STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT 1

Case No. 2013AP000127 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RAHEEM MOORE,

Defendant-Appellant.

On Appeal from the Judgment of Conviction Entered
in Milwaukee County Circuit Court, the
Honorable David L. Borowski, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Fifteen-Year-Old Raheem Moore's Inculpatory Statement, Made Eleven Hours After He Was Arrested, Held Incommunicado, and Interrogated by Two Teams of Detectives, Was Not Voluntary.

A. Introduction.

The state first responds at length to an argument that Raheem did not make. It argues that detectives properly gave Raheem his ***Miranda*** rights and he said he understood. Raheem has not claimed otherwise.

With regard to voluntariness, the state urges the court to listen to the recordings and read the transcripts of the interrogation. Raheem agrees, but points out that the court cannot replicate the circumstances surrounding the recorded interrogation. The court cannot experience a 15-year-old boy's reaction to the stress of being arrested, booked, and left alone in a small interrogation room for two hours before the first two detectives entered. Unlike Raheem, who could not pick up a telephone to call his mother or father, the court can hit "pause" whenever it is hungry or restless, or just needs a break. Listening to the recordings cannot replicate the three hours Raheem was left alone in the interrogation room after the first round of interrogation, and before the second set of officers arrived to interrogate him. The court cannot experience the lack of control Raheem had, not knowing how long the interrogation would last, where he would sleep that night, or whether he would sleep that night.

The court's review of the recordings must take these additional factors into consideration when it determines the totality of 15-year-old Raheem's circumstances.

B. Under the totality of the circumstances, Raheem's inculpatory statement did not result from a knowingly and voluntarily waiver of his rights.

The parties agree that the totality of the circumstances requires "a balancing of the personal characteristics of the defendant against the pressures imposed upon the defendant by law enforcement officers." ***State v. Hoppe***, 2003 WI 43 ¶ 38, 261 Wis. 2d 294, 661 N.W. 2d 407.

Throughout the state's brief, it makes four broad claims that are false when the subject of an interrogation is 15 years old – that juveniles are like adults, that adult interrogation practices can be used on juveniles, that parents only have to be called if the juvenile specifically asks for them, and that only illegal police action triggers a voluntariness analysis.

The state's broad arguments ignore the fundamental principles governing the voluntariness of juvenile statements that have been established by decades of United States Supreme Court decisions, and unanimously agreed to by the Wisconsin Supreme Court in ***In re Jerrell C.J.,*** 2005 WI 105, 283 Wis. 2d 145, 699 N.W. 2d 110. The arguments will be addressed more specifically below.

1. Raheem was young, uneducated, and of low average intelligence.

The state admits that Raheem was young, in eighth grade and of below average intelligence. But it attaches no significance to those characteristics, arguing that "other than his age, he was not much different than many of his adult criminal counterparts." (Response brief, p. 23).

"His age" is not an inconsequential factor to be so easily brushed aside. A long history of United States and Wisconsin Supreme Court decisions establishes that age is perhaps the most consequential factor in the totality of the circumstances equation.

"No matter how 'sophisticated,' a juvenile subject of police interrogation 'cannot be compared' to an adult subject," the court wrote in ***Gallegos v. Colorado***, 370 U.S. 49, 54 (1962). *See also* ***Haley v. Ohio,*** 332 U.S. 596, 599 (1948), (a 15-year-old boy "cannot be judged by the more exacting standards of maturity"); ***Eddings v. Oklahoma***, 455 U.S. 104, 115-16 (1982) (youth is "more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage"). More recently, the Supreme Court held in ***Roper v. Simmons***, 543 U.S. 551, 569 (2005), that as a class, children "are more vulnerable or susceptible to . . . outside pressures" than adults. This vulnerability is explained in part by the fact that juveniles "have less control, or less experience with control, over their own environment." ***Id.***

The Wisconsin Supreme Court has agreed. "Simply put, children are different than adults, and the condition of being a child renders one 'uncommonly susceptible to police pressures.'" ***In re Jerrell C.J., supra,*** 2005 WI 105, ¶ 26. Jerrell was just 102 days younger than Raheem,[1] and his age was "a strong factor weighing against the voluntariness of his confession." ***Id.***

[1] Undersigned counsel notes that her brief-in-chief contained a minor error on this point. It stated that Jerrell was 102 days older than Raheem, when it should have said 102 days younger than Raheem. (Brief, p. 18).

