STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2013AP453-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STANLEY K. BULLOCK,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION TO SUPPRESS, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE REBECCA F. DALLET PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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QUESTIONS PRESENTED

I. Whether Officer Phelps and Detective Gulbrandson engaged in coercive or improper

conduct sufficient to render Bullock's statements to those officers involuntary.[1]

- By denying Bullock's motion to suppress, the circuit court answered "No."

- This court should answer "No."

II. Whether Wis. Stat. § 972.115(2), governing the use at trial of audio and visual recordings of statements made during custodial interrogations, should be interpreted to impose a dispositive negative credibility inference against Detective Gulbrandson because he did not record the preliminary three-minute interaction with Bullock in the hospital, when Gulbrandson testifies that he spent that time ascertaining whether Bullock was able and willing to speak with the detectives.

- By denying Bullock's motion to suppress, the circuit court implicitly answered "No."

- This court should answer "No."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. The parties' briefs adequately set forth the relevant facts and applicable law. Publication, however, may be helpful to provide guidance on

[1]The State does not concede that Bullock's personal characteristics—i.e., his injuries and disorientation—were such that *any* amount of coercion would have rendered his statements involuntary. Rather, because the circuit court found that the officers' conduct exhibited *no* indicia of coercion or impropriety, the State argues that Bullock's personal characteristics are immaterial in the voluntariness inquiry.

the issues of voluntary statements by injured individuals, and the proper application of Wis. Stat. § 972.115(2).

SUPPLEMENTAL STATEMENT OF THE CASE

Defendant Stanley Bullock was charged with First Degree Intentional Homicide, a class A felony, contrary to Wis. Stat. §§ 940.01(1)(a) and 939.50(3)(a) (3:1). Upon conviction, Bullock faced life imprisonment (*id.*). Eventually, Bullock pleaded guilty to an amended charge of First Degree Reckless Homicide, a class B felony, and was sentenced to twenty years of initial confinement and ten years of extended supervision (38:1).

Bullock's plea arises from the death of his girlfriend, Dedrie Kelly-Baldwin, who was found stabbed to death in their shared residence on the morning of January 21, 2011 (3:1, 3). Around 7 a.m. that morning, members of the Milwaukee Fire Department responded to Bullock's 911 call for medical help, in which Bullock stated that he had been stabbed but made no mention of Ms. Kelly-Baldwin (3:1; 60:61). When firefighters arrived, they found Bullock lying on a bed, breathing and conscious, with lacerations to his stomach, left wrist, and neck, and a puncture wound on his right abdomen (3:1-2). The first responders noticed that none of Bullock's wounds were actively bleeding, and that there was a substantial amount of dried blood on Bullock and throughout the house (3:2). One of the paramedics also noted with suspicion that Bullock's wounds seemed to be symmetrical on both sides of his

body, as though they had been self-inflicted (3:2; 47:32-34).[2]

Beside the bed, covered with blankets and pillows, firefighters discovered the body of Ms. Kelly-Baldwin, which was cold to the touch (3:2). Bullock told the medical personnel that two nights earlier, two or three men had broken into the residence through the upper porch, and attacked the couple while they were sleeping (3:2). Bullock also stated that he and the victim had been "fooling around," and he believed that her boyfriend had sent the men to attack the couple (3:2).

But in fact, Bullock had been the victim's boyfriend for eight years, five of which they had spent living together (3:3; 47:40). Subsequent investigation revealed no sign of forced entry, no footprints in the snow on the upper porch, and no blood outside the unit (3:4). Inside the unit, investigators found a 13-inch Cutco knife, smeared with blood, stashed between the couch and a storage container (3:4). Later analysis showed that the DNA found on both the handle and the blade of the knife matched Bullock's DNA (3:4).

After first responders initially treated Bullock, he was transported from the residence to Froedtert Hospital in a Milwaukee Fire Department medical unit (55:16-17). As he was being loaded into the transport, Milwaukee Police Department officer James Phelps accompanied Bullock and joined the transport (55:16-17). During that time, Bullock muttered "my girlfriend, my girlfriend," and when Phelps asked whether she had caused Bullock's injuries, Bullock

[2]Bullock's treating physician at Froedtert Hospital also expressed suspicion that Bullock's injuries were self-inflicted (3:2; *see also* 12:8).

replied "no, no, no," and reiterated his account of the masked attackers (55:16-18). Officer Phelps later testified that at the time of the transport, he considered Bullock a victim rather than a suspect, and was trying to ascertain how Bullock's injuries had occurred (55:17-20).

Later that evening at the hospital,[3] Bullock spoke with two detectives from the Milwaukee Police Department, Rodney Young and Erik Gulbrandson (55:23-25).[4] After Bullock agreed to make statements to the detectives, Detective Gulbrandson began audio recording the discussion (3:3; 55:24-50; 56:5-8). Bullock was then read his *Miranda* rights,[5] after which he provided his account of the evening of Ms. Kelly-Baldwin's death (3:3; 55:24-50; 56:5-8). Bullock claimed that, after going out to dinner on Wednesday night, January 19, he and the victim drank some wine, used some marijuana and cocaine, and went to bed around 4:00 a.m. (3:3).[6] Bullock claimed that, sometime after going to bed, he was

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[3]While at the hospital, Bullock was placed under arrest for an outstanding warrant in an unrelated retail theft case, and a police officer was stationed at Bullock's room (3:3; 55:34; 56:7).

[4]Detective Young did not testify at either the preliminary hearing or the suppression hearing.

[5]*See Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966).

[6]During the suppression hearing, the court urged counsel not to reiterate the material that was discussed during the interview in Bullock's hospital room, on the ground that the court would independently review the recording of the interview. Neither the recording nor a transcript thereof is in the record on appeal, so the only accounts of the interview available for reference on appeal are Detective Gulbrandson's testimony at the preliminary and suppression hearings (47:38-47; 55:24-50), and the criminal complaint (3:3).

awakened by two or three masked men who attacked him and Ms. Kelly-Baldwin (3:3). After the attack, Bullock stated that he faded in and out of consciousness over the next day, but that he recalled hearing Kelly-Baldwin say "I don't want to die," at which point Bullock crawled to the bathroom and passed out (3:3). Later, when he came to, he crawled back to the bedroom and found Kelly-Baldwin convulsing, after which he passed out again, regained consciousness, and called 911 to report that he had been stabbed (3:3).

In addition to other pretrial proceedings not at issue in this appeal, Bullock moved to suppress his statements to Officer Phelps and Detectives Young and Gulbrandson on the ground that, due to his injuries, Bullock's statements to law enforcement were not voluntary (*see generally* 25; 55). Additionally, Bullock argued that Wis. Stat. § 972.115(2) (providing for an instruction to a fact-finder that custodial interrogations should be recorded), must be interpreted to impose a negative credibility inference against Detective Gulbrandson for not recording three minutes of preliminary discussion that occurred in Bullock's hospital room before the interrogation.

After hearing testimony from Officer Phelps and Detective Gulbrandson, and listening to the recording of Bullock's statements to the detectives, the circuit court concluded that all of Bullock's statements to law enforcement were voluntary (56:4-13). The court found that, although Bullock's injuries were significant, they were not so overwhelming as to render Bullock incapable of freely exercising his will (56:4-12). Most important, the circuit court found that none of the officers engaged in any coercive or improper conduct when speaking with Bullock (*id.*).

With regard to Bullock's Wis. Stat. § 972.115(2) argument, the court concluded that the purpose of the statute is to require recordings, but that the statute does not afford defendants any rights other than an instruction that custodial interrogations should be recorded and that failure to do so may be considered by the fact-finder (56:12-13). The court acknowledged that such an instruction could be appropriate if the case would go before a jury, but also noted that the State was not seeking to admit any information conveyed during the first three minutes, before the interrogation started (56:12-14).

