

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-1259

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

JAMES EVERETT MARCUM,

Defendant Below, Petitioner.

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

I.

QUESTIONS PRESENTED

1. The circuit court erred in the manner it conducted the suppression hearing, shifting the burden to the Defendant, requiring him to put on evidence first in order to make a showing that would trigger the State's rebuttal of the Defendant's suppression grounds.
2. The circuit court erred in finding that the Defendant's statement to the police was voluntarily given, where the Defendant was interviewed by the police after midnight in a hospital room where he had undergone surgery that same day and was on an intravenous pain medication drip, as well as taking oral pain medication.

II.

STATEMENT OF THE CASE

The facts necessary here are those related to the Petitioner's statement and the ensuing proceedings concerning the Petitioner's Motion to Suppress.

The Petitioner was charged with the murder of James Ward. App. vol. I at 8. On the evening of December 9-10, 2009, as part of the investigation leading to the indictment, West Virginia State

Trooper R. J. Drake took a statement from the Petitioner, App. vol. II (Pet'r's Statement) at 1-15, while the Petitioner was in Three Rivers Medical Center, a hospital located in Louisa, Kentucky. App. vol. II (Pretrial Mot. Hr'g, Oct. 4, 2010) at 38. The interview lasted about half of an hour. *Id.* at 51. The interview was video recorded. *Id.* at 40, 44. Before the videotaping of the interview commenced, Trooper Drake informed the Petitioner that he (Drake) was outside his jurisdiction, that he was not arresting the Petitioner, that he was not fully aware of what was going on (although he knew Jim Ward was dead), that criminal charges may be pending, and that the Petitioner might be arrested in the near future for murder. *Id.* at 47-48. After Trooper Drake confirmed the Petitioner could read and understand english, Trooper Drake told the Petitioner the following:

Q. Tpr. Drake: I'm going to read you your Miranda Rights. Before we ask you any questions you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions and have him or her with you during questioning. If you are under arrest and can not afford a lawyer the court will appoint one for you before any questioning at your request. If you decide to answer questions now without a lawyer present you still have a right to stop answering anytime. You also have the right to stop answering at anytime to talk to a lawyer. Do you understand what I just read to you?

A. Marcum: Yea.

App. vol. II (Pet'r's statement) at 1-2. Trooper Drake then gave the Petitioner a copy of some kind of *Miranda* form and asked the Petitioner to sign and initial it as an indication that he did have his rights read to him. *Id.* at 2. This form stated that the Petitioner was under arrest for murder, App. vol. II (Pretrial Mot. Hr'g, Oct. 4, 2012) at 32, but the Petitioner denies having seen that statement in the waiver. *Id.*

The Petitioner filed a Motion to Suppress his statement, wherein he wrote that he was not under arrest when he made his statement, but that he was under the influence of medications that rendered him incapable of voluntarily and knowingly waiving his rights. App. vol. I at 89.

At a pretrial hearing on motions, the circuit court addressed the suppression motion. App. vol. II (Pretrial Mot. Hr'g, Oct. 4, 2010) at 13. The Petitioner's counsel advised the circuit court that "it's the state's burden to establish that the statement in this case . . . was a knowing and voluntary waiver of [the Petitioner's] constitutional rights. As your Honor is aware . . . the defendant does not have a burden to establish a knowing and voluntary waiver." *Id.* In reply, the circuit court responded "I mean, I think you have to raise the issue, what it is. I think you have to put something on, whether it's -- you have to make the issue -- raise the issue. I don't think you have the burden, but I do think you have to raise the which issues we're talking about. Is it knowing? Is it voluntary? Is it both? Those issues." *Id.* In reply, the Petitioner's counsel stated "Okay. That's fair." *Id.* at 14.

The Petitioner's counsel denied that the State Police engaged in any coercion against the Petitioner. *Id.* at 16, 17. The circuit court then said "I think he has to say, I think, that, 'I don't'-- 'I didn't know what these rights were,' from testimony." *Id.* at 18. It further said "I agree with the state that I think he has to testify and say -- and agree with this 'Yes, nobody coerced me, and I did not know what I was signing,' or, 'I do not recall giving the statement.'" *Id.* The Petitioner's counsel then replied "Right. And we can take --" to which the circuit court responded "Yes. I think you have to do it on that issue. I don't think you have to give -- the medical stuff, I think, is fine. I'll take that as proffer, unless the state has some objection." *Id.* After the state voiced no objection, Petitioner's counsel then called the Petitioner as a witness. *Id.* at 18-19.

The Petitioner testified that he was in pain when he gave his statement, *id.* at 21, he remembered being informed of his *Miranda* rights, *id.* at 22, and signing the *Miranda* form. *Id.* The Petitioner testified that he was not threatened by the police. *Id.* at 23.

