STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2013AP127-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RAHEEM MOORE,

Defendant-Appellant.

APPEAL, PURSUANT TO WIS. STAT. § 971.31(10), FROM 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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C O U R T O F A P P E A L S

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BRIEF OF PLAINTIFF-RESPONDENT

ISSUES PRESENTED

1. Did the state prove by a preponderance of the evidence that Moore voluntarily and intelligently waived his *Miranda* rights and thereafter gave an uncoerced voluntary confession to police?

The trial court concluded that Moore was advised of, and voluntarily and intelligently waived, his *Miranda*

rights before giving an uncoerced voluntary confession to his participation in the robbery and murder.

2. Should Moore's admissions during the brief unrecorded portion of the interview after police granted his request 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 is a jury instruction on the failure to record – not suppression.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The state does not request oral argument or publication. The briefs of the parties should adequately address the legal and factual issues presented.

Publication is not necessary because this court will likely not reach the merits of the issue Moore believes warrants publication: whether his "refusal" to have a portion of his custodial interrogation recorded, when he twice asked that the recorder be turned off, was sufficient to satisfy the statutory exception to the requirement that the custodial interrogation of a juvenile be recorded. Wis. Stat. § 938.31(3)(c)1. This court can avoid creating precedent on that issue because, the state intends to prove, any error was harmless.

STATEMENT OF THE CASE

Raheem Moore appeals from a judgment of conviction entered upon his guilty plea, pursuant to Wis. Stat. § 971.31(10), challenging the trial court's order denying his motion to suppress his inculpatory statements to police (63; 65; 69).

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 day to having fired the shot that killed Parish as the victim tried to escape (40; 101).[1]

Although only 15 years old at the time, 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).[2] 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

[1] 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 7, 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, 2012 hearing. They will be cited as follows: "101:Exh. 2, at __," and 101:Exh. 3, at __."

[2] The information was amended to allege party-to-a-crime liability for first-degree reckless homicide, under Wis. Stat. § 939.05(3)(b), February 3, 2010 (31).

transferred to juvenile court (81-82; 86-88).[3] *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).

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

The trial court, the Honorable Jeffrey A. Conen presiding at this point, 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, and during the subsequent surreptitiously recorded portion, would be admissible at trial (92:9-15; A-Ap. 105-117).

The court also, apparently, broadly interpreted Moore's motion as challenging the overall voluntariness of his statements, and their compliance with *Miranda v. Arizona*, 384 U.S. 436 (1966). It held a *Miranda-Goodchild* hearing on May 17, 2011 and continued to

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

June 20, 2011 (93-94).[4] 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 the totality of the circumstances (94:73-79; A-Ap. 103-04).

Moore pled guilty December 6, 2011, the Honorable David L. Borowski presiding at this point, to an amended information setting forth a reduced charge of second-degree reckless homicide, party-to-the-crime (57; 99). Moore was sentenced by Judge Borowski February 17, 2012, to eleven years of initial confinement in prison followed by nine years of extended supervision (100:57).

There were no postconviction proceedings. Moore appealed directly from the judgment of conviction entered upon his guilty plea, challenging the denial of his suppression motion (69).

STATEMENT OF RELEVANT FACTS

To fully understand what occurred, and to fairly assess the actions of police and the correctness of the trial court's decision under review, this court must do as the trial court did; read the transcripts of the interrogation and listen to the compact discs containing the audio recordings thereof in their entirety (101).

[4] This is what has long been known as a "*Miranda-Goodchild"* hearing at which the court assesses: (1) whether police complied with the procedural requirements of *Miranda v. Arizona*; (2) whether the suspect voluntarily and intelligently waived his *Miranda* rights; and, if so, (3) whether the statement was voluntary or the product of police coercion under the totality of the circumstances. *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 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 at the police department's 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 of the interview, 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. He never asked for a lawyer. He never refused to answer any specific question. He 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 in the interview, Moore admitted he was aware of a shooting in the neighborhood, as he was on a porch nearby, 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 Franklin, and insisted he had never seen or heard of Raynard (101:Exh. 6, at 25-26, 36). The detectives

challenged Moore's denials with encouragement 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 him 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 the fact that his father said he had not seen Moore in several 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"[5] and "Ronald." Moore exclaimed: "That was a lie" (*id.* at 51).