Ultimately, Bullock pleaded guilty to a charge of First Degree Reckless Homicide, admitting that he had stabbed Ms. Kelly-Baldwin, but claiming that she had pulled the knife on him first (60:51:52). Additional facts will be discussed as needed in the "Argument" section of this brief.

ARGUMENT

I. BULLOCK'S STATEMENTS TO OFFICER PHELPS AND DETECTIVE GULBRANDSON WERE VOLUNTARY; NOTWITHSTANDING BULLOCK'S INJURIES, THERE IS NO INDICATION THAT THE OFFICERS USED ANY COERCIVE OR IMPROPER TACTICS.

A. Governing legal principles.

1. Standard of review.

At a suppression hearing where the voluntariness of a confession is challenged, the

State bears the burden of showing that the confession was voluntary, by a preponderance of the evidence. *State v. Hoppe*, 2003 WI 43, ¶ 40, 261 Wis. 2d 294, 661 N.W.2d 407. On appellate review, whether a statement was voluntary turns on the application of constitutional principles to historical facts. *Hoppe*, 261 Wis. 2d 294, ¶ 34. This court defers to the trial court's findings of fact, and will overturn those findings only if clearly erroneous; however, the application of constitutional principles to the facts of record is subject to de novo review. *See State v. Casarez*, 2008 WI App 166, ¶ 9, 314 Wis. 2d 661, 762 N.W.2d 385.

2. Procedure for appeals from denials of motions to suppress, under Wis. Stat. § 971.31(10).

Generally, when a criminal defendant enters a guilty plea, the plea "constitutes a waiver of nonjurisdictional defects and defenses, including claimed violations of constitutional rights." *Racine Cnty. v. Smith*, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984). A narrow exception to this rule is found in Wis. Stat. § 971.31(10), which provides that a defendant may seek review of a denial of a motion to suppress, notwithstanding having entered a guilty or no-contest plea. *See Smith*, 122 Wis. 2d at 434-35. If a defendant prevails on appeal of a denial of a suppression motion, the result is a reversal of his conviction; the defendant will then be given an opportunity to withdraw his plea, and either try to plead again or proceed to trial. *State v. Jiles*, 2003 WI 66, ¶ 49, 262 Wis. 2d 457, 663 N.W.2d 798.

3. Legal principles governing voluntariness of statements to law enforcement.

Under both the Fourteenth Amendment's Due Process Clause and the Fifth Amendment's right against self-incrimination, a defendant's statement to law enforcement must have been voluntary to be admitted into evidence.[7] *See State v. Ward*, 2009 WI 60, ¶ 18, 318 Wis. 2d 301, 767 N.W.2d 236. A defendant's statement is voluntary if it is "the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist." *Hoppe*, 261 Wis. 2d 294, ¶ 36; *see also State v. Clappes*, 136 Wis. 2d 222, 235-36, 401 N.W.2d 759 (1987). A necessary corollary to this precept is that there must be some coercive or improper law enforcement conduct to support a finding that a statement was involuntary. *See Colorado v. Connelly*, 479 U.S. 157, 167 (1986).

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[7]On appeal, Bullock does not argue that his statements were obtained in violation of *Miranda*, i.e., that he was in custody, subject to interrogation, and did not receive the proper warnings. Accordingly, Bullock has forfeited any *Miranda*-based argument. Bullock's sole argument before this court is that because he was injured, his will was overborne by discussions with law enforcement officers, and therefore his statements were not voluntary. As discussed, *infra*, because some misconduct is necessary to support a finding that a statement was involuntary, and because the circuit court found that the officers did not engage in any coercive or improper conduct, Bullock's motion to suppress his statements was properly denied.

The voluntariness of a statement is determined by examining the totality of the circumstances surrounding the statement, balancing "the personal characteristics of the defendant against the pressures imposed upon the defendant by law enforcement officers." *Hoppe*, 261 Wis. 2d 294, ¶ 38. Relevant characteristics of the defendant include his "age, education and intelligence, physical and emotional condition, and prior experience with law enforcement." *Id.* ¶ 39. Factors relevant to determining law enforcement pressures include

> 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.

Id.

While extreme physical pain or debilitation may make a defendant *more susceptible* to coercion, *see Mincey v. Arizona*, 437 U.S. 385, 398-402 (1978), such a characteristic must be balanced against demonstrated improper conduct by law enforcement. *See Clappes*, 136 Wis. 2d 241-42. There is no rule that statements made after suffering significant injury or during medical treatment are per se involuntary as resulting from coercion by law enforcement. *See id.* at 242-44. Indeed, without a showing of coercive or improper law enforcement conduct, statements made while injured, in pain, or hospitalized are voluntary, and therefore admissible. *See id.*

B. Because the officers did not engage in any coercive or improper tactics, Bullock's statements were voluntary.

The thrust of Bullock's argument in support of suppressing his statements is that, because he was injured, law enforcement officers should not have been speaking or listening to him (Bullock's brief at 11-15). But "[t]o accept that proposition would be equivalent to a holding that a wound, such as defendant suffered, per se renders the victim incapable of exercising reason. This hypothesis is contrary to common sense and unsupported by cases or other authorities known to us." *Clappes*, 136 Wis. 2d at 242-43 (internal quotation and alteration omitted). Thus, the rule that Bullock now urges upon the court has been soundly rejected in the past. Because he presents no argument in support of such a per se rule of involuntariness based on injury, and because he has failed to point to *any* misconduct or coercion by the officers, this court should affirm the circuit court's denial of Bullock's motion to suppress.

As noted above, a voluntariness inquiry typically involves a balancing of the defendant's characteristics against the pressures imposed by law enforcement. But in Bullock's case, the circuit court found no coercive or improper law enforcement conduct against which to balance Bullock's personal characteristics. Nonetheless, the State sets forth the relevant considerations to illustrate the propriety of the circuit court's decision.

Bullock's personal characteristics

Age: At the time of the offense Bullock was forty-five years old. Age is generally more important when the defendant is a minor. *See In re Jerrell C.J.*, 2005 WI 105, ¶¶ 25-26, 283 Wis. 2d 145, 699 N.W.2d 110; *see also Haley v. Ohio*, 332 U.S. 596, 599-600 (1948).

Education and intelligence: Bullock completed eleven years of schooling, and held a GED (29:1). There is no suggestion in the record that Bullock possesses anything less than average intelligence.

Physical and emotional condition: At the time of Bullock's statements to Officer Phelps, Bullock had received initial, on-the-scene treatment of multiple lacerations and a puncture wound, and was being transported to Froedtert Hospital for further treatment (3:1-3). All parties agree that his wounds were significant. Additionally, Officer Phelps testified that Bullock was "somewhat disoriented" during the initial transport (55:21).

Prior experiences with law enforcement: The record shows that Bullock was initially arrested at Froedtert Hospital for an outstanding warrant in an unrelated retail theft case (55:34; 56:7). Additionally, a search of the Wisconsin Circuit Court Access database shows records for Stanley K. Bullock, with the same address as in this case, for charges of misdemeanor Possession of Cocaine, contrary to Wis. Stat. § 961.41(3g)(c) (*see also* 12:39); Operating After Revocation (5th), contrary to Wis. Stat. § 343.44(1); as well as at least one other non-criminal offense. *See Sisson v. Hansen Storage Co.*, 2008 WI App 111, ¶ 11, 313 Wis. 2d 411, 756

N.W.2d 667 (court may take judicial notice of matters of government record). Bullock's familiarity with the criminal justice system makes him less vulnerable to any asserted police pressures. *See State v. Lemoine*, 2013 WI 5, ¶¶ 22-23, 345 Wis. 2d 171, 827 N.W.2d 589.

Law enforcement pressures

Length of questioning: There is no reference in the record to precisely how long Bullock spoke with Officer Phelps, but the circuit court did note that the conversation was "very short" (56:5). Bullock's interview with Detectives Young and Gulbrandson lasted approximately an hour and a half (55:26-27).

Delay in arraignment: Nothing in the record suggests any delay.

General condition under which statements took place: Bullock's statements to Officer Phelps occurred as Bullock was being loaded into the fire department transport vehicle, and during transport to Froedtert (55:16-17). Bullock's statements to the detectives occurred in a hospital room, where he was handcuffed to the bed, with a police guard stationed outside. Although the arrest and restraint demonstrates some exercise of control by law enforcement, there is no suggestion that these measures were improper under the circumstances, or that they were used for the purpose of coercing Bullock. Additionally, neither of the locations at issue have the overbearing, coercive potential of an isolated interrogation room in a police station. *See State v. Clappes*, 117 Wis. 2d 277, 286-87, 344 N.W.2d 141 (1984). In fact, the interview in Bullock's room was interrupted at least once by medical staff freely entering and exiting the room (55:27).

Excessive physical or psychological pressure brought to bear on the defendant: Notwithstanding Bullock's implicit assertion that merely talking with him exerted undue pressure, there is nothing in the record showing that the officers actually engaged in any such tactics. Rather, the circuit court explicitly found that the detectives did not use any improper tactics, and that the detectives made a recognizable effort to ensure that Bullock was not in too much pain (56:8-9).

Inducements, threats, methods, or strategies used by the police to compel a response: The circuit court found that none of the officers engaged in any such improper methods.

Whether the defendant was informed of his right to counsel and the right against self-incrimination: The circuit court found that the interaction between Bullock and Officer Phelps was so informal as not to require any such warnings (56:4-7). Detectives Young and Gulbrandson provided *Miranda* warnings prior to interviewing Bullock in his hospital room (56:7-8).

The totality of the circumstances shows that the officers did not engage in any coercive or improper tactics, and that any statements Bullock made to law enforcement were therefore the products of a "free and unconstrained will." While the State acknowledges that Bullock suffered significant injuries and was somewhat disoriented when he initially spoke with Officer Phelps, with absolutely no indication that the officers somehow coerced Bullock—other than merely speaking with him while he was in pain—there is no basis for a finding that his statements were involuntary. *See Connelly*, 479 U.S. at 165-66 (rejecting rule that would expand voluntariness inquiry "into a far-

ranging requirement that courts must divine a defendant's motivation for speaking or acting as he did even though there be no claim that governmental conduct coerced his decision").

Bullock relies almost exclusively on *Mincey v. Arizona*, 437 U.S. 385, to support his argument that his injuries, accompanied by interactions with law enforcement, give rise to a finding of involuntariness. Bullock, however, over-emphasizes the import of his injuries under *Mincey*, and completely ignores the more egregious aggravating factors in that case.

For example, Mincey told investigators *at least four times* that he did not want to speak without having a lawyer present. *Mincey*, 437 U.S. at 400 nn.16, 17. Notwithstanding his protestations, a nurse present in Mincey's room during the interrogation urged Mincey that "it would be best" if he would answer the officer's questions. *Id.* at 399. And although Mincey told the officer multiple times that he was confused and unable to think clearly, the officer pressed Mincey to continue. *Id.* at 400. No such misconduct occurred in this case (*see, e.g.*, 56:4-9).

Moreover, Mincey's injuries were far more extensive than Bullock's: Mincey was partially paralyzed, and required a breathing tube, a tube through his nose to control vomiting, a catheter, and a tube in his arm for intravenous feeding. *See id.* at 399 n.14. A nurse described Mincey's status as "critical," and the record illustrated multiple instances of Mincey being in severe pain, disoriented, and at times incoherent. *Mincey*, 437 U.S. at 396-402. Conversely, in Bullock's case, while there is no question Bullock suffered significant injuries, he did receive prompt medical care (when he finally called 911) (*see* 56:11), and

just the next day doctors noted his progress in recovery, encouraging regular diet and out-of-bed movement (12:19). Whereas Mincey's injuries kept him in the hospital for a month, Bullock was released from the hospital in little over a week (60:54).

