APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A Opinion of the North Carolina Supreme Court, *State of North Carolina v. Bobby Johnson*, 821 S.E.2d 822 (N.C. 2018) . . . . . App. 1

Appendix B Opinion of the North Carolina Court of Appeals, *State v. Johnson*, 795 S.E.2d 625 (N.C. Ct. App. 2017). . . . . App. 25

Appendix C Order Denying Defendant's Motion to Suppress in the General Court of Justice Superior Court Division, 11 CRS 247933-95 (November 3, 2015). . . . . App. 67

Appendix D Defendant's Motion to Suppress Evidence of Defendant's Statement in the General Court of Justice Superior Court Division, 11 CRS 247933-95 (December 11, 2014) . . . . . App. 73

Appendix E Affidavit in Support of Defendant's Motion to Suppress Evidence of Defendant's Statement in the General Court of Justice Superior Court Division, 11 CRS 247933-95 (December 11, 2014) . . . . . App. 78

Appendix F Declaration in Support of Petition for Writ of Certiorari . . . . . App. 82

APPENDIX A

IN THE SUPREME COURT OF NORTH CAROLINA

No. 57PA17

[Filed December 21, 2018]

STATE OF NORTH CAROLINA	)
	)
v.	)
	)
BOBBY JOHNSON	)
	)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 795 S.E.2d 625 (2017), finding no prejudicial error after appeal from a judgment entered on 6 October 2015 by Judge Eric L. Levinson in Superior Court, Mecklenburg County. On 3 May 2017, the Supreme Court allowed defendant's conditional petition for discretionary review as to an additional issue. Heard in the Supreme Court on 8 January 2018.

Joshua H. Stein, Attorney General, by Derrick C. Mertz, Special Deputy Attorney General, for the State-appellant/appellee.

Marilyn G. Ozer for defendant-appellant/appellee.

BEASLEY, Justice.

The Court of Appeals concluded that defendant's inculpatory statements to law enforcement were given under the influence of fear or hope caused by the interrogating officers' statements and actions and were therefore involuntarily made. *State v. Johnson*, ___ N.C. App. ___, ___, 795 S.E.2d 625, 639-40 (2017). The unanimous Court of Appeals panel held that the confession should have been suppressed but concluded the error was harmless beyond a reasonable doubt due to the overwhelming evidence of defendant's guilt. *Id.* at ___, 795 S.E.2d at 641. For the reasons stated below, we uphold the trial court's conclusion that, under the totality of the circumstances, defendant's inculpatory statements were voluntary. Therefore, we modify and affirm the decision of the Court of Appeals.

Background

In the early morning hours of 2 May 2007, three men robbed a Charlotte motel where the victim, Anita Jean Rychlik, worked as manager and her husband worked as a security guard. After pistol whipping and robbing the security guard in the parking lot, two of the men entered the victim's room, where the victim was shot once in the back of her neck and killed. The men escaped, and no one was charged in the murder until October 2011. DNA evidence collected from beneath the victim's fingernails and analyzed in 2009 indicated defendant was the likely contributor.

Defendant voluntarily met with detectives on 24 October 2011 at the police station, where he was questioned in an interview room for just under five hours before being placed under arrest and warned of his rights as required by *Miranda v. Arizona*, 384 U.S.

436, 16 L. Ed. 2d 694 (1966). After being advised of his rights, defendant signed a written waiver of those rights and made inculpatory statements. Defendant was indicted on 7 November 2011 for first-degree murder for the killing of Rychlik.

Defendant was tried before Judge Eric L. Levinson at the 28 September 2015 criminal session of Superior Court, Mecklenburg County. On 6 October 2015, a jury found defendant guilty of first-degree murder under the felony murder rule with armed robbery as the underlying felony. That same day, the trial court sentenced defendant to life imprisonment without parole.

Defendant made a number of pretrial motions, including a motion to suppress statements he made to law enforcement while being interrogated on 24 October 2011. Defendant argued that he was subjected to custodial interrogation before being informed of his rights as required by *Miranda*, and that his inculpatory statements were made in response to improper statements by detectives inducing a hope that his confession would benefit him. The trial court denied the motion to suppress, concluding that "[b]ased on the totality of the circumstances during the entirety of the interview, the statements made by Defendant were voluntary."

Defendant appealed his conviction to the Court of Appeals, arguing that the trial court's findings of fact "seem[ed] to intentionally downplay the influence of hope and fear" during his interrogation and were insufficient to support its conclusion that the *Miranda* warnings in this case were effective under *Missouri v.*

Seibert, 542 U.S. 600, 159 L. Ed. 2d 643 (2004). The Court of Appeals panel determined that defendant was subject to custodial interrogation before being *Mirandized* and then analyzed whether the entirety of the interrogation, from the time defendant first should have been advised of his rights under *Miranda* until the time defendant made inculpatory statements, rendered those statements involuntary. *Johnson*, ___ N.C. App. at ___, 795 S.E.2d at 638-39.

The Court of Appeals concluded that the detectives used the "question first, warn later" technique held invalid in *Seibert*, but that defendant did not make inculpatory statements prior to being advised of his rights as required by *Miranda*. *Id.* at ___, 795 S.E.2d at 637-38. Because of that distinction, the Court of Appeals did not determine whether the postwarning statement should have been suppressed under *Miranda* and *Seibert*, and instead analyzed the overall voluntariness of the statements. *Id.* at ___, 795 S.E.2d at 637-38. The Court of Appeals held that the circumstances under which defendant made inculpatory statements were at least as coercive as those at issue in *State v. Pruitt*, 286 N.C. 442, 212 S.E.2d 92 (1975), and therefore, any statements given were involuntary and inadmissible. *Johnson*, ___ N.C. App. at ___, 795 S.E.2d at 638. Despite its conclusion that the statements should have been suppressed, the panel determined that admission of defendant's statements was harmless beyond a reasonable doubt due to the overwhelming additional evidence of defendant's guilt, including DNA evidence, eyewitness testimony, and accomplice testimony. *Id.* at ___, 795 S.E.2d at 640-41. This Court allowed both the State's

and defendant's petitions for discretionary review on 3 May 2017.

Analysis

I. – Standard of Review

We evaluate a trial court's denial of a motion to suppress evidence to determine "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citing *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994)). If the trial court's findings of fact are supported by competent evidence, they "are conclusive on appeal, . . . even if the evidence is conflicting." *State v. Hammonds*, 370 N.C. 158, 161, 804 S.E.2d 438, 441 (2017) (quoting *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001)). Conclusions of law, however, "are fully reviewable on appeal" and "must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *Id.* at 161, 804 S.E.2d at 441 (first citing *State v. Greene*, 332 N.C. 565, 577, 422 S.E.2d 730, 737 (1992); then quoting *Buchanan*, 353 N.C. at 336, 543 S.E.2d at 826).

Determinations regarding the voluntariness of a defendant's waiver of his *Miranda* rights or the voluntariness of incriminating statements made during the course of interrogation are conclusions of law, which we review de novo. *State v. Knight*, 369 N.C. 640, 646, 799 S.E.2d 603, 608 (2017) (citation omitted); *State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994) (citation omitted).

II. – Voluntariness and *Miranda*

At common law a confession obtained through inducements, promises, or threats of violence lacked the presumption of reliability ordinarily afforded such statements, and therefore, was not admissible at trial. *State v. Roberts*, 12 N.C. (1 Dev.) 259, 260 (1827) (per curiam) (declining to allow admission of a confession when "the defendant ha[d] been influenced by any threat or promise"); *cf. Hopt v. Utah*, 110 U.S. 574, 585, 28 L. Ed. 262, 267 (1884) (holding a confession admissible when not made as a result of inducements, threats, or promises preying on the "fears or hopes of the accused"). In short, "coerced confessions are inherently untrustworthy." *Dickerson v. United States*, 530 U.S. 428, 433, 147 L. Ed. 2d 405, 412 (2000) (citations omitted).

Compliance with *Miranda* is a threshold requirement for admissibility of such statements when made as a result of custodial interrogation and does not abrogate the need for confessions to be obtained in compliance with traditional notions of due process under both the federal and state constitutions. *Seibert*, 542 U.S. at 617 n.8, 159 L. Ed. 2d at 658 n.8 (plurality opinion) (declining to "assess the actual voluntariness of the statement" where *Miranda* warnings were inadequate); *New York v. Quarles*, 467 U.S. 649, 655 n.5, 81 L. Ed. 2d 550, 556 n.5 (1984) (noting that "failure to provide *Miranda* warnings in and of itself does not render a confession involuntary" and suggesting the defendant was "free on remand to argue that his statement was coerced under traditional due process standards"). " '[T]he mere fact that a suspect

has made an unwarned admission does not warrant a presumption of compulsion' as to any subsequent, warned statement." *United States v. Mashburn*, 406 F.3d 303, 307 (4th Cir. 2005) (quoting *Oregon v. Elstad*, 470 U.S. 298, 314, 84 L. Ed. 2d 222, 235 (1985)). And conversely, compliance with *Miranda* does not necessarily raise a presumption of voluntariness. Consequently, even when a defendant's *Miranda* rights are respected, and even when those rights are voluntarily, knowingly, and intelligently waived, the confession itself must also be voluntary under traditional notions of due process. "If, looking to the totality of the circumstances, the confession is 'the product of an essentially free and unconstrained choice by its maker,' then 'he has willed to confess [and] it may be used against him;' where, however 'his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.' " *Hardy*, 339 N.C. at 222, 451 S.E.2d at 608 (alteration in original) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26, 36 L. Ed. 2d 854, 862 (1973)).

Whether the defendant's rights under *Miranda* and its progeny have been respected is a factor to be considered when assessing the overall voluntariness of a defendant's confession. *See, e.g.*, *id.* at 222, 451 S.E.2d at 608 (listing compliance with *Miranda* as a factor to be considered in the voluntariness inquiry). Consequently, assessing the admissibility of a statement given in response to police questioning requires an assessment of both compliance with *Miranda* and the overall voluntariness of the statement. We agree with the State that the Court of

Appeals erred by compressing these steps to analyze voluntariness alone. *Johnson*, ___ N.C. App. at ___, 795 S.E.2d at 634. Compliance with *Miranda* is a factor to be considered when evaluating voluntariness in light of the totality of the circumstances under which the statement was given. Whether the State has complied with *Miranda* necessarily involves a determination whether the person being interviewed was subjected to custodial interrogation, which is itself a totality of the circumstances analysis. While these two analyses will require the Court to examine interrelated and overlapping facts, one is not a replacement for the other. Likewise, determining whether a defendant has voluntarily waived his rights under *Miranda* does not abrogate the need to evaluate the voluntariness of the statement itself.

III. – Compliance with *Miranda* in light of *Seibert*

"*Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' " *Oregon v. Mathiason*, 429 U.S. 492, 495, 50 L. Ed. 2d 714, 719 (1977) (per curiam). There is no question that defendant was read the *Miranda* warnings when he was formally placed under arrest and that he signed a form acknowledging his waiver of those rights. The parties disagree, however, as to whether those warnings, when given, were sufficient to comply with *Miranda* in light of the United States Supreme Court's decision in *Seibert*, 542 U.S. at 600, 159 L. Ed. 2d at 643. Defendant relies on *Seibert* to argue that the officers' use of the "question first, warn later" method of interrogation violated *Miranda*. The State argues that there is no evidence

that officers intentionally used the "question first, warn later" technique at issue in *Seibert*, and therefore, this case is distinguishable and should be analyzed instead under the rationale of *Oregon v. Elstad*, 470 U.S. 298, 84 L. Ed. 2d 222 (1985). We do not find the reasoning of *Elstad* distinguishable from *Seibert* in this way. Rather, the two cases stand for the same proposition: *Miranda* warnings must be given in a manner that meaningfully apprises the interviewee of his choice to give an admissible statement or stop talking before he is taken into custody and questioned.

