THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0394

State of New Hampshire

v.

Caleb Douglas Marquis

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT
OF THE HILLSBOROUGH COUNTY SUPERIOR COURT
(SOUTHERN DISTRICT)

BRIEF FOR THE STATE OF NEW HAMPSHIRE

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(15-minute oral argument requested)

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ISSUES PRESENTED

I. Whether the trial court committed error when it concluded that the defendant was subjected to custodial interrogation during the third interview and whether it placed too much emphasis on its conclusion that the questioning was "accusatory" in reaching this conclusion. Issue preserved by the Defendant's Motion to Suppress, the State's Objection, and the State's Motion to Reconsider.

II. Whether the trial court erred in declining to identify at precisely what point in time during the third interview the defendant was in custody where the defendant arrived at the police station voluntarily, entered as a visitor, was told that he was free to go, and indicated that he understood that he could leave. Issue preserved by the Defendant's Motion to Suppress, the State's Objection, and the State's Motion to Reconsider.

RELEVANT LAWS AND STATUES

No subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse or furnish evidence against himself. Every subject shall have a right to produce all proofs that may be favorable to himself; to meet the witnesses against him face to face, and to be fully heard in his defense, by himself, and counsel. No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land; provided that, in any proceeding to commit a person acquitted of a criminal charge by reason of insanity, due process shall require that clear and convincing evidence that the person is potentially dangerous to himself or to others and that the person suffers from a mental disorder must be established. Every person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown; this right he is at liberty to waive, but only after the matter has been thoroughly explained by the court.

- N.H. CONST. pt. I, art. 15

STATEMENT OF THE CASE AND FACTS

A. The Charges

The Hillsborough County grand jury returned ten indictments charging the defendant with: (1) four counts of first-degree assault, RSA 631:1, I(B), 651:6, I9e) and III(a); (2) two counts of second-degree assault; RSA 631:2, I(d), 651:6, I(e) and III(a); (3) three counts of reckless conduct; RSA 631:3, 651:6, I(e) and III(a); and (4) one count of criminal restraint, RSA 633:2, I . SA 1-10.[1] The defendant was also charged with two misdemeanor counts of endangering the welfare of a minor, RSA 639:3, I, and one count of misdemeanor Class A reckless conduct, RSA 631:3. All of these charges arose from first- and second-degree burns suffered by a toddler, who was the child of the defendant's girlfriend, while the toddler was under the defendant's supervision.

B. The Motion to Suppress

On March 12, 2021, the defendant filed a motion to suppress statements made in three interviews on September 15, 2020. SA 13. The defendant contended that the police had subjected the defendant to custodial interrogation during the three interviews without advising him of his *Miranda*[2] rights. SA 16. He contended that, while he had not been formally arrested, his movements were restricted "to a degree associated with a formal arrest." SA 17.

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[1] References to the record are as follows: "Int." refers to the recording of the third interview and the approximate time of the statement. "T _" refers to the transcript of the suppression hearing and page number. "AS _ " refers to the Addendum to the State's Brief and page number. "SA _" refers to the Appendix to the State's Brief and page number.

[2] *Miranda v. Arizona*, 384 U.S. 536 (1966).

The defendant argued that, under the totality of the circumstances test, he reasonably believed that he was not free to leave the interview room. SA 18-19. The defendant asserted that, during the first two interviews, the "character and nature of the interviews" were accusatory. SA 22. He characterized the detectives as "pressuring" him to adopt their view of the case and that they expressed "false sympathy" with the defendant's situation. SA 22.

On March 22, 2021, the State objected. SA 27. The State contended that the defendant was not in custody and was not subject to interrogation while he was at the Nashua Police Department. SA 32. In that regard, the State distinguished this Court's ruling in *State v. McKenna*, 166 N.H. 671 (2014), pointing out that, in *McKenn*a, the law enforcement officers had driven three hours to the defendant's place of work, had already obtained a warrant for his arrest, and believed that he had committed the offense. SA 33-34. In contrast, in this case, the defendant wanted to assist the detectives and voluntarily participated in the interview. SA 34.

The State pointed out that, before each interview, the detectives told the defendant that he was free to leave. SA 35. The State also contended that the questions posed by the two detectives were not the equivalent of interrogation. SA 37.

C. The Hearing on the Motion to Suppress

The hearing on the motion to suppress established the following:

On September 15, 2020, Nashua Police Sergeant Timothy MacIsaac went to 15 Beech Street to help investigate injuries sustained by a 16-month old toddler, T 91, who had been "in the care of" the defendant. T 28. The toddler had been injured in the shower, suffering serious burns. T 28, 40.

Sgt. MacIsaac contacted the Nashua Police Department's Special Investigation Division and Detective Thomas Durden asked the sergeant if he would ask the defendant to come to the department for an interview. T 40-41.

While they were in the kitchen of the apartment, Sgt. MacIsaac asked the defendant if he would be willing to come to the police department to provide a statement. T 28-29. Sgt. MacIsaac told the defendant that he was not under arrest and the defendant said that he was willing to give a statement, but that he would need a ride. T 30.

At the time of the suppression hearing, Nashua Police Officer Adam Anderson was a sixteen-year veteran with the Nashua Police Department. T 13. On September 15, 2020, he met Sergeant Timothy MacIsaac at an apartment at 15 Beech Street in Nashua in order to drive the defendant to the Nashua Police Department for an interview. T 14. Officer Anderson previously met the defendant in November 2018, when he reported a stolen firearm and had been interviewed by Anderson at the police department. T 18-19.

The defendant was "very compliant" and, although they did not talk during the trip, the officer and the defendant were "very friendly and cordial." T 15. Once at the department, Officer Anderson escorted the defendant into the reception area. T 16. The defendant was given a visitor badge and Officer Anderson brought him to meet with Detective Durden. T 17.

On September 15, 2020, Det. Durden interviewed the defendant in two sessions. T 47. The sessions were videotaped and recorded. T 48. After the second session, the defendant left the Nashua Police Department

and, although the detective offered him a ride, the defendant decided to walk home. T 53. The following day, at about 2:10 p.m., the defendant returned to the Nashua Police Department for another interview. T 55-56.

D. The Transcripts of the September 15 and 16, 2020 Interviews

The first September 15, 2020 interview began at 5:45 p.m. and ended at 7:03 p.m. SA 58, 93. Det. Durden conducted the interview with another detective. SA 58. Det. Durden began the interview by advising the defendant that the interview was voluntary and that he could "stop talking to [the detectives]," leave, or take a break any time he wished. SA 58. The defendant had no questions before the interview started. SA 58.

The defendant had been dating the toddler's mother for about four or five months. SA 60. The defendant watched the toddler and his seven-year-old brother every day that the mother went to work. SA 61. He thought that the toddler did not like him. SA 61. The toddler "[gave] him a hard time about pretty much fucking everything." SA 62. When the toddler cried, the defendant generally fed him because the toddler was "a fucking garbage disposal." SA 67. The defendant gave the toddler a shower. SA 58 (Defendant: "I was giving [the toddler] a shower, no bath, shower[.]"). The toddler did not like showers, SA 61, and was crying, SA 63.

While doing so, the defendant flushed the toilet and then heard the dog barking, so he went to see if there was a visitor. SA 62-64. The defendant said that, when the toilet flushed, the water in the shower got "[r]etarded hot," but that he "didn't even think about it" when he flushed the toilet. SA 63.

When the defendant returned to the bathroom, the toddler's eyes were closed and, when the defendant picked him up, the toddler was "lifeless." SA 76. The toddler was "definitely hot." SA 76. The defendant wrapped him in a towel and held him in front of the air conditioning. SA 76. After a minute or two, SA 76, the defendant "started freaking out" and ran to a neighbor's apartment. SA 76-77. After trying to revive the toddler, the neighbor called an ambulance and the defendant called the toddler's mother. SA 77.

Partway through the interview, the detectives took a break to "check stuff out." SA 80. At that point, the defendant, who had his cell phone, said that he wanted to call the toddler's mother. SA 80. Det. Durden asked him to "hold off on that" because the mother was at the hospital, talking to a detective. SA 80. When the detectives returned, they told the defendant that the toddler had bruises on him. SA 80.

At this point, the defendant said that he had not been able to get the toddler's shirt off, so he put him in the shower with it still on. SA 81. The defendant acknowledged that he put the toddler in warm water, but said that the water was not "scorching hot." SA 82. The shower had lasted for about 20 minutes. SA 83. The defendant also had put music on to clean the house. SA 83. He put music on, as well, because he did not like to hear the toddler crying. SA 83. He acknowledged that he felt that he was "not fully paying attention to" the toddler, SA 84, but added that he would never hurt the toddler, "no matter how much" he disliked him, SA 85.