At this point, 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

[5] This is the name of Ronald Franklin's girlfriend on whose porch Moore said he had been before and after the shooting. Although her name is spelled different ways in the record, the spelling that appears most frequently is "Tiawanna."

whether he had an active part in it, Moore answered: "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 they saw making a purchase at a crack house and Moore stood watch in a nearby alley (*id.* at 62). Moore then pointed out on a map provided by Detective Mueller where he and Jevonte were 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 then 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 then described the offense. He explained how 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 baggies of cocaine to the ground and ran. After the shot was fired, Moore and Jevonte 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 outside to the porch asking what happened. Moore said he told them that 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 that it was Raynard Franklin (40:12).

At this point, the CD cut off and only the last few minutes of the interview went unrecorded.[6] This portion of the interview ended at 5:34 p.m., or two hours and forty-five minutes after it began (40:12; 93:42).

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 (40:2-3; 93:52; 101:Exh. 2, at 2). Much of this portion of the 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 separate right (*id.* at 3-4). No threats or promises were made (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 in the interview process, 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 proceeded to give directions to the crime scene. This was interspersed with small talk (91:24, 40-41; 93:54-55; 101:Exh. 2, at 8-10). Moore pointed out various locations at the scene where he said people were positioned and events occurred (40:3). Moore directed them to a specific house. As they approached it, 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"

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

again (101:Exh. 2, at 13). Shortly 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 arrived at 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, and nicknamed "Squeak" (101:Exh. 2, at 25-26; *see* 40:9). Moore then 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 he 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).

At this point, 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., or one hour and 19 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 because he "lied" about some things (101:Exh. 2, at 38). Detective

Salazar then insisted police "knew" that Jevonte does not exist and asked why Moore is scared of the unidentified person. 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; 93:64-65; 101:Exh. 2, at 42). The recorder remained on.

Salazar again asked who the other person was. 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 revealed that Ronald Franklin threatened to kill him if he told on his brother. 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 48). Moore said Raynard fired the fatal shot (*id.* at 48). 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 said he was the one who yelled to the victim 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 whom he said were interviewing Raynard to clear this up, but 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 this point, at 10:07 p.m., or 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 (*id.* 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 again described in detail his account of the incident and the route everyone took (*id.* at 61-67). At this point, Moore was given a cigarette (*id.* at 68).[7] Moore continued to describe the incident. Moore said this was his and Raynard's first robbery and he 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

At this point, 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, 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 in a manila envelope (91:18, 37-39; 93:71; 101:Exh. 3, at 2). Recording of the interview

[7] Moore earlier told the detectives when they returned to the crime scene that he smoked cigarettes and marijuana (101:Exh. 2, at 20).

resumed three minutes later at 11:20 p.m., or thirty-eight minutes after the recorder was turned off (40:5-6; 91:36; 101:Exh.3, at 2).[8]

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 Ronald's girlfriend, Tiawanna's, porch. Moore said he told Ronald about the shooting and believed the others on the porch overheard him (*id.* at 7-8). Moore still had the gun in his pocket (*id.* at 8-9). Moore identified the gun from a police department firearms card as a black snub-nose revolver (40:6). At 9:59 p.m., or one-and-one-half hours after the interview began, Moore admitted he 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).

At this point, the detectives summarized with Moore his account of what he and Raynard did (*id.* at 16-22; *see* 40:6-7). In this account, 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." The victim ran and Moore fired (101:Exh. 3, at 19). Moore said he cried during the unrecorded portion of the interview when he admitted to

[8] 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).

being the shooter because he did not mean to shoot Parish (*id.* at 24; *see* 40:5).

Moore finished his cigarette and the interview ended at 11:44 p.m. October 10, 2008. Moore was taken to the Children's Center for the evening (101:Exh. 3, at 25; *see* 40:8).

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

SUMMARY OF ARGUMENT

1. Raheem Moore was only 15 years old when he confessed. The law allows police to interview a juvenile such as Moore about a murder police suspect him of committing. The law recognizes that a 15-year-old is capable of voluntarily confessing to murder during a police interview after he voluntarily and intelligently waives his rights to remain silent and to the presence of counsel.

Raheem Moore was also 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, he tried to talk his way out of trouble. Moore engaged in a frank give-and-take with detectives over several hours hoping to convince them that he was not involved at all and, when that strategy went nowhere, to downplay his role in the murder; maintaining he was coerced by a fictitious accomplice named "Jevonte" to act only as his lookout. When that ploy fell on deaf ears, Moore decided to tell the truth and tearfully admitted that his accomplice was Raynard Franklin and that he, Moore, fired the fatal shot. Moore even wrote what seemed at the time to be a heartfelt letter of apology to the victim's family.

In hindsight, this may not have been a wise strategy but it is a strategy criminals much older and far more sophisticated than Moore routinely try to pull off, usually unsuccessfully: 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.

Milwaukee detectives did nothing wrong here. 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 him with food, drink and even cigarettes. They took numerous breaks. They left the interrogation room to return to the crime scene and stopped at McDonald's on the way back. They engaged in sound police work that produced an uncoerced and reliable 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.

Moore's voluntariness challenge to his statement misses the mark. In reality his challenge is to the *reliability* of his uncoerced confession. The gist of his argument is: who can believe a confession from an impressionable teenager of below average intelligence? That would be an issue of fact for the jury at trial; not a constitutional basis for suppression. Moore voluntarily and intelligently waived his right to challenge the reliability of his confession at a jury trial, opting to accept the highly favorable plea deal instead (99).

2. The trial court properly found that late in the interview Moore "refused" to have his admissions to firing the fatal shot recorded. The detectives agreed to turn off the recorder following Moore's second request that it be turned off. Therefore, Moore's inculpatory admissions during the unrecorded portion after his

"refusal," and during the recorded portion that followed, remained admissible pursuant to Wis. Stat. § 938.31(3)(c)1.

3. Finally, it is plain that any error was harmless. Moore only challenges, after all, his admissions during and after the unrecorded portion of the interview beginning at 10:42 p.m. Moore's brief at 15 (challenging only his admissions "made eleven hours after he was arrested") (initial capitalization omitted). Before then, beginning around 4:30 p.m., Moore repeatedly admitted to 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 in all reasonable probability would still have found Moore guilty based on his admissions long before the unrecorded portion to being a party to the murder, based on the anticipated 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. So, in all reasonable probability, Moore would still have accepted the undeniably favorable plea deal on the sound advice of counsel even assuming the trial court erred in denying the suppression motion.

ARGUMENT

I. MOORE MADE A VOLUNTARY CONFESSION, UNCOERCED BY IMPROPER POLICE TACTICS, 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 inculpatory statements.

When it seeks to introduce a defendant's inculpatory statements into evidence at trial, 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) that the statements were voluntary. *State v. Triggs*, 2003 WI App 91, ¶ 12, 264 Wis. 2d 861, 663 N.W.2d 396.

1. Waiver of *Miranda* rights.

The issues concerning the adequacy of the *Miranda* warnings and waiver thereof are questions of constitutional fact which this court reviews *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 the sufficiency of the *Miranda* warnings and waiver thereof by a preponderance of the evidence. *Id.* at 28-29. Specifically, 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 *Miranda* waiver when it proves that the suspect was told or has read all of the rights required by *Miranda* and the suspect indicates he understands them and is 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).

Waiver of the rights to counsel and to remain silent after *Miranda* warnings are given may be implied when the accused who understands those warnings goes on to give an uncoerced statement without exercising those rights. *Berghuis v. Thompkins*, 560 U.S. 370, 130 S. Ct. 2250, 2261-62 (2010).

2. Voluntariness of an inculpatory statement.

When assessing the voluntariness of a defendant's inculpatory statement during custodial interrogation, the trial court must consider the totality of the circumstances to determine whether the statement was or was not coerced by improper police practices. Again, this court independently applies constitutional principles to the not clearly erroneous facts as found by the trial court. *State v. Jerrell C.J.*, 283 Wis. 2d 145, ¶ 16; *State v. Hoppe*, 2003 WI 43, ¶ 34, 261 Wis. 2d 294, 661 N.W.2d 407; *State v. Triggs*, 264 Wis. 2d 861, ¶ 11.

