STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2010AP2809-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW A. LONKOSKI,

DEFENDANT-APPELLANT.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR ONEIDA COUNTY, THE HONORABLE MARK A. MANGERSON, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of record.

STATEMENT OF THE CASE

Matthew Lonkoski appeals his conviction for recklessly causing great harm to a child and neglecting a child resulting in death, entered on his guilty pleas (46). Lonkoski had previously moved to suppress statements he gave police (20). The circuit court ultimately denied his motion (61). As his sole issue, he contends the circuit court erred in denying his suppression motion.

At the suppression hearing, Detective Sarah Gardner testified that she and Lieutenant Jim Wood investigated the death of infant P.L. (26:6). The child's mother, Amanda, contacted the sheriff's department requesting to speak with Detective Crowell "about black mold" (26:6-7). The previous day, toxicology findings had revealed P.L.'s death was caused by an overdose (26:6). Crowell requested Amanda come to the sheriff's department (26:7-8). Gardner and Wood interviewed Amanda before and during the interview with Lonkoski (26:8-9). Amanda was interviewed in the same room as Lonkoski but was taken to a break room during Lonkoski's interview (26:9).

Lonkoski drove Amanda to the sheriff's department (26:8). Lonkoski waited in the lobby until Wood came and got him (26:9). His interview occurred in an interview room that is through a door from the lobby (26:9-10). The department requires an escort beyond the lobby (26:10). The door from the lobby into the area of the interview rooms is locked to entry (26:10, 14-15). But the door is not locked to someone exiting the interview room area (26:15).

Lonkoski had been arrested on prior occasions (26:13). Gardner had interviewed him on many occasions (26:12). Some of Lonkoski's previous interviews had been custodial interviews (26:13). Lonkoski had used the exit door in the past (26:15). Lonkoski's interview was video recorded; the recording was admitted as an exhibit (71).

The State will refer to further facts in the argument portion of the brief.

STANDARD OF REVIEW

Appellate courts use a two-part standard of review for constitutional questions. The court upholds the circuit court's findings of historical or evidentiary fact unless they are clearly erroneous. It reviews independently the application of constitutional principles to the facts found. *State v. Forbush*, 2011 WI 25, ¶ 10, ___ Wis. 2d ___, 796 N.W.2d 741.

ARGUMENT

I. LONKOSKI WAS NOT IN CUSTODY WHEN HE DEMANDED A LAWYER.

Lonkoski argues the circuit court erred in denying his motion to suppress his two inculpatory statements to detectives. He reasons that he was "in custody" when he demanded a lawyer even though he had not been warned when he made his assertion. In his view, since the police did not honor his request by ceasing their interview, the first statement should have been suppressed. The second statement should also

have been suppressed because even though Lonkoski signed a waiver of his *Miranda*[1] rights, that waiver was ineffective under *Edwards v. Arizona*, 451 U.S. 477 (1981).

In *Miranda*, the Supreme Court held that, among other things, "an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation . . . ." *Miranda,* 384 U.S. at 471. Once an individual in custody invokes his right to counsel, interrogation "must cease until an attorney is present"; at that point, "the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning." *Id.* at 474. *See also Minnick v. Mississippi*, 498 U.S. 146, 150 (1990).

In *Edwards*, 451 U.S. at 484-85, the Court held that an accused who has expressed a desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available unless the accused himself/herself initiates further communication, exchanges, or conversations with the police. "[A] valid waiver of . . . right[s] cannot be established by showing only that [the accused] responded to further police-initiated custodial interrogation even if he has been advised of his rights." Police initiated interrogation may not occur even when police obtain a waiver of *Miranda* rights. *Id.* at 484.

[1] *Miranda v. Arizona,* 384 U.S. 436 (1996).

These rules, however, apply only when the accused is "in custody." *State v. Kramer*, 2006 WI App 133, ¶ 9, 294 Wis. 2d 780, 720 N.W.2d 459. And, unless a suspect is in custody, she may not invoke the *Miranda/Edwards* rules. *Id. See also State v. Hassel,* 2005 WI App 80, ¶ 9, 280 Wis. 2d 637, 696 N.W.2d 270; *MacNeil v. Wisconsin*, 501 U.S. 171, 182 n.3 (1991) ("We have in fact never held that a person can invoke his *Miranda* rights anticipatorily . . . .")