Asked if he was impaired at the time, the defendant said that he did not take drugs, aside from, smoking marijuana. SA 93. The defendant said that the toddler had no medical issues, but that he did do things like climb

on his highchair and knock things over. SA 93. Det. Durden gave the defendant his business card and told him that the police would be in touch. SA 93 . He added that the defendant could call them. SA 93.

Thirteen minutes later, the detectives returned to the interview room. SA 94. Det. Durden reminded the defendant that he was free to leave, but added that he had "a few more questions." SA 94. Det. Durden told the defendant that the toddler was *en route* to Massachusetts General Hospital with first and second-degree burns. SA 94. Det. Durden told the defendant that his account was not "adding up." SA 94. The defendant began to cry and said that there was "no way" that the toddler had been burned that badly. SA 94.

Det. Durden assured the defendant that the interview was not "about getting [the defendant] in trouble," it was about getting help for the toddler. SA 95. As the defendant denied that the toddler had been in hot water for 20 minutes, his phone rang, but he silenced it. SA 96. Det. Durden responded that the doctors said "something else was wrong" with the toddler. SA 97. Det. Durden told the defendant that he was "choosing bits and pieces" to remember, but that he did not think that the defendant had acted "maliciously." SA 97. The detective asked the defendant to describe how the shirt was on the toddler and the defendant said that he tried to pull the shirt over the toddler's head, but that the toddler's head was "so fucking big" and he couldn't pull it off. SA 98.

The defendant thought that the injuries were his fault because he "wasn't paying attention." SA 100. Det. Rogers asked if the toddler's diaper was off when the defendant placed him in the shower and the defendant said that the diapers were off. SA 100. The defendant again

acknowledged that the water was hot, but denied that the room was like a sauna. SA 102. The interview concluded at 7:33 p.m. SA 102.

The defendant returned to the police department at 2:15 p.m. the following day. SA 103. Det. Durden told the defendant that he was there as a visitor. SA 103. The detective told the defendant: "If at any point in time you feel uncomfortable and you don't want to talk to me, you need more water, you need to go to the bathroom or anything like that just let me know and we'll be more than happy to accommodate that, ok?" SA 103. The defendant responded, "Thank you," and, when asked, said that he had no questions. SA 103. By this point, the toddler had been released from the hospital and was doing well. SA 103.

Det. Durden asked: "[I]s 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?" SA 104. The defendant said that he had talked to the mother and she had told the defendant that there was a "significant amount of THC or whatever" in the toddler's system. SA 104. The defendant acknowledged that he and the mother "smoked that morning." SA 104. He added that they kept the marijuana in a drawer with a latch on it so that the toddler could not reach it. SA 105.

After that, the defendant continued to try to explain that flushing the toilet could have made the water run hot and Det. Durden interrupted, saying: "I'm going to stop you right there." SA 105. The detective explained that the doctors at Massachusetts General Hospital knew that the toddler had "a high level of THC in his blood" and that it "didn't just get there from walking in a room" where the defendant had been smoking marijuana earlier that day. SA 106. The detective added that the

defendant's story was not "adding up" and that he did not want to "get the vibe" that the defendant was being "deceitful." SA 106. The detective mentioned DCYF and a "case." SA 106.

The defendant responded that he was not a "baby killer," that he loved his own children, and that he would never hurt a child. SA 106-07. He said that he thought that the detectives thought that he was "some sort of monster," that he had not been paying attention, and that he was ashamed of himself. SA 107. He acknowledged that he had given the toddler melatonin in the past, but denied giving it to him on the day that the toddler was injured. SA 107.

Det. Durden responded that the detectives did not think that the defendant was a monster, but that "1 and 1 [was] not equaling 2," because the toddler had "high levels of THC ln his system and he had petechiae around his chest that was indicative of someone coughing a lot." SA 107. The detective asked the defendant if he had smoked in the bathroom, to which the defendant responded, "Yeah, I probably smoked while I was in the bathroom." SA 108. The defendant said that he had smoked a joint, but that he had not used a bong. SA 109. The detective suggested that his continued marijuana use had built up a tolerance for its effects and the defendant answered: "It's a little for me[,] a lot for him." SA 109.

After the defendant rejected the possibility that the toddler had simply ingested a half-smoked joint, the detective reminded the defendant that the toddler was "gonna be fine." SA 110-11. He assured the defendant that neither detective would "think any less of [him] as a person" if he told them "exactly what happened." SA 111.

The defendant then said that he thought that the bathroom window was closed, but that the bathroom door was open and the air conditioning was on. SA 111. The defendant did not recall the toddler coughing in the bathroom. SA 112. Asked if he had created a "fish bowl," the defendant did not initially understand, but upon hearing the detective's explanation, the defendant responded: "Hot box." SA 112.

The detective then asked if it was possible, in the bathroom "hot box," if the toddler had breathed in the marijuana smoke because it was in the air and the defendant agreed that it was possible. SA 113-14. The defendant said that he "really didn't think about it" as he was in the bathroom smoking marijuana. SA 114.

The defendant then returned to his view that the toddler cried too much of the time. SA 113-14. He thought that the toddler needed "tough love" so that he would be more independent. SA 113.

Det. Miller told the defendant to "hear [him] out." SA 116. He said that 98 percent of the people that the police interviewed were "good quality people [who were] trying to do the right thing." SA 116. He then asked the defendant how much melatonin he had given the toddler the previous day. SA 116. The defendant responded that he did not have any melatonin and so he had given the child none. SA 116.

Det. Miller told the defendant that the flushing toilet could not have caused the water temperature to rise because the police had tested that possibility. SA 117. Det. Durden asked when the defendant had removed the toddler's shirt. SA 119. When the defendant responded that he had taken the shirt off when the toddler was sleeping, Det. Durden interjected, "Passed out." SA 119. Det. Durden then said:

> Pulling the shirt off, most people take it off before they get in the shower. You have a wet shirt covering his mouth and his nose for, you said, four seconds, but it could have been longer. That could be starving him of oxygen and that could result in him passing out. Right?

SA 122. The defendant responded, "Yes." SA 122.

Later the defendant admitted that the toddler had tried to get out of the bathtub, but that he had held him in it and the toddler sat down with his legs crossed and his head down. SA 124-25. It was at that point that the defendant's dog barked and the defendant left the bathroom. SA 125.

After a brief break, the detectives asked what the seven-year-old brother would say about the bathroom temperature. SA 134. They asked the defendant where he was staying and he said that he was staying with a friend named Mike, who drove an old maroon car. SA 134-35. He volunteered that he had a firearm and they asked him where his firearm was. SA 135-36. The interview ended at 3:44 p.m. SA 138.

E. The Trial Court's Order

On July 9, 2021, the trial court (*Coburn*, J.) issued its order on the motion to suppress. AS 41. It concluded that the defendant was not in custody for purposes of the first two interviews. AS 52. The court concluded that the first two interviews were not "accusatory in nature" and that the detectives maintained "respectful demeanor[s]." AS 52. Although the court acknowledged that there were factors that weighed in favor of finding that the defendant was in custody during the first two interviews, AS 53-54, it concluded that a reasonable person would not have believed he or she in custody, AS 54.

In contrast, however, the third interview was, in the court's view, a custodial interrogation. The court pointed out that the room was small and that the two detectives and the defendant could barely fit in it. AS 55. The court noted that the detectives questioned the defendant for approximately 90 minutes, after having questioned him for nearly two hours the previous day. AS 55. The court found that, unlike the previous interviews, the questioning in the third interview was "increasingly accusatory." AS 56. The court concluded that the questions in the third interview were "premised upon the assumption that the defendant had committed the crime." SA (quoting *State v. Carrier*, 173 N.H. 189, 202 (2020) (internal quotation marks omitted)).

Although the court noted that there were factors that weighed against a finding that the defendant was in custody, it concluded that a reasonable person would have concluded that he or she was not free to leave. AS 58. It, therefore, suppressed the statements made by the defendant in the third interview. AS 58. Because it concluded that the defendant was in custody, it did not address the defendant's contention that his statements were also involuntary. AS 58.

F. The State's Motion to Reconsider

On July 19, 2021, the State filed a motion to reconsider. SA 42. The State first questioned the court's finding that the defendant was not free to "roam the police station," arguing that this was not a function of restraint, but simply that the police department had "certain areas [that were] private and secure from third parties." SA 43. The State pointed out that the defendant had previously been interviewed in the same interview room when he reported a stolen firearm. SA 43.

The State also pointed out that, after the third interview, the defendant left the police station. SA 44. The State contended that the court erred in adding the duration of the first two interviews to the third interview to find that the defendant was in custody. SA 45.

The State contended that the questions asked by the detectives in the third interview were not accusatory, but investigative, as they still did not know how the toddler had been burned. SA 45. It added that the case was, at that juncture, being investigated by DCYF. SA 47. The State noted that Det. Durden repeatedly told the defendant that he did not believe that the defendant was a monster. SA 47.

The State contended that accusatory questioning was only one factor in finding that a defendant is in custody. SA 49. The State acknowledged that the detectives "pressed" the defendant when the defendant's explanations were inconsistent with the medical diagnoses. SA 49. The State also acknowledged that the detectives confronted the defendant with his own inconsistent statements. SA 50. But the State contended that the detectives did not have the "information to ask accusatory questions" at the time of the third interview. SA 51.

Finally, the State contended that the court's order was "overbroad" and that custody did not occur "as soon as [the defendant] entered the interview room." SA 51. The State asked the court to consider if some of the statements made by the defendant "precede[d] a finding of custody." SA 51.

On July 22, 2021, the defendant filed an objection. SA 52. On July 26, 2021, the court denied the State's motion to reconsider. AS 40.

SUMMARY OF THE ARGUMENT

I. The trial court erred in suppressing the statements of the defendant in the third interview. It gave too much weight to three factors, particularly the "accusatory questioning," and failed to appreciate the countervailing factors. It also appears that the trial court did not give sufficient attention to the recorded interview, which undercuts some of its factual findings.

II. The trial court erred in declining to reconsider its order as the order is clearly overbroad. Even if this Court concludes that some of the interview should have been suppressed, the entire interview did not constitute custodial interrogation. When asked by the State to reconsider, the court should have done so.

ARGUMENT

I. THE TRIAL COURT'S CONCLUSION THAT THE THIRD INTERVIEW CONSTITUTED CUSTODIAL INTERROGATION WAS ERROR.

Part I, Article 15 of the New Hampshire Constitution provides that "[n]o subject shall . . . be compelled to accuse or furnish evidence against himself." N.H. Const. Pt. I, Art. 15. "Before a 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. Sachdev*, 171 N.H. 539, 548 (2018). "For *Miranda* warnings to be required a defendant must be subjected to custodial interrogation by the police." *Id.* "Therefore, as a general rule, two conditions must be met before *Miranda* warnings are required: (1) the suspect must be 'in custody'; and (2) he must be subject to 'interrogation.'" *Id.*

"'Custody entitling a defendant to *Miranda* protections requires formal arrest or restraint on freedom of movement of the degree associated with formal arrest.'" *Id.* (quoting *State v. McKenna*, 166 N.H. 676, 671 (2014)). "'In the absence of formal arrest, [the court] must determine whether a suspect's freedom of movement was sufficiently curtailed by considering how a reasonable person in the suspect's position would have understood the situation.'" *Id.* (quoting *McKenna*, 166 N.H. at 676-77). Whether "a reasonable person in the defendant's position would believe himself in custody" depends on the "totality of the circumstances of the encounter." *Id.* "'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.* (quoting *In re E.G.*, 171 N.H. 223, 230 (2018)).

On appeal, the custody determination "is a law-dominated mixed question in which 'the crucial question entails an evaluation made after [the] determination of [the historical facts]: if encountered by a "reasonable person," would the identified circumstances add up to custody as defined in *Miranda*?'" *State v. Ford*, 144 N.H. 57, 62-63 (1999) (quoting *Thompson v. Keohane*, 516 U.S. 99, 113 (1995)). "The trier of fact is not 'in an appreciably better position' than [this Court is] to answer that question." *Id.* at 63 (quoting *Thompson*, 516 U.S. at 114-15). Thus, while this Court "will not overturn the trial court's findings of historical facts unless they are contrary to the manifest weight of the evidence," it "review[s] the ultimate determination of custody *de novo*." *Sachdev*, 171 N.H. at 548.

Applying the above standard, the defendant was not in custody during the third interview. The defendant came to the third interview at the police station voluntarily after arranging for a friend to drive him there. He entered through the front lobby, signed in as a visitor, and was given a visitor's badge, just like the previous day. He was escorted to the same 10 x 12 interview room he had been in the previous day. Two detectives spoke with him, Det. Durden, who had interviewed the defendant the previous day, and Det. Miller. Thus, the defendant had some familiarity with his surroundings and the process from the previous day.

Det. Durden began the interview by confirming that the defendant came to it voluntarily and that he was a visitor. The defendant acknowledged this. Det. Durden also confirmed that the defendant

understood that he could "leave at any time you want." The defendant stated, "Yes." Durden informed the defendant that interview door was closed for privacy and asked the defendant if that was okay. The defendant stated, "Yes." Det. Durden also made clear that "[i]f at any point in time you feel uncomfortable and you don't want to talk to me, you need more water, you need to go to the bathroom or anything like that just let me know and we'll be more than happy to accommodate that, ok?" The defendant answered, "Thank you," and confirmed that he had no questions before the interview began. *See* SA

Det. Durden stated that he was putting a case together for DCYF. *See* SA 103 ("obviously we're putting a case together, 'cause DCYF, I don't know how much more you've been talked, I'm assuming you talked to your girlfriend."). The defendant confirmed his understanding of this, SA 103 (Def: " . . . that's pretty much all she [defendant's girlfriend] told me so I was like ok, well, you know, the guy from last night asked me to come back down so 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 and she was asking me like, um, if I got any weed after she left for work and like I didn't."). The defendant did not ask to leave or stop the interview.

The first substantive question from Det. Durden came at page four of the interview transcript. When Det. Durden told the defendant that his story was "not jiving" with what he learned from the doctors "so it looks like you're trying to be deceitful," he simultaneously emphasized that the defendant was present for the interview "voluntarily." SA 106. As review of the interview recording reveals, the questioning was not aggressive or

hostile; the officers used normal speaking voices and their demeanor was not intimidating. The defendant was not physically restrained and, when the interview ended, left the police station. In short, under a totality of the circumstances analysis, a reasonable person would not have believed himself in custody.

Moreover, the court's order ignored certain key facts. First, the defendant arrived at the police station on his own, without coercion, persuasive evidence that he was not in custody when he was questioned. *See State v. Sachdev*, 171 N.H. 539, 548 (2018) (no custody where the defendant "agreed to go to the police station voluntarily and drove there himself); *see also California v. Beheler*, 463 U.S. 1121, 1122–25 (1983) (where suspect voluntarily went to the police station, and was not placed under arrest, suspect was not in custody); *Oregon v. Mathiason,* 429 U.S. 492, 493, 495 (1977) (when the defendant agreed to come to the station where the police informed suspect that they suspected him of committing a burglary, the defendant was not in custody for *Miranda* purposes). "[P]olice officers are not required to administer *Miranda* warnings ... simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." *Mathiason*, 429 U.S. at 495.

The defendant signed in as a visitor, wore a visitor's badge, and was assured by the detectives that he was there of his own volition, SA 103, another factor against finding custody. *Sachdev*, 171 N.H. at 549 (no custody where the defendant "entered through the front lobby of the station and signed in as a visitor"). In all three interviews, the detectives

assured the defendant that he was simply a visitor and that he could stop the questioning at any time. SA 58, 94, 102.

This assurance that he was a visitor should have played a greater role in the court's decision. *See United States v. Infante*, 701 F.3d 386, 396-97 (1st Cir. 2012) (defendant told that he was free to leave); *United States v. Ludwikowsk*i, 944 F.3d 123, 132-34 (3d Cir. 2019) (no custody, despite four-hour interview, because defendant was not restrained, the door was unlocked, the defendant retained access to his cell phone, and the defendant arrived voluntarily and left after the interview ended); *cf. Sachdev*, 171 N.H. at 549 ("'[M]ost importantly, at the start of the interview, the defendant was notified that his presence was voluntary and ... he was not under arrest,' and 'that he could stop the interview at any time and ... the defendant would be permitted to leave.'").

The detectives wore plain clothes and used normal speaking voices when talking to him. *Id.* (citing *Locke,* 149 N.H. at 4). Although they were armed, they did not brandish their weapons. *Id.* ("[A]lthough armed, the detectives did not brandish their weapons" and this fact weighed against a finding of custodial interrogation.).

Only two detectives conducted the questioning. *Cf. United States v. Hinckley*, 803 F.3d 85, 90 (1st Cir. 2015) (noting the presence of one officer suggested non-custodial interrogation); *see also United States v. Swan*, 842 F.3d 28, 32 (1st Cir. 2016) (two officers non-custodial). And they sat in the same seats that they had occupied for the previous two interviews and the interview room was held in the same room. The defendant's familiarity with his surroundings, therefore, should have weighed in favor of finding that he was not in custody. *Sachdev*, 171 N.H.

at 548; *see also McKenna*, 166 N.H. at 685 (familiarity with surroundings "weighs against a finding of custody").

