STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Case No. 2013AP000834CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRENTON JAMES DAWSON,

Defendant-Appellant.

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On Appeal from a Judgment of Conviction
Entered in Milwaukee County Circuit Court,
the Honorable Rebecca F. Dallet, Presiding

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# REPLY BRIEF

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## ARGUMENT

I. The Totality of the Circumstances in This Late-Night Squad Car Interrogation Rendered Dawson "In Custody" for ***Miranda*** Purposes.

The State properly acknowledges that a reasonable person would not have felt free to leave the scene of this squad car interrogation. (State's brief at 7). Notably, "freedom to leave" is one of the factors to be considered in "totality of the circumstances" test to determine whether a suspect was "in custody" for ***Miranda*** purposes. ***State v. Morgan***, 2002 WI App 124, ¶12, 254 Wis. 2d 602, 648 N.W.2d 23.

However, the State's reliance on the detective's belief that he was merely investigating a suicide and that he had no information that Dawson was a suspect in the shooting is misplaced. (State's brief at 5). The law is clear that the "in custody" determination for ***Miranda*** purposes is an objective one, and thus the subjective belief of the detective regarding Dawson's status as a suspect is irrelevant. ***State v. Lonkoski,*** 2013 WI 30, ¶35, 346 Wis. 2d 523, 828 N.W.2d 552. A reasonable person in Dawson's shoes would have had every reason to think that the detectives interrogating him in the squad car's back seat viewed him as a suspect of criminal activity—either in the shooting or for illegal drug activity. When police arrived at Dawson's apartment, Dawson was sitting next to the shooting victim, holding a towel and bed sheets to his neck; both men were covered in blood. (2:2). Police investigating the scene observed baggies of crack cocaine and marijuana, along with a digital scale and cash. (2:3-4). The interrogating detective was aware of this evidence of illegal drug activity, and also knew that Dawson

was the sole occupant of the apartment and the only person present during the shooting. (32:12-13, 18; App. 112-13). And certainly Dawson was well aware of what police found in his residence, and would have reasonably believed that detectives thought he was involved in illegal activity.

And, while the record is silent as to whether Detective Devalkenaere's partner was actively involved in the questioning of Trenton Dawson in the squad car (State's brief at 6), his participation in the questioning is beside the point, as it is his presence at the scene that matters for ***Miranda*** purposes. (32:16-17; App. 116-17). *See* ***Gruen***, 218 Wis. 2d 581, 595-96 (in exploring the degree of restraint, the number of police officers involved is a relevant factor).

The State attempts to distinguish ***Morgan*** by noting the fact that the defendant there was handcuffed and the police pointed a weapon at him. (State's brief at 6). While certainly relevant, these sub-factors of the degree of restraint are not determinative for ***Miranda*** purposes. *See* ***State v. Martin***, 2012 WI 96, ¶34, 343 Wis. 2d 278, 816 N.W.2d 270; ***State v. Uhlenberg***, 2013 WI App 59, ¶¶12-13, 348 Wis. 2d 44, 831 N.W.2d 799. Indeed, there are far more similarities than differences between the circumstances in this case and ***Morgan***. Both Morgan and Dawson were interviewed after being placed by officers in the back seat of a squad car. Both Morgan and Dawson were questioned by police regarding evidence of illegal drug activity found in their apartments. And, in neither case did police inform the suspects that they were under arrest or administer ***Miranda*** warnings.

Moreover, in ***Morgan***, the court found that police placed Morgan in the squad car at the scene because they were outdoors and it was the middle of winter. ***Morgan***, 254 Wis. 2d 602, ¶7. Police had a similar reason for putting the

suspect in the squad car in ***State v. Gruen,*** 218 Wis. 2d 581, 593, 582 N.W.2d 728 (Ct. App. 1998) (suspect was placed in the police car due to inclement weather, which factored into finding that he was not "in custody"). Similarly, in ***United States v. Manbeck***, 744 F.2d 360 (4th Cir. 1984), a case cited in the State's brief at 6, the suspect was also placed in the squad car due to "inclement weather." ***Manbeck*** at 379. The State's citation to ***United States v. Murray***, 89 F.3d 459 (7th Cir. 1996) is also unavailing, as this case is readily distinguishable, as police placed Murray in their squad car's back seat after he became "verbally combative" at the scene of a traffic stop.

In contrast, here police professed no weather or conduct-related reason for placing Dawson in the squad car, and then proceeding to interrogate him for 30 to 45 minutes. Under the totality of the circumstances, a reasonable person in Dawson's place would consider himself "in custody" during the squad car interrogation. ***Miranda*** warnings were therefore required, but were not provided. As a result, Dawson's squad car statement, and any subsequent references to it, should have been suppressed. *See* ***Morgan***, 254 Wis. 2d 602, ¶26.

