STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2013AP000127 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RAHEEM MOORE,

Defendant-Appellant-Petitioner.

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

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

EILEEN A. HIRSCH
Assistant State Public Defender
State Bar No. 1016386

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 264-8566
hirsche@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

Wisconsin Statutes

OTHER AUTHORITIES CITED

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 reversed the order of Raheem's arguments in its response brief, and added a subsection on waiver of ***Miranda*** rights. Raheem has adopted this order of argument in reply.

"[O]ther than his age," the state argues, "Moore was not much different than many of his adult criminal counterparts." (Brief, p. 24). This argument flies in the face of decades of United States Supreme Court decisions holding that, in fact, adolescents are fundamentally different than adults, and that difference has Constitutional implications.

Sixty-six years ago, the Supreme Court held that a 15-year-old subjected to police interrogation "cannot be judged by the more exacting standards of maturity." ***Haley v. Ohio***, 332 U.S. 596, 599 (1948). Adolescent vulnerability was recognized again in the interrogation setting in ***Gallegos v. Colorado,*** 370 U.S. 52 (1962). "The greatest care" must be taken in assessing the voluntariness of statements by juveniles, the court held in ***In re Gault***, 378 U.S. 1 (1967). The "peculiar vulnerability of children" and "their inability to make critical decisions in an informed, mature manner" was noted in ***Bellotti v. Baird,*** 443 U.S. 622, 634 (1979). The Supreme Court has repeatedly held that the death penalty and mandatory life imprisonment sentences are cruel and unusual when applied to children under age 18, because of the

significant differences between children and adults. ***Eddings v. Ohio,*** 455 U.S. 104 (1982); ***Thompson v. Oklahoma,*** 487 U.S. 815 (1988); ***Roper v. Simmons***, 543 U.S. 551 (2005); ***Graham v. Florida***, 560 U.S. 48 (2010); ***Miller v. Alabama,*** __U.S.__ 132 S.Ct. 2455 (2012).

This court agreed that it must use "the greatest care" when assessing the voluntariness of confessions in ***In the Interest of Jerrell C.J.,*** 2005 WI 105, ¶21, 283 Wis.2d 145, 699 N.W.2d 110. And again in 2011, the United States Supreme Court recognized the importance of special caution when assessing a juvenile's waiver of constitutional rights in ***J.D.B. v. North Carolina***, ___ U.S. ___, 131 S.Ct. 2394 (2011), finding again that "'no matter how sophisticated,' a juvenile subject of police interrogation 'cannot be compared' to an adult subject." ***J.D.B.,*** 131 S.Ct. at 2403 (quoting ***Gallegos***, 370 U.S. 49 at 54).

This court cannot accept the state's invitation to ignore the fact that Raheem was a 15-year-old boy, and his immaturity made him "uncommonly susceptible" to suggestive and coercive police interrogation techniques. ***Jerrell C.J.,*** 283 Wis.2d 145, ¶26.

B. Raheem did not knowingly and intelligently waive his ***Miranda*** rights.

The state's argument hinges on its assumption that Raheem said: "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." It concludes that the "most hardened adult criminal would be hard-pressed to more succinctly and accurately articulate his understanding of these essential rights." (Brief, p. 23-24).

The fatal flaw in the state's argument is that Raheem did not say those words. Detective Gastrow did. The voice on the recording "succinctly and accurately" stating a ***Miranda*** right, is that of Detective Gastrow. (101:Ex1 at 15:30). The attribution of those words to Raheem in the transcript of the interview is in error. The recorded words are indisputably those of the detective.

The actual evidence is that Raheem answered "yes," and "yeah," when he was asked if he understood various ***Miranda*** rights, but the one time he was asked to demonstrate his understanding, his explanation completely missed the mark. Asked to explain the right to stop questioning and ask for a lawyer, he instead described his incomplete understanding of the right to remain silent.

Therefore, Raheem did *not* understand that he could stop the questioning at any time and ask for a lawyer, and he did *not* understand that he had to affirmatively assert his right to remain silent. (101:Ex.6:16).

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

1. Summary.

Under the general heading, "Moore's personal characteristics," the state makes a series of claims that are without evidentiary foundation, beginning with the broad assertions that he was street-smart, experienced, knew his rights, and grasped the concept of party-to-a-crime liability. (Brief, p. 24). Although each of these claims was addressed and refuted in Raheem's brief-in-chief, the state simply

ignores those portions of Raheem's brief. Therefore, the evidence is summarized briefly, below.