In *Seibert*, the officer testified that he purposefully did not place the defendant under arrest until after he had questioned her for some time and she had fully confessed. *Seibert*, 542 U.S. at 604-07, 159 L. Ed. 2d at 650-51. By doing so, he was able to secure a confession without apprising the defendant of her constitutional rights as required by *Miranda*. *Id.* at 604-07, 159 L. Ed. 2d at 651. He then gave the obligatory warnings, confronted her with her prewarning statements, and repeated the questions to confirm what had already been said. *Id.* at 605, 159 L. Ed. 2d at 650-51. According to the Court, the manifest purpose of this interrogation technique was to obtain "a confession the suspect would not make if he understood his rights at the outset," thereby intentionally circumventing *Miranda* and undermining the purposes it sought to serve—combatting interrogation tactics designed to trick, pressure, or coerce a suspect into incriminating himself without knowing or understanding he had the right not to do so. *Id.* at 613, 159 L. Ed. 2d at 655. The Court explained that the practice of administering *Miranda* warnings in the midst of coordinated and

continuing interrogation undermines the defendant's ability to knowingly and intelligently waive the right to remain silent by placing him in a state of confusion as to why his rights are being discussed *after* he has been interrogated. *Id.* at 613-14, 159 L. Ed. 2d at 656. Doing so is "likely to mislead and 'depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.' " *Id.* at 613-14, 159 L. Ed. 2d at 656 (alteration in original) (quoting *Moran v. Burbine*, 475 U.S. 412, 424, 89 L. Ed. 410, 422 (1986)).

The prewarning statement at issue in *Elstad*, on the other hand, was not made in a station house interrogation but rather in the defendant's home where officers had come to execute an arrest warrant. *Id.* at 300-01, 84 L. Ed. 2d at 226-27. The officers allowed the defendant to get dressed before placing him under arrest and taking him to the sheriff's department for interrogation, where the defendant was read the *Miranda* warnings before being questioned. *Id.* at 300-01, 84 L. Ed. 2d at 226-27. The defendant's initial statements were made in casual conversation with an officer in the defendant's own home, while his subsequent statements were made after being transported to the police station in a patrol car and placed in an interrogation room for questioning. The Court concluded that, under such circumstances, "a subsequent administration of *Miranda* warnings . . . should suffice to remove the conditions that precluded admission of the earlier statement," *id.* at 314, 84 L. Ed. 2d at 235; those "conditions" being his lack of information essential to understanding the nature of his rights and the consequences of abandoning them.

Consequently, under both *Elstad* and *Seibert*, the question for a reviewing court remains whether, under the totality of the circumstances, the warnings so given could function effectively to apprise the suspect that he had a real choice to either give an admissible statement or stop talking.

The Court of Appeals here "agree[d] that the detectives in the present case used the same objectionable technique considered in *Seibert*," but held that because defendant "did not confess until after he was given his *Miranda* warnings," the court needed only to determine whether his statements were involuntary. *Johnson*, ___ N.C. App. at ___, 795 S.E.2d at 637-38. This was error. When a defendant asserts that his or her *Miranda* rights have been violated as a result of successive rounds of custodial interrogation, some portion of which was unwarned, the question for the court is whether the warnings effectively apprised him of his rights and whether he made a voluntary, knowing, and intelligent waiver of his right to remain silent. Whether a defendant made prewarning inculpatory statements may be a factor that affects that analysis, but it does not change the nature of the question to be asked.

While defendant has argued vigorously on appeal that his *Miranda* rights were violated by the officers' use of the "question first" technique, he did not make that argument to the trial court. He did not assert to the trial court that his postwarning statements suffered from the same constitutional infirmity as any prewarning statements, because there were no such inadmissible prewarning statements upon which he

could base such an argument. Rather, he argued that the totality of his interaction with officers was involuntary because of the substance of his unwarned conversations with officers that morning. Although his motion to suppress includes an assertion that the officers "initially . . . did not ascertain that he knowingly and voluntarily waived his rights to remain silent," he did not argue that the waiver of his rights under *Miranda* in the afternoon was not voluntary, knowing, and intelligent, nor that he did not understand his right to remain silent at the time he was *Mirandized*; only that officers should have obtained the waiver earlier in the day.[1] In fact, he conceded to the trial court that "the technical requirements of *Miranda* may have been met," but contended that his statement should have been suppressed nonetheless because it was involuntary.

The trial court found as fact that the waiver forms introduced into evidence by the State "accurately reflect[ed] the required *Miranda* warnings." This determination is supported by competent evidence in

---

[1] Because defendant did not seek to suppress any statements made to officers during the first several hours of his interrogation, before he was formally arrested and *Mirandized*, and in light of defendant's concession that "the technical requirements of *Miranda* may have been met," we do not find it necessary to determine whether he was "in custody" for purposes of *Miranda* before he was formally arrested. This position, taken at the hearing on the motion to suppress, appears to conflict with the motion itself which stated that "[u]se of Defendant's statement would be in violation of Fifth, Sixth and Fourteenth Amendment rights . . . under case law of the United States Supreme Court, *Miranda v. Arizona*, and its progeny."

the record and has not been challenged by defendant. Consequently, it is binding on appeal. Having made an appropriate waiver of his rights under *Miranda*, the finding supports the trial court's conclusion that "[t]he requirements of *Miranda* were satisfied." We therefore proceed to defendant's claim that his statements were involuntary.

IV. - Voluntariness

Although defendant does not argue that his postwarning statements failed to comply with *Miranda*, he does argue that they were involuntarily procured as a result of the statements made by officers during the first "round" of interrogation before he was *Mirandized*. Defendant contends that the officers' statements improperly induced hope that his confession would benefit him. His motion to suppress cites *State v. Pruitt* for the proposition that "a confession obtained by the slightest emotions of hope or fear ought to be rejected." 286 N.C. at 455, 212 S.E.2d at 101. The State argues that both defendant's and the Court of Appeals' reliance on *Pruitt* is misplaced because, in the State's view, the "*per se*" voluntariness analysis in that case and its predecessors has been circumscribed by our more recent decisions that favor a totality of the circumstances analysis of the voluntariness of a confession. The Court of Appeals quoted *Pruitt* extensively and ultimately determined that "the circumstances in the present case were at least as coercive as those in *Pruitt*" and therefore held "that Defendant's inculpatory statements 'were made under the influence of fear or hope, or both, growing out of the language and acts of those who held him in

custody.' " *Johnson*, ___ N.C. App. at ___, 795 S.E.2d at 639-40 (quoting *Pruitt*, 286 N.C. at 458, 212 S.E.2d at 103). We hold that the trial court's conclusion that defendant's inculpatory statements were voluntarily made was adequately supported by its findings of fact and that those findings are supported by competent evidence in the record. We therefore modify and affirm the decision of the Court of Appeals.

We assess the voluntariness of a confession by determining whether, under the "totality of the circumstances, the confession is 'the product of an essentially free and unconstrained choice by its maker,' " in which case it is admissible against him, or conversely, whether " 'his will has been overborne and his capacity for self-determination critically impaired,' " in which case " 'the use of his confession offends due process.' " *Hardy*, 339 N.C. at 222, 451 S.E.2d at 608 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26, 36 L. Ed. 2d 854, 862 (1973)). In addition to considering whether the defendant's rights under *Miranda* have been heeded, when conducting this review of the totality of the circumstances, the Court should also consider: (1) circumstances under which the interrogation was conducted, for example the location, the presence or absence of restraints, and the suspect's opportunity to communicate with family or an attorney; (2) treatment of the suspect, for example the duration of the session or consecutive sessions, availability of food and drink, opportunity to take breaks or use restroom facilities, and the use of actual physical violence or psychologically strenuous interrogation tactics; (3) appearance and demeanor of the officers, for example whether they were uniformed,

whether weapons were displayed, and whether they used raised voices or made shows of violence; (4) statements made by the officers, including threats or promises or attempts to coerce a confession through trickery or deception; and (5) characteristics of the defendant himself, including his age, mental condition, familiarity with the criminal justice system, and demeanor during questioning.[2] None of these factors standing alone will necessarily be dispositive, *State v. Kemmerlin*, 356 N.C. 446, 458, 573 S.E.2d 870, 881 (2002) (citing *State v. Barlow*, 330 N.C. 133, 141, 409

---

[2] *See, e.g.*, *State v. Kemmerlin*, 356 N.C. 446, 458, 573 S.E.2d 870, 881 (2002) (citing, *inter alia*, *State v. Hyde*, 352 N.C. 37, 45, 530 S.E.2d 281, 288 (2000), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001)) (listing factors, including "whether defendant was in custody, whether her *Miranda* rights were violated, whether she was held incommunicado, whether there were threats of violence, whether promises were made to obtain the confession, the age and mental condition of defendant, and whether defendant had been deprived of food," as well as the "defendant's familiarity with the criminal justice system, length of interrogation, and amount of time without sleep"); *Hardy*, 339 N.C. at 221-22, 451 S.E.2d at 607-08 (listing same factors and additionally considering the environment and duration of the interview; demeanor and characteristics of the interviewee; officers' civilian dress, lack of weapons, and demeanor; and subjective belief of the defendant, including whether he asked to leave, requested an attorney, felt he was free to leave, and believed what officers were telling him); *State v. Jackson*, 308 N.C. 549, 573-74, 304 S.E.2d 134, 147-48 (1983) (finding the defendant's statement voluntary even though officers fabricated evidence because the defendant: was not in custody; was *Mirandized*; was not threatened, touched, or intimidated; was driven by officers to his chosen destination at the conclusion of the first interview; and had extensive experience with interrogation), *overruled on other grounds as stated in State v. Abbott*, 320 N.C. 475, 481, 358 S.E.2d 365, 369 (1987).

S.E.2d 906, 911 (1991)), and the court is certainly free to look to a host of other facts and circumstances surrounding the act of confessing to determine whether, under the totality of the circumstances, the defendant was truly capable of making, and did in fact make, a free and rational decision to confess his guilt.

In this case the trial court's findings of fact indicate that defendant came to the police department headquarters on his own without police escort, was not shackled or handcuffed,[3] and retained possession of his personal cell phone while inside the interview room. Defendant was placed in an interview room with two plainclothes police officers on the second floor of a secure law enforcement facility. At one point, his cell phone rang and it appears from the record that officers would have allowed him to answer had he chosen to do so. Officers made no threats of physical violence but did interrogate defendant rigorously and raised their voices. Defendant was told, contradictorily and repeatedly, that officers both could not promise him anything and that the district attorney would "work with him" and would "go easier on him" if he cooperated and gave them truthful information. After a lengthy interrogation, officers asked whether defendant believed he would be able to go home that

[3] The Court of Appeals recited as fact that defendant was made to shackle himself to the floor of the interrogation room after he was placed under arrest, four and one-half hours after questioning began. Defendant has not challenged the trial court's finding that he was not shackled or handcuffed and that finding is therefore binding on appeal.

day and defendant responded, "No." The following conversation ensued:

> Officer 1: Then you're under arrest for murder.
>
> Officer 2: If you don't believe you can get up and walk out of here, then I have no choice. You just told me you believe you're going to jail.
>
> Officer 1: Did you just say that, yes or no?
>
> Defendant: Yes, sir.
>
> Officer 1: Then I'm going to have to place you under arrest and then I've got some stuff to do before I continue. Because to be voluntary, you've got to believe you can walk out of here.
>
> . . . .
>
> Officer 1: If you feel like you can leave, then we're good. But if not, then we'll have to do something different. Do you think you can get up and walk out of here any time?
>
> Defendant: Not at any time, only after you free me to go.
>
> Officer 2: That's different, Bobby. Do you think you can walk out of here right now?
>
> Defendant: Yes.