To determine whether a suspect is in *Miranda* custody, courts must ask whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. *Stansbury v. California*, 511 U.S. 318, 322, (1994) (*per curiam*).

Not all restraint on freedom of movement is custody for *Miranda* purposes. In *Illinois v. Perkins*, 496 U.S. 292, 297 (1990), the Court stated:

> It is the premise of *Miranda* that the danger of coercion results from the interaction of custody and official interrogation. We reject the argument that *Miranda* warnings are required whenever a suspect is in custody in a technical sense and converses with someone who happens to be a government agent.

Thus a *Terry*[2] stop does not trigger *Miranda*. *Berkemer v. McCarty*, 468 U.S. 420, 439-40 (1984); *State v. Griffith*, 2000 WI 72, ¶ 69 n.14, 236 Wis. 2d 48, 613 N.W.2d 72. Even though the person has been seized under the Fourth Amendment's criteria, the person is not "in custody" under *Miranda*.

---

[2] *Terry v. Ohio*, 392 U.S. 1 (1968).

The test for custody is based on the totality of the circumstances; would a reasonable person in the suspect's position have considered himself or herself free to end the interview given the degree of restraint under the circumstances. *State v. Gruen*, 218 Wis. 2d 581, 593, 582 N.W.2d 728 (Ct. App. 1998); *State v. Pheil*, 152 Wis. 2d 523, 532, 449 N.W.2d 858 (Ct. App. 1989).

> Two discrete inquiries are essential to the determination [of whether a suspect is in custody]: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the 'ultimate inquiry': "[was] there a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983) (per curiam)(quoting [*Oregon v.] Mathiason*, 429 U.S. [492], 495, 97 S. Ct. [711] 714 [(1977)]).

Thompson v. Keohane, 516 U.S. 99, 112 (1995)(footnote omitted).

The circuit court found that approximately thirty minutes into Lonkoski's interview he asserted a right to counsel (60:3-4; 61:3), but the circuit court found that Lonkoski was not in custody at that time. "I think when I looked at the totality of the circumstances Mr. Lonkoski was not in custody at the time that he claimed his right to counsel" (61:3). Therefore, the court reasoned, it constitutes an anticipatory attempt to invoke *Miranda* rights.

Whether a person who is in custody can assert her *Miranda* right to counsel before interrogation begins, is an open question in Wisconsin. *See State v. Hambly*, 2008 WI 10, ¶¶ 32-33, 307 Wis. 2d 98, 745 N.W.2d 48. But the issue is only presented here if this court disagrees with the circuit court and concludes Lonkoski was in custody. Lonkoski's argument concerning the timing of his request for counsel and his discussion about imminent interrogation misses the mark. His reliance on *United States v. Kelsey*, 951 F.2d 1196 (10th Cir. 1991), *United States v. LaGrone*, 43 F.3d 332 (7th Cir. 1994), *Alston v. Redman*, 34 F.3d 1237 (3rd Cir. 1994), and *United States v. Grimes*, 142 F.3d 1342 (11th Cir. 1998), is misplaced because for the *Miranda/Edwards* rules to apply, there must be both custody and interrogation. *See Rhode Island v. Innis*, 446 U.S. 291, 300 (1980) (The special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation.)

In all of the above cases, there was no question of custody; the question was whether a suspect could invoke *Miranda* prior to interrogation (or the *Miranda* warnings).[3] In such an inquiry, the concept of imminent interrogation makes sense. *See Hambly*, 307 Wis. 2d 98, ¶¶ 29-30 (setting out two possible standards for invoking *Miranda/Edwards*, one of which is when a reasonable person would believe interrogation is imminent). But the circuit court's denial rests on its finding that Lonkoski was not in custody, not

[3] As the *Hambly* court pointed out, *State v. Collins*, 122 Wis. 2d 320, 363 N.W.2d 229 (Ct. App. 1984), appears to require this court to hold Lonkoski's request for counsel effective if he was in custody.

on any application of the competing standards set out in *Hambly*. Lonkoski's reliance on *LaGrone* for his claim that an assertion of *Miranda* right to counsel can be when custodial interrogation is imminent, Lonkoski Br. at 21, is incorrect if the assertion comes before the suspect is in custody.