2. Age.

The state acknowledges that Raheem was 15 years old, but gives no weight to that fact. This court has held that age "was a strong factor weighing against the voluntariness of the confession," in a case in which the subject of interrogation was just 102 days younger than Raheem. ***Jerrell C.J.,*** 283 Wis.2d 145**,** ¶26.

3. Education, intelligence, disabilities.

The state also acknowledges that Raheem was in eighth grade and had an IQ of 73, but again it gives those characteristics no weight. In ***Jerrell C. J.,*** Jerrell's same eighth grade education and higher IQ of 84, were factors weighing against the voluntariness of his confession. 283 Wis.2d 145, ¶27.

There was no testimony that Raheem had "deliberately underperformed" on an IQ test. Rather, Raheem told a psychologist that during one previous testing session, "he hadn't tried his best." (88:19). Nevertheless, that psychologist, as well four others, agreed that he was of low intelligence. (88:18; 94:57-58; 43:5-6).

Contrary to the state's assertion, Raheem had three diagnosed mental health disorders: dysthymic disorder, attention deficit-hyperactivity disorder, and oppositional defiant disorder. (21:7).

Raheem did not "grasp the concept" of "party to a crime." Although he used the phrase, he then denied that he and Jevonte were "both going to do a robbery." He "was just with [Jevonte.]" (101Ex6:55). Raheem was parroting words

he had heard before, without understanding the concept of shared responsibility.

4. Understanding of ***Miranda*** rights.

Asked to explain the right to stop questioning and consult a lawyer, Raheem said, "That mean 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:Ex6:16). His statement shows that he did not understand his right to consult with a lawyer during questioning, and he did not understand that he would have to assert his right to remain silent. On a later test of his understanding of ***Miranda*** rights, he scored "very, very poorly" on the right to silence during interrogation. (94:26, 32).

5. Prior experience with law enforcement.

Like Jerrell C.J., Raheem had two prior arrests. (100:32-33). Jerrell's two arrests did not weigh in favor of a finding of voluntariness, because the court found that only "extensive" police contacts weighed in favor of a finding of voluntariness. ***Jerrell C.J.,*** 283 Wis.2d 145, ¶¶28-29. The state suggests no reason to distinguish this case from ***Jerrell C.J.***

6. Length of custody and interrogation.

The length of custody and interrogation are important factors in the "totality of the circumstances" analysis. They are ignored by the state's brief.

In ***Jerrell C.J.,*** the court held that his lengthy custody and interrogation was evidence of coercive conduct. ***Id.***, 283 Wis.2d 145, ¶¶32-33. Raheem was held in custody and in the interrogation room for an even longer time than Jerrell C.J. – more than 11 hours. (101Ex6:1; 40:12). He was

questioned for 5 ½ hours, about the same as Jerrell C.J. His interrogation was five times longer than the average interrogation. *Inside the Interrogation Room,* 86 J. Crim. L. & Criminology 266, 279 (1996).

The extraordinary length of Raheem's interrogation and incommunicado custody, as in ***Jerrell C.J.,*** weighs strongly against the voluntariness of his confession.

7. Failure to call parents.

Wisconsin has no *per se* rule requiring parental consultation in a juvenile interrogation. However, failure to call parents is *not* just "one of many factors." (Brief, p. 28). Failure to call parents is "strong evidence that coercive tactics were used to elicit the incriminating statements." ***Jerrell C.J.,*** 283 U.S. 145, ¶30 (quoting ***Theriault v. State***, 66 Wis.2d 33, 48, 223 N.W.2d 850 (1974)).

The state asserts that police did contact Raheem's father on the day of the interrogation. (Brief, p. 29). However, there is no evidence that they contacted him *after* Raheem was taken into custody, and no evidence that they notified him that Raheem had been taken into custody.

Therefore, the state failed to meet its burden of proving that police called Raheem's father when they took Raheem into custody, and their failure to do so is strong evidence of coercion.

8. Psychological techniques applied.

The state emphasizes the fact that Raheem was not deprived of food, water, bathroom breaks or cigarettes, and he was not handcuffed for most of the interrogation. Physical comforts are a small part of the analysis. For more than 50 years, our Supreme Court has recognized that the "modern

practice of in-custody interrogation is psychologically rather than physically oriented." ***Miranda v. Arizona***, 384 U.S. 436, 448 (1996) (quoting ***Blackburn v. State of Alabama***, 361 U.S. 199 (1960)).

