STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP127-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RAHEEM MOORE,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE WISCONSIN COURT OF APPEALS AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING A SUPPRESSION MOTION ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, HONORABLE DAVID L. BOROWSKI, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did the lower courts err in holding that the state proved by a preponderance of the evidence Moore voluntarily and intelligently waived his *Miranda* rights and thereafter voluntarily confessed to police?

The trial court concluded after a suppression hearing that Moore voluntarily and intelligently waived his *Miranda* rights before voluntarily admitting his participation with another in an armed robbery and murder.

The Court of Appeals, District I, affirmed on Wis. Stat. § 971.31(10) review of the judgment of conviction and the order denying the suppression motion. The court agreed with the trial court that Moore's inculpatory statements obtained after 10:42 p.m.—the only statements being challenged here—were admissible because they were voluntary under the totality of the circumstances.

2. Should Moore's admissions during the brief, unrecorded portion of the interview after police granted his request at 10:42 p.m. that the audio recorder be turned off, and his admissions in the surreptitiously recorded portion that immediately followed, have been suppressed for violating the judicially-imposed requirement that custodial interrogations of juveniles be recorded? *State v. Jerrell C.J.*, 2005 WI 105, 283 Wis.2d 145, 699 N.W.2d 110.

The trial court held that Moore's admissions during the unrecorded portion of the interview, and during the surreptitiously recorded portion that immediately followed, were admissible because they occurred after Moore "refused" to have his admissions recorded. Moreover, because this prosecution was in adult court, the remedy would have been a jury instruction addressing the failure of police to record that portion of the interview – not suppression of his statements.

The court of appeals agreed that Moore's admissions during the unrecorded portion of the interview after 10:42 p.m., and the surreptitiously recorded portion thereafter, were admissible because Moore had "refused" to continue with the interview if it were recorded, and police obtained his refusal on the record before turning off the recorder.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The state assumes that, in granting review, the court has deemed this case appropriate for both oral argument and publication.

STATEMENT OF THE CASE

Moore was convicted upon his guilty plea December 6, 2011, to a reduced charge of second-degree reckless homicide, party-to-the-crime (57; 63; Pet-Ap. 129-30; 99). He was sentenced February 17, 2012, to eleven years of initial confinement in prison and nine years of extended supervision (63; Pet-Ap. 129-30; 100:57).

James Parish was shot and killed during a botched armed robbery committed by Moore and Raynard Franklin on North 23rd Street in the City of Milwaukee October 8, 2008 (2). Moore was arrested two days later, October 10, and confessed later that evening to having fired the fatal shot as Parish tried to escape (40; 101).

Although only 15 years old, Moore was charged in an information filed in adult court December 1, 2008 (7), with first-degree reckless homicide, contrary to Wis. Stat. § 940.02(1), as required by Wis. Stat. § 938.183(1)(am). The trial court held "reverse waiver" hearings September 9-10, 2009; November 19, 2009; January 8, 2010; and January 22, 2010, to determine whether jurisdiction should be transferred to juvenile court (81-82; 86-88).[1] *See* Wis. Stat. §§ 938.183(1m)(b) and 970.032(2). The court issued an oral decision denying reverse waiver and retained adult jurisdiction January 22, 2010 (88:70-83).

[1] These proceedings were all held before Milwaukee County Circuit Judge Glenn H. Yamahiro.

Moore was arraigned on an information charging him with first-degree reckless homicide, February 3, 2010 (31; 89). Moore filed a motion to suppress his inculpatory statements July 13, 2010 (33). The motion sought suppression of only those statements made during the unrecorded portion of the interview late in the evening of October 10, 2008, and during the brief surreptitiously recorded portion that immediately followed (33:7-13). The motion did not challenge the admissibility of any of Moore's inculpatory statements that preceded the unrecorded portion.

The trial court, the Honorable Jeffrey A. Conen presiding, held an evidentiary hearing on the motion December 10, 2010 (91). The court denied the motion in a decision from the bench January 24, 2011 (92). The court held that, because Moore effectively "refused" to give a recorded statement, his admissions made after police granted his second request to turn off the recorder at 10:42 p.m., and during the subsequent surreptitiously recorded portion, would be admissible at trial (92:9-15; Pet-Ap. 138-44).

The court also, apparently, broadly interpreted Moore's motion as challenging the voluntariness of all his statements, and police compliance with *Miranda v. Arizona*, 384 U.S. 436 (1966). The court held a *Miranda-Goodchild* hearing on May 17, 2011, continued to June 20, 2011 (93-94).[2] The court ruled orally from the bench at the close of the hearing that Moore was repeatedly advised of, and voluntarily and intelligently waived, his *Miranda* rights. His subsequent statements were voluntary and uncoerced by police misconduct under

[2] *State ex rel. Goodchild v. Burke*, 27 Wis.2d 244, 264-65, 133 N.W.2d 753 (1965). *See State v. Jiles*, 2003 WI 66, ¶¶25-26, 262 Wis.2d 457, 663 N.W.2d 798.

the totality of the circumstances (94:73-79; Pet-Ap. 131-32).[3]

Moore appealed pursuant to Wis. Stat. § 971.31(10) (69). The Court of Appeals, District I, affirmed January 14, 2014. *State v. Moore*, 2014 WI App 19, 352 Wis.2d 675, 846 N.W.2d 18 (Pet-Ap 101-28). It agreed with the trial court that Moore's statements obtained by police after 10:42 p.m. were voluntary. *Id.* ¶¶26-41 (Pet-Ap. 113-20). Both the unrecorded portion and the surreptitiously recorded portion thereafter were admissible because police made a sufficient record of Moore's refusal to continue the interview with the recorder on. *Id.* ¶¶42-48 (Pet-Ap. 120-24).

In a concurring opinion, Judge Kessler disagreed with the majority that there was a sufficient showing of Moore's "refusal" to continue with the recorder on, *id.* ¶¶49-52 (Pet-Ap. 125-28), but agreed with the outcome because "Moore's multiple lies, fabrications and admissions, support the denial of his motion to suppress." *Id.* ¶53 (Kessler, J., concurring) (Pet-Ap. 128).

[3] The three transcripts of Moore's inculpatory statements appear in the record inside the envelope marked Document #101. The compact discs containing the complete audio recordings of those interviews are also included inside Document #101. The parties stipulated at the May 17, 2011 portion of the suppression hearing that the transcripts accurately reflect what is recorded on those CDs (93:18-19). The transcript of the first interview conducted by Detectives Gastrow and Mueller was introduced as Exhibit #6 at the May 17, 2011 hearing. It will be cited as follows: "101:Exh. 6, at __." The transcripts of the second interview conducted by Detectives Salazar and Lough were introduced as Exhibits #2 and #3 at the December 10, 2010 hearing. They will be cited as follows: "101:Exh. 2, at _," and 101:Exh. 3, at __."

STATEMENT OF RELEVANT FACTS

The interview by Detectives Gastrow and Mueller

Moore was arrested shortly after noon October 10, 2008. He gave a false name and birth date to police (40:9; 101:Exh. 6, at 11-12). Milwaukee Detectives Gastrow and Mueller began interviewing Moore in an interrogation room in the Criminal Investigation Bureau at 2:49 p.m. (40:10; 93:12, 42; 101:Exh. 6, at 1). The room was 8' by 8' with three chairs and a table (93:12, 40). The interview was audio recorded as required by *State v. Jerrell C.J.*, 283 Wis.2d 145 (93:16).

