Circuit Court for Montgomery County
Case No. 131568C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 801

September Term, 2019

TYSEAN A. LIPFORD

v.

STATE OF MARYLAND

Graeff,
Beachley,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: December 11, 2020

In the early morning hours of Tuesday, March 21, 2017, Christian Matthews, age 17, was strangled to death. The murder took place in the victim's bedroom at his home in Silver Spring, Maryland. Two days after the murder, Tysean A. Lipford ("Lipford" or "appellant"), was interviewed by two female detectives employed by the Montgomery County Police Department concerning the Matthews murder. During that interview, Lipford confessed that he had strangled Matthews.

Lipford was indicted for first-degree murder of Matthews in the Circuit Court for Montgomery County. His counsel filed a motion to suppress Lipford's confession along with other evidence that was uncovered as a result of what Lipford told the police in the course of that confession. That motion was heard on September 21, 2018.

No witnesses were called at the suppression hearing but the State introduced into evidence the entire transcript of the police interview of Lipford together with a videotape of that interview. The transcript showed that the first four hours (approximately) of that interview took place before Lipford had been advised of his *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 436 (1966)) (hereafter "the unwarned portion of the interview").

As discussed more fully *infra*, during the unwarned portion of the interview, Lipford made some incriminating statements concerning the death of Matthews but he did not confess to the murder. He was then advised of his *Miranda* rights (hereafter "the warned portion of the interview"). During the warned portion of the interview, appellant made a full confession.

At the suppression hearing, Lipford's counsel argued that during the unwarned portion of the interview, his client was subjected to custodial interrogation and therefore

the detectives were required to give him his *Miranda* warning. According to counsel, because Lipford was not warned of his *Miranda* rights, everything said in that unwarned portion of the interview should be suppressed. Moreover, counsel argued that the *Miranda* warnings belatedly given to Lipford were ineffective because the police intentionally used a two-step interrogation technique in violation of principles enunciated in *Missouri v. Seibert*, 542 U.S. 600 (2004).[1] On that basis, according to Lipford, all post warning statements should be suppressed. Lipford's counsel also argued that, apart from the *Seibert* violation, the State failed to establish that Lipford had knowingly, intelligently and voluntarily waived his *Miranda* rights, which required suppression of all statements made by appellant while subject to custodial interrogation. Lastly, counsel argued that the State failed to establish that the statements given to the police by Lipford were made voluntarily, and therefore the statements should be suppressed, even apart from the violation of principles enunciated in *Miranda* and its progeny.

The motions judge, after considering oral argument of counsel together with their written submissions, concluded that Lipford, for *Miranda* purposes, was not "in custody" at any time while being interrogated and therefore was not entitled to *Miranda* warnings. The judge ruled in the alternative that even if appellant was in custody after he was given his *Miranda* warnings, he voluntarily waived his *Miranda* rights by his subsequent

[1] The first step is to obtain a confession from an individual who is in custody but who has not been advised of his or her *Miranda* rights; the second step is to advise the suspect of his or her *Miranda* rights and then obtain a second confession. If the police deliberately use the two-step technique to deprive a suspect of his *Miranda* rights, both the first and second confession must be suppressed. *Seibert*, 542 U.S. at 622 (Kennedy, J. concurring); *Wilkerson v. State*, 420 Md. 573, 594-95 (2011).

conduct. Accordingly, appellant's motion to suppress was denied. The court also ruled that the confession was voluntary.

Lipford was tried before a jury in a trial that began on January 14 and ended on January 22, 2019. The jury acquitted Lipford of first-degree murder but convicted him of second-degree murder. On June 28, 2019, the court sentenced Lipford to 30 years imprisonment. This timely appeal followed, in which Lipford raises the same issues that he raised at the suppression hearing.

Because the issues raised in the appeal deal exclusively with whether the trial judge erred in denying Lipford's motion to suppress, there is no need for us to discuss the evidence presented to the jury, except to point out that both the unwarned portion of appellant's statement to the police together with the portions of his statement given after Lipford was advised of his *Miranda* rights were used as evidence against appellant—except for a few unimportant deletions.

I.

THE UNWARNED PORTION OF THE POLICE INTERVIEW

A. Background Information Appellant Provided at the Interview

At the time of the interview Lipford was 19 years old, had a high school education, and worked at a Red Lobster restaurant in Montgomery County. Appellant's girlfriend, Leandra Matthews ("Leandra"), was the sister of the murder victim, Christian Matthews. Leandra was also the mother of appellant's eighteen-month-old daughter and, at the time of the interview, Leandra was six months pregnant with what would be appellant's second child.

On the date of the murder, Leandra lived with the victim along with her mother, a twin sister named Lemay Matthews, and two other siblings at 1021 Mondrian Terrace, Silver Spring, Maryland. Appellant, who usually lived with his mother, visited his girlfriend from time to time at the Mondrian Terrace address. On the date of the murder, however, appellant was living with a friend of his because he had had an argument with his mother and she had asked him to leave.

B. Circumstances Surrounding the Interview

Appellant was interviewed at a Montgomery County police station by Detective Michelle Smith and Detective Beverly Then. Lipford came to the interview voluntarily after one of the detectives had told his mother that they wished to speak with him. Lipford's mother drove him to the police station and, before talking to Lipford, the two detectives talked to his mother in the same room where appellant was later interviewed. The room where appellant was questioned was small but carpeted, well-lighted and improved by a comfortable couch, two chairs and a small table. In the room there was no place to handcuff a person. Appellant apparently thought the room was comfortable because on the tape, prior to questioning, he was heard commenting to himself that it was a "cool little room" and that he could imagine converting the room into a "man cave" with a television, video games and a "little mini fridge with snacks." Appellant entered the room at 1:25 p.m.

The detectives carried no weapons and were not in uniform. Because the interview room was small, the detectives sat relatively close to appellant but, as the suppression judge said, referring to one of the detectives, the tone of the detective's voice was "soothing" and

her technique was "consoling" and "nurturing, . . . [like] a mother that had a child that had had a rough day at school…."

After obtaining some background information from appellant concerning where he worked, his educational background and the fact that he was the father of a daughter with a son "on the way," Detective Smith told appellant at 1:35 p.m. the following:

> [E]ven though this doesn't look like it, it is a police station, so you're free to go at any time, but we appreciate . . . you coming in. We just want to talk to you a little bit, okay? We talked to your mom and she was very nice. . . .

(Emphasis added.)

There followed more "small talk" concerning where appellant and his mother were currently staying and who was living with them. After additional casual conversation concerning subjects such as where appellant met his girlfriend, how long they had been dating and how frequently he saw his girlfriend, Detective Smith asked appellant to describe "family life" at the house where Leandra lived with the victim, her sisters and her mother. Appellant replied:

> I mean from what I see, they all get along well, except for [the victim], . . . I don't know what's wrong, he just doesn't like me I guess, I don't know. But everyone else gets along well. Everybody else good.

Appellant added that he understood from what he had been told by people that lived with the victim, that the victim used to cut up clothing belonging to his (the victim's) sisters. Appellant also said that sometimes the victim would fight with his youngest (seven or eight-year-old) sister.

With no prompting, Lipford told the detectives that the victim was, in effect, "two-faced" because when no one else was around, the victim was friendly toward him, but when

the victim was among friends, he would make derogatory comments concerning him. For instance, once when appellant was visiting his girlfriend, appellant heard the victim, who was downstairs, say to his friends, in reference to appellant: "that bitch, that n***** Bambi need to come downstairs." Appellant interpreted those words as a threat, which he ignored because he just wanted to stay upstairs with his infant daughter.

Appellant initially told the detectives that the last time he was at his girlfriend's house was on Sunday evening (March 19, 2017). After he left her house that night, he stayed with a friend all day Monday but left at about 2:00 a.m. on Tuesday, March 21, 2017, at which time he phoned and asked his mother to come and get him. The reason he gave the detective for wanting to leave his friend's house at such an odd hour was that his friend was "going out of town."

Appellant told the detective that his mother arrived at the friend's house on Tuesday at about 2:20 a.m. During the trip in his mother's car from his friend's house to the hotel where his mother was staying, the victim's mother phoned appellant's mother and told her something had happened to the victim. The victim's mother asked appellant's mother to come to the victim's house to pick up appellant's daughter. When they arrived at the victim's house, they learned that the victim was dead.

The interview segued into a discussion as to the names of appellant's friends and then, roughly one hour into the interview, appellant was asked whether he was surprised when he learned of the victim's death. Appellant said that he was not surprised because, according to what he had been told by members of the victim's family, the victim was a "wild dude" who, along with the victim's cousin, got kicked out of high school for

committing robberies. Shortly thereafter, Detective Then asked appellant what were the "rumors out there" as to who killed the victim. Appellant answered that there were rumors in the neighborhood that he, appellant, had killed the victim but there were also rumors that one of the victim's friends may have killed him while "playing." Detective Then next inquired as to why people would think that he did it. To that question, and others similar to it, appellant responded that he could not figure out why people were making that accusation because he never got into an altercation with the victim or even had a "heated argument" with him. Moreover, although he was called names by the victim, he ignored the taunts.

One of the detectives said that she and her colleague had heard from persons "very close" to the victim that the latter had threatened Leandra and her daughter. Appellant admitted that he had heard about such threats. Detective Smith then advised appellant that they had also been told that the victim did not like either Leandra or appellant and was afraid of them. At that juncture, the interrogating detectives voiced criticism of the victim, saying that they understood why Leandra would have been afraid of the victim. The following exchange is illustrative:

> DETECTIVE THEN: And if someone is going to even, someone who, like [the victim] who likes to fight and rob and what, you know, just act crazy . . . I won't want him around my child.
>
> [APPELLANT]: Yeah.
>
> DETECTIVE THEN: Right? And the kind of person [the victim] was, he's very unpredictable.
>
> [APPELLANT]: Yeah.

DETECTIVE THEN: And there's no saying what he could have done to [Leandra] or to, to the baby.

[APPELLANT]: Uh-huh.

DETECTIVE THEN: Well, [Leandra], she can take care of herself – –

[APPELLANT]: Yeah.

DETECTIVE THEN: – – but, you know what I'm saying, like she's never going to let nobody, nobody hurt her baby . . . you know what I'm saying? But I know that both of you have deep, deep concerns for the safety of your baby to the extent that [Leandra] tried to move out [of her home].

[APPELLANT]: Yeah.

The detectives next discussed with appellant the subject of whether he had ever been in the victim's basement bedroom. Appellant admitted that he had been in that bedroom on Sunday night, March 19, 2017. He explained that he went downstairs to see if he could find a laptop (belonging to someone in the Matthews family); that he could not locate the laptop, but during the search he went into the victim's bedroom. The only other time appellant was in the basement, according to what he initially told the detectives, was one time he went downstairs to borrow a cigarette from the victim.

Appellant also told the detectives that before he left his girlfriend's home on Sunday evening, the victim returned to the house with some friends. The victim remained downstairs while appellant stayed upstairs, but he nevertheless heard the victim say to his friends, "Where's that bitch-ass n***** Bambi at?" One of the victim's friends rejoined: "Where that bitch-ass n***** Bambi at? Tell him to come downstairs." Appellant ignored these remarks and remained upstairs.

Shortly thereafter, appellant admitted to the detectives that Leandra had told him that the victim had threatened their baby but appellant said the threat did not worry him. At that point, the detectives mentioned that they had been doing a lot of interviews concerning the murder and had been told that appellant threatened the victim, that the victim was afraid of appellant and that the victim was afraid to go to sleep in his own house because he feared that appellant was "going to hurt him." Appellant replied that he could not understand why the victim would have said such things because the victim was the one who had threatened him when he (the victim) was in the presence of friends. The detectives also said that they had received "numerous calls" saying that the victim was also afraid of Leandra.

The detective then shifted the focus of the interview to a discussion about what appellant's mother had told them about her having picked appellant up at between 2:00 and 2:30 a.m. on March 21, 2017. They reported that appellant's mother had said that when she picked up appellant, he "didn't look right" and looked "stressed." Next, the officers told appellant that they knew that the victim "was a menace," and "just a horrible person." Detective Then said:

> I know that [Leandra] was involved. I know that. What I need to know is why and I want to give her the opportunity to tell me what happened. And I want to give you the same opportunity to tell me what happened because, remember I told you that there are different reasons why people do things[.]

The detective explained that sometimes people "do things" to protect someone, especially children or family; by contrast, some people do things for bad reasons, such as to collect money for drug sales. Detective Then next told appellant that she knew that appellant was

"not being completely forthcoming. . . ." because what he had told her didn't "make any sense." Appellant retorted "what doesn't make sense?" Detective Then did not answer that question; instead, she said that she had spent two days canvassing the neighborhood and collecting DNA evidence and inspecting the house where the murder occurred. Detective Then added that she knew that appellant was involved in the murder. Appellant asked, "[w]hat makes you say that?" Detective Then said her belief was based on what people had told her, but she was unwilling to divulge "all the facts or specifics" of what she had been told because providing such information would "jeopardize[ ] the integrity of my investigation." Detective Then next said that she wanted appellant to tell her everything that he had previously said in the interview that was not true. She reassured appellant, however, that no matter what he said, his mother would "stand by [him] no matter what," because appellant's mother knew that appellant was not "a bad person."

Detective Then next shifted the focus of her questions slightly by saying, once again, that she knew that Leandra was involved in the murder. The detective recalled that appellant's mother had said that she didn't want appellant to "screw up [his] life for that bitch." Detective Smith added that Leandra had told the police that she was afraid of the victim. Under such circumstances, Detective Smith asserted, "[s]he had to have told you how scared she was for herself and the baby." Appellant then admitted that Leandra had told him of such fears. She only told him this once, however. When asked if he was concerned about Leandra's fear, appellant said, ambiguously:

> I am concerned, but the way I live my life, you know, I'm an Israelite, I'm a child of the Lord. Everything is in the Lord's hands. So, like I said, if

> he wanted to do something, it would have been done. It hasn't happened yet. Why? Because he [the victim] wasn't going to do anything.

Appellant was asked how he knew that the victim would not harm Leandra or his daughter. He replied that he was a positive person and believed that God would protect his daughter. At that point, the detectives took a break and appellant asked for some water. Detective Smith saw to it that some water was delivered. The officer who brought the water then asked if appellant wanted any pretzels or anything. Appellant replied: "No, I'm good." He was also asked if he needed to use the restroom and he said that he did not.

When the interview resumed at 3:55 p.m., which was approximately two and one-half hours after it began, appellant said, "I was, no, we probably can't do that.

> DETECTIVE THEN: What?
>
> [APPELLANT]: I just wanted to smoke a cigarette.
>
> DETECTIVE THEN: I'll share my water.
>
> [APPELLANT]: Somebody already gave me some.
>
> DETECTIVE SMITH: Oh.
>
> DETECTIVE THEN: All right. So . . . we took a break because we have just arrived, an eyewitness from the neighborhood[.]

Detective Then added that the witness they had just talked to knew appellant but the detective would not tell appellant what that witness had said.

Detective Then next confided to appellant that she and her husband had a 22-year-old son who had made some bad decisions because he felt obligations to other people along with "peer pressure," and as a result, her son now couldn't get certain jobs. Detective Then next said: "I know you were there that night, I do, . . . yes, you were there, absolutely there.

I know that, absolutely there." To that assertion, appellant replied: "I don't know what would make you say that." Instead of replying directly, Detective Then simply said that she knew that appellant was trying to protect Leandra and was "covering" for her. Detective Then also claimed that she knew that the victim hated and resented Leandra "for whatever reason." Detective Then added that she knew this because she had checked the victim's laptop computer and his phones and his social media entries. Detective Then also said that when she and Detective Smith had taken a break, they talked to a neighbor who told them that appellant was there [at the victim's house] on the night of the murder.

The detective next said that the reason appellant was being interviewed was because his name kept "coming up" in their investigation. Appellant replied: "[M]y name keeps coming out of people's mouths. It doesn't necessarily mean that I did anything just because . . . ." Detective Then interjected: "I'm not saying you did anything. . . . I'm saying you were there." Both detectives then assured appellant that they were not saying that he did anything, they just wanted to know what happened when appellant "was there." The following ambiguous exchange then occurred:

> [APPELLANT]: Well, who told you I was there?
>
> DETECTIVE THEN: Well, if I could tell you, I wouldn't be asking you because I wouldn't need to prove it, right?
>
> [APPELLANT]: Yeah.
>
> DETECTIVE THEN: And I'm telling you[,] you were there. In the future, I'll have to prove it. I just need to know why you were there. And I know you're playing with words, but I'm telling you as clearly as I can tell you . . . and I've been doing this for a long time, I don't know how . . . unless, I never said you did anything. I said you were there.

Appellant retorted that he did not believe that the police had proof that he was there, i.e., at the victim's house on the night of the murder. The detective replied that his mother had told them that she believed that Leandra had committed the murder. Detective Smith opined that Leandra had "every reason to not want [the victim] to be there anymore." After that comment, appellant said: "I kind of feel like you all [are] drifting towards me," meaning accusing him of murder. The detectives denied it and reiterated that they just wanted him to tell them what happened. The detectives also stressed that they had had numerous calls from people, some of whom did not know appellant's name but knew that he was the father of Leandra's baby, saying that he was at Leandra's house on the night of the murder. Appellant then inquired, "how do you know [this is true]" inasmuch as their information was just hearsay, in his words, "he say, she say." When Detective Then replied that "many people are saying that," appellant retorted that this meant nothing because "a lot of people said the world was flat. . . . It's round."

The detectives then segued back into inquiries and assertions suggesting that the victim was afraid of appellant; he was also asked whether he carried a weapon, which he denied. When it was suggested that the victim was afraid of appellant, he became somewhat assertive:

> Answer this. If he was scared of me and [Leandra], why would he threaten our child if he was so-called scared of us? Why would he threaten our child to provoke us? If he's so-called scared, threatening somebody's child would provoke them, right? Yeah. If he was so-called scared of me and [Leandra] why would he threaten our child? Why?

Detective Then replied that she could not answer that question. The questioning next circled back to the issue of whether appellant had been at the victim's home at any time after Sunday evening. Appellant denied, once again, that he had ever returned.

After this denial, the detectives scored a breakthrough, although not immediately, when one of the detectives told appellant that DNA was taken from the victim when an autopsy was performed on him. They asked appellant if it was found that appellant's DNA was on the victim, how would he explain it? Appellant replied that he had no contact with the victim except when he was in his room searching for the laptop. The detectives next inquired as to whether there was any physical contact between him and the victim on "Monday night going into Tuesday[.]" Appellant flatly denied that he had touched the victim. The detectives then said that they were "processing" the DNA they had collected and were giving appellant a chance to explain in case his DNA was found on the victim's body. Detective Smith warned: "If your DNA is on him, there's going to be no talking to you." Appellant said that he understood. He was then told that "[t]oday is your opportunity . . . to help us understand why it would be there[.]" At 5:11 p.m., the following colloquy occurred:

> [APPELLANT]: Can we step out real quick? We can't run down there real quick?
>
> DETECTIVE THEN: Huh?
>
> [APPELLANT]: We can't run down there right quick, like five minutes?
>
> DETECTIVE THEN: Where?
>
> [APPELLANT]: Downstairs?

DETECTIVE SMITH: For what?

[APPELLANT]: I just want to smoke real quick and talk to my mother like – –

DETECTIVE SMITH: Okay. We, . . . can let you smoke. Let . . . me tell you what we did, okay? We told your mom we were still talking to you.

[APPELLANT]: Uh-huh.

DETECTIVE SMITH: We told her to go ahead and take Caroline [appellant's aunt] to work.

[APPELLANT]: Okay.

DETECTIVE SMITH: Okay? We were trying to help her out because she said, "I need to leave." So we . . . told your mom that, go ahead and take Caroline to work – –

[APPELLANT]: Uh-huh.

DETECTIVE SMITH: – – that we would take you to work, okay?

[APPELLANT]: Okay.

DETECTIVE SMITH: And she [appellant's mother] said no problem. She was fine with that.

[APPELLANT]: Okay.

DETECTIVE SMITH: So please tell us why your DNA would be on him? It's okay. Just go ahead.

[APPELLANT]: Can I please smoke a cigarette and I'll come back and tell you, please.

DETECTIVE SMITH: Why do you want to go smoke a cigarette?

[APPELLANT]: Because I'm stressing out.

DETECTIVE SMITH: I understand. I understand and we can take you out to smoke a cigarette. We can't have you smoking in here, okay? And I understand you're stressing and, but I, I want, we are here to listen to you, okay? We're . . . both right next to you. [W]e want to talk to you and we're,

> we want to hear what you have to say. It's okay. . . . We're both mothers and we're both looking at you like you're our son, okay? Her [Detective Then's] son is 22, mine is not as old as you, but we, we have children, we understand. We're here for you and . . . we want to hear what you have to say.

Appellant then asked what she meant when she said that they were "here for" him. Detective Smith explained, "we're both here listening." Detective Then said, "[N]o matter what you say, it doesn't change anything about you. And I will stand by this, I will tell your mother you're exactly as she described you, respectful and I think highly of you no matter what you have to tell us."

In reply to this compliment, appellant said, "What happens after I tell you?" Detective Then said that she would have to go tell her supervisor what appellant had said. She reiterated that no matter what he said, it wouldn't change the fact that they, the detectives, liked appellant. The detectives added that they could tell that what he had done was weighing on him. At approximately 5:27 p.m., Detective Then said, "[T]ell us that night when you got there what happened. It's okay Tysean." Appellant began to cry and replied that he was trying to keep everybody alive like his daughter, himself, his mother, "like everybody." Appellant then said that the victim had "[t]hreatened everybody." The detectives again encouraged appellant to tell his story and Detective Smith observed that "people make mistakes" and added that she thought that appellant wanted to protect his family.

At that point, appellant said that approximately a week or two before the date that the victim was killed, he overheard the victim threatening to kill appellant's daughter, appellant's mother and his (the victim's) sisters. When the threat was made, the victim

was in the company of a friend (of the victim's) who had a gun. At that point, Detective Smith encouraged appellant to "tell us what happened . . . Monday night and into Tuesday, what happened?" She then gave appellant a tissue.

Detective Smith next asked appellant how he got into the victim's house on the night of the murder. Appellant replied that he entered the house with a key. Over the next eight minutes, approximately, appellant told the detective the following story: that he entered the victim's house through the back door and went downstairs; he saw that the victim's bedroom door was ajar and then entered his room carrying no weapon; he saw that the victim was sleeping; when he entered the room it was illuminated only by a television that was in operation; the victim was startled when appellant entered his room and screamed "ah," but did not see who had entered.

At approximately 5:48 p.m., both detectives left the room. They returned about two minutes thereafter and Detective Then advised appellant of his *Miranda* rights, which appellant said he understood.

II.

THE WARNED PORTION OF THE INTERVIEW

Appellant told the detectives that after he entered the victim's room, the victim sat up when appellant tried to grab him. A struggle ensued. In the struggle, the victim and appellant probably scratched each other but appellant was not noticeably harmed. Appellant succeeded in getting behind the victim and putting him in a headlock, with one of appellant's arms in the shape of an L. The headlock prevented the victim from breathing. While in the headlock, the victim struggled and twice yelled "please stop" before

becoming unconscious. After the victim stopped struggling, appellant covered his body with a blanket. He then left the house through the back door.

Initially appellant said that after the crime he went back to his friend's house, which was approximately 15 minutes away from the murder scene, and that Leandra was unaware of what he had done. Thereafter, appellant admitted that he and Leandra had planned to kill the victim so that he "wouldn't hurt anybody." Appellant then changed his story and said that he was able to enter the victim's house because Leandra had left the door unlocked.

Appellant further related that he got a ride to the victim's house on the night of the murder from someone other than Leandra and that while the murder was taking place, Leandra was upstairs. He later changed that story and said that Leandra had phoned him, prior to the murder, and said that the victim was asleep; Leandra picked up appellant in her car, drove him into her neighborhood, pulled over at the side of the road near her house, and waited in the car while appellant killed the victim. After the murder, Leandra then drove appellant back to his friend's house.

Appellant also told the detectives that Leandra had left latex gloves for him on the couch at the house where the victim lived, which he had used when he strangled the victim. After the murder, he discarded the gloves in a sewer located near his friend's house.

The post *Miranda* questioning lasted until approximately 11:00 p.m. The questioning, however, was not continuous. Most of the important facts were obtained within two hours after the *Miranda* warnings were given. Thereafter, the detectives left appellant alone for periods of time and then came back and asked additional questions.

Toward the end of the interview, Detective Smith was joined by a Detective Springer who got appellant to repeat some of the crime details and to point out on a map when key events occurred. When this occurred, Detective Then was not in the room. At the conclusion of the interview, appellant was arrested for first-degree murder.

As mentioned, the motions judge concluded that appellant was not in custody either during the warned or unwarned part of the interview. The judge's findings, *inter alia*, included the following:

- Lipford went to the police interview voluntarily.
- The interview room was comfortable; Lipford was seated on a couch where he could, and did, lie down.
- Although the door to the interview room was apparently locked, it was secured with a key card, which the court noted was "different than a big set of jail house keys and all the rest and hearing a slamming door" because "[w]e're in a day and age now where people have key cards all over the place so, that doesn't ripe[n] it into the defendant believing he's in jail cell."
- He was interviewed almost exclusively by two female detectives, and sometimes only one.
- The detectives explicitly told Lipford that he was "free to go at any time."
- Lipford was "never handcuffed."
- The detectives "never display[ed] any weapons. . . . They weren't in uniform. There were no badges."

III.

CUSTODY

A. Standard of Review

The Court of Appeals has said that review of a suppression motion:

> is limited to the record of the suppression hearing. The first-level factual findings of the suppression court and the court's conclusions regarding the

> credibility of testimony must be accepted by this Court unless clearly erroneous. The evidence is to be viewed in the light most favorable to the prevailing party. We "undertake our own independent constitutional appraisal of the record by reviewing the law and applying it to the facts of the present case."

Thomas v. State, 429 Md. 246, 259 (2012) (quoting *State v. Tolbert*, 381 Md. 539, 548 (2004) (other citations omitted)).

Even in a case like the one *sub judice*, where evidence is presented to the fact-finder by means of a videotape, a reviewing court must give deference to the fact-finder in his or her assessment of the facts and the inferences that may be drawn from those facts. *Estate of Blair v. Austin*, 469 Md. 1, 28 (2020).

B. Legal Principles

Under *Miranda, supra*, the Supreme Court has recognized that any police interview of an individual suspected of a crime has "coercive aspects to it[.]" *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam). Nevertheless, "[o]nly those interrogations that occur while a suspect is in police custody, . . . 'heighte[n] the risk' that statements obtained are not the product of the suspect's free choice." *J.D.B. v. North Carolina*, 564 U.S. 261, 268-69 (2011) (quoting *Dickerson v. United States*, 530 U.S. 428, 435 (2000)). The burden of demonstrating that the questioning occurred during "custody" is on the defendant. *Paige v. State*, 226 Md. App. 93, 102 (2015). If it is shown that a suspect made a statement during custodial interrogation, it then becomes the State's burden to show, "as a 'prerequisit[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.*, 564 U.S. at 269-70 (citing *Miranda*, 384 U.S. at 444, 475-76).

In *Buck v. State*, 181 Md. App. 585, 608-09 (2008), we said, quoting *Owens v. State*, 399 Md. 388, 427-29 (2007) (further citations omitted):

> A significant body of law has developed around the questions of what constitutes "custody" and "interrogation" for Fifth Amendment purposes. The *Miranda* Court defined "custodial interrogation" as "questioning initiated by the law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444. "Custody," though typically associated with formal arrest or incarceration . . ., is not always so clearly a delineated concept. The Supreme Court declared in *California v. Beheler* that "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' *of the degree associated with a formal arrest*." 463 U.S. 1121, 1125 (1983) (per curiam) (quoting *Mathiason*, 429 U.S. at 495, (emphasis added). In fact, a person is considered "in custody" when "a reasonable person [would] have felt he or she was not at liberty to terminate the investigation and leave." *Thomas v. Keohane*, 516 U.S. 99, 112 (1995); *see also Yarborough v. Alvarado*, 541 U.S. 652, 662 (2004); *accord* [*State v.*] *Rucker*, 374 Md. [199], 209 [(2003)]; *Whitfield v. State*, 287 Md. 124, 141 (1980).
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> * * * *
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> The question of whether a suspect is "in custody" is determined objectively, to the exclusion of the subjective intent of law enforcement, in light of the totality of the circumstances of the situation. [*Yarborough*,] 541 U.S. at 667; *Stansbury* [*v. California*], 511 U.S. [318] at 323 [(1994)]; *accord Whitfield*, 287 Md. at 140. Among the circumstances which should be considered in determining whether "custodial interrogation" took place are:
>
> > When and where [the interrogation] occurred, how long it lasted, how many police were present, what the officers and defendant said and did, the presence of actual physical restraint on the defendant or things equivalent to actual restraint such as drawn weapons or a guard stationed at the door, and whether the defendant was being questioned as a suspect or a witness. Facts pertaining to events before the interrogation are also relevant, especially how the defendant got to the place of questioning[,] whether he came completely on his own, in response to a police request or escorted by police officers. Finally, what happened after the interrogation whether the defendant left freely, was detained or arrested may assist the court in determining whether the defendant, as a reasonable person, would have felt free to break off the questioning.

As already mentioned, the ultimate test to determine whether a person is in custody for *Miranda* purposes is whether "a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). In this case, as the State emphasizes, Lipford was explicitly told at the beginning of the interview that he was free to go at any time. Such advice to a person about to be interrogated, is a strong factor favoring a finding of no custody. But, as appellant points out, if "the contemporaneous conduct of the police has the effect of nullifying that advice, the advice 'will not carry the day.'" *Brown v. State*, 452 Md. 196, 218 (2017) (quoting *Buck, supra*, 181 Md. App. at 626). Therefore, it is important to determine whether anything done by the detectives either explicitly or implicitly contradicted their statement that appellant was "free to go at any time."

C. The Factors

1. Circumstances Prior to Questioning

Appellant was driven from his home to the police station by his mother. The police asked him to come, but he did so voluntarily. Counsel for appellant admitted this at the suppression hearing ("he went [to the police station] on his own volition.)" This is a factor that supports a finding that appellant was not in custody because a person who voluntarily comes to the police to be questioned would not likely believe that he was under arrest or feel that by submitting to interrogation that his/her freedom was restricted to a degree associated with a formal arrest.

Appellant contends that it was not proven that he went to the police station voluntarily. He cites *Yarborough v. Alvarado*, 541 U.S. 652, 665 (2004) as a case

illustrative of an instance where a defendant "was brought to the police station by his legal guardian[ ] rather than arriving on his own accord, making the extent of his control over his presence unclear." *Id*. *Yarborough* is distinguishable. In *Yarborough*, the Supreme Court, in applying the totality of the circumstances test to determine whether the petitioner was in custody, first said, 541 U.S. at 664, that included in the facts that weighed against a finding that the petitioner was in custody, were: "[t]he police did not transport Alvarado to the station or require him to appear at a particular time. . . . They did not threaten him or suggest he would be placed under arrest. . . . Alvarado's parents remained in the lobby during the interview, suggesting that the interview would be brief." (citations omitted). Shortly thereafter, the *Yarborough* Court, in listing factors that weighed in favor of a finding of *Miranda* custody, said: "Alvarado was brought to the police station by his legal guardians rather than arriving on his own accord, making the extent of his control over his presence unclear." In this case, unlike *Yarborough*, the same ambiguity does not exist as to whether appellant appeared voluntarily and had "control over his presence" at the police station. Appellant was nineteen years old, was employed and was the father of a child with another child expected shortly. He was of, at least, average intelligence. Unlike the petitioner in *Yarborough*, he was an adult and therefore needed no legal guardian. Using an objective standard, there is no indication that his mother had the ability to compel him to go to the police station if he was unwilling to do so.

2. <u>Inculpatory Statements</u>

During the unwarned part of the interview, Lipford did not confess to the crime. He did, however, make statements that could incriminate him, namely, admitting that on the

night of the murder he had snuck into the bedroom where the victim was sleeping. That inculpatory statements were made, or even a confession during a police interview, is not dispositive of the issue of whether the suspect was in custody; instead, it is but one factor that must be considered:

> If confession [during a police interview] is the trigger for custody, however, then each person who confesses in a police station must have been given *Miranda* warnings *per se*, which is without basis in *Miranda* jurisprudence. *See United States v. Chee*, 514 F.3d. 1106, 1114 (10th Cir. 2008) (stating, in the course of considering whether Chee's confession at a police station rendered him in custody, that "[n]o Supreme Court case supports [the] contention that admission to a crime transforms an interview by the police into a custodial interrogation" (internal quotation marks and citations omitted)); *see also Locke v. Cattell*, 476 F.3d 46, 53 (1st Cir.2007) (stating that a confession does not automatically turn an interview into a custodial interrogation, when considering whether Locke was in custody after he confessed to a robbery while being interviewed at the police station); *Commonwealth v. Hilton*, 443 Mass. 597, 823 N.E. 2d 383, 397 (2005) (stating that the defendant, who had confessed while at a police station being interviewed, was not in custody thereafter, <u>because there was no "fundamental transformation in the atmosphere" of the interview</u>) (internal quotations and citations omitted); *State v. Oney*, 187 Vt. 56 (2009) ("A non-custodial situation does not become custodial automatically because the interviewee has confessed to a crime.... A confession is just one of the circumstances to consider in evaluating whether a reasonable person would feel free to leave.").

Thomas v. State, 429 Md. at 261 (emphasis added).

Here, as far as we can determine, there was no "fundamental transformation in the atmosphere" of the interrogation during the several minutes (approximately) when appellant, although he did not confess to any crime, made inculpatory statements.

3. Length of the Unwarned Portion of the Interview

The unwarned portion of the interview lasted about four hours. This factor, although not determinative, is a factor that weighs in favor of a finding of custody. *See Yarborough*, 541 U.S. at 665 (factor in favor of a finding of custody was that the interview lasted two hours; nevertheless, an ultimate finding of no custody was upheld). *See also Howes v. Fields*, 565 U.S. 499, 515-17 (2012) (finding of no custody even though the defendant was questioned for five to seven hours without *Miranda* warnings).

4. The Hour of the Day When the Unwarned Part of the Interview Started and Stopped

In *Bartram v. State*, 33 Md. App. 115, 146-47 (1976), we said:

. . . *The Time of Interrogation*

> "Another factor that bears upon the question of custody is whether the interview is conducted during normal business hours or is conducted at an odd hour of the night." *Cummings v. State*, 27 Md. App. [361 at] 372 [(1975)].

The hospital interview in the present case occurred between 9:30 a.m. and 10:30 a.m. on a Monday. Although this is but a peripheral factor, we feel as we did in *Cummings*:

> "This fact, though not itself conclusive, helps tilt the interview in question toward the non-custodial side of the spectrum." 27 Md. App. at 373.

Here, as in *Bartram*, the facts that the unwarned portion of the interview occurred in the afternoon during usual business hours, "tilts the interview . . . toward the non-custodial side of the spectrum."

5. What Happened After the Unwarned Part of the Interview Ended

The appellant was not arrested**.** He was given his *Miranda* rights. This factor is neutral because the interview continued after *Miranda* warnings were given.

6. Manner in Which the Interrogation Was Conducted

The video shows that throughout the unwarned portion of the interview, the two female detectives treated appellant with dignity and did not put him in handcuffs or otherwise restrict his movement within the interview room. The detectives never raised their voices or threatened appellant. As the motions judge noted, those factors favor a finding of non-custodial interrogation. *See State v. Marin,* 211 A.3d 692, 698 (N.H. 2019), holding that the lack of evidence that the police shouted or used loud tones weighed in favor of a finding of no custody. By contrast, use of language or tone of voice that suggests that compliance with an officer's request is compulsory weighs in favor of a finding of custody. *United States v. Jones*, 523 F.3d 1235, 1240 (2008). There was no language suggesting that answers to questions were compulsory in this case.

At the suppression hearing, defense counsel argued that during the interview, the detectives tried "to foster a fake mother son relationship or to act motherly." That may well be true. But that mother-son relationship, whether "faked" or not, does not support a finding of custody. Instead, such a relationship is in marked contrast to the harsh interrogation tactics that "powered" the *Miranda* decision. *See Howes v. Fields*, 565 U.S. at 508-09 (when addressing the issue of custody, a court should ask "the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*."). The motions judge, impliedly at

least, found that the same coercive pressures that powered *Miranda* were not present because he said in his oral opinion: 1) The two female detectives talked to appellant "in soft tones" and "never threatened" him; 2) He was never told that "if he doesn't tell he's going to get arrested, he's going to jail for a long time" . . . [the detectives] used terms like "your side of it"; and 3) Although the detectives did touch appellant, the touch was by a "soothing hand [of a female detective] when [he] became emotional."

Whether a coercive environment existed is a very important consideration when determining the custody issue. As the Court said in *Brown v. State*, 452 Md. at 212:

> [T]he lodestar of our objective test is whether Brown was subjected to an environment containing the inherently compelling pressures of custodial interrogation, which powered the Court's decision in *Miranda*. *See* [*Berkemer v. McCarty*, 468 U.S. 420] at 437 [(1984)] (stating that "[f]idelity to the doctrine announced in [*Miranda*] requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated.").

(Emphasis added.)

7. Where the Questioning Occurred

That the interrogation took place at a police station is a factor favoring a finding of custody. *Moody v. State*, 209 Md. App. 366, 384 (2013), but that factor is not dispositive. *See Norwood v. State*, 222 Md. App. 620, 638 (2015). Appellant argues:

> The interrogation room was small. It was furnished with a small table, two chairs and a sofa-sized piece of furniture. The walls were unadorned. By all appearances, the room was windowless. *Brown*, 452 Md. at 214-15 (noting factor in favor of custody that the interrogation room did not provide a "view outside of the police headquarters" and explaining that "the *Miranda* Court was specifically concerned about providing procedural safeguards for those who are held incommunicado and cut off from the outside world"); *Aguilera-Tovar v. State*, 209 Md. App. 97, 103 (2012) (noting "room was windowless").

Appellant's description of the interrogation room is technically accurate. But, as the motions judge found, the room was comfortable and did not appear intimidating. Moreover, appellant was not held "incommunicado" inasmuch as, during the unwarned portion of the interview, he was allowed to keep his iPod with which he could send text messages.[2]

To enter and exit the interview room, the police detectives used a key card which, presumably, appellant observed. This is a factor favoring a finding of custody although, like almost all other factors, it is not determinative. *See Abeokuto v. State*, 391 Md. 289, 331-34 (2006) (no custody even though defendant was held for two and one-half hours in a "small locked room" at a police station prior to interrogation).

The fact that the unwarned part of the interview was conducted by only two detectives, that they were unarmed and in civilian clothes, are factors favoring a finding of non-custody. *Thomas v. State*, 429 Md. at 262 (the fact that "there were only two officers present, both of whom were not in uniform, did not have weapons, and were 'polite,' 'courteous,' and 'respectful'" were factors in favor of a finding of no custody).

8. <u>Was Appellant Led to Believe He Was a Witness Rather Than a Suspect</u>?

Throughout much of the unwarned portion of the interview, a reasonable person in appellant's position would not have believed that he was a suspect. The detectives said

[2] In his brief, appellant says that he was only allowed to go to the bathroom with an escort. During the unwarned part of the interview, appellant never mentioned the need to go to the bathroom. It was only after he received his *Miranda* warning that he did so and was escorted to the bathroom. Whether he was escorted to the bathroom at that stage has nothing to do with whether appellant was in custody during the unwarned portion of the interview.

many times "that they were not saying he did it" but they knew "he was there" meaning that he witnessed the murder but did not commit it. But that changed when Detective Then told the appellant that she knew that appellant was "involved" in the murder and he was then asked a series of questions that suggested that his DNA might have been on the victim's body. The fact that a defendant knows that he or she is a suspect, can be a strong factor in favor of a finding of custody. *See, e.g., Aguilera-Tovar v. State*, 209 Md. App. 97, 110 (2012). But the weight of that factor varies in importance and is not dispositive. *Thomas*, 202 Md. App. at 571. One of the reasons that it sometimes is not an important factor is because, in at least some situations, it has little to do with whether a suspect feels that he or she is free to discontinue the interview and leave. For instance, in some interrogations, it may develop, based on what the detectives say or imply, that although the person being interviewed is a suspect, it does not appear from the conduct of the police that the State has strong evidence against that person. If so, this factor would favor a finding of non-custody because a reasonable person would think that he or she was free to leave, if the State's evidence was weak or non-existent. On the other hand, if a defendant is told that the police have clear evidence of his or her guilt, conveying such information may be a strong factor tending to show that a reasonable person would not think he was free to leave. *See Aguilera-Tovar v. State*, 209 Md. App. at 118, where we said:

> Given the totality of the circumstances, we hold that, when Detective Carvajal confronted appellant with his purported failure to pass the polygraph examination, which she described as "almost (100%) correct," repeatedly accused him of lying, and then questioned him without letup in an aggressive, persistent, and accusatory manner, his interrogation was custodial[.]

By contrast to the situation in *Aguilera-Tovar*, in this case, it does not appear, based on what appellant said, that he (or a reasonable person in his position) believed that the police presently had strong evidence to prove that he committed the murder. That factor favors a finding of no custody, because a person, like appellant, who was told by the police at the beginning of the interview that he was "free to go at any time," would likely believe that to be true if, after over several hours of questioning, the police still had no evidence to show that he was guilty. In other words, on the "free to leave question," there is a difference between telling a murder suspect for instance, that the police have strong incriminating evidence against him or her and telling the suspect they have evidence (e.g. DNA) that hasn't been processed yet that might be incriminating.

9. Lack of Cigarette Break

In discussing the issue of whether the statement by a detective that appellant was "free to go at any time" was nullified by subsequent conduct of the detectives, both the appellant and the State focus, to some degree at least, on appellant's statement, during the unwarned portion of the interview, where appellant indicated that he would like to take a break to smoke a cigarette.

As mentioned, about two and one-half hours into the interview, appellant said that he wanted to smoke a cigarette but immediately before he voiced that desire, he said: "We probably can't do that." Meaning smoke in the interrogation room. Evidently, because appellant had answered his own question as to whether he could smoke in a government building, the detectives did not directly answer his question and proceeded with the interview.

The motions judge addressed the cigarette break question but in doing so, did not distinguish between the warned and unwarned part of the interview. He said:

> Yes, he asked for a cigarette at various occasions and to see his mom. But a denial of a treat or a denial of a request doesn't translate or escalate into custody. The same as if you have a child, and that's how she was dealing with it. If you take the child's mind off something, like mom I want ice cream, can we have ice cream and then you say you know, let's go read a nice book. Okay, you're taking the child's mind off it and moving on and that's all they're doing and that was good police work.
>
> Whether or not he got a cigarette or not or talk to his mom would only be effective if he said I got to get out of this place, I can't stand it in here, I don't want to be here anymore. There was no language such as that. Because once the officer, to her credit, and she was persistent. There was a long period of time, but not persistent [or] being overbearing. She wasn't. She was soothing. She was understanding. She made it clear throughout that she was not making him any promises and couldn't make him any promises and that's throughout the tape. And the defendant was put at ease in that room with her. And he was obviously overcome with emotion which does not vitiate a voluntary statement.

Appellant argues:

> Given the circumstances of the interrogation and the substance of the interrogation, by the time [a]ppellant's first request to smoke a cigarette was ignored, by which time the interrogation had proceeded uninterrupted for approximately two and one-half hours, and by which time [a]ppellant had registered a recognition that he was suspected of involvement in the killing of Matthews, a reasonable person in [a]ppellant's position would not have felt free to leave to a degree associated with formal arrest. Assuming, *arguendo*, that [a]ppellant was not in custody at an earlier point in the interrogation, he clearly was in custody by this point.

(References to record omitted.)

It is probably true that when appellant first mentioned having a cigarette (at 2:55 p.m.), that a reasonable person in his position would have known that he was suspected of murder, although the detective later made this ambiguous by repeatedly suggesting that

they thought appellant's girlfriend committed the crime. In any event, the first time appellant mentioned smoking, he was not denied the right to smoke; instead, he answered his own question knowing, presumably, that he could not smoke in a government building.

The second time smoking was mentioned was about seventy minutes after he had first mentioned a desire to smoke. This time he also expressed a desire to talk to his mother. The request to meet his mother outside the room to speak to her could not be granted. But the failure to grant the request was not because appellant's freedom of movement was restricted. Instead, as the detectives explained, because his mother was gone, it was impossible for appellant to step out in the hall to speak with her. Importantly, the detectives also added that they had told appellant's mother that they would give appellant a ride to work. In our view, the way that detectives responded to the smoking request during the unwarned portion of the interview, would not leave a reasonable person in appellant's position to believe that he was no longer "free to go."

D. RESOLUTION

In deciding whether appellant was in custody, we must consider all of the pertinent facts taken as a whole. *Brown v. State*, 452 Md. at 216. We are enjoined to not simply add up the factors which favor a finding of custody and then count the factors favoring a finding of non-custody and see which side has the higher number. Instead, the factors are evaluated in their totality and no factor is viewed in isolation. *Thomas*, 429 Md. at 260 (in resolving the custody issue, we "must not parse out each individual circumstance for separate consideration" without consideration of the totality of the circumstances) (citation omitted).

Although there are many reported Maryland appellate cases dealing with the issue of *Miranda* custody, *vel non*, it is usually impossible to find a case that is exactly on point because the analysis must be fact-intensive and there are so many diverse variables surrounding each interrogation. With that in mind, there are four cases that are illustrative of the approach taken in Maryland when evaluating the custody issue.

In *Brown v. State*, Terrance J. Brown was suspected by the police of being involved in a shootout that occurred outside the Elks Lodge in Cambridge, Maryland. 452 Md. at 201. Mr. Brown was wounded by the gunfire. *Id*. at 202. A Maryland State Trooper went to Brown's home and transported him to the hospital for treatment. *Id*. After the treatment was complete, a detective went to the hospital at 5:40 a.m. and advised Mr. Brown that his purpose was to "obtain" him. *Id*. at 203. He was then asked, "if he would consent to coming back" to police headquarters to give a statement. *Id*. Brown consented and was interviewed at the police station for about six minutes prior to his being advised of his *Miranda* rights. *Id*. at 204. In that six minutes, he made incriminating statements including an admission that he was at the scene of the shooting where the victim was killed. *Id.* at 205. The motions judge found that during the six minutes of interrogation, prior to *Miranda* warnings, Brown's freedom was restrained to the degree associated with a formal arrest. The judge therefore suppressed the statement. The State appealed and this Court reversed in an unreported opinion. The Court of Appeals granted Brown's petition for a *writ of certiorari*. The Court of Appeals summarized the facts surrounding the interrogation that it considered important for a determination of custody:

> Brown was taken to the hospital to treat multiple gunshot wounds; Detective Howard came to the hospital and advised Brown that his purpose in coming to the hospital was to "obtain" Brown; Detective Howard arrived at the hospital to collect Brown at approximately 5:40 a.m.; Detective Howard transported Brown directly from the hospital in hospital garb with his head still bandaged; Brown was transported in the rear seat of a marked police cruiser; Brown was told that his car was towed to the police station because of dried blood on the passenger side; Detective Howard escorted Brown through the north tower door of the police department, which is located apart from the entrance for the general public; Brown was placed in an isolated interrogation room upon his arrival, where he was subsequently interrogated; and Brown was arrested at the conclusion of the interrogation.

Id. at 212.

Applying the totality of the circumstances test, the Court opined that the evidence showed a "lack of voluntariness" on Brown's part when he was transported to the police station. *Id*. at 213. In the Court's view, a person in Brown's predicament "would feel inhibited from simply leaving the presence of the police," and therefore, under such circumstances, the evidence supported the motions judge's finding that "Brown's freedom of movement was curtailed to the degree associated with a formal arrest." *Id*. at 214. Unlike the facts proven in the case sub judice, Mr. Brown was never told that he was "free to leave." *Id*. at 204.

In *Buck v. State*, 181 Md. App. 585 (2008) we held that a five-hour interrogation at the police station was custodial. Prior to the interrogation, Mr. Buck was walking on the shoulder of a road when he was stopped by a police officer and briefly questioned about the fatal stabbing of an elderly pedestrian whose last name was Baroody. The stabbing had taken place the previous day. *Id.* at 596-97. After Buck answered a few questions about his whereabouts at the time of the crime, one detective phoned another and, in Mr. Buck's

presence, said: "I think we got him" – meaning that he thought he found Mr. Baroody's killer. *Id*. at 597. The day after the roadside interview, officers went to Mr. Buck's house and asked if he would be willing to come to the sheriff's office to be interviewed about the murder. Buck was told that he would not be under arrest and he would be free to leave at any time. *Id*. at 598. Buck agreed to accompany the officer but said that he had to first change his clothes. A detective followed Buck upstairs to his bedroom and watched him dress. *Id*. Buck then got into the front passenger's seat of the police cruiser and was taken to the sheriff's office, which was a 30-minute drive. *Id*. During the trip to the sheriff's office, Buck was asked about the murder; he told the detective who was transporting him that a clerk at a filling station near where the murder occurred, had commented that he (Buck) resembled the person who committed the murder. Buck was 21 years old, had suffered from severe depression for several years, was on medication for depression but had not been taking his medication on the day of the interview. Once at the sheriff's office, Buck was interrogated from 1:20 p.m. to 6:20 p.m. *Id*. at 599. During the interview, he was never physically restrained and no weapons were displayed or drawn. He was not, however, advised of his *Miranda* rights. While being questioned, Buck mentioned the fact that a detective had said "I think we got him," which he took to mean that the officer thought that he had killed the victim. *Id*. at 600.

In *Buck*, we said:

> The interrogation at the station house lasted for about five hours, during which time Buck was not allowed to move about unescorted and was at all times being watched. He was escorted to and from his cigarette breaks by one sheriff's deputy on one occasion and by two sheriff's deputies on the other occasion. They monitored him during his two cigarette breaks and

> questioned him about his knowledge of the murder during the second such break. In the course of the five-hour interrogation, Buck was asked accusatory questions, was told his house was being searched for evidence in the Baroody murder, was asked to give a DNA sample, and gave such a sample. He was shown a photograph of his kitchen, taken during the search of his house, and was asked to identify the knife he used to stab [the victim]. Buck clearly was being interrogated as a suspect, not a witness, and, as stated above, *he* knew that and *the detectives* knew he knew that.

Id. at 625-26.

In finding that the interrogation took place while Buck was in custody, we stressed that the police drove Buck to the police station and that the police, by design, arrested Buck 20 minutes after being returned home from the interview. In *Buck*, even before the interrogation began, Buck's actions were strictly controlled by the police. This case, in some respects at least, is similar to *Buck* because Buck, like appellant, was told that he was free to go. But here, as already mentioned, appellant went to the police station voluntarily and, during the unwarned portion of the interview, the police didn't have any occasion to escort him anywhere. Moreover, unlike the situation in *Buck*, appellant was not held *incommunicado* because at all times during the unwarned portion of the interview, he had an iPod with which he could communicate with the outside world.

The case of *Abeokuto v. State*, 391 Md. 289 (2006), concerned crimes for which the State sought the death penalty. Mr. Abeokuto was picked up by the police and transported to the Missing Persons unit. *Id*. at 303. He was cooperative with the police after they asked if he was willing to talk with them about the disappearance of his girlfriend's eight-year-old daughter. Prior to the interview at issue, the police had questioned him on three prior occasions about the same subject. *Id*. at 331. The Court of Appeals held that the

questioning of the defendant took place when he was not in custody. *Id*. at 334. This finding was made even though the defendant was held, prior to questioning, for two-and-a-half hours in a small locked room at the Missing Persons unit of the police station before he was taken by a police cruiser to the Homicide unit where he was made to wait another three hours before questioning began. *Id*. at 331. While at the police station, when he went to the bathroom, he was escorted by a police officer "according to normal police practices." *Id*. at 304. The questioning lasted for approximately one and a half hours and took place in a detective's office with an open door. *Id*. at 330-32.

During the interview, the police were, at times, accusatory. *Id*. at 305. After finding a discrepancy in his story, the interviewing detective said, "[I]t looks like there's something going on here" and "you better let us know about that shit, because we find out anything further, then you're going to be looking like a prime suspect in this stuff[.]" *Id*. If, during the interview the defendant was ever told that he was "free to leave," it is not mentioned in the *Abeokuto* opinion. The Court of Appeals said in *Abeokuto*:

> After considering the circumstances surrounding [a]ppellant's interrogation at the Homicide Unit, we hold that, while some circumstances hint at restraint or coercive elements, we are not prepared to conclude that they rise to the level that a reasonable person would feel that he or she were under arrest or his or her freedom of movement restrained to the degree associated with a formal arrest. That the questioning occurred in a police station is not determinative of whether a custodial interrogation occurred. In *Oregon v. Mathiason*, the U.S. Supreme Court held there was no custody and no deprivation of freedom when the defendant, a burglary suspect, came voluntarily to the police station at the request of the police, was told that he was not under arrest, although a suspect, and was permitted to leave at the end of the half-hour interview because the defendant was not deprived of his freedom of action in any significant way. 429 U.S. 492, 495 (1977) (per curiam). The Court stated that a non-custodial interrogation is not converted merely because the questioning took place in a "coercive environment." *Id.*

> Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody."

Id. at 332-33.

In *Thomas v. State*, Konnyack A. Thomas was charged and convicted of one count of sexually abusing his minor daughter and two counts of second-degree rape of her. 429 Md. at 249-50. One of the important items of evidence against Mr. Thomas was a confession he gave at a police station in an interview that lasted an hour and a half. *Id*. at 249. During the course of the interview, Mr. Thomas admitted touching his daughter inappropriately and having sexual intercourse with her. *Id*. At no time prior to his confession was he advised of his *Miranda* rights. *Id*.

Prior to the interview, a police officer called Mr. Thomas and asked if he would "come down to the [police] station"; he was told that the interview "had to do with one of his children." *Id*. at 262. Prior to his arrival at the police station, Mr. Thomas spoke with his estranged wife who informed him that the police wanted to speak to him about accusations of sexual abuse made by their daughter against him. *Id*. At the police station, Mr. Thomas was interviewed in a room that was adorned with children's toys and a couch. The interview room was not "intimidating" and was characterized by one of the detectives

that questioned Mr. Thomas as "not look[ing] like a police facility[.]" *Id.* Mr. Thomas was interviewed by only two police officers, "both of whom were not in uniform, did not have weapons, and were 'polite,' 'courteous,' and 'respectful[.]'" *Id.* Mr. Thomas was not placed under arrest at the end of the interview but twenty minutes after the questioning was concluded, Mr. Thomas was arrested for sexual abuse. *Id*. at 266. During the course of the interview, one of the detectives told Mr. Thomas that he had spoken to Thomas's daughter who told him "some things that ha[d] been going on for quite some time between you and her." *Id*. at 265. Thomas then admitted to touching and abusing his daughter. *Id.*

Counsel for Mr. Thomas made a motion to suppress the confession and contended that because the questioning was custodial, he was entitled to receive his *Miranda* warnings. The circuit court granted the motion to suppress after finding that Mr. Thomas was in custody during the interrogation. The State appealed to this Court (*State v. Thomas*, 202 Md. App. 545 (2011)) and we reversed and remanded the case back to the circuit court for trial. Mr. Thomas filed a petition for a *writ of certiorari*, which was granted. The Court of Appeals affirmed our decision holding that the defendant was not in custody at the time he was interrogated and thus was not entitled to *Miranda* warnings prior to or during interrogation. 429 Md. at 273.

The Court of Appeals, in *Thomas*, summarized the position of the parties as follows:

> Thomas . . . asserts . . . that an analysis of all the factors surrounding his interrogation supports that he was subjected to custodial interrogation as soon as he entered the police station:
>
> > key factors that point to petitioner being in custody include: 1) prior to questioning, petitioner was aware that the police had been told by his wife and daughter that he had been sexually assaulting his

> daughter, thus he knew they had sufficient evidence to arrest him before he even said one word; 2) petitioner was questioned inside a police station interview room with two detectives seated between himself and a closed door; 3) the detectives never once told petitioner he was free to leave or did not have to cooperate; 4) police confronted petitioner with the evidence they had against him, his daughter's own words to them; and 5) he was actually placed under arrest shortly after the interrogation ended.
>
> The State counters that the Court of Special Appeals correctly determined that Thomas was not in custody for the duration of his interview, highlighting that Thomas voluntarily came to the police station, was told he was not under arrest, was told the door was unlocked, was confronted with officers who were not in uniform or armed, and was left alone for a period of time.

Id. at 269 (emphasis added).

In *Thomas*, the Court of Appeals criticized the circuit court for not properly applying the totality of the circumstances test. *Id*. at 261. The Court of Appeals said: "[T]he judge based his conclusion that Thomas was initially in custody on the bases that Thomas was at the police station and that he later confessed." As mentioned earlier, the *Thomas* Court rejected that reasoning. *See* page 24, *supra*. *See also United States v. Chee*, 514 F.3d 1106, 1114 (10th Cir 2008).

There are many similarities between this case and *Thomas*, although here, the unwarned portion of the interview covered four hours in contrast to an hour and one-half in *Thomas*. On the other hand, here appellant was told, from the outset, that he was free to go at any time, but Mr. Thomas was never so advised.

Based on the totality of the circumstances, we hold that during the unwarned part of the interview, a reasonable person in appellant's position would have felt that he was at liberty to terminate the interview and leave. Put another way, we conclude that appellant

was not subjected to a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. at 1125 (quotation marks and citation omitted). The factors that we have considered in arriving at our conclusion are set forth *supra* at pages 22-32 and there is no reason to repeat what has already been said, except to acknowledge that there are some factors that weigh in favor of a finding of custody although more compelling factors point in the opposite direction. The factors that most favor a finding of custody, are the length of the interrogation (four hours) and the place where the interrogation took place (a relatively small room at a police station that had a door that could only be opened or closed with a key card that appellant did not possess). But, in the words of the Court of Appeals in *Brown*, *supra*, the lodestar of our objective test that we must apply is whether the defendant was subject to an environment containing the inherently compelling pressures of custodial interrogation, which powered the *Miranda* decision. 452 Md. at 212. That was not the type of environment that appellant faced. Two female police officers were polite to appellant, never raised their voice, never threatened him, treated him with kindness and good manners. Nothing the interrogating detectives did throughout the four hours of interrogation, expressly or implicitly, contradicted the statement made by Detective Then at the outset that appellant was "free to go at any time." We therefore hold that appellant did not meet his burden of proving that during the unwarned portion of the interview he was in custody.[3]

[3] Appellant argued in his brief that the detectives used "a two-step interrogation technique prohibited under" *Missouri v. Seibert*, 542 U.S. 600 (2004). But in order for the (continued…)

IV.

LIPFORD'S WAIVER OF HIS MIRANDA RIGHTS

Appellant contends that the State failed to prove that he "knowingly, intelligently and voluntarily" waived his *Miranda* rights. He also complains that he was pressured, coerced, deceived and provided with a "jargon-laden [waiver] advisement."

Inquiry into the adequacy of the waiver of the *Miranda* rights "has two distinct dimensions":

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if "the totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Moran v. Burbine, 475 U.S. 412, 421 (1986) (citations omitted).

> The *Miranda* Court recognized that a waiver of the rights afforded by the warnings can be undermined by words or actions on the part of the police. If the evidence shows "that the accused was threatened, tricked, or cajoled into a waiver," then that "will, of course, show that the defendant did not voluntarily waive his privilege." *Miranda*, 384 U.S. at 476. *See Colorado v. Spring*, 479 U.S. 564, 576 n.8 (1987) (noting that the Court "has found affirmative misrepresentations by the police sufficient to invalidate a suspect's waiver of the Fifth Amendment privilege" (citation omitted)); *accord United States v. Anderson*, 929 F.2d 96, 100-01 (2d Cir. 1991) (affirmative misrepresentations by the police may be sufficiently coercive to invalidate a suspect's waiver of the Fifth Amendment privilege); 2 WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL

principles set forth in *Seibert* to be applicable, it must be shown that a suspect gave an inculpatory statement, while in custody, without having been advised of his *Miranda* rights (first-step). *See* n.1, *supra*. Because we have just held that appellant was not in custody during the unwarned part of the interview, the principles set forth in *Seibert* are inapplicable.

> PROCEDURE § 6.9(c) (stating that, in contrast to traditional voluntariness, "there is an absolute prohibition upon any trickery that misleads the suspect as to the existence or dimensions of any of the applicable [*Miranda*] rights").

Lee v. State, 418 Md. 136, 150-51 (2011).

Appellant was advised of his rights, by Detective Then, as follows:

> So you have the right now and at any time to remain silent. Anything you say will be used against you, will be used against you, excuse me. You have the right to a lawyer before or during any questioning. If you can't afford one, one will be appointed for you, okay? You guys rather [sic] be taking probably before a District Court commissioner who is a judicial officer not connected with the police. The commissioner will inform you of each of, either offense you're charged with and the penalties for each offense, provide you with a written copy of the charges against you, advise you of your right to counsel, make a plea, trial, custody determination and advise you of every other right to a preliminary hearing before a judge at a later time. Do you understand what I've just said?
>
> Mr. Tysean Lipford: Yes.
>
> Detective Then: Yes?
>
> Mr. Tysean Lipford: Yes.
>
> Detective Then: Okay.

At the motions hearing, the State introduced a video clip from a 2013 police interview where Mr. Lipford (then 16 years old) was read and waived his *Miranda* rights. This evidence was introduced to show that Lipford had prior experience and knowledge of the rights afforded to suspects undergoing police interrogation. *See Finke v. State*, 56 Md. App. 450, 488 (1983) (evidence admissible to show that the suspect was "no stranger to police interrogation.").

The motions judge found that the detective properly advised appellant of his *Miranda* rights and that appellant waived those rights by his actions and conduct when he continued to "talk and answer" the questions of the detectives.

The State, not surprisingly, agrees with the motions judge and argues:

> [T]he record is clear that Lipford waived his *Miranda* rights. It is well-established that a defendant may waive his *Miranda* rights by verbally stating that he understands the rights read to him and proceeding to speak to the police. *Swain v. State*, 50 Md. App. 29, 43 (1981). In *Berghuis v. Thompkins*, 560 U.S. 370, 384 (2010), the Supreme Court held that the State "[did] not need to show that a waiver of *Miranda* rights was express." An "implicit waiver" will suffice, which "may be implied through the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver." *Id*. (quoting *North Carolina v. Butler*, 441 U.S. 369, 373 (1979)); *see also In re Darryl P*., 211 Md. App. 112, 170 (2013) ("Once informed of and understanding his *Miranda* rights, a suspect who then voluntarily speaks to the police may be found to have implicitly waived those rights.").

In support of his contention that he was coerced into waiving his *Miranda* rights, appellant first points to the fact that immediately after twice saying he understood his rights, he asked to take a break so that he could smoke a cigarette. The cigarette request was not explicitly denied, but it was ignored at least temporarily. Nevertheless, contrary to appellant's claim, neither the words nor actions of the detectives implied that appellant would not be allowed to smoke unless he waived his *Miranda* rights. In fact, he asked to smoke <u>after</u> he waived those rights.

Appellant also argues that "[a]dding to the coercive pressure, the detectives invoked the watchful eye of [a]ppellant's mother and God[.]" In support of this contention, appellant points to something Detective Smith said in the unwarned portion of the interview. This statement was made a significant amount of time before he was given his

Miranda rights and shortly after appellant told the detective that he believed in God. Detective Smith said, "you know that God can see everything" to which appellant said, "uh-huh." She then told appellant that both his mother and God would "want you to tell the truth." We fail to see how these statements by Detective Smith coerced appellant into giving up his *Miranda* rights.[4] For starters, the emphasis on what God and appellant's mother would want him to do, didn't convince him to change his story because he thereafter, in answer to numerous questions, denied that he visited Leandra's house on the night of the murder. *See Finke v. State*, 56 Md. App. at 490-91 (1983) (upholding confession as voluntary even though the police invoked the defendant's religion and provided "advice concerning mortal sins" that, as the defendant perceived it, "had the effect of telling [him] to 'confess to earthly authorities'" where, after receiving the mortal sin advice he persisted in not telling the truth); *State v. Cobb*, 43 P.3d 855, 859, 864-65 (Kan. Ct. App. 2002) (upholding confession as voluntary even though the police "made numerous religious references," including indicating that "the Lord" does not want "half-baked Christians" and would be displeased if the defendant lied).

Appellant also contends that the two detectives deceived him by repeatedly telling him "that an explanation to the effect that he killed Matthews to protect himself and his family would be 'understandable' or 'justifiable,' consistent with being a 'man,' perhaps an act of 'self-defense,' and would not make him a bad person." In other words, appellant

[4] In this regard, appellant cites *Carley v. State*, 739 So.2d 1046, 1053 (Miss. Ct. App. 1999), where a detective's appeal to "Heaven and Hell" and the exhortation "the truth sets you free" contributed to an involuntary confession of a defendant with a mental disability. Appellant had no disability.

contends that these statements contradicted the *Miranda* warnings that anything he said would be used against him. There are many cases where a *Miranda* waiver is held to be ineffective because what the police tell the suspect contradicts what is said in the *Miranda* warnings. For instance, in *Logan v. State*, 164 Md.App. 1, 48 (2005), a detective told a suspect that he "wo[uldn't] use any of the information to harm" him. Or, a statement in *Hart v. Attorney General of the State of Florida*, 323 F.3d 884, 889 (11th Cir. 2003), that "honesty wouldn't hurt" him; or in *State v. Stanga*, 617 N.W.2d 486, 491 (S.D. 2000) (when the suspect, Stanga, told the detective that he knew that the detective was there to get something against him and the detective responded "no, I'm here for you and I to talk" nullified the *Miranda* warnings.).

Much of what the detectives said to appellant can be characterized as "sympathetic," and the detectives led appellant to believe that they thought they understood why he may have acted as he did. But the detectives never crossed the line by saying either explicitly or implicitly, that what he told them would not be used against him in a court of law or that he might have a valid self-defense claim if he were charged with Matthew's murder.