The unwarned portion of the interrogation lasted about five hours. When defendant was formally arrested, officers *Mirandized* him and secured a written waiver of his rights. Questioning continued for another four hours. During the unwarned portion of the

interrogation defendant was given coffee and cigarettes and was offered food. He had access to the restroom if needed and was offered a wastebasket when he began to feel ill. Defendant was, at times, left alone in the interview room. There was no guard or police officer stationed at the door. Defendant was in his mid-thirties, had obtained his GED, and was articulate, intelligent, literate, and knowledgeable about the criminal justice system and its processes. As the trial court found, defendant at times appeared eager to assist the officers in their investigation and offered to help, offered to wear a wire, and offered to do whatever else he could to help with the investigation.

The trial court concluded as a matter of law that, "[b]ased on the totality of the circumstances during the entirety of the interview, the statements made by Defendant were voluntary," and that "[t]he confession was not obtained as a result of hope or fear instilled by the detectives." Defendant argues that the trial court's findings of fact failed to disclose material circumstances regarding the giving of his confession and therefore do not support the trial court's conclusion of law. Defendant has challenged five of the trial court's findings of fact:

> 5 The Defendant was not told he was under arrest[.]
>
> 19[ ] The Defendant was emotional at times[.]
>
> 20 The Defendant cried at times[.]
>
> 21 The defendant expressed concern with his ability to "keep food down[.]"
>
> 26[ ] While there were no specific promises or threats made by law enforcement, the

> detectives conducting the interview did represent to the Defendant that the District Attorney "might look favorably" at the Defendant if he made a confession[.]

Defendant asserts that finding of fact 5 is "at best an incomplete finding," as he was told he would be arrested if he did not state that he was there voluntarily. While we agree that a more detailed finding may have preserved for the record a more nuanced understanding of the exchanges that took place between defendant and the interviewing officers, there is competent evidence in the record to support the finding as written. Consequently, the finding is conclusive on appeal.

Defendant similarly asserts that findings of fact 19, 20 and 21 "downplay" the actual circumstances of the encounter. Again, while it may be true that a more detailed set of findings would have more thoroughly described defendant's physical and emotional state, the findings as written are not erroneous. Instead, these findings are supported by the evidence in the record and it is not the duty of this Court to reweigh the evidence presented to the trial court. Consequently, we are also bound by these findings.

Finally, defendant challenges finding of fact 26 as inaccurate. Defendant argues that detectives threatened him when they told him that they had sufficient evidence to convict him of capital murder and that he would "wear" the whole charge himself unless he provided them the names of his accomplices. However, we have held that informing a defendant of

the charge he is facing does not constitute a threat. *See State v. Richardson*, 316 N.C. 594, 602, 342 S.E.2d 823, 829-30 (1986). We find sufficient evidence in the record to support finding of fact 26 as written, and we are consequently bound by it for purposes of appellate review.

In addition to challenging several of the trial court's findings of fact, defendant also argues that his statements were involuntary as a result of statements made by officers before he was *Mirandized* that "improperly induced hope that his confession would benefit him." Defendant's arguments incorporate the division of the interrogation into "rounds" as in the United State Supreme Court's analysis in *Seibert*, 542 U.S. at 615, 159 L. Ed. 2d at 658, and defendant asks that this Court evaluate the voluntariness of the statement he gave after receiving the *Miranda* warnings in the second "round" of questioning through the lens of the statements by officers in the first "round." To do as defendant asks is unnecessary given the trial court's totality of the circumstances analysis which requires that the entire encounter be evaluated to determine whether defendant freely and voluntarily chose to make a confession. The question is not simply whether the officers made a promise or made a threat, no matter when such statements were made during the encounter, but whether any such statements made by the officers resulted in defendant's will being overborne such that his capacity for self-determination was so impaired that the giving of his confession cannot be thought to be voluntary.

Defendant did not argue to the trial court that officers made specific promises to him or threatened him. He simply argued that their statements "improperly induced hope that his confession would benefit him." We note that the presiding judge watched the entirety of the interrogation interview and concluded that defendant's statements were voluntarily made. The trial court had the benefit of observing the testifying witnesses and heard extensive arguments from counsel. The trial court's findings of fact are supported by sufficient competent evidence and support the conclusion that, under the totality of the circumstances, defendant was not coerced or induced through hope or fear into giving his confession and that his confession was in fact voluntarily given.

V. – Conclusion

We hold that the Court of Appeals erred in condensing the *Miranda* and voluntariness inquiries into one. We also hold that defendant did not preserve the argument that officers employed the "question first, warn later" technique to obtain his confession in violation of *Miranda* and *Seibert*. The trial court's conclusion that the requirements of *Miranda* were met is adequately supported by its findings of fact, as is its conclusion that defendant's statements to officers were voluntarily made. We therefore modify and affirm the decision of the Court of Appeals.

MODIFIED AND AFFIRMED.

Justice HUDSON concurring in result.

I concur in the result reached by the majority. Here the Court of Appeals determined that although defendant's constitutional rights were violated by the trial court's failure to suppress his inculpatory statements, this error was harmless beyond a reasonable doubt due to the overwhelming evidence of defendant's guilt. *State v. Johnson*, ___ N.C. App. ___, ___, 795 S.E.2d 625, 640-41 (2017); *see also State v. Autry*, 321 N.C. 392, 400, 364 S.E.2d 341, 346 (1988) ("Significantly, this Court has held that the presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt." (citing *State v. Brown*, 306 N.C. 151, 164, 293 S.E.2d 569, 578, *cert. denied*, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982))). Specifically, the Court of Appeals stated:

> [W]e hold that the overwhelming evidence of Defendant's guilt of first-degree murder, based upon the evidence that Anita was murdered in the course of a robbery in which Defendant played an essential part, renders this error harmless beyond a reasonable doubt.
>
> Both Josh and Tony, whose testimony Defendant did not move to suppress, identified Defendant as the third man involved in the robbery and shooting, and both stated Defendant was wearing a mask that covered his face. They both testified that Defendant and Tony entered the motel while Josh remained outside, and both claimed Defendant was carrying a gun. Brandy testified that there were two younger men

> without their faces covered, and an older, larger man whose face was covered by a mask. Brandy testified it was the older, larger man who held the gun, and who entered the motel with one of the younger men. Most importantly, Defendant's DNA was recovered from under Anita's fingernails. Although Defendant's admission of participation in the crime, which we have held was involuntary, clearly prejudiced Defendant, in light of the overwhelming evidence presented pointing to Defendant as one of the three men involved in the robbery and murder, we hold the prejudice to Defendant was harmless beyond a reasonable doubt. We reach this holding on these particular facts, and because the jury was instructed on acting in concert and felony murder based upon killing in the course of a robbery. The State did not have to prove that Defendant shot Anita, only that he was one of the three men involved in the robberies and murder. The evidence that Defendant was one of the three men involved was overwhelming, and the State has shown beyond a reasonable doubt that Defendant would have been convicted even had his motion to suppress his inculpatory statements been granted.

Johnson, ___ N.C. App. at ___, 795 S.E.2d at 640-41 (footnote omitted). In my opinion, the Court of Appeals properly concluded that there was overwhelming evidence of defendant's guilt of felony murder, particularly in light of the evidence of defendant's DNA recovered from under the victim's fingernails.

Accordingly, this Court's analysis and determination regarding defendant's constitutional rights is unnecessary, in my view. *See James v. Bartlett*, 359 N.C. 260, 266, 607 S.E.2d 638, 642 (2005) ("However, appellate courts must 'avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds.' " (quoting *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (per curiam))); *see*, *e.g.*, *State v. Powell*, 340 N.C. 674, 686, 459 S.E.2d 219, 224 (1995) ("Assuming *arguendo* that the trial court erred by admitting the statements defendant made after [the police officer] destroyed the [*Miranda*] waiver form, we hold that the error is harmless beyond a reasonable doubt." (citing N.C.G.S. § 15A-1443(b) (1988))), *cert. denied*, 516 U.S. 1060, 116 S. Ct. 739, 133 L. Ed. 2d 688 (1996). Because I conclude that any error by the trial court was harmless beyond a reasonable doubt, I would affirm the Court of Appeals on that basis alone. Therefore, I respectfully concur in the result.

APPENDIX B

COURT OF APPEALS OF NORTH CAROLINA

No. COA 16-491

[Filed January 17, 2017]

State)
)
v.)
)
Johnson)

September 19, 2016, Heard in the Court of Appeals;
January 17, 2017, Filed

Reporter
251 N.C. App. 639 *; 795 S.E.2d 625 **; 2017 N.C. App. LEXIS 33 ***
STATE OF NORTH CAROLINA v. BOBBY JOHNSON

Subsequent History: Review granted by State v. Johnson, 369 N.C. 563, 798 S.E.2d 524, 2017 N.C. LEXIS 282 (May 3, 2017)

Review granted by State v. Johnson, 369 N.C. 563, 798 S.E.2d 525, 2017 N.C. LEXIS 286 (May 3, 2017)

Motion granted by State v. Johnson, 799 S.E.2d 613, 2017 N.C. LEXIS 389 (N.C., June 5, 2017)

Motion granted by State v. Johnson, 800 S.E.2d 666, 2017 N.C. LEXIS 505 (N.C., June 30, 2017)

Affirmed in part and modified in part by State v. Johnson, 821 S.E.2d 822, 2018 N.C. LEXIS 1137 (N.C., Dec. 21 , 2018)

Prior History: Mecklenburg County, No. 11 CRS 247933.

Disposition: NO PREJUDICIAL ERROR.

Counsel: Attorney General Josh Stein, by Assistant Attorney General Alvin W. Keller, Jr., for the State.

Marilyn G. Ozer for Defendant.

Judges: McGEE, Chief Judge. Judges STROUD and INMAN concur.

Opinion by: McGEE

Opinion

Appeal by Defendant from judgment entered 6 October 2015 by Judge Eric L. Levinson in Superior Court, Mecklenburg County. Heard in the Court of Appeals 19 September 2016.

McGEE, Chief Judge.

Anita Rychlik ("Anita") and her husband, David Rychlik ("David"), were employees of the Thrift Motel in Charlotte ("the motel") when Anita was shot and killed in the early morning hours of 2 May 2007. David was outside in the parking lot in front of the motel talking to Brandy Davis ("Brandy"), when three men ("the men"), all dressed in black, approached from the left side of the motel as one faced the front of the building. At that time, Anita managed the motel and David acted as the security guard. Anita was asleep

inside the motel. One of the men was holding a gun, and the man forcibly searched David and Brandy, taking some personal items from both of them, and a set of keys to the motel from David.

Brandy testified the men were African-American, that two of them were approximately five feet, six inches tall or five feet, seven inches tall and weighed about 150 pounds, while the third man was approximately six feet or six feet, one inch tall and weighed between 180 and 200 pounds. According to Brandy, the larger man was holding a small black gun. The men asked David where the safe was and they demanded keys. All three of the men were talking and demanding things. David was hit in the head with the gun during the altercation. Brandy described the man holding the gun as "the older gentleman," and "the tall one," and testified that he told one of the "younger guys" to stay with her and David, and to "shoot" them if they moved. Brandy could see the younger men's faces, and estimated them to be eighteen or nineteen years old. Brandy also testified that the man holding the gun had a "mask all the way down his face" which made it difficult to tell how old he was. One of the smaller, younger men remained with David and Brandy, while the other two men entered the motel. Brandy did not know if the younger man who remained with them had a gun. The two men then entered Anita's bedroom in the motel and there was a struggle. Brandy heard Anita give "a very panic-attack scream," and Anita was shot once in the back of her neck and killed. The men then fled from the scene.

James Rhymes ("Rhymes"), who lived at the motel, testified that on the night in question he left his room upon hearing a strange noise. As Rhymes turned to head toward Anita's office, which was a very short distance from Rhymes' room, he was confronted by a man wearing a mask and holding a gun. Rhymes pushed the gun away from him and turned and ran away up a nearby hill. As he was running away, he heard two gunshots, but was not hit.

The three men escaped, and no one was charged with Anita's murder until 24 October 2011 . However, during the course of the investigation Bobby Johnson ("Defendant") was identified as a suspect and, in 2007, he was placed in custody, read his *Miranda* rights, which he waived , and he voluntarily gave investigators an interview and a buccal swab for the purposes of collecting his DNA. DNA was also recovered from under Anita's fingernails, and these DNA samples were sent for testing and comparison. Results from the DNA analysis were returned to investigators in 2009. Although the DNA analysis indicated that only one in 16,600,000 African-Americans could have been the contributor of the DNA recovered from under Anita's fingernails, and that Defendant was one of those African Americans who could have contributed that DNA, the Charlotte-Mecklenburg Police Department did not attempt to locate Defendant until late 2011.

A police detective "called [Defendant] and spoke to him a number of times and made arrangements for him to come down to the station." Detective William Earl Ward, Jr. ("Detective Ward") testified that they "wanted to talk to him about the DNA evidence."

Defendant voluntarily went to the police station on the morning of 24 October 2011 , arriving at approximately 9:40 a.m. Defendant was escorted to an interview room on the second floor, just outside the homicide office. The interview room was behind doors that remain locked. Detective Ward and Detective Brian Whitworth ("Detective Whitworth"), together ("the detectives") began to interview Defendant. Approximately four hours after entering the interview room, Defendant was placed under arrest for murder, and approximately ten minutes later, after additional conversation, he was read his *Miranda* rights and signed a waiver of those rights. Approximately twenty-five minutes after that, Defendant began to discuss his involvement in the crime. Defendant named brothers Antonio Chaney ("Tony") and Joshua Chaney ("Josh") as the two other men involved, and stated that it was Tony who shot and killed Anita.

Because the voluntariness of Defendant's confession is an issue on appeal, we examine in great detail Defendant's interrogation on 24 October 2011 - from the initiation of the questioning until Defendant admitted participating in Anita's murder. According to the video recording of Defendant's interview, the questioning began in a police interrogation room at approximately 9:50 a.m. Defendant told the detectives that he had been "saved" recently, and Defendant was reminded that Detective Ward had interviewed him back in 2007. At approximately 10:11 a.m., the detectives showed Defendant a forensic report stating DNA had been recovered from under Anita's

fingernails,[1] and that there was only a one in 16,600,000 chance that the DNA would match any particular African-American, but that the DNA recovered from under Anita's fingernails matched Defendant's DNA.

Detective Ward told Defendant that the 2007 interview had locked Defendant into a statement and that, with the DNA report, they now had the "meat and potatoes," and that Defendant's 2007 statement was coming back and "kicking you in the ass." Defendant was told that the crime was committed by three people, and that one of those three people was Defendant. Defendant was told: "The fact is your DNA is under [Anita's] fingernails in her living quarters which you denied even being there." Defendant was told that he needed "to do the right thing by God," and was told the DNA analysis "puts you there[,]" that "[y]ou were there that night, you know what happened." Defendant was told he had not been at home like he had been telling the detectives. Defendant was told, "you were there [at the motel], you were involved in this crime, it's as simple as that, I can't put it more plainly, you can't make this stuff up. It's a scientific fact." "You were there. This puts you there. You understand what this holds? This could be a capital murder case. This is a death penalty case." "If you want to wear it on your own, that's your decision. If you want to do the right thing and bring

---

[1] The DNA recovered was identified as having come from three separate individuals, one of whom was Anita. Defendant was identified as the likely (one in over sixteen million chance) contributor of the second profile. The third profile was never matched to anyone.

other people that were involved, that's your decision." The detectives continued:

> Your body parts, your cells, your DNA, are on her body. How can that happen if you never touched her? There's no way. There's no way your DNA can be spit in the wind and land somewhere. It has to be her grabbing your hair or grabbing your neck. That's how it happens. It's forever, Bobby.[2] Bobby, so you understand, where we're coming from is not "hey, we wanted to talk to you about this murder case . . . ." Where we stand now as a law enforcement agency . . . is that there's no question anymore. That's the meat and potatoes right there for the case [pointing at the DNA analysis]. That's enough to charge you with murder right now. Right now. My suggestion to you is this. Stop with the "I wasn't there," because this proves you were there.

The detectives told Defendant that if the shooting was an accident, if Anita backed into the gun and "pow, holy sh*t, you didn't mean for that to happen, now's the time to talk about it. If you stay silent about it, Bobby, you're going to wear it." The detectives told Defendant that they knew what happened to Anita in her room, but that Defendant was going to have to explain it. Defendant was then told again that that the odds were one in 16,600,000 that any African-American person

---

[2] Throughout the interview, the detectives referred to Defendant as "Bobby." At times, Defendant referred to himself as "Bobby."

other than Defendant could have contributed the DNA recovered from under Anita's fingernails.

Referring to an earlier comment Defendant had made, Detective Ward stated: "When you said [Anita] was shot in the back of the neck, only you, me, the victim, and the coroner knew that. That was not publicized." Detective Ward told Defendant: "I have locked you in so hard to this story here, you can't get out with a blow torch." As Defendant continued to deny being involved, the detectives stopped him from talking and told him they knew he was lying. The detectives told Defendant:

> You're in a box right now. This is the . . . lock to the door [Detective Ward was holding the DNA report in his hand]. If you want to wear capital murder on your own and let them other two dipsticks go run free, that's on you man. I can't help you with that. But if you want to be a hero, be a real man, be a God saved man, then do the right thing.

The detectives told Defendant they could not promise him anything and people had to pay for their crimes, but that Defendant was facing a capital murder charge and he needed to do what was best for himself. They told Defendant the district attorney would look at the people involved and work with those that they and the detectives believed were being "honest and true." Defendant was told he should cooperate and get the truth "*off* his chest." Defendant was told that "[p]eople need . . . something to grab ahold of in a case when they're . . . boxed in, and you're boxed in. You're boxed in by the best evidence that is out there for any case today — DNA." Defendant was told that because of the

DNA evidence, "I know you're either my shooter, or you're someone who was with my shooter. We want the shooter."

Defendant was asked, in light of the DNA evidence, what he thought the jury was going to think. Defendant answered that they would think he took part in the crime. Defendant was told that DNA analysts do not make mistakes, and he needed to "do the right thing." Defendant was told that the DNA evidence was "pretty damning, that puts you there." Defendant responded "That put me there, man. That right there just took my life. That right there just took my life." Detective Ward responded:

> Yes, so, and I want you to understand that. That's what I'm trying to explain to you, that it's over. This game is over. This is the meat and potatoes of the case [touching the DNA analysis], that's what we need to lock folks up. We thought well, we can go get a warrant, let's not do that. . . . But this isn't going away, this is a done deal. It's a done deal.

Defendant responded: "I mean, I'm going to jail, so . . . ." Detective Ward interjected: "Well, we're not there yet, but it's pretty close, ok? And if that will make you understand. If that will make you a believer that's, that's a possibility. We'll do what we need to do." Defendant replied, "I want to be on your team. I don't want to be in prison the rest of my damn life." Detective Ward said: "I tell you that the DA works with people . . . ." Defendant interjected that the issue was "not going away," and told the detectives he would try and help them out in the hope that the case against

him would be resolved in the best way possible. The detectives told Defendant: "We're going to need everybody that was involved, and what part they played, to help you. That's the only thing that's gonna help you. Saying what you're saying right now, that's not gonna help Bobby a damn bit."

Shortly after making this statement, at approximately 10:36 a.m., the detectives asked Defendant if they could pat him down for weapons. Defendant complied, and was frisked and asked to take off his hat. After the pat-down, Defendant sat back in his chair and the interrogation continued. Defendant was asked to talk about his experience of being "saved," and was told that it was more important to help others than to help himself. The detectives told Defendant that there were three people involved, and that he was one of them. They told Defendant he should help himself, that if he wanted to "wear this" by himself, then "God bless you," but that that would be crazy since there were two others involved. Detective Ward said: "Sh*t, I wouldn't go down by myself."

Defendant was then asked again if he had shot Anita, or been with the person who had, and Defendant again replied, "no." Defendant was told that the detectives did not believe him, and Defendant replied: "I know you don't." Defendant was told: "So what you're telling us, and what you're telling the DA, is that you're not willing to help out." Defendant was again reminded that it was a capital murder case with DNA evidence implicating him. Detective Ward told Defendant they locked him into a story in 2007, a story that was a lie, then they took the buccal swab to test his DNA, and

that if "Bobby doesn't choose to help himself, then Bobby can wear it himself. All I can do is say that the smartest thing, based on my experience, is to cooperate . . . . You and two other folks, two other people, have gotten away with murder since 2007. That sucks."

Detective Ward told Defendant they had shown the "meat and potatoes" to him, but he was still not willing to help himself. Defendant was told: "We rely on facts. We don't rely on B.S. This right here [touching DNA report] is fact." Defendant was then told: "Bobby doesn't know what we've done. He doesn't know that we haven't already talked to the *other defendants*. You don't know what other evidence we have, or what other folks have said about what you did." (Emphasis added).

Defendant was told: "We've done our homework. The ball's in your court. The time to get on the bus and get the best seat is now. I didn't have this [the DNA evidence]" in 2007. The detectives told Defendant that he was allowed to tell his lies in 2007, but now they were showing him the truth. "It's black and white." The detectives offered to go and get an assistant district attorney to see what offer Defendant might get for cooperating, but Defendant declined. Defendant was told that it was up to him to "save your own tail," and that if he needed to throw others "under the bus" he should do that. The detectives talked some more about Defendant needing to get the best seat on the bus, and Defendant told them that he was trying to. Defendant then started crying.

The detectives said that "accidents happen," and that Defendant should act in a godly way. Defendant said that he felt "set up." When Defendant again denied

having been at the murder scene, the detectives told him he could not keep denying involvement. Defendant said: "I don't have a life." The detectives responded: "You don't," and told Defendant he was lying, they knew the truth, that Defendant could not deny what was in his heart, and that the only way to "take care of those tears" was to get it all out in the open and "clean his heart, clean Bobby's soul."

The detectives then told Defendant his tears didn't "mean sh*t," that Defendant was just crying because he was "trapped," and that Defendant did what he did and made his own choices. The detectives told Defendant they were giving him the option to cut his losses, and that was all they could do. A few minutes later, Defendant stated: "I want to help you bad" and started to cry again. Defendant then hit himself in the head and began sobbing for over a minute. As Defendant whimpered with his head on the table, he was told to wipe his face, and asked if he had any regrets. Defendant was asked if the tears were for Anita or himself.

At approximately 11:09 a.m., Defendant told the detectives he was sick to his stomach, and he was provided with a trash can and told that the only way to feel better would be to start talking to them. Defendant was told that the best thing for him, and what the jury would like to see, would be to show remorse. Defendant began sobbing again and denied having killed Anita. Defendant continued sobbing for a couple of minutes and, at one point, his head fell to the table. Talking through sobs, Defendant said he was "a free man right

now," then spit into a cup and said, "I'm about to lose my life."

The detectives kept telling Defendant he was making it hard on himself, and to think about God. Defendant told the detectives he was trying to help, and that he came voluntarily to talk. Defendant was then told that most people do not run, they talk, and that "we didn't call you and say hey Bobby I need to talk to you about this murder case, you're a suspect. Would you have come down? Probably not." Defendant was told the only way to "make it right" with God and with Defendant's children was to tell the detectives "how it went down." Defendant was then asked: "What you blubbering for?" "Bad news for you, Bobby, cause it's your DNA hooked to hers. Boom!" Defendant responded, crying, "I'm tore apart. I'm destroyed right now."

Defendant was told: "There's only one thing to do in this room," and Defendant responded: "I know there's only one thing to do in this room." The detectives told Defendant that either he "goes down" or he "gives up the other two folks." Defendant continued crying with his head on the table and was told: "For us, this is the best interview in the world. We got you. You know we got you." The detectives then told Defendant how making a plea agreement worked, that not all cases went to trial, and that if Defendant wanted, they would go and get an assistant district attorney at that moment. After a couple of minutes, Defendant stated that if he admitted to committing the crime, he would go to prison for life or get the death penalty. After some more back and forth, Defendant was told, "you're trying to find another lie to tell me. You're stuttering."