Once the Petitioner was done testifying, the State called Trooper Drake. *Id.* at 37. Trooper Drake testified that although the Petitioner appeared to be in pain, the Petitioner appeared “coherent . . . conscious . . . sensible” *id.* at 39, and “in good mind” to him. *Id.* at 46. The Petitioner did not “doze off, or nod off or lose his consciousness[.]” *Id.* at 40. Based upon his questions and the Petitioner’s responses, Trooper Drake concluded the Petitioner understood the questions asked of him and responded in an appropriate manner. *Id.* at 43. Trooper Drake denied threatening the Petitioner. *Id.*

The circuit court, upon hearing the testimony and viewing the videotaped statement, found the statement admissible, concluding that the Petitioner was read his *Miranda* rights and that, even though the Petitioner was receiving pain medication, the Petitioner recalled making his statement and signing the *Miranda* form. App. vol. I at 101-02. The circuit court further found that the Petitioner did not allege he was coerced into making his statement and the Petitioner did not assert to Trooper Drake that he did not understand his rights, as well as finding both Trooper Drake’s testimony and the videotaped statement itself confirmed that the Petitioner understood the questions asked of him and his answers. *Id.* at 102. The circuit court therefore concluded the statement was admissible, *id.*, and the statement was played for the jury at trial. App. vol. II (Trial Tr. July 27, 2011) at 11.

During the jury instruction conference, the Petitioner offered a *State v. Vance*, 162 W. Va. 467, 250 S.E.2d 146 (1978).¹ During the discussion, the circuit court stated “Now, I agree with you my understanding of the law was wrong. I don’t know that you would have had to put him on, and I would have given this instruction whether you would have put him on or not.” App. vol. II (Trial Tr., July 29, 2011) at 188-89. The jury returned a verdict of second degree murder against the Petitioner for killing James Ward. App. vol. I at 311; App. vol. II (Trial Tr., July 29, 2011) at 257-58.

III.

SUMMARY OF ARGUMENT

1. The Petitioner contends that the circuit court erred in requiring him to produce his evidence first at the suppression hearing. The Petitioner never objected before the circuit court that this was an improper procedure and, in fact, when the circuit court stated that he had to raise the issue, counsel responded “Okay. That’s fair.” The issue is waived in the pure sense of the term precluding even plain error review.

Further, while the State has the burden of proving a knowing and voluntary waiver of the *Miranda* rights, it is the Petitioner who carries the burden of proving that he was entitled to *Miranda* rights, *vel non*, i.e., he must prove that he was both in custody and under interrogation at the time he gave his statement. Since he carried that burden, it was not error to direct him to go forward with the evidence.

¹In Syllabus Point 4 of *Vance*, this Court held “We adopt the ‘Massachusetts’ or ‘humane’ rule whereby the jury can consider the voluntariness of the confession, and we approve of an instruction telling the jury to disregard the confession unless it finds that the State has proved by a preponderance of the evidence it was made voluntarily.”

Finally, any error is harmless. The State had in its possession before the suppression hearing even began (1) a *Miranda* form signed by the Petitioner confirming he had been read his rights, and, (2) a videotape of the Petitioner being read his rights and stating on that videotape he understood his rights. The videotape showed the Petitioner was lucid and able to fully answer and respond to questions, and never showed the Petitioner asked to stop the questioning. Had the State put this evidence on first, the Petitioner would have been compelled to testify to rebut it. “[S]ince the State had evidence of the statement and its voluntariness, the presentation of this evidence first would have made it imperative that appellant testify in order to make an issue as to its admissibility, thus affording the Solicitor the same opportunity to observe appellant as a witness.” *State v. Scott*, 237 S.E.2d 886, 890 (S.C. 1977), *overruled on other grounds by State v. Foust*, 479 S.E.2d 50 (S.C. 1996).

2. The State proved by a preponderance of the evidence the statement was admissible. Here, the State proved the Petitioner was informed of his *Miranda* rights, that he acknowledged that he understood them, that there was no coercion, and that the Petitioner at no point ever invoked his right to remain silent, and never asked the interview to stop. “Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused’s uncoerced statement establishes an implied waiver of the right to remain silent.” *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2262 (2010).

IV.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary.

V.

ARGUMENT

A. The Petitioner has waived in the pure sense of the term the issue of whether the circuit court erred in sequencing the order of evidence at the suppression hearing. The Petitioner’s Motion to Suppress dealt solely with his Fifth Amendment rights and, as such, he carried the burden to prove that *Miranda* warnings were legally necessary, i.e., that he was in custody and interrogated. Finally, any error is harmless.

1. *The Petitioner has waived in the pure sense of the term the issue of whether the circuit court erred in sequencing the order of evidence at the suppression hearing.*

The Petitioner has waived any issue relating to how the suppression hearing was conducted. At the pretrial admissibility hearing concerning the Petitioner’s confession, the Petitioner informed the circuit court “As Your Honor is aware, and I think the case law is fairly clear, the defendant does not have a burden to establish knowing and voluntary waiver.” App. vol. II (Pretrial Mot. Hr’g, Oct. 4, 2010) at 13. The circuit court responded “I mean, I think you have to raise the issue, what it is. I think you have to put something on, whether it’s -- you have to make the issue -- raise the issue. I don’t think you have the burden, but I do think you have to raise which issues you’re talking about. Is it knowing? Is it voluntary? Is it both? Those issues.” *Id.* In reply, the Petitioner’s counsel answered “Okay. That’s fair.” *Id.* at 14. Additionally, when the circuit court stated to the Petitioner’s counsel that “I think you have to do it on that issue[,]” *id.* at 18, the Petitioner’s counsel responded “[t]hen let’s swear . . . Mr. Marcum.” *Id.* at 18-19.