In a similar vein, the appellant criticizes the detectives for presenting themselves as "surrogate mothers" when one of them said "[w]e're both mothers and we're both looking at you like you're our son, okay? . . . We're here for you and . . . we want to hear what you have to say." Appellant argues that this was "a potent ploy when the suspect is only nineteen as was [a]ppellant." According to appellant, the reason this was objectionable was because, purportedly, mothers "do not hurt their children." This argument is a clever one, but it overlooks the fact that appellant asked the detectives what they would do once

he told them what he had done and he was told by Detective Then that she would have to tell her supervisor. Regardless of whether it is true that mothers don't "hurt their children," appellant knew that if he said anything incriminating, the detectives would not keep quiet about it but instead would report his statement to higher ranking police authorities.

Appellant also complains about a "deceptive tactic," used by the detectives when they "communicated to [a]ppellant that his only opportunity to explain what happened was in the interrogation room that day." He cites *United States v. Anderson*, 929 F.2d 96, 100 (2nd Cir. 1991) a case where a confession was held to be involuntary, in part, because a federal agent "may have created in [the suspect's mind] a false sense that he must confess at that moment or forfeit forever any future benefit that he might derive from cooperating with the police agents." In regard to that argument, appellant points to a statement by Detective Smith, in the unwarned portion of the interview, where she said:

> We're trying here to give you the opportunity to tell us what you know, okay, because the science [DNA test] isn't going to lie, it is what it is. It's going to be 99.9[%] accurate. . . . And if your DNA comes back on his body, we're not going to talk to you about this anymore. . . . Today is your opportunity . . . to help us understand why it would be there, okay?

The facts in this case are a far cry from those in *United States v. Anderson*. In *Anderson*, a federal agent admitted that he told the defendant three times to choose between having an attorney present during questioning or cooperating with the government. *Id*. The Court, in *Anderson*, held that these statements were false and/or misleading because "[i]t is commonplace for defendants who have acquired counsel to meet with federal law enforcement officials and agree to cooperate with the government." 926 F.2d at 100. Here, appellant was not asked to make the choice that the suspect in *Anderson* was forced to

make. The detectives did not say that this was the appellant's last opportunity to cooperate nor did they say they would not talk to him, if he elected to have an attorney present. They said, in effect, that if, in the future, his DNA was proven to be on the decedent's body, they would not be questioning him about how it got there. That statement was neither false nor misleading. A suspect has no right to be questioned by the police and this statement made by the detectives did not otherwise coerce appellant into giving up any right. In other words, the statement by Detective Smith did not prove, or even help to prove, that appellant did not "knowingly, intelligently and voluntarily" waive his *Miranda* rights. Nor did it prove coercion.

Also, appellant criticizes the manner in which he was advised of his *Miranda* rights. His argument is as follows:

> The detective asked, "Do you understand what I've just said?," to which [a]ppellant replied, "Yes." Did [a]ppellant understand the bit about *Miranda*, the bit about a commissioner, or both – or neither? The record does not provide an answer to this question. There is no evidence in the record that [a]ppellant had ever been before a commissioner; the notion that he understood what a "preliminary hearing" is, or the difference between a commissioner and a judge, as referenced by the detective, is ludicrous.[5] He answered "yes" just to get the ordeal over with.

This argument overlooks the fact that when Detective Then advised him of his *Miranda*, and other rights, she inquired "[d]o you understand what I've just said?" To

[5] Whether the appellant had ever been before a commissioner or knew what a preliminary hearing was or knew the difference between a commissioner and a judge is irrelevant, when, as here, the question is whether he knowingly, intelligently and voluntarily waived his right to remain silent, his right to have an attorney present before or during any questioning, and the right to have an attorney appointed to represent him if he could not afford to pay an attorney.

which appellant answered "[y]es." Taking the evidence, as we must, in the light most favorable to the State, the prevailing party below, the answer appellant gave meant he understood all the rights that had been read to him. Here, the motions judge's finding that appellant knowingly, intelligently and voluntarily waived his *Miranda* rights was bolstered by proof introduced by the State that previously, when appellant was a juvenile, he had been advised, and waived, his *Miranda* rights.

Lastly, appellant, in support of his argument that his waiver was not "knowingly" made, points to the fact that, towards the end of the warned portion of the interview, when Detective Smith talked to appellant about what would happen when he left the interview room and was formally processed, appellant asked "[d]o I get lawyers or anything?" Appellant argues that because that question was asked, it "leaves no doubt that [a]ppellant's waiver was not knowing and intelligent." His argument continues: "If [a]ppellant had understood the *Miranda* advisement, he would not have asked this question." Appellant cites *Logan*, 164 Md. App. at 42 quoting with approval, from *Hart v. Attorney General of the State of Florida*, 323 F.2d at 894, as follows: "Although asking for the pros and cons of hiring a lawyer is not an unequivocal request for counsel, it does indicate that [the suspect] did not fully understand his right to counsel and was asking for clarification of that right." The inquiry that appellant made in this case is not analogous to the one made in *Logan*, or the inquiry at issue in *Hart*. The question appellant asked in this case, when read in context, concerned whether he would get a lawyer once he had been photographed, fingerprinted and processed. In other words, the question did not indicate that he was unaware of the fact that at all times during the warned portion of the interview, he had a

right to a lawyer. Moreover, the inquiry cannot be appropriately construed as indicating that he presently wanted a lawyer, because immediately after he asked the question, Detective Smith asked appellant whether he wanted a lawyer and he replied in the negative.

In viewing the totality of the circumstances surrounding the interrogation, we hold that the suppression judge did not err when he held that appellant made an uncoerced choice to waive his *Miranda* rights with the requisite level of comprehension.

V.

WAS APPELLANT'S STATEMENT MADE VOLUNTARILY?

In regard to the issue of voluntariness, appellant's entire argument is as follows:

> [T]he State must establish, by a preponderance of the evidence, that . . . the incriminating statement was made voluntarily under Maryland non[-] constitutional law, the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and Article 22 of the Maryland Declaration of Rights." *Whittington v. State*, 147 Md. App. 496, 514 (2002). The "ultimate issue of 'voluntariness' [of a confession] is a legal question" reviewed *de novo*. *Id*. at 514-15 (citations omitted).
>
> Relevant factors for determining the voluntariness of a statement include, but are not limited to, the following:
>
> > where the interrogation was conducted, its length, who was present, its content, whether the defendant was given *Miranda* warnings, the mental and physical condition of the defendant, the age, background, experience, education, character, and intelligence of the defendant, when the defendant was taken before a court commissioner following arrest, and whether the defendant was physically mistreated, physically intimidated or psychologically pressured.
>
> *Hof v. State*, 337 Md. 581, 596-97 (1995) (citations omitted). Ultimately, the "'totality of the circumstances' test . . . governs the analysis of voluntariness under the State and Federal Constitutional provisions," as well as the Maryland common law analysis. *Burch v. State*, 346 Md. 253, 266 (1997).

> For the reasons set forth above [in the section of appellant's brief dealing with whether his *Miranda* rights were knowingly, intelligently and voluntarily waived], the *Miranda* warnings were ineffective and, thus, cannot support a finding of voluntariness. Furthermore, incorporating the "totality of circumstances" analysis set forth above, [a]ppellant's pre-*Miranda* and post-*Miranda* statements were involuntary and, on that separate basis, must be suppressed.
>
> Recently in *Ford v. State*, 235 Md. App. 175 (2017), we said:
>
> > Under federal and Maryland constitutional law, a statement is involuntary if it results from police conduct that overbears the will of the suspect and induces the suspect to confess. Under Maryland non-constitutional law, a statement is involuntary when a suspect is so mentally impaired that he does not know or understand what he is saying, or when the confession is induced by force, undue influence, improper promises, or threats. To determine whether a suspect's statement was voluntary, the trial court must consider the totality of the circumstances, including, *inter alia*, the length of the interrogation, the manner in which it was conducted, the number of police officers present throughout the interrogation, and the age, education and experience of the suspect.

Id. at 187 (quotation marks and citations omitted).

In this case, appellant was questioned over a period of approximately ten hours. During questioning, Lipford was repeatedly offered water and food and he was promptly taken to the restroom whenever he requested to go. The length of the interrogation, ten hours, was not "excessively prolonged." *See Hamwright v. State*, 142 Md. App. 17, 41 (2001) (confession was voluntary even though the suspect was in handcuffs and leg irons during questioning, and the questioning was not "excessively prolonged" even though questioning lasted ten hours). *See also Hines v. State*, 58 Md. App. 637, 658-60 (1984) where the Court held that the confession was voluntary even though the defendant was continuously interrogated for "over fifteen hours with breaks only to eat or go to the bathroom[.]"

The transcript of the interrogation together with the videotape showed that appellant was of at least average mental competence and had no physical disabilities. He was, at the time of the interrogation, an adult with a high school education. As a juvenile, he had previously been interrogated and previously been advised, and waived his *Miranda* rights. He was never physically mistreated or physically intimidated by the interrogating detectives. Instead, as the motions judge found, the detectives were "kind, gentle, non-threatening," and indeed "soothing" and "motherly" toward appellant. Moreover, the detectives made appellant no unfulfilled promises and repeatedly told him that they could not make any promises, just "to make [him] feel better." Importantly, during the interrogation, appellant was never told, nor was it implied, that making an inculpatory statement would be to his advantage, or that he would be given help or some special consideration if he confessed. For all of the above reasons, we hold that the motions judge's conclusion that Lipford's confession was given voluntarily was supported by the record.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.