At the outset, the detectives advised Moore of his *Miranda* rights and he waived them, after assuring them he had been advised of his rights two or three times in the past and understood them (40:10; 93:13-15; 101:Exh. 6, at 15-16). Moore never exercised those rights. He never declined to be interviewed, never asked for a lawyer and never refused to answer any specific question. Moore never asked for his parents (93:26-27). Moore was not handcuffed (except when detectives later drove him to the scene of the crime). No threats or promises were made (93:17). Moore denied being under the influence, or having been diagnosed with any mental or learning disabilities. He appeared to understand the questions and responded appropriately (93:44-46; 101:Exh. 6, at 14).

Early on, Moore admitted he was aware of the shooting, was on a nearby porch when it happened, but denied any involvement (93:16; 101:Exh. 6, at 17-21). The detectives confronted Moore's denials with what they claimed were statements from witnesses, including a Ronald Franklin, that Moore may have been involved (101:Exh. 6, at 22-24). Moore said he knew Ronald Franklin, identified his photo, and admitted he told Ronald Franklin, "that somebody had got shot and stuff" (101:Exh. 6, at 24, 27). Moore said he did not recognize the photo of Ronald's brother, Raynard, and insisted he

had never seen or heard of Raynard (101:Exh. 6, at 25-26, 36). The detectives encouraged Moore to tell the truth because it would be better for him. They speculated what might have happened; it could have been an intentional cold-blooded shooting, or an accident. They told Moore the case would be reviewed by the district attorney who might view it as an intentional shooting (101:Exh. 6, at 27-40). When Moore said he was staying at his father's house, detectives confronted him with his father's statement that he had not seen Moore in a couple of days (101:Exh. 6, at 41).

The detectives showed Moore a photo of the victim, Parish, and said his family was "besides themselves in grief," they deserve an explanation and, as Christians, they might forgive him (101:Exh. 6, at 43-44). In response, Moore maintained: "I don't know who exactly who did it. . . . it wasn't me" (*id.* at 44). When they asked whether Moore was "scared," he insisted there was nothing to be afraid of because he was not there, so no witness would pick him out (*id.*). Moore then asked who had told police he was involved. The detectives answered: "Tiawanna"[4] and "Ronald." Moore exclaimed: "That was a lie" (*id.* at 51).

A break was taken from 4:02 p.m. to 4:30 p.m. Moore was allowed to use the bathroom and, when he told the officers he was hungry, they got him two bologna sandwiches, a bag of Doritos and water (*id.* at 53; *see* 40:10).

The interview resumed at 4:30 p.m. At this point, less than two hours after it began, Moore admitted for the first time his involvement in the robbery and shooting along with someone named "Jevonte" (101:Exh. 6, at 53-55). Moore explained that Jevonte wanted to commit a robbery for money and "I was just part of it." When asked whether he had an active part in it, Moore answered:

[4] This is the name of Ronald Franklin's girlfriend on whose porch Moore said he had been before and after the shooting.

"Yeah like party to a crime," and he expected to share some of the money (*id.* at 55).

Moore explained they decided to rob a man making a purchase at a crack house and Moore stood watch in a nearby alley (*id.* at 62). Moore pointed out on a map provided by Detective Mueller where he and Jevonte were positioned at various points (*see* 40:12). He said the objective "was robbing somebody;" Moore waited as a lookout and ran when he heard a shot and saw a flash (101:Exh. 6, at 58-62). Moore provided a detailed physical description of Jevonte (*id.* at 66-69, 72; *see* 40:10-11). Moore continued to deny knowing anything about Raynard Franklin (101:Exh. 6, at 66), and insisted he was not covering for someone else (*id.* at 72-73). Moore claimed that Jevonte pressured and "influenced" him to be a lookout (*id.* at 77-78, 80, 83).

Moore described the offense. After the victim purchased drugs from the rear window of a crack house, Jevonte called the victim back saying someone wanted him at the window. When Parish returned, Jevonte pulled the gun and announced the robbery. Parish threw two packets of cocaine to the ground and ran. After Jevonte fired, they both ran. Before they split up, Jevonte told Moore he did not think he shot the man. Moore returned to Tiawanna's nearby porch (*id.* at 84-89). When the ambulance arrived 30-40 minutes later, Moore said, Ronald Franklin, Tiawanna and several other girls came out to the porch asking what happened. Moore said he told them someone got shot and Jevonte shot him (*id.* at 90-91). The detectives challenged this account with witness statements that someone by a name other than Jevonte was the shooter. Moore insisted it was Jevonte (*id.* at 91-92). He denied it was Raynard Franklin (40:12).

At this point, the CD cut off and only the last few minutes of the interview went unrecorded.[5] This portion of the interview ended at 5:34 p.m., or two hours and forty-five minutes after it began (40:12).

The interview by Detectives Salazar and Lough

The next interview began almost three hours later at 8:28 p.m. when Moore was now interviewed by Milwaukee Detectives Salazar and Lough (40:3; 93:52; 101:Exh. 2, at 2). Most of this interview involved taking Moore out to the scene of the crime and having him point out where events occurred. When Salazar prepared to read *Miranda* warnings to him at the outset, Moore responded: "I know my rights" (101:Exh. 2, at 3). Salazar read the *Miranda* warnings regardless, getting Moore's express acknowledgment of his understanding after reading each right separately (*id.* at 3-4). There were no threats or promises (93:56).

At 8:39 p.m., eleven minutes after the interview started, Moore agreed to accompany the detectives in a squad to the crime scene. For the first time, Moore was handcuffed (in the front) for security purposes (101:Exh. 2, at 4-5). Detective Lough drove and Salazar was in the rear seat with Moore (40:3; 93:59). The detectives promised to take Moore to McDonald's while they were out (101:Exh.2, at 7). Moore gave directions to the crime scene (91:24, 40-41; 93:54-56). This was interspersed with small talk (101:Exh. 2, at 8-17). Moore pointed out various locations at the scene where he said people were positioned and events occurred (40:3). Moore directed the detectives to a specific house. As they approached, Moore ducked down in the squad so people inside the house would not see him. In response, the detectives told Moore they would pull around the corner so he could "pop up" again (101:Exh. 2, at 13). Shortly

[5] Moore does not claim any illegality from this brief technical malfunction. *See* Wis. Stat. §§ 938.31(3)(c)3 and 972.115(2)(a)3.

thereafter, Lough told Moore to "[l]ay back down again" because more people were nearby, but told Moore it was up to him whether he wanted to duck down (93:60-61; 101:Exh. 2, at 14). Moore then pointed out where he said Jevonte called out to the victim (101:Exh. 2, at 15). Moore said the gun used was a small black revolver with a large barrel (*id.* at 16-17). Moore insisted that Jevonte "peer pressured" him to be a lookout (*id.* at 21).

At this point, they drove to McDonald's and food was ordered amid more small talk, including talk about Moore's parents (*id*. at 22, 24, 27; *see* 40:4). Moore said he was brought in earlier that day with his "cousin," a close friend named "Brandon" or "Britton" (correctly "Brenton") Oden, nicknamed "Squeak" (101:Exh. 2, at 25-26; *see* 40:9). Moore acknowledged he has known Ronald Franklin for a long time (101:Exh. 2, at 26).

Salazar pointed out to Moore that his father said he had never met Jevonte. Moore responded that his father probably had not (*id.* at 31). Salazar expressed the belief that Moore is covering for a friend because he is scared, and it is unfair considering that the friend is still free while Moore is in trouble because of him. Salazar encouraged Moore to be "a hundred percent truthful" because he is hurting himself by not being truthful, and he assured Moore police would do everything to protect him and his family (*id.* at 32-35).

They returned to the police station. The detectives allowed Moore to eat before they resumed the interview (*id.* at 36-37). A break was taken at 9:33 p.m. and the interview resumed at 9:47 p.m., one hour and nineteen minutes after it began; a time frame that included the visit to the crime scene, the trip to McDonald's, and time for Moore to eat (*id.* at 37; *see* 40:4). Moore asked why his friend "Squeak" was arrested along with him. The detectives answered that "Squeak" had "lied" about some things (101:Exh. 2, at 37-38).