This Court has held:

When a litigant deems himself or herself aggrieved by what he or she considers to be an important occurrence in the course of a trial or an erroneous ruling by a trial court, he or she ordinarily must object then and there or forfeit any right to complain at a later time. The pedigree for this rule is of ancient vintage, and it is premised on the notion that calling an error to the trial court’s attention affords an opportunity to correct the problem before irreparable harm occurs.

State v. LaRock, 196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996). A procedural bar is not iron clad, “[t]he ‘plain error’ doctrine grants appellate courts, in the interest of justice, the authority to notice error to which no objection has been made.” *State v. Miller*, 194 W. Va. 3, 18, 459 S.E.2d 114, 129 (1995). “To trigger application of the ‘plain error’ doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and, (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” *Id.* at Syl. Pt. 7. “Under . . . ‘plain error’ . . . , ‘waiver’ of error must be distinguished from ‘forfeiture’ of a right. A deviation from a rule of law is error unless there is a waiver. When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined.” *Id.* at Syl. Pt. 8, in part.

Here, when told by the circuit court that “I mean, I think you have to raise the issue, what it is. I think you have to put something on, whether it’s -- you have to make the issue -- raise the issue. I don’t think you have the burden, but I do think you have to raise which issues you’re talking about. Is it knowing? Is it voluntary? Is it both? Those issues[,]” App. vol. II (Pretrial Mot. Hr’g, Oct. 4, 2010) at 13, the Petitioner’s counsel answered, “Okay. That’s fair.” *Id.* at 14. Additionally, when the circuit court stated to the Petitioner’s counsel that “I think [the Petitioner] has to say, I think, that ‘I don’t’ -- or ‘I didn’t know what those rights were,’ from testimony” and that “I agree with the State that I think he has to testify[,]” *id.* at 18, the Petitioner’s counsel responded “Right.” *Id.* And finally, the Petitioner’s counsel called the Petitioner to testify. *Id.* at 18-19. “The failure of counsel to object to the trial court’s ruling in the case *sub judice* does not necessitate a plain error analysis insofar as counsel not only failed to object to, but affirmatively agreed with, the trial court’s

decision.” *State v. Whittaker*, 221 W. Va. 117, 132 n.18, 650 S.E.2d 216, 231 n.18 (2007) (*per curiam*). See also *State v. Donley*, 216 W. Va. 368, 374, 607 S.E.2d 474, 480 (2004). (“The existence of such affirmative waiver and intentional relinquishment of the right to object to the court’s findings precludes this Court from utilizing the plain error doctrine to reverse on this issue.”)

Furthermore, the circuit court committed no error here.

2. *The Petitioner’s Motion to Suppress dealt solely with his Fifth Amendment rights and, as such, he carried the burden to demonstrate that Miranda warnings were legally unnecessary for the statement to be admissible.*

The issue of whether the circuit court correctly required the Petitioner to present his evidence first is reviewed only for abuse of discretion. “The order of evidence and the time of its introduction are, of course, matters within the circuit court’s discretion.” *State v. Nixon*, 178 W. Va. 338, 342, 359 S.E.2d 566, 570 (1987). Indeed, “[t]he trial court has traditionally exercised the broadest sort of discretion in controlling the order of proof at trial[.]” *Huddleston v. United States*, 485 U.S. 681, 690 (1988). Thus, the “trial court . . . to a large extent, has full control of the order in which evidence is to be introduced.” *State v. Fischer*, 158 W. Va. 72, 72, 211 S.E.2d 666, 667 (1974). See also *State v. Chaffin*, 156 W. Va. 264, 267-68, 192 S.E.2d 728, 730-31 (1972) (“The order in which evidence is introduced and the time of its introduction is a matter which rests in the sound discretion of the trial court and the exercise of this discretion will not be disturbed unless there has been a flagrant abuse of it.”); Syl. Pt. 12, *State v. Sheppard*, 49 W. Va. 582, 39 S.E. 676 (1901) (“The order of introducing testimony is in the sound discretion of the trial court, and it is not error to permit the introduction of evidence out of its regular order, unless it appears that the prisoner was, or may have been, prejudiced thereby.”). The circuit court did not abuse its discretion here.

Confessions may be rendered inadmissible as violative of either the 14th Amendment's due process clause, *Jackson v. Denno*, 378 U.S. 368, 376 (1964) ("It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession."), or the 5th Amendment's self-incrimination clause. *New York v. Quarles*, 467 U.S. 649, 660 (1984) (O'Connor, J., concurring in part and dissenting in part) ("In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the Court held unconstitutional, because inherently compelled, the admission of statements derived from in-custody questioning not preceded by an explanation of the privilege against self-incrimination and the consequences of forgoing it.")² Here, the Petitioner's Motion to Suppress, App. vol. I at 89, dealt only with the Fifth Amendment's self-incrimination clause and not the 14th Amendment's due process clause. Therefore, only the *Miranda* issue is properly before the Court. While the State bears the burden

²While "[t]he requirement that *Miranda* warnings be given does not, of course, dispense with the voluntariness inquiry[,] '[c]ases in which a defendant can make a colorable argument that a self-incriminating statement was "compelled" despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare.'" *Dickerson v. United States*, 530 U.S. 428, 444 (2000) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 433 (1984)). Of course, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment[.]" *State v. Honaker*, 193 W. Va. 51, 58, 454 S.E.2d 96, 103 (1994) (quoting *Colorado v. Connelly*, 479 U.S. 157, 167 (1986)), as well as *Miranda. Colorado*, 479 U.S. at 169-70 ("There is obviously no reason to require more in the way of a 'voluntariness' inquiry in the *Miranda* waiver context than in the Fourteenth Amendment confession context. The sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion."). In front of the circuit court, the Petitioner disavowed any such coercive activity by the State Police. App. vol. II (Pretrial Mot. Hr'g, Oct. 4, 2010) at 16 (statement of defense counsel) ("I'm not saying the Trooper did anything wrong, because there is case law that talks about coercion. So, there were no threats or any allegations that there were any threats."); *id.* at 17 ("THE COURT: . . . you're not raising the issue of its voluntariness? [DEFENSE COUNSEL]: There was no coercion."). The Petitioner has waived any error relating to due process or self-incrimination voluntariness.

of proving a voluntary and knowing waiver of *Miranda* rights, it is the Petitioner's burden to prove *Miranda* rights were even required. As such, the circuit court did not err in directing the Petitioner to go forward with the evidence.

The admissibility of a statement is contingent on *Miranda* warnings (i.e., the State must prove by a preponderance of the evidence that the Defendant knowingly and voluntarily waived the right to remain silent) only when *Miranda* warnings are required. As the United States Supreme Court has held, “if a suspect makes a statement *during custodial* interrogation, the burden is on the Government to show, as a ‘prerequisite[e]’ to the statement’s admissibility as evidence in the Government’s case in chief, that the defendant ‘voluntarily, knowingly and intelligently’ waived his rights.” *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2401 (2011) (citations omitted) (emphasis added). “Thus, before a defendant can claim the benefit of *Miranda* warnings, the defendant must establish two things: (1) custody; and, (2) interrogation.” *State v. Thomas*, 33 A.3d 494, 506 (Md. Ct. App. 2011). In short, it is the *Petitioner’s* burden to prove that *Miranda* warnings are required and “[t]he mere filing of a motion to suppress does not thrust a burden on the State to show compliance with *Miranda* . . . unless and until the defendant proves that the statements he wishes to exclude were the product of custodial interrogation. Thus, the State has no burden at all unless “the record as a whole clearly establishe[s]” that the defendant’s statement was the product of custodial interrogation by an agent for law enforcement. It is the defendant’s initial burden to establish those facts on the record.” *Herrera v. State* 241 S.W.3d 520, 526 (Tex. Ct. Crim. App. 2007) (footnote omitted). *See also United States v. Smith*, No. 5:12-cr-52, 2012 WL 5187922, at *4 (D. Vt. Oct. 18, 2012) (“Courts generally hold that a criminal defendant bears

the burden of establishing that he or she was subjected to custodial interrogation.”); *People v. Colon*, 784 N.Y.S.2d 316, 323 (Sup. Ct. 2004) (“Those [federal] courts which have considered the issue have uniformly placed the burden to prove custody on the defendant.”); *Commonwealth v. Mejia*, 961 N.E.2d 72, 79 (Mass. 2012) (“The defendant bears the burden of proving that any interrogation was custodial.”); *State v. Pinder*, 736 A.2d 857, 873 (Conn. 1999) (“The defendant bears the burden of proving custodial interrogation.”); *State v. Pontbriand*, 878 A.2d 227, 230 (Vt. 2005) (“A defendant seeking to suppress statements under this rule has the burden of proving that he or she was in police custody when the incriminating statements were made.”); *State v. Munoz*, 233 P.3d 52, 60 (Idaho 2010) (“Munoz had the burden of proving that at the time he was questioned, he was in custody for the purposes of *Miranda*.”); *Commonwealth v. Butcher*, No. 0314–12–3, 2012 WL 2730024 n.1 (Va. Ct. App. July 10, 2012) (collecting other cases). *But see State v. Grant* 939 A.2d 93, 100-01 (Me. 2008) (“In the context of a motion to suppress, the State bears the burden of proving, by a preponderance of the evidence, that a suspect was not in custody at the time he or she made incriminating statements.”).

Until such time as the Petitioner discharges his burden of showing *Miranda* rights were required, “the State has no burden to show a knowing, intelligent and voluntary waiver of appellant’s right to counsel or privilege against self-incrimination.” *State v. Bruske*, 288 N.W.2d 319, 322 (S.D. 1980). Therefore, since the Petitioner was obligated to show that *Miranda* warnings were required, the circuit court did not abuse its discretion in placing the onus on the Petitioner to initiate the

presentation of evidence at the hearing.³ See *Allegheny Devel. Corp. v. Barati*, 166 W. Va. 218, 223, 273 S.E.2d 384, 388 (1980) (“Inasmuch as the party having the burden of proof should usually open and close, we cannot hold that the trial judge abused his discretion in directing that Mr. Barati first introduce evidence during the trial.”).

3. *Any error is harmless.*

West Virginia Rule of Criminal Procedure 52(a) provides “Harmless Error. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.” Any error here is harmless. “A judgment will not be reversed because of an error of the court in directing as to the order in which testimony shall be introduced, unless it clearly appears that the complaining party has been injured by what was done.” *Clark v. Fredericks*, 105 U.S. 4, 5 (1881). Here, there was no prejudice.

First, the circuit court was actually overly solicitous of the Petitioner’s rights in affording him a hearing because the Petitioner’s own Motion to Suppress contains an admission that he was not under arrest— “Admittedly, Mr. Marcum was not under arrest at the time he made the statement[.]” App. vol. I at 89.

³Whether or not the circuit court was correct in its reasons in requiring the Petitioner to go first at the hearing, and whether or not the circuit court subsequently believed it made an error in this regard, App. vol. II (Trial Tr., July 29, 2011) at 188, see Pet’r’s Br. at 18, is beside the point as this Court has “previously contemplated in a myriad of contexts, ‘[it] may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment.’” *State v. Payne*, 225 W. Va. 602, 611, 694 S.E.2d 935, 944 (2010) (quoting Syl. Pt. 3, *Barnett v. Wolfolk*, 149 W. Va. 246, 140 S.E.2d 466 (1965)). See also *State ex rel. Dandy v. Thompson*, 148 W. Va. 263, 274, 134 S.E.2d 730, 737 (1964) (the “correctness of . . . [a lower court’s] final action is the only material consideration, not the stated reasons for [the court’s] taking such action”). In asking the court to affirm an alternate ground, the State does not technically “confess error.” *State v. Boothe*, 285 N.W.2d 760, 763 n.4 (Iowa Ct. App. 1979) (“We do not regard such action of the state as a confession of error, however, as it urges that defendant’s conviction be affirmed on a somewhat different theory.”)

Second, the circuit court never placed the burden of proof on the Defendant as to waiver. Pet'r's Br. at 7-8 ("The [Circuit] Court correctly advised defense counsel that it didn't believe the Defendant had the 'burden' obviously referring to the burden of proof[.]"); App. vol. II (Pretrial Mot. Hrg, Oct. 4, 2010) at 13 (circuit court's statement—"I don't think you have the burden . . ."). Thus, even if "[t]he trial court may have confused matters by allowing the defense to put its case first, followed by the State's case . . . [,] we conclude that the trial court did not place the burden of proof on defendant at the suppression hearing and thus find no error in that regard." *People v. Wheeler*, 590 N.E.2d 552, 558 (Ill. Ct. App. 1992).

Third, the Petitioner claims prejudice because "the State . . . gained the advantage of being able to cross-examine the defendant without showing his statement was voluntary." Pet'r's Br. at 15. However, "[h]ad the State produced its evidence first, without doubt the same testimony would have been elicited." *State v. Rank*, 214 N.W.2d 136, 138 (Iowa 1974). "[S]ince the State had evidence of the statement and its voluntariness, the presentation of this evidence first would have made it imperative that appellant testify in order to make an issue as to its admissibility, thus affording the Solicitor the same opportunity to observe appellant as a witness." *State v. Scott*, 237 S.E.2d 886, 890 (S.C. 1977), *overruled on other grounds by State v. Foust*, 479 S.E.2d 50 (S.C. 1996).

The circuit court should be affirmed.

B. The circuit court did not abuse its discretion in allowing the statement into evidence.

This Court has held:

Where the question on appeal is whether a confession admitted at trial was voluntary and in compliance with *Miranda* with respect to issues of underlying or historic facts, a trial court's findings, if supported in the record, are entitled to this Court's deference. However, there is an independent appellate determination of the

ultimate question as to whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of *Miranda* and the United States and West Virginia Constitutions.

State v. Potter, 197 W. Va. 734, 741, 478 S.E.2d 742, 749 (1996).

In this case, the circuit court found that the Petitioner was read his *Miranda* rights, App. vol. I at 101, that even though the Petitioner was in the hospital receiving pain medication, he admitted that he recalled signing a *Miranda* form and giving a statement, *Id.* at 102, (*see* App. vol. II (Pretrial Mot. Hr'g, Oct. 4, 2010) at 22), that the Petitioner conceded that he was not under any form of coercion, App. vol. I at 102 (*see* App. vol. II (Pretrial Mot. Hr'g, Oct. 4, 2010) at 26; *id.* at 26 (defense counsel stating that "I'm not saying there was any coercion")), that State Trooper Drake⁴ took the statement and opined that the Petitioner appeared to understand the questions and answers in the *Miranda* form, App. vol. I at 102 (*see* App. vol. II (Pretrial Mot. Hr'g, Oct. 4, 2010) at 38-39), and upon the circuit court's review of the videotaped statement, the Petitioner appeared to understand the questions and answers given. App. vol. I at 102. Additionally, at the hearing, Trooper Drake testified that he informed the Petitioner that he (Trooper Drake) was outside of his jurisdiction and that the Petitioner was not under arrest, and that although criminal charges were pending and he might be arrested in the near future. App. vol. II at 47.