As ***Miranda*** points out, the "principal psychological factor contributing to a successful interrogation is privacy– being alone with the person under interrogation." ***Id.,*** 449. Additionally: "The guilt of the subject is to be posited as a fact," and "explanations to the contrary are dismissed and discouraged." ***Id.,*** 450. Here, Raheem denied his involvement at least twenty times during his first interrogation, and detectives challenged him every time.

The state argues that the "detectives were right to challenge his denials. . . to encourage him to tell the truth . . . to confront him with contrary witness accounts." (Brief, p. 28). Raheem agrees that police are not prohibited from doing so. But that practice is recognized as a powerful psychological interrogation technique. ***Jerrell C.J.,*** 283 Wis.2d 145, ¶35; ***A.M. v. Butler,*** 360 F.3d 787, 800, (7th Cir. 2004) (the "detective's behavior of continually challenging the juvenile's statement and accusing him of lying" could "easily lead a young boy to 'confess' to anything.")

The state argues there is "nothing wrong with encouraging honesty," and that the use of police deception is "not improper per se." (Brief, p. 29-30). This may be true to a point, but context matters and the state ignores the fact that deception and accusing a suspect of lying are powerful psychological techniques. Their repeated use over a prolonged period of time weighs against the voluntariness of Raheem's confession.

In this section of its brief, the state asserts, "Ronald told police Moore admitted to him he (Moore) and Raynard were involved, and he (Moore) fired the fatal shot." (Brief, p. 31). The state does not provide a citation because there is none. The assertion is false.

Ronald Franklin told police that Raynard, not Raheem, was the shooter. Raheem told him, "specifically, Franklin's brother, Raynard was responsible for shooting the victim during a failed robbery attempt." (23:Ex. 8:3). Ronald Franklin's girlfriend told police she overheard Raheem telling Ronald "that the man laying on the sidewalk down the street was shot in the back by Raynard." (23:Ex. 9:3).

The state's extended speculation about Raheem's reasons for confessing is based on its false assertion that Raheem did, in fact, shoot Mr. Parrish. (Brief, p. 31-32). Raheem is aware of no evidence other than his coerced confession, that he was the shooter.

The state's argument is also based on a faulty legal premise. In effect, it argues that the confession was not coerced because it is true. Voluntariness and truthfulness are separate concepts. If police obtain a suspect's confession by beating him with sticks, the confession is inadmissible because it was coerced, even if it is true.

The litany of psychological techniques used by police in this case - isolation, accusation, cutting off denials, lying, minimizing culpability, threatening he would get no "mercy" if he didn't confess, threatening arrest if he didn't confess, and suggesting Christian forgiveness – weigh against the voluntariness of Raheem's confession.

9. Totality of the circumstances.

The state's assertion that the "gist of Moore's argument seems to be that, because of his age and below average intelligence, police should not have interviewed him," is ridiculous. (Brief, p. 25).

As Raheem has consistently argued, the voluntariness of any juvenile's waiver of Constitutional rights is determined by proper consideration of the totality of the circumstances. A waiver of Constitutional rights under different circumstances may result in a voluntary statement. *See*, cases cited in state's brief, p. 25-26.

Here, the circumstances are nearly indistinguishable from those in ***Jerrell C.J.*** Raheem was 102 days older than Jerrell, but he was less intelligent. He had the same level of education and the same prior experience with police. He affirmatively demonstrated his lack of understanding of his ***Miranda*** rights. Unlike Raheem, Jerrell asked to call his parents, but neither boy was given an opportunity to call his parents. Raheem and Jerrell were both questioned for about 5 ½ hours, and Raheem was held in custodial isolation for a longer period of time than Jerrell. Both boys were handcuffed at times. Detectives employed more psychological tactics on Raheem than they did on Jerrell.

Therefore, under the totality of the circumstances, Raheem's inculpatory statement, like Jerrell C.J.'s statement, was "not the product of a free and unconstrained will." ***Id.,*** ¶36.

D. Harmless error.

Again in this section of the brief, the state asserts "facts" not in evidence, and assumes without proof that it can determine which of Raheem's statements was true and which was not. It asserts that Ronald Franklin would have testified that Raheem was the shooter – an assertion directly contradicted by the police reports. (23:Ex. 8:3, 9:3). It also assumes that Raynard Franklin would have testified against Raheem. It is equally or more likely that Raynard was in fact the shooter, and so would not have testified against Raheem.