Factors bearing on whether a suspect is in custody include the suspect's freedom to leave, the purpose, place and length of the interrogation and the degree of restraint. *Gruen*, 218 Wis. 2d at 594. When considering the degree of restraint, courts consider whether the suspect is handcuffed; whether a weapon is drawn; whether a frisk is performed; the manner in which the defendant was restrained; whether the suspect is moved to another location; whether questioning took place in a police station; and the number of officers involved. *Id.* at 594-96. *See also Yarborough v. Alvarado*, 541 U.S. 652, 675-76 (2004) (Breyer dissenting) ("Our cases also make clear that to determine how a suspect would have "gaug [ed]" his "freedom of movement," a court must carefully examine "all of the circumstances surrounding the interrogation," *Stansbury*, *supra,* at 322, 325, 114 S. Ct. 1526 (internal quotation marks omitted), including, for example, how long the interrogation lasted (brief and routine or protracted?), *see, e.g.*, *Berkemer*, *supra*, at 441, 104 S. Ct. 3138; how the suspect came to be questioned (voluntarily or against his will?), *see, e.g., Mathiason*, 429 U.S. at 495, 97 S. Ct. 711; where the questioning took place (at a police station or in public?), s*ee, e.g.*, *Berkemer*, *supra*, at 438-439, 104 S. Ct. 3138; and what the officer communicated to the individual during the interrogation (that he was a suspect? that he was under arrest? that he was free to leave

at will?), *see, e.g., Stansbury*, *supra*, at 325, 114 S. Ct. 1526.")

The circuit court made the following findings of evidentiary fact.

> Now, I note a number of things. First of all, the officers were not dealing with someone unfamiliar to formal interrogation. The video clearly shows that the defendant had previously been in custody and had previously been questioned by Officer Gardner while the defendant was in a locked portion of the jail. The portion of the jail he was in is a typical interrogation setting. It is locked to ingress by individuals, but there is no indication that it was locked for egress. That is, that the defendant could simply walk out.
>
> Additionally, there is no evidence that Mr. Lonkoski knew or thought he was locked in, in any respect. Although the interrogation took place largely with the door closed, there were clearly times when the door was opened and he could in fact have walked out.
>
> He was offered a number of things during the 30 minutes and especially the few minutes after he claimed his right to counsel. He was offered to go to the bathroom, and he was allowed to smoke. The interrogation, in my estimation, also indicated a lack of custody. The questions to Mr. Lonkoski, up until the point he claimed his right to counsel, were rather open ended questions.
>
> They called for a narrative by him. They were not accusatory. They were not leading questions. He was given facts and then it was suggested to him that he comment on things or tell the officers what they already knew. As interrogations go, the interrogation was relatively short before he claimed his right to counsel, almost exactly after 30 minutes.
>
> The defendant was not physically restrained in any respect. He showed up for the questioning on his own free will with the child's mother. He was not

> handcuffed. There was no indication that he was restrained in any respect. He was told on more than one occasion that he was not under arrest. He was not moved from one place to another. The entire questioning took place in one simple setting. The factors that would indicate custody would be only that first of all, this was an interrogation within a jail.
>
> Secondly, it was an important investigation. It was a homicide investigation. Although, up until the point that the defendant decided he was the focus of the investigation, there wasn't a clear indication that the officers were looking for a homicide defendant. The search in the questioning was for cause of death and what Mr. Lonkoski may have known at the time concerning how the child died. It only became a focused investigation in the last two or three minutes before he claimed the right to counsel and the focus was on morphine and Mr. Lonkoski's potential contact with morphine.

(61:4-6). These findings constitute the circumstances surrounding the interview. The circuit court's findings of evidentiary fact are not clearly erroneous.

The circuit court concluded in applying the law to the above facts:

> So, on balance, there are factors that weigh heavily in the court is information not only as to number, but the significance of the factors that would indicate that objectively, a reasonable person would not think he was in custody. In fact, something very telling is, after Mr. Lonkoski said he wanted a lawyer, he asked if he was under arrest. If he believed he was under arrest I suspect he would not be asking that question point blank.
>
> So, although [*sic*] those factors indicate to me that he was not in custody at the time, he claimed his right to counsel.

(61:6).

The factors point to the conclusion the circuit court reached. First, Lonkoski was not invited to the police station at all; he was there because he drove Amanda. Amanda had requested to speak to Detective Crowell who had requested she, not Lonkoski, come to the sheriff's department. Lonkoski's presence at the sheriff's department was fortuitous. Second, the interview to the point of the arrest was thirty to thirty-one minutes. (The exact point of arrest is unknowable but is certain as of Detective Wood's statement, "You are now.") Not a long time, as the circuit court observed. Third, the detectives told Lonkoski several times he was not under arrest.