In order for the Petitioner to be entitled to *Miranda* warnings, the Petitioner must not only be interrogated, he must simultaneously be in custody. "*Miranda* rights are not triggered unless there is custody[.]" *State v. Farley*, 192 W. Va. 247, 255 n.10, 452 S.E.2d 50, 58 n.10 (1994). Here, Trooper Drake informed the Petitioner that he was not under arrest and that he (Trooper Drake) was

⁴In the circuit court's order Trooper Drake is misidentified as Trooper Ramey. App. vol. I at 102.

outside of his jurisdiction. App. vol. II at 47. Telling the Petitioner he was not under arrest, coupled with the fact that Trooper Drake was a West Virginia State Trooper acting in Kentucky, is sufficient to prevent a finding of custody. *See Farley*, 192 W. Va. at 255 n.10, 452 S.E.2d at 58 n.10 (“Telling a suspect that he/she is not under arrest and is free to leave usually is sufficient to prevent a finding of custody and will circumvent a finding of *de facto* arrest.”). And while the Petitioner was, of course, not free to leave, his curtailed freedom was not the result of police conduct but of his status as a patient in a hospital. “Generally, questioning of a patient-suspect in the hospital does not amount to custodial interrogation when the suspect is not under formal arrest[,]” *Nelson v. State*, 623 So.2d 432, 434 (Ala. Ct. Cr. App.1993). *See United States v. Jamison*, 509 F.3d 623, 625 (4th Cir. 2007) (“we find that Jamison’s freedom to terminate the interview was curtailed primarily by circumstances resulting from his injury and hospital admittance rather than by police restraint. We therefore hold that Jamison was not in custody at the time of his questioning and that *Miranda* warnings were not required.”); *United States v. Martin*, 781 F.2d 671, 673 (9th Cir. 1985) (“There are no facts to indicate law enforcement officials were in any way involved in Martin's hospitalization or did anything to extend Martin’s hospital stay and treatment. In such circumstances, the district court correctly found Martin was not ‘in custody,’ and that the procedural safeguards outlined in *Miranda* were not required before law enforcement personnel spoke with Martin.”).

Additionally, the fact that Trooper Drake told the Petitioner that there was a criminal case and an arrest might occur in the near future, does not require *Miranda* warnings. *State v. Pontbriand*, 878 A.2d 227, 233 (Vt. 2005) (“The . . . investigating officers’ statements that they knew what had happened and could not promise not to arrest him put Pontbriand on notice that the

police thought he was guilty and he might face arrest at some point in the future. These actions did not, however, constitute evidence so overwhelming that a reasonable person in Pontbriand's position would believe that he or she was no longer free to end the conversation.”). *Cf. Beckwith v. United States*, 425 U.S. 341, 346–47 (1976) (quoting *United States v. Caiello*, 420 F.2d 471, 473 (2d Cir. 1969)) (“It was the compulsive aspect of custodial interrogation, and not the strength or content of the government’s suspicions at the time the questioning was conducted, which led the Court to impose the *Miranda* requirements with regard to custodial questioning”).

Finally, the *Miranda* form did apparently state that the Petitioner was under arrest, App. vol. II at 32, but the Petitioner denies having seen that statement in the form. *Id.* In such circumstances, the Petitioner cannot rely on knowledge he has disclaimed to show custody. Because there was no custody, there was no obligation upon Trooper Drake even to read the Petitioner his *Miranda* rights. Absent custodial interrogation, a freely given statement is admissible in evidence at trial. But, if *Miranda* was triggered here, the State carried its burden to show a voluntary and knowing waiver.

A defendant can validly waive his rights under *Miranda*. “When determining whether a waiver was made, there are three considerations: were the rights given in proper form and substance; did the appellant understand them; and did he waive them?” *State v. Boxley*, 201 W. Va. 292, 297, 496 S.E.2d 242, 247 (1997). “[T]he State bears the burden of proof in a motion to suppress a statement that the defendant claims was obtained in violation of . . . *Miranda* . . . by a preponderance of the evidence.” *Colorado v. Connelly*, 479 U.S. 157, 168 (1986).

In the instant case, there is no dispute that the rights read to the Petitioner were in both form and substance consistent with *Miranda*. Compare App. vol. II (Pet’r’s Statement) at 1-2 (“Tpr. Drake: You have the right to remain silent. Anything you say can be used against you in court. You

have the right to talk to a lawyer for advice before we ask you any questions and have him or her with you during questioning. If you are under arrest and can not afford a lawyer the court will appoint one for you before any questioning at your request. If you decide to answer questions now without a lawyer present you still have the right to stop answering anytime to talk to a lawyer.”) *with Florida v. Powell*, 130 S. Ct. 1195, 1203 (2010) (“*Miranda* prescribed the following four now-familiar warnings: ‘[A suspect] must be warned prior to any questioning [1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.’”).