Detective Salazar told Moore that police "knew" Jevonte does not exist and asked why Moore is scared of the unidentified accomplice. Moore answered: "Cause he might try, he might try to kill me or something." The detectives again assured Moore they would protect him (*id.* at 40-41). Moore admitted he has known this individual for awhile (*id.* at 42). Salazar then asked: "Okay. What's his real name?" At this point, Moore asked that the recorder be turned off. The detectives explained they needed the recorder on for their own protection from false claims of misconduct (40:4; 91:29-31, 33; 101:Exh. 2, at 42). The recorder remained on.

Salazar again asked Moore to name the other person. Moore said it was Ronald's brother, Raynard Franklin (101:Exh. 2, at 43-44). Moore admitted that he made "Jevonte" up (*id.* at 45). Moore said Ronald Franklin threatened to kill him if he told on Raynard. Moore also admitted he does not like telling on people, "[b]ut in this situation I've got to" (93:66-67; 101:Exh. 2, at 47). He then identified Raynard Franklin's photo (101:Exh. 2, at 47-48). Moore claimed Raynard had the gun (*id.* at 48-49). When told that Raynard had accused Moore of firing the shot, Moore said Raynard was lying. Moore admitted that he had held the gun in the past, but only "touched" it earlier that day (*id.* at 49-50). Moore now claimed he was the one who called out to Parish to return to the window at the crack house and Raynard fired the shot as he ran (*id.* at 53-54). Moore again denied Raynard's supposed accusation that Moore fired the shot. Salazar then announced he would go speak with the detectives who he said were interviewing Raynard to clear this up, but assured Moore he would not play the tape for Raynard (*id.* at 54-55). Moore then described in detail what he and Raynard did (40:4-5).

At 10:07 p.m., one hour and thirty-nine minutes after the interview started, and twenty minutes after the break for Moore to eat, they took a bathroom break (101:Exh. 2, at 55). When the interview resumed at 10:20, Moore again described his and Raynard's roles

consistently with his earlier accounts (*id.* at 55-60; *see* 40:5). Moore then remarked: "So Raynard in the other room saying I had the gun?" "Cause I didn't have no gun" (101:Exh. 2, at 60). Moore described in detail his account of the incident and the routes everyone took (*id.* at 61-67). Moore was then given a cigarette (*id.* at 68).[6] Moore continued to describe the incident. Moore said this was his and Raynard's first robbery and Moore was the one who selected the victim (*id.* at 70-71). They then discussed Moore's previous cases, including possession of dangerous weapons and use of "fake money" (*id.* at 72-74).

The unrecorded portion of the interview and the recorded portion that followed

When Salazar asked if he could take a few notes, Moore asked him a second time to turn off the recorder because "I don't feel safe" (*id.* at 75). Moore explained he was not afraid of police but of Raynard (*id.* at 75-76; *see* 91:15-17).

The recorder was turned off by Detective Salazar at 10:42 p.m. after Moore acknowledged it was his, not the detectives', desire that it be turned off (40:5; 91:33-36; 101:Exh. 2, at 76). The interview proceeded unrecorded. During the unrecorded portion, according to Salazar, Moore admitted for the first time that he, not Raynard, fired the fatal shot (91:17; 101:Exh. 3, at 2). This admission came at a point when Salazar was alone with Moore (91:37). Moore also wrote a letter of apology to the victim's family (40:5, 7).

At 11:17 p.m., the detectives stopped the unrecorded interview to find out from their supervisor how to proceed. They decided to surreptitiously record the remainder of the interview by concealing a recorder inside a manila envelope (91:18, 37-39; 93:71; 101:Exh. 3, at 2).

[6] Moore earlier told the detectives he smoked cigarettes and marijuana (101:Exh. 2, at 20).

Recording of the interview resumed three minutes later at 11:20 p.m., thirty-eight minutes after the recorder was turned off (40:5-6; 91:36; 101:Exh.3, at 2).[7]

Moore was given another cigarette before stating that the gun was Raynard's (101:Exh. 3, at 2-3). Moore said he threw his clothing into a sewer and burnt his shoes because he had fired the gun. Moore said he fired the shot because he was scared, "the hammer was cocked," the victim "moved too quick" (*id.* at 3), he wanted the victim to stop but got "nervous" because Parish moved "real quick" (*id.* at 5).

Moore said he returned to Tiawanna's porch and told Ronald about the shooting. He believed others on the porch overheard him (*id.* at 7-8). Moore still had the gun in his pocket (*id.* at 8). Moore identified the gun from a police department firearms card as a black snub-nose revolver (40:6). Moore told Ronald Franklin on the porch that he had fired the shot (101:Exh. 3, at 11). Moore said he returned the gun to Raynard on the street after police left the area (*id.* at 12-13).

The detectives summarized with Moore his latest account of what he and Raynard did (*id.* at 16-22; *see* 40:6-7). Moore said Raynard told the victim "[s]omebody ah at the window wants you." Moore then pointed the gun at Parish and demanded, "give me everything you got." Parish ran and Moore fired (101:Exh. 3, at 19). Moore said he cried during the unrecorded portion of the interview when he admitted to being the shooter because he did not mean to shoot Parish (*id.* at 24; *see* 40:5).

[7] Their decision to surreptitiously record the statement without Moore's knowledge or consent was proper. Wis. Stat. § 972.115(4) ("a defendant's lack of consent to having an audio . . . recording made of a custodial interrogation does not affect the admissibility in evidence of an audio . . . recording of a statement made by the defendant during the interrogation"). *Also see* Wis. Stat. §§ 938.31(3)(d) and 938.195(3).

Moore finished his cigarette and a bathroom break was taken. Although Moore wanted to look at all of the police photos (101:Exh. 3, at 24), the detectives decided to end the interview at 11:44 p.m. Moore was taken to the Children's Center for the evening (*id.*, at 25; *see* 40:8).

Moore did not testify at the suppression hearing (94:59-61).

SUMMARY OF ARGUMENT

1. Moore admitted his involvement in the robbery and murder beginning around 4:30 p.m. October 10, 2008, after "police did an exemplary job of ensuring that Moore understood his rights." *State v. Moore,* 352 Wis.2d 675, ¶36 (Pet-Ap. 117-18). Moore's inculpatory statements were, therefore, admissible.

2. The law allows police to interview a juvenile such as Moore about a murder police suspect him of committing. The law recognizes that a fifteen-year-old is capable of voluntarily confessing to murder after he voluntarily and intelligently waives his rights to remain silent and to the presence of counsel.

Raheem Moore was streetwise, experienced in the criminal justice system and fully aware of his rights to demand a lawyer, to stop the interview, and to refuse to talk to police at all. He even grasped the concept of party-to-a-crime liability. Moore made a conscious choice and took a calculated risk: rather than keep quiet or ask for a lawyer, he tried to talk his way out of trouble.

In hindsight, Moore's strategy may not have been wise but it is a strategy criminals much older and far more sophisticated than Moore routinely try to pull off: Rather than exercise the rights they know and are reminded they have, they try to outsmart police with protestations of innocence or of minimal responsibility that fly in the face of facts police already know. They get caught in their web of lies.

Milwaukee detectives did nothing wrong. They did not coerce Moore's dubious decision to talk. They twice told Moore he could stop the interview at any point and demand an attorney. There were no threats or false promises. They talked with Moore for as long as he was willing to talk with them. They provided food, drink and even cigarettes. They took several breaks. They took Moore from the interrogation room to the crime scene and stopped at McDonald's on the way back. This was sound police work that produced an uncoerced and reliable, albeit evolving, confession. If Moore was "coerced" to confess, he was coerced not by improper police tactics, but by his own sense of guilt and fear of his accomplice.

3. The lower courts properly determined that at 10:42 p.m. Moore "refused" to discuss his and Raynard's roles with the recorder on. Moore's inculpatory admissions during the unrecorded portion after his "refusal," and during the surreptitiously recorded portion that followed, remained admissible pursuant to Wis. Stat. § 938.31(3)(c)1.

4. Any error was harmless. Moore only challenges his admissions during and after the unrecorded portion of the interview beginning at 10:42 p.m. *State v. Moore*, 352 Wis.2d 675, ¶¶1, 26 (Pet-Ap. 101-02, 113). Before then, beginning around 4:30 p.m., Moore repeatedly admitted being a party to the robbery and murder, the details of which remained substantially unchanged; only the roles of the two participants were reversed by Moore during the unrecorded portion. A jury would likely have found Moore guilty based on his admissions before 10:42 to being a party to the robbery and murder; based on the anticipated trial testimony of accomplice Raynard Franklin putting the gun in Moore's hand; and based on Moore's admission to Ronald Franklin on Tiawanna's porch immediately after the shooting that he fired the fatal shot. In all reasonable probability, Moore would still have accepted the undeniably favorable plea deal on the sound advice of his attorney even if his statements after 10:42 p.m. were suppressed.

ARGUMENT

I. MOORE VOLUNTARILY CONFESSED AFTER HE VOLUNTARILY AND INTELLIGENTLY WAIVED HIS *MIRANDA* RIGHTS.

A. The applicable law and standard for review of a trial court's order denying a motion to suppress statements.

When seeking to introduce inculpatory statements into evidence, the state must prove by a preponderance of the evidence that: (1) the defendant was provided *Miranda* warnings, understood them, and voluntarily and intelligently waived them; and (2) the statements were voluntary. *State v. Triggs*, 2003 WI App 91, ¶12, 264 Wis.2d 861, 663 N.W.2d 396.

On review of the circuit court's denial of the suppression motion, this court upholds the trial court's finding of historical fact unless they are clearly erroneous. It then independently reviews the application of constitutional principles to those facts as found. *State v. Stevens*, 2012 WI 97, ¶36, 343 Wis.2d 157, 822 N.W.2d 79; *Jerrell C.J.*, 283 Wis.2d 145, ¶16.

1. Waiver of *Miranda* rights.

The adequacy of the *Miranda* warnings and waiver thereof are issues of constitutional fact reviewed by this court *de novo* but in light of the trial court's not clearly erroneous findings of fact and credibility determinations. *State v. Santiago*, 206 Wis.2d 3, 18, 556 N.W.2d 687 (1996). *See State v. Jennings*, 2002 WI 44, ¶¶20-21, 252 Wis.2d 228, 647 N.W.2d 142. The state bears the burden of proving by a preponderance of the evidence the sufficiency of the *Miranda* warnings and waiver thereof.

State v. Santiago, 206 Wis.2d at 28-29. The state must prove that Moore was properly informed of his *Miranda* rights, understood them and intelligently waived them. *State v. Lee*, 175 Wis.2d 348, 359, 499 N.W.2d 250 (Ct. App. 1993).

The state establishes a *prima facie* valid waiver if it proves that Moore was informed of or read the *Miranda* warnings, Moore indicated his understanding of them and was willing to make a statement. *State v. Lee*, 175 Wis.2d at 360 (citing *State v. Mitchell*, 167 Wis.2d 672, 697-98, 482 N.W.2d 364 (1992)). *See State v. Hernandez*, 61 Wis.2d 253, 259, 212 N.W.2d 118 (1973). *Also see Schultz v. State*, 82 Wis.2d 737, 747-48, 264 N.W.2d 245 (1978); *State v. Beaver*, 181 Wis.2d 959, 966-67, 512 N.W.2d 254 (Ct. App. 1994).

A valid waiver of the rights to counsel and to remain silent after *Miranda* warnings may be implied when the accused who says he understands those warnings gives an uncoerced statement without exercising those rights. *Berghuis v. Thompkins*, 560 U.S. 370, 384 (2010). *See State v. Ward*, 2009 WI 60, ¶66, 318 Wis.2d 301, 767 N.W.2d 236 ("'In the overwhelming majority of cases, a court will find that a suspect who received proper warnings and waived his or her Fifth Amendment rights made a voluntary statement.'") (quoting Charles D. Weisselberg, *Saving Miranda*, 84 Cornell L. Rev. 109, 166 (1998).

2. Voluntariness of an inculpatory statement.

The state bears the burden of proving voluntariness by a preponderance of the evidence. *Jerrell C.J.*, 283 Wis.2d 145, ¶17. The trial court must consider the totality of the circumstances, balancing the defendant's personal characteristics against coercive pressures brought to bear on him by police. *Id.* ¶¶18-20.

> The relevant personal characteristics of the defendant include the defendant's age, education and intelligence, physical and emotional condition, and prior experience with law enforcement. The personal characteristics are balanced against the police pressures and tactics which were used to induce the statements, such as: the length of the questioning, any delay in arraignment, the general conditions under which the statements took place, any excessive physical or psychological pressure brought to bear on the defendant, any inducements, threats, methods or strategies used by the police to compel a response, and whether the defendant was informed of the right to counsel and right against self-incrimination.

State v. Hoppe, 2003 WI 43, ¶39, 261 Wis.2d 294, 661 N.W.2d 407 (internal citations omitted). *Jerrell C.J.*, 283 Wis.2d 145, ¶20. *See State v. Agnello*, 2004 WI App 2, ¶¶8-9, 269 Wis.2d 260, 674 N.W.2d 594.

B. Moore voluntarily and intelligently waived his *Miranda* rights.

Although the focus in the lower courts was mainly on the voluntariness of Moore's statements, Moore now insists his *Miranda* waiver at the outset of the first interview was not knowing and voluntary because he gave "non-responsive" answers when asked to explain in his own words his understanding of the right to have counsel present. Moore's brief at 4-5, 31-32.[8]

Shortly after the first interview began, around 3:00 p.m., Detectives Gastrow and Mueller engaged Moore in the following exchange:

[8] Moore's challenge to his *Miranda* waiver in the court of appeals consisted of nothing more than the claim that he had a "poor understanding of the right to silence." Moore's court of appeals' brief at 26.

DETECTIVE G: I am, I am, we're just kidding around. Okay, now, how many times have you been read your rights before?

MOORE: About two, three times.

DETECTIVE G: Did you understand them then?

MOORE: Hmm-hmm.

DETECTIVE G: Okay, I'm going to read these from this card. Would you like to read along with me?

MOORE: No, I don't.

DETECTIVE G: Here, read along with me as I read along.

DETECTIVE M: Here, I got one always.

DETECTIVE G: I gotcha, good. Okay. You have the right to remain silent. Anything you say can and will be used against you in a court of law. Following, yes?

MOORE: Yes.

DETECTIVE G: You have the right to consult with a lawyer before questioning and have a lawyer present with you during questioning. You understand that?

MOORE: Yes.

DETECTIVE G: If you can not afford to hire a lawyer, one will be appointed to represent you at public expense before or during any questioning if you so wish. Do you understand that?

MOORE: Yeah.

DETECTIVE G: If you decide to answer questions now without a lawyer present, you have the right to stop the questioning at any time you wish and the right to ask for and to have a lawyer at any time you wish, including during questioning. Do you understand that?

MOORE: Yeah.

DETECTIVE G: *What does that mean in your own words?*

MOORE: *That means like, if I'm talking to you all, then I don't want to say no more, I can just, um, don't say nothing.*

DETECTIVE G: Right.

DETECTIVE M: Right.

MOORE: *If at any time you don't want [to] answer questions or if you say at some point you want your lawyer, you can do that.*

DETECTIVE G: But it's your option to tell us the truth about what happened here, okay.

MOORE: Yeah.

DETECTIVE M: Or you can just pick and choose if you say, well I'll answer that question but I don't want to answer that question, okay?

MOORE: Yeah.

DETECTIVE G: Knowing those rights, do you mind if we ask you a few questions now. Is it okay with you?

MOORE: Yes.

(101:Exh. 6, at 15-16) (emphasis added).

Shortly after the second interview began, around 8:30 p.m., Detectives Salazar and Lough engaged Moore in the following exchange:

SALAZAR: Okay. Um we have a few more questions about this so. What we're gonna do is, we're gonna ah get a car and then take you out there. Okay. Alright. I'm gonna read your rights to you cause I, they read them to you before right?

MOORE: I know my rights.

SALAZAR: Okay. Did they read them off a card like this?

MOORE: Yeah.

SALAZAR: Okay. I'm gonna read them to you anyways. You said you know them but I'm gonna read them to you anyways. You have the right to remain silent. Do you understand that?

MOORE: Yes.

SALAZAR: Okay. Anything you say can and will be used against you in a court of law. Do you understand that? I know you're nodding your head but yes or no?

MOORE: Yes.

SALAZAR: Okay. You have the right to consult with a lawyer before questioning, and to have a lawyer present with you during questioning. Do you understand that?

MOORE: Yes.

SALAZAR: Okay. If you cannot afford to hire a lawyer one will be appointed to represent you at public expense before or during any questioning if you so wish. Do you understand that?

MOORE: Yes.

SALAZAR: Okay. If you decide to answer questions now without a lawyer present, you have the right to stop the questioning and remain silent at anytime you wish and the right to ask for and have a lawyer at any time you wish, including during the questioning. Do you understand that?

MOORE: Yes.

> SALAZAR: Okay. We have some more questions for you and we'd like you to point out where all this happened. Are you willing to do that?
>
> MOORE: Yes.

(101:Exh. 2, at 3-4).

This was a voluntary and intelligent *Miranda* waiver if ever there was one. The detectives "did an exemplary job of ensuring that Moore understood his rights." *State v. Moore*, 352 Wis.2d 675, ¶36. At the very least, the trial court could reasonably find from this record that the state met its burden of proving by a preponderance of the evidence a valid waiver of Moore's *Miranda* rights. *See State v. Lee*, 175 Wis.2d at 359-60; *State v. Hernandez*, 61 Wis.2d at 258-59.

Moore nonetheless insists that he did not understand his rights and cites his "non-responsive" answers when asked by Detective Gastrow to explain in Moore's own words his understanding of the rights to stop the interview and to have counsel present. Moore's brief at 4-5, 31-32. Moore claims his answers reflect his failure to grasp the right to a lawyer, and his misunderstanding of the right to silence. *Id.* at 31-32. Moore focuses his new argument on only the following questions and answers:

> DETECTIVE G: If you decide to answer questions now without a lawyer present, you have the right to stop the questioning at any time you wish and the right to ask for and to have a lawyer at any time you wish, including during questioning. Do you understand that?
>
> MOORE: Yeah.
>
> DETECTIVE G: What does that mean in your own words?

> MOORE: That means like, if I'm talking to you all, then I don't want to say no more, I can just, um, don't say nothing.

(101:Exh. 6, at 16).

Moore takes those questions and answers completely out of context and hopes that this court will, as he does, ignore his continued answer to that two-part question immediately following:

> MOORE: *If at any time you don't want [to] answer questions or if you say at some point you want your lawyer, you can do that.*
>
> DETECTIVE G: But it's your option to tell us the truth about what happened here, okay.
>
> MOORE: Yeah.
>
> DETECTIVE M: Or you can just pick and choose if you say, well I'll answer that question but I don't want to answer that question, okay?
>
> MOORE: Yeah.
>
> DETECTIVE G: Knowing those rights, do you mind if we ask you a few questions now. Is it okay with you?
>
> MOORE: Yes.

(101:Exh. 6, at 16) (emphasis added).

Detective Gastrow asked Moore a two-part question regarding Moore's understanding of both his right to stop the interview and his right to have counsel present during the interview. Moore correctly answered both parts of that question: (1) (right to stop the interview) "[I]f I'm talking to you all, then I don't want to say no more, I can just, um, don't say nothing;" (2) (rights to stop the interview and to have counsel present) "If at any time you don't want [to] answer questions or if you say at some point you want your lawyer, you can do that."

The most hardened adult criminal would be hard-pressed to more succinctly and accurately articulate his understanding of these essential rights. The state proved that Moore's *Miranda* waiver was voluntary and intelligent under the totality of the circumstances. *See Fare v. Michael C.*, 442 U.S. 707, 725 (1979).[9]

C. The state proved by a preponderance of the evidence that Moore's confession was voluntary.

1. Moore's personal characteristics.

Moore was fifteen years old, in the eighth grade and of below average intelligence (88:31; 93:11-12, 26). He was also street-smart, experienced and knew his rights. He grasped the concept of party-to-a-crime liability. In short, other than his age, Moore was not much different than many of his adult criminal counterparts.

Moore was not mentally retarded and did not suffer from any psychosis or mental disorder. His was only a behavioral disorder, meaning that he often "acts out"[10] (88:12, 61-62, 65-66; 93:25; 94:52-53), and may have "deliberately" underperformed on an intellectual functioning test (88:18-19). Moore initially denied having a learning disability, then said: "'Not really. A little bit.'" But he hastened to add: "'I get it though'" (93:25). He

[9] This understanding also puts into proper context Moore's question in the second interview, whether "we're gonna be here all night?" Moore's brief at 32. Moore knew all along he could end the interview at any point or demand a lawyer. His question indicates a continued willingness to talk, but not if it meant talking "all night." The interview did not last "all night."

[10] Moore's well-documented acting out behavior indicates his antagonism towards authority figures, not his desire to please them, belying the research cited at 37 of his brief (82:78-79, 85).

appeared to the detectives not to have any learning disability and responded appropriately to questions. Moore denied being under the influence and seemed to understand what was going on (93:44-46, 52-53).

The gist of Moore's argument seems to be that, because of his age and below average intelligence, police should not have interviewed him. But decisions such as *Jerrell C.J.* assume that juveniles can and will be interrogated by police; juveniles can and will give voluntary confessions during police interrogation. The courts allow it but police must proceed with caution, 283 Wis.2d 145, ¶21, and must electronically record all juvenile custodial interrogations "where feasible, and without exception when questioning occurs at a place of detention." *Id.* ¶¶3, 58. Unless this court or the United States Supreme Court rejects the totality-of-the-circumstances test and rules as a matter of law that juveniles may not be interrogated, Moore's argument fails. That is not likely to occur. *See Fare v. Michael C.*, 442 U.S. at 725-27.

> We recognize, however, that "it is the totality of the circumstances underlying a juvenile confession, rather than the presence or absence of a single circumstance, that determines whether or not the confession should be deemed voluntary." *Gilbert*, 488 F.3d at 793; *see also Hardaway*, 302 F.3d at 763–68 (refusing to impose a per se rule that no child under the age of sixteen may waive his rights and denying habeas relief even though a fourteen-year-old's confession was obtained without the presence of a friendly adult); *Fare*, 442 U.S. at 725, 99 S.Ct. 2560.

Etherly v. Davis, 619 F.3d 654, 661 (7th Cir. 2010).