Concerning the degree of restraint, Lonkoski was never handcuffed. Although the door to the interview room was closed, the detectives told him they closed the door out of privacy concerns. Lonkoski knew the door was not locked because the detectives left and reentered during the interview. The door separating the interview area from the lobby was not locked either (26:15; 61:4). And Lonkoski knew that from prior experience. The interview took place at the same location; Lonkoski was never moved. There are no weapons apparent on the recording of the interview (71).[4] The interview did take place in a police station conducted by two detectives. But an interview at the police station does not alone make an interview custodial. *California v. Beheler*, 463 U.S.

[4] The State will adopt the circuit court and Lonkoski's convention of citing to the interview record by reference to the time read out on the software player. Where, as here, the fact is apparent throughout the recording, the cite is to the exhibit as a whole.

1121, 1125 (1983); *See also e.g., State v. Grady*, 2009 WI 47, ¶ 4, 317 Wis. 2d 344, 766 N.W.2d 729. Under these circumstances, a reasonable person would have felt free to terminate the interview and leave.

Lonkoski relies on four cases: *Jackson v. State*, 528 S.E.2d 232 (Ga. 2000), *Mansfield v. State*, 758 So. 2d 636 (Fla. 2000), *Ramirez v. State*, 739 So. 2d 568 (Fla. 1999), and *United States v. Jacobs*, 431 F.3d 99 (3rd Cir. 2005). Reliance on cases from other jurisdictions is some help in determinations under a totality of the circumstances standard but each of these cases has important distinguishing facts.

For example, Jackson had just confessed his involvement in a crime to law enforcement officers so the court believed a reasonable person who had so confessed would not believe herself free to leave. *Jackson*, 528 S.E.2d at 235. Lonkoski had made no such admission.

Ramirez was in possession of physical evidence of a murder including the murder weapon and some of the victim's jewelry. Police informed him that they had overheard a conversation with his accomplice in which they discussed destroying the evidence. *Ramirez*, 739 So. 2d at 572.

Mansfield was interrogated by three detectives at a police station, confronted by strong evidence of his guilt and was told by one detective "You and I are going to talk. We're not going to leave here until we get to the bottom of this." *Mansfield*, 758 So. 2d at 644.

Jacobs was summoned to FBI offices without explanation, incriminating evidence was place in her view, she was told the interrogator thought she was guilty and reasonably felt her status as an FBI informant obliged her to stay. *Jacobs*, 431 F.3d at 105.

Lonkoski also points to the fact that the detectives probably suspected Lonkoski or Amanda or both, because Wood made reference to bad parenting. Lonkoski also points to what he considers a change in the tenor of the interview where Wood suggested somebody "did something" to P.L. Lonkoski Br. at 19.

Unarticulated suspicions or plans have no bearing on whether a suspect is in custody. *Berkemer*, 468 U.S. at 442; *State v. Koput*, 142 Wis. 2d 370, 379, 418 N.W.2d 804 (1988). Lonkoski seizes on Wood's reference to parenting. Lonkoski Br. at 19. That reference was not a direct accusation. Lonkoski did not take that as directed at him because he immediately made reference to a "rumor" that Amanda had smothered P.L. Lonkoski Br. at 19. Wood's reference to Lonkoski's comment he was sorry as P.L.'s body was taken away could be considered accusatory but the detectives both disavowed accusing him stating they were asking. Lonkoski Br. at 19-20. In any event, "[e]ven a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest." *Stansbury*, 511 U.S. at 325.

The circuit court correctly determined that under Lonkoski's circumstances, a reasonable person would have felt free to terminate the interview and leave.

II. EVEN IF LONKOSKI WAS IN CUSTODY WHEN HE DEMANDED A LAWYER, HE INITIATED THE FURTHER EXCHANGE WITH DETECTIVES.

Even if this court disagrees with the circuit court and concludes Lonkoski was in custody when he demanded a lawyer, his statements are still admissible under *Miranda/Edwards* because he re-initiated the discussion about the investigation.

As previously noted, once a suspect in custody asserts the *Miranda* right to counsel, *Edwards* prohibits any future questioning unless counsel is present, or (1) the accused initiates "further communication, exchanges, or conversations with the police," *Edwards,* 451 U.S. at 484-85; and (2) waives the right to counsel voluntarily, knowingly and intelligently. *Hambly*, 307 Wis. 2d 98, ¶¶ 69-70. Eight of nine Supreme Court Justices approved this two-step analysis in *Oregon v. Bradshaw*, 462 U.S. 1039, 1044-46, 1053 (1983).