Additionally, the Petitioner verbally acknowledged when he gave his statement at Three Rivers Medical Center that he understood his rights:

Q. Tpr. Drake: Can you read and understand English?

A. Marcum: Yea.

Q. Tpr. Drake: I’m going to read you your Miranda Rights. *Before we ask you any questions you must understand your rights.* You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions and have him or her with you during questioning. If you are under arrest and can not afford a lawyer the court will appoint one for you before any questioning at your request. If you decide to answer questions now without a lawyer present you still have a right to stop answering anytime. You also have the right to stop answering at anytime to talk to a lawyer. *Do you understand what I just read to you?*

A. Marcum: Yea.

App. vol. II (Pet’r’s statement) at 1-2 (emphasis added). An oral acknowledgment that one understands his *Miranda* rights after having them orally read to him demonstrates knowledge of the

rights and the consequences of waiving them. *United States v. Savage*, 161 Fed. Appx. 256, 257 (4th Cir. 2006) (“Officers provided appropriate warnings under *Miranda* . . . before questioning Savage, and Savage verbally acknowledged he understood his rights.”). *See also United States v. Miggins*, 302 F.3d 384, 397 (6th Cir. 2002) (“The evidence presented at Moore’s suppression hearing established that after Officer Adams orally advised Moore of his *Miranda* rights, Moore stated that he understood them.”); *Warren v. State*, 43 A.3d 1098, 1112 (Md. Ct. App. 2012) (“After Detective Elliott read appellant his *Miranda* rights and asked appellant if he understood his rights, appellant replied ‘yes.’”); *State v. Aitken*, 2012 WL 1057954, at *10 (N.J. Super. Ct. App. Div. Mar. 30, 2012) (*per curiam*) (“[Officer] Joy orally administered *Miranda* warnings and [the defendant] orally acknowledged to Joy that he understood them. The trial judge found that the warnings were administered to and understood by Brian, and that finding is supported by the evidence adduced at the hearing.”); *United States v. Nguyen*, No. 2:05CR130-3, 2006 WL 2260104, at *10 (D. Vt. Aug. 7, 2006) (“After advising Nguyen of his *Miranda* rights, Agent Doud asked Nguyen if he understood his rights, and Nguyen nodded. Nguyen then verbally confirmed that he understood his rights.”). *Cf. United States v. Cazares*, 121 F.3d 1241, 1244 (9th Cir. 1997) (“In this case, recitation of the rights in English and supervision of the reading in Spanish, accompanied by the officer's confirming that Parra Cazares understood his rights, is sufficient to establish that Parra Cazares knew his rights.”).

Finally, the Petitioner validly waived his *Miranda* rights. While there may not be proof here of an explicit written *Miranda* waiver, Pet’r’s Br. at 18, a *Miranda* waiver need not be in writing or even explicit. *State v. Blaney*, 168 W. Va. 462, 464-465, 284 S.E.2d 920, 923 (1981) (*Miranda* “waiver . . . can be satisfied by inferences drawn from the words and actions of the person being interrogated”); *State v. Clawson*, 165 W. Va. 588, 599, 270 S.E.2d 659, 667 (1980) (citing *North*

Carolina v. Butler, 441 U.S. 369 (1979) (“a specific waiver of *Miranda* rights [i]s not necessary, . . . a waiver could be implied from all of the circumstances surrounding the administration of the *Miranda* warnings and the defendant’s conduct in relation to these warnings.”); *United States v. Dinkins*, 486 Fed. Appx. 355, 356 (4th Cir. 2012) (“a written waiver is not required under *Miranda*”). “Since in the instant case there was no explicit waiver by the defendant of his ‘*Miranda* rights,’ we must determine whether or not the inferences that can be properly drawn from the State’s evidence are sufficient to constitute a waiver.” *State v. Rissler*, 165 W. Va. 640, 645, 270 S.E.2d 778, 782 (1980). The answer to that question is indisputable yes. In *Berghuis*, 130 S. Ct. at 2262, the Supreme Court held, “[w]here the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused’s uncoerced statement establishes an implied waiver of the right to remain silent.” And here, the confession was uncoerced. The Petitioner’s trial counsel stated to the circuit court “I’m not saying the Trooper did anything wrong, because there is case law that talks about coercion. So, there were no threats or any allegations that there were any threats.” App. vol. II (Pretrial Hr’g, Oct. 4, 2010) at 16 (statement of defense counsel). *See also id.* at 17 (“THE COURT: . . . you’re not raising the issue of its voluntariness? [DEFENSE COUNSEL]: There was no coercion. THE COURT: In other words, he -- there was no coercion? [DEFENSE COUNSEL]: Correct.”). But even if the question of whether there was coercion was properly before this Court, the only authority the Petitioner musters in support of such a claim is inapplicable here.