This court has recognized that a seventeen-and-a-half-year-old is as capable of giving a voluntary statement as an adult. *Theriault v. State*, 66 Wis.2d 33, 38-44, 223 N.W.2d 850 (1974). *See also State v. Jackson*, 2011 WI App 63, ¶¶1, 3, 20-25, 333 Wis.2d 665, 799 N.W.2d 461 (statement of fifteen-year-old with below average

I.Q., poor performance in school and two prior police contacts admissible); *Shaun B.N. v. State*, 173 Wis.2d 343, 363-66, 497 N.W.2d 141 (Ct. App. 1992) (confession of a thirteen-year-old to murder was voluntary under totality of circumstances absent proof of coercion).

Moore was advised of his *Miranda* rights and voluntarily waived them at the outset of both interviews, assuring both sets of detectives in his own words that he knew his rights, having been advised of them before (93:13, 15, 41, 50-52).[11] Moore never asked for a lawyer, never asked to stop the interview and never refused to answer a specific question. The interview was audio recorded as required by *Jerrell C.J.* (93:16), until towards the end when Moore asked for a second time that the recorder be turned off but *not* that the interview end. Moore never asked to see either of his parents even though he talked at length about his parents with both sets of detectives throughout the interviews (93:26-28).

The detectives were unarmed (93:49). Moore was not handcuffed (*id.*), except when taken in the squad to the crime scene (93:54). No threats or promises were made (93:17, 56). Moore was provided two meals, beverages, bathroom breaks and even cigarettes (101:Exh. 2, at 68; 93:55-56, 63). The two interviews were separated by approximately three hours. They occurred in the late afternoon and evening, at a time when Moore would normally be up and about, not in the middle of the night or during the wee hours of the morning without sleep.

Moore was not passive. When arrested, he gave a false name and birth date. Moore initially denied involvement, then admitted to being a party-to-the-crime as a lookout for the shooter "Jevonte," and gave a detailed physical description of his fictitious accomplice. Moore at times asked the officers how they had obtained certain

[11] Moore's juvenile record reveals multiple offenses, supporting his claimed familiarity with *Miranda* (100:32-33).

information. Moore challenged the credibility of what the detectives told him regarding what witnesses had told them. Moore offered the defense that he was the victim of peer pressure by, at first Jevonte, and later the older Raynard. Moore pointed out locations on a map. He directed detectives where to drive and showed where people were positioned and houses located on their visit to the crime scene. He twice asked that the recorder be turned off but *not* that either interview be stopped—a request that was finally granted at 10:42 p.m. (93:55, 64-65, 69, 71; 97:12-13). At the end, Moore hand wrote a letter of apology to the victim's family.

Moore was afraid, to be sure, but not of the interviewing detectives. Moore said he was afraid of his accomplice, Raynard, and of Raynard's brother, Ronald (93:66-67; 97:12-13; *see* 100:23). Moore was under pressure, to be sure, but not from improper police coercion. Moore was coerced by the enormity of what he had done and by his fear of retaliation from the Franklin brothers.

2. The conduct of the detectives.

The transcripts and the audio recordings reveal that this was, in the final analysis, a frank give-and-take between experienced detectives and an experienced juvenile homicide suspect who knew all along he did not have to talk to police and could demand a lawyer. This process was hardly one-sided. Moore was not the sleepless, ill or mentally deficient juvenile who after being refused access to his parents, sits silently and helplessly, or mumbles the occasional one word response, before finally cracking under relentless pressure from overbearing detectives during an unrecorded interview.

Both sets of detectives properly advised Moore of his *Miranda* rights. Moore voluntarily and intelligently waived those rights, assuring them "I know my rights," and agreed to be interviewed.

As long as Moore was willing to be interviewed, the detectives were right to challenge his denials, to truthfully remind him how much trouble he was in, to encourage him to tell the truth, to challenge what they had good reason to believe was his fictitious "Jevonte" story, to confront him with contrary witness accounts, to encourage him not to protect his real accomplice, to engage in small talk, to ask for details of the crime, to ask him to point things out on a map, to have him direct them to the crime scene and describe for them how and where events unfolded there.

Both sets of detectives went out of their way to make sure Moore received food and drink—even cigarettes—throughout the process. There were multiple breaks. The two interviews were separated by approximately three hours. Detectives took Moore out of the station in a squad to the scene of the crime and then to McDonald's on the way back. They later granted Moore's second request that the recorder be turned off. There were no threats or promises. Moore was not intoxicated or on medication. *Compare State v. Triggs*, 264 Wis.2d 861, ¶22 (while the suspect "consumed a large quantity of alcohol," there was no evidence she failed to understand her rights or behaved "irrationally" during the interview). Moore was not handcuffed or otherwise restrained during the interview except, for security reasons, when they drove out to the crime scene; *Jerrell C.J.*, 283 Wis.2d 145, ¶6 (the juvenile was "handcuffed to a wall and left alone for approximately two hours" before the interrogation began).

The police "tactics" complained of here would indisputably be proper if the interviewee were an adult. They were proper here even though Moore was a juvenile under the totality of these circumstances.

Moore complains that the interview could not proceed until he was given an opportunity to speak with his parents. There is no *per se* rule requiring parental consultation before a juvenile's statement is deemed voluntary. It is one of the many factors in the totality of the circumstances analysis. Parental presence is not

required. *Jerrell C.J.*, 283 Wis.2d 145, ¶¶3, 43 ("However, we decline to abandon the 'totality of the circumstances' approach at this time in favor of Jerrell's per se rule regarding consultation with a parent or interested adult."). Moore never asked to speak with his parents even though talk about his parents came up repeatedly during the interviews and even though he provided his father's telephone number (93:25-26, 28). *Compare id.*, ¶¶10, 42 (police repeatedly rejected the juvenile's requests during the interview to speak with his parents); *id.* ¶¶121, 130 (Butler, J., concurring).

> Thus, the current state of the law in Wisconsin is that the validity of juvenile confessions is determined based upon the totality of the circumstances in the case, and that presence of parents, guardian, or attorney is not an absolute requirement for the minor to validly waive his right to remain silent.

Theriault v. State, 66 Wis.2d at 41.

Moreover, the detectives told Moore they had spoken with his father and they apparently did (*see* 100:25). Moore did not in response ask to speak with his father, and there is nothing to indicate his father asked to speak with Moore. His mother was apparently taken into custody that day for a drug offense (*id.*).[12]

Moore complains that the detectives encouraged him to tell the truth and assured him that telling the truth is best. There is nothing wrong with encouraging honesty and telling the suspect that cooperation would be to his

[12] Police contacted Moore's father. It does not appear that his father asked to see Moore, told police not to talk to Moore or demanded that they get him a lawyer. Moore's mother was incarcerated at the time for a drug offense (101:Exh. 6, at 9, 41; 100:25). Despite talking about them throughout the interviews, Moore never asked to see either one of his parents. It is, therefore, misleading for Moore to state that the detectives "did not allow him to call his father," Moore's brief at 4, or that the detectives were guilty of "[f]ailure to call [his] parents." *Id.* at 35.

benefit, so long as police do not promise leniency. *State v. Berggren*, 2009 WI App 82, ¶31, 320 Wis.2d 209, 769 N.W.2d 110. There was no promise of leniency here. There is also nothing wrong with predicting what the prosecutor might do if he fails to cooperate. *Id.*

Moore complains the detectives used deception when they falsely led him to believe that Ronald Franklin and Raynard Franklin were "in the other room" being interviewed. The use of deception during an interrogation is not improper *per se*. It is but one relevant factor in the totality of the circumstances analysis. *State v. Ward*, 318 Wis.2d 301, ¶27; *State v. Triggs*, 264 Wis.2d 861, ¶¶1, 18-19. *See also State v. Jackson*, 333 Wis.2d 665, ¶¶21-22.

> Of the numerous varieties of police trickery, however, a lie that relates to a suspect's connection to the crime is the least likely to render a confession involuntary.