## II. The State Has Failed to Establish That the Erroneous Denial of Suppression of This Statement Was Harmless.

The State argues that Dawson's squad car statement was duplicative of other evidence, namely a statement he gave to police the following day, and that therefore its admission was harmless. (State's brief at 7-8). However, that statement differs in content and context from the squad car statement, and is therefore not duplicative. While in the beginning of the next-day statement Dawson maintained that

the shooting was a suicide attempt, police then informed him that Cunning had died, and he then admitted the truth – that he accidentally shot his friend while they were playing with guns. (32:49; 2:4). Thus, the next-day statement provides additional information and context that reflects Dawson's concern for his friend in that he told the truth upon learning that Cunning had died.

Second, the State argues that failure to suppress the squad car statement was harmless because acceptance of responsibility is not highly relevant to "utter disregard" and that "after-the-fact regard for human life does not negate 'utter disregard'…" (State's brief at 8-9).

Wisconsin case law clearly establishes that after-the-fact regard for human life is equally relevant to conduct occurring before and during the event in determining "utter disregard." ***State v. Burris***, 2011 WI 32, ¶27, 333 Wis. 2d 87, 797 N.W.2d 430. In ***Burris***, after shooting a man in the neck, the defendant expressed remorse and said it was unintentional, but then left the apartment, did not inquire about the victim's condition, and evaded police for five months. ***Burris*** at ¶3. The Supreme Court held that a defendant's after-the-fact conduct carries the same evidentiary weight as before and during-the-fact conduct, rejecting the State's argument to the contrary. ***Id.*** at ¶34. *See also* ***State v. Miller***, 2009 WI App 111, ¶35, n.12, 320 Wis. 2d 724, 772 N.W.2d 188.

Here, Dawson's conduct following the shooting would have played a prominent role in the determination of "utter disregard" for life as, unlike other "utter disregard" cases, this case did not involve a series of events or ongoing conduct. In ***Wagner v. State***, 76 Wis. 2d 30, 250 N.W.2d 331 (1977) and ***Balistreri v. State***, 83 Wis. 2d 440, 265 N.W.2d 290 (1978),

the defendants engaged in high-speed chases with police. In ***State v. Jensen*****,** 2000 WI 84**,** 236 Wis. 2d 521, 613 N.W.2d 170, the defendant repeatedly shook his infant child. And in ***State v. Miller***, 2009 WI App 11, 320 Wis. 2d 724, 772 N.W.2d 188, the defendant's conduct reflected an escalating series of steps to subdue a violent houseguest.

By contrast, in this case, the victim's death occurred in a single, terrible moment as the result of an accidental discharge of a gun. Because the before and during-the-fact conduct in this case was limited, jurors likely would have focused on what occurred after the incident in order to determine whether or not Dawson's conduct amounted to the "utter disregard for human life" sufficient to establish first-degree reckless homicide beyond a reasonable doubt. *See* Wis JI-Criminal 1022.

The phrase "utter disregard for human life" has the same meaning as "depraved mind, regardless of life," the language used in the Wisconsin code until 1987 to denote the aggravating element in crimes of recklessness. ***Miller***, 320 Wis. 2d 724 at ¶32 (citations omitted). To evince utter disregard, "[t]he mind must not only disregard the safety of another but be devoid of regard for the life of another." ***Wagner***, 76 Wis. 2d 30 at 46-47. A person acting with utter disregard must possess "a state of mind which has no regard for the moral or social duties of a human being." ***Id.*** at 45.

In this case of gunplay-gone-bad, the State had less than overwhelming proof of utter disregard of life. Dawson and the victim were best friends and there was nothing to suggest the shooting was anything but accidental. After the shot fired, Dawson immediately came to his friend's aid, attempting to apply pressure to the wound and calling for help. (2:4-5).

"Utter disregard for human life" is the sole element distinguishing first-degree reckless homicide from the lesser offense of second-degree reckless homicide.

The State has not established beyond a reasonable doubt that Trenton Dawson would have still entered a guilty plea to first-degree reckless homicide had the squad car statement been suppressed and the State been unable to use this evidence at a trial. Thus, the circuit court's error in failing to suppress the squad car statement was not harmless.

## CONCLUSION

Mr. Dawson was "in custody" when the police interrogated him in the back of the squad car without providing the required ***Miranda*** warnings. He respectfully requests that this court vacate the judgment of conviction, reverse the circuit court's decision, and order the statement to be suppressed.

Dated this _____ day of September, 2013.

Respectfully submitted,

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## CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,591 words.

## CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

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

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

Dated this _____ day of September, 2013.

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