The vulnerability created by Raheem's young age was compounded in this case by his eighth grade education and his intelligence, which was "at the low end of the borderline range of intelligence." (94:28). He also had a long history of attention deficit hyperactivity disorder, going back to age four, when he was described as "extremely restless." (94:38-39). He also had a "long track record of language difficulties," meaning he had "difficulty understanding and using language." (94:39).

As the sentencing court noted, Raheem's apology letter to the victim's family indicates his immaturity and his academic difficulties. It has spelling and grammar errors, and ends with a picture Raheem drew of his crying face. Adults, the court said, "don't draw a face on their apology." (100:45; 59:8).

2. Raheem had limited experience with police interrogation and a "very, very poor understanding" of his right to silence in the interrogation setting.

The state's brief on this point is long on rhetoric and short on facts. It argues that Raheem was "street-smart, experienced and knew his rights." (Brief, p. 23). There is no evidence that he was "street smart." His "experience" was limited to two previous arrests. There is no evidence that he was previously interrogated or detained in connection with those arrests. (100:32-33). As the court concluded in noting Jerrell's previous two arrests in ***In re Jerrell C.J.***, that limited experience "may have contributed to his willingness to confess in the case at hand." ***Id.***, ¶ 29.

Additionally, although Raheem thought he understood his ***Miranda*** rights, the court found that he was "not as well versed as many adults and is probably not as well versed as

many juveniles." (94:74; App. 103). Standard tests showed a "very, very poor understanding" of his right to silence as applied to an interrogation setting. (94:32).

3. Police failure to call parents is strong evidence of coercion.

The state's brief brushes off the significance of the detectives' failure to call Raheem's father, saying it "is but one of the many factors in the totality" analysis. (Response brief, p. 27). The state is wrong. Parental presence is an important factor, and failure to call parents is "strong evidence" that coercive tactics were used. ***Jerrell C.J., supra***, ¶ 30; ***Theriault v. State,*** 66 Wis. 2d 33, 48, 223 N.W. 2d 850 (1974).

The state asserts also that "apparently" the detectives spoke to Raheem's father on the day he was arrested. There is no evidence establishing that they did, or if they did, whether it was before or after Raheem was arrested. There is no evidence that the detectives made an "immediate attempt" to notify Raheem's father that he had been taken into custody, as required by Wis. Stat. § 938.19(2). ***Id.,*** ¶ 43.

4. Raheem was held incommunicado and interrogated over an extraordinarily long period of time.

The state's brief does not address this factor, specifically recognized in ***Miranda*** as "strong evidence that the accused did not validly waive his rights." ***Id.*** at 476. *See also* ***Jerrell C.J., supra,*** ¶ 32.

5. Psychological techniques overcame Raheem's ability to resist.

The state argues that the detectives "did nothing wrong," and returns repeatedly to that theme, arguing "detectives were right," "there is nothing wrong with encouraging honesty," and the use of deception "is not improper." (Response brief, p. 15, 26, 27, 28). It concludes that the "'tactics' employed here would certainly be proper if the interviewee were an adult" and were also proper for a child. (Response brief, p. 27).

Again, the state is wrong. The question is not whether the police did anything "wrong." It is whether the psychological techniques created pressure on Raheem that overcame his ability to resist. ***Jerrell C.J., supra.,*** ¶¶ 35, 36.