Holland v. McGinnis, 963 F.2d 1044, 1051 (7th Cir. 1992), *cert. denied*, 506 U.S. 1082 (1993) (citing Wayne R. LaFave et al., Criminal Procedure § 6.2(c), at 446-48 (1984)).

Nor is it significant that deception regarding the evidence against a suspect might cause the suspect to confess because, in the *Holland* court's view:

> Inflating evidence of Holland's guilt interfered little, if at all, with his "free and deliberate choice" of whether to confess, *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 1141, 89 L.Ed.2d 410 (1986), for it did not lead him to consider anything beyond his own beliefs regarding his actual guilt or innocence, his moral sense of right and wrong, and his judgment regarding the likelihood that the police had garnered enough valid evidence linking him to the crime. In other words, the deception did not interject the type of extrinsic considerations that would overcome Holland's will by distorting an

> otherwise rational choice of whether to confess or remain silent.

Holland v. McGinnis, 963 F.2d at 1051. *See also Johnson v. Pollard*, 559 F.3d 746, 754-55 (7th Cir. 2009); *United States v. Jacques*, 744 F.3d 804, 812 (1st Cir. 2014).

The important point was not whether Ronald or Raynard Franklin was "in the other room." It was that Ronald told police Moore admitted to him he (Moore) and Raynard were involved, and he (Moore) fired the fatal shot. When the detectives confronted him with Ronald's accusation, Moore knew it to be true because Moore had indeed told Ronald on Tiawanna's porch immediately after the shooting that he and Raynard were involved, and he (Moore) fired the shot. At that point, Moore must have realized he was caught in a lie that might seal his fate, regardless whether Ronald and/or Raynard were "in the other room" or out on the street. *See State v. Triggs*, 264 Wis.2d 861, ¶¶19-20. This information caused Moore to consider "his own beliefs regarding his actual guilt or innocence, his moral sense of right and wrong, and his judgment regarding the likelihood that the police had garnered enough valid evidence linking him to the crime." *Holland v. McGinnis*, 963 F.2d at 1051.

If police inflated what they had learned up to that point, it did not prevent Moore from making a rational choice based on what *he knew about his own guilt. Id.* "A defendant's will is not overborne simply because he is led to believe that the government's knowledge of his guilt is greater than it actually is." *Ledbetter v. Edwards*, 35 F.3d 1062, 1070 (6th Cir. 1994). Finally, it should be recalled that Moore also employed deception during the interview—his creation of the overbearing "Jevonte" character.

In reality, Moore is challenging the reliability of his confession rather than its voluntariness: who would believe a confession from a fifteen-year-old of below average intelligence obtained after lengthy police

interrogation? Reliability of a confession is, however, an issue of fact for the jury; not for the trial judge assessing its admissibility at a pretrial suppression hearing. *State ex rel. Goodchild v. Burke*, 27 Wis.2d at 262 ("If the judge determines that the confession was voluntarily made, the confession is admitted and the jury consideration is limited to its weight and credibility"). Moore waived his right to challenge the reliability of his confession when he waived his right to a trial.

Voluntary confessions are *desirable*. *Maryland v. Shatzer*, 559 U.S. 98, 108 (2010) ("they are an 'unmitigated good'" (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991)), essential to finding, convicting and punishing law violators). *See Oregon v. Elstad*, 470 U.S. 298, 305 (1985) ("'far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable'" (quoting *United States v. Washington*, 431 U.S. 181, 187 (1977))). *See also Arizona v. Mauro*, 481 U.S. 520, 529 (1987); *State v. Ward*, 318 Wis.2d 301, ¶43 n.5.

The trial court properly refused to suppress Moore's voluntary confession—the end-product of lawful police interrogation of an experienced juvenile murder suspect that produced reliable evidence of his guilt.

D. If Moore's confession during and after the unrecorded portion of the interview should have been suppressed, it was harmless error.

Moore challenges the admissibility of only his inculpatory statements after 10:42 p.m. when police turned off the recorder. Moore does not challenge his admissions before then to participating in the robbery and murder.

1. The applicable law.

The harmless-error rule applies not only to appellate review of convictions obtained after trials, but also to review of convictions after a guilty or no-contest plea. *See State v. Armstrong*, 223 Wis.2d 331, 367-71, 588 N.W.2d 606, *on reconsideration*, 225 Wis.2d 121, 121-22, 591 N.W.2d 604 (1999).

The harmless-error test applicable to a guilty or no-contest plea is whether there is a reasonable probability Moore would not have pled guilty and would have insisted on going to trial had his statements after 10:42 p.m. been suppressed. *Id.*, 223 Wis.2d at 370-71; *State v. Semrau*, 2000 WI App 54, ¶22, 233 Wis.2d 508, 608 N.W.2d 376. *See also State v. Rockette*, 2005 WI App 205, ¶31, 287 Wis.2d 257, 704 N.W.2d 382; *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (on an ineffective assistance challenge to a guilty or no-contest plea, the defendant must prove there is a reasonable probability he would not have pled and would have insisted on going to trial but for counsel's deficient performance).

The court considers several factors including: the strength of the state's case, the comparative weakness of the defense case, the defendant's incentive for pleading guilty, and the thoroughness of the plea colloquy. *State v. Rockette*, 287 Wis.2d 257, ¶¶27-31; *State v. Semrau*, 233 Wis.2d 508, ¶22. *See State v. Martin*, 2012 WI 96, ¶46, 343 Wis.2d 278, 816 N.W.2d 270.

2. In all reasonable probability, Moore would have pled guilty to the reduced charge even if his admissions after the recorder was turned off had been suppressed.

Long before the audio recorder was turned off at 10:42 p.m., beginning shortly after 4:30 p.m., Moore readily admitted his active participation in the armed robbery and murder. He truthfully described in detail what occurred, where it occurred, how it occurred and why. The only falsehoods in his admissions up to that point were that: (1) his accomplice was the fictitious "Jevonte" and not Raynard Franklin; (2) Moore was only a lookout and his accomplice fired the fatal shot as the victim fled.

Long before the recorder was turned off, the first falsehood dropped out when Moore admitted his accomplice was Raynard Franklin. At this point, the state had an ironclad case of party-to-a-crime liability against Moore regardless of who fired the fatal shot.

Moore's description of the details of the crime and the actions of the two men did not change significantly throughout. Moore consistently described how they selected Parish whom they believed was buying drugs at a crack house; they called Parish back because someone "at the window" wanted to talk with him; when Parish returned, they announced the robbery and pointed the gun at him; Parish threw two baggies of cocaine at the men and ran; he was shot from behind. Moore simply reversed his and Raynard's roles after the recorder was turned off. The state had a detailed, ironclad case of party-to-a-crime liability against both men long before 10:42 p.m.

The state would have had more than Moore's admissions to use against him at a trial if Moore were allowed to withdraw his plea. There would be the

testimony of Ronald Franklin disclosing Moore's excited admission on Tiawanna's porch immediately after the shooting that Moore and Ronald's brother, Raynard, were involved, and Moore shot the man. *See* Wis. Stat. §§ 908.01(4)(b)1. and 908.03(2). There would be the testimony of Moore's accomplice, Raynard Franklin, describing the crime they jointly committed.[13]

Moore also had every incentive to accept the state's plea offer. He faced 60 years on the initial charge of first-degree reckless homicide (31). That exposure was reduced to 25 years on the amended charge of second-degree reckless homicide, party-to-the-crime (57). Moore was sentenced on that reduced charge to a mere eleven years in prison followed by nine years of extended supervision (100:57).

It is impossible to believe that Moore would risk a trial now on the reinstated first-degree reckless homicide charge, facing a 60-year prison sentence, with the above-described damning evidence still available to the state even without his inculpatory admissions after the recorder was shut off. In all reasonable probability, Moore's trial lawyer would not have recommended that he reject the favorable plea deal and risk trial under these circumstances.