Although the court had access to the recorded interviews, AS 43, n.2, it did not refer to them in gauging the defendant's behavior while being interviewed. In fact, the trial court appears to have relied heavily on the transcripts and the order offers little description of the tenor of the interview and the participants' reactions as it progressed. Normally, this Court should defer to the factual findings of the trial court, but in this case, the video recordings undercut the trial court's findings.

For example, the trial court's order did not consider the defendant's behavior while the detectives were out of the room. During that time, he either sent or received text messages (or both). Int. 15:32:00; *see also United States v. Swan*, 842 F.3d 28, 34 (1st Cir. 2016) (officers not only let the defendant make the phone call, but left the room). When he put his sweatshirt on, he took the "visitor" badge off his shirt and placed it on his sweatshirt so that it was visible. Int. 15:35:00 to 15:32:50. It was also clear that the defendant did not feel that he was likely to be arrested. Asked what would happen next, he expressed concern about his visitation rights. Int. 15:21:50. His mention of jail was an afterthought. Int. 15:22:10 to 15:22:20.

Nor was the defendant in any way restrained. *Sachdev*, 171 N.H. at 553. A good example of the defendant's comfort zone is reflected in the defendant's response when he was asked about getting the shirt off the toddler. The defendant explained it and demonstrated by removing his own shirt. Int. 14:58:40. He acted quickly, pulling off his shirt, without any fear that the detectives would overreact to those quick movements. In other

words, as he removed his shirt, he offered an explanation, comfortable that his physical display would not cause the detectives to react negatively. He was not asked to remove his shirt and he did not ask to be allowed to do it. This spontaneity is reflected in the recorded interview, but not in the transcript. *Compare* Int. 14:58:40 and AS 58-59 (no mention of defendant removing his shirt). Notably, this act is also missing from the trial court's order. And yet the defendant's action is inconsistent with the court's conclusion that he was in custody.

While the standard is an objective standard, the defendant's actions and concerns illustrate his perception of his situation. Like any reasonable person, he was concerned about the toddler and his role in the toddler's injuries. He was, like any reasonable person, concerned about the impact that his inattention would have on his relationships with his children and the toddler's mother. And like any reasonable person, he was not concerned that he would be placed under arrest. Indeed, he was not arrested and left the police station after the interview a free man.

The court's conclusion on these facts constituted factual and legal error. The trial court reached placed undue weight on the size of the interview room, the duration of the interview, and the "increasingly accusatory" nature of the questioning. These three factors alone are not sufficient to warrant a finding of custody when balanced against all of the factors revealing the defendant was not in custody. Additionally, each of the three factors the trial court relied on to find custody suffers from the following analytical flaws that undermine their persuasive value in this case

A. The Size of the Interview Room Is Not A Factor That Weighs In Favor Of Custody.

The trial court identified the size of the interview room as "10 foot-by-12 foot." AS 44. The third interview occurred in this room. *Id.* In *State v. Belonga*, 163 N.H. 343, 355 (2012), this Court found a room that was "eight by ten feet" with a table and three chairs to be "not inordinately small" and to "not support" the defendant's claim that her statements made to the police were involuntary. Accordingly, the size of the interview room does not support a claim of custody.

B. The Length of the Third Interview Was Not Problematic.

The third interview lasted ninety minutes in length. This Court has found similar lengths of time to be neither inordinate nor oppressive. *See, e.g.*, *McKenna*, 166 N.H. at 685 (interview length of one hour and fifteen minutes "weigh[ed] neither in favor of, nor against, a finding of custody"); *State v. Hernandez,* 162 N.H. 698, (2011) ("The interview itself was 'not an inordinate or oppressive length'—it lasted less than two hours."); *State v. Champman*, 135 N.H. 390, 401 (1992) (2½-hour interview was "not inordinate or oppressive" in length). Although the court cited the *Mittel-Carey* case for the proposition that a 90 to 120 minute interview was lengthy, *See* SA 55 (citing *United States v. Mittel-Carey*, 493 F.3d 36, 40 (1st Cir. 2007) (interview lasting 90 minutes to two hours), conflicting authority exists within the same circuit, *see United States v. Hughes*, 640 F.3d 428, 437 (1st Cir. 2011) (noting that a 90-minute interview is a "relatively short duration"); *United States v. Swan*, 842 F.3d 28, 33 (1st Cir. 2016) (90-minute interview "reinforce[d] the conclusion that [the defendant] was not in custody").

Thus, as a matter of law, the length of the ninety-minute interview in this case is at best neutral in determining custody.

C. A review of the recorded interviews reveals that the questioning was not accusatory.

The court relied heavily on the idea that the questioning was "accusatory." This finding is flawed both factually and legally.

Accusatory questioning alone does not support a decision to suppress the evidence. *See McKenna*, 166 N.H. at 682 ("The accusatory nature of questioning is widely recognized as *a factor* weighing in favor of a finding of police custody.") (emphasis added). Although accusatory questioning may be a factor in considering to suppress a statement, it is rarely, if ever, sufficient basis by itself. In addition, this Court has looked to whether the questioning was "highly confrontational and accusatorial" and whether the detective tells the defendant that the detective knows that he committed the crime. *Id.* at 682 (quoting *Ross v. State*, 45 So.3d 403, 415-16 (Fla. 2010)); *see also United States v. Wauneka*, 770 F.3d 1434, 1439 (9th Cir. 1985) ("The questioning progressed for over an hour and turned accusatory—[the defendant] was told that he supplied information that only a perpetrator would know, that he matched the description of the rapist, and that he had better tell the truth.") (cited by *McKenna*, 166 N.H. at 682)).

Further, if questioning is not accusatory, that fact weighs against a finding that suspect has been subjected to custodial interrogation. *See Sachdev*, 171 N.H. at 552-53 ('[T]he detectives presented a relaxed demeanor[,] ... were cordial toward the defendant, and did not raise their voices. Thus, the overall tone of the interview was not accusatory and,

therefore, this factor weighs against a finding of custody.) (internal quotation marks omitted)).

In this case, the detectives' questions were not accusatory. First, the recorded interview shows that the detectives did not aggressively question the defendant. They did not raise their voices or insinuate that they knew that he had committed a crime. Instead, they were trying to understand how the toddler could have been so badly burned and why his THC levels were so high.

In stark contrast to the *McKenna* case in which the law enforcement officers asked "[o]n numerous occasions" asked why the defendant had abused the victim, *McKenna,* 166 N.H. at 683, the detectives did not tell the defendant that they knew what had happened. Instead, the detectives attempted to help the defendant remember what had happened. The defendant's memory was not clear; indeed, he repeatedly stated that his sense of time was not reliable. Int. 14:53:50, 14:59:20, 15:00:11.

Nor did the detectives imply that the defendant would be arrested. Instead, they asked him what he thought should happen and he responded that he should not lose his children. Int. 15:21:50. Although he later mentioned that he should not go to jail, Int. 15:22:10, as noted earlier, the remark seems an afterthought. If the detectives had made the defendant believe that his arrest was imminent, it is hard to imagine that the prospect of punishment would not be foremost in his mind. *Cf. McKenna*, 166 N.H. at 682 (accusatory nature of questioning may have conveyed to the defendant that he would be arrested).

The detectives did question the defendant's account, but that was in part because the defendant did not appear to understand that, by smoking

marijuana in a steamy, small bathroom, he exposed the toddler to second-hand marijuana smoke and caused him to lose consciousness. When the detectives corrected his misunderstanding (for example, his belief that the toddler had eaten the marijuana, Int. 14:22:18), they did so directly, without raising their voices, and by making factual statements. The questions were not even "one[s] of frustration," which would not merit suppression, let alone "anger or aggression." *Hinckley*, 803 F.3d at 90.

The defendant became emotional at times, but this appears to be from his sense of guilt, not in response to the detectives' questions. And the detectives did not try to take advantage of his vulnerability. *Cf. Commonwealth v. Magee*, 668 N.E.2d 339, 344 (Mass. 1996) (upholding suppression where the "defendant was suffering from lack of sleep and that she had been emotionally distraught throughout the entire interrogation period, with a number of episodes of forceful crying and uncontrollable shaking."). Instead, they reassured him, and each time, he regained his composure. And although courts have upheld use of deception, *see, e.g., United States v. Jacques*, 744 F.3d 804, 812 (1st Cir. 2014), the detectives did not deceive the defendant with false accusations or mislead him with false information.

There were points during the interview that the detectives encouraged the defendant to tell the truth. *See, e.g.*, Int. 14:27:41 (urging the defendant to be honest, explaining that if he was not, the police would have "a lot more digging to do" to explain the high THC levels in the toddler's blood, SA 107); Int. 15:18:35 ("At what point do you stop lying to yourself?" Int. 15:17:50; telling the defendant to "man up."); Int. 15:20:30-

15:21:20 (asking the defendant to "be honest" with himself and the defendant responded that he had "fucked up").