The circuit court rejected the State's contention that Lonkoski re-initiated communication because it believed that some time must pass between the invocation of the *Miranda* right to counsel and the suspect's re-initiation of questioning (60:6). The court stated, "So it wasn't a matter here of defendant not reinitiating as much as it was the interrogation procedure never ending. They never really stopped the interrogation" (60:7). On reconsideration, the court stated:

> there was not the *Edwards v. Arizona* break that that case anticipated because *Edwards v. Arizona* as I indicated, anticipates that the defendant is placed back in his or her cell and there's no contact with that defendant and then the defendant on his own initiative contacts the police and says, "look, I thought this over I want to speak with you," we didn't have that situation here. There wasn't a break.

(61:14).

Lonkoski argues that the circuit court correctly rejected the State's contention. He claims that the interchange between he and the detectives after he invoked his *Miranda* right to counsel, constituted interrogation which, in his view, negated any re-initiation under *Edwards*. Lonkoski Br. at 21-22.

> [T]he term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Rhode Island v. Innis, 446 U.S. at 301 (footnote omitted). The Wisconsin Supreme Court has referred to this as an "objective foreseeability test." *State v. Cunningham*, 144 Wis. 2d 272, 278, 423 N.W.2d 862 (1988). The test asks "whether an objective observer could foresee that the officer's

conduct or words would elicit an incriminating response." *Id.*[5] Police will not be held accountable for the unforeseeable results of their words or actions. *Innis,* 446 U.S. at 301-02.

The interchange between Lonkoski and the detectives after Lonkoski's demand for a lawyer was short.

> Lonkoski: I want a lawyer. I want a lawyer now. This is bullshit.
>
> Wood: Okay.
>
> Lonkoski: I would never do that to my kid ever I wasn't even at the apartment at all except at night . . . wh wh why are you guys accusing me?
>
> Wood: I didn't accuse you . . .
>
> Gardner: We were asking.
>
> Lonkoski: There is this is is is is is is is is insane . . . .
>
> Wood: I have to stop talking to you though cause you said you wanted a lawyer.
>
> Lonkoski: Am I under arrest?
>
> Wood: You are now.
>
> Lonkoski: Then I'll talk to you without a lawyer. I don't want to go to jail. I didn't do anything to my daughter I would not lie to you guys. This is in fact life or death.

---

[5] The test also reflects the "police officer's specific knowledge of the suspect". *State v. Cunningham*, 144 Wis. 2d 272, 278, 423 N.W.2d 862 (1988). Gardner had a history with Lonkoski but there is nothing in the record to indicate that she was aware of any particular susceptibility Lonkoski had and he does not suggest she did.

(61:6-7; 71:00:30:29-00:31:03).

There are four statements from detectives in this interchange:

- I didn't accuse you.
- We were asking.
- I have to stop talking to you though cause you said you wanted a lawyer.
- You are now.

The question is whether the police should have foreseen these four statements would be likely to elicit an incriminating response from Lonkoski.

The latter two statements can be quickly rejected; they are not the functional equivalent to interrogation. The first, "I have to stop talking to you though cause you said you wanted a lawyer," would make all statements conveying the *Miranda* requirement to cease questioning a continuation of interrogation automatically violating *Miranda*. This is an absurd result. This court has recently found a re-initiation under similar facts. *State v. Hampton*, 2010 WI App 169, ¶¶ 10-14, 330 Wis. 2d 531, 793 N.W.2d 901.

The second statement, "You are now," is the equivalent of "You are under arrest." *Innis* specifically excluded words "normally attendant to arrest and custody." *Innis*, 446 U.S. at 301. Moreover, construing "You are now" as interrogation rather than words attendant with arrest, would obviate any need for the imminent interrogation rule which Lonkoski advocates.