Several minutes later, Defendant was told: "You know it's over," and he responded: "I know it's over." The detectives then asked, "who else was with you that night?" After another long pause, Defendant again denied involvement, cried some more, and said, "that's all I got." After several minutes, the detectives told Defendant: "You are almost there." "We know what happened." "We're trying to be there for you." Detective Whitworth told Defendant: "I could have just come and locked you up but I don't do that to people because I'm an honorable man." Defendant said he could not keep repeating the same thing, and was told, "then don't, repeat the right thing." Defendant began crying again and indicated he felt suicidal.

A couple of minutes later, Defendant was told it was not unusual for people to come in "and lie like you." Defendant cried some more and the detectives told him that his continued lying made the "best case for DA — you lie to us once on tape, lied again on tape — got your DNA." Defendant then said: "I know I'm dead," and the detectives told him he had the choice to cooperate or not, and asked him, "are you willing to wear this yourself?"

Detective Ward asked Defendant if he thought he was going to be able to go home "today." When Defendant answered that he did not, he was told: "Then you're under arrest for murder." Detective Whitworth told him: "If you don't believe you can get up and walk out of here, then I have no choice. You just told me you believe you're going to jail." Detective Ward then asked Defendant: "Did you just say that, yes or no?" Defendant responded: "Yes, sir." Detective Ward

responded: "Then I'm going to have to place you under arrest and then I've got some stuff to do before I continue." "Because to be voluntary you've got to believe you can walk out of here." Defendant said he believed he could go home but that he wanted to help because he believed he was the "star player." Detective Ward told Defendant that if he felt like he could leave, "we're good," but if he did not, "then we'll have to do something different." Defendant was then asked if he thought he could get up and walk out at any time, and Defendant responded, "not at any time, only after you free me to go." A visibly exasperated Detective Whitworth responded: "That's different, Bobby." He then asked Defendant again if he thought he could walk out at that moment, and Defendant responded in the affirmative. Defendant was then told: "Because if not, then we're going to have to go to the next level." Defendant later said he had "faith" that he could walk out, but also knew he could not provide what the detectives wanted and that he was confused.

Defendant said, speaking about himself: "Right now it looks like Bobby did this because Bobby has DNA under the victim['s] . . . nails." Several minutes later, the detectives told Defendant: "You did what you did." "You're full of sh*t." And: "You're done." The detectives again told Defendant they were certain they were talking to the right person, that Defendant was "choosing not to help" himself, and that he was lying. The detectives told Defendant: "All you can do is make it a little easier on you." They asked him: "Do you think it will go easier on you if you don't talk?" Defendant replied: "No[,]" and the detectives thanked him and said: "So you're listening to us." The detectives

reiterated they were certain they were "talking to the right person" and that Defendant was not going to change their minds. The detectives told Defendant to "cut your losses. Help yourself."

At approximately 12:20 p.m., the detectives told Defendant there would be no other interviews with him after that one, that someone would have to pay for the crime, and the nature of the punishment would depend on the individual. Defendant was told: "You told us things in these interviews that only the killer knows. It's that simple." "So is Bobby willing to help Bobby?" Defendant was again told to "cut his losses" and "get the best seat on the bus." Several minutes later, Defendant was told he had gotten away with murder for four years, was asked if he wanted to share the blame, and was told that the "DA wants to know who didn't cooperate; who did cooperate."

The detectives told Defendant they did not "think" he was lying to them, they "knew" it. Defendant was told the "ball" was in his court and, after a long pause, Defendant was again asked if he wanted an assistant district attorney to come and tell him what was in his best interest. Defendant was told that coming clean would give him peace and closure, and that showing remorse would help "cleanse" his soul, and put him at "a higher level." At approximately 12:45 p.m., Defendant was told the district attorney would look at who had cooperated; if only one of the three involved had cooperated , the district attorney would go after the other two; if two of the three had cooperated, the district attorney would go after the uncooperative one.

Several minutes later, the detectives asked: "Do you trust them that much?"

Defendant then put his head on the table and went silent for a very long pause. One of the detectives touched Defendant, and Defendant said: "God," which was followed by minutes more of silence. At approximately 1:05 p.m. Defendant stated: "I'm dead." The detectives told him he would have to pay, but the question was how much; that it would be a question of cooperation versus non-cooperation. Defendant was again told it would be better for him if he cooperated. He was asked if he wanted the detectives to get an assistant district attorney, and was told by Detective Ward that, if he gave a truthful statement, "I'll work for you."

The detectives told Defendant his record was not that bad, other than his prior murder conviction, and that the district attorney would consider that. Defendant was again told the detectives knew they were talking to the right person, and that Defendant knew he was the right person, too.

The detectives left Defendant alone in the interrogation room at 1:15 p.m. and Defendant began to pray out loud. A few minutes later Defendant got up and asked if he could use the restroom, which he did, then returned to an empty interrogation room where he sat alone until 1:57 p.m., when Detective Ward returned alone and resumed talking to Defendant. Detective Ward showed Defendant two post-mortem photographs of Anita at approximately 2:01 p.m.

At approximately 2:03 p.m., Detective Ward told Defendant he was placing him under arrest for Anita's murder, and Detective Ward had Defendant shackle himself to chains set in the interrogation room floor. Although Detective Ward had not yet given Defendant his *Miranda* warnings, he continued to talk to Defendant and listen to him for approximately eleven more minutes. Defendant told Detective Ward he could give him some answers if Detective Ward would allow him to call someone. Detective Ward told Defendant that he was not going to listen to lies. Defendant was told that he was not going to get to go home because murder suspects are generally held without bail.

At approximately 2:14 p.m., Detective Ward began to read Defendant his *Miranda* rights, and Defendant signed a waiver of those rights at approximately 2:17 p.m. Detective Ward continued to question Defendant and told him he was trying to work with Defendant, and that cooperating would be the smartest thing. At approximately 2:22 p.m., Detective Ward told Defendant: "I felt like I had to make you a believer, you weren't believing us." "I felt in my heart like the only thing that's going to make you understand that this isn't going to go away is to charge you with murder. So I charged you with murder."

Several minutes later, Detective Ward assured Defendant he did not "have a problem taking the stand on the behalf of a defendant." Detective Ward told Defendant that he could face either second-degree, first-degree, or capital murder and "that's why I'm . . . beating my head against the wall trying to explain to you, help yourself. Put it into a better category for you."

Detective Ward told Defendant he could not promise anything, but the district attorney would go easier on Defendant if Defendant was truthful. Defendant was told to "cut his losses," that if he was honest about what he had done, it would help him. Defendant was told not to "wear" the charge all by himself.

At approximately 2:38 p.m., Defendant began crying again and told Detective Ward, "you have to get me a witness protection plan, though," then began sobbing. Defendant asked: "I'm already dead, should I just kill myself all the way?" At approximately 2:40 p.m., Defendant told Detective Ward, while sobbing, "I wasn't the gunman." Defendant then told Detective Ward that Tony and Josh were the other two men involved, asked Detective Ward for a hug, and sobbed on Detective Ward's shoulder. As indicated above, Defendant told the detectives that he had not killed Anita, and that he assumed Tony had been the one who shot her.

Acting on information obtained from Defendant, the detectives located Tony and Josh and questioned them at the police station. Tony and Josh gave different accounts from each other when questioned by the police, and then gave different accounts when testifying at trial. When initially questioned, Josh told police he had handled a gun that night, and that the gun belonged to him. Josh testified that he first told the detectives that he shot Anita, but that this statement was not recorded. Josh then told police Tony had killed Anita; that Tony had told him "he [Tony] shot her[, but Tony] didn't know if he killed her or not." However, at trial, Josh testified he never touched a gun, that

Defendant brought the gun, and that he did not know who shot Anita. Tony testified at trial that Defendant and Josh planned the robbery. Tony also testified that Josh never had a gun, but admitted he had previously told police that Josh "probably did have a gun[.]"

When Josh testified at trial, he said that he, Tony, and Defendant walked to the motel and when they were beside the motel, Defendant pulled out a gun and said they should rob a man and a woman who were standing in the parking lot. Josh and Tony wore stocking caps, and Defendant wore a ski mask that covered his face. They all approached the man and woman in the parking lot and Defendant threatened them with his gun and told them to get on the ground; then Josh went through their pockets. Josh put the items he recovered into his own pockets, except a set of keys, which he gave to Defendant. Defendant told Josh to remain with the victims, and he and Tony went to the motel. Josh heard both a man and a woman screaming, and some gunfire. Defendant and Tony returned a few minutes later and the three men left together. Josh testified that Defendant attempted to rob another man who was approaching the motel, but the man ran away and Defendant fired his gun at the man, but missed. Defendant hid the gun under a brick beside an abandoned building. Josh testified he never had a gun that night, and that he never saw Tony with a gun.

Tony's testimony was that he, Josh, and Defendant left a friend's house and headed toward the motel with the intention of committing a robbery. According to Tony's testimony, Defendant and Josh had come up with the

plan. However, Tony then testified they all came up with the plan once they were at the motel. Tony testified Defendant hit the man in the head with his gun, then saw Josh doing something to the man and woman who were on the ground. Tony took the keys and attempted to unlock to door to the motel, and finally managed to find the correct key. He and Defendant went inside, and encountered a woman sleeping. Defendant went to the woman, and when she woke up "she was trying to get him off[,] and "she was screaming." Tony said he left the room to rejoin Josh, then they heard a gunshot and saw Defendant "coming out of the room running." The three men then ran away from the motel, but when they saw a man coming towards them, Defendant shot at the man twice. They went behind a building where Defendant hid the gun under a brick.

Defendant filed a motion to suppress on 11 December 2014, arguing his statements to police should be suppressed because they were not voluntarily made. Defendant's motion specifically argued that Defendant was subjected to custodial interrogation before he was given his *Miranda* rights, and that Defendant's inculpatory statements were made pursuant to improper use of both threat and promise.

Defendant's motion was heard 28 September 2015, and was denied by order entered 3 November 2015, *nunc pro tunc*, 29 September 2015. The trial court ruled that Defendant "was not in custody until the time that he was advised that he was under arrest and Mirandized at 2:14 p.m." The trial court further ruled that Defendant's inculpatory statements were made

voluntarily, and not "obtained as a result of hope or fear instilled by the detectives." Defendant was tried and found guilty of first-degree murder on 6 October 2015. Defendant appeals.

In Defendant's first argument, he contends the trial court erred in denying his motion to suppress. We agree, but hold the error was harmless.

Our Supreme Court has stated the proper standard of review for denial of a motion to suppress as follows:

> The applicable standard in reviewing a trial court's determination on a motion to suppress is that the trial court's findings of fact "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." Any conclusions of law reached by the trial court in determining whether defendant was in custody "must be legally correct, reflecting a correct application of applicable legal principles to the facts found."

State v. Barden, 356 N.C. 316, 332, 572 S.E.2d 108, 120-21 (2002) (citations omitted). This Court has held:

> We review *de novo* a trial court's conclusions as to the voluntariness of a defendant's waiver of *Miranda* rights and statements. "The State bears the burden of proving that a defendant made a knowing and intelligent waiver of his rights and that his statement was voluntary." Where, as here, "a defendant's waiver of *Miranda* rights arises under the same circumstances as the making of his statement, the voluntariness issues may be evaluated as a

> single matter. Whether a waiver and statements were voluntarily made "must be found from a consideration of the entire record[.]" "[T]he reviewing court applies a totality-of-circumstances test."

State v. Ingram, 242 N.C. App. 173, 184, 774 S.E.2d 433, 442 (2015) (citations omitted).