But encouraging a defendant to tell the truth does not render his statement involuntary. *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004) ("Instead of pressuring [the defendant] with the threat of arrest and prosecution, [the officer] appealed to his interest in telling the truth and being helpful to a police officer."); *United States v. Chalan*, 812 F.2d 1302, 1307 (10th Cir. 1987); *see also United States v. Carpentino,* 948 F.3d 10, 28 (1st Cir. 2020) ("Neither an admonition to tell the truth (even if repeated) nor a suggestion that cooperation would lead to favorable treatment is enough, without more, to constitute impermissible coercion.") (discussing waiver of *Miranda* rights); *United States v. Ballard,* 586 F.2d 1060, 1063 (5th Cir. 1978) ("Encouraging a suspect to tell the truth… does not, as a matter of law, overcome a confessor's will"); *United States v. Blanchard*, 2017 WL 1017931, *3 (W.D. La. Feb. 17, 2017) ("The evidence shows that the agents conducted themselves in a respectful and conversational manner. Although Agent Plants told Defendant that he should 'tell the truth,' Agent Plants did not do so in an accusatory, condescending, rude, or harsh manner.") (unpublished).

Finally, the detectives questions do not support the trial court's conclusion that their investigation was complete and that they had completed their investigation. Their investigation was not complete. Their questions attempted to eliminate other explanations for why the toddler fell unconscious. *See* SA 107 (questions about melatonin); SA 111 (questions about blowing marijuana smoke in the toddler's face); SA 112 (questions

about the "fish bowl" or "hot box"). In short, they were trying to eliminate possibilities that might lead to lesser or greater culpability.

Moreover, if, as the trial court suggested, they had decided to charge the defendant with serious criminal conduct, it is contradictory that they allowed him to leave the police station. Significantly, their decision not to arrest the defendant is also inconsistent with the trial court's finding that the questions were accusatory. *See State v. Marin*, 172 N.H. 154, 161 (2019) ("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.*") (citation, internal quotation marks, and punctuation omitted) (emphasis added).

On this record, the court erred in finding that the questions throughout the interview were accusatory and further erred in suppressing the statements of the defendant.

II. THE ENTIRE INTERVIEW SHOULD NOT HAVE BEEN SUPPRESSED AND THE TRIAL COURT SHOULD HAVE RECONSIDERED ITS RULING TO THE CONTRARY.

Even if some of the interview should have been suppressed, the court erred when it suppressed the entire interview. When the State asked the Court to revisit the ruling, the court declined to determine when the "accusatory" nature of the questioning converted the consensual interview into a custodial interrogation. In declining to revisit its ruling, it erred.

Under Rule 43 of the Superior Court Rules of Criminal Procedure, a motion to reconsider "shall state, with particular clarity, points of law or fact that the court has overlooked or misapprehended and shall contain such

argument in support of the motion as the movant desires to present." N.H. Crim. P. R. 43(a). In this case, the State pointed out that the trial court had suppressed the entire third interview and argued that the entire interview was not the equivalent of custodial interrogation. SA 51 . The court allowed its initial order to stand without examining whether the entire interview should have been suppressed.

As noted above, the State contends that the conclusions of the trial court were erroneous. But even if, at some point, the interview turned into a custodial interrogation, the entire interview was not a custodial interrogation requiring the *Miranda* warning.

For example, the court declined to revisit its order suppressing the defendant's response to Det. Durden's statement that the defendant was "obviously" "here as a visitor." SA 103. When Det. Durden asked if the defendant understood, he responded, "Yes." SA 103. That response, under the trial court's order, has been suppressed. So, too, are the defendant's responses that he understood that he could leave at any time, that he did not mind if the door remained closed, that he understood that if he felt "uncomfortable," and that, if he did not want to continue the interview, needed more water, or wanted to use the bathroom, he could let the detective know. SA 103. None of these responses falls under any theory of suppression, and yet, according to the trial court's order, the responses are inadmissible.

The defendant's statements about his current understanding of the case are similarly suppressed. In response to the detective's question (SA 104: "Before I start questioning you, is there anything else you think I'm gonna talk about that you might want to tell me about before we go down

that road?"), the defendant stated that he had already called his girlfriend who told him that there was "a significant amount of THC or whatever" in the toddler's system. SA 104; Int. 14:21:10. The detective responded, "Yup." SA 104.

The defendant, in response to another "yup" from the detective, said that when he had talked to the detectives the day before, that he did not think of the fact that he had smoked marijuana. SA 104. He said that did not think that smoking marijuana was "a thing" and that he had told the police everything that he had thought was important the previous day. SA 104. This admission is suppressed under the trial court's order, even though the question that prompted it was not accusatory.

The trial court similarly suppressed the defendant's statement that he then had found out that that his marijuana use was "clearly significant." SA 104. He said that, since his girlfriend smoked marijuana around the children, "shit, yeah, I'm gonna smoke, too." 105. This explanation, minutes into the interview, was not coerced. In fact, since the initial question, the detective had asked no other questions. Instead, he had said "Yup" six times, "OK" three times, "Yeah" one time, and "Yes" one time. SA 104-05.

The close of the interview, similarly, strongly suggests that the defendant was not in custody as he was preparing to leave. As the interview was winding down, Det. Durden asked for information about where and with whom the defendant was staying. SA 134-35. He then asked, "Um, do you have any questions for us? Anything else you want to add before we end this? SA 135. The defendant responded, "I have a gun,

too. Is that a fucking issue that I have a gun and that stuff?" SA 135; *see also* Int. 15:39:10.

After some discussion about the gun, the detective asked the defendant to sign a consent form so that the police could go to the apartment and retrieve the gun. SA 137; Int. 15:41:30. This was not the only time that the defendant volunteered information, a fact which may be considered in determining whether an interview is actually a custodial interrogation. *Cf. United States v. Joseph*, 2020 WL 974870, *5 (D. V.I. Feb. 28, 2020) (noting that the defendant "sometimes volunteered information" in determining that the interview was not custodial interrogation). The State still contends that the interview was voluntary and should not have been suppressed.

But even if some of the interview should have been suppressed, the State's motion to reconsider correctly described the order as "overbroad." SA 51. As the early part of the interview proves, the trial court's order is clearly wrong as a matter of law that the entire interview was coercive; its refusal to revisit its order with an eye toward explaining what the line of demarcation was an unsustainable exercise of discretion.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a 15-minute oral argument.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

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March 15, 2022

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CERTIFICATE OF COMPLIANCE

I, Elizabeth C. Woodcock, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 8126 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

March 15, 2022 /s/*Elizabeth C. Woodcock*

CERTIFICATE OF SERVICE

I, Elizabeth C. Woodcock, hereby certify that a copy of the State's brief shall be served on Chief Appellate Defender, Christopher M. Johnson, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

March 15, 2022 *s/Elizabeth C. Woodcock*

ADDENDUM TABLE OF CONTENTS

File Date: 7/19/2021
Hillsborough Superior Court Southern
E-Filed Dc

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
DOCKET NO. 226-2020-CR-00715

SUPERIOR COURT
SOUTHERN DISTRICT

STATE OF NEW HAMPSHIRE

v.

CALEB MARQUIS

STATE'S MOTION TO RECONSIDER ORDER THAT IN PART GRANTED DEFENDANT'S MOTION TO SUPPRESS

NOW COMES the State of New Hampshire, by and through the Hillsborough County Attorney's Office, and moves this Court to reconsider its Order that in part granted the Defendant's Motion to Suppress, stating in support as follows:

1. On July 9, 2021, this Court (Colburn, J.) issued an Order (Court Index # 97) that in part granted the Defendant's Motion to Suppress. Order at 14-18. This part of the Order granted the Defendant's Motion to Suppress any statements made during the third interview.[1]

2. The State disagrees with several of the factual findings and conclusions reached by the Court in this section of the Order, pp. 6-9 and 14-18, and files this pleading requesting that the Court reconsider its Order regarding its finding that "a reasonable person in the defendant's position would have believed himself to be in custody..." Order at 18.

3. According to Rule 43 of the N.H. Rules of Criminal Procedure, "[A motion for reconsideration] shall state, with particular clarity, points of law or fact that the court has overlooked or misapprehended and shall contain such argument in support of the motion as the

1 It seems agreed among the parties and the Court that the Nashua Police conducted three interviews with the defendant, Caleb Marquis. The first two occurred on September 15, 2020 and were separated by a short amount of time. The first interview began at approximately 5:45 PM and ended at 7:03 PM. The second interview began at approximately 7:16 PM and ended at 7:38 PM. The third interview occurred on September 16, 2020 and began at approximately 2:15 PM and ended at 3:44 PM.

Denied

Honorable Jacalyn A. Colburn
July 26, 2021

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT
No. 2020-CR-00715

State of New Hampshire

v.

Caleb Douglas Marquis

ORDER ON DEFENDANT'S MOTION TO SUPPRESS

The defendant, Caleb Douglas Marquis, is charged, inter alia with four counts of first degree assault, arising out of a September 15, 2020 incident. He moves to suppress statements made to the Nashua police on the basis that those statements were made while he was subject to custodial interrogation without being informed of his Miranda rights. (Def.'s Mot. Suppress at 2.) Alternatively, he moves to suppress the statements because they were not made voluntarily. (Id. at 9.) The State objects. The Court held a hearing on May 19, 2021, at which it heard testimony from Officer Adam Anderson, Sergeant Timothy MacIsaac, and Detective Thomas Durden of the Nashua Police Department. After consideration of the evidence, the arguments, and relevant law, the Court finds and rules as follows.

Factual Findings

The Court makes the following relevant factual findings based on the evidence presented at the hearing. On September 15, 2020, Nashua emergency services, including Sergeant MacIsaac and Detective Durden, responded to 15A Beach Street after receiving a call that an approximately 16[1] month old child, E.A., was unconscious

[1] During the hearing, the Sergeant MacIsaac testified that the child was roughly 18 months old. However, according to the exhibits and indictments, E.A. was approximately 16 months old at the time of the incident.

but breathing. E.A. sustained injuries while in the shower under the defendant's supervision. E.A. was initially transported to Southern New Hampshire Medical Center by ambulance. During this time, the defendant remained at the apartment. While at the apartment, the defendant spoke with several members of the Nashua Police Department, including Sergeant MacIsaac. Sergeant MacIsaac asked the defendant if he would go to the Nashua Police Station to further discuss what happened. The defendant inquired if he was under arrest. Sergeant MacIsaac informed the defendant that he was not under arrest, but that the police wanted to speak with him to investigate what happened to E.A. In response, the defendant agreed to go to the police station. However, the defendant asked Sergeant MacIsaac if an officer could drive him there. Sergeant MacIsaac then contacted Officer Anderson to transport the defendant to the police station. During this time, the defendant was not placed in any restraints and was not being actively guarded or watched by the officers.

Shortly thereafter, Officer Anderson arrived at 15A Beach Street. Once there, Officer Anderson met briefly with Sergeant MacIsaac and the defendant. Officer Anderson then escorted the defendant to his cruiser and opened the rear door for the defendant. The defendant got into the cruiser and Officer Anderson drove the defendant to the police station. Officer Anderson parked in the station's front lot. Officer Anderson and the defendant entered the station through the front lobby. The defendant signed in as a visitor at the reception area and the defendant received a visitor badge. Officer Anderson then escorted the defendant through the station to an interview room on the second floor. Once at the interview room, Officer Anderson and the defendant met Detective Durden.

A. First Interview

The interview room is a 10-foot-by-12-foot room with a square table pressed up against one wall and three chairs around the table. The room has no windows and a single door. Although the door can be opened when all of the chairs are pulled away from the table, the room is not large enough to allow a person to exit it while the chairs are occupied. All of the subsequent interviews were also held in this interview room.

The defendant sat in the interview room for a short time before Detective Durden and Detective Rogers entered the room at approximately 5:45 p.m. The defendant was sitting the in chair furthest from the door. Detective Rogers took the seat on the far side of the table from the defendant and Detective Durden sat in the chair between the defendant and the door. The detectives were wearing professional clothing. However, neither detectives had visible weapons on them nor were they displaying their badges.

Detective Durden started the interview. He asked the defendant, "You know you're here voluntarily, right? You're signed in as a visitor?" (State's Ex. 1 at 1.)[2] The defendant responded affirmatively. Detective Durden then informed the defendant that the door was closed for privacy. He continued that, "if at any point you want to stop talking to me, you want to leave, you need a break, just let me know and we'll do that, ok?" (Id.) He then asked if the defendant had any questions before the interview began, to which the defendant responded that he didn't have any questions. Neither detective read the defendant Miranda warnings.

[2] This audio recording was transcribed. (See State's Exs. 1–3.) The actual conversations, as captured in the video recordings, varies slightly from the transcripts. (See State's Exs. 8–10.) However, for ease of analysis, the Court will refer to the transcripts when quoting the interviews.

Detective Durden then asked the defendant to tell him what brought him into the station. The defendant described that he was watching his girlfriend's children and giving E.A., the younger child, a shower. The defendant described that he flushed the toilet and went to check on his dog which was barking in the other room and when he returned to the bathroom E.A. had his back against the back wall of the shower with his eyes closed. The defendant continued that he picked E.A. up and that E.A.'s body was "lifeless" but that he could hear E.A. breathing. (Id. at 2.) The defendant said that was when he brought E.A. to the neighbor's apartment, where the neighbor attempted C.P.R. on E.A.

The conversation continued for the next forty minutes. At that time, Detective Durden told the defendant that they were going to take a quick break to "check stuff out" and that he was going to contact his partner who was with E.A. (Id. at 23.) The defendant then asked, "Is it all right if I use my phone?" (Id.) Detective Durden responded "You wanna just hold off on that?" (Id.) The defendant stated that he wanted to call his girlfriend. Detective Durden replied, "[w]ell, she's at the hospital right now, speaking to a detective, so just give us literally 2 minutes and we'll come back in." (Id.) The detectives then left the room. The defendant retained use of his phone and is seen using it while the detectives are out of the room (State's Ex. 8 at 42–45.) During this time, the defendant also becomes visibly upset and can be seen shaking and heard sniffling. The detectives returned nearly 8 minutes later.

Detective Durden then resumed the interview asking what the defendant learned about E.A.'s bruising from his girlfriend. The defendant and detectives continued to speak in a generally cordial and reasoned manner. After the defendant revealed more

details, Detective Durden stated to the defendant that "it seems like there's still like, you're, you're giving me a little bit more, and a little bit more everytime we talk." (State's Ex. 1 at 24.) The defendant continued talking with the detectives. Occasionally, the defendant became upset, stating, for example: "I just feel like even if I'm not being accused of something, I feel like I did something wrong, because I wasn't paying attention." (Id. at 28.) The detectives continued to speak to the defendant in a calming tone. The defendant regained his composure and continued to answer the detective's questions. The interview lasted approximately 15 more minutes, until the detectives conclude the interview at approximately 7:02 p.m.

B. Second Interview

Despite the interview being concluded, the defendant remained in the interview room. At approximately 7:16 p.m., Detectives Durden and Rogers returned to the room to interview the defendant for a second time. Detective Durden again reminded the defendant that the interview was being recorded. He again asked if the defendant was there voluntarily, to which again the defendant answered affirmatively. Detective Durden reminded the defendant that the door was closed for privacy and that if he needed to go to the bathroom or wanted to stop talking at any point to just say so and the interview would stop. Finally, Detective Durden asked if the defendant was "all set if we continue talking with you." (State's Ex. 2 at 1.) To which the defendant agreed.

Detective Durden then informed the defendant that he just got off the phone with a detective at the hospital and asked if the defendant had spoken with his girlfriend. The defendant said that he hadn't spoken to her and didn't have any information. Detective Durden then informed the defendant that E.A. was being transferred to

Massachusetts General Hospital because he has first degree burns and second degree burns. The defendant became visibly upset and began crying. Detective Durden informed the defendant that E.A. was acting lethargic. As the defendant continued to cry, the detectives offered him some tissues and reassured the defendant that E.A. was going to be ok and that E.A. was "conscious and alert" "[s]o [the defendant] do[es]n't have to worry about that." (Id. at 2.) The defendant regained his composure and began talking with the detectives again. The interview lasted approximately another eleven minutes. During that time, the detectives asked the defendant about inconsistencies in the defendant's recounting of the events and how those events compared to reports that they were receiving from the hospital, including if E.A. ever had a shirt over his head, if E.A. was wearing a diaper while in the shower, and the amount of time the defendant left E.A. alone after flushing the toilet. Despite asking about these inconsistencies, the conversation remained cordial and the defendant continued to provide information about the evening's events. This second interview ended at approximately 7:33 p.m. Detective Durden then escorted the defendant to the lobby and offered to arrange a ride for the defendant. The defendant declined and left the station by foot.

C. Third Interview

The next day, on September 16th, Detective Durden contacted the defendant and asked if he would be willing to come into the station again. The defendant agreed and stated that he would need some time to arrange a ride. The defendant was able to obtain a ride from a friend and arrived at the police station at approximately 2:10 p.m. The defendant again entered through the front lobby and signed in as a visitor at the reception desk. The defendant received a visitor's badge and was escorted to the

interview room. The defendant was, similar to the previous evening, seated in the chair furthest from the door and waited for a short time before Detective Durden and Detective Miller entered the interview room.

Detective Durden again began the interview by introducing himself and Detective Miller. Detective Durden then asked the defendant if he came to the station voluntarily, which the defendant answered affirmatively. Then Detective Durden stated, "You know that you can leave at any time you want, right?" (State's Ex. 3 at 1.) The defendant again said yes. Detective Durden reminded the defendant that the door was closed for their privacy and that "[i]f at any point in time you feel uncomfortable and you don't want to talk to me, you need more water, you need to go to the bathroom or anything like that just let me know and we'll be more than happy to accommodate that, ok?" (Id.) The defendant agreed. Detective Durden then asked if the defendant had any questions before the interview began. The defendant responded that he didn't have any questions.

Detective Durden then began questioning the defendant stating "[o]bviously we're putting a case together" and asking the defendant about his knowledge of how E.A. progressed since the previous interview. (Id.) In response, the defendant informed the detectives that he had spoken with his girlfriend and learned that the doctors found "a significant amount of THC . . . in the baby's system." (Id. at 2.) The defendant then admitted that he had smoked marijuana with his girlfriend earlier in the day yesterday. After the defendant began to talk about the toilet flushing again, Detective Durden interrupted him. Detective Durden told the defendant that his story is not adding up. Detective Durden continued "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 . . . you've been awesome with me." (Id. at 4.) The defendant responded that he had talked with his mom and informed her that "I was getting the vibe that like, I felt like I was, you know, like being looked at like I'm a fucking baby killer, or whatever." (Id.) The defendant continued for another minute or so, again stating, "I feel like I'm being judged in the sense that I'm like some sort of monster, you know what I mean?" (Id. at 4–5.) Detective Durden responded, that "we don't think you're a monster." (Id. at 5.) He continued, "we have facts that the doctor's giving us, stuff that we can't deny, that's facts . . . [a]nd your story of what has happened is not [adding up]." (Id.) After a few minutes, the defendant admitted to smoking a joint in the bathroom while giving E.A. the shower. The conversation continued for several more minutes. At approximately 2:49, Detective Miller spoke for the first time, telling the defendant:

> Be honest about what happened. That's where you're at right now. 'Cause we know that, like Detective Durden was saying . . . . The best specialists in the world tell us that your story that you said yesterday is not accurate, ok? . . . Hold on. Hear me out. It's not accurate. 98% of the people that we see in this room are good quality people trying to do the right thing. Tough love, train their children, or children that are in their life, how to do the right thing. 2% that we see in this very room are monsters. Absolute trash, terrible, terrible people. Right? You don't look like a 2%. Just from me sitting here talking. You don't look like a 2%. But when we have the, the most world renowned doctors in the world saying he's . . . lying to you. He's not . . . being truthful, right? That, that makes you look like that 2%, which is terrible. And you're not that 2%, right? We know what you said yesterday and what you're saying here today is not accurate. Yeah, you might not have smoked weed and puffed it in his face. Yes it was probably the fish bowl, maybe that's why, but there's more. We ask questions in this room that we know the answers to, right? We're just gauging, are, is he a monster, or is he the 98%? . . .

(Id. at 14.) After a short exchange, Detective Miller continued:

> Ok. What did you do when he tried to get out of the bathtub? And this, this, again, this is where that judgement on you as a person comes in, right?

> Because we, we know your story yesterday was not, not accurate, right? And you know it wasn't accurate.

(Id. at 15.) The interrogation moved onto other topics for a few minutes before again Detective Miller asked, "[s]o he doesn't try to get out of the bathtub at any point?" The defendant then responded, "he did try to get out of the bathroom. He, he does this mommy thing, pick me up, pick me up, and I literally just, nope. Stay right there guy, you gotta stay in the shower." (Id. at 20.) The defendant then admitted to holding E.A. in the bathtub; however the defendant continued to deny that the water was hot. A few minutes later, Detective Durden raised his voice stating:

> So you're 28 years old. At what point do you stop lying to yourself? Because we're coming here, there, you're, you told me two different stories just today alone on certain things you're forgetting things and you're telling me other parts of things, the story that's just not making sense to me right now. You understand what I'm saying? You, you're, at what point to you man up and say I screwed up. You keep saying . . . [the defendant begins to speak] . . . Stop. Let me finish. You keep saying, I wasn't thinking of it. I wasn't thinking of it. At what point do you just say, you know what, I'm gonna man up and I'm gonna own what I did and you're copping out. You keep saying I wasn't thinking of it. I wasn't thinking of it. People can't go around in this world, you're 28 years old saying I wasn't thinking of it. Your kid goes and kills someone. Sorry. I didn't think of it. Is that acceptable?

(Id. at 26.) The interview lasted for twenty more minutes with the detectives asking if the defendant's recollection and statements will match with what the victim's older brother will testify to. The detectives concluded the interview by asking where they will be able to find the defendant after he leaves the station. Shortly after the interview ended, the defendant was arrested pursuant to an arrest warrant. (State's Ex. 4.)

Analysis

The defendant now moves to suppress his statement pursuant to Part I, Article 15 of the New Hampshire Constitution and the Fifth and Fourteenth Amendments to the

United States Constitution. He first argues that he was subject to custodial interrogation without being read Miranda warnings. In response, the State asserts that the defendant was not in custody at any point during the interrogation and was thus not entitled to Miranda warnings. The defendant contends that a reasonable person in his position would have felt constraints on his freedom consistent with formal arrest. Because the defendant has "invoked the protections of the New Hampshire Constitution," the Court addresses his claims under the State Constitution, relying on federal law merely for guidance. State v. Ball, 124 N.H. 226, 231–33 (1983).

Part I, Article 15 of the New Hampshire Constitution provides that "[n]o subject shall . . . be compelled to accuse or furnish evidence against himself." N.H. CONST. pt I, art. 15. Under this provision, "[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. McKenna, 166 N.H. 671, 676 (2014) (quotation omitted); see Miranda v. Arizona, 384 U.S. 436, 441–46 (1966). Correspondingly, Miranda warnings are not required if the defendant was not subject to a custodial interrogation. State v. Carroll, 138 N.H. 687, 696 (1994); see State v. Sachdev, 171 N.H. 539, 548 (2018) ("[T]wo conditions must be met before Miranda warnings are required: (1) the suspect must be 'in custody'; and (2) he must be subject to 'interrogation.' "). Here, there is no dispute that Detective Mabry and Officer Lewis interrogated the defendant.[3] The only

[3] The State contends that the defendant was not subject to interrogation. (State's Obj. at 12.) Yet, the State also admits that "Detective Durden's questioning was investigative[.]" (Id. ¶ 33.) It appears to the Court that the State has combined its arguments regarding voluntariness and if the defendant was subject to interrogation for Miranda analysis. However, there is no question that the defendant was subject to "either express questioning or its functional equivalent" during each of the interviews. State v. Spencer, 149 N.H. 622, 625 (2003).

issue before the Court is whether the defendant was in custody when they did so.

Custody entitling a defendant to Miranda protections requires formal arrest or restraint on freedom of movement to the degree associated with formal arrest. State v. Carrier, 173 N.H. 189, 197 (2020). In the absence of formal arrest, the Court must determine whether a suspect's freedom of movement was sufficiently curtailed by considering how a reasonable person in the suspect's position would have understood the situation. State v. Marin, 172 N.H. 154, 159 (2019); see also Stansbury v. California, 511 U.S. 318, 323 (1994) (per curiam) ("[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned."). 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, including but not limited to such factors as the number of officers present, the degree to which the suspect was physically restrained, the interrogation's duration and character, and the suspect's familiarity with his surroundings. Marin, 172 N.H. at 159–60. Custody analyses, however, are rarely based upon a static set of circumstances. Id. at 160; McKenna, 166 N.H. at 677. Instead, "interrogations are fluid: what may begin as noncustodial questioning may evolve over time into custodial questioning." Carrier, 173 N.H. at 198.

Here, the Court finds that the defendant was not in custody for Miranda purposes during the first two interviews. Several factors contribute to this determination. First, 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. See Carrier, 173 N.H. at 201 (stating the absence of accusatory questions and statements weighs against custody); see also State v. Censullo, No. 2016-0270, 2017 N.H. Lexis 128, at *5–6 (June 16, 2017) (3JX) (finding that the detective maintained a respectful demeanor and did not raise her voice weighed against custody). Second, the defendant was clearly informed that he was free to terminate the conversation at the beginning of each of the interviews and stated that he was speaking with the detectives voluntarily. See State v. Jennings, 155 N.H. 768, 775 (2007) (A "person who is clearly advised that he is free to leave is ordinarily not in custody"). Third, Detectives Durden and Rogers were in plain clothes and during the entirety of the interviews did not display their weapons. See State v. Locke, 149 N.H. 1, 4, 6 (2002). Fourth, the defendant entered through the lobby and was signed in as a visitor. See Sachdev, 171 N.H. at 549. Fifth, the defendant had access to his cell phone during both interviews.[4] Cf. Carrier, 173 N.H. at 200 ("[S]eizure of the defendant's phone is an especially weighty factor" in favor of custody). Finally, at no time did the defendant ask to leave the interview room or to terminate the interrogation, nor did the defendant make any indications that he wanted to leave or terminate the interrogation. See Sachdev, 171 N.H. at 551.

The Court does recognize that several factors are neutral or weigh in favor of a finding of custody during the first two interviews. First, "the degree to which the defendant's movements were restrained" suggests he was in custody. Marin, 172 N.H. at 162. Here, "although the defendant may not have been placed in handcuffs or any

[4] Although Detective Durden asked the defendant not to call his girlfriend when the detectives stepped out of the interview room during the first interview, (see State's Ex. 1 at 23), the defendant retained his cell phone and is seen using it during this time.

similar device, he was restrained from early on in the encounter," based on the conditions of the interview room. Id. The interview room contained a square table, which was pushed up against a wall, and three chairs placed on the three open sides of the table. The interview room was barely large enough to fit all three individuals in their chairs around the table. The room had no window. The defendant was sat in the chair furthest from the door. Detective Rogers sat across from the defendant and Detective Durden sat at the open side of the table between the defendant and the door. When all three individuals were in the room, space was extremely limited. The defendant could not have left the room unless Detective Durden stood up, pushed his chair under the table, and moved out of the way. Furthermore, there was no evidence that during his time at the police station, the defendant was actually free to move about the station. Jennings, 155 N.H. at 774. Next, the duration of the interrogation weighs in favor of custody. The two interviews, which occurred with only a short break between them, lasted nearly two hours combined. See Jennings, 155 N.H. at 774–75 (interrogation length of "nearly two hours in the closed-door, confined atmosphere of the interview room" weighed in favor of custody); cf. Sachdev, 171 N.H. at 551 (two hour interaction between the defendant and detectives weighed against finding custody due to substantive questioning lasting less than twenty minutes). Finally, although the defendant agreed to speak with the officers voluntarily, the police initiated the interview and provided the defendant with a ride to the police station. See Sachdev, 171 N.H. at 553 (explaining that "when police initiate contact with the suspect, custody is more likely to exist").

Thus, although some factors weigh in favor of finding custody during the first two interviews, after considering the totality of the circumstances of the encounters, the Court concludes that a reasonable person in the defendant's position would not have believed himself to be in custody. Additionally, the Court finds that none of the defendant's statements during the first two interviews were coerced or involuntary. See State v. Wood, 128 N.H. 739, 741 (1986) ("To prove that a statement is voluntary, the State must show that the statement was the product of an essentially free and unconstrained choice and was not extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of any improper influence." (cleaned up)).

Alternatively, several circumstances surrounding the defendant's third interview at the Nashua police station weigh in favor of finding that he was in custody. As previously discussed, based on the conditions of the interview room, "although the defendant may not have been placed in handcuffs or any similar device, he was restrained from early on in the encounter." Carrier, 173 N.H. at 199. Additionally, again Detective Durden initiated contact with the defendant and suggested that the defendant return to the police station. See Sachdev, 171 N.H. at 553.

Next, the Court considers the "duration and character" of the third interview. Marin, 172 N.H. at 160. Although "in general, brief interrogations weigh against a finding of custody, the length of questioning can be a relatively undeterminative factor in the analysis of custody." Sachdev, 171 N.H. at 551. Here, the defendant was questioned over a period of approximately an hour and a half after being subject to nearly two hours of questioning the previous day. See Jennings, 155 N.H. at 774–75

(interrogation length of "nearly two hours in the closed-door, confined atmosphere of the interview room" weighed in favor of custody); see also, e.g., United States v. Mittel-Carey, 493 F.3d 36, 40 (1st Cir. 2007) (interrogation length of ninety minutes to two hours weighed in favor of custody); cf. Sachdev, 171 N.H. at 551 (two hour interaction between the defendant and detectives weighed against finding custody due to substantive questioning lasting less than twenty minutes). Thus, the duration of the police interrogation in this case suggests that the defendant was in custody.

"In evaluating the character of the interrogation, [the Court] consider[s] the presence or absence of both accusatory questions and accusatory statements." Carrier, 173 N.H. at 201. "Accusatory questioning weighs in favor of custody because such questioning often conveys that the questioning officer believes the defendant is guilty and that he . . . intends to arrest." Id. This stands in contrast to general questioning which does not weigh in favor of custody. Id. "In addition to accusatory questioning, the presence or absence of accusatory statements is relevant to [the Court's] 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).

Unlike the first two interviews, during the third interview, the nature of the questions was increasingly accusatory. Detective Durden started by telling the defendant that "[o]bviously we're putting a case together." (State's Ex. 3 at 1.) After a short exchange with the defendant, Detective Durden told the defendant, "there's more to the story than what happened yesterday that you told me and that's kind of why we're having this conversation right now." (Id. at 2.) Detective Durden continued, "So your

story's not adding up right now. So that's why we're having this conversation, because there's a lot of unanswered questions and I have a theory what I think, and I'm fairly certain I know what happened and you're story is not jiving with that, so it looks like you're trying to be deceitful[.]" (Id. at 4.) Detective Miller further pressed upon the defendant "Be honest about what happened. That's where you're at right now. . . . The best specialists in the world tell us that your story that you said yesterday is not accurate, ok. . . . We know what you said yesterday and what you're saying here today is not accurate." (Id. at 14.) Detective Miller again stated later, "when I have doctors and everything telling me, and my own medical knowledge that this story's not accurate, its not. That makes me think you're more of a monster than you just being honest about it . . . ." (Id. at 21.) Finally, Detective Durden stated to the defendant, "So you're 28 years old. At what point do you stop lying to yourself? . . . At what point do you just say, you know what, I'm gonna man up and I'm gonna own what I did and you're copping out." (Id. at 26.)

As these statements make clear, Detectives Durden's and Miller's "questions were premised upon the assumption that the defendant had committed the crime, and would have communicated that assumption to a reasonable person in the defendant's position." Carrier, 173 N.H. at 202. "In other words, 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." Id. (cleaned up). "Coupled with the control exercised by the police from the beginning of the encounter, this clear indication that the police believed the defendant to be guilty . . . [and] would have signaled to a reasonable person that his freedom of movement was curtailed to the degree

associated with formal arrest." Id.; see also Jennings, 155 N.H. at 774.

In reviewing the ultimate determination of custody, the Court acknowledges that some facts weigh against finding custody for the third interview. First, Detectives Durden and Miller were in plain clothes and were not displaying their weapons. See Locke, 149 N.H. at 4, 6. Second, the defendant was driven by a friend to the police station and entered through the lobby. Sachdev, 171 N.H. at 549. Third, the defendant was signed in as a visitor. Id. Fourth, the defendant had access to his cell phone during the entire interrogation. Cf. Carrier, 173 N.H. at 200 ("[S]eizure of the defendant's phone is an especially weighty factor" in favor of custody). Finally, at no time did the defendant ask to leave the interview room or to terminate the interrogation, nor did the defendant make any indications that he wanted to leave or terminate the interrogation. Id. at 551.

Thus, although some factors weigh against finding custody, after considering the totality of the circumstances of the third interview, the Court concludes that a reasonable person in the defendant's position would have believed himself to be in custody. Therefore, the Court finds that the defendant was in custody for Miranda purposes during the third interview. See id. Accordingly, the defendant's motion to suppress is GRANTED. In light of the foregoing, the Court need not address the defendant's voluntariness argument with regards to the third interview.

Conclusion

In conclusion, the Court finds that the defendant was not in custody for Miranda purposes during the first two interviews at the Nashua police station. Additionally, the Court finds that the defendant's statements during these interviews were made

voluntarily. Accordingly, the defendant's motion to suppress is DENIED as to any statements made during the first two interviews. However, the Court finds, after considering the totality of the circumstances of the third interview, that a reasonable person in the defendant's position would have believed himself to be in custody, and he did not have the benefit of Miranda warnings. Accordingly, the defendant's motion to suppress is GRANTED as to any statements made during the third interview.

So ordered.

Date: July 9, 2021

Hon. Jacalyn A. Colburn

Hon. Jacalyn A. Colburn,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
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