But even acknowledging the significance of his injuries and the seriousness of a week-plus stay in the hospital, the circuit court found that the officers in Bullock's case simply did not engage in any coercive or improper techniques (47; 55; 56:4-11). First, with regard to his statements to Officer Phelps,[8] Bullock was neither under arrest nor a suspect, and was instead under the care of

[8]Notably, much of the information that Bullock relayed to Officer Phelps (including the masked attacker story) was also relayed to firefighters responding to Bullock's injuries (3:2). Bullock does not assert that the firefighters' accounts, which were included in the criminal complaint, should have been suppressed. Although the State has not located any precedential Wisconsin cases that have decided the issue of voluntary statements to medical first-responders, other jurisdictions have recognized that such statements are not statements to "law enforcement" for purposes of the voluntariness inquiry. *See, e.g.*, *People v. Williams*, 692 N.E.2d 1109, 1117-18 (1998). Although the court need not reach this particular issue, the additional, non-law-enforcement sources for Bullock's statements could provide support for the conclusion that, if the circuit court erred in denying Bullock's motion to suppress, such error was harmless because there were other, comparable sources for identical information. *See State v. Armstrong*, 223 Wis. 2d 331, 588 N.W.2d 606, *as modified on denial of reconsideration,* 225 Wis. 2d 121, 121-22, 591 N.W.2d 604 (1999) (recognizing possibility that harmless error analysis may be applied in appeals from denials of suppression motions under Wis. Stat. § 971.31(10)); *see also State v. Harvey*, 2002 WI 93, ¶ 47 n.12, 254 Wis. 2d 442, 647 N.W.2d 189 ("The harmless error rule . . . is an injunction on the courts, which, if applicable, the courts are required to address regardless of whether the parties do.").

the Milwaukee Fire Department (55:16-21). Phelps exerted no control over Bullock and was "just along for the ride." The circuit court thus properly found that "there was nothing caused by [Officer Phelps] to put [Bullock] under any kind of duress or to take advantage of him," and there was no indication that the officer was "attempting to use his status to elicit information" (56:5).

With regard to Bullock's statements to Detectives Young and Gulbrandson, the court relied on Detective Gulbrandson's account and the recording of the ninety-minute interview to find that there was no indication throughout the interrogation that Bullock's statements were in any way coerced (56:5-11). The court found that Bullock had willingly agreed to speak with the detectives, that there was no point during the interview when Bullock was in debilitating pain, and that Bullock fully understood what was happening (56:6-9). Moreover, the court found that the detectives did not make any threats, raise their voices, or in any way coerce Bullock into either continuing the interview or answering certain questions (56:9-11).

The record is therefore devoid of any indication that the officers used any coercive or improper measures when speaking with Bullock. Accordingly, the circuit court properly denied his motion to suppress, and this court should affirm that decision.

II. WISCONSIN STAT. § 972.115(2) SHOULD NOT BE CONSTRUED TO REQUIRE A NEGATIVE CREDIBILITY INFERENCE AGAINST A TESTIFYING OFFICER WHO WAS RESPONSIBLE FOR RECORDING A CUSTODIAL INTERROGATION.

A. Standard of review and governing law.

Interpretation of a statute presents a question of law for this court's independent review. *Wis. Indus. Energy Grp., Inc. v. Pub. Serv. Comm'n*, 2012 WI 89, ¶ 14, 342 Wis. 2d 576, 819 N.W.2d 240. Appellate courts begin with the language of the statute, and if the meaning of the language is plain, "the statute is applied according to the plain meaning of the terms used." *Id.* ¶¶ 15-16. Only where a statute is "capable of being understood by reasonably well-informed persons in two or more senses" will a court conclude that the statute is ambiguous and requiring construction by resort to extrinsic sources. *Id.* ¶ 16 (internal quotation omitted).

