THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0394

State of New Hampshire

v.

Caleb Marquis

Appeal Pursuant to Rule 7 from Judgment
of the Hillsborough County Superior Court (South)

BRIEF FOR THE DEFENDANT

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QUESTION PRESENTED

Whether the court correctly ruled that Marquis was in custody for his third police interview and suppressed statements made during that interview.

STATEMENT OF THE FACTS AND OF THE CASE

History of the litigation

Caleb Marquis is charged with several felonies related to injuries suffered by a child in his care on September 15, 2020. SAd[1] 41-42; SAp 1-12.

He filed a motion to suppress statements he made to the police in three[2] interviews on September 15 and 16, 2020. SAp 13-26. He argued that he was in custody during his three interviews and was not advised of his Miranda warnings. SAp 16-21. He also argued that his statements were involuntary. SAp 21-24.

The State objected, arguing that he was not in custody and that his statements were voluntary. SAp 27-41.

Evidence from the suppression hearing

On September 15, 2020, Nashua Police responded to a call for a toddler experiencing a medical emergency. SAd 41-

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[1] * Citations to the record are as follows:
"Exh. 10" refers to the video of the third interview, which was admitted as State's exhibit 10 at the suppression hearing and which was transferred to this Court;
"S" refers to the transcript of the suppression hearing held on May 19, 2021;
"SB" refers to the State's brief, filed on March 15, 2022;
"SAd" refers to the Addendum attached to the State's brief;
"SAp" refers to the Appendix to the State's brief.

[2] The trial court and the parties referred to the statements as having been made during three interviews, the first two having taken place on September 15, 2020. SAp 14, 35; SAd 46. This appears based on the fact that the statements from September 15 were captured on two separate videos. However, Marquis did not leave the interview room between these videos, S 52, so likely would have perceived the event as one interview.

42; S 14, 27. Marquis had been watching his girlfriend's children, including the toddler. SAd 42. Marquis agreed to go to the Nashua Police Department to talk to detectives about what happened. SAd 42; S 30. He was driven there by Officer Anderson and signed in as a visitor. SAd 42; S 14-16.

Marquis met with Detectives Durden and Rogers in a small interview room. SAd 43; S 59-60. When the officers were seated, the door of the room could not be fully opened without one of the officers moving. SAd 53. The interview started at approximately 5:45 p.m. SAd 43; S 65. Durden started the interview by telling Marquis that he could stop the interview and leave. SAd 43. Durden did not advise Marquis of his Miranda rights. Id.

Marquis described giving the toddler a shower. SAd 44. He explained that he had flushed the toilet while the child was in the shower, which typically caused the water to run hot. SAd 44; SAd 58, 63. He also explained that, when his dog barked, he left the bathroom briefly and, when he returned, the toddler was unconscious but breathing. SAd 44; SAp 58-59. As a result, Marquis sought help for the child. SAd 44.

After about forty minutes of talking, the detectives left the room to confer with other police personnel. Id. As they left, Marquis asked whether he could use his phone and Durden told him to "hold off" on doing that. SAd 44; S 68-69.

Marquis was alone in the room for nearly eight minutes, during which time he used his phone, though not to make a phone call. SAd 44.

The detectives returned and spoke with Marquis for another fifteen minutes, discussing possible bruising on the child. SAd 44-45. Durden then ended the interview, by shutting off the recording device, at approximately 7:00 p.m. SAd 45; SAp 93; S 65.

However, Marquis remained in the room and, at approximately 7:15 p.m., the detectives returned. SAd 45; S 52, 65. Durden reminded Marquis that if he wanted to stop talking to let the detectives know, but he did not advise Marquis of his Miranda rights. SAd 45; SAp 94. Marquis agreed to continue talking to the detectives. Id.

Durden told Marquis that the toddler was being transported to Massachusetts General Hospital with first- and second-degree burns. SAd 45-46. Marquis became visibly upset and began crying. SAd 46; S 71-72. Durden also told Marquis that, although the child was conscious, he was lethargic. SAd 46. Durden told Marquis that he was not in trouble "right now," but that they needed more information to help the child and to help the doctors understand what had happened. S 70, 75; SAp 95.

Marquis spoke with the detectives until around 7:30 p.m. SAd 46; S 65. The tone of the interview on September

15 was cordial and it was conducted primarily in an information-gathering spirit. SAd 44-46. Although police offered him a ride, Marquis left the station on foot. SAd 46; S 53.

On September 16, 2020, Durden called Marquis and asked him to come in again. Id. Marquis agreed and arranged a ride to the station. SAd 46; S 53-54. He was again signed in as a visitor and Detectives Durden and Miller began interviewing him at around 2:15 p.m. SAd 46; SAp 103; S 54, 56, 65; Exh. 10. Durden told Marquis that he could leave or end the interview at any time. SAd 47; Exh. 10. The officers again did not advise Marquis of his Miranda rights. SAp 103; Exh. 10.

Durden began by telling Marquis, "obviously we're putting a case together." SAd 47; SAp 103; Exh. 10. As they spoke, Durden and Miller interrupted Marquis repeatedly and told him things like, "I'm fairly certain I know what happened and your story is not jiving with that, so it looks like you're trying to be deceitful," and the "best specialists in the world are telling us that your story that you said yesterday is not accurate." SAd 47-48; SAp 105-06, 116-17, 119, 124-25, 128; Exh. 10. The interview continued in this vein, with the detectives repeatedly telling Marquis that he was not being truthful and suggesting events that might have happened as though the detectives knew how they had happened. S 81;

SAp 104-06, 116-17, 119, 123-27, 132; Exh. 10. Durden raised his voice and asked when Marquis was going to "man up" and admit what he did. SAd 49; SAp 128; Exh. 10. The detectives took a break after about an hour and, upon returning, they questioned Marquis about where they could find him later. SAd 49; SAp 133-35; Exh. 10. At approximately 3:45 p.m., the interview ended and Marquis left the station. SAd 47; SAp 138; S 64-65. He was arrested a short time later. SAd 49.

Trial court's order

The court (Colburn, J.) denied the motion to suppress as to the first two interviews but granted it as to the third interview. SAd 58. Looking at the totality of the circumstances, the court found that for the first two interviews, while some factors supported a finding of custody, they were outweighed by the factors supporting a lack of custody. SAd 51-54. The court noted the conversational tone of the first two interviews, among other factors, as weighing against a finding of custody. SAd 51-52 ("the character of these interviews was generally not accusatory in nature and throughout these interviews the detectives maintained a respectful demeanor and never raised their voices."). The court found other factors that supported a finding of custody, including the degree to which Marquis's movements were

restrained, the duration of the interview, and the fact that the interview was initiated by the police. SAd 52-53.

The court however found a different balance of factors for the third interview after considering the totality of the circumstances. SAd 54-57. For the third interview, the court found significant that it lasted approximately ninety minutes after Marquis had been interviewed for two hours the day before. SAd 54. The court also relied on a finding that the third interview was replete with accusatory questioning and accusatory statements, starting with Durden's statement "obviously we're putting a case together." SAd 55-57.

The State filed a motion to reconsider, disputing the court's conclusion on the significance of the circumstances of the third interview. SAp 42-51. "As an alternative argument," the State argued that the court erred in suppressing the entire interview because, it argued, "there certainly are statements made by Mr. Marquis during the third interview that precede a finding of custody." SAp 51. The court denied that motion. SAd 40. The State appealed the suppression decision.

SUMMARY OF THE ARGUMENT

Based on the totality of the circumstances and the trial court's factual findings, the court correctly balanced the relevant factors in ruling that Marquis was in custody and entitled to Miranda warnings for his third police interview. The accusatory character of the third interview, combined with the restraints on Marquis's freedom of movement and the duration of his interactions with police, outweighed the factors supporting a finding that he was not in custody. This Court must affirm.

I. THE COURT CORRECTLY RULED THAT MARQUIS WAS IN CUSTODY FOR HIS THIRD POLICE INTERVIEW AND SUPPRESSED THAT INTERVIEW.

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. Carrier, 173 N.H. 189, 197 (2020).

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 [person] in the suspect's position would have understood [the] 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, e.g., Carrier, 173 N.H. at 197-98 (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, the State must prove no Miranda violation beyond a reasonable doubt. Id. at 197; 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 regarding the circumstances surrounding the interrogation are entitled to the deference [this Court] normally accord[s] factual findings." Carrier, 173 N.H. at 198 (quotation omitted). This Court will accept those factual findings "unless they lack support in the record or are clearly erroneous." State v. Davis, 174 N.H. 596, 600 (2021).

This Court reviews "the ultimate determination of custody de novo." Carrier, 173 N.H. at 198.

"To determine whether a reasonable person in the suspect's position would believe himself to be in custody, the trial court should consider the totality of the circumstances of the encounter." Id. Factors to consider 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.

A. The totality of the circumstances supports the trial court's finding that Marquis was in custody during the third interview

The relevant factors support the trial court's finding that Marquis was in custody. The trial court found that Marquis was restrained in a manner that would have caused a reasonable person to not feel at liberty to terminate the encounter and leave. "The lack of handcuffs or similar devices is not dispositive" on the question of physical restraint. Id. at 199 (quotation omitted). Rather, a finding of physical restraint can be "the product of verbal, psychological, or situational restraint." Id. (quotation omitted).

As the trial court noted, during each of Marquis's interviews, he sat in the seat farthest from the door. SAd 52-

54. Due to the small size of the room and the arrangement of the furniture within it, Marquis could not have gotten up and left without Durden first getting up, pushing in his chair, and moving out of the way. SAd 53-54. Here, unlike in State v. Belonga, 163 N.H. 343, 355 (2012), the trial court's finding was not based solely on the size of the room, but rather on the effect the room's dimensions and arrangement had on Marquis's ability to move freely from the room.

The court also found that Marquis was not free to move through the police station in order to terminate the encounter. SAd 53-54. Marquis was escorted each time he entered and left the police station. S 17, 20, 53, 84.

As this Court has noted, "as a practical matter, citizens almost never feel free to end an encounter initiated by the police." State v. Jones, 172 N.H. 774, 777 (2020) (quotation omitted). Here, there was no evidence that Marquis felt free to terminate his encounters with the police. Rather, the evidence showed that, for each interview, Marquis remained in the interrogation room until the detectives told him they were done with the interview. Indeed, between the first and second interviews, Marquis remained in the room even after he was told the interview was over. S 52.

Relatedly, the trial court also found significant that each interview was initiated by the police. SAd 53-54. When

"police initiate contact with the suspect, custody is more likely to exist." State v. Sachdev, 171 N.H. 539, 553 (2018).

The trial court also found the duration of the overall questioning significant, considering both the two hours of questioning on September 15 and the ninety minutes on September 16. SAd 54. This Court has found that interviews lasting less than two hours can support a finding of custody. Carrier, 173 N.H. at 200-01; State v. Jennings, 155 N.H. 768, 774-75 (2007).

However, "custody has also 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." Carrier, 173 N.H. at 200 n.2 (quotation omitted). The fact that the interview on September 16 took place after two hours of questioning on September 15 would have communicated to a reasonable person that the police were looking for different answers during the later interview and therefore would not end the interview until receiving different answers. See, e.g., B.M.B. v. State, 927 So.2d 219, 221-22 (Fla. Ct. Ap. 2006) (renewed questioning after the suspect's repeated denials support finding of custody); United States v. Scharf, 608 F.2d 323, 325 (9th Cir. 1978) (second interview in police car held custodial based, in part, on fact that defendant had "spent

considerable time responding to police questions … earlier in the day”).

Finally, the character of the third interview, with its accusatory questioning and statements, support a finding that Marquis was in custody. “Accusatory questioning weighs in favor of custody because such questioning often conveys that the questioning officer believes the defendant is guilty and that he or she intends to arrest.” Carrier, 173 N.H. at 201. “Accusatory questioning stands in contrast to questioning of a purely general nature, which does not weigh in favor of custody.” Id. (quotation omitted).” “In addition to accusatory questioning, the presence or absence of accusatory statements is relevant to [the] analysis because a reasonable person understands that the police ordinarily will not set free a suspect when there is evidence strongly suggesting that the person is guilty of a serious crime.” Id. (quotation omitted). Finally, the Court considers whether the officers “raised their voices or used harsh language.” Id. (quotation and brackets omitted).

Here, the court correctly found that the accusatory nature of the third interview supported a finding that Marquis was in custody. The shift in tone between the discussion on September 15 and that on September 16 to a far more accusatory and challenging interrogation would have communicated to any reasonable person that they were not

free to leave. The detectives started by telling Marquis they were "obviously … putting a case together." They repeatedly told him that he was not being truthful, that the evidence contradicted his account, and that their version of what had occurred, a version not presented as a hypothetical, but as fact left Marquis no space for denial.

The "detectives' questions would have signaled to a reasonable person in the same circumstances that as often as he made denials, they would renew their accusations." Carrier, 173 N.H. at 202 (quotation, brackets, and ellipses omitted).

The court also considered those factors that weighed in favor of a finding that Marquis was not in custody. SAd 57. In the end, the court correctly held that, on balance, the totality of the circumstances favored a finding that Marquis was in custody during the third interview. This Court should affirm.

B. The trial court's factual findings are supported by the record and are not clearly erroneous

The State takes issue with the trial court's factual findings. SB 22-32. For example, the State argues that Durden told Marquis he was "putting a case together for

DCYF[3].” SB 22. However, the trial court’s finding that Durden told Marquis that “we’re putting a case together,” SAd 47, 55, is entitled to deference.

Durden said:

> Obviously, we’re putting a case together, ‘cause DCYF, I don’t know how much more you’ve been talked [sic], I’m assuming you talked to your girlfriend. You got a little more information about what’s going on.

SAp 103. Durden expressed that he and his police associates were putting together a “case.”. Id. He then went on to discuss DCYF’s role before being distracted by the topic of what Marquis learned about “what’s going on” from his girlfriend. Id.

While the officers and Marquis sometimes mentioned DCYF later in the interview, these references confirm the trial court’s implicit finding that Durden spoke of DCYF as an alternative process to a criminal investigation. See SAp 104 (Marquis saying “the guy from last night asked me to come back down so I don’t know if that’s part of it or whatever, but he asked me to finish up a thing for DCYF so I don’t know if like they’re going hand in hand right now”), 106 (Durden said “because … DCYF is investigating this. Obviously they think it potentially could be a criminal matter”), 132-33 (Marquis

[3] “DCYF” stands for the Department of Children, Youth, and Families.

mentioned DCYF investigation regarding his own son, detectives telling him current witness will be forensically interviewed at Child Advocacy Center, which is different than DCYF process); see also SAp 104 (Marquis mentioned DCYF as a potential source of girlfriend's information). Marquis expressed confusion about whether the police investigation goes "hand in hand" with the DCYF investigation and the detectives later made clear that the two types of investigation are distinct.

The State next takes issue with the trial court's finding that the questioning began in an accusatory manner from the outset of the third interview. The State claims that Durden's "first substantive question came at page four of the interview transcript." SB 22. However, the trial court noted the tone of the detectives' interrogation starting at page 2 of the transcript. SAd 55; see also SAp 104 (Durden tells Marquis that he got information from doctors and "there's more to the story than what happened yesterday that you told me about and that's kind of why we're having this conversation right now. . . . Before I start questioning you, do you, is there anything else that you think I'm gonna talk about that you might want to tell me about before we go down that road?").

The State next claims that the trial court "ignored certain key facts." SB 23. The State first complains that the trial court ignored the fact that Marquis arrived at the police

station on his own. <u>Id.</u> However, that fact was noted by the trial court as a factor that supported a finding that Marquis was not in custody. SAd 46, 57. The State next complains that the trial court ignored the fact that Marquis signed in as a visitor. SB 23. However, this fact is also part of the trial court's consideration of the totality of the circumstances. SAd 46, 57. The State also claims that the trial court did not refer to the video recordings. SB 25. However, the trial court made a factual finding after review of the video of the third interview - that Durden raised his voice at Marquis when telling him to "man up." SAd 49. The State nonetheless argues that the detectives did not raise their voices during the third interview. SB 24, 29.

Finally, the State contests the trial court's factual finding that the detectives engaged in accusatory questioning. SB 28-32; <u>compare</u> SAd 55-57. For instance, the State challenges the trial court's finding that the questioning was premised on the assumption that Marquis had committed the crime, SAd 56, when it argues that the detectives did not "insinuate that they knew that [Marquis] had committed a crime," SB 29, and that the detectives conveyed that their investigation was complete, SB 31-32. However, the detectives began the interview by telling Marquis they were "fairly certain" they knew what happened and that Marquis was untruthful, SAp 106, and ended it by telling Marquis

what had happened, SAp 126-27. Given the consistent accusatory tone throughout the interview, the trial court sustainably found that this factor was present here.

The trial court's factual findings are well-supported in the record and are not clearly erroneous. Nor did the court err in balancing the totality of the circumstances in reaching the conclusion that Marquis was in custody during the third interview.

C. The court did not err in excluding the entire third interview

The State's final argument is that the trial court erred in excluding the entire third interview. SB 32-35. However, because the State maintains that the court erred in finding that Marquis was ever in custody, SB 33, it does not identify a point in the interview beyond which evidence should be suppressed but before which there is any relevant or admissible evidence.

The trial court's order relies on facts from the very first page of the transcript of the third interview when Durden told Marquis "[o]bviously we're putting a case together." SAd 55; SAp 103. The State argues that some statements made before this should have been ruled admissible. SB 33. These statements, about whether Marquis was there as a visitor and whether he understood he could leave, SB 33; SAp 103, have

no relevance without the rest of the interview being admitted. But just as a defendant's invocation of his right to silence is inadmissible if offered just to show the manner in which a police interrogation came to an end, State v. Cassavaugh, 161 N.H. 90, 100 (2010), so also evidence describing the first moments of a police interrogation, the rest of which is inadmissible. Nothing relevant happened in the first moments of this interview and only jury confusion could result in admitting evidence of those moments. The court did not err in suppressing the entire third interview.

The State also seems to argue that Marquis's statements, made at the end of the interview when he is preparing to leave, were admissible. SB 34-35. The Court should reject this argument for two reasons. First, there is no evidence that Marquis was "preparing to leave." The detectives returned to the room and told Marquis that they were almost done. SAp 134. However, the day prior, the detectives had "ended" an interview but had Marquis remain in the room, only to question him further upon their return. Thus, there is no evidence that a reasonable person in Marquis's position and with Marquis's experience would come to believe he was free leave at that moment. Second, the State cites no case, and undersigned counsel is aware of no case, that stands for the proposition that custodial

statements given without the benefit of Miranda warnings become admissible at the end of a custodial interrogation.

The State cannot identify what statements were made before the interview became custodial that would be admissible at trial. The Court should affirm the trial court's ruling.

CONCLUSION

WHEREFORE, Caleb Marquis respectfully requests that this Court affirm the trial court and remand for further proceedings.

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

This brief complies with the applicable word limitation and contains less than 4500 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief has been 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

DATED: May 31, 2022