> There are a number of . . . relevant factors [in determining the voluntariness of a statement]:
>
> > whether defendant was in custody, whether he was deceived, whether his Miranda rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.
>
> . . . . Furthermore, for a waiver of *Miranda* rights to be valid, it "must be . . . given voluntarily 'in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception[.]'" "[W]here it appears that an incriminating statement was given under any circumstances indicating coercion or involuntary action, that statement will be inadmissible." "[T]he question of whether Defendant's incriminating statements were made voluntarily turns on an analysis of the circumstances Defendant was subjected to

> before making his incriminating statements and the impact those circumstances had upon him."

Id. at 185, 774 S.E.2d at 442-43 (citations omitted).

In the present case, the trial court made the following relevant findings of fact:

> 3. Det. Ward and another CMPD detective, Brian Whitworth ("Det. Whitworth") sought to make contact with the Defendant on October 19, 2011.
> 4. The Defendant came to the police department headquarters on his own, without police escort, on October 24, 2011.
> 5. The Defendant was not told he was under arrest.
> 6. The Defendant was not shackled or handcuffed.
> 7. At times, during the interview with Det. Ward and Det. Whitworth, both detectives left the interview room.
> 8. There was not a guard or police officer stationed at the door to the interview room.
> 9. The Defendant was in possession of his personal cell phone while inside the interview room.
> 10. The Defendant was offered, and accepted, food and drink.
> 11. The Defendant was not hesitant to engage with, or otherwise speak to, the detectives.
> 12. At no point was the Defendant made any specific promises.
>
> . . . .

18. At no time did the Defendant ask detectives to obtain for him, or to give him the opportunity to speak with, a defense lawyer.
19. The Defendant was emotional at times.
20. The Defendant cried at times.

21. The Defendant expressed concern with his ability to "keep food down."
22. The Defendant was 37 years old at the time of the interview.
23. The Defendant is high-school-educated through the 11th grade and obtained his GED.
24. The Defendant is articulate, intelligent, literate, and knowledgeable about the criminal justice system and its processes.
25. Det. Ward had previously interviewed the Defendant, in 1993, about a murder unrelated to the above-captioned case.
26. While there were no specific promises or threats made by law enforcement, the detectives conducting the interview did represent to the Defendant that the District Attorney "might look favorably" at the Defendant if he made a confession.
27. At one point, the Defendant was patted down, as a matter of course, for safety purposes.
28. Det. Ward had previously interviewed the Defendant, in 2007, about the above captioned case.
29. During his 2007 interview, the Defendant did not admit any involvement in the above-captioned case.
30. The Defendant had self-interest in staying and engaging with police in 2011.

> 31. The Defendant offered to help, offered to wear a wire, and offered to do whatever else he could to assist the detectives.

Defendant argues the trial court's findings of fact "seem to intentionally downplay the influence of hope and fear." Defendant specifically contends that findings of fact five, nineteen, twenty, twenty-one, and twenty-six are incorrect or incomplete.

Defendant argues that finding five: "Defendant was not told he was under arrest," "is at best an incomplete finding as [Defendant] was told he would be arrested if he did not state that he was there voluntarily. [Defendant] was also told that he was guilty of murder and would 'pay the price.'" In order to evaluate Defendant's arguments, we have reviewed the relevant parts of the video recordings of Defendant's interview on 24 October 2011, which are set forth above. We note that Defendant *was* told that he was under arrest at approximately 2:03 p.m. Concerning the time prior to formal arrest, when Defendant was being interrogated, we agree with Defendant that whether or not he was specifically told he was under arrest, the detectives' statements to Defendant, along with the attendant circumstances, made Defendant's position akin to a formal arrest at a point early in the interview.

Findings of fact nineteen, twenty, and twenty-one are all supported by competent evidence, though we agree with Defendant that finding Defendant "was emotional at times," and "cried at times" tends to understate Defendant's emotional state during much of the interview. Concerning Defendant's ability to keep food down, our review of the video interrogation

demonstrates that Defendant did tell the detectives he felt sick to his stomach, and that he rejected an offer of food at one point, stating that he worried he would not be able to "keep it down." Defendant also on occasion spit into a cup in a manner indicating stomach upset. Finally, though we may agree with the wording of finding of fact twenty-six that "there were no *specific* promises or threats made by" the detectives (emphasis added), we agree with Defendant that viewing the totality of the circumstances, Defendant was induced by both fear and hope to make inculpatory statements to the detectives.

Defendant was asked to "voluntarily" show up at the police department for an interview. What Defendant did not know at that time was that the police had received DNA evidence suggesting the overwhelming likelihood that Defendant's DNA had been recovered from underneath Anita's fingernails. Defendant did not know this at the time he was asked to "voluntarily" submit to an interview at the police station, so at the time Defendant arrived at the police station, a reasonable person in Defendant's situation would not have "believed that he was under arrest or was restrained in his movement to the degree associated with a formal arrest." *Barden*, 356 N.C. at 337, 572 S.E.2d at 123 (citation omitted). What is clear to this Court, however, is that Defendant was not going to leave the police station that day without being placed under arrest for Anita's murder.

As the State acknowledges:

> Both the United States Supreme Court and this Court have held that *Miranda* applies only in

> the situation where a defendant is subject to custodial interrogation. *Miranda v. Arizona*, 384 U.S. at 444, 16 L.Ed.2d at 706; *State v. Gaines*, 345 N.C. 647, 661, 483 S.E.2d 396, 404 (1997). The proper inquiry for determining whether a person is "in custody" for purposes of *Miranda* is "based on the totality of the circumstances, whether there was a 'formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'" In this case, we must examine "whether a reasonable person in defendant's position, under the totality of the circumstances, would have believed that he was under arrest or was restrained in his movement to the degree associated with a formal arrest."

Id. (citations omitted); see also *J.D.B. v. North Carolina*, 564 U.S. 261, 269-71, 131 S. Ct. 2394, 180 L. Ed. 2d 310, 321-22 (2011).

Approximately twenty minutes into the interview, Defendant was shown the DNA analysis indicating that his DNA had been recovered from under Anita's fingernails. This evidence, if true, placed Defendant not only at the scene of the murder, but in close physical proximity to the victim. We hold that at that time, "a reasonable person in [D]efendant's position, under the totality of the circumstances, would have believed that he was under arrest or was restrained in his movement to the degree associated with a formal arrest." *Barden*, 356 N.C. at 337, 572 S.E.2d at 123. A reasonable person, who had previously denied ever having had contact with a murder victim, when confronted with DNA evidence recovered from underneath that murder

victim's fingernails, would not believe he was free to exit a police interrogation room and go home. At that point in time, Defendant should have been informed that he was under arrest and should have been provided his rights under *Miranda*. *Id.*

We note that the detectives continued to reinforce the position that Defendant was not free to leave through their subsequent and continuing interrogation. At approximately 10:12 a.m., Detective Ward told Defendant that the DNA evidence locked Defendant in on charges of armed robbery and murder. The detectives told Defendant at approximately 10:16 a.m. that this case would be a capital murder case, and, unless Defendant wanted "to wear" the whole charge, Defendant needed to tell them who else was involved. In the next few minutes, the detectives told Defendant that his DNA under Anita's fingernails provided enough probable cause to charge Defendant for murder, and showed that Anita had grabbed Defendant's arm or his hair before she was murdered. Approximately thirty-one minutes into the interview, the detectives told Defendant that he should stop denying his participation, because he was so locked into the charges that he could not "get out with a blow torch." Detective Ward again told Defendant that this case would be a capital case, but Defendant could help himself by cooperating, and that district attorneys "will work with people who are honest and true." Defendant was challenged in this manner for over four hours, as thoroughly set out above, until he was finally told he was under arrest. Though we do not apply a subjective test, we note that Defendant was eventually placed under arrest and *Mirandized*, even though he had

continued to deny involvement in Anita's murder from the time his interrogation began until he was placed under arrest.

Defendant argues that *Missouri v. Seibert*, 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004), renders his inculpatory statements involuntary. In *Seibert*, the United States Supreme Court stated that the "technique of interrogating in successive, unwarned and warned phases raises a new challenge to *Miranda*." *Id.* at 609, 159 L. Ed. 2d at 653. In *Seibert*, detectives first questioned the defendant without *Miranda* warnings until he confessed, then detectives got the *Mirandized* defendant to repeat his confession. This technique was

> 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*, the interrogating officer follows it with *Miranda* warnings and then leads the suspect to cover the same ground a second time.

Id. at 604, 159 L. Ed. 2d at 650 (citation omitted). The Supreme Court held:

> By any objective measure, applied to circumstances exemplified here, it is likely that if the interrogators 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 the 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. A more likely reaction on a suspect's part would be perplexity about the reason for discussing rights at that point, bewilderment being an unpromising frame of mind for knowledgeable decision. What is worse, telling a suspect that "anything you say can and will be used against you," without expressly excepting the statement just given, could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail. Thus, when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and "depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." By the same token, it would ordinarily be unrealistic to treat two spates of integrated and proximately conducted questioning as

> independent interrogations subject to independent evaluation simply because *Miranda* warnings formally punctuate them in the middle.

Id. at 613-14, 159 L. Ed. 2d at 655-56 (citations omitted).

We agree that the detectives in the present case used the same objectionable technique considered in *Seibert*. However, unlike in *Seibert*, Defendant in the present case did not confess until after he was given his *Miranda* warnings. For this reason, our analysis is whether the entirety of the interrogation, from when Defendant first should have been *Mirandized*, up until his inculpatory statements, rendered Defendant's inculpatory statements involuntary, even without Defendant having confessed prior to having been *Mirandized*.

We hold that resolution of the present case is determined by precedent, which is partially analyzed in *State v. Pruitt*, 286 N.C. 442, 212 S.E.2d 92 (1975). In *Pruitt*, there was

> plenary evidence that the procedural safeguards required by the *Miranda* decision were recited by the officers and that defendant signed a waiver stating that he understood his constitutional rights, including his right to counsel. Even so, the ultimate test of the admissibility of a confession still remains whether the statement made by the accused was in fact voluntarily and understandingly made.

Id. at 454, 212 S.E.2d at 100 (citation omitted). Our Supreme Court in *Pruitt* reasoned:

> Another case factually similar to the case now before us is State v. Stevenson, 212 N.C. 648, 194 S.E. 81. There the evidence tended to show that the defendant had started to make a statement while in jail and was told by an officer that he need not lie because the officer already had more than enough evidence for his conviction. The defendant thereupon confessed. This Court awarded a new trial on the ground that the confession was not a free and voluntary confession but was instead a product of unlawful inducement on the part of the law enforcement officer.
>
> In *State v. Drake*, 113 N.C. 624, 18 S.E. 166, the facts showed that while the defendant was being carried from the place of his arrest to a Justice of the Peace, a law enforcement officer said to him, 'If you are guilty, I would advise you to make an honest confession. It might be easier for you. It is plain against you.' At that time the defendant denied his guilt, but after the Justice of the Peace had committed him to jail, he confessed. The Court again held the confession to be involuntary and, in part, stated:
>
> > ". . . The assertion of his innocence, in reply to the proposition that he should confess and thus make it easier for him, does not at all prove that the offer of benefit from the officer who had him in charge did not find a lodgment in his mind. If so, what could be

> more reasonable than that when he found himself on the way to prison in charge of the author of this hope that a confession would alleviate his condition, he should be tempted to act then upon a suggestion that he had rejected when the prospect did not seem to him so dark, and make a confession. It *may* have proceeded from this cause, from this hope so held out to him. If it *may* have proceeded from that cause, there is no guaranty of its truth, and it must be rejected."