> Whether a statement is voluntary or involuntary depends on whether it was compelled by coercive means or improper police practices. *State v. Clappes*, 136 Wis. 2d 222, 235-36, 401 N.W.2d 759, 765 (1987). We look to the "totality of the circumstances" to resolve the question, weighing the defendant's personal characteristics—such as his or her age, education, intelligence, physical and emotional condition, and

> prior experience with the police—against the coercive police conduct. *Id.* at 236, 401 N.W.2d at 766. Matters relevant to the coercive nature of the police conduct include the length of the interrogation, delay in arraignment, the general conditions under which the questioning took place, whether excessive physical or psychological pressure was brought to bear on the accused, whether the police used inducements, threats, or "strategies" to compel a response, and whether the accused was informed of his or her constitutional rights to counsel and against self-incrimination. *Id.* at 237, 401 N.W.2d at 766. In this context, "voluntariness" is a question of constitutional fact, which we review *de novo*. *State v. Owen*, 202 Wis. 2d 620, 640, 551 N.W.2d 50, 59 (Ct. App. 1996). The circuit court's findings of historical fact, however, will not be set aside unless they are clearly erroneous. *Id.*

State v. Franklin, 228 Wis. 2d 408, 413, 596 N.W.2d 855 (Ct. App. 1999). *See State v. Agnello*, 2004 WI App 2, ¶¶ 8-9, 269 Wis. 2d 260, 674 N.W.2d 594; *State v. Triggs*, 264 Wis. 2d 861, ¶ 13. *See generally State v. Brockdorf*, 2006 WI 76, ¶¶ 35-36, 291Wis. 2d 635, 717 N.W.2d 657.

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

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

> 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.

DETECTIVE G: Okay. Now we're talking about an incident that happened two nights ago. Today is Friday and two nights ago was Wednesday evening.

MOORE: Hmm-hmm.

DETECTIVE G: Do you know what we're talking about?

MOORE: Yeah.

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

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

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 is a voluntary and intelligent *Miranda* waiver if ever there was one. At the very least, the trial court could reasonably find from this record that the state met its burden of proving a valid waiver of his *Miranda* rights. *See State v. Lee*, 175 Wis. 2d at 359-60; *State v. Hernandez*, 61 Wis. 2d at 258-59. Moore makes little effort to argue to the contrary, focusing almost the entirety of his argument on the voluntariness of his confession. *See* Moore's brief at 26.

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

1. Moore's personal characteristics.

Moore was young and of below average intelligence. 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, he was not much different than many of his adult criminal counterparts.

Moore was 15 years old. He was in the eighth grade and was of below average intelligence (88:31; 93:26). He was not, however, mentally retarded and did not suffer from any psychosis or mental disorder. His was only a personality disorder, meaning that he often "acts out"[9] (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

[9] Moore's well-documented acting out behavior indicates his antagonism towards authority figures, not his desire to please them, belying the research cited at pp. 23-24 of his brief (82:78-79, 85).

a learning disability, then said: "'Not really. A little bit.'" But he hastened to add: "'I get it though'" (93:25). He 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).

As discussed above, Moore was twice fully advised of his *Miranda* rights and voluntarily waived them at the outset of both interviews, assuring both sets of detectives that he knew his rights having been advised of them previously (93:13, 15, 41, 50-52).[10] 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 (93:16), until towards the end when Moore asked for a second time that the recorder be turned off. 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).[11]

The detectives were unarmed in the interview room (93:49). Moore was not handcuffed (*id.*), except when for security reasons he was 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 interviews were separated by approximately three hours. They occurred in the late afternoon and evening, at a time when Moore would presumably be up and about, not in the middle of the night or during the wee hours of the morning without sleep.

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

[11] Contrary to the argument at p. 22 of Moore's brief, police contacted his father. It does not appear that his father asked to see Moore, told police not to talk to him or demanded that they get a lawyer for him. Moore's mother was apparently incarcerated at that time for a drug offense (100:25).

Moore was not passive from the time of his arrest to the end. When arrested, he gave a false name and birth date. Throughout the interviews he actively denied involvement in the offense, persisted in his claim that "Jevonte" was the shooter, even going so far as to provide a detailed physical description of "Jevonte," and at times asked the officers how they had obtained certain 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 thereafter asked that the recorder be turned off but *not* that the interview be stopped – a request that was finally granted (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 his accomplice's brother, Ronald who, Moore said, threatened to kill him if he told on Raynard (93:66-67; 97:12-13; *see* 100:23). Moore was under pressure, to be sure, but not as the result of 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 suspect in a homicide who knew all along he did not have to talk to police and could demand a lawyer. This interview 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 police pressure hours later.

As discussed above, the detectives properly advised Moore of his *Miranda* rights at the outset of both interviews. Moore voluntarily and intelligently waived those rights, assuring the detectives "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 only handcuffed, for security reasons, when they went out to the crime scene. *Compare State v. 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 "tactics" employed here would certainly 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 the opportunity to consult with his parents. There is no *per se* rule requiring parental consultation before a juvenile's statement can be deemed voluntary. It is but one of the many factors in the totality of the circumstances analysis. Parental presence is not required. *Id.* ¶¶ 3, 43. 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).

> 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 33, 41, 223 N.W.2d 850 (1974).

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 that his father asked to speak with Moore. Meanwhile, his mother was apparently taken into custody that day (*id.*).

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 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 that 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, however, improper. *State v. Triggs*, 264 Wis. 2d 861, ¶ 1 ("Police misrepresentations during an interrogation do not make an otherwise voluntary statement inadmissible, but become one factor in the totality of the circumstances analysis"). It should be noted that, in these interviews, both sides employed deception (i.e., Moore's "Jevonte" story).

> 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 & Jerold H. Israel, Criminal Procedure § 6.2(c), at 446-48 (1984)).

Nor is it significant that the lie about the evidence against a suspect may cause the suspect to confess because, in the *Holland* court's view:

> Thus the **issue is not** causation, but the degree of improper coercion, and in this instance the degree was slight. 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 consider-

> ations 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.

The important point is not whether Ronald or Raynard Franklin was "in the other room." The important point is that Ronald apparently told police at some point during the two days since the murder that Moore had 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 serious lie that might seal his fate, regardless whether Ronald and/or Raynard were "in the other room" or still out on the streets. *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.

Even if police inflated what their investigation revealed 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).

The gist of Moore's argument is that, because he was 15 and of below average intelligence, police should not have interviewed him. But decisions such as *State v. 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 insist that police proceed with caution

and, as required by *Jerrell C.J.*, that police electronically record all juvenile custodial interrogations "where feasible." 283 Wis. 2d 145, ¶¶ 3, 58. Unless and until a higher court holds as a matter of law that juveniles may not be interrogated by police at all, Moore's argument fails. That is not likely to occur. Wisconsin law recognizes that a seventeen-year-old is as capable of giving a voluntary statement as is an adult. *See Theriault v. State*, 66 Wis. 2d at 39-44. *See also 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 a murder was voluntary under totality of circumstances absent proof of coercion).

In the final analysis, Moore's challenge is more to the reliability of his confession than to its voluntariness. Reliability of a confession is, however, an issue of fact for the fact-finder at trial; not for the trial court 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 voluntarily and intelligently waived his right to challenge the reliability of his confession when he waived his right to a trial.

It bears emphasis that voluntary confessions are *desirable*. *Maryland v. Shatzer*, 559 U.S. 98, 106 (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))). *Also see Arizona v. Mauro*, 481 U.S. 520, 529 (1987). The trial court properly refused to suppress Moore's voluntary, uncoerced and reliable confession.

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

Once again, Moore only challenges the admissibility of inculpatory statements he made after 10:42 p.m. when police granted his request to turn off the recording device. He does not challenge any of his admissions to his participation in the robbery and murder before then.

1. The applicable law.

The harmless-error rule applies not only to appellate review of convictions obtained after trials, but also to appellate review of convictions obtained 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 review of a guilty or no-contest plea is whether there is a reasonable probability that Moore would not have pled guilty and would have insisted on going to trial had his statements been suppressed. *See State v. Armstrong*, 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. Travis*, 2013 WI 38, ¶ 67 n.54, 347 Wis. 2d 142, __ N.W.2d __ ; *State v. Martin*, 2012 WI 96, ¶¶ 45-46, 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 during and after the recorder was turned off had been suppressed.

Long before the audio recorder was turned off at his request 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 great detail what occurred, where it occurred, how it occurred and why. The only falsehoods in his admissions up to that point were: (1) that his accomplice was the fictitious "Jevonte" and not Raynard Franklin; and (2) that Moore was only a lookout and his accomplice fired the fatal shot as the victim fled.

