ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2018-000782

THE STATE, ... RESPONDENT

v.

RICKY ANTHONY SHORT, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

J. ANTHONY MABRY
Senior Assistant Attorney General
S.C. Bar No. 11973

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-6305

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

RULES

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the court erred by allowing Detectives Bailey and Riedel to testify they did not believe appellant's explanation for matters that appeared inculpatory, since their "investigative opinions" constituted irrelevant speculation that were wholly improper for law enforcement witnesses?

2. Whether the court erred by allowing Detective Serrundo to testify that during his investigation he "cleared" another suspect since this irrelevant testimony was not, as the court reasoned, made relevant because the defense maintained another person, and not appellant, killed the decedent?

3. Whether the court erred by refusing to suppress appellant's statements, since appellant's will was overborne by police deception when Detectives admitted they did not believe appellant was telling them the truth but continued with the interrogation while engaging in the condemned Missouri v. Seibert, 542 U.S. 600 (2004) and State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010), "question first-give Miranda warnings later" tactic where appellant was handcuffed at the scene of the crime, and interrogated for about four hours at the police station before Miranda warnings were given, since the police deliberately locked appellant into his "narrative" they did not believe before appellant was given Miranda warnings?

STATEMENT OF THE CASE

On October 10, 2015, at approximately 11:20 p.m., Appellant Ricky Anthony Short murdered Malakia Frazier in Charleston County. The victim was six (6) months pregnant. Her child was delivered by emergency caesarean section that night. Short was arrested the following day, October 11, 2015, and charged with Frazier's murder and the attempted murder of her child. Two (2) weeks later, Frazier's child died from complications from the assault. Short was then charged with the child's murder as well. Subsequently, the Charleston County grand jury indicted Short for Frazier's murder, the murder of her child, and possession of a weapon during the commission of a violent crime. (Ind. #s 2016-GS-10-1699 - 1701). Short was represented on the charges by Peter Shahid, Esquire. On April 16 – 20, 2018, Short proceeded to a jury trial before the Honorable Deadra L. Jefferson. At its' conclusion, the jury found Short guilty of Frazier's murder, the murder of her child, and of the weapon charge. Judge Jefferson sentenced Short to concurrent sentences of life in prison for Frazier's murder, life for the murder of the child, and five (5) years for the weapon charge. (R. pp. 17; 175-378; 382-607; 612-831; 1086, 1092). Short appeals his convictions and sentences raising three (3) issues. (BOA, p. 1). This is the Brief of Respondent.

RESPONDENT'S STATEMENT OF FACTS

On October 10, 2015, at 11:26 p.m., North Charleston police officers responded to an emergency call of a stabbing assault. When they arrived at the end of a driveway at 4997 Railroad Avenue at 11:30 p.m., they found the victim Malakia Frazier (hereinafter "Frazier" or "the victim") lying on her back. There were several Hispanic witnesses standing in the driveway near the victim. Appellant Ricky A. Short ("Short"), an African-American male, was kneeling near the victim. Short was not wearing a shirt and had on blue jeans and low cut duck boots.

Police later learned Short's white t-shirt was balled up like a pillow and under the victim's head. Short's cell phone was lying next to the victim. Short had in fact called 911 and reported the assault. (R. pp. 261-70; 271-85; 292-98; 300-12; 313-17; 319, 321-330).

The victim was unconscious, barely alive, and lying in a large pool of blood. She had numerous stab wounds to her body including to her neck, arms, chest, and abdomen. She was bleeding profusely from her neck. The first two (2) officers who arrived on the scene applied compression to the wounds and administered CPR but were unable to revive the victim or obtain a pulse. They turned over rescue efforts to EMS who continued to try and resuscitate the victim and transported her to the local hospital where she was pronounced dead at 11:59 p.m. (R. pp. 261-70; 271-98; 292-98; 300-12; 313-17; 319, 321-30).[1]

One (1) of the Hispanic witnesses standing near the victim when police first arrived at 4997 Railroad Ave., a Hispanic woman, Ms. Flores-Urbina, informed police she had witnessed the assault and the assailant was an African-American male wearing a black jacket partially un-zipped, a white shirt, and blue jeans. She also stated the assailant had something in his hand when he was attacking the victim and he fled from the scene on foot.[2] The eyewitness explained she and a friend were returning home in her car at approximately 11:20 p.m. when they witnessed the assault. She had intended to pull in the driveway where the victim was found, since it was her residence, but saw the assailant attacking the victim. Because of witnessing the assault and her fear, Ms. Flores-Urbina continued down Railroad Avenue in her car. At this

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[1] The victim's unborn child, a girl, Miracle Frazier, was delivered by emergency caesarean section that night, and survived two (2) weeks; however, the child died from complications due to the assault on her mother. (R. pp. 741-831).

[2] When police first arrived on the scene, the eyewitness, who spoke Spanish, gave police a quick general description of the suspect. Police obtained more details when the eyewitness was taken to a nearby residence and interviewed with an interpreter and a written statement was taken from her. Her friend who was accompanying her was unable to speak at all. The eyewitness informed police she would be unable to identify the assailant.

time, she witnessed the assailant flee on foot and then turn and run perpendicular to the direction he originally ran. Ms. Flores-Urbina eventually stopped at another residence nearby and attempted to use a phone to call police because her cell phone was not working. She eventually circled back to the driveway and parked nearby and walked up to where the victim was found. She and her friend were standing there with the victim when police arrived. (R. pp 261-70; 271-85; 292-98; 300-12; 313-17; 319, 321-30).

It was unknown to police when Appellant Short arrived on the scene and began kneeling next to the victim. However, the eyewitness, Ms. Flores-Urbina, was standing near or next to Short when police arrived and did not identify him as the assailant. Neither did her friend. (R. pp. 261-70; 271-85; 292-98; 300-12; 313-17; 319, 321-30).

As previously stated, when police first arrived at the scene, Short was kneeling beside the victim. He eventually stood at the foot of the victim with his hands on his head and made a spontaneous statement in the presence of the first responding officer that the victim was not breathing and was six (6) months pregnant. After the officer turned rescue efforts over to EMS, Short made another spontaneous statement in the officer's presence that the victim was his girlfriend and he and the victim had had an argument.[3] Based on the injuries to the victim, and the statements made by Short, the first responding officer placed Short in investigative detention as a possible person of interest. He handcuffed Short and placed him in the back of a police car. (R. pp. 261-70; 271-85; 292-98; 300-12).

When Detective Robert Bailey of the North Charleston Police Department arrived at the scene, Short was already sitting in the back of the police car. Bailey informed Short they needed him to come to the police station to be interviewed so they could determine what happened to the

[3] Short testified at trial that what he told the first responding officer was that he and the victim had argued earlier and she had walked or stormed off. (R. pp. 839-1003, 882).

victim. Short stated that he understood. Short was then transported to the police department where he was placed in a conference room, un-handcuffed, and eventually interviewed by Bailey beginning at about 1:30 a.m. (R. pp. 25-62; 361-78).

While Short was being transported to the police department and then interviewed there by Bailey, other officers and detectives at the scene continued the investigation into the victim's assault. This included interviewing the Hispanic witnesses in more detail and taking a written statement from Ms. Flores-Urbina and processing the crime scene. (R. pp. 261-70; 271-85; 292-98; 300-12; 361-78; 566-581).

Police were able to determine the actual crime scene began up Railroad Avenue from where the victim's body was found, toward a convenience store. There police found a flip flop similar to one found near the victim's body, and the beginning of a trail of blood drops. Also found in this area was a woman's tank top t-shirt. The blood trail went back and forth across Railroad Avenue to the location where the victim was found lying on the ground. This was in the same general direction if the victim had been headed from the convenience store toward Harper Street where her car was parked in front of Short's residence.[4] (R. pp. 261-70; 271-85; 292-98; 300-12; 361-78; 566-81).

Because of the eyewitness's description, police began searching the surrounding area looking for the suspect or the clothing described by the eyewitness and/or the murder weapon, believed to be a knife. At around 10:00 a.m. the following morning, October 11th, approximately one (1) block from the crime scene, behind a garage, near a property line, police found a black *Old Navy* jacket, a long sleeve white thermal type shirt, and a knife. All three (3) items were

[4] Short lived on Harper Street which is approximately three (3) blocks from where the victim's body was found and which runs perpendicular to Railroad Avenue. Short lived there with his mother. After the murder, the victim's car was found parked in front of Short's residence. (R. pp. 404-08).

found together on the ground directly behind this garage. All three (3) items appeared to have fresh blood or fresh blood stains on them. The garage was also located approximately two (2) blocks from Short's residence. These items were located in the general path of flight of the assailant as described by the eyewitness. Police eventually showed the jacket to Short's mother who confirmed the jacket belonged to Short. (R. pp. 331-61; R. pp. 109-43; R. pp. 404-08; 561-63; 581-607; State's Ex. 30).

The autopsy determined the victim died from loss of blood as a result of stab wounds with a sharp object. The victim was stabbed a minimum of thirty (30) times. She was stabbed in the neck, chest, abdomen, and arms. She was also cut on the ear and stabbed in the shoulders. The victim also had dirt on her legs and her feet, including the soles. (R. pp. 798-803).

DNA testing subsequently showed the victim's blood [DNA] was on the knife, the black jacket, and the long sleeve white thermal shirt found behind the garage. The victim's blood was found on the front of the black jacket. The victim's DNA was also found on a swab of the neck and cuff of the black jacket, indicating she had worn the jacket in the past. The victim's blood was found on the handle of the knife. The victim's DNA [blood] was also found on the center of the white thermal long sleeve shirt. (R. pp. 612-15; 690-96; 701-02).

Short's DNA was also found on the black jacket, the long sleeve white thermal shirt, and DNA consistent with Short's was found on the knife. (R. pp. 617-27; 640-737). Short's DNA was a minor contributor to the sample taken from the collar and cuff area of the black jacket, indicating he had worn the jacket before. Short's DNA was consistent with that found in two (2) places on the knife contained in a mixture with the victim's blood [DNA]. Short's DNA was consistent with that found on the underarms of the white

thermal shirt which contained the victim's blood, indicating he had previously worn it before. (R. pp. 690-96).

The victim's fingernail scrapings seized at autopsy were also analyzed for DNA. Short's DNA was found under the victim's fingernails. The State's DNA expert testified there was a significant amount of Short's DNA under the victim's fingernails consistent with Short being involved in an altercation with the victim and inconsistent with mere casual contact. (R. pp. 612-16; 698-701).

Short's boxer shorts were also tested for DNA. The victim's blood [DNA] was found on the front waist area of Short's boxer shorts. (R. pp. 687-90).

Short was initially questioned at the police station as a witness or person with information about the case not as a suspect. During that questioning, Short related he and the victim had been together that evening and had an argument at his residence. The victim initially left on foot, returned, and the argument resumed. The victim then left on foot again. A few minutes later, Short decided to go after the victim and calm her down. As he was walking on Harper St. toward Railroad Ave., he heard the victim scream in the distance and he ran toward her screams. When he arrived at 4997 Railroad Ave., the victim had already been assaulted and was lying on her back with Mexicans standing nearby. Short then called 911 to report the assault and get the victim assistance. Short then placed his white t-shirt under the victim's head and put his cell phone down next to the victim. (R. pp. 25-62; 361-78; 382-458; 460-507).

As the night and investigation progressed, Short's version of events did not match up with witnesses' version of events at the scene and Detective Bailey noticed injuries on Short

consistent with his possibly being the perpetrator.[5] As a result, Short was read his Miranda rights at 4:30 a.m. and executed a waiver of those rights. Short then told investigators the same exculpatory story he had told them prior to his Miranda warnings. Short was then asked how he got cuts on the palm of his right hand. He explained these came from picking flowers for the victim two (2) days before her murder. Short was also asked if he had ever owned a black jacket, and he stated he had owned a Black Old Navy Jacket but he had given it away two (2) weeks before the victim's death. (R. pp. 25-143; Ex. 1 Jackson v. Denno [Miranda Waiver Form]; R. pp. 382-458, 460-507; 508-47).

Around, 10:30 a.m., Short was informed police had found the black jacket, the white thermal shirt, and the knife near the crime scene and the items contained blood. Short maintained the same exculpatory story throughout the interview post-Miranda as he did pre-Miranda, until approximately 11:30 a.m. (R. pp. 25-143; Court's Ex. 2 Jackson v. Denno [Video of interview of Short with Johnson]; R. pp. 404-08; 460-507; 508-47).

At that time, 11:30 a.m., Detective Lt. Angela Johnson, who knew Short's family, spoke with Short alone. She informed Short he was being arrested for the murder of the victim and would be taken to the Charleston County Detention center for booking. When Johnson asked Short if there was anything he would like to tell the victim's mother, Short for the first time made admissions that it was he who killed the victim and not some unknown third person. (R. pp. 25-143; Court's Ex. 2 Jackson v. Denno [Video of interview of Short with Johnson]; R. pp. 404-08; 460-507; 508-47).

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[5] Detective Bailey noticed cuts or scratches on Short's forehead that he initially thought might be blood spatter from Short attending to the victim at the scene. Bailey eventually saw a cut to the back of Short's right hand and when Short turned over his hands Bailey saw straight line cuts to the fingers of the palm of Short's right hand.

Police obtained a search warrant to obtain a buccal swab from Short to compare his DNA to any blood or DNA found on the knife, the black jacket, the white thermal shirt, and the fingernail scrapings or clippings of the victim. The buccal swab was then taken from Short. Short was then formally arrested for the victim's murder. (R. pp. 412-16; 548-566; 225-39).

At trial, Short testified in his own defense. He testified to each statement he gave to police beginning with those made at the crime scene until his eventual arrest the following day. He testified he informed the first responding officer without being questioned that the victim was his girlfriend, they had argued earlier, and the victim had walked away or stormed off. Short testified that at the police station he told the police exactly what he was telling the jury, that he and the victim had argued at his residence, she walked away once and returned, they argued again and she struck him with her car keys, and she walked away again headed down Railroad Avenue. He then decided to follow her to calm her down and he heard her scream and by the time he reached her she was lying on the ground and had been stabbed by someone else. He also testified before the jury he told police he cut his fingers on the flowers he picked for the victim the previous Thursday, and that he also gave the black "Old Navy" jacket he previously owned to a homeless person about two (2) weeks before the murder. He testified before the jury that all of these statements were true. He also testified he made the final statements to Lt. Johnson, after he was informed he was going to be arrested, but he asserted he did not admit his guilt, but was simply stating he was sorry that the victim had ever got involved with him, because if she had not been involved with him romantically she would not have been at his residence that night, she would not have walked away after their argument, and she would not have been killed by an unknown third person. (R. pp. 839-1003).

Short also admitted while testifying that the black "Old Navy" jacket recovered by police one (1) block from the crime scene and two (2) blocks from his residence was his jacket. Short also admitted the white thermal shirt recovered by police in the same location was his. Short also admitted both items contained the victim's blood and his DNA. Finally, Short also admitted there was some question whether the victim's unborn child was his and that he and the victim had agreed to have a paternity test done when the child was born. (R. pp. 839-1003).

ISSUE I.

Whether Judge Jefferson erred by allowing Detectives Bailey and Riedel to testify they did not believe appellant's explanation for two different matters?

What Occurred Below

During the trial, Detective Bailey testified that when Short was originally brought to the police station he gave an account of what occurred that evening. Bailey did not testify what that account was. Bailey was asked if that account was consistent or matched up with other witnesses police were talking to at the scene. Short's counsel objected, but did not give a basis for the objection. After a bench conference, the objection was overruled. Bailey then testified that at first Short was the only witness that he had been able to talk to, but later after speaking with other detectives who had been at the scene, he learned what other witnesses had told police and Short's account of events was not consistent with what those witnesses had told police. Bailey did not testify to what those witnesses at the scene had told police, only that Short's account was not consistent with the other witnesses' account. Bailey testified based on this fact, and later observing things on Short's body, he began to consider Short as a possible suspect in the murder of the victim. (R. pp. 382-93).

Later, Detective Bailey testified before the jury to statements Short made post-Miranda. One statement of Short was that he cut the palm of his hand the Thursday before the murder picking flowers for the victim.

On *re-direct* examination by the State, Bailey was asked if Short's explanation of how he cut his hand was reasonable to him.[6] Short objected that this was outside of the ability of Bailey to answer, and it called for speculation. Judge Jefferson agreed that it was speculative. The State then stated it was only going to ask the Detective if he believed Short's version of how he cut his hand. Short then objected to this question based on it *being opinion*. Judge Jefferson agreed that it would be opinion but ruled Detective Bailey could give his opinion because it "was within his rational perception based on his years of experience." (R. pp. 453-54). Detective Bailey then testified he did not believe Short's story about how he cut his hand. (R. p. 454). Bailey went on to testify **again** that he observed straight line cuts to the palm of Short's hand that were consistent with those made by a person stabbing someone with a knife and their hand slipping on the knife resulting in them cutting them-self. (R. pp. 456, ll. 1-7; 457, ln. 14 – 458, ln. 12). Bailey had already testified to this **in his direct testimony** *and* **on re-direct** before being asked the objected to question. (R. pp. 384, ln. 14–16; 385, ln. 10; 451-53). Additionally, photographs of the cuts to Short's hand had been admitted and shown to the jury while Bailey testified **on direct**; and, Bailey had testified without objection to his opinion **these cuts were caused by Short's hand sliding across the blade of a knife** [not picking flowers]. (R. pp. 384, ln. 14–16; 385, ln. 10; State's Ex. 23-28). Short had questioned Bailey extensively on cross-examination and attempted to impeach him about this testimony. (R. pp. 418-29, 441-45).

[6] On cross-examination, Short had questioned Bailey extensively about his un-objected to *direct examination testimony* that the injuries to the palm of Short's hands were straight line cuts and were consistent with Short's hand having slid over a knife blade during an attack on another person. (R. pp. 418-29, 441-45).

Detective Riedel also testified to statements Short made post-Miranda. Among other statements, Riedel testified Short stated that he and the victim argued, she left, she returned and they argued again, she left again, and a short time later he followed the victim after she left in an attempt to calm her down. (R. pp. 473-77). Riedel was asked if he believed this statement. Short objected on the grounds of relevance. Judge Jefferson overruled the objection finding the testimony went to the course of the investigation. (R. p. 477, ll. 4-22). Detective Riedel then testified Short's explanation "wasn't completely believable, no." (R. pp. 477, ln. 14 – 478, ln. 10). Detective Riedel then went on to testify without objection that Short informed him as he neared Railroad Avenue, he heard the victim screaming, and he ran to help her. Riedel testified without objection this statement was inconsistent with what other witnesses or a witness at the scene had told police. (R. pp. 478-80).[7]

Lack of Preservation of this Issue

On appeal, Short argues Judge Jefferson erred in admitting each of the three (3) statements above [2 by Bailey and 1 by Riedel] because they called for improper opinion testimony. (IBOA, pp. 16-20).[8]

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[7] Although not related to the jury, the eyewitness, Ms. Flores-Urbina had explained to police she witnessed the assault on the victim, saw the assailant flee, and she proceeded past her driveway and drove to a nearby residence and attempted to use the telephone there because her phone was inoperable at the time. She then drove around the block and back to her driveway where the victim was lying on the ground. Short's statement was inconsistent with Ms. Flores-Urbina's timeline because he alleged he heard the victim being attacked and he immediately went to her and when he arrived at the end of the driveway, the victim was on the ground and Ms. Flores-Urbina and her friend were already there.

[8] Short did not object below that in asking either officer whether they believed statements made by Short that the State engaged in improper witness pitting. *See* State v. Daise, 421 S.C. 442, 807 S.E.2d 710 (Ct. App. 2017). As a result, to the extent Short argues this on appeal as a basis for reversal, this issue is not preserved for appellate review. State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997)(defendant may not argue one ground below and a different ground on appeal); State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996)(similar); State v. Tucker, 319 S.C. 425, 462 S.E.2d 263 (1995)(same).

The challenge to the first statement of Bailey is not preserved for appeal. A general objection to the admission of evidence, without more, does not preserve the issue for appeal. Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998)(a general objection does not preserve an issue for appeal, specific grounds in support of the objection must be clearly stated); State v. Ivey, 325 S.C. 137, 481 S.E.2d 125 (1997)(a general objection to the admissibility of testimony or evidence does not preserve the issue for appeal); State v. Bailey, 253 S.C. 304, 170 S.E.2d 376 (1969)(the trial judge commits no error in overruling a general objection); State v. White, 311 S.C. 289, 296, 428 S.E.2d 740, 744 (Ct. App. 1993)(an objection that is too general does not preserve issue for appeal). *See* York v. Conway Ford, Inc., 325 S.C. 170, 480 S.E.2d 726 (1997) While Short argues on appeal that this testimony was inadmissible because it was speculative opinion testimony, this objection was not raised below. Therefore, the objection to this testimony is not preserved for appellate review.

As to the remaining two (2) statements, Short's argument below and on appeal has no merit.

ARGUMENT I.

Judge Jefferson did not err in admitting the challenged testimony of Detectives Bailey and Riedel; regardless, the testimony was harmless beyond a reasonable doubt.

Standard of Review

"The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a 'manifest abuse of discretion accompanied by probable prejudice.'" State v. Commander, 396 S.C. 254, 262-63, 721 S.E.2d 413, 417 (2011)(*quoting* State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006). "An abuse of discretion occurs when the

conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262 (2006).