The other two statements, one by Wood and one by Gardner were responses to Lonkoski's question, "Why are you guys accusing me?" Both responses are declaratory statements, not questions. The detectives' responses did not call for any response from Lonkoski at all. On similar facts, this court has found response to a custodial suspect not to be interrogation. *State v. Banks*, 2010 WI App 107, ¶¶ 33, 35, 328 Wis. 2d 766, 790 N.W.2d 526. When a police officer prepared to leave once Banks invoked his right to counsel,

> Banks asked Jacobsen about the reason for his detention, Jacobsen told him it was in regard to a green van, a foot chase, and a gun. This is not express questioning, nor is it the functional equivalent. Banks' subsequent unsolicited comment about his presence in the area was not provoked by any statement or action on the part of Jacobsen.

Id. ¶ 35 (internal citation omitted).

Several federal courts have held that responses to a suspect's questions are not interrogation. *See United States v. Jackson*, 863 F.2d 1168, 1172 (4th Cir. 1989), which the *Hambly* court cited with approval, ("Just think about Harry Payne," in response to repeated questions about why the defendant was being arrested); *United States v. Briggs*, 273 F.3d 737, 740 (7th Cir. 2001) (response to what would happen to Trigg); *United States v. Conley*, 156 F.3d 78, 83 (1st Cir. 1998) (no interrogation where police responded after suspect repeatedly asked, "What's this all about?"); *United States v. Benton*, 996 F.2d 642, 643-44 (3rd Cir. 1993) (no interrogation where police responded to suspect's demand to know "what was going on"); *United States v. Taylor*, 985 F.2d 3, 6 (1st Cir. 1993) (no interrogation where officer responded

"You can't be growing dope on your property like that." to Taylor's question, "Why is this happening to me?").

The *Taylor* court's following comment is applicable here.

> Viewed objectively, appellant's initial inquiry ("Why is this happening to me?") was a direct request for an explanation as to *why she was under arrest*. Appellant would have us propound a rule that police officers may not answer direct questions, even in the most cursory and responsive manner. It might well be argued, however, that an officer's refusal to respond to such a direct question in these circumstances would be at least as likely to be perceived as having been intended to elicit increasingly inculpatory statements from a disconsolate suspect arrested moments before.

Taylor, 985 F.2d at 8 (emphasis in original).

The questions remain whether *Edwards* requires a "break" before a suspect can re-initiate communication, and whether Lonkoski re-initiated communication here. *Hambly* strongly suggests the answer to the first question is "no." Hambly asserted "that for a suspect to 'initiate' communication or dialogue there must be a break between the suspect's invocation of the right to counsel and the subsequent communication by the suspect to law enforcement that led to the inculpatory statements." *Hambly*, 307 Wis. 2d 98, ¶ 76. Hambly argued the dialog between he and police "had never ceased and no break in the dialogue occurred" before he re-initiated communication. *Id.* The court responded, "Whether a suspect 'initiates' communication or dialogue does not depend solely on the time elapsing between the invocation of the right to

counsel and the suspect's beginning an exchange with law enforcement, although the lapse of time is a factor to consider." *Id.* ¶ 77. And in *Hampton*, there was no break in the interchange between Hampton and police. *Hampton*, 330 Wis. 2d 531, ¶¶ 10-15. The circuit court was, therefore, wrong to reject the State's argument solely on the ground that there was no break between Lonkoski's invocation and his re-initiation.

What constitutes a re-initiation of "further communication, exchanges, or conversations," *Edwards*, 451 U.S. at 484-85, is an open question. In *Oregon v. Bradshaw*, the eight justices were equally divided on the proper standard for determining whether a custodial suspect who has invoked the *Miranda* right to counsel subsequently "initiates" a further dialogue with law-enforcement authorities.

The four-justice plurality concluded that the suspect initiates the dialogue if the suspect's remarks to officers "evince[] a willingness and a desire for a generalized discussion about the investigation," whether "directly or indirectly." *Bradshaw,* 462 U.S. at 1045-46. Conversely, a suspect's "inquiries or statements . . . relating to routine incidents of the custodial relationship," such as "a request for a drink of water or request to use a telephone," generally will not constitute "initiation." *Id.* at 1045.

The four dissenters defined "initiation" more narrowly to mean communication or dialogue about "the subject matter of the criminal investigation." *Id.* at 1055-56 (Marshall, J., dissenting).

The *Hambly* court had no need to select one of the competing standards. *Hambly*, 307 Wis. 2d 98, ¶¶ 75, 82. Neither does this court here. Lonkoski's statement, "Then I'll talk to you without a lawyer" (71:00:31:01-00:31:03), expresses a desire to talk to the detectives about "the subject matter of the criminal investigation." *Bradshaw,* 462 U.S. at 1055-56. His further dialog reinforces that desire. When Gardner said "we need to know a couple of the gaps to fill . . . the gaps," Lonkoski responded twice "ask those gaps" (61:7; 71:00:31:24-00:31:30).

