent claimed that Appellant gave non-verbal assent during the pre-trial hearing. Importantly, however, Lent never requested or obtained a waiver of those rights from Appellant. State's Exhibit #167. He simply continued questioning Appellant, picking up where he left off during the initial questioning. State's Exhibit #167.

It is not enough that the interrogator advised the suspect of his rights and the suspect made an uncoerced statement. The prosecution must show that the accused understood the rights. Berghuis v. Thompkins, 560 U.S. 370, 384 (2010) (citing Colorado v. Spring, 479 U.S. 564, 573-575 (1987); Connecticut v. Barrett, 479 U.S. 523, 530 (1987)). Thus, "[t]he waiver inquiry 'has two distinct dimensions': waiver must be 'voluntary in the sense that it was the product of a free and

deliberate choice rather than intimidation, coercion, or deception,' and 'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" Id. at 382-383 (quoting Moran v. Burbine, 475 U.S. 421, 421 (1986)); see also Johnson v. Zerbst, 304 U.S. 458, 464 (1938) ("A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.").

In South Carolina, a court must examine the totality of the circumstances surrounding the custodial statement. The examining court must answer the question: did totality of the circumstances surrounding the custodial statement defeat the defendant's will? State v. Moses, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct. App. 2010).

> Courts have recognized appropriate factors that may be considered in a totality of the circumstances analysis: background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations; isolation of a minor from his or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep.

Id. at 513-514, 702 S.E.2d at 401 (internal citations omitted).

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During the remainder of the interrogation, Lent was very confrontational with Appellant at times. Lent told Appellant that if he told him that he were in that fucking store, then they were going to have a very different conversation, but if he told him he were not in the store, then it put Appellant in a different category. State's Exhibit #167. This was a "much better category" according to Lent. State's Exhibit #167. Then, Lent confronted Appellant with the time stamps on the videos from the store – Lent knew exactly what time Appellant was in the store. State's Exhibit #167. He told Appellant that he was not the "worst of the worst." State's Exhibit #167. Thereafter,

Appellant provided additional incriminating information. State's Exhibit #167. Later, when Appellant indicated he did not know why he dropped off his brother and Jerome Jenkins, the officers began questioning him very aggressively and insisted that none of what Appellant said would be believed and that a judge would conclude that Appellant was in the store as well. State's Exhibit #167.

Alternately, when Appellant was hesitant, the police encouraged him to continue cooperating because he was "helping himself." State's Exhibit #167. When Appellant expressed his concerns about being arrested, an officer told him to relax and reminded him of everything he had going on in his life. State's Exhibit #167. The officer told Appellant to tell the truth so that law enforcement could "help" him and that the police were "the only chance" he had. State's Exhibit #167. The officer repeatedly reminded him of his girlfriend, his daughter, and his unborn child. State's Exhibit #167. When Appellant asked what he needed to do to "stay out" with his family, the officers told him to "keep doing what [he] was doing." State's Exhibit #167. Appellant repeatedly tries to bargain with the officers to allow him to go home and to find out the charges against him, but the officers refused to tell him what charges they intended to seek or to let him go. State's Exhibit #167.

During the interrogation on the day after Appellant's arrest, Lent indicated he wanted to "go back over" what had been discussed the previous day. State's Exhibit #168. He indicated he was simply continuing with the interrogation from the prior day. State's Exhibit #168. When he advised Appellant of his rights, he explained Appellant "still" had his rights. State's Exhibit #168. Again, the officer neglected to get an affirmative indication that Appellant understood his rights or was willing to waive those rights. State's Exhibit #168. Instead, he just plowed ahead with his questioning. State's Exhibit #168.

The evidence did not support the judge's finding that Appellant was not in custody. Although Appellant was not in handcuffs, he was in a police station with multiple officers for an extended period of time. The judge indicated that Appellant willingly went to the police station, but as this Court indicated in Hill, the police officer's "invitation" was a far cry from an actual invitation. In fact, the police refused to permit Appellant to drive himself to the precinct. He was required to ride with a police officer to the station. He was taken the station around 8:30 p.m., but he was not questioned for about an hour later because the police were questioning his pregnant girlfriend. The very fact that the police required Appellant's pregnant girlfriend to go to the police station and submit to questioning added pressure to Appellant to cooperate and accompany the police to the station. The clear purpose of the interrogation was the elicit incriminating information. The police knew Appellant had entered in the store prior to the armed robbery, and the police knew Appellant had access to a car matching the one seen on the surveillance video around the time of the robberies. Frankly, the fact that the police had enough evidence to establish probable cause for a search warrant for the car shows the police had enough evidence to establish probable cause to arrest Appellant, which is what the officers effectively did. Thus, the trial judge erred in determining Appellant was not in custody when the interrogation began, and an advisement and waiver of Miranda was required prior to the continued questioning.

Turning to the factors enumerated in Navy, the trial judge erred in concluding the statements were admissible as the officers engaged in question-first tactic in order to obtain Appellant's incriminating statements. While Lent did not obtain a complete and detailed admission from Appellant during the first thirty minutes of the interrogation, he did obtain significant and incrimination information. He got Appellant to admit he did not have a workplace alibi on the dates of the robberies and murders. He got Appellant to admit he had access to a car matching the

description of one on the surveillance videos on the dates of the robberies and murders. Finally, and most importantly, he got Appellant to admit he went to one of the stores on the day of the robbery. These facts were critical for the investigation. Second, the first and second interrogations occurred in the same room at the same precinct. The third interrogation occurred at the jail the following day, but the officer made very clear it was simply a continuation from the prior day. Third, the same police officers were involved in the first and second interrogations, and the third interrogation involved one of the same officers from the first and second. Finally, Lent's questionings treated the first, second, and third interrogations and one big continuous event. Therefore, the trial judge erred in his determination that Appellant's statements were admissible because the evidence showed the police engaged in an unconstitutional "question-first tactic" to induce a confession from Appellant.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of June, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Robert E. Hood, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES ELBERT DANIELS, JR.

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on James Elbert Daniels, #311245, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 7th day of June, 2019.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 7th day of June, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028