> If the witness is not testifying as an expert, the witness'[s] testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness'[s] testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

Rule 701, SCRE. "Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge...." Watson v. Ford Motor Co., 389 S.C. 434, 445-46, 699 S.E.2d 169 (2010). "On the other hand, a lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training." Id. at 446, 699 S.E.2d at 175; *see also* State v. Douglas, 380 S.C. 499, 502, 671 S.E.2d 606, 608 (2009)("Lay witnesses are permitted to offer testimony in the form of opinions or inferences if the opinions or inferences are rationally based on the witness'[s] perception, and will aid the jury in understanding testimony, and do not require special knowledge."). "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." State v. Fripp, 396 S.C. 434, 439, 721 S.E.2d 465, 467 (Ct. App. 2012)(quoting Rule 704, SCRE).

In his brief, in support of his argument on this issue, Short references two (2) cases: State v. Westmoreland, 421 S.C. 410, 807 S.E.2d 701 (Ct. App. 2017) and State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015). However, neither case is apposite or controlling on this issue.

In Westmoreland, 421 S.C. 410, 807 S.E.2d 701, this Court held the admission of the testimony of the coroner that he determined the victim's death was a homicide was an abuse of discretion and not harmless because the coroner testified incorrectly that "a homicide" is when a

death results *from the intentional act of another* and the testimony was not based on the coroner's perception but the perceptions of others.[9] Critical to the Court's decision, the defendant in Westmoreland asserted at trial the death of the victim, which was the result of the impact of the defendant's vehicle with the victim, was an accident caused by him but not intentional. The State asserted the defendant intentionally ran over the victim after an earlier argument and fight. The coroner's misguided opinion that a homicide *is an intentional act* went to the ultimate issue in the case and could have persuaded the jury on the ultimate issue in the case. Id. This Court did not hold in Westmoreland that a law enforcement officer can never testify to his perception or opinion or why he continued to question a suspect. Id. What occurred in Westmoreland did not occur in this case.

In Brewer, 411 S.C. 401, 768 S.E.2d 656, the defendant was convicted of ABWIK, murder, and a gun charge. There was overwhelming evidence the defendant committed the ABWIK and the gun charge which occurred inside a night club. The evidence was scant that the defendant committed the murder which occurred outside the nightclub in the parking lot and entrance to the club. There was also evidence of a second shooter outside the night club. The Court held it was error to admit the entire videotape of officers interviewing the defendant when the defendant denied his guilt, exercised his right to remain silent, said he wanted an attorney, and officers repeatedly stated hearsay on the tape, some of which was false, and challenged the defendant to prove his own innocence. Id.

What occurred in Brewer did not occur in this case. Short did not exercise his right to remain silent, ask the interrogation to cease, and none of the detectives challenged Short to prove

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[9] As this Court pointed out in Westmoreland, a homicide is actually defined as the death of a human being caused at the hand or as a result of the actions of another, but it does not have to be an intentional act but includes unintentional killings. Id., 421 S.C. at 420-21, 807 S.E.2d at 707 (citing Commander, 396 S.C. 265-70, 721 S.E.2d 419-21).

his innocence. In fact, even though Short's entire interview, from the time he arrived at the police station until his admissions at approximately 11:40 a.m., was audio and video recorded, the State did not introduce the entire audio and video tape as the State did in Brewer. The State redacted from the audio and video tape portions of the interview where Detectives Bailey and Riedel confronted Short with evidence in the case. During the trial, Bailey and Rieter only testified to the statements Short made to them in response to their questions or statements. The only portion of the audio and video recorded interview that was played for the jury was the portion from 11:40 a.m. until 12:10 p.m. when Short made admissions of guilt to Lt. Johnson. The record shows the State actually complied with Brewer.

Detective Bailey's first challenged statement **was not opinion testimony**. He merely testified that as the investigation progressed and he was able to gather more information, Short's initial story was inconsistent with that of a witness or witnesses at the scene. He did not recount to the jury the information he had received from the scene.

Likewise, Bailey's second challenged statement was **not opinion testimony**. Bailey merely testified he, personally, did not believe Short's story about how he cut his hand. *See* Rule 602, SCRE (requiring personal knowledge).

And even if this challenged statement constituted opinion testimony, it was not improper lay witness opinion testimony. His un-objected to testimony on direct examination shows this. (R. pp. 384, ln. 14–16; 385, ln. 10; 451-53; State's Ex. 23-28). Rule 701, SCRE.

The objected to portion of his testimony [on re-direct] was based on Bailey's experience as a detective and his observation of the cuts on the palm of Short's hand, nothing else. Based on Bailey's years of experience and observations of the cuts to the palm of Short's hand, those cuts were consistent with Short stabbing another person with a knife and Short's hand slipping

down the knife, not picking flowers. (R. pp. 384, ln. 14–16; 385, ln. 10; 451-53). Additionally, photographs of the cuts to Short's hand had been admitted and shown to the jury while Bailey testified on direct examination; and, Bailey had testified without objection to his opinion these cuts were caused by Short's hand sliding across the blade of a knife [not picking flowers]. (R. pp. 384, ln. 14–16; 385, ln. 10; 451-53; State's Ex. 23-28).[10]

Similarly, Detective Riedel **did not give opinion testimony**, but testified he personally did not believe Short's initial version of events because Short's version of events did not match up with what he had learned through his investigation at the scene. Because he did not accept Short's version of events, he continued to question Short. The admission of this testimony was not an abuse of discretion.

What the State actually elicited was testimony *on the witness stand* from Detectives Bailey and Riedel that they did not accept Short's version of events and as a result continued their questioning of him at the police station. This was obvious to the jury from the fact the detectives did not accept Short's version of events, that an unknown third party committed the offense, and his explanation for injuries to his hand, and continued to question him after Short related these facts several times.

This testimony is also consistent with the un-objected to video-tape of Lt. Johnson interviewing Short (State's Ex. 30), wherein she informs Short he is being arrested for the murder and the reason he is being arrested for the murder, and Short's admissions to her that it was in fact he who committed the murder.

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[10] Furthermore, this was re-direct examination of the witness by the State, after Short had questioned Bailey extensively and attempted to impeach him about his un-objected to testimony on direct examination that the cuts to Short's palm were consistent with Short's hand having slid over the blade of a knife. (R. pp. 418-29, 441-45). The objected to testimony was proper re-direct in response to Short's cross-examination and attempted impeachment of Bailey on this issue. (See R. pp. 447-58 [re-direct of Bailey]). Rule 611(a)(b) & (d), SCRE.

Harmless Error

Regardless, the admission of the challenged testimony was harmless beyond a reasonable doubt. As previously stated, it was obvious to the jury and anyone else listening to the testimony that police did not accept Short's initial version of events because they continued to question him.

Additionally, Detective Bailey testified several times without objection that the injuries to Short's hands were caused by or consistent with someone's hand sliding down a knife and cutting them-self on the blade of the knife. (R. pp. 384, ln. 14–16; 385, ln. 10; 451-53; State's Ex. 23-28). Obviously, this testimony itself is inconsistent with Short's claim that he cut his hand on flowers removing them from a flowerbox the Thursday before the murder. Therefore, it was obvious to the jury that Detective Bailey did not accept or believe Short's version of how he cut the palm of his hand.

Likewise, Riedell testified without objection that Short's version of events was inconsistent with what the investigation at the scene revealed. Therefore, it was obvious to the jury that Detective Riedell did not accept or believe Short's version of events.

This testimony is also consistent with Lt. Johnson's testimony and the un-objected to video-tape of Lt. Johnson interviewing Short at 11:40 a.m. (State's Ex. 30), wherein she informs Short he is being arrested for the murder and the reason he is being arrested for the murder; she gives Short the opportunity to relate what really happened, and Short makes admissions of guilt. As a result, it was abundantly clear to the jury that investigators did not believe Short's initial statements to law enforcement.

Furthermore, the evidence of Short's guilt was overwhelming. The victim was found approximately three (3) blocks from Short's residence with thirty (30) stab wounds. The victim

was Short's girlfriend. Short was covered in blood including his hands, face, and on his pants. Short was the last person with the victim before the deadly assault. The victim's car was found parked in front of Short's home after the deadly assault. Short and the victim had argued at his residence shortly before the deadly assault. The assailant was described by an eyewitness as an African-American male, with a partially zipped up black jacket, a white shirt, and blue jeans with something metal in his hand. Short is an African-American male. Police discovered at the police station that Short had straight line cuts to the palm of his hand consistent with his hand having slipped down the knife while stabbing the victim and cutting himself. Police recovered the black jacket, white thermal shirt, and knife approximately one (1) block from the crime scene and two (2) blocks from Short's residence. The jacket, thermal shirt, and knife contained the victim's blood and DNA. The jacket, thermal shirt, and knife also contained Short's DNA. Short had injuries to his face consistent with having been in a struggle with the victim prior to her death. Short's DNA was found under the victim's fingernails in a quantity consistent with having been in a struggle with the victim before her death. The victim's blood [DNA] was also found on Short's boxer underwear. Short eventually admitted to Lt. Johnson between 11:40 a.m. and 12:10 p.m. on October 11th that it was he who was responsible for the victim's murder. Short admitted under oath the black jacket and white thermal shirt recovered by police were his. As a result, the admission of the challenged testimony was harmless.

ISSUE II.

Whether Judge Jefferson erred in allowing Detective Serrundo to testify that his investigation cleared a potential suspect of the crime?

Short contends Judge Jefferson erred in allowing Detective Ruben Serrundo to testify that during his investigation of this case he "cleared" another person, a former boyfriend of the victim, of the crime. Short alleges this testimony was irrelevant. Short alleges the fact that he

[Short] maintained that another person, not himself, killed the decedent did not make this testimony relevant. Short is wrong. Regardless, the testimony was harmless beyond any doubt.

What Occurred Below

During trial, Detective Ruben Serrundo testified to his role and actions in the investigation of the murder of the victim. Among other things,[11] Detective Serrundo testified he was given the names of some of the victim's prior boyfriends and he was asked to contact them during his investigation to see if they could be possible suspects. When the Solicitor asked the Detective whether he was able to clear them as suspects in the case, defense counsel objected to the relevance of this question. Judge Jefferson ruled the question was not irrelevant since the State could anticipate Short was denying having committed the crime and it was therefore permissible for the Solicitor to have law enforcement testify whether they investigated and cleared other possible suspects. Therefore, she overruled the objection. (R. pp. 550-51). Serrundo then testified he was able to clear another person, a former boyfriend, as a suspect. Serrundo testified based on his investigation the initial information police were given by the victim's family at the hospital was incorrect and the former boyfriend had not had any contact with the victim at all. This was the extent of Detective Surrundo's testimony on this issue. (R. pp. 550-51). Detective Serrundo went on to testify to other things he did in the investigation including being present when the murder weapon, jacket, and thermal shirt were recovered;

[11] Detective Serrundo was also at the crime scene the night of the murder and was involved in taking the written statement of the Hispanic woman who was an eyewitness and he witnessed the recovery of the knife, black jacket, and thermal shirt behind the garage two (2) blocks from Short's residence. Serrundo also obtained the search warrant to obtain the buccal swab from Short to compare Short's DNA to any evidence found on the black jacket, thermal shirt, and the knife recovered behind a garage approximately one (1) block from the crime scene. Serrundo also took the buccal swab from Short and packaged this evidence. (R. pp. 548-66; 225-39).

obtaining the search warrant to obtain the buccal swab from Short, and taking the buccal swab from Short and packaging it to be transported to SLED for DNA analysis. (R. pp. 548-66).

ARGUMENT II.

Judge Jefferson did not err in admitting the challenged testimony of Detective Serrundo; regardless, the admission of this testimony was harmless

Analysis

"All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina." Rule 402, SCRE; State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. In the Matter of the Care and Treatment of Corley, 353 S.C. 202, 577 S.E.2d 451 (2003); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003).

Judge Jefferson did not err in overruling Short's objection to this limited testimony on the grounds of relevance. Short asserted in his statements to police and at trial that he did not kill the victim but an unknown third party did. It was therefore relevant whether the State investigated the possibility of any other potential assailant and whether the investigation eliminated that person as a possible perpetrator. Rule 401 & 402, SCRE; Aleksey, 343 S.C. 20, 538 S.E.2d 248; Adams, 354 S.C. 361, 580 S.E.2d 785. As a result, Judge Jefferson did not abuse her discretion.

Harmless Error

Regardless, the testimony was harmless. Surrendo only testified that he investigated the possibility that one (1) former boyfriend could have been the perpetrator and his investigation eliminated him as a potential suspect because the former boyfriend had not had any contact with the victim. This limited testimony could not have prejudiced Short. It was admissible on reply.

Furthermore, as previously discussed, the evidence of Short's guilt was overwhelming. The victim was found approximately three (3) blocks from Short's residence with thirty (30) stab wounds. Short was the last person with the victim before the deadly assault. The victim's car was found parked in front of Short's home after the deadly assault. Short and the victim had argued at his residence shortly before the deadly assault. The assailant was described by an eyewitness as an African-American male, with a partially zipped up black jacket, a white shirt, and blue jeans with something metal in his hand. Short is an African-American male. Police recovered the black jacket, white thermal shirt, and knife approximately one (1) block from the crime scene and two (2) blocks from Short's residence. The jacket, thermal shirt, and knife contained the victim's blood and DNA. The jacket, thermal shirt, and knife also contained Short's DNA. Short eventually admitted to Lt. Johnson between 11:40 a.m. and 12:10 p.m. on October 11th that it was he who was responsible for the victim's murder. Short had injuries to his face consistent with having been in a struggle with the victim prior to her death. Short's DNA was found under the victim's fingernails in a quantity consistent with having been in a struggle with the victim before her death. The victim's blood [DNA] was also found on Short's boxer underwear. Short admitted under oath the jacket and thermal shirt recovered by police were his. Short had straight line cuts to the palm of his hand consistent with his hand having slipped down the knife while stabbing the victim. As a result, the admission of Detective

Serrundo's limited testimony that as a result of his investigation he cleared one (1) former boyfriend, was harmless beyond a reasonable doubt.

Issue III.

Whether Judge Jefferson erred in admitting Short's post-Miranda statements in evidence?

What Occurred Below

Pre-trial, Short moved to suppress all statements he made to police at the police station whether inculpatory or exculpatory. Short alleged police violated Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601 (2004) and State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010) by questioning him first and then Mirandizing him later and that his statements were involuntary. Judge Jefferson conducted an *in camera* Jackson v. Denno, 378 U.S. 368 (1964) hearing to determine the admissibility of Short's statements to police. At the hearing, Detective's Bailey, Riedel, and Johnson testified. (R. pp. 25-143). The State also introduced a portion of the audio and video recorded statement of Short.[12] Short did not testify or call any witnesses. (R. pp. 25-143).

The Denno Testimony

Detective Bailey testified that when he arrived at the crime scene Short was already handcuffed and was sitting in the back seat of a patrol car. Bailey informed Short they needed to take him to the police station and interview him and find out what had happened to his girlfriend. Short stated that he understood. Short was then transported to the police station and placed in a conference room at approximately 1:30 a.m. (R. pp. 25-62).[13]

[12] The entire questioning of Short, including breaks in questioning, was audio and video recorded.

[13] Short's handcuffs were removed immediately after he entered the conference room.

Bailey testified that eventually he went into the conference room and interviewed Short as a witness or person with knowledge about the case. He did not consider Short a suspect at this time. His questions to Short were open ended and he simply asked Short to tell him what happened to the victim and give him a timeline. (R. pp. 25-62).

Short informed him that he and the victim had argued at his residence, the victim left on foot, she returned, they argued again, she then left again on foot and he eventually decided to go after her to calm her down. When he did, as he was approaching the corner of Harper Street and Railroad Avenue, he heard the victim scream in the distance "stop, stop, stop." Short then ran down Railroad Avenue and found the victim on the ground surrounded by several Mexicans. He asked for an address so he could inform 911 of the location, which he eventually obtained from another woman standing nearby, and he called 911 and reported the assault. He then called his mother and informed her something had happened to Malikia. Short then placed his white t-shirt under the victim's head and put his cell phone down next to the victim. (R. pp. 25-62).

Bailey testified the initial interview of Short was not continuous because Bailey was in and out of the conference room conferring with investigators at the scene who were interviewing witnesses there and processing the crime scene. After conferring with investigators or officers at the scene, Bailey would re-enter the conference room and speak with Short about further details of what Short knew. (R. pp. 25-62).

Bailey testified at some point during the initial interview, he asked to look at the blood on Short more closely. It was at this time that Bailey noticed that Short had actual injuries to his face not just blood spatter from attending to the victim at the scene. Bailey also asked to see Short's hands, and Bailey saw one (1) cut on the back of Short's hand and a straight line cut to the palm of Short's right hand across Short's fingers. Bailey then had an officer photograph

Short to preserve the evidence he saw. Bailey testified it was at this point that he first began to suspect that Short may be the perpetrator and not simply a witness or person with knowledge about the case. (R. pp. 25-62).

Bailey left the conference room again and followed up with other officers working on the case and re-entered the conference room and spoke with Short several times but basically obtained the same information. The only additional information Short gave was that in their last altercation before the victim walked off, the victim had hit Short with her car keys. (R. pp. 25-62).

Bailey testified that around 3:30 a.m., Detective Riedel arrived from the crime scene. After speaking with Riedel about what he had learned at the scene, Bailey asked Riedel to listen to Short's version of events. Bailey testified he and Riedel re-entered the conference room and he asked Short to tell Riedel what he had told him. Short then told Riedel the same story as described above. At this point, Bailey and Riedel left the conference room and conferred. Riedel informed Bailey that he thought Short was probably the perpetrator and they needed to read Short his Miranda[14] rights before they asked Short any further questions. As a result of this conversation, Bailey and Riedel re-entered the conference room and read Short his Miranda rights. Short subsequently executed a Waiver of Rights form waiving his Miranda rights and agreeing to talk to Bailey and Riedel. (R. pp. 25-62).

Bailey testified that he and Riedel then began to interrogate Short. Short told the investigators the same story, i.e. that he and the victim argued, she left, she came back, they argued again, she walked off again, and then he decided to go after her. He started walking down Harper Street to catch up with her and calm her down when he heard the victim scream

[14] Miranda v. Arizona, 384 U.S. 436 (1966).

"stop, stop, stop." Short then ran down Railroad Avenue and found the victim lying at end of the driveway with several Mexicans around her. It was at this time that Short was first asked how he got the cuts on his hand. Short stated those cuts came from picking some flowers for the victim the Thursday night before her assault. Short explained he cut his hands on the thorns when pulling the flowers out of the flower box. Bailey eventually left the conference room and Riedel continued to interview Short. Bailey did not further participate in interviewing Short except to notify him around 10:30 a.m. that the jacket, thermal shirt, and knife had been found behind a garage near Short's home and they contained blood on them. (R. pp. 25-62).[15]

Investigator Riedel testified at the Denno hearing that he arrived at the police department at approximately 3:30 to 3:45 a.m. He had previously been at the scene working on the investigation. While at the scene, he had talked to witnesses and obtained other information regarding the assault on the victim. Once he arrived at the police station, he interviewed Short as a witness with Bailey present to learn as many details as he could about the victim's assault. Riedel testified that at that point Short was not a suspect to him but a witness or person with information. Riedel testified he and Bailey entered the conference room and he let Short tell him what he had told Bailey earlier. It was basically the same story he had related to Bailey when he first arrived at the police department. Short stated he and the victim argued, she walked off, she came back, the argument started up again, she then walked off again, and he eventually decided to follow her to calm her down. As he was doing so, he heard her scream "stop, stop, stop." Short then ran down Railroad Avenue in the direction of her screams and found her at the end of a driveway lying on the ground surrounded by several Mexicans. Riedel and Bailey then left the

[15] Detective Bailey' trial testimony before the jury, which is consistent with his Denno testimony, is contained in the Record at pages 361-78 and 382-458.

conference room and conferred. At this point, Riedel believed Short was probably a suspect based on what he knew from the scene and talking to witnesses there and Short's version of events did not match up with those finite details. The Hispanic eyewitness at the scene had seen the assault, driven past the assault, saw the assailant flee, drove to another location to use a phone, and then returned to the scene. This was a much longer period of time than Short was claiming. Riedel informed Bailey they needed to read Short his Miranda rights before they questioned him any further. (R. pp. 62-109).

As a result, Riedel and Bailey eventually re-entered the conference room at approximately 4:30 a.m. and read Short his Miranda rights. Short stated he understood those rights and executed a Waiver of Rights form agreeing to talk to Riedel and Bailey. (R. pp. 62-109; Ex 1 Denno [Waiver or Rights Form]). The Waiver form also sets forth Short's waiver of his Miranda rights was not permanent, and Short could stop answering questions at any time if he chose to do so. (R. pp. 62-109; Ex. 1 [Waiver of Rights Form]).

Riedel testified at this point he began to interrogate Short. Short gave the same version of events, that he did not assault the victim, someone else did, and he only found her after hearing her screams and running to her. Short was asked for the first time how he got the cuts on his hand and he stated that he cut his hand picking flowers from a flower box on the Thursday before the assault. Riedel testified he and Bailey eventually left the room again. (R. pp. 62-109).

Eventually Riedel and Lt. Angela Johnson, a supervisor, questioned Short at approximately 6:30 a.m. This was two (2) hours after Short had been read his Miranda rights and signed a Waiver of those rights. At this time, Short was asked if he owned a black jacket. Short said he had owned a black "Old Navy" jacket but had given it away approximately two (2)

weeks before the victim's assault. He stated he gave the jacket to a homeless person. Riedel testified that he eventually left the conference room. (R. pp. 62-109).

Riedel testified that at approximately 10:40 a.m. Riedel showed Short a portion of a videotape from an officer's body camera at the scene which contradicted what Short was telling detectives. Short told an officer at the scene he saw someone flee from the assault. Riedel testified he did not interview Short anymore after this. (R. pp. 62-109).[16]

Lt. Angela Johnson testified at the Denno hearing that she first interviewed Short at approximately 6:30 a.m. on October 11th with Detective Riedel. This was approximately two (2) hours after Short had been read his Miranda rights and executed a Waiver of those rights. (R. pp. 109-143).

Lt. Johnson testified Short maintained at this time the same story he had told Detective Bailey after first arriving at the police department. He did not kill the victim but went to her aid when he heard her scream. She did ask Short during the 6:30 a.m. interview if he had ever owned a black jacket. He told her he had owned a black jacket, an "Old Navy" jacket, but he had given to a homeless person approximately two (2) weeks before the victim's assault. He explained the homeless person asked him for money, and he just gave him the jacket so the homeless person would leave him alone. Short also told her he cut his hand picking flowers for the victim on the Thursday night before her murder. Lt. Johnson only interviewed Short for a brief period of time at 6:30 a.m. and then left the conference room. Lt. Johnson testified that Short was eventually informed the knife, the thermal shirt, and the black jacket had been found close to the crime scene. (R. pp. 109-43).

[16] Riedel's trial testimony before the jury, which is consistent with his Denno testimony, is contained in the Record at pages 460-489.

Lt. Johnson testified that around 11:30 a.m. she eventually re-entered the conference room alone and spoke with Short. She informed Short that he was being arrested for the murder of Malakia Frazier and he would be taken to the detention center. He was informed that the paperwork was being typed up as she was speaking with him. She asked Short if there was anything that he wished to tell the victim's mother or Short's own mother, who Lt. Johnson knew. At this point, for the first time, Short made admissions that it was he who had assaulted and killed the victim. Short stated to Lt. Johnson that he wanted the victim's mother to know he was sorry, that he could not remember how he got on top of the victim, but that the whole incident resulted from something petty. Short stated he was sorry the victim had ever got involved with him and that he knew her death was his fault and no one else's fault. Lt. Johnson testified that based on the admissions made during this interview, it was clear that Short was admitting he was the person who killed the victim. (R. pp. 109-143; Ex. 2 [Video-tape of Johnson interview with Short at 11:40 a.m.-12:00 p.m.]).[17]

As previously stated, Short did not testify at the Jackson v. Denno hearing or call any witnesses. (R. p. 143). As a result, he offered no evidence contradicting anything testified to by Detectives Bailey and Riedel or by Lt. Johnson.

At the conclusion of the hearing, and after viewing a video recording of the interview of Short, and hearing the argument of both the State and Short, Judge Jefferson found the State had not violated Seibert and Navy by employing a question first / Miranda later questioning technique and that Short's statements to police were voluntary under the totality of the circumstances. (R. pp. 143-66).

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[17] Lt. Johnson's trial testimony, which is also consistent with her Denno testimony, is contained in the Record at pages 508-47. Her final interview with Short alone is trial exhibit State's Ex. 30.

Thereafter, the State only introduced those statements made by Short after Miranda warnings were given and the Waiver of Rights form was executed and the videotape of Short's final statement to Lt. Johnson from 11:40 a.m. to 12:10 p.m. in which Short first made statements admitting to the crime. (R. pp. 361-78; 382-458; 460-507; 508-547; State's Ex. 30). Pre-trial and during the trial, Short did not object to the admission of State's Ex. 30, the interview of Lt. Johnson with Short from 11:40 a.m. until 12:10 p.m. And Short only made a general objection on the record to the admission of any post-Miranda statements when Detective Bailey testified.

As previously set forth, Short testified at trial in his own defense and testified to each of the statements he made to law enforcement including those both pre-Miranda and post Miranda. (R. pp. 839-1003).[18] Short affirmed that each of those statements were true, and clarified that the last statement, the videotaped statement to Lt. Johnson, was not an admission of guilt, but his belief that he was somehow responsible for the victim's death because of the argument earlier at his residence from which the victim walked away and was murdered by an unknown third person. (R. pp. 839-1003). Short's version of events at trial was the same as he told Bailey pre-Miranda, and to Bailey and Riedel post-Miranda. (R. pp. 839-1003).

Lack of Preservation of the Issue

This ground is not preserved for appellate review because Short waived any appellate issue when he testified and went over each statement he gave to law enforcement, both pre-Miranda and post-Miranda, as part of his defense. State v. Miles, 421 S.C. 154, 805 S.E.2d 204 (Ct. App. 2017)(defendant waived any appellate issue with regard to his first two statements to

[18] Short not only testified to statements made at the police station pre-Miranda and post-Miranda but also to statements he made to police at the crime scene before being transported to the police station. (R. pp. 839-1003). This was all part of his defense that he had told police the truth from the beginning, and he did not kill the victim but some unknown third person. (R. pp. 839-1003).

police alleged to be in violation of Seibert and Navy by introducing those statements as part and parcel of his defense), *cert. denied* October 18, 2018.

Further, this issue was not preserved where Short made no objection to the introduction of the videotaped interview with Lt. Johnson (State's Ex. 30) when admitted in evidence (R. pp. 175-180 & R. p. 530) and Short made only a general objection when Detective Bailey testified to Short's first post-Miranda statement. (R. p. 398, ll. 9-25). As a result, this ground is not preserved for appellate review. State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999)(in order to preserve an issue for appellate review the objection at trial must be contemporaneous to the introduction of the objectionable evidence); Medlock v. One 1985 Jeep Cherokee, 322 S.C. 127, 470 S.E.2d 373 (1996)(same); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993)(the granting or denying of a motion in limine does not remove the need to make a contemporaneous objection at trial); Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997)(the ruling on a motion in limine remains subject to change and a contemporaneous objection must be made when the evidence is offered at trial);[19] Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998)(a general objection does not preserve an issue for appeal, specific grounds in support of the objection must be clearly stated); State v. Ivey, 325 S.C. 137, 481 S.E.2d 125 (1997)(a general objection to the admissibility of testimony or evidence does not preserve the issue for appeal); State v. Bailey, 253 S.C. 304, 170 S.E.2d 376 (1969)(the trial judge commits no error in

[19] When no evidence is presented between the time of the trial court's ruling on the motion in limine and presentation of the objectionable evidence, there is no basis for the trial court to change its ruling, and it is therefore final and the issue is preserved. Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997); Mizell v. Glover, 339 S.C. 567, 529 S.E.2d 301 (Ct. App. 2000); State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001). An in limine ruling is also preserved where the trial court indicates its ruling is final and instructs a party that it need not object to the evidence when it was introduced at the time of the admission, even though the party fails to raise an objection at trial. State v. Humphries, 346 S.C. 434, 551 S.E.2d 286 (Ct. App. 2001).

overruling a general objection); State v. White, 311 S.C. 289, 296, 428 S.E.2d 740, 744 (Ct. App. 1993)(an objection that is too general does not preserve issue for appeal). *See* York v. Conway Ford, Inc., 325 S.C. 170, 480 S.E.2d 726 (1997)(an objection made during an off-the-record conference which is not made part of the record does not preserve the question for review).

Standard of Review

Appellate Standard

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Williams, 405 S.C. 263, 747 S.E.2d 194, 199 (Ct. App. 2013). Thus an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id.

Admission of Evidence

"The admission of evidence is within the discretion of the trial court and will not be reversed absent and abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006); State v. Williams, 405 S.C. 263, 747 S.E.2d 194, 199 (Ct. App. 2013). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. Id., *see also* State v Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004)("The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.").

Statements given by a criminal defendant

"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.E2d 244 (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 and abuse of discretion." State v. Myers, 359 S.C. 40, 47, 596 S.E.2d 488, 491 (2004). "In criminal cases, appellate courts are bound by fact finding in response to preliminary motions where there has been conflicting testimony 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).

ARGUMENT III.

Judge Jefferson did not abuse her discretion in finding police did not violate Seibert and Navy and Short's statements were voluntary under the totality of the circumstances.

In Missouri v. Seibert, 542 U.S. 600 (2004)(*plurality opinion*),[20] the defendant was formally arrested for arson and murder. Police intentionally decided to not read the defendant her Miranda rights. At the police station, the investigating officer questioned the defendant until he obtained an un-Mirandized confession from the defendant that she had planned to set the fire with the deceased victim still in the home. After obtaining the un-Mirandized confession, the investigating officer gave the defendant a 20-minute break, returned to give the defendant her Miranda warnings, and obtained a signed waiver of her Miranda rights. The officer then resumed his questioning of the defendant, confronting her with her pre-Miranda warning confession and getting her to repeat the information in a post-Miranda confession. At trial, the defendant moved to suppress both her pre-Miranda warning and her post-Miranda warning statement. The United States Supreme Court held the two-step interrogation technique distorted

[20] Justice Kennedy filed an opinion concurring in judgment. It is on the narrowest grounds and is controlling. Marks v. United States, 430 U.S. 188, 193 (1977).

the meaning and purpose of Miranda, and served only to obscure the practical and legal significance of the Miranda warnings when finally given. A plurality of the Court stated:

> This case tests a police protocol for custodial interrogation that calls for giving no warnings of the rights to silence and counsel until interrogation has produced a confession. Although such a statement is generally inadmissible, since taken in violation of Miranda v. Arizona [citation omitted], the interrogating officer follows it with Miranda warnings and then leads the suspect to cover the same ground a second time. The question here is the admissibility of the repeated statement. Because this midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with Miranda's constitutional requirement, we hold that a statement repeated after a warning in such circumstances is inadmissible.

Missouri v. Seibert, 542 U.S. 600, 604.

> By any objective measure, applied to circumstances exemplified here, it is likely that if the interrogations employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content. After all, the reason that question first is catching on is as obvious as its manifest purpose, which is to get a confession the suspect would not make if he understood his rights at the outset; the sensible underlying assumption is that with one confession in hand before warnings, the interrogator can count on getting its duplicate, with trifling additional trouble. Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again.

Missouri v. Seibert, 542 U.S. 600, 612-14.

In Bobby v. Dixon, 565 U.S. 23 (2011)(*per curiam*), the United States Supreme Court explained its' holding in Missouri v. Seibert. There the Court stated as follows:

> In Seibert, police employed a two-step strategy to reduce the effect of Miranda warnings: A detective exhaustively questioned Seibert until she confessed to murder and then, after 15-20 minute break, gave Seibert Miranda warnings and led her to repeat her prior confession. 542 U.S., at 604-606, 616, 124 S.Ct. 2601 (plurality opinion). The Court held that Seibert's second confession was inadmissible as evidence against her even though it was preceded by a Miranda warning. A plurality of the Court reasoned that "[u]pon hearing warnings only in the aftermath of a confession, a suspect would hardly think he had a genuine right to remain silent, let

> alone persist in so believing once the police began to lead him over the same ground again." 542 U.S. , at 613, 124 S.Ct. 2601.

Bobby v. Dixon, 565 U.S. 23, at 31. The Court in Dixon went on to note that "[i]n Seibert, the suspect's first, unwarned interrogation left "little, if anything, of incriminating potential left unsaid," making it "unnatural" not to "repeat at the second stage what had been said before." Dixon, 565 U.S. at 31, *quoting* Seibert, 542 U.S. at 616-617.

Similarly, in State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010), the police intentionally obtained incriminating admissions of guilt from the defendant without giving Miranda warnings and then confronted the defendant with the incriminating pre-Miranda admissions after Miranda warnings in order to obtain a post-Miranda admission or confession. Id. Our Supreme Court held this was akin to what police did in Seibert and suppressed the statements. Id.

Again, in State v. Hill, 425 S.C. 324, 822 S.E.2d 344 (Ct. App. 2018), this Court found officers violated Seibert and Navy by questioning a defendant in custody without Miranda warnings until they obtained an admission of guilt from the defendant that he hit the victim with a cane after catching the victim, a friend, in his home stealing his T.V. Officers then Mirandized the defendant, promised him they just wanted him to repeat what he had already told them, and obtained further admissions. As a result, this Court held both the pre-Miranda admission and the post-Miranda admissions should have been suppressed. Id. [21]

[21] In Hill, 425 S.C. 324, 822 S.E.2d 344, decided after the trial of this case, the critical issue was whether the defendant was in custody or not when he made the first admission he "tapped" [struck] the victim with his cane. Here there is no dispute that Short was in custody when he was questioned at the police station. Both Bailey and Riedel testified Short was not free to leave and a reasonable person in Short's position would have believed he was not free to leave. The distinguishing fact in this case, as will be discussed, is police did not employ the improper question first tactic outlawed in Seibert and Navy, i.e. they did not question Short until they obtained a confession or admission of guilt. Bobby v. Dixon, 565 U.S. 23, 31 (2011).

As Judge Jefferson correctly found below, what occurred in Seibert and Navy did not occur here. Police did not interrogate Short without Miranda warnings until they obtained a confession or admission of guilt, then give Miranda warnings and go back over or re-elicit the pre-Miranda confession or admission of guilt. Appellant Short, like the defendant in Bobby v. Dixon, maintained his innocence with regard to the murder of the victim prior to any Miranda warnings.

> But in this case Dixon steadfastly maintained during his first, unwarned interrogation that he had '[n]othing whatsoever" to do with Hammer's disappearance. App. to Pet. for Cert. 186a. Thus, unlike in Seibert, there is no concern here that police gave Dixon Miranda warnings and then led him to repeat an earlier murder confession, because there was no earlier confession to repeat. Indeed, Dixon contradicted his prior unwarned statements when he confessed to Hammer's murder [post-Miranda].

Bobby v. Dixon, 565 U.S. at 31. And, like the defendant in Bobby v. Dixon, Short post-Miranda and after being confronted much later with the fact the jacket, shirt, and knife had been found, and only after being informed by Lt. Johnson that he was going to be formally arrested for the murder, contradicted his prior unwarned statements and made admissions of guilt. (R. pp. 25-143; State's Ex. 30, Videotape of interview from 11:40 a.m. to 12:10 p.m.).

Similarly, in Mitchell v. MacLaren, 933 F.3d 526 (6th Cir. 2019), the defendant was questioned without Miranda warnings and provided a statement placing himself at the crime scene on the night of the murder but denying any involvement in the murder. After Miranda warnings, upon further questioning the defendant subsequently confessed to killing the victim. The Sixth Circuit Court of Appeals held the Michigan Supreme Court did not err in finding no Seibert violation on these facts since the facts of the case were closer akin to the United States Supreme Court's decisions in Bobby v. Dixon, *supra* and Oregon v. Elstad, 470 U.S. 298, 105

S.Ct. 1285 (1985). Mitchell v. MacLaren, 933 F.3d at 536-39. *See also* People v. Mitchell, 822 N.W.2d 224 (Mich. 2012), *quoting* Bobby v. Dixon, 565 U.S. at 31.

Other courts have similarly recognized that the United States Supreme Court distinguished Seibert in Bobby v. Dixon and limited Seibert to the situation where the police elicit an illegal pre-Miranda confession or admission of guilt and then post-Miranda go back over the same confession or admission of guilt. Sorto v. Stephens, 2015 W.L. 5734464 (S.D. Tex 2015)(*not reported in F.Supp.3d*)(petitioner's confession was not taken in violation of Seibert where he did not confess prior to Miranda);[22] United States v Street, 472 F.3d 1298 (11th Cir. 2006)(similar); United States v. Gonzalez-Lauzon, 437 F.2d 1128, 1130-37 (11th Cir. 2006)(similar); State v. Clifton, 892 N.W.2d 112 (Neb. 2017)(similar); State v. Jarnigan, 277 P.3d 535 (Ore. 2012)(similar)[also purged the taint]; United States v. Iles, 753 Fed. Appx. 107, 110, n. 18 (3rd Cir. 2018); United States v. Breal, 2012 W.L. 12862662 (S.D. Fla. 2012)(*not reported in F.Supp.3rd*); State v. Martinez, 2012 W.L. 5949116 (Ariz. Ct. App. 2012)(*not published in P.3d*); People v. Mitchell, 822 N.W.2d 224 (Mich. 2012)(memorandum opinion). *See* United States v. Montalvo-Rangel, 437 Fed. App'x 316, 319 (5th Cir. 2011)(Seibert condemned a "question first" police tactic "a strategy by which officials interrogate an individual without administering a Miranda warning, obtain an admission, administer a Miranda warning, and then obtain the same admission again").

Thus, the "improper question first tactic" outlawed in Seibert and Navy was custodial interrogation of a suspect without Miranda warnings until a confession or admission of guilt is obtained and then Mirandizing the suspect and having them go back over the pre-Miranda confession or admission of guilt post-Miranda.

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[22] *Vacated in part on other grounds*, 716 Fed. Appx. 366 (5th Cir. 2018)

What occurred in Seibert and Navy did not occur here. Short maintained his innocence pre-Miranda and even post-Miranda until approximately 11:30 a.m. to 12:00 noon. It was only when he was told at 11:30 a.m. that he was going to be arrested that Short made any admission or confession of guilt. As a result, Judge Jefferson did not abuse her discretion in finding the State did not commit a Seibert/Navy violation. Bobby v. Dixon; Mitchell v. MacLaren, *supra*.[23]

Statements made after a Miranda violation but no Seibert/Navy violation

Short also argues Judge Jefferson erred in finding his statements were voluntary. Under the totality of the circumstances, Judge Jefferson did not err in finding Short's statements were voluntarily made and Short's post-Miranda statements were properly admitted in evidence.

What occurred here was a Miranda violation. It is undisputed that Short was in custody and was questioned at the police station intermittently from approximately 1:30 a.m. until 4:30 a.m. before Miranda warnings were administered. However, none of Short's pre-Miranda statements were introduced by the State before the jury. *See* Bobby v. Dixon, *supra* (similar).

The legal analysis is different when there has been a Miranda violation but not a Seibert/Navy violation. The general rule is that in those cases where a statement has been taken in violation of Miranda, and a second statement has been taken in compliance with Miranda, the court must determine if the second statement has been irrevocably tainted by the initial Miranda violation. State v. Callahan, 263 S.C. 35, 208 S.E.2d 284 (1974). Generally, an initial failure to administer Miranda warnings before a statement is given does not automatically taint any subsequent statement which is made after a suspect has been fully advised of and has waived his

[23] Furthermore, Bailey and Riedel did not intentionally set out to circumvent Miranda and lessen the import of the Miranda warnings by questioning Short until a confession or admission of guilt was obtained and only then reading Short his Miranda warnings. Bailey was led to believe by Short that he was a witness or person with information about the case. When it became apparent to Bailey that Short could be the perpetrator, Bailey stopped questioning Short and read him his Miranda rights.

Miranda rights, when both pre-Miranda and post-Miranda statements are voluntary. State v. Campbell, 287 S.C. 377, 339 S.E.2d 109 (1985); Verigan v. People, 420 P.3d 247 (Col. 2018).

In Oregon v. Elstad, 470 U.S. 298 (1985), a suspect who had not received his Miranda warnings confessed to burglary when briefly questioned as he was being taken into custody at his residence. Approximately an hour later, after he had received Miranda warnings, the suspect again confessed to the same burglary. The Supreme Court held that the later warned confession was admissible because "there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of Miranda, was voluntary. The relevant inquiry is whether in fact, the second [warned] statement was also voluntarily made." 470 U.S. at 318(footnote omitted), *quoted in* Bobby v. Dixon, 565 U.S. 23, 29-30 (2011).

In Bobby v. Dixon, the Supreme Court likewise clarified that where there is a Miranda violation but not a Seibert violation, the relevant inquiry is still that set forth in Oregon v. Elstad, *supra*, i.e. whether in fact, the second [warned] statement was voluntarily made. Bobby v. Dixon, 565 U.S. at 29-30.[24] *See also* Seibert, 542 U.S. at 620-22 (Kennedy, concurring in judgment)(Elstad applies unless police intentionally employed improper two-step interrogation technique); U.S. v. Williams, 435 F.3d 1148 (9th Cir. 2006)(Kennedy concurrence is controlling).

[24] In his brief, Short mistakenly discusses those factors set forth in Seibert for determining whether a later warned statement is admissible in evidence; however, those factors are not apposite here. Bobby v. Dixon, 565 U.S. at 29-30. The factors set forth in Seibert, and correctly relied upon by this Court in Hill, *supra* and State v. Medley, 417 S.C. 18, 787 S.E.2d 847 (Ct. App. 2016), are used for determining whether a later warned statement is admissible or not when police first obtain an unwarned confession or admission of guilt. Seibert, 542 U.S. at 620-22 (Kennedy, concurring)(admissibility should still be governed by Elstad, unless the outlawed two-step interrogation technique is intentionally employed). Those factors are not applicable here where police did not obtain an unwarned confession or admission of guilt but there was a Miranda violation. Id.; Bobby v. Dixon, 565 U.S. at 29-30.

As Judge Jefferson correctly found based on the testimony and evidence presented at the Denno hearing, and as shown in Short's trial testimony[25] before the jury, the totality of the circumstances surrounding Short's questioning demonstrates his statements were voluntary. State v. Rabon, 25 S.C. 459, 461, 272 S.E.2d 634, 635 (1980)(When analyzing the voluntariness of a defendant's statements, the trial judge should examine the totality of the circumstances under which the statements were made, including the characteristics of the accused, and the details of the interrogation, to determine whether voluntariness has been demonstrated).[26]

Factors to be considered in the totality of the circumstances analysis include: (1) the age of the accused; (2) the educational level and intelligence of the accused; (3) the accused's knowledge of his constitutional rights; (4) the length of the accused's detention; (5) the nature of the questioning and whether it was repeated and prolonged; and (6) the presence or absence of the use of punishment, including deprivation of food or sleep. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973). Ultimately, the voluntariness analysis hinges upon whether the confession was the product of an essentially free an unconstrained choice by its maker" or was the product of an overborne will and critically impaired capacity for self-determination. Id. at 225-26; *see* State v. Von Dohlen, 322 S.C. 234, 243, 471 S.E.2d 689, 695 (1996)("the question is whether the defendant's will was overborne when he confessed."); *see also* Miller v. Fenton, 796 F.2d 598, 604 (3rd Cir. 1986)("We emphasize that the test for voluntariness is not a but-for test; we do not

[25] Short's *trial testimony* is contained on pages 839-1003 of the Record. Again, Short did not testify at the Denno hearing.

[26] Supporting Judge Jefferson's finding on the issue of voluntariness, Short elected not to testify during the Denno hearing and thus never presented any testimony suggesting his post-warning statements were the involuntary product of the initial questioning. *See* State v. Breeze, 379 S.C. 538, 545, 665 S.E.2d 247, 251 (Ct. App. 20008)("Conversely, Breeze did not contradict [the officer]'s testimony with respect to the issue of whether the statement was voluntary. . . . Faced with [the officer]'s undisputed testimony the trial court concluded the State had showed that Breeze voluntarily made the statement. Based on [the officer]'s testimony, we cannot conclude the trial court's ruling is unsupported by any evidence").

ask whether the confession would have been made in the absence of the interrogation. Few criminals feel impelled to confess to the police purely of their own accord, without any questioning at all.").

Short was an adult, not a juvenile. He was twenty-six (26) years old at the time of this incident. He was also the father of two (2) children. He was also employed through a temporary service. He had been employed in construction, landscaping, warehousing, and in several plants and factories. Short attended high school and had obtained a GED in 2007. He had also received other education beyond his GED. Short was not under the influence of any alcohol or drugs when questioned. (R. pp. 43-44; 408-10, 466-67, 613-16, 683-84).

During his first questioning, Short was given water and offered food, and was not abused or threatened. He was not promised anything in order to get him to give a statement. He was seated in a conference room during the interview, and the entire interview was video and audio recorded. He was not physically abused. He was not handcuffed. He told police the same exculpatory story he told the jury at trial, that he did not kill the victim and some unknown third-party did. There were several long breaks in the questioning as Detective Bailey left the room to speak with officers at the scene and those arriving at the police station. In fact, Bailey testified he was out of the room longer than he was in the conference room with Short. Another break was taken before Short was read his Miranda rights.

Prior to any further questioning, Short was read his Miranda rights and he knowingly, intelligently, and voluntarily waived those rights and agreed to speak with officers. He signed a Waiver or Rights Form agreeing to waive his Miranda rights and speak with officers and that he was doing so of his own free will. Fully knowing now that anything that he said could be used against him in a court of law and that he did not have to make any statement at all, Short told

police the same exculpatory story again, the same exculpatory story he told the jury at trial, that he did not kill the victim but an unknown third party did. *See* Elstad, 470 U.S. at 318 ("[T]he finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements. The fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative.")(footnote omitted)).[27] During this questioning, Short was taken to the restroom when he needed to do so and was offered food and water, and was not threatened or coerced by police. He was not physically abused. Short did not ask to speak with an attorney or invoke his right to remain silent. This entire interview was also audio and video recorded so there can be no contention he was coerced in any way.

During this post-Miranda interrogation, Short volunteered new details such as where he received the cuts on his hand and that he had owned a black jacket and given away his jacket two (2) weeks prior to the murder, but he did not confess. He did not admit his guilt. Again, there were long breaks in the interrogation where Short was not questioned at all. And, there was a change in those questioning him. There was simply no coercion.[28]

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[27] Short admitted before the jury that when he was read his Miranda rights he understood those rights, initialed them on the waiver form, signed his name to the waiver form, and waived those rights and talked to Detectives Bailey and Riedel. He also testified he told the officers the truth and everything he knew about the victim's murder. (R. p. 972, ll. 13-24 & p. 973).

[28] Short argues his post-Miranda statements were involuntary because at one point an investigator yelled at Short and used profanity ["cut the bullsh_t"]. However, as has been recognized this does not prove coercion. United States v. Wylie, 2006 WL 1431656, at *4 (W.D.N.C. May 19, 2006) *aff'd*, 328 F. App'x 888 (4th Cir. 2009). *See also* Jenner v. Smith, 982 F.2d 329, 334 (8th Cir. 1993)("Numerous cases have held that questioning tactics such as a raised voice, deception, or a sympathetic attitude on the part of the interrogator will not render a confession involuntary unless the overall impact of the interrogation caused the defendant's will to be overborne"). "Similarly, neither expressing disbelief in the statements of the defendant in this case, nor continuing to question on specific matters constitute coercion. Such tactics often are necessary to achieve the truth." Wylie, 2006 WL 1431656, at *4. *See also* Schneckloth v.

Short argues his post-Miranda statements were involuntary because officers deceived him in not telling him he was a suspect. "'Both this Court and the United States Supreme Court have recognized that misrepresentations of evidence by police, although a relevant factor, do not render an otherwise voluntary confession inadmissible ... The pertinent inquiry is, as always, whether the defendant's will was 'overborne.'" State v. Von Dohlen, 322 S.C. 234, 243, 471 S.E.2d 689, 695 (1996). *See also* State v. Parker, 381 S.C. 68, 90, 671 S.E.2d 619, 630 (Ct. App. 2008); Frazier v. Cupp, 394 U.S. 731, 89 S.Ct. 1420 (1969) (confession voluntary despite police misrepresentation that associate had confessed); State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980)(confession voluntary despite police misrepresenting the evidence that had been accumulated). Here, the fact officers did not tell Short he was a suspect, initially, does not render Short's statements involuntary. Further, before Short admitted his guilt he was told he was a suspect and the only suspect police had for the murder of the victim.

Several other things of significance occurred before there was any admission of guilt. Police conducting a neighborhood canvass found the black jacket, thermal shirt, and knife covered in blood, and Short was informed of this at approximately 10:30 a.m. Another break in the interrogation occurred.[29]

Bustamonte, 412 U.S. at 224, 93 S.Ct. at 2046 ("very few people give incriminating statements in the absence of official action of some kind").

[29] While Short was questioned off and on from about 1:30 a.m. until 12:10 p.m. [a total period of 10 ½ hours], there were numerous breaks during this process where Short was not questioned by anyone at all. Therefore, Short's questioning was not continuous and the length of Short's questioning was not coercive. *See* State v. Johnson, 422 S.C. 439, n. 8, 812 S.E.2d 739 (Ct. App. 2018)(statement held voluntary where defendant was in custody for total of 10 to 11 hours and interrogated for 7 to 8 hours); State v. Crawley, 349 S.C. 459, 562 S.E.2d 683 (Ct. App. 2002)(statement was voluntary where interrogation lasted about 7 and ½ hours, during which time the defendant was given a lie detector test, which lasted an hour and a half, and she also received dinner and restroom breaks): State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001)(statement was admissible where interrogation lasted 6 and ½ hours); State v. Chaffee and

At approximately, 11:30 a.m., Lt. Johnson, an African-American[30] female who knew Short's mother, entered the conference room alone and informed Short that he was going to be arrested for the murder of the victim, formally booked, and taken to the Detention Center. He was asked if he understood why he was being arrested. He was asked at that time if there was anything he wanted to communicate to the victim's mother and to Short's own mother. It was only at that time that Short made the admissions to Lt. Johnson admitting responsibility for the victim's death that were played for the jury. This entire interview was also audio and video recorded. (State's Ex. 30, Videotape 11:40 a.m. until 12:10 p.m.). In the words of the United States Supreme Court, by that time, things had dramatically changed. *See* Bobby v. Dixon, 565 U.S. 23, 32 (admission of Dixon's confession was consistent with this Court's precedents: Dixon received Miranda warnings before confessing to Hammer's murder; the effectiveness of those warnings was not impaired by the sort of two-step interrogation technique" condemned in Seibert; and there is no evidence any of Dixon's statements was the product of coercion. That does not excuse the decision not to give Miranda warnings before Dixon's first interrogation. But the Ohio courts recognized that failure and imposed the appropriate remedy: exclusion of the

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Ferrell, 285 S.C. 21, 328 S.E.2d 464 (1984)(5 hours); State v. Cannon, 260 S.C. 537, 197 S.E.2d 678 (1973)(statement was voluntary where interrogation lasted about 5 and ½ hours); State v. Parker, 381 S.C. 68, S.E.2d (Ct. App. 2008)(3 ½ hours); State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990)(2 and ½ hours). Moreover, statements given after much longer interviews have been found to be voluntary. *See* People v. Collins, 106 A.D.3d 1544, 1545, 964 N.Y.S.2d 393, 395 (N.Y.A.D., May 03, 2013) ("Contrary to defendant's contention, ... his statements made during the first 15 hours of interrogation were not involuntary due to police coercion"), *leave to appeal denied*, People v. Collins, 21 N.Y.3d 1072 (N.Y. Sep 12, 2013) (Table); Torrence v. Ozmint, 2008 WL 628604, 23 (D.S.C., Mar. 5, 2008); State v. Neeley, 271 S.C. 33, 244 S.E.2d 522 (1978); State v. Chasteen, 228 S.C. 88, 88 S.E.2d 880 (1955); State v. Gilbert, 273 S.C. 690, 258 S.E.2d 890 (1979).

[30] Detectives Bailey and Riedel are Caucasian. Short, who is African-American, never made any admission of guilt until he was questioned by Lt. Johnson alone at 11:40 a.m. And, he only made admissions to her when told he was being arrested for the murder and after Lt. Johnson appealed to Short's humanity, i.e. the victim's mother was entitled to know what happened.

statements given without Miranda warnings. No precedent of this Court required the Ohio courts to do more); *See also* State v. Medley, 417 S.C. 18, 787 S.E.2d 847 (Ct. App. 2016)(while circuit court erred in admitting pre-Miranda statements because they were result of custodial interrogation, circuit court did not err in admitting post-Miranda statements because they were not the product of improper Seibert or Navy technique and were voluntary).

As a result, based on the totality of the circumstances, Judge Jefferson did not abuse her discretion in finding Short's statements were voluntary. State v. Saltz, 346 S.C. at 136, 551 S.E.2d at 252 (recognizing a trial judge's ruling regarding the voluntariness of a statement will be affirmed on appeal if supported by any evidence); State v. Arrowood, 375 S.C. 359, 369 652 S.E.2d 438, 443 (Ct. App. 2007)("The trial judge's determination is not in error if there is any evidence to support it.") *See* State v. Rochester, 301 S.C. 196, 201, 391 S.E.2d 244, 246 (1990)(finding Rochester's statement was properly admitted where sufficient evidence was presented to show he "was not worn down by improper interrogation tactics such as lengthy questioning, trickery, or deceit."). Therefore, this appellate ground has no merit.

Harmless Error

Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). After an error is found, the appellate court must then review the other evidence considered at trial besides the erroneously admitted evidence. Baccus, 367 S.C. at 55, 625 S.E.2d at 223 (2006); *see* State v. Northcutt, 372 S.C. 207, 217, 641 S.E.2d 873, 878 (2007)("Determining the trial judge committed error is the first step of our analysis. Next we must determine whether the error was harmless."). The harmlessness of an error in the admission of evidence generally depends on the materiality of the evidence in relation to the case as a whole. State v. Haselden, 353 S.C. 190,

196, 577 S.E.2d 445, 448 (2003); *see* State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010)("No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case."). Ultimately, if an error does not contribute to the verdict, that error is harmless beyond a reasonable doubt. State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480, 484 (2008). Moreover, "[w]hen guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989); *see* United States v. Hastings, 461 U.S. 499, 509 (1983)("[T]he [United States Supreme] Court has consistently made clear it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations[.]").

In the present case, notwithstanding consideration of the statements Short made after being informed of his rights, overwhelming evidence of Short's guilt was presented during trial. Specifically, testimony established when police arrived at the crime scene, Short was present with the victim and Short was covered in blood on his face, arms, chest, and pants. Short blurted out to an officer that the victim was his girlfriend and they had argued.

An eyewitness informed police the assailant was an African-American male wearing a black jacket partially zipped up, a white shirt, and blue jeans. The assailant also had something metal in his hand when he was attacking the victim and fleeing the area on foot.

The autopsy determined the victim was stabbed thirty (30) times with a sharp object consistent with a knife. The victim had defensive wounds to her arms and stab wounds to her neck, chest, and abdomen. She had been in an altercation further down the street from where her body was eventually found, and there was a blood trail leading from that location to where the

victim collapsed. There was also a flip-flop and a tank-top T-shirt found in the area where the assault began, indicating a struggle between the victim and her assailant. Her body was located approximately three (3) blocks from Short's residence. Scrapings were taken of the victim's fingernails at autopsy.

At the police station, police eventually observed on Short's face scratch marks that were fresh and bleeding indicating Short had been in a physical altercation or struggle with someone as had the victim. Police also observed on Short's hands linear cuts in the palm of his right hand, his dominant hand, consistent with someone who had been wielding a knife and their hand slipped down the knife as they were stabbing someone else. Short also had another cut on his hand. These cuts all appeared fresh. Short also had blood on both the palm and back of his hands and around his cuticles. Photographs were taken of Short's hands preserving these injuries and introduced into evidence.

At approximately 10:30 a.m., while conducting a neighborhood canvass for evidence, police discovered a black Old Navy jacket, a long sleeve white thermal shirt, and a steak knife. These items were found together behind a garage one (1) block from the crime scene and two (2) blocks from Short's residence. Each of these items were separately processed for DNA. The black jacket contained both the victim's DNA [blood] and Short's DNA.[31] The white thermal shirt contained both Short's DNA and the victim's DNA [blood].[32] And, the kitchen knife contained the victim's DNA and DNA consistent with Short's DNA, both blood. Short's underwear was also covered in blood. It tested positive for the victim's blood [DNA].

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[31] Short testified in his own defense and admitted the black Old Navy jacket containing the victim's blood was his. (R. pp. 839-1003).

[32] Short also admitted while testifying in his own defense that the white thermal shirt containing the victim's blood, found behind the garage with the black Old Navy jacket and the knife, was his. (R. pp. 839-1003).

The scrapings from the victim's fingernails at autopsy were also examined for the presence of DNA. Short's DNA in a substantial amount was found under the victim's fingernails. The DNA expert testified the amount of Short's DNA under the victim's fingernails was substantial, more than that which would result from casual contact. It was consistent with that obtained in a struggle.

As a result, the evidence of Short's guilt was overwhelming and the admission of his post-Miranda statements, if erroneous was harmless. *See* State v. White, 410 S.C. 56, 60, 762 S.E.2d 726, 728 (Ct. App. 2014)(finding any error in the trial judge's failure to suppress White's statement placing White at the scene of a murder as the product of impermissible "question first and warn later" questioning was harmless beyond a reasonable doubt because, "notwithstanding White's statement, cell phone evidence clearly placed [the victim] and White together at the time and place of the murder" and further finding any error to be harmless in light of the witness testimony linking White to the murder); *see also* State Tench, 353 S.C. 531, 537, 579 S.E.2d 314,317 (2003)("Given the abundant evidence of Tench's guilt, we find any error in the admission of the seized items clearly harmless beyond a reasonable doubt): Medley, 417 S.C. at 30, 787 S.E.2d at 853 ("[N]ot withstanding the erroneous admission of Medley's statements regarding his alcohol consumption, we find the record contained ample evidence from which a jury could have concluded Medley was guilty, beyond a reasonable doubt, of second-offense DUI. Thus, to the extent the court erred in admitting such statements, we find the error, if any, was harmless beyond a reasonable doubt."); *see also* State v. Easler, 327 S.C. 121, 129, 489 S.E.2d 617, 621-22 (1997)([A]ny error in the failure to suppress his statements was harmless beyond a reasonable doubt . . . . The overwhelming evidence of Easler's guilt renders any Miranda violation harmless.") *overruled on other grounds*, State v. Greene, 423 S.C. 263, 814 S.E.2d 496

(2018); State v. Lynch, 375 S.C. 628, 636, 654 S.E.2d 292, 297 (Ct. App. 2007)("The overwhelming evidence of Lynch's guilt renders any possible Miranda violation harmless."); State v. Newell, 303 S.C. 471, 477, 401 S.E.2d 420, 424 (Ct. App. 1991)("Although the trial judge erred in not suppressing Sergeant Canty's testimony regarding Newell's in-custody statement because of his failure to advise Newell of her rights under Miranda, we deem the admission of this testimony harmless beyond a reasonable doubt. The record contains overwhelming evidence of Newell's guilt independent of her statements to Sergeant Canty." (citation omitted)); *cf.* White, 410 S.C. at 60, 762 S.E.2d at 728 ("[W]e find the entire record on appeal establishes beyond a reasonable doubt that any error in the admission of White's statement did not contribute to the verdict obtained."). Short's conviction must be affirmed.

Finally, Short testified in his own defense and told the jury the identical facts he had told Detectives Bailey, Riedel, and Lt. Johnson admitted by the State in its' case in chief. (R. 839-1003).[33] Short testified before the jury to the same version of events he related to the first officer on the scene, to Detective Bailey pre-Miranda, and to Bailey, Riedel, and Johnson post-Miranda. (R. pp. 839-1003). Short also admitted before the jury to each of the statements he made to police whether pre-Miranda or post-Miranda. (R. pp. 839 -1003).

Short admitted to the jury he told police at the scene that he and the victim had argued and the victim had stormed off. Short admitted to the jury he told police at the police station that he and the victim had argued at his mother's residence, she left, and then she returned. Short admitted he told police they argued again and she struck him with car keys causing the marks on his face and she left again. He decided a short time later to follow her and attempt to calm her down and when doing so he heard her yelling for someone to "stop, stop, stop" and he ran to

[33] Short admits this fact in his brief. (BOA, p. 15, ll. 17-20).

assist her. By the time he arrived, she was lying on the ground injured. Short admitted he made the statements on the videotape when questioned by Lt. Johnson. He simply disagreed on what those statements meant. (R. pp. 839-1003). Short asserted each of the statements he made to police were true and his trial testimony was consistent with those statements because it was the truth. (R. pp. 839-1003). As a result, the admission of any of Short's statements were harmless. State v. Miles, 421 S.C. 154, 166-67, 805 S.E.2d 204 (Ct. App. 2017)(where appellant challenged the admission of his 3rd statement pursuant to Seibert and Navy but 3rd statement was cumulative to 2 prior statements of appellant introduced by appellant himself, any error was harmless), *cert. denied* October 18, 2018; State v. Martucci, 380 S.C. 232, 261 669 S.E.2d 598, 614 (Ct. App. 2008)("The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence."); State v. Easler, 322 S.C. 333, 471 S.E.2d 745 (Ct. App. 1996) (*citing* People v. Cagle, 158 A.2d 931 (N.Y. 1990)(the admission of the defendant's statements in violation of Miranda held harmless beyond a reasonable doubt because the evidence of the defendant's guilt was overwhelming and the testimony of both the defendant and his witness was essentially the same as the defendant's statement), *affirmed as modified* State v. Easler, 327 S.C. 121, 489 S.E.2d 617.[34]

[34] Respondent would also point out, even had Short not admitted to his pre-Miranda and post-Miranda statements while testifying before the jury, he could have been impeached with any statement taken in violation of Miranda once he took the stand. Oregon v. Hass, 420 U.S. 714, 721-22 (1975); Harris v. New York, 401 U.S. 222, 225 (1971); *See also* Oregon v. Elstad, 470 U.S. 298, 304 (1985); Michigan v. Tucker, 417 U.S. 433, 441 (1974).

CONCLUSION

For all of the foregoing reasons, Short's convictions and sentences must be affirmed.

Respectfully submitted,

J. ANTHONY MABRY
Senior Assistant Attorney General

BY: _____
J. Anthony Mabry
S.C. Bar No. 11973
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
November 26, 2019

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2018-000782

THE STATE, ... RESPONDENT

v.

RICKY ANTHONY SHORT, ...APPELLANT.

CERTIFICATE OF COMPLIANCE

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

This 26th day of November, 2019.

J. ANTHONY MABRY
Senior Assistant Attorney General

ATTORNEY FOR RESPONDENT