

7/1/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00984 COA

RANDY ANESS ZINN A/K/A "BO" APPELLANT

v.

STATE OF MISSISSIPPI APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. FRANK ALLISON RUSSELL

COURT FROM WHICH APPEALED: LEE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: C. EMANUEL SMITH

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: W. GLENN WATTS

DISTRICT ATTORNEY: JOHN R. YOUNG

NATURE OF THE CASE: CRIMINAL - CT I MANSLAUGHTER; CT II AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: CONVICTED ON BOTH COUNTS AND SENTENCED TO SERVE 20 YRS IN THE CUSTODY OF THE MDOC ON EACH COUNT. SAID SENTENCES TO RUN CONSECUTIVELY.

MANDATE ISSUED: 7/22/97

BEFORE THOMAS, P.J., DIAZ, HINKEBEIN, AND PAYNE, JJ.

HINKEBEIN, J., FOR THE COURT:

Randy Zinn was convicted for the crimes of manslaughter and aggravated assault in the Circuit Court of Lee County. He was sentenced to a term of twenty years imprisonment on each count to serve in the custody of the Mississippi Department of Corrections, with said sentences to run consecutive to

each other. Feeling aggrieved by the judgment against him, Zinn appeals his conviction on the following grounds:

I. THE TRIAL COURT ERRED BY REFUSING TO SUPPRESS THE DEFENDANT'S STATEMENT AND CONFESSION OBTAINED IN VIOLATION OF THE MISSISSIPPI YOUTH COURT ACT, THE CONSTITUTIONS OF THE UNITED STATES AND MISSISSIPPI.

II. THE TRIAL COURT ERRED IN EXCLUDING THE STATEMENT OF WITNESSES FOR THE DEFENDANT AS TO DEFENDANT'S CHARACTER TRAIT IN ISSUE.

III. THE TRIAL COURT ERRED BY REFUSING TO SUPPRESS EVIDENCE OF INDEPENDENT PRIOR BAD CONDUCT BY THE DEFENDANT IN VIOLATION OF THE MISSISSIPPI CONSTITUTION AND THE CONSTITUTION OF THE UNITED STATES.

IV. THE ADMISSION OF POSTMORTEM PHOTOGRAPHS OF THE DECEASED VIOLATED RULE 401 AND 403 OF THE MISSISSIPPI RULES OF EVIDENCE AND THE STATE AND FEDERAL CONSTITUTIONS.

We find that the issues raised by the Appellant do not warrant a reversal of his conviction. Accordingly, we affirm the judgment of the trial court.

FACTS

On October 22, 1993, Daniel Fowler, a resident of Dennis, Mississippi, was driving an automobile in the city of Tupelo, Mississippi. With him in the automobile were two passengers, Renee Ridings and Travis Ridings. Fowler and the Ridings were in an area of Tupelo known as "the hill" when Randy Zinn approached their automobile. Zinn subsequently fired three shots into the automobile with a .380 automatic weapon, striking both Fowler and Renee Ridings. Fowler, although seriously injured, sped away in the vehicle. The car eventually came to rest several blocks away from where the shooting occurred. Fowler died as a result of his gunshot wounds, and Renee Ridings sustained injuries.

PROCEEDINGS BELOW

Zinn, who was seventeen years old at the time of the incident, was later arrested and charged with the murder of Daniel Fowler and the aggravated assault of Renee Ridings. Zinn gave a statement to the police wherein he admitted shooting both Fowler and Ridings. A suppression hearing was held on the admissibility of Zinn's confession. The trial court, after hearing from all those present when Zinn gave his confession, denied the motion to suppress the confession. The trial court found that the evidence heard at the pre-trial hearing was sufficient for showing that the confession had been freely, voluntarily and knowingly made after a full *Miranda* warning.

The jury returned a guilty verdict on one count of aggravated assault against Ridings. With respect to the murder charge in the death of Fowler, the jury found Zinn guilty of manslaughter.

ANALYSIS

I. THE TRIAL COURT ERRED BY REFUSING TO SUPPRESS THE DEFENDANT'S STATEMENT AND CONFESSION OBTAINED IN VIOLATION OF THE MISSISSIPPI YOUTH COURT ACT, THE CONSTITUTIONS OF THE UNITED STATES AND MISSISSIPPI.

The Mississippi Youth Court Law is provided in title 43, chapter 21 of the Mississippi Code. Section 43-21-151(1) of the Mississippi Code addresses jurisdictional issues of the youth court. This section states that:

The youth court shall have exclusive original jurisdiction in all proceedings concerning a delinquent child, . . . except where any act committed by a child, which if committed by an adult would be punishable under state or federal law by life imprisonment or death, in which, under such circumstances, the circuit court shall be the court of original jurisdiction.

Section 43-21-157(1) states that:

If a child who has reached his thirteenth birthday is charged by petition to be a delinquent child, the youth court, either on motion of the youth court prosecutor or on the youth court's own motion, after a hearing as hereinafter provided, may, in its discretion, transfer jurisdiction of the alleged offense described in the petition or a lesser included offense to the criminal court which would have trial jurisdiction of such offense if committed by an adult. The child shall be represented by counsel in transfer proceedings.

Section 43-21-311(2) states that:

When a child is taken into custody, the child may immediately telephone his parent, guardian or custodian; his counsel; and personnel of the youth court. Thereafter, he shall be allowed to telephone his counsel or any personnel of the youth court at reasonable intervals. Unless the judge or his designee finds that it is against the best interest of the child, he may telephone his parent, guardian or custodian at reasonable intervals.

In the case at bar, Zinn was questioned regarding the shooting incident. Both the murder charge and the aggravated assault charge arose out of the same set of circumstances. It was, therefore, impossible to employ a separate method of interrogation as to both charges. At some point, the youth court certified the charge of aggravated assault as being triable in circuit court, and both charges were tried simultaneously.

Zinn argues that because he was charged with aggravated assault, as well as murder, he should have been afforded all of the additional protections provided by the Youth Court Act. Specifically, he complains that his statement was obtained in violation of the Act because he was not represented by counsel at the time, nor was he allowed to call his parent. Thus, he asserts that the statement he gave should not have been admissible at the trial against him.

Although Zinn acknowledges that Mississippi law allows a juvenile defendant who is charged with murder to be treated as an adult for all purposes, he contends that a juvenile defendant arrested on charges of aggravated assault as well, is entitled to all the rights and protection of the Mississippi Youth Court Act on that charge and that the rights relative to the aggravated assault charge are not lost, waived or merged into the associated murder charge.

The State concedes that Zinn was not given the opportunity to contact his mother after his arrest. The State argues, however, that a full suppression hearing was held wherein Zinn admitted that his statement was voluntarily given without any coercion or promises. More to the point, the State asserts that the record indicates the aggravated assault charge was certified from youth court to circuit court, thereby giving the circuit court exclusive jurisdiction over the entire matter. The Court, while in agreement with this proposition, determines that the crux of this issue is not whether the circuit court eventually obtained jurisdiction over the entire matter, but rather when it obtained jurisdiction. If in fact the questioning of the juvenile defendant took place before the charge of aggravated assault was certified from the youth court, the defendant should be afforded the greater protection provided for by the Youth Court Act as to that charge. *See Ferguson v. State*, 688 So. 2d 760 (Miss. 1997). Unfortunately, the record is unclear regarding this issue.

The appellant bears the burden of proof as to issues on appeal. In *Mason v. State*, 440 So. 2d 318, 319 (Miss. 1983), the Court stated that issues must be decided based upon record evidence not assertions in the appellant's briefs.

We have on many occasions held that we must decide each case by the facts shown in the record, not assertions in the briefs, however sincere counsel may be in those assertions. Facts asserted to exist must and ought to be definitely proved and placed before us by a record, certified by law, otherwise, we can not know them.

Zinn provides us with nothing in the record to prove that he was questioned prior to the charge of aggravated assault being certified to the circuit court. Once the charge was certified to the circuit court, the Youth Court Act no longer applied. Consequently, Zinn's statement would not have been taken in violation of the Act and would be properly admitted as to both charges. Simply put, we cannot find that the statement was taken in violation of the Act where there is no proof of such. Furthermore, assuming arguendo that the statement was taken prior to the aggravated assault charge being certified to the circuit court, under the facts of this case, we find the error of admitting the statement to be harmless. Because the aggravated assault charge was certified to the circuit court, Zinn was tried on both charges simultaneously. This resulted in the same jury hearing evidence on both charges. The statement was admissible as to the murder charge, regardless of when it was taken, because the Youth Court Act does not apply to juveniles charged with this crime. Consequently, the jury would have heard the admission contained in the statement regardless of whether the court sustained the motion to suppress. The court, in this circumstance, could not have allowed the jury to consider the statement for the purposes of the murder charge and then instructed them to disregard it as to the aggravated assault charge.

II. THE TRIAL COURT ERRED IN EXCLUDING THE STATEMENT OF WITNESSES FOR THE DEFENDANT AS TO DEFENDANT'S CHARACTER TRAIT IN ISSUE.

As part of his case in chief, Zinn sought to introduce testimony from several witness as to his character for peacefulness and non-violence. The trial court excluded all of this evidence and included in the record a proffer by Zinn that these witnesses would testify that they knew of Zinn's reputation in the community for peace and violence and that it was good. The court concluded that it would not allow the testimony of these witnesses at that time because Zinn had not yet testified. Mississippi Rule of Evidence 404 provides that evidence of a person's character or a trait of his character is

generally not admissible. The rule does, however, designate certain exceptions. One of these exceptions allows the accused to offer evidence of a pertinent trait of his character. Miss. R. Evid. 404(a)(1). Only upon doing so is the prosecution then allowed to offer character evidence of the accused in an effort to rebut the earlier testimony. *Rowe v. State*, 562 So. 2d 121, 123 (Miss. 1990). Other than the character trait being one which is pertinent to the resolution of guilt or innocence, there is no restriction on the defendant's ability to offer evidence of his character. Here, Zinn's character as to peacefulness was at issue. Thus, it was error not to allow witnesses on his behalf to testify as to his peaceable nature. As the Mississippi Supreme Court explained in *Rowe v. State*, 562 So. 2d 121, 123 (Miss. 1990):

The defendant in a criminal case may offer his good character to evidence the improbability of his doing the act charged. Miss. R. Evid. 404(a)(1). . . . The prosecution may not offer evidence of the accused's character unless and until the accused has raised the issue by offering evidence of his good character. . . . The defendant does not put his character in issue by taking the stand as a witness. If the defendant testifies as a witness, his credibility as a witness may be attacked. A defendant's character is put in issue when he states that he has a good character or a good record, or when he otherwise offers evidence of good character.

The trial court's decision to disallow the character evidence until after Zinn had testified would have been appropriate if the witnesses were to testify as to Zinn's credibility, as this was not yet in issue. The proffer, however, reflects that the witnesses were to testify as to whether Zinn has a peaceful or violent nature. Given that Zinn was charged with murder and aggravated assault, this was pertinent testimony.

This, however, does not conclude our review. We must next determine whether this error is of a magnitude warranting reversal. In doing so, we are guided by Mississippi Rules of Evidence 103(a) (2) which provides as follows:

(a) **Effect of Erroneous Ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

...

(2) *Offer of Proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

The comment to Rule 103 indicates that this rule has no effect on the harmless error principle. *See also Hoover v. State*, 552 So. 2d 834, 840 (referencing comment with approval).

The record reflects that Zinn made the offer of proof as required by the rule. The rule also "requires that we affirm unless the exclusion affects a substantial right of the party offering evidence." *Hoover*, 552 So. 2d at 840, citing *Darby v. State*, 538 So. 2d 1168, 1173-74 (Miss. 1989). The right to a fair trial, as is implicated here, does affect a substantial right of the defendant. *Id.* "However, when dealing with constitutional issues such as the right to a fair trial involved here, reversal is not required if "on the whole record, the error was harmless beyond a reasonable doubt." *Id.*