The statute that Bullock asserts should be construed to undermine the credibility of Detective Gulbrandson is Wis. Stat. § 972.115(2), which provides in relevant part:

> (a) If a statement made by a defendant during a ***custodial interrogation*** is ***admitted into evidence in a trial*** for a felony ***before a jury*** and if an audio or audio and visual recording ***of the interrogation*** is not available, upon a request made by the defendant as provided in s. 972.10 (5) and unless the state asserts and the court finds that one of the following conditions applies or

> that good cause exists for not providing an instruction, ***the court shall 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[.]
>
> . . . .
>
> (b) If a statement made by a defendant during a ***custodial interrogation*** is ***admitted into evidence*** in a proceeding heard by the court without a jury in a felony case and if an audio or audio and visual recording of the interrogation is not available, ***the court 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 unless the court determines that one of the conditions under par. (a) 1. to 6. applies.

(Emphases added.)

B. The plain language of Wis. Stat. § 972.115(2) provides that any negative credibility determinations remain soundly within the fact-finder's discretion, and this court should not construe the statute to *require* circuit courts to discredit the testimony of law enforcement officers.

The statutory language emphasized above shows that the statute applies only to custodial interrogations that are not recorded, and only

allows (does not *require*) a fact-finder to consider the absence of a recording when weighing the credibility of evidence. Application of the plain language of Wis. Stat. § 972.115(2) to Bullock's challenged statements shows that Bullock's argument for a negative credibility inference is unavailing.

First, Bullock does not assert that the statute applies to his non-custodial statements to Officer Phelps (*see* Bullock's brief at 15-17), and therefore no statutory analysis is required. Next, the only arguably custodial interrogation to which the statute might apply is Detectives Young and Gulbrandson's interview in the hospital, which occurred *after* Bullock was Mirandized, and which *was recorded*. The statute therefore has no bearing on the information exchanged during that interview.

Thus, the only remaining exchange between Bullock and law enforcement is the three-minute unrecorded segment immediately following the detectives' arrival to Bullock's room, when they sought to ascertain his ability and willingness to speak with them. The circuit court found that this portion of the interaction was not custodial interrogation (56:13), so the statute is yet again inapplicable. The circuit court was aware of the statute when evaluating the officers' testimony, and even noted that it might have considered an instruction if the case went to trial (56:13-14). In light of this finding, Bullock's argument reduces to a claim that Gulbrandson's failure to record an exchange that was not custodial interrogation

should be dispositive against Gulbrandson's credibility. This argument finds no support under the plain language of the statute.

One final consideration further undermines Bullock's argument: under the plain language of Wis. Stat. § 972.115(2), it is not clear that the statute even applies in the context of a suppression motion hearing. Both subsections of § 972.115(2) refer to statements that are "admitted into evidence," either in a trial to a jury ((2)(a)), or in a proceeding before a court ((2)(b)). But a hearing on a suppression motion is, by definition, intended to determine whether a piece of information may be "admitted into evidence" during trial. Thus, because testimony in a suppression motion hearing is not yet "admitted into evidence," neither subsection seems to apply.

Based on the foregoing, Bullock's argument to *require* a negative credibility inference under Wis. Stat. § 972.115(2) should be rejected. Instead, this court should read the plain language of the statute as merely *allowing* fact-finders to consider the lack of a recording when evaluating the credibility of evidence relating to a custodial interrogation. Because there is no indication that the circuit court erroneously exercised its discretion in considering Detective Gulbrandson's testimony, that court's decision should be affirmed.

CONCLUSION

Based on the record and legal principles discussed herein, the State asks this court to affirm the order denying Bullock's motion to suppress and the judgment of conviction.

Dated this 4th day of November, 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 4,725 words.

_____

Gabe Johnson-Karp
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 4th day of November, 2013.

_____

Gabe Johnson-Karp
Assistant Attorney General