The state's unsupported speculation is inadequate to prove beyond a reasonable doubt that the erroneous admission of Raheem's statement "did not contribute to the conviction." ***State v. Rockette,*** 2005 WI App 205, ¶26, 287 Wis.2d 257, 704 N.W.2d 382.

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

A. Raheem did not "refuse to respond or cooperate" if the interrogation was recorded.

Raheem made specific and detailed legal arguments about statutory interpretation of Wis. Stat. §938.195 and §938.31(3)(c)1. in his brief-in-chief, and the state did not respond to those. Therefore, Raheem will rely on the brief-in-chief, and will not repeat the arguments here.

Instead, the state makes another speculative argument that Raheem wanted the recorder turned off at 10:42 p.m. because he feared retaliation from Raynard and Ronald Franklin if "word got out" that he admitted to being

the shooter. (Brief, p. 39). The state's speculation is illogical.

Before the recorder was turned off, Raheem had told police that he and Raynard were involved in an armed robbery, and Raynard was the shooter. (101:Ex.2:48, 49, 54). He knew those statements were recorded, because they were made immediately after police deflected his request to turn off the recorder. (101:Ex 2:42).

Raheem's unrecorded statement, on the other hand, absolved Raynard of responsibility for the shooting. If Raheem was afraid of Ronald and Raynard Franklin, he would *want* them to hear that he had shifted the blame from Raynard to himself. In fact, the more likely speculation is that Raheem took responsibility for being the shooter precisely *because* he was afraid of Raynard and Ronald.

The bottom line here is that the legislature specifically created a narrow exception to the recording requirement when a juvenile "refused to respond or cooperate." §938.31(3)(c)1. Raheem did not refuse.

B. The remedy for violating Wis. Stat. §938.195 is inadmissibility in all court proceedings.

The state's brief ignores the mandate set forth by the court in ***Jerrell C.J.,*** 283 Wis.2d 145, ¶48:

> This would not make it illegal for police to interrogate juveniles without a recording. Instead, it would render the unrecorded interrogations and any resultant written confession inadmissible as evidence in court.

The state's brief ignores the fact that 2005 Wis. Act. 60 was intended to "codif[y] the Jerrell recording requirement." 2005 Assembly Bill 648, Legislative Reference Bureau Analysis, 2, at http://docs.legis.wi.gov/2005/related/proposals/ab648.

The state's brief ignores the fact that both the ***Jerrell C.J.*** decision and the resulting legislation were intended to protect the "youth of our state" from "confessing to crimes they did not commit." ***Id.,*** ¶59. At the time of interrogation, Raheem was a youth. The court and the legislature intended to protect him by making unrecorded interrogations inadmissible. Subsequent decisions to try him in criminal court did not transform him into an "adult" at the time of his interrogation.

Wisconsin Statute §972.115 cannot be interpreted in isolation. The legislature paired it with §968.073. It created another pair of statutes for juveniles, §938.195 and §938.31. This court should construe these statutes in a way that is consistent with legislative intent, by holding that Wis. Stat. §938.31 is applicable when the subject of an interrogation is a juvenile.

C. Denial of the suppression motion was not harmless error.

The state's argument on this point is limited to quoting a sentence from the concurrence to the court of appeals decision. It does not explain why Raheem's alleged "lies, fabrications and admissions" during interrogation made the error harmless and Raheem is unaware of any legal standard for determining harmlessness that is based on contradictory statements made during interrogation. (Brief, p. 36, quoting ***State v. Moore***, 2013AP127-CR (Slip op., ¶53)).

As argued in the brief-in-chief, the state has failed to prove beyond a reasonable doubt that the erroneous admission of Raheem's statement "did not contribute to the conviction." ***Rockette***, 287 Wis.2d 257, ¶26.

CONCLUSION

For the reasons stated above and in 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 22nd day of July, 2014.

Respectfully submitted,

EILEEN A. HIRSCH
Assistant State Public Defender
State Bar No. 1016386

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 264-8566
hirsche@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

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 2,992 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 22nd day of July, 2014.

Signed:

EILEEN A. HIRSCH
Assistant State Public Defender
State Bar No. 1016386

Office of State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 264-8566
hirsche@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner