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State of Wisconsin
Court of Appeals
District 1
Appeal No. 2013AP1901-CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Eduardo Ivanez,

Defendant-Appellant.

On appeal from a judgment of the Milwaukee County Circuit Court, The Honorable Jeffrey Wagner, presiding

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Defendant-Appellant's Brief and Appendix

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Statement on Oral Argument and Publication

The issue presented by this appeal is controlled by well-settled law. Therefore, the appellant does not recommend either oral argument or publication.

Statement of the Issue

I. Whether the circuit court erred in denying Ivanez's motion suppress his custodial statements to police on fourth amendment grounds where the evidence at the suppression hearing showed:

- a child told a police detective that he had recently seen a dead body in an abandoned house;
- the child told the police that he had heard a rumor that "Smokey" killed the girl;
- the child pointed out the house where the body could be found, and pointed out Smokey's house, which was nearby
- the police in fact found the dead body of a minor girl in the house where the child had indicated
- at about the time the body was found, a police detective saw a woman and two boys standing on the porch of Smokey's house
- a detective went to that house, determined which of the

two boys was Smokey (the appellant, Ivanez), and then put him into the back of a locked squad car

- Smokey, without ever being released from custody, was held for four hours and then subjected to police interrogation, and confessed to being involved in the death of the girl.

Answered by the circuit court: The motion was denied. The circuit court found that this was a temporary detention of Ivanez, and that the police had a reasonable suspicion to detain him.

Summary of the Argument

Ivanez was not temporarily detained at the scene. He was arrested. He was placed in the back seat of a locked squad car. The squad car remained at the scene for only a few minutes before it was driven to the police station so that Ivanez could use the restroom. Thereafter, Ivanez was held in the squad car in the sally port of the police station for approximately four hours. Then, according to the officer who had custody of Ivanez, the officer received a message to arrest Ivanez. There was no evidence presented at the motion hearing to establish what, if any, additional information the police obtained during the four hours that Ivanez was being held. Thus, it does not matter whether Ivanez was arrested at the scene, or arrested four hours later in the sally port.

There was no probable cause to arrest Ivanez. The only facts that the police had at the time of the arrest were that there was a girl who had apparently died from something other than natural causes; there was a rumor that Smokey had killed the girl; and Smokey lived two doors down from where the body was found. These facts are woefully inadequate to establish probable cause to arrest Ivanez for any crime.

Thus, the statements made by Ivanez while subject to police interrogation were there product of the illegal arrest. The circuit court erred in denying the motion to suppress the statements. The record demonstrates that the erroneous admission of the statements impelled Ivanez to testify at trial. Thus, appeals court need not conduct the harmless error analysis.

Statement of the Case

I. Procedural History

The defendant-appellant, Eduardo Ivanez (hereinafter "Ivanez") was charged with first degree intentional homicide, use of a dangerous weapon, and hiding a corpse arising out of an incident that occurred in Milwaukee on or about April 13, 2012. (R:2) Ivanez waived the preliminary hearing, and he entered not guilty pleas to the charges.

Ivanez filed a pretrial motion to suppress the three

custodial statements he made to police. (R:8) Ivanez alleged that the statements were subject to suppression under the fourth amendment because he was unreasonably arrested without a warrant.

The motion was heard on August 24, 2012. Following the submission of briefs by the parties, the circuit judge denied the motion on October 8, 2012. (R:43-3; Appendix B)

After four days of trial, the jury returned verdicts finding Ivanez guilty of both counts. Later, the court sentenced Ivanez to life in prison[1] on count one, and eight years consecutive on count two, bifurcated as four years initial confinement and four years extended supervision. (R:27, 28)

Ivanez timely filed a notice of intent to pursue postconviction relief. (R:31) He then filed a notice of appeal. There were no postconviction motions.

II. Factual Background

A. Generally

Ivanez testified at trial that on April 13, 2012 he was in the vicinity of 21st and Greenfield Avenue in Milwaukee with a friend, Eric. (R:50-37) While there, he saw a girl at a bus stop. (R:50-38) The girl, Stephanie R., called Ivanez by name, and then he recognized her. (R:50-39) The three left together;

[1] The circuit judge made Ivanez eligible for supervised release on January 10, 2065. At that time, Ivanez will be eighty-one years old.

however, Eric went home. (R:50-39)

Ivanez and Stephanie went to an abandoned house. (R:50-40) After a while, according to Ivanez, he and Stephanie went to the home of Eduardo Garcia; however, they did not stay long because Stephanie wanted to drink. (R:50-42) Therefore, they went to a liquor store and gave a man $20 to buy some “Lokos” (apparently an alcoholic drink). (R:50-43)

They took the drinks and went back to the abandoned house. After having some drinks, Stephanie then began talking about having sex. (R:50-47) According to Ivanez, Stephanie performed oral sex on him and, when he was finished, he started talking about the past with her. (R:50-48) At that point, Stephanie got very angry and pulled out a knife. (R:50-49) When Stephanie began attacking Ivanez with the knife, he hit her in the head (R:50-52) Then, according to Ivanez, he got on top of her and put his hands around her neck for about thirty seconds. (R:50-54)

At just about that time, Ivanez heard other people coming into the house. He said it was Luciano Hernandez and Eduardo Garcia. (R:60-56) The three of them later hid the body in the bathroom.

Augustin Santiago testified that he, along with his two cousins Eduardo Garcia and Luciano Hernandez, went to the vacant house and met Ivanez there. (R:49-76) When they arrived, they saw Stephanie on the floor. Her face was swollen,

she had no top on, but she was breathing. (R:49-78 to 80) According to Santiago, Ivanez then went up to Stephanie and kicked her in the face. (R:49-81) Santiago testified that he was present when, a short time later, Stephanie was killed. He said he saw Ivanez choking her, and she did not appear to be fighting back. (R:50-9) Santiago did not see a weapon in Stephanie's hand. (R:50-9) Rather, according to Santiago, Ivanez had a knife, he stabbed her in the back with it, and then threw the knife away. (R:50-9, 10, 11)

Jessica Hernandez-Salazar testified that she knows Ivanez. At one point she had been in his girlfriend. (R:47-49) Hernandez said that on the night of April 13-14, Ivanez came to her house. (R:47-51) He knocked on the window and he asked for money. (R:47-52) According to Hernandez, Ivanez said that "something crazy" had happened, and that he needed to go to the north side. (R:47-54) Ivanez said that he had stabbed a lady. *Id.* Several days later, Ivanez called Hernandez and told her that on the night in question he had gone into the house and he saw a girl with a knife, and the girl attempted to stab him (Ivanez). (R:47-59)

On April 20, 2012, Milwaukee police were summoned to the Rogers Academy because a student there, Joel C. claimed to have seen a dead body in an abandoned house two days earlier. (R:46-40) Joel was questioned by Detective Carlos Negron. Joel told Negron that he had gone to the house with

two friends, Luis and Tony, because they told him that there was a dead body there. (R:47-76 to 78) At that point, Negron put Joel into a squad car, and Joel pointed out the house where he had seen the dead body. (R:46-45) Joel further told Negron that, according to what he had heard, a boy named "Smokey" had killed the girl. (R:46-44) Smokey, Joel said, lived two doors down from the house where the body was located. (R:46-44) Joel, though, said that he had never spoken to Smokey. (R:46-63)

The police searched the house that was pointed out by Joel. There, in a crawl space on the third floor (R:46-77), they found Stephanie's body. (R:46-49, 50, 71) The body had puncture or stab wounds around the neck. (R:46-73) It was determined that Stephanie died from manual strangulation. (R:47-111) She also had numerous contusions on her face. *Id.*

While officers were processing the scene, Det. Negron went outside, and he saw Ivanez standing on the porch of the house that Joel had identified as Smokey's house. (R:46-54) Negron approached Ivanez and confirmed that he (Ivanez), lived at the house and that he was known as Smokey. (R:46-55)

At trial, the state played for the jury portions of the April 21, 2012 interrogation of Ivanez conducted by Det. Steven Cabellero (R:48-54; R:36) In this statement to police, Ivanez did not deny killing Stephanie; rather, he admitted that he

choked her, punched her, and stabbed her. Nevertheless, he steadfastly maintained that she had a knife, and mentioned that he believed he was the target of a robbery. He admitted that, after Stephanie was dead, it was he, Eddie Garcia, and Luciano Hernandez who moved Stephanie's body to the bathroom. (R:49-9; R:36) Two days later, he and Garcia moved the body to the attic crawl space. (R:49-10)

Near the end of the interrogation, Ivanez wrote a letter of apology to Stephanie's family. In the letter he said that "we all make mistakes, and this is a mistake I will always regret doing." (R:49-46)

Ronald Witucki, a DNA analyst called by the state, testified that a swab of genetic material taken from Stephanie's right breast included DNA from Eduardo Ivanez. (R:49-54)[2]

B. Motion to Suppress Statement

Evidence was presented at the pretrial motion hearing that on April 20, 2012, Detective Negron was dispatched to the Rogers Academy located at 2430 W. Rogers Street in Milwaukee. (R:40-11) Negron was accompanied by his partner, Malcolm McNeilly. When the detectives arrived at the Academy, they met with the principal and a student named Joel C., who appeared to be ten to twelve years old. Joel told the

[2] Witucki testified that he came to his own conclusion after reviewing Sharon Polatkowski's notes and data. (R:49-57, 58) In other words, Witucki did not actually do the lab work of extracting the genetic material from the swabs.

detectives that two days earilier he had been to the house at 2512 W. Rogers and, while there, he saw a dead body. Joel said he was with two friends, Luis and Tony. (R:40-13) According to what Joel told Negron, people were saying that a high school student named "Smokey" was responsible for killing the person. (R:40-27) Joel never spoke to Smokