THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0575

State of New Hampshire

v.

Dominic Carrier

Appeal Pursuant to RSA 606:10 from Judgment of the Hillsborough County Superior Court – Southern District

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BRIEF FOR THE DEFENDANT

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QUESTIONS PRESENTED

1. Whether the court correctly held that a reasonable person in Carrier's position would have felt restraints on his freedom consistent with formal arrest.

2. Whether the court correctly found that Carrier's second statement was involuntary.

STATEMENT OF THE CASE

Dominic Carrier is charged in the Hillsborough County Superior Court with one count of aggravated felonious sexual assault. SBA[1] 44. As part of the investigation of the allegation, Nashua Police interviewed Carrier twice. SBA 45-51. In addition, the alleged victim made allegations during a forensic interview at the Child Advocacy Center ("CAC"). SBA 50; SH 95.

Carrier moved to suppress his statements under the state and federal constitutions. SBA 72-83. He argued that the first statement was the product of custodial interrogation without the benefit of Miranda warnings and that it was involuntary. SBA 74-80. He argued that the second statement was involuntary because of the influence of the first, unwarned statement and that the Miranda waiver was invalid. SBA 80-82. The State objected. SBA 84-93. The court (Colburn, J.) held a suppression hearing, at which Nashua Police Officer Michael Kekejian and Nashua Detective Steven Hallam testified. SH 3-98.

Following the hearing, the court suppressed the first statement, after a particular point in the recording, and the

[1] References to the record are as follows:
"SB" refers to the State's brief;
"SBA" refers to the appendix attached to the state's brief;
"App." refers to the separately submitted State's appendix;
"SH" refers to the transcript of testimony at the suppression hearing on June 25, 2018.

entire second statement. SBA 44-70. The court found that Carrier was in custody at the identified point of the first interview. SBA 51-64. The court further found that the second interview was involuntary, based on the totality of the circumstances. SBA 64-70.

The State filed a motion to reconsider, SBA 94-103, to which Carrier objected, SBA 104-06, and which the court denied. SBA 71. This appeal followed.

STATEMENT OF THE FACTS

On the morning of November 20, 2017, M.G., a thirteen-year-old girl, reported to her father that Carrier entered her bedroom in the night and touched her genitals while she slept. SBA 44; SH 18. Carrier lived in the same home, as his mother and M.G.'s father were engaged. SBA 44; SH 14. Carrier had been living elsewhere but had moved back home the night before. SBA 44; SH 25. He left for work at about 5:00 a.m. that morning and thus was not home when M.G. made her report. SBA 44; SH 5, 15. M.G.'s father called police. SBA 45; SH 14.

Nashua Police Officer Kekejian went to the home at approximately 7:00 a.m. and gathered information from M.G. and her family. SBA 45; SH 4. The only thing he asked M.G. was whether she required medical attention. SBA 45; SH 15. He learned of M.G.'s allegation from her father and that Carrier's mother had sent Carrier texts advising him of the allegations. SBA 45; SH 11-12, 15-16, 18, 35. However, it was unclear whether Carrier received those messages, since he did not have a cell phone plan and could only use his phone when on wifi. SBA 46; SH 6, 32-33. Kekejian was instructed to remain at the home until M.G. was interviewed at the CAC. SBA 45; SH 19-20.

Kekejian was in the living room with the family when Carrier returned just after 9:00 a.m. SBA 45; SH 5-6, 21.

When Carrier walked into the home, Kekejian told him he had to leave and followed him out onto the porch, closing the door behind him. SBA 45; SH 5-6, 20, 33-34. Kekejian told Carrier that police were investigating a matter and that the home was "being held as a scene." SBA 45; SH 11. However, Carrier could see that his mother, M.G., and M.G.'s father were sitting in the living room. SH 33-34.

It was a cold and windy day. SBA 45; SH 8, 31, 40. Neither State's witness could remember what Carrier was wearing, but Carrier's later statement suggested that he was not wearing a jacket. SBA 45, 49; SH 8, 62. Kekejian frisked Carrier for weapons, despite there being no allegation of use of a weapon. SBA 46; SH 10-11, 22. When Carrier took out his phone, Kekejian took it into custody. SBA 46; SH 11-12. Kekejian testified that he did so to preserve any evidence, such as the texts Carrier's mother had sent, and to prevent Carrier from contacting his family in the house. Id.

Kekejian stood in front of the door to the home, blocking Carrier's entrance, and questioned Carrier. SBA 46; SH 6-7, 20-21, 24-26. He asked where Carrier had been that morning and what time he had left the home. SBA 46; SH 24-26. He asked about Carrier's living arrangements in the home. SBA 46; SH 8. He also asked what Carrier had done that morning and whether he had gone into M.G.'s room. SBA 46; SH 25-26. Kekejian did not tell Carrier he was free to leave, that he

was not under arrest, or that he did not have to answer questions. SBA 46; SH 29-30.

About five to ten minutes after they went out onto the porch, Officer Ciszek arrived at the home and stood on the porch with Kekejian and Carrier. SBA 46; SH 7, 24. Kekejian called Detective Hallam and learned that Hallam intended to interview Carrier later. SBA 46; SH 6-7, 24, 37. Kekejian then talked to Carrier about where he would go. SBA 47; SH 7-8. He wrote Hallam's name and phone number on a police business card to give to Carrier. SBA 46-47; SH 7. Hallam then called Kekejian back to say he would be coming to the house to talk to Carrier. SBA 47; SH 8, 37-38. The plan changed because Hallam's supervisor was concerned that police might not be able to find or get a statement from Carrier later. SBA 47; SH 55-56.

Hallam asked Kekejian to see if Carrier would "stick around" until Hallam got there. SBA 47; SH 8, 26-27. Carrier, who was apparently about to leave, agreed to wait for Hallam. SBA 47; SH 8, 27. Kekejian engaged him in "small talk," including asking where he had been that morning. SBA 47; SH 12.

Detectives Hallam and McIver arrived at about 10:00 a.m. SBA 47; SH 29, 38. Although Kekejian and Ciszek were in full uniform, each driving a fully marked cruiser, Hallam and McIver were in plain clothes. SBA 46-47; SH 14-15, 28.

However, their badges and guns were visible. SBA 47; SH 39-40. They drove an unmarked Chevrolet Impala, which had a police radio inside but otherwise functioned and appeared like a normal passenger vehicle. SBA 47; SH 43.

Hallam asked Carrier if he would speak with them for a "second," and Carrier came down off the porch and walked to the side of the building with them. SBA 47-48; SH 13, 30, 41-42, 60-61. Hallam then asked Carrier to talk with them in the unmarked cruiser across the street. SBA 47-48; SH 39, 42. Hallam testified that he suggested the conversation occur in the car for privacy and because it was cold. SBA 48; SH 42. Carrier agreed. Id. Hallam did not tell Carrier he could refuse to answer questions or that he was not under arrest. SBA 48; SH 63-64.

Hallam got in the driver's seat, Carrier got in the front passenger seat, and McIver sat in back. SBA 48; SH 43. Hallam began the conversation by asking if he could record, to which Carrier agreed. SBA 48; SH 45. Hallam then asked Carrier if he was giving the statement "voluntarily," and Carrier responded, "yeah." SBA 48; App. 6. Hallam said, "I just want to make sure, I don't want you to feel forced to talk to me." Id. Carrier replied, "No, no, no, dude, I'm willing to do it. I don't know exactly—" Id. Hallam told Carrier and demonstrated that the doors of the Impala were unlocked and that Carrier could leave "at any point." Id. However, Hallam

and Carrier were talking over each other at this point. SBA 55.

Hallam did not advise Carrier of his Miranda rights or tell him that he could decline to answer questions. SBA 49; SH 67-68. Hallam asked Carrier if he knew what was going on and Carrier responded that he did not. SBA 48-49; App. 6. Carrier said that the police were at his house when he came home from work, that he was told to leave, that he "still" had to go to the bathroom, and that he was not allowed to get a jacket. SBA 49; App. 6-7. Carrier pointed to the officer who told him to leave, thus indicating that Kekejian was still outside and in Carrier's view. SBA 49; App. 7.

Carrier started the interview by saying he had not done anything wrong. Id. When asked about his activities in the night, Carrier denied leaving his bedroom. SBA 49; App. 18. However, as Hallam continued to question him, and press for different answers, Carrier admitted going upstairs for a drink of water in the night, then to looking into M.G.'s bedroom, then to going into M.G.'s bedroom, then to stepping on M.G.'s bed, then to having contact with her leg, then to possibly having accidental contact with her vagina, and then to touching her vagina for approximately fifteen seconds. SBA 49-50; App. 18-88.

The questioning inside the Impala lasted approximately one hour. SBA 50; SH 47-48. As Hallam wrapped up the

interview, he allowed Carrier to use a phone to contact his father and then Hallam dropped Carrier off at a nearby convenience store to meet his father. SBA 50; SH 48; App. 100-05.

Carrier was arrested that evening at 8:20 at his father's home in Litchfield. SBA 50; SH 90-91. Hallam was present for Carrier's arrest and after Carrier was brought to the Nashua police station. SBA 50; SH 49, 90-91. At approximately 10:00 p.m., Hallam approached Carrier in the booking area and asked if he wanted to speak to Hallam. SBA 50; SH 49, 91. Carrier agreed, and Hallam and another detective, Murray, began the interview at about 10:20 p.m. SBA 50; SH 49-50, 92.

Hallam began the second interview by advising Carrier of his Miranda rights. SBA 50-51; SH 50. Carrier signed the form waiving his rights. SBA 51; SH 50. Hallam began by telling Carrier that he wanted to talk to Carrier

> again. I know we went over this already and, and we talked about it in the car out at the, the scene. Just a couple inconsistencies, man, we want to make sure we paint the clearest picture possible and, and get exactly what happened there. Right now would you just be able to give me the truth the first time, 100 percent. But I feel like there's a little bit of inconsistencies. Could you agree that there's a little bit that you kind of left

> out when you, when you were speaking with me the first time, where you kind of led me in the wrong direction a little bit like as far as the reasons you were in the room and stuff to that extent? If you could start from the beginning, man, and give me the 100 percent straight truth, we're here today, man, and – and let's just [get it] handled right now, dude. Can, can we be honest and just get it handled? It is what it is. You've been arrested. Let's, let's get past this, man, and – and move on from it, 100 percent honest right now, man. Start from when, from when you showed up at the house on Sunday? Time frame, give me everything, paint me a picture, man? We'll start with what time did you show up on Sunday?

SBA 67-68; App. 121-22.

During the second interview, Hallam brought up topics that he and Carrier had discussed that morning, repeated phrases he had used that morning, and urged Carrier to "skip all that B.S. that we were doing out there." SBA 68; App. 123; SH 94-96. The second interview lasted approximately forty-five minutes and Carrier made additional incriminating statements. SBA 51; SH 50, 95.

SUMMARY OF THE ARGUMENT

1. Based on the totality of the circumstances and the trial court's factual findings, the court correctly balanced the relevant factors in ruling that Carrier was in custody and entitled to Miranda warnings at the point in the interrogation when he was repeatedly accused of lying. The character of the interrogation, combined with the control the police exerted over Carrier and the lack of effective communication that Carrier could leave and could refuse to answer questions, outweighed the factors supporting lack of custody. This Court must affirm.

2. The trial court correctly considered the totality of the circumstances. The trial court was justified in finding significant the use of Carrier's first statement as a lever to extract his later, warned statement. The court's finding that Carrier's second statements were involuntary is not against the manifest weight of the evidence, viewed in the light most favorable to him. This Court must affirm.

I. THE COURT CORRECTLY HELD THAT A REASONABLE PERSON IN CARRIER'S POSITION WOULD HAVE FELT RESTRAINTS ON HIS FREEDOM CONSISTENT WITH FORMAL ARREST.

Part I, Article 15 of the New Hampshire Constitution and the Fifth and Fourteenth Amendments to the United States Constitution establish certain protections governing police questioning of suspects. Before the State may introduce, in its case in chief, statements obtained by the police during custodial interrogation, it must first establish that the police gave the Miranda warnings and obtained a valid waiver of those rights. Miranda v. Arizona, 384 U.S. 436, 444 (1966); State v. Pyles, 166 N.H. 166, 168 (2014).

Miranda warnings are required "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 (1977) (*per curiam*). "[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." Berkemer v. McCarty, 468 U.S. 420, 442 (1984). Custody arises when a reasonable person would feel "he or she was not at liberty to terminate the interrogation and leave." Thompson v. Keohane, 516 U.S. 99, 112 (1995). "Custody" is similarly defined in cases construing the New Hampshire Constitution. See In re E.G., 171 N.H. 223, 229 (2018) (summarizing custody doctrine under New Hampshire Constitution).

This Court has found the State Constitution more protective than the Federal Constitution in this area. For example, under the State Constitution, "[b]efore the defendant's responses made during a custodial interrogation may be used as evidence against [him], the State must prove, beyond a reasonable doubt, that it did not violate [his] constitutional rights under Miranda." State v. Marin, ___ N.H. ___ (slip op. at 4) (decided May 10, 2019) (quotation omitted); compare Berghuis v. Thompson, 560 U.S. 370, 384 (2010) (standard of proof under the Federal Constitution is preponderance of the evidence). Moreover, under the State Constitution, "certain physical 'fruits' derived from a Miranda violation are inadmissible at trial." State v. Barkus, 152 N.H. 701, 706 (2005); compare United States v. Patane, 542 U.S. 630, 633-34 (2004) (under Federal Constitution, the physical fruits of a suspect's unwarned but voluntary statements are admissible). See also State v. Roache, 148 N.H. 45, 47-53 (2002) (rejecting holding of Moran v. Burbine, 475 U.S. 412 (1986), based on a finding that Part I, Article 15 provides greater protection against self-incrimination than the Fifth Amendment and the United States Supreme Court's application of the Miranda rule).

"The trial court's findings of historical facts relevant to the question of custody are entitled to the deference [this Court] normally accord[s] its factual findings." Marin, (slip

op. at 5) (quotation and ellipsis omitted). This Court reviews "the ultimate determination of custody de novo." Id. (quotation omitted).

"To determine whether a reasonable person in a suspect's position would believe himself in custody, the trial court should consider the totality of the circumstances of the encounter." E.G., 171 N.H. at 229-30 (quotation and brackets omitted). "Factors to be considered include, but are not limited to: the number of officers present, the degree to which the suspect was physically restrained, the interview's duration and character, and the suspect's familiarity with his surroundings." Id. (quotation omitted).

Those factors support the trial court's finding of custody. "The number of officers present is a relevant factor in a custody determination – when multiple officers isolate and question a defendant, it is more likely that the defendant is in custody." E.G., 171 N.H. at 237. "Conversely, the presence of friends or family has been considered a factor weighing against a finding of custody." Id.

Here, Carrier was in the presence of numerous police officers for approximately two hours. First, he was ordered to leave his home by a police officer, who then blocked his entrance back into the home. Another officer arrived five to ten minutes later. It was only when Ciszek arrived that Kekejian "could" call Detective Hallam, SH 6, indicating that

the police presence would have communicated to Carrier constant attention and rigid resistance to any effort to re-enter his home. Both officers remained with him, preventing his entry into the house, until two detectives arrived almost an hour later. Both detectives sat in the car during the recorded interview while an officer remained, for at least some period of time, within Carrier's view in front of the house. The two officers were uniformed and armed and the two detectives, although not in uniform, were visibly armed. See Marin, (slip op at 8) (that officers are "visibly armed" "tends to weigh in favor of a finding of custody"). In addition to the unmarked cruiser, two marked cruisers were visible in front of the house. The court correctly found that this factor weighed in favor of a finding of custody. SBA 18-19.

Carrier was also physically restrained in a manner that would have caused a reasonable person to feel not at liberty to terminate the encounter and leave. "When a defendant is not permitted freedom of movement within [his] own home, . . . it weighs in favor of a finding of custody." Marin, (slip op. at 7) (quotation omitted). Carrier was ordered to leave his home by a uniformed police officer. See id. (that defendant "required to leave [her] home" a factor weighing in favor of custody). Although the officer told him it was because the home was being secured as a "scene," Carrier could see that the rest of his family was allowed to remain in the home. This

order separated Carrier not only from his home and belongings, but also from his mother, who remained inside.