Regardless of the court's ruling, the record reflects that character witnesses were allowed to testify on behalf of Zinn. Furthermore, the jury was presented overwhelming evidence of Zinn's guilt. In addition to Zinn's statement wherein he admits firing what he believed was three shots into the automobile driven by the victim with a .380 automatic pistol, one of Zinn's closest friends testified that he saw Zinn fire three shots into the automobile. There were also other eyewitnesses who knew Zinn that placed him on the driver's side of the car as well as their accounts of how Zinn was leaning into the car when he fired the handgun that was in his right hand. The two other passengers in the vehicle at the time of the shooting corroborated the testimony of the other eyewitnesses. The physical evidence presented at trial included Zinn's fingerprints on the driver's side window of the automobile where Fowler was sitting when he was shot. This evidence was confirmed by two fingerprint experts. While the trial court did erroneously exclude the character witnesses for the defendant, or otherwise put undue restrictions on their ability to testify, considering the evidence against him, we find that Zinn did not suffer actual prejudice in this case. As the Mississippi Supreme Court recognized in *Hoover*:

Judicious application of the harmless error-rule does not require that we indulge assumption of irrational jury behavior when a perfectly rational explanation for the jury's verdict, completely consistent with the judge's instructions, stares us in the face.

Id. at 841.

Taking the record as a whole, we conclude that the exclusion of evidence in this case was harmless error beyond a reasonable doubt.

III. THE TRIAL COURT ERRED BY REFUSING TO SUPPRESS EVIDENCE OF INDEPENDENT PRIOR BAD CONDUCT BY THE DEFENDANT IN VIOLATION OF THE MISSISSIPPI CONSTITUTION AND THE CONSTITUTION OF THE UNITED STATES.

By motion prior to trial, Zinn sought to exclude in limine any evidence regarding a similar incident that occurred earlier on the same day at basically the same place, involving a red truck. The trial court ruled that the State would be initially precluded from going into the "red truck" incident. The court, nevertheless, stated that if it later developed from the testimony that the "red truck" incident was part of the *res gestae*, he would consider letting it in.

However, during cross examination of one of the State's witnesses, Zinn's counsel explicitly asked about the shooting incident involving the red truck. After hearing this testimony, the trial court ruled that Zinn had opened the door on the "red truck" incident, and that it was in his opinion now relevant evidence for showing intent or plan under 404(b).

In *Hunt v. State*, 538 So. 2d 422, 426 (Miss. 1989), the Mississippi Supreme Court held that evidence of other offenses can be admissible where the defendant "opens the door" to such evidence and where it is relevant to show intent, scheme, plan or absence of mistake. The court in *Hunt* stated that:

Certain well-established exceptions exist, however, to the rule on the inadmissibility of other unconvicted crimes of an accused. Evidence of another offense is admissible when offered, not to show the accused's criminal tendencies, but instead to prove identity, knowledge, intent, common

criminal scheme or plan, or absence of mistake, and where the defendant may "open the door" to evidences of other crimes or because the offense is so closely related to the crime charged as to form a single transaction or closely related series of transactions.

Id.

In *Fisher v. State*, 532 So. 2d 992, 999-1000 (Miss. 1988), the court ruled that evidence of prior incidents similar to the one for which Fisher was charged was admissible pursuant to Mississippi Rule of Evidence 404 (b) to show plan or modus operandi.

It was Zinn that first introduced evidence about this earlier shooting incident involving a "red truck". The record reflects that this shooting occurred just prior to the shooting which resulted in the death of Fowler and injury to Ridings. The same party was involved and the incident took place at essentially the same location and with the same gun that was used to shoot Fowler and Ridings. Given these facts, the trial court did not err in allowing evidence of the prior bad act into the record. Thus, we find that this issue is without merit.

IV. THE ADMISSION OF POSTMORTEM PHOTOGRAPHS OF THE DECEASED VIOLATED RULE 401 AND 403 OF THE MISSISSIPPI RULES OF EVIDENCE AND THE STATE AND FEDERAL CONSTITUTIONS.

The State offered into evidence photographs of the murder victim during autopsy. Zinn objected and sought to exclude all photographs of Fowler taken in preparation and during the autopsy. The court overruled the objection without comment. Zinn submits that the court abused its discretion in allowing the introduction of the photographs labeled as State's exhibits S-25, S-26, S-27 and S-28. S-25 shows the body of Dan Fowler when it was received in the autopsy room. S-26 shows the body of Fowler with two entrance gunshot wounds on the back of the body. S-27 shows the exit wounds on Fowler's chest. S-28 shows certain marks on the skin where the bullet was removed.

Zinn argues that the photographs should not have been admitted because their probative value was substantially outweighed by their prejudicial effect. Zinn admits that the photographs at issue were not gruesome, but were neither highly probative nor relevant to any issue in controversy. The State contends that the photographs were relevant and material in enabling the jury to understand the exact cause of Fowler's death. They were also helpful in depicting how the bullets which were fired from the gun entered and exited the body.

As a general rule, the admissibility of photographic evidence rests within the sound discretion of the trial judge. The trial judge's decision will be upheld on appeal unless abuse of discretion can be shown. Photographs of bodies may be admitted into evidence where they have probative value, and where they are not so gruesome as to be overly prejudicial and inflammatory.

Alexander v. State, 610 So. 2d 320, 338 (Miss. 1992).

The Mississippi Supreme Court has held that "photographs have evidentiary value where they aid in describing the circumstances of the killing and the corpus delicti, describe the location of the body and cause of death, or supplement or clarify witness testimony." *Holly v. State*, 671 So. 2d 32, 41 (Miss. 1996). As the court in *Holly* observed, "[t]he discretion of the trial judge runs toward almost

unlimited admissibility regardless of the gruesomeness, repetitiveness, and the extenuation of probative value." *Id.*

We find that the photographs were relevant to establish cause of death and served to clarify and supplement the testimony of the state medical examiner. Considering this and the standard of review, we conclude that the trial court did not abuse its discretion in admitting the photographs. This issue is without merit.

CONCLUSION

Although error did arise in the proceedings below, we do not find that any prejudice to the defendant resulted therefrom. Hence, there is no basis to reverse the decision of the trial court.

THE JUDGMENT OF THE LEE COUNTY CIRCUIT COURT OF CONVICTION OF MANSLAUGHTER AND AGGRAVATED ASSAULT AND SENTENCE OF TWENTY YEARS ON BOTH COUNTS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, SAID SENTENCES TO RUN CONSECUTIVELY, IS AFFIRMED. COSTS ARE ASSESSED TO LEE COUNTY.

THOMAS, P.J., COLEMAN, HERRING, AND KING, JJ., CONCUR. BRIDGES, C.J., McMILLIN, P.J., DIAZ, PAYNE, AND SOUTHWICK, JJ., CONCUR AS TO ISSUES II, III AND IV. McMILLIN, P.J., CONCURS IN RESULT ONLY AS TO ISSUE I WITH SEPARATE WRITTEN OPINION JOINED BY BRIDGES, C.J., DIAZ, PAYNE AND SOUTHWICK, JJ.

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McMILLIN, P.J., CONCURRING:

I concur in the result reached by the majority in this case; however, as to one issue, I arrive at the result by a different route. The defendant claims that his incriminating statement given to arresting officers was inadmissible on the aggravated assault charge. He suggests this to be true because, at the time he gave the statement, jurisdiction for that offense remained in the Lee County Youth Court. He argues that his statement was taken in violation of the protections afforded him under section 43-21-311 of the Mississippi Code of 1972, a part of Mississippi's Youth Court Act. This section provides, among other things, that a detained youth must be permitted to telephone his parents and that "no person shall interview or interrogate a child held in a detention or shelter facility unless approval therefor has first been obtained from the judge or his designee." Miss. Code Ann. 43-21-311(4) (1972).

The majority finds this Court to be procedurally barred from considering this issue because the record does not affirmatively demonstrate that the interrogation occurred before the aggravated assault charge was transferred from youth court to circuit court. This may be technically true based upon the state of the record, but only because the record does not contain a copy of the transfer order from the Lee County Youth Court. With that order, it would be a simple matter to compare the date of the confession with the date of the transfer hearing to determine the sequence of events. Since a transfer order is jurisdictional to the State's right to prosecute the defendant on the aggravated assault charge, I would suggest that its absence from the record ought to be more properly charged against the State. Were it vital to the proper consideration of the issue before this Court, I think the better practice would be to order the record supplemented to include this jurisdictional order rather than to decline to reach the merits of the issue on this procedural defect.

In point of fact, I would conclude that the present record *is* sufficient to demonstrate that the defendant's statement was given before the aggravated assault charge was transferred from youth court. The shootings occurred sometime after 8:00 p.m. on the evening of October 22, 1993. The defendant was arrested on a murder warrant at about 4:45 a.m. on the morning of October 23, 1993. In fact, he had been in police custody for several hours prior to the time the formal warrant was served. His statement was given at 5:30 a.m. that same morning. There is nothing to suggest that a youth court transfer hearing on the aggravated assault charge was held in that interval. Such a transfer can only occur after (a) a child is "charged by petition [in the youth court] to be a delinquent child," (b) a motion to transfer has been filed, and (c) a transfer hearing has been held at which the juvenile must be represented by counsel. Miss. Code Ann. 43-21-157 (1972). In my opinion, this Court can safely conclude, for purposes of reaching the merits of this appeal, that this involved process was not accomplished -- and, in fact, could not possibly have been accomplished -- in the time between the commission of the offense and the time of the confession.

I, therefore, think it appropriate to consider the defendant's claim on the merits. I would hold that the provisions of section 43-21-311, to the extent that they applied to this defendant in the early morning hours of October 23, 1993, do not require the exclusion of his confession. The defendant was arrested on a murder warrant, an offense that, despite the defendant's age, was within the jurisdiction of the circuit court and a crime for which section 43-21-311 had no application. The investigating officers could, by following "Miranda" procedures, obtain a statement on this crime that could be admitted at trial. The separate aggravated assault offense was so factually interwoven with the

murder charge that it would have been impossible for the defendant to discuss his role in the homicide without giving information that incriminated him on the assault charge. I find nothing in section 43-21-311 that offers additional protection against self-incrimination to a juvenile offender that could be said to rise to a constitutional level. The right against self-incrimination under the Fifth Amendment -- not a statutory violation -- is the fundamental right being protected by rules of exclusion, and so long as this fundamental right has not been violated, there is no basis to exclude a defendant's incriminating out-of-court statements. The United States Supreme Court has said on the subject:

We conclude that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults. We appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique -- but not in principle -- depending upon the age of the child and the presence and competence of parents. The participation of counsel will, of course, assist the police, Juvenile Courts and appellate tribunals in administering the privilege. If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.

In Re Gault, 387 U.S. 1, 55 (1967).

Guided by these broad concepts, I do not believe that every deviation from the letter of the requirements of section 43-21-311 would require a confession to be excluded from evidence. In *Smith v. State*, the supreme court held that a juvenile's confession was admissible as being voluntary even though given to an officer at a time when the juvenile was represented by counsel and the interrogating officer was aware of this representation -- a seemingly clear violation of section 43-21-311(4), which provides that a child in custody may not be interviewed except "in the presence of his counsel or guardian ad litem or with their consent." *Smith v. State*, 534 So. 2d 194, 196 (Miss. 1988) ; Miss. Code Ann. 43-21-311(4) (1972). While, puzzlingly, the court stated that "the interrogation did not violate MCA 43-21-311(4)," I would find this case to stand for the proposition that exclusion is not automatic for every deviation from the literal terms of the statute. 534 So. 2d at 196.

The inquiry, when exclusion is sought, should properly focus on matters that inform the court as to whether the statement was given voluntarily and with informed consent. The youth of the defendant, the applicability of section 43-21-311, as well as the circumstances surrounding any deviation from the provisions of that section are factors that would bear on, but not conclusively determine, the ultimate question of the voluntary nature of the statement.

In this case, the trial court fully explored the circumstances in which this statement was given and concluded that it was made voluntarily. Evidence presented at the hearing included the age of the defendant, his educational background, and the circumstances of his detention and interrogation. There is nothing in this record that convinces me that any deviation from strict compliance with the terms of section 43-21-311 so violated this defendant's rights against self-incrimination that his statement ought to be excluded from consideration on the assault charge.

I would affirm on this basis rather than declining to consider the issue on the merits because of a perceived procedural defect in the record.

BRIDGES, C.J., DIAZ, PAYNE, AND SOUTHWICK, JJ., JOIN THIS SEPARATE WRITTEN OPINION.