Police psychological interrogation techniques are discussed in caselaw and academic literature, and are outlined in Raheem's brief-in-chief. The Milwaukee detectives used all of them, isolating Raheem for hours before and during interrogation, cutting off his denials, confronting him with true or false incriminating evidence, developing themes of reduced culpability, lying, appealing to sympathy for the victim's family, and implying that he, like his friend Squeak, would be arrested for lying. Merely describing those techniques in more benign terms does not lessen their impact on Raheem.

6. Under the totality of the circumstances, Raheem was coerced into making an incriminatory statement to police.

When Raheem's young age, low intelligence, and limited education and experience are weighed against the

totality of the pressures imposed by law enforcement, including long-term isolation, lengthy questioning, failure to call parents, and psychological tactics, it becomes apparent that his inculpatory statement was "the result of a conspicuously unequal confrontation in which the pressures brought to bear on the [Raheem] by representatives of the State exceeded [his] ability to resist." ***State v. Hoppe, supra***, ¶ 59**.** Raheem's inculpatory statement was involuntary and must be suppressed.

C. The court's decision to admit the involuntary statements was not harmless error.

Harmless error analysis does apply to erroneous admission of coerced confessions. ***Arizona v. Fulminante,*** 499 U.S. 279 (1991). However, the state carries the high burden to prove harmlessness "beyond a reasonable doubt." ***Id., State v. Martin*****,** 2012 WI 96, 343 Wis. 2d 278, 816 N.W. 2d 270.

To prove harmlessness, the state must prove that the error did not "affect the substantial rights of the adverse party." ***State v. Armstrong***, 223 Wis. 2d 331, 368, 588 N.W. 2d 606 (1999) (citing Wis. Stat. § 805.18(1)). In ***Armstrong***, the defendant entered into a plea after the court erroneously denied his motion to suppress his oral statement to police. However, he had a made an admissible written statement that mirrored the inadmissible oral statement. The error was harmless, the court held, because it did not contribute to his conviction. ***Id.,*** at 370.

As the state correctly points out, Raheem has not challenged the admissibility of his admission that he agreed to act as a lookout while Raynard Franklin robbed and shot the victim. However, Raheem's later statement to police appears

to be the only evidence of his possible "shooter" role in this record. [2]

While Raheem's admissible statement provides a sufficient factual basis to prove party-to-a-crime liability for a homicide crime, there is a substantial practical difference between being a lookout for a robbery, and being the actual shooter. Those widely divergent roles carry very different degrees of culpability, which is inherently a factor in plea negotiation. *See* ***Enmund v. Florida***, 102 S. Ct. 3368 (1982) (Eighth Amendment prohibits the death penalty for person who was merely lookout for robbery in which two people were killed).

The state speculates that Raheem would have agreed to plead to second degree reckless homicide if his statement had been properly excluded. Again, this is speculation. Raheem may have negotiated a lesser charge, or a sentencing recommendation. In fact, Raheem's co-defendant, Raynard Franklin, did negotiate a more favorable plea agreement by negotiating a sentence recommendation from the state.

Mr. Franklin was two years older than Raheem, and had an extensive juvenile delinquency record, including an armed robbery, two counts of possessing a dangerous weapon, and a placement in juvenile corrections. His negotiated plea called for a sentencing recommendation of 15 years in prison. (106:5, 11). Raheem, younger and less

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[2] The state suggests the possibility that Ronald Franklin would have testified that Raheem had admitted to being the shooter, and that Raynard Franklin would say Raheem was the shooter, but the state provides no citations to the record. (Brief, p. 33). Raheem respectfully requests that the court disregard the state's unsupported assertions of fact. Neither he, nor the court, should have to search through the lengthy record of this case to find the basis, if any, for those assertions.

experienced in the juvenile justice system, was offered a plea that was premised on an anticipated sentencing recommendation of 25 years in prison. (100:4).

This evidence contradicts the state's speculation that Raheem's confession to being the shooter had no effect on plea negotiations. The state has failed to meet its burden of proving that the error was harmless as to the plea.

Additionally, the evidence shows that the court's failure to suppress Raheem's statement that he was the shooter, was not harmless as to Raheem's sentence. It is well established that a defendant's coerced statements cannot be constitutionally used against him at sentencing, as well as at trial. ***State v. Peebles,*** 2010 WI App 156, ¶ 21, 330 Wis. 2d 243, 792 N.W. 2d 212. *See also****, Estelle v. Smith***, 451 U.S. 454, 462 (1981) ("The essence of this basic constitutional principle is 'the requirement that the State which proposes to convict *and punish* an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.'").

At Raynard Franklin's sentencing, the state immediately points out its position "that Mr. Moore is the shooter in this case." (106:6). The state noted that Raheem had said that Mr. Franklin was the shooter, but "I don't believe that. I believe that Raheem Moore he confessed to being the shooter. . . ." (106:10). The state then asked the court to follow its recommendation of 10 years in confinement and 5 years of extended supervision. (106:5, 13).

At Raheem's sentencing, the state recommended the maximum prison sentence of 25 years. (100:4). In describing the offense, the state twice referred to Raheem being the

shooter, saying "he decided to fire a shot at James Parish and killed him," and "when the victim tries to run away, he is shot and killed by the defendant who is the gunman." (100:8).

The state's belief that Raheem was the shooter, a belief derived from Raheem's statement to police, is the only explanation for the state recommending a much longer prison term for Raheem than it did for Mr. Franklin. Raheem was younger, and had a minor delinquency record. Therefore, the state has failed to meet its burden of proving that the error was harmless as to sentencing.

II. Evidence of Raheem's Unrecorded Statements and the "Sew-Up" Confession That Followed, Were Not Admissible Because Raheem Did Not "Refuse to Respond or Cooperate" With Recording.

A. The unrecorded statement must be suppressed because Raheem did not "refuse to respond or cooperate" if the interrogation was recorded.

In stark contrast to the state's word-by-word recitation of the ***Miranda*** warnings, the state's response on this point fails entirely to set forth the words that made up Raheem's so-called "refusal."

Here, Raheem did not refuse to cooperate. In response to Detective Salazar's question about taking notes, he said, "What ah do you want ah like talk on there?" (101Ex2:75).

There is no interpretation of those words that equals a refusal to talk while the recorder was running. It was Detective Salazar who offered to turn the recorder off, asking: "You want me to turn that off?" Given the choice, Raheem said yes.

The word "refused" in Wis. Stat. § 938.31(3)(c)1. cannot be construed so broadly as to includes instances, such as this one, where a juvenile is given a choice by police detectives whether to have a recorder on or off and chooses "off." Such a construction is contrary not only to the plain language of § 938.31(c)1., but also to the intent of the legislature and the dictates of ***Jerrell C.J.***

B. Raheem's subsequent recorded statements "sewing up" the unrecorded statements, must be suppressed.

The state does not argue this point, apparently conceding that if the detectives violated the law by turning off the recorder, Raheem's subsequent statement must be suppressed.

C. The remedy for failure to record a 15-year-old's interrogation is suppression of his statements.

If Wis. Stat. §§ 972.115 and 938.31(3)(b) are interpreted to allow a 15-year-old's unrecorded custodial statement to be used against him in a criminal prosecution, the statutes are in conflict with the court's decision in ***In re Jerrell C.J.***, that "unrecorded interrogations and any resultant written confession" must be "inadmissible as evidence in court." ***Id.***, ¶ 48.

The legislature's intent was to codify the ***Jerrell C.J.*** decision. (LRB 05-3492, "[t]his bill codifies the *Jerrell* recording requirement.)" Therefore, the court should construe the statute in accordance with the legislative intent.

CONCLUSION

For the reasons stated in this brief and his brief-in-chief, Raheem Moore respectfully requests that the court vacate his conviction and his plea, and remand the case to the circuit court with instructions to suppress evidence of his unrecorded statement and his subsequent recorded statements.

Dated this 12th day of September, 2013.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,841 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 12th day of September, 2013.

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