The Petitioner cites to *Mincey v. Arizona*, 437 U.S. 385 (1978), Pet'r's Br. at 17-18⁵, in support of his claim. *Mincey* is inapplicable here.⁶

In *Mincey*, the Supreme Court held statements to police were involuntary where the defendant (1) arrived at the hospital a few hours before the interrogation “depressed almost to the point of coma”; (2) suffered “unbearable” pain; (3) was unable to think coherently; (4) was “encumbered by tubes, needles, and [a] breathing apparatus” including a tube in the mouth rendering him incapable of talking; and, (5) despite *Mincey*'s entreaties to be let alone, the interrogation ceased only during intervals when Mincey lost consciousness or received medical treatment, 437 U.S. at 398–400, and otherwise lasted some three hours. *Id.* at 409 (Rehnquist, J., dissenting in part). Short of *Mincey* like cases, i.e., those with “egregious facts[,]” *United States v. Mohammed*, 693 F.3d 192, 198 (D.C. Cir. 2012), “courts tend to view a hospitalized defendant’s statements as voluntary where

⁵The Petitioner’s Brief quotes as a holding “Syl. Pt. 2 of *Mincey*[.]” Pet’r’s Br. at 17. A syllabus affixed to a Supreme Court opinion by the Reporter of Decisions cannot constitute the Court’s holding since “the headnote is not the work of the court, nor does it state its decision It is simply the work of the reporter, gives his understanding of the decision, and is prepared for the convenience of the profession in the examination of the reports.” *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337 (1906). *See also Mincey v. Arizona*, 437 U.S. 385, 385 n.* (1978) (“The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.”).

⁶*Mincey* was a due process voluntariness case, not a knowing waiver case. *Mincey*, 437 U.S. at 397 n.13 (“In light of our holding that *Mincey*'s hospital statements were not voluntarily given”); *id.* at 402 (“Due process of law requires that statements obtained as these were cannot be used in any way against a defendant at his trial.”). The Petitioner disavowed at the suppression hearing that his confession was coerced. App. vol. II (Pretrial Mot. Hr’g, Oct. 4, 2010) at 17. *Mincey*—as a voluntariness case—provides no support for any claim that the confession was not knowing and intelligent waiver of the right against self-incrimination. *See, e.g., United States v. Ackerman*, 51 Fed. Appx. 226, 227 (9th Cir. 2002) (“There is no evidence that the officer engaged in any coercive activity in this case, thereby distinguishing it from *Mincey v. Arizona*”).

the defendant was lucid and police conduct was not overbearing.” *United States v. Siddiqui*, 699 F.3d 690, 707 (2d Cir. 2012).

“A defendant may voluntarily waive his rights even when in the hospital, on medication, or in pain.”” *United States v. Guay*, 108 F.3d 545, 550 (4th Cir. 1997). Indeed, “[t]he fact that [an interviewee] had been given pain killers and narcotics . . . is not enough to render his waiver involuntary.” *United States v. Cristobal*, 293 F.3d 134 at 141 (2002). While the Petitioner insists he was in a “10 out of 10” level of pain, App. vol. II (Pretrial Mot. Hr’g, Oct. 4, 2010) at 21, he “never requested not to be interviewed due to pain.” *Guay*, 108 F.3d at 550.

Here, there was no showing that the Petitioner was depressed to the point of coma. “Unlike the suspect in *Mincey*, [the Petitioner’s] answers to questions were lucid and in fact very detailed.” *Cristobal*, 293 F.3d at 143. The Petitioner knew his name, address, telephone number, height, weight, eye color, and social security number, App. vol. II (Pet’r’s Statement) at 1, he not only answered “yes and no” questions with “yes” or “no,” but also gave multi-sentence expository responses and did so verbally—unlike *Mincey* whose mouth was filled with a tube. Trooper Drake testified that the Petitioner was “coherent . . . conscious and talking sensible[.]” App. vol. II (Pretrial Mot. Hr’g, Oct. 4, 2010) at 39, *see also id.* at 45 (Trooper Drake, “he seemed a hundred percent coherent the whole time I talked to him”), even though he appeared to be in pain, *id.* at 46, and was upset in giving answers. *Id.* *See United States v. Martin*, 781 F.2d 671, 673–74 (9th Cir.1985) (statement made while in great pain and receiving Demerol found voluntary where accused was awake and relatively coherent). *Accord United States v. Campos*, 48 M.J. 203, 207 (C.A.A.F. 1998). Trooper Drake testified the Petitioner did not “doze off, or nod off or lose . . . consciousness[.]” *Id.* at 40. *See Cristobal*, 293 F.3d at 143 (“Though it was obvious to the officers

that *Cristobal* was in pain, he did not slur his words during the interview, he never lapsed into unconsciousness, nodded off or went to sleep.”). Finally, in *Mincey* the interview lasted three hours while Trooper Drake’s interview with the Petitioner here might have lasted around thirty minutes. App. vol. II (Pretrial Mot. Hr’g, Oct. 4, 2010) at 51. “[T]he trial court listened to the tape of the interrogation and found that petitioner understood what was being asked, he was coherent and his responses were clear and responsive. Petitioner’s situation was very much *unlike* that of the defendant’s in *Mincey* described above.” *Briscoe v. Scribner*, No. CIV S-04-2175 FCD GGH P, 2010 WL 1525695, at *68 (E.D. Cal. Apr. 15, 2010) (Mag. J.).

VI.

CONCLUSION

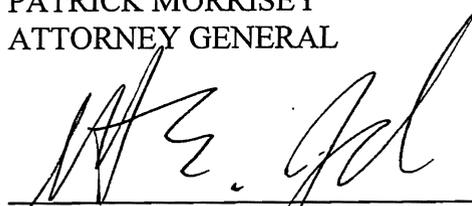
For the above reasons, the circuit court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Scott E. Johnson, Senior Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the *Respondent's Brief* upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 12th day of March, 2013, addressed as follows:

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