The order to leave was enforced by consistent police presence barring the door. This prevented Carrier from obtaining any of his belongings, such as money to pay for somewhere to stay or something to wear in the cold. Cf. id. (officers allowed defendant to gather her possessions before requiring her to leave). It also prevented him from being able to use the facilities to relieve himself. To that restraint was added a search of his body by the police officer and then the seizure of his phone. See id. (slip op. at 8) ("By not allowing the defendant to use her phone, the police restricted her ability to communicate with others, including her lawyer."); State v. Jennings, 155 N.H. 768, 773-74 (2007). Although Carrier may not have been immediately able to use his phone, any number of public accommodations in Nashua offer public wifi. By barring him from his home, preventing him from obtaining his belongings, and taking his phone, Kekejian cut off Carrier's possible means of finding a place to go. Jennings, 155 N.H. at 774 ("By denying the defendant access to his truck and phones, the police effectively ensured that he was dependent upon them for any further transportation or communication with the outside world."). The trial court correctly found that this factor weighed in favor of a finding of custody. SBA 53-55.

While the two-hour length of Carrier's interaction with police neither compels nor dispels a finding of custody, the character of the interaction would convey to a reasonable person that he was not free to leave. "[T]he length of questioning can be a relatively undeterminative factor in the analysis of custody." E.G., 171 N.H. at 237 (quotation omitted). However, "custody has been found in relatively brief interrogations where the questioning is of a sort where the detainee is aware that questioning will continue until he provides his interrogators the answers they seek." Id. (quotation omitted).

Thus, the tone of the interrogation can carry great weight in the determination of custody. "The accusatory nature of questioning is widely recognized as a factor weighing in favor of a finding of police custody, because accusatory questioning often conveys an officer's belief in the defendant's guilt and the officer's intent to arrest." Marin, (slip op. at 6) (quotation and brackets omitted). "Likewise, accusatory statements made by the officers and directed at the defendant also weigh in favor of custody." Id. (quotation omitted). Cf. E.G., 171 N.H. at 233-35 (questioning similar to that which can lawfully take place during an investigatory stop does not weigh in favor of a finding of custody).

The police never told Carrier that he did not have to answer questions. When Carrier was first ordered out of his

home, Kekejian did not tell him that he was free to leave or that he was not under arrest. Rather, Kekejian questioned him about his whereabouts. In his testimony at the hearing, Kekejian characterized this topic as Carrier's "initial report of his whereabouts or his alibi rather." SH 26. Given that Carrier's family had told Kekejian when Carrier left and what he does for work, SH 11, 15, Kekejian's skepticism would likely have communicated his disbelief to a reasonable person. It was only after Kekejian learned that detectives did not plan to interview Carrier right away, that he began discussing where Carrier might go.

Most importantly, the tone of the interview in the unmarked cruiser changed in a way that would have communicated to a reasonable person that the detectives did not believe Carrier and that they were convinced he was guilty of a serious crime. Each account Carrier gave of his activities in the night was met with continued probing, indications of disbelief, and assertions that the detective had contrary evidence or believed Carrier was lying. For example, when Carrier said he only went upstairs in the night to get a drink, Hallam said "there's something else that's being reported to us." App. 24-25. He continued:

> I'm trying to allow you to give me what actually happened last night so, so I don't have to like beg for it or anything like that. I think there was another

> stop on the way to get some water last night, man, that – that you're kind of not telling us about. And I'm asking you to tell me what you did last night, man, when you went to get water, whether –

App. 25-26.

This pattern continued throughout. See App. 26-32 (Carrier denied going to M.G.'s bedroom; Hallam: "I'm trying to figure out why you were in there…. You were in there…what else are you lying about, dude?"); App. 35-39 (Carrier denied entering M.G.'s bedroom; Hallam: "And I think you went further into the room, dude…. How far did you actually go into the bedroom"); App. 39-42 (Carrier denied going close to M.G.'s bed; Hallam: "I think you got pretty close to the bed….part of why we're confused is why you were so close to her last night?"); App. 48-51 (Carrier denied touching M.G.; Hallam: "she reported that your hand was on her and that's, that's why we're here talking, man, because we think your hand might have been on her. And I want to get clarification from you as to why, you know, your hand was on her."); App. 53-69 (Carrier denied touching anything other than M.G.'s leg; Hallam: "She was saying it's more towards her, her genital area, man. So that's, that's why we're here….I have a good feeling it happened. I, I think – I think you did have your hand on her vagina, man. Now I'm just trying to figure out the reason behind it, why it was

there.…And I think you know that you did touch her vagina.…Like we don't want her to feel like she's crazy because she's not.…she's telling us this and I think she's being 100 percent honest with us.…Like this happened, Bro, and you're not being straight up with me, man.…I'm trying to figure out why you're being so deceptive…it makes us wonder why is he lying about it"); App. 74-79 (Carrier denied touching her vagina intentionally; Hallam: "I don't think this was an accident, man.…"); App. 81-89 (Carrier denied that he touched M.G.'s vagina for sexual gratification; Hallam: "You're clearly fucking turned on for some reason, man.…don't tell me you were fucking high so you don't remember why you were doing it").

The trial court correctly found that the character of the interrogation, including Hallam's accusatory statements of belief that Carrier committed a serious offense, supported a finding of custody. SBA 58-61. See, e.g., E.G., 171 N.H. at 234-35 (questioning as part of investigation of sexual assaults different in character than brief, on-the-scene questioning).

The trial court also correctly weighed Carrier's familiarity with his surroundings. SBA 63. "The location of questioning is not, by itself determinative: a defendant may be in custody in [his] own home but not in custody at a police station." Marin, (slip op. at 5) (quotation omitted). While the first hour Carrier interacted with police was on his front

porch, he had been forced out of his home and it was made clear he would not be able to go inside, even to get his personal belongings. The second hour of his interaction with police was across the street from the home from which he had been ejected and was in a police car. This factor neither weighs strongly in favor of a lack of custody or of custody.

The trial court also correctly considered other relevant factors this Court has identified. SBA 55-57, 62.

> The extent to which the suspect is made aware that he or she is free to refrain from answering questions or to end the interview at will often defines the custodial setting. Conversely, the lack of a police advisement that the suspect is at liberty to decline to answer questions or free to leave is a significant indication of a custodial detention.

E.G., 171 N.H. at 235 (quotation omitted). Not telling the suspect that he is not under arrest or that he does not have to answer police questions weighs in favor of a finding of custody. Id.

Carrier was never told he was not under arrest or that he did not need to speak to the police. During his initial encounter with Carrier, Kekejian did not tell Carrier he was free to leave until Hallam indicated he would seek to interview Carrier later. While Kekejian then indicated to Carrier that he could go, Carrier had nowhere to go once banned from his

home and after his phone was taken from him. Shortly thereafter, Kekejian asked Carrier if he would wait until the detectives arrived to speak to him. Hallam informed Carrier that the doors of the Impala were unlocked so he could leave at any time. However, at that point, Hallam and Carrier were talking over each other and that point was never reiterated. [2] Instead, Carrier appeared to need Hallam's assistance to call his father and go to a meeting place.

In addition, the police initiated contact with Carrier. Kekejian remained at the home until Carrier returned, escorted him out of the home when he returned, and interrogated him on the porch. Kekejian also conveyed Hallam's request that Carrier remain at the scene until the detectives arrived. Finally, the detectives did not offer Carrier a break, food or drink, or an opportunity to talk to someone else or to use the bathroom despite his expressed need. This would have communicated to Carrier that the interrogation was the detectives' sole priority and that it would continue until they decided it was finished.

[2] While the State has submitted transcripts of the interviews, it has not asked to transfer the recordings, which were admitted as exhibits at the hearing, to this Court. The trial court based its factual finding about the ineffectiveness of Hallam's statement about Carrier being free to leave upon the recording, not the transcript. "[W]here a case turns upon a factual dispute and [the Court] lack[s] a record to review, [the Court] must assume that the evidence was sufficient to support the result reached by the trial court." State v. Thiel, 160 N.H. 462, 464 (2010) (quotation omitted).

While some considerations weighed against a finding of custody, the trial court correctly found that these did not outweigh the other relevant factors. App. 63-64. The trial court considered that Carrier was not handcuffed or otherwise physically restrained, that he agreed to go to the Impala to talk to the detectives, that Hallam and McIver were not in uniform, that the car doors were not locked and that Hallam told him he could leave at any time, and that Carrier did leave when the detectives concluded the interview was over. App. 63. "The lack of handcuffs or similar devices is not dispositive, effective restrictions on a defendant's movement can be a product of verbal, psychological, or situational restraint." Marin, (slip op. at 7) (quotation, brackets, and ellipsis omitted).

The factors in this case have a similar balance to those in State v. McKenna, 166 N.H. 671 (2014). In that case, a uniformed state trooper entered McKenna's place of business and asked him to come outside to speak to some officers from a distant town. Id. at 674. Outside, the officers asked to speak to McKenna without his girlfriend present. Id.

They suggested speaking in their unmarked police vehicle because of the cold, but McKenna instead opted to wander on his property. Id. For approximately one hour and fifteen minutes, McKenna walked around the property and the officers followed him. Id. at 675. At one point, McKenna

went to walk into the woods, but the officers told him to stay in the clearing within sight of the trooper. Id. The officers did not stop McKenna when he went to his truck, got in the front seat, and started smoking. Id.

They told McKenna he was not under arrest. Id. McKenna was not told he was free to leave, was not informed of his Miranda rights, and was not told he could ask the police to leave his property or that he was not required to answer their questions. Id.

The officers told him they were there to investigate a sexual assault. Id. Although the tone of the interrogation was conversational, the officers responded to McKenna's repeated denials by saying they did not believe him and urging him to tell the truth. Id. "Many of the questions asked by the officers were premised upon the assumption that" McKenna was guilty. Id. They also suggested various reasons why the assaults might have occurred. Id. Although the Court considered McKenna a "close case," it found that the balance of factors weighed in favor of a finding of custody at the point the officers prevented him from going into the woods. Id. at 685-86.

Given the totality of the circumstances here, a reasonable person in Carrier's shoes would not have felt free to terminate the interrogation in the unmarked cruiser once Hallam confronted Carrier with the evidence against him, told

him his denials were not believed, and accused him of having committed a serious offense. The police conveyed to Carrier that the interrogation would continue until the detectives were satisfied with his answers. Only then did the detectives make an effort to assist Carrier in finding someplace to go after the police ejected him from his home, prevented him from obtaining his personal belongings, and took his only means of communication. The trial court's ruling was consistent with this Court's caselaw on custody and a correct ruling of law. This Court must affirm.

II. CONSIDERING THE TOTALITY OF THE CIRCUMSTANCES, THE TRIAL COURT CORRECTLY FOUND THAT CARRIER'S SECOND STATEMENT WAS INVOLUNTARY.

"To be voluntary, a confession must be the product of an essentially free and unconstrained choice and not be extracted by threats, violence, direct or implied promises of any sort, or by exertion of any improper influence or coercion." State v. Ruiz, 170 N.H. 553, 560 (2018) (quotation omitted). "Whether a confession is voluntary is initially a question of fact for the trial court, whose decision will not be overturned unless it is contrary to the manifest weight of the evidence, as viewed in the light most favorable" to the appellee. Id. (quotation omitted).

"When . . . the defendant's post-Miranda confession is preceded by an earlier voluntary confession that violated Miranda rights," the Court has identified certain factors specific to that occurrence to consider when "determin[ing] whether the lesser taint of a Miranda violation was dissipated." Id. (quotation omitted). However, the Court is not bound to consider only those factors. See, e.g., id. ("Viewing *all of the circumstances surrounding the defendant's post-Miranda confession* . . . ." (emphasis added)). Thus, as with other voluntariness inquiries, the Court considers the totality of the circumstances. State v. Cloutier, 167 N.H. 254, 258 (2015); see also Ruiz, 170 N.H. at 560-61 (Court

considered whether there were "promises, threats, or displays of force in an attempt to induce the defendant to confess" as well as other, not enumerated factors).

The factors this Court has found relevant to a determination of whether a post-Miranda confession is involuntary in light of an earlier, unwarned statement are:

> (1) the time lapse between the initial confession and the subsequent statements; (2) the defendant's contacts, if any, with friends or family members during that period of time; (3) the degree of police influence exerted over the defendant; (4) whether the defendant was advised that his prior admission could not be used against him; and (5) whether the defendant was advised that his prior admission could be used against him.

Ruiz, 170 N.H. at 560. "No single factor is dispositive." Id.

Here, the trial court correctly considered the totality of the circumstances, including those factors specific to the circumstance – a post-Miranda statement after an earlier, unwarned interrogation. Some factors supported a finding that Carrier's second statement was voluntary. There was a break between the first and second statements and it appeared that Carrier had had contact with a family member, as he was arrested later that day at his father's home. The trial court made no finding on whether the factor relating to

the degree of police influence over Carrier supported or dispelled a finding that his statement was involuntary.

The final two Ruiz factors focus on the relation of the second statement to the first: whether the defendant was advised that his prior admission could or could not be used against him. In one sense, "[i]t is impractical to require the police to determine the admissibility of an unwarned confession." Ruiz, 170 N.H. at 561-62 (quotation omitted). "This would require them to make legal determinations regarding whether there had been interrogation and custody." Id. at 562 (quotation omitted).

But in another sense, a post-Miranda statement necessarily references prior statements. Carrier was warned, not that the *subsequent statements* he made would be used against him, but that *anything* he said would be used against him. App. 117-18. As a plurality of the Supreme Court has noted, "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." Missouri v. Seibert, 542 U.S. 600, 613 (2004) (plurality opinion).

While it is impractical to expect the police to make a legal determination about the admissibility of a prior statement, it is not impractical to consider the police's failure

to state that the decision to speak post-Miranda should be made independent of the prior statement, as that statement may or may not be usable against the suspect. Such a statement counteracts the impression, given in the Miranda warnings, that to choose silence would be futile.

Here, more was communicated to Carrier than just the implication that his prior statements would be used against him. After being told anything he said would be used against him, Hallam immediately invoked the prior statement. SBA 67. By acknowledging the prior statement and explicitly bringing it into second interrogation, any reasonable person in Carrier's position would have understood that a decision to exercise his right to stop talking to the police would be futile given his prior statements.

The explicit use of a prior, unwarned statement during a post-Miranda interrogation has been considered in a voluntariness inquiry. For example, in State v. Dellorfano, 128 N.H. 628 (1986), this Court ruled on the admissibility of a warned and detailed confession, following an unwarned statement, under the Federal Constitution. Although not then relevant under the federal caselaw, this Court was nonetheless troubled by the possible coercion resulting from the police confronting the defendant with his unwarned statement. Id. at 636. See also State v. Miller, 159 N.H. 125, 135-36 (2009) (considering a suspect's feeling of futility in

deciding the admissibility of a statement); State v. Aubuchont, 141 N.H. 206, 209 (1996) (that police reinterviewed defendant to "go over" his prior statement does not, "standing alone," support finding that second statement was involuntary).

Federal law similarly recognizes the effect on the voluntariness of a warned statement when a prior, inadmissible statement is referenced. In Seibert, all nine justices regarded an explicit reference to a prior, inadmissible statement as relevant to the admissibility of a later, warned statement. Seibert, 542 U.S. at 616-17 (plurality opinion), id. at 621 (Kennedy, J., concurring), id. at 628 (dissent). This was consistent with the Court's prior opinion in Oregon v. Elstad, 470 U.S. 298, 316 (1985), in which the Court stressed that the police did not "exploit the unwarned admission to pressure respondent into waiving his right to remain silent." See also United States v. Jackson, 608 F.3d 100, 104 (1st Cir. 2010) (considering whether police used unwarned statement as a "deliberate lever to extract further information").

The State suggests in a footnote, SB 31-32, that the Court should overrule New Hampshire's approach, as embodied in State v. Fleetwood, 149 N.H. 396 (2003), and most recently applied in Ruiz. This Court did not find that approach intolerable, unworkable, abandoned, or robbed of significance last year in Ruiz. Rather, the considerations

articulated by the Court in Fleetwood are mirrored in the various considerations of the Supreme Court in Seibert. Moreover, the State does not make a case for why the Court should abandon its traditionally more protective view of the New Hampshire Constitution for the split reasoning embodied in Seibert.

Here, the trial court correctly considered the totality of the circumstances. The court's finding that Carrier's second statements were involuntary is not against the manifest weight of the evidence, viewed in the light most favorable to him. This Court must affirm.

CONCLUSION

WHEREFORE, Dominic Carrier respectfully requests that this Court affirm the lower court ruling and remand for further proceedings.

Undersigned counsel requests fifteen minutes of oral argument before a full panel of the Court.

This brief complies with the applicable word limitation and contains under 7000 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to the Criminal Bureau of the New Hampshire Attorney General's Office through the electronic filing system's electronic service.

/s/ Stephanie Hausman
Stephanie Hausman

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