Next, this court must consider whether Lonkoski's waiver of his *Miranda* rights was voluntary, knowing and intelligent. *Hambly*, 307 Wis. 2d 98, ¶ 70. A *Miranda* waiver is voluntary if it is "the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Hambly*, 307 Wis. 2d 98, ¶ 91 (citation and internal quotation marks omitted). A *Miranda* waiver is knowing and intelligent if it is "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.* However, the suspect need not "know and understand every possible consequence" of waiver, but only "that he [or she] may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time." *Colorado v. Spring,* 479 U.S. 564, 574 (1987). The validity of a *Miranda* waiver depends on the totality of the circumstances surrounding each case, including "the background, experience and conduct" of the suspect. *Fare v. Michael C.*, 442 U.S. 707, 725 (1979); *Hambly*, 307 Wis. 2d 98, ¶ 91.

After Lonkoski re-initiated the dialog with the detectives, Gardner reiterated that Lonkoski did not have to talk to the detectives (61:7; 71:00:31:34). Wood added that if Lonkoski wanted an attorney, he could have an attorney and then "We're going to quit" (61:8; 71:00:31:43-00:31:45).[6] Wood then tells Lonkoski to go have a cigarette with Sara (61:8; 71:00:31:49-00:31:51). He also tells Lonkoski that when they begin again, he will read a *Miranda* card (61:8; 71:00:32:01-00:32:03). Wood then says, "I don't want to talk to you at this point. Let's take a little break" (71:00:32:12-00:32:17). Wood then tells Lonkoski they were required to stop because he requested an attorney (71:00:32:51-00:32:56). Wood then left the room (Gardner had already left) (71:00:33:35). They took a break and Lonkoski was escorted outside (61:8; 71:00:34:08-00:34:18). He had a cigarette and used the bathroom (61:8; 71:00:34:18-00:41:28).

When they resume, Wood says: "We will start over here" (61:9; 71:00:41:29-00:41:30). After asking Wood if he had talked to the District Attorney, Lonkoski then asks: "Is that fine to go on with it?" (61:9; 71:00:41:48-00:51:51). Wood responds, "And the first question for you, Matt is, do you want to talk to us?" (61:9; 71:00:41:51-00:41:56). Lonkoski answers: "Yes, I will talk to you guys. I have nothing to hide" (61:9; 71:00:41:56-00:41:58). Wood then asks: "And you are initiating that you want us to talk to you?" (61:9; 71:00:41:59-00:42:00). Lonkoski responds, "Yes" (61:9; 71:00:42:01).

[6] The record does not contain page eight of Document 61. That page is reproduced in Lonkoski's appendix as page 116.

Wood then read Lonkoski his Miranda rights aloud (71:00:42:07-00:42:54). He then had Lonkoski read the rights himself (71:00:42:54-00:43:28). Lonkoski told Wood he understood his rights and that he was willing to answer questions (71:00:43:28-00:43:43).

The record shows that Lonkoski had a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. *Hambly*, 307 Wis. 2d 98, ¶ 91.

Lonkoski relies on *United States v. Gomez*, 927 F.2d 1530 (11th Cir. 1991), and *Collazo v. Estelle*, 940 F.2d 411 (9th Cir. 1991). Both of those cases can be distinguished on their facts. In *Gomez*, officers coerced Gomez by telling him he was facing "a possible life sentence and a minimum of ten years, and that the only chance he had to reduce the sentence was through cooperation with the government." *Gomez*, 927 F.2d at 1536. In *Collazo*, the officers intimidated Collazo by telling him after he said he wanted to talk to a lawyer, that this was his last chance to talk to them and if he didn't talk to the police "[t]hen it might be worse for you." *Collazo*, 940 F.2d at 414. There is no evidence of intimidation, coercion, or deception here, contrary to what Lonkoski would have the court believe. Lonkoski's waiver was voluntary, knowing and intelligent.

CONCLUSION

For the reasons given above, this court should affirm Lonkoski's judgment of conviction.

Dated at Madison, Wisconsin, this 8th day of June, 2011.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,585 words.

Dated this 8th day of June, 2011.

_____
Warren D. Weinstein
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that: This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 8th day of June, 2011.

_____
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