In *State v. Livingston*, 202 N.C. 809, 164 S.E. 337, the defendants were arrested, and after measuring their shoes and tracks at the scene of the crime, the officers told defendants that "it would be lighter on them to confess" and that "it looks like you had about as well tell it." The defendants forthwith confessed to the crime charged. There the Court . . . held that the confessions were involuntary and inadmissible in evidence. *Accord: State v. Fox*, *Supra* (Officer told defendant that it would be better for him in court if he told the truth and that he might be charged with a lesser offense of accessory to the homicide charge rather than its principal.); *State v. Fuqua*, 269 N.C. 223, 152 S.E.2d 68 (A police officer told the incarcerated defendants that he [the officer] would be able to testify that they cooperated if they aided the State in its case.); *State v. Woodruff*, 259 N.C. 333, 130 S.E.2d 641 (Officer obtained favors and concessions on the part of State officials to induce defendant to aid

in solving the homicide and promised that if the evidence obtained involved defendant, he would try to help defendant.); *State v. Davis*, 125 N.C. 612, 34 S.E. 198 (Officer told defendant that he had "worked up the case, and he had as well tell all about it.").

The rule set forth in *Roberts* has been consistently followed by this Court. The Court has, however, made it clear that custodial admonitions to an accused by police officers to tell the truth, standing alone, do not render a confession inadmissible. Furthermore, this Court has made it equally clear that any improper inducement generating hope must promise relief from the criminal charge to which the confession relates, not to any merely collateral advantage.

In instant case the interrogation of defendant by three police officers took place in a police-dominated atmosphere. Against this background the officers repeatedly told defendant that they knew that he had committed the crime and that his story had too many holes in it; that he was "lying" and that they did not want to "fool around." Under these circumstances one can infer that the language used by the officers tended to provoke fright. This language was then tempered by statements that the officers considered defendant the type of person "that such a thing would prey heavily upon" and that he would be "relieved to get it off his chest." This somewhat flattering language was capped by the

> statement that "it would simply be harder on him if he didn't go ahead and cooperate." Certainly the latter statement would imply a suggestion of hope that things would be better for defendant if he would cooperate, *i.e.*, confess.
>
> We are satisfied that both the oral and written confessions obtained from defendant were made under the influence of fear or hope, or both, growing out of the language and acts of those who held him in custody. We hold that both the oral and the written confessions obtained in the Sheriff's Department on 9 October 1973 were involuntary and that it was prejudicial error to admit them into evidence.

Id. at 456-58, 212 S.E.2d at 101-03 (citations omitted). We hold that the circumstances in the present case were at least as coercive as those in *Pruitt*. In the present case, Defendant was questioned for hours after he should have been *Mirandized* and, throughout this questioning, the detectives repeatedly told Defendant they knew he was lying; that they had DNA proof of Defendant's guilt; that only a guilty person would have known Anita was shot in the back of the neck; that this could be a capital case, and that Defendant's treatment would depend on his cooperation; that the district attorney's office would usually work with those who cooperated; that Detective Ward would consider testifying on Defendant's behalf;[3] that Defendant would

---

[3] *See State v. Flood*, 237 N.C. App. 287, 297, 765 S.E.2d 65, 73 (2014), *disc. review denied*, 368 N.C. 245, 768 S.E.2d 854 (2015) (citing *State v. Fuqua*, 269 N.C. 223, 228, 152 S.E.2d 68, 72 (1967)

feel better if he confessed and did right by God and his children; and that Defendant should get the "best seat on the bus" by giving statements against the two other men involved. It is also clear that the detectives decided to arrest Defendant at the time they did in order to shake him up and, in Detective Ward's words: "I felt in my heart like the only thing that's going to make you understand that this isn't going to go away is to charge you with murder. So I charged you with murder."[4]

The facts before us are in contrast to those in cases where a defendant's statements were found to have been voluntary:

> Unlike the situations in *Pruitt* and *Stevenson,* the detective did not accuse defendant of lying, but rather informed defendant of the crime with which he might be charged and urged him to tell

---

"(statements inadmissible where an officer offered to testify on the suspect's behalf if he cooperated)."

[4] *See Pruitt*, 286 N.C. at 457, 212 S.E.2d at 102 (citation and quotation marks omitted) ("The assertion of his innocence, in reply to the proposition that he should confess and thus make it easier for him, does not at all prove that the offer of benefit from the officer who had him in charge did not find a lodgment in his mind. If so, what could be more reasonable than that when he found himself on the way to prison in charge of the author of this hope that a confession would alleviate his condition, he should be tempted to act then upon a suggestion that he had rejected when the prospect did not seem to him so dark, and make a confession. It *may* have proceeded from this cause, from this hope so held out to him. If it *may* have proceeded from that cause, there is no guaranty of its truth, and it must be rejected.").

> the truth and think about what would be better for him. Further, at the time Howard made the statements defendant contends were coercive, Howard had already identified for defendant, and defendant had acknowledged, the others with him the night of the murder. Earlier in the interview Howard had stated:
>
> > What I want to talk with you about is when you and Chuck and Brian and Bootsy and another guy from Clayton by the name of Brian Barbour come to Raleigh and ya'll robbed an old man and hit him with a bat. That's the incident I'm talking about, okay?
>
> Shortly thereafter, Howard asked defendant, "So who was together? Who was with ya'll that night?" Defendant responded, "Everybody that you named." Defendant knew at that point that the State had at least one witness.
>
> . . . .
>
> Under the totality of the circumstances test, the isolated statements by Howard do not support defendant's contention that his statements were made involuntarily out of fear or hope on the part of defendant. We conclude, therefore, that the trial court did not err in determining that the statements were freely and voluntarily given and in denying defendant's motion to suppress.

State v. McCullers, 341 N.C. 19, 28, 460 S.E.2d 163, 168 (1995); see also *State v. Thomas*, 310 N.C. 369, 379, 312 S.E.2d 458, 464 (1984) ("In *Pruitt*, unlike the case before us, the police repeatedly told defendant that

they knew that he had committed the crime and that his story had too many holes in it; that he was 'lying' and that they did not want to 'fool around.' In addition, the officers told defendant in that case that 'it would simply be harder on him if he didn't go ahead and cooperate.'") (citations and quotation marks omitted); *Flood*, 237 N.C. App. at 296-99, 765 S.E.2d at 72-74 (lengthy analysis of *Pruitt* and other relevant opinions); *State v. Patterson*, 146 N.C. App. 113, 124, 552 S.E.2d 246, 255 (2001) ("In *Pruitt*, the investigating officers repeatedly told defendant that they knew that he had committed the crime and that his story had too many holes in it; that he was 'lying' and that they did not want to 'fool around.' They also told him that they considered [him] the type of person 'that such a thing would prey heavily upon' and that he would be 'relieved to get it off his chest.' The Court found that under these circumstances the defendant's confessions were made under the influence of fear or hope, or both, growing out of the language and acts of those who held him in custody.") (citations and quotation marks omitted).

The fact that the detectives at times managed to get Defendant to state that he thought he could leave does not change our analysis. *J.D.B.*, 564 U.S. at 271 , 180 L. Ed. 2d at 322 ("[T]he 'subjective views harbored by either the interrogating officers or the person being questioned' are irrelevant. The test, in other words, involves no consideration of the 'actual mindset' of the particular suspect subjected to police questioning."). Based upon *Pruitt* and other cited cases, we hold that Defendant's inculpatory statements "were made under the influence of fear or hope, or both, growing out of the language and acts of those who held him in custody."

Pruitt, 286 N.C. at 458, 212 S.E.2d at 103. Defendant's motion to suppress his confession should have been granted.

Because we have held that Defendant's constitutional rights were violated by the failure to suppress his inculpatory statements, it is the State's burden to prove this error was harmless beyond a reasonable doubt. "'A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.' N.C.G.S. § 15A-1443(b) (2011)." *State v. Ortiz-Zape*, 367 N.C. 1, 13, 743 S.E.2d 156, 164 (2013). In its brief, the State incorrectly attempts to place this burden on Defendant. However, we hold that the overwhelming evidence of Defendant's guilt of first-degree murder, based upon the evidence that Anita was murdered in the course of a robbery in which Defendant played an essential part, renders this error harmless beyond a reasonable doubt.

Both Josh and Tony, whose testimony Defendant did not move to suppress, identified Defendant as the third man involved in the robbery and shooting, and both stated Defendant was wearing a mask that covered his face. They both testified that Defendant and Tony entered the motel while Josh remained outside, and both claimed Defendant was carrying a gun. Brandy testified that there were two younger men without their faces covered, and an older, larger man whose face was covered by a mask. Brandy testified it was the older, larger man who held the gun, and who entered

the motel with one of the younger men. Most importantly, Defendant's DNA[5] was recovered from under Anita's fingernails. Although Defendant's admission of participation in the crime, which we have held was involuntary, clearly prejudiced Defendant, in light of the overwhelming evidence presented pointing to Defendant as one of the three men involved in the robbery and murder, we hold the prejudice to Defendant was harmless beyond a reasonable doubt. We reach this holding on these particular facts, and because the jury was instructed on acting in concert and felony murder based upon killing in the course of a robbery. The State did not have to prove that Defendant shot Anita, only that he was one of the three men involved in the robberies and murder. The evidence that Defendant was one of the three men involved was overwhelming, and the State has shown beyond a reasonable doubt that Defendant would have been convicted even had his motion to suppress his inculpatory statements been granted.

In Defendant's second argument, he contends the trial court erred in excluding evidence of bullet fragments recovered from the parking lot that might have indicated the presence of a second gun at the crime scene. We disagree.

Defendant argues he could have used this evidence to impeach the testimonies of Josh and Tony. Even assuming *arguendo* that there was a second gun

---

[5] To a stated certainty of 1 in 16,600,000 African-Americans, and all evidence presented demonstrated that all three of the men involved were African-American.

involved in the crime, the State did not need to prove that Defendant was the person who shot Anita in order to obtain a conviction against him for first-degree murder, nor would the presence of an additional gun have weakened the plenary evidence of Defendant's involvement. This argument is without merit.

The trial court erred in denying Defendant's motion to suppress his inculpatory statements, but we hold this error was harmless in light of the plenary additional evidence of Defendant's guilt. For the same reason, we hold that, even assuming *arguendo* the trial court erred in excluding evidence of bullet fragments recovered from the parking lot, any such error was harmless.

NO PREJUDICIAL ERROR.

Judges STROUD and INMAN concur.

APPENDIX C

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

FILE NO. 11 CRS 247933

[Filed November 3, 2015]

STATE OF NORTH CAROLINA	)
	)
v.	)
	)
BOBBY JOHNSON,	)
Defendant.	)
	)

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

The Defendant's Motion to Suppress Evidence of Defendant's Statement in the above-captioned case, coming on to be heard, and being heard, during the September 28, 2015, session of Superior Court in Mecklenburg County, before the undersigned Superior Court Judge, is **DENIED**. The Court announced its ruling in open court during the September 28, 2015, session and before jury selection began. In denying the Motion, the Court makes the following written FINDINGS OF FACT and CONCLUSIONS OF LAW:

FINDINGS OF FACT

1. The Defendant's Motion to Suppress Evidence of Defendant's Statement was filed on December 11, 2014.

2. Detective William Ward ("Det. Ward") was first employed by the Charlotte-Mecklenburg Police Department ("CMPD") in 1986. Det. Ward retired in 2012 but is currently affiliated with the police department, as a detective, on a part-time basis.

3. Det. Ward and another CMPD detective, Brian Whitworth ("Det. Whitworth") sought to make contact with the Defendant on October 19, 2011.

4. The Defendant came to the police department headquarters on his own, without police escort, on October 24, 2011.

5. The Defendant was not told he was under arrest.

6. The Defendant was not shackled or handcuffed.

7. At times, during the interview with Det. Ward and Det. Whitworth, both detectives left the interview room.

8. There was not a guard or police officer stationed at the door to the interview room.

9. The Defendant was in possession of his personal cell phone while inside the interview room.

10. The Defendant was offered, and accepted, food and drink.

11. The Defendant was not hesitant to engage with, or otherwise speak to, the detectives.

12. At no point was the Defendant made any specific promises.

13. State's Exhibits M1 and M2 are waiver forms that were used and that accurately reflect the required *Miranda* warnings.

14. State's Exhibits M4 through M8 properly reflect the Defendant's prior felony conviction history.

15. State's Exhibits M9 through M11 are accurate copies of the interview that transpired in 2011.

16. State's Exhibit M12 is an accurate transcript.

17. State's Exhibit M13 and M14 are accurate representations of the latter part of the interview.

18. At no time did the Defendant ask detectives to obtain for him, or to give him the opportunity to speak with, a defense lawyer.

19. The Defendant was emotional at times.

20. The Defendant cried at times.

21. The Defendant expressed concern with his ability to "keep food down."

22. The Defendant was 37 years old at the time of the interview.

23. The Defendant is high-school-educated through the 11th grade and obtained his GED.

24. The Defendant is articulate, intelligent, literate, and knowledgeable about the criminal justice system and its processes.

25. Det. Ward had previously interviewed the Defendant, in 1993, about a murder unrelated to the above-captioned case.

26. While there were no specific promises or threats made by law enforcement, the detectives conducting the interview did represent to the Defendant that the District Attorney "might look favorably" at the Defendant if he made a confession.

27. At one point, the Defendant was patted down, as a matter of course, for safety purposes.

28. Det. Ward had previously interviewed the Defendant, in 2007, about the above-captioned case.

29. During his 2007 interview, the Defendant did not admit any involvement in the above-captioned case.

30. The Defendant had self-interest in staying and engaging with police in 2011.

31. The Defendant offered to help, offered to wear a wire, and offered to do whatever else he could to assist the detectives.

CONCLUSIONS OF LAW

1. Based on the totality of the circumstances surrounding the statement of the Defendant on October 24, 2011,the Defendant was not in custody until the time that he was advised that he was under arrest and Mirandized at 2:14pm.

2. The requirements of Miranda were satisfied.

3. The representations made to the Defendant by the detectives such as "you're lying" or "you're boxed in as a result of the DNA" or "you shouldn't wear this alone" do not make the interview, or statements of the Defendant, involuntary.

4. Based on the totality of the circumstances during the entirety of the interview, the statements made by Defendant were voluntary.

5. The confession was not obtained as a result of hope or fear instilled by the detectives. The Defendant had a self-interest in helping the police.

6. The Defendant recognized the gravity of the circumstances, but he was not in custody

until he was specifically informed he was in custody and Mirandized at 2:14 pm.

ORDER

The Defendant's Motion to Suppress Evidence of Defendant's Statement is DENIED on all grounds, including those based in whole, or in part, on the United States Constitution, the North Carolina Constitution, and N.C.G.S. 15A-974.

THIS THE 2 of November, 2015, *nunc pro tunc*, 29 September 2015.

/s/ Eric L. Levinson
Eric L. Levinson
Superior Court Judge

APPENDIX D

STATE OF NORTH CAROLINA
MECKLENBURG COUNTY
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

11 CRS247933-95

[Filed December 11, 2014]

IN THE MATTER OF	)
STATE OF NORTH CAROLINA	)
	)
VS.	)
	)
BOBBY JOHNSON	)
	)

DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OF DEFENDANT'S STATEMENT

NOW COMES the Defendant, pursuant to N.C.G.S. §15A-974, the Fourth, Fifth, Sixth, and Fourteenth Amendments of the U.S. Constitution, and N.C. State Constitution Art. I, sections 19 and 23 and moves the Court to enter an Order suppressing the October 24, 2011 statement of Defendant to Charlotte-Mecklenburg ("CMPD") Detectives.

In support of the motion the Defendant shows the court that:

1. "[E]vidence must be suppressed if . . . [i]ts exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina." N.C. *Gen. Stat. 15A-974;* "[N]o evidence obtained from a defendant through custodial interrogation may be used against that defendant at trial, unless the interrogation was preceded by (1) the appropriate warnings of the rights to remain silent and to have an attorney present and (2) a voluntary and intelligent waiver of those rights." *State v. Jackson,* 165 N.C. App. 763, 769 (2004).

2. On the morning of October 24, 2011 Mr. Johnson came to the Charlotte-Mecklenburg Police Department ("CMPD") Law Enforcement Center at the request of Detectives.

3. At 9:47 a.m. Mr. Johnson was placed in an interrogation room.

4. At 9:50 a.m. CMPD Detectives Ward and Whitworth entered the room.

5. Detectives entered the interrogation room soon after and shut the door. Detectives Ward and Whitworth sat between Mr. Johnson and the closed door.

6. At 9:52 a.m. Detectives began to ask Mr. Johnson about the murder, and his previous

July 10, 2007 interview with Homicide Detectives.

7. Although Detective Whitworth stated to Mr. Johnson "this was strictly voluntary, there are no warrants" Mr. Johnson was not told he was free to leave or that he could end the interview at any time.

8. "The proper inquiry for determining whether a person is 'in custody' for purposes of Miranda is 'based on the totality of the circumstances, whether there was a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest."" *State v. Waring, 364 N.C. 443,470 (N.C. 2010)* citing *State v Barden,* 356 N.C. 316, 337 (N.C. 2002)

9. Neither Detective initially advised the Defendant of his rights and did not ascertain that he knowingly and voluntarily waived his rights to remain silent or his rights to have counsel present.

10. The voluntariness of a confession is determined by the "totality of the circumstances." *State v. Corley,* 310 N.C. 40, 47 (N.C. 1984).

11. Further, several comments of Detectives to Defendant improperly induced hope that his confession would benefit him.

12. A confession cannot be received in evidence where the defendant has been influenced by

any threat or promise; for, as it has been justly remarked, the mind, under the pressure of calamity, is prone to acknowledge, indiscriminately, a falsehood or a truth, as different agitations may prevail; and therefore a confession obtained by the slightest emotions of hope or fear ought to be rejected. . . ." *State v. Pruitt,* 286 N.C. 442,455 (N.C. 1975) *citing State v. Roberts,* 12 N.C. 259 (N.C. 1827).

13. Defendant was not advised of his Miranda rights until 2:14 p.m., approximately 4 and a half hours after he entered the interrogation room.

14. Use of Defendant's statement would be in violation of his Fifth, Sixth and Fourteenth Amendment rights as set out above and under case law of the United States Supreme Court, *Miranda v. Arizona*, and its progeny. Wherefore, the Defendant respectfully prays:

    a. That the Court hold a suppression hearing in this matter; and

    b. That this Honorable Court issue an Order suppressing the October 24, 2011.

Respectfully submitted this the 11th day of December, 2014

/s/Desmond McCallum
Desmond McCallum

Law Offices of Harold Cogdell, Jr., P.C.
905 E. 7th Street
Charlotte, NC 28204
Telephone: (704) 376-4464
Facsimile: (704) 919-5612
Email: desmond@consultmyattorney.com

APPENDIX E

STATE OF NORTH CAROLINA
MECKLENBURG COUNTY
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

11CRS247933-95

[Filed December 11, 2014]

IN THE MATTER OF	)
STATE OF NORTH CAROLINA	)
	)
VS.	)
	)
BOBBY JOHNSON	)
	)

AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS EVVIDENCE OF DEFENDANT'S STATEMENT

I, Desmond McCallum, being first duly sworn, state upon information and belief that I have investigated the basis for Defendant's Motion to Suppress Evidence of Defendant's Statement by reviewing the October 24, 2011 video taped interview of Defendant and police narratives:

1. On the morning of October 24, 2011 Mr. Johnson came to the CMPD Law Enforcement Center at the request of Detectives.

2. At 9:47 a.m. Mr. Johnson was placed in an interrogation room.

3. At 9:50 a.m. CMPD Detectives Ward and Whitworth entered the room.

4. Detectives entered the interrogation room soon after and shut the door. Detectives Ward and Whitworth sat between Mr. Johnson and the closed door.

5. At 9:52 a.m. Detectives began to ask Mr. Johnson about the murder, and his previous July 10, 2007 interview with Homicide Detectives.

6. Neither Detective initially advised the Defendant of his rights to remain silent and to have counsel present.

7. At 10:44:40 a.m. Defendant was told he was "in a good position right now like we said there are no warrants on you, you are not under arrest".

8. At 10:49:10 a.m. Defendant was told "the smartest thing based on my experience, is to cooperate".

9. At 10:50:00 a.m. Defendant was told he was not willing to "help himself even".

10. At 10:52:33 a.m. Defendant was told "Bobby needs to consider helping Bobby, there is no other advice I can give a person sitting in that chair other than that, the ball is in your court".

11. At 10:54:15 a.m. Defendant was told " Do you want me to get a DA to come in and say Bobby, I will work with you, I will do this if you give a full complete truthful statement on this case. If you want that for Bobby I will do that right now. Is that what you need?"

12. At 10:55:15 a.m. Defendant was told " its up to you to save your own tail right now, your own butt, its up to you to do the right thing for your own self".

13. At 11:10:40 a.m. Defendant was told "the best thing I can show a jury Bobby is that you showed remorse, one of the best things for a person in your positions to do right now is to show remorse, show that you are upset about it, show that you made a mistake".

14. At 11:14:10 a.m. Defendant was told "my suggestion is you start talking to us, you know, you're a free man right now, you're a free man right now, you know you need to talk to us if there is something if there is something you need us to hear about that case."

15. At 2:03 p.m. Defendant was advised that he was being placed under arrest.

16. At 2:14 p.m. Defendant was advised of his Miranda rights.

/s/Desmond McCallum
Desmond McCallum

Sworn to and subscribed before me, this the 11th day of December 2014.

/s/Cassandra J. Jones
Notary Public

My commission expires: 1-20-2019

* * *

[*Certificate of Service Omitted in the Printing of this Appendix*]

APPENDIX F

DECLARATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

In support of the Petition for Writ of Certiorari in the case of *Bobby Johnson v. State of North Carolina*, I, Michael R. Hoernlein, state as follows:

1. I am over 18 years of age. I am an attorney in good standing licensed to practice law in North Carolina and New York.

2. I have reviewed a copy of the October 24, 2011 videotaped interrogation of Petitioner Bobby Johnson. The video was included in the record below. *See* App. 29 ("According to the video recording of Defendant's interview . . . .").

3. The following are true and accurate quotations from the interrogation video.

4. Around 11:31 a.m., Johnson said, "If I could say you'd understand, I'd be lying. If I could say that I was really there, I was involved, I'd be putting myself in a situation. Not only that, I would be lying on myself to get myself a life sentence."

5. Around 11:52 a.m., the following exchange occurred:

   Johnson: You're telling me . . .

   Det. Ward: That we don't believe you.
   That's all it is.

Johnson: And I can't control that.

Det. Ward: Right.

Johnson: I can't control that.

Det. Ward: No more than anybody else [unintelligible].

Johnson: I can't contribute to that.

Det. Ward: With something believable, sure. With something believable.

Johnson: Something that will fit your —something that will fit your case.

Det. Ward: Here's what happened. You planned this.

Johnson: I don't have a puzzle—I don't have a puzzle piece. I've been trying to explain that.

6. Around 2:22 p.m., Detective Ward stated, "We stepped out, okay, and we talked. And I feel in my heart that the only thing that's going to make you understand that this isn't going to go away—that I needed to charge you with murder. Okay? So I charged you with murder today. You're going to go to the Mecklenburg County jail. And right now, I'm asking you the same thing I've been asking you all day since I've been with you is just be honest with us about what happened. What happened, who you were with, and what happened. And put it on this. And I want you to tell the story just like you did about your finger on the porch. From the heart.

Truthful. Okay? That's all I'm asking. I know you can do it. I've been sitting in here with you since 10:00 this morning . . . ."

7. Exhibit A to this Declaration is a series of three true and accurate screen shots from the interrogation video.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 7, 2019.

/s/ Michael R. Hoernlein
Michael R. Hoernlein

Exhibit A