Eventually, and still before the recorder was turned off, his first falsehood dropped out when Moore admitted that his accomplice was indeed 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.

Moreover, 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 decided to rob someone: 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; and he was shot from behind. Moore simply reversed their roles after the recorder was turned off. Again, the state had an ironclad case of party-to-a-crime liability against both men regardless of who fired the shot.

The state would have far more than Moore's admissions to use against him at a trial. There would be the testimony of Ronald Franklin disclosing Moore's admission against his interest on Tiawanna's porch immediately after the shooting that Moore and his brother, Raynard Franklin, were involved, and Moore shot the man. There would be the testimony of Moore's accomplice, Raynard Franklin, describing the crime they jointly committed.[12]

Moore had every incentive to accept the state's plea offer regardless of his confession's admissibility. He faced a 60-year penalty exposure for the initial charge of first-degree reckless homicide, party-to-the-crime (31). His penalty exposure was reduced to 25 years on the amended charge of second-degree reckless homicide, party-to-the-crime (57). He 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, and risk a 60-year sentence, with all of 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

[12] Raynard Franklin pled guilty to felony murder and was sentenced to a lengthy prison term (100:20). He, presumably, would not be able to invoke the Fifth Amendment if he were called by the state to testify.

favorable plea deal and risk trial under these circumstances.

II. MOORE'S STATEMENTS OBTAINED AFTER THE RECORDER WAS SHUT OFF AT HIS REQUEST WERE ADMISSIBLE.

A. This court need not reach the issue whether Moore "refused" to talk unless the recorder was turned off because any error was harmless in light of the limited remedy available to him in an adult felony jury trial.

For the reasons discussed immediately above, this court need not reach the esoteric issue raised by Moore: whether his repeated requests that the detectives turn off the recorder amounted to his "refusal" to have his interview recorded within the contemplation of the exception at Wis. Stat. § 938.31(3)(c)1. Even if this exception to the recording requirement was inapplicable, and all statements made during and after the unrecorded portion of the interview should have been suppressed, the error was plainly harmless.

Moreover, even if Moore did not "refuse" to be recorded, the remedy is not suppression of his statements. Because this was an adult criminal trial, the controlling section is not § 938.31, applicable only to juvenile proceedings, but 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 that the jury be instructed,

> 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, an adult felony criminal prosecution. By virtue of the plain language of both of these statutes, Moore would only have been entitled to the jury instruction set forth at § 972.115(2)(a) had there been a jury trial. *See State v. Steffes*, 2013 WI 53, ¶ 21, 347 Wis. 2d 683, __ N.W.2d __ (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 have still advised him to take the favorable plea offer and plead guilty to the reduced charge. Any error was harmless.

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.

Finally, if this court reaches the question whether Moore's twice-repeated request to turn off the recorder was a "refusal," it most certainly was here. Moore asked

the officers to turn off the recorder twice as he got closer to truthfully admitting his and Raynard's roles in the robbery and murder. More specifically, all indications are that Moore would not have admitted to firing the fatal shot unless and until the recorder was turned off.

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 was rebuffed by the detectives, they assured his safety, and he continued to talk. But Moore repeated the request a second time as he was about to admit to being the shooter. 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).

Perhaps the detectives could have forced the issue by telling Moore a second time that they did not want to turn it off, making Moore state unequivocally that he "refuses" to say anything else unless it was turned off. Such a confrontation might create its own level of coercion. Be that as it may, the detectives could have reasonably interpreted Moore's dual requests that they turn off the machine as tantamount to his refusal to truthfully admit the full extent of his involvement unless it was turned off. They then obtained on the recording Moore's acknowledgment that this was his decision and his alone, and against the wishes of police, to turn off the recorder. *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 is what 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 trial court reasonably held that Moore's words and actions late in the second interview 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. There was no error.

CONCLUSION

Therefore, because the trial court properly denied the suppression motion, the State of Wisconsin

respectfully requests that the judgment of conviction be AFFIRMED.

Dated at Madison, Wisconsin, this 11th day of July, 2013.

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 10,467 words.

Dated this 11th day of July, 2013.

_____
DANIEL J. O'BRIEN
Assistant Attorney General

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

I hereby certify that:

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

I further certify that:

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

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

Dated this 11th day of July, 2013.

_____
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