[13] Raynard Franklin pled guilty to felony murder and was sentenced to a lengthy prison term (100:20). Raynard, presumably, would not be able to invoke the Fifth Amendment if he were called by the state to testify. In his harmless error argument, Moore ignores the likely detrimental impact of Raynard and Ronald Franklin's testimony against him at a trial. Moore's brief at 23-25.

II. MOORE'S INCULPATORY STATEMENTS AFTER 10:42 P.M. WERE ADMISSIBLE.

A. This court need not reach the issue whether Moore "refused" to talk with the recorder on because any error was harmless.

This court need not determine whether Moore "refused" at 10:42 p.m. to have the rest of his interview recorded, within the exception at Wis. Stat. § 938.31(3)(c)1. Even if this was not a "refusal," and all statements made during and after the unrecorded portion of the interview should have been suppressed, the error was harmless. "Moore's multiple lies, fabrications and admissions" before then render any error harmless. *State v. Moore*, 352 Wis.2d 675, ¶53 (Kessler, J., concurring) (Pet-Ap. 128).

Moreover, if this was not a sufficient "refusal" to be recorded, the remedy is not suppression of Moore's statements. Because this would have been an adult court trial, the remedy is not found in § 938.31, applicable only to juvenile proceedings, but in its counterpart at § 972.115(2)(a), applicable to adult felony jury trials.

Under § 972.115(2)(a), the remedy for improperly failing to record an inculpatory statement is merely to instruct the jury,

> that it is the policy of this state to make an audio or audio and visual recording of a custodial interrogation of a person suspected of committing a felony and that the jury may consider the absence of an audio or audio and visual recording of the interrogation in evaluating the evidence relating to the interrogation and the statement in the case.

Conversely, the juvenile code counterpart relied on by Moore, § 938.31(3), provides for *suppression* of such a statement but only under the following circumstances:

> (b) Except as provided under par. (c), a statement made by the juvenile during a custodial interrogation is not admissible in evidence against the juvenile in any *court proceeding alleging the juvenile to be delinquent* unless an audio or audio and visual recording of the interrogation was made as required under s. 938.195 (2) and is available.

This was not at any point a juvenile delinquency proceeding. This was, from beginning to end, a felony prosecution in adult court. By virtue of the plain language of these statutes, Moore would only have been entitled to the jury instruction provided in § 972.115(2)(a) had there been a trial. *See State v. Steffes*, 2013 WI 53, ¶21, 347 Wis.2d 683, 832 N.W.2d 101 (this court is not free to rewrite or ignore the plain language of the statute). Left with only this remedy, it is plain that Moore's lawyer would still have advised him to take the favorable plea offer and plead guilty to the reduced charge. Any error was harmless.[14]

B. On the merits, by his words and actions, Moore effectively "refused" to fully confess his and Raynard's roles in the murder unless the detectives turned off the recorder.

Moore asked the officers to turn off the recorder at the point when he got closer to truthfully admitting his and Raynard's roles in the robbery and murder during

[14] Moore believes the legislature "fell short with regard to its remedy provisions" concerning juveniles tried in adult court. Moore's brief at 23. If so, Moore should direct his complaint to the legislature, rather than ask this court to redraft the plain language of the statute.

both interviews. All indications are that Moore would not have admitted to firing the fatal shot unless and until the recorder was turned off.

Moore unequivocally asked during the afternoon interview that the recorder be turned off as he began to discuss Raynard Franklin's involvement (101:Exh. 2, 42). After the detectives told Moore they preferred to keep the recorder on, the interview proceeded with it on. *State v. Moore,* 352 Wis.2d 675, ¶¶17-19 (Pet-Ap. 108-10).

At 10:42 p.m., Moore asked a second time that the recorder be turned off when they again discussed Raynard's involvement. This time, Moore's initial request was not as clear as earlier, but the follow-up questioning revealed his unequivocal refusal to discuss Raynard's role with the recorder on:

> [DETECTIVE] SALAZAR: You want me to turn that off?
>
> MOORE: Yeah.
>
> SALAZAR: Just tell me why you want me to turn this off?
>
> MOORE: ['Cause I don't feel safe [inaudible] that.
>
> SALAZAR: Okay. So you're asking me to turn it off. And you realize that we want to keep it on? Right? Yes, no? I need you to answer yes or no. How's that?
>
> MOORE: Yes.
>
> SALAZAR: Okay.
>
> [DETECTIVE] LOUGH: Who are you afraid of because of this? Us?
>
> MOORE: Uh huh.

LOUGH: Who then?

MOORE: Raynard.

(101:Exh. 2, 75-76).

The recorder was turned off and Moore admitted for the first time that, while Raynard was involved, Moore was the one who fired the fatal shot. *State v. Moore*, 352 Wis.2d 675, ¶¶21-22 (Pet-Ap. 110-12). It is apparent that Moore would not talk about Raynard's involvement while the recorder was on because he feared retaliation from Raynard and/or his brother, Ronald, if word got out. It is also apparent that Moore would not truthfully discuss his own role as the shooter while the recorder was on.

Sure, it would have been preferable from the state's point of view had Moore said, "I refuse to say anything else unless you turn off the recorder." This was one step removed, but with the same purpose: Moore did not want to talk about these matters with the recorder on for fear his cohort, Raynard, would hear the recording. So, he twice asked that it be turned off. Moore's first request in the afternoon was rebuffed by the detectives, they assured his safety, and he continued to talk. But Moore repeated the request at 10:42. The detectives turned off the recorder only after advising Moore that they preferred it be kept on and, as the statute requires, only after they made a contemporaneous audio recording of his refusal. Wis. Stat. § 972.115(2)(a). With the recorder off as he wished, Moore truthfully discussed his and Raynard's roles.

The detectives reasonably interpreted Moore's requests in both interviews that they turn off the machine as his refusal to truthfully admit the full extent of his and Raynard's involvement unless they do so. As required by the statute, the detectives recorded Moore's acknowledgment that it was his decision and his alone, against the wishes of police, to turn off the recorder. This was tantamount to his "refusal." *See State v. Baratka*,

2002 WI App 288, ¶ 15, 258 Wis.2d 342, 654 N.W.2d 875 (drunk driving arrestee's repeated requests for counsel in response to an officer's request that he submit to a field sobriety test is "a refusal as long as the officer informs the driver that there is no right to an attorney at that point. The officer did so inform Baratka") (citation omitted); *State v. Reitter*, 227 Wis.2d 213, 237, 595 N.W.2d 646 (1999) (drunk driving arrestee's conduct amounted to a refusal to submit to a sobriety test despite insisting to the officer, "'I'm not refusing,'" because his "actions ring louder than his articulated words").

The reality of the situation determines whether there is a refusal, at least for purposes of the Implied Consent Law. Uncooperative conduct, or a refusal in fact regardless of the words used, may be the equivalent of an express verbal refusal. *State v. Reitter*, 227 Wis.2d at 234-35. *Also see State v. Rydeski*, 214 Wis.2d 101, 106-07, 571 N.W.2d 417 (Ct. App. 1997). The lower courts reasonably held that Moore's words and actions effectively worked as his "refusal" to fully confess to his and Raynard's respective roles in the murder until after the recorder was turned off at 10:42 p.m. *State v. Moore*, 352 Wis.2d 675, ¶¶47-48 (Pet-Ap. 123-24).

CONCLUSION

Therefore, the decision of the court of appeals must be AFFIRMED.

Dated at Madison, Wisconsin, this 8th day of July, 2014.

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 10,788 words.

Dated this 8th day of July, 2014.

_____
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I hereby certify that:

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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Dated this 8th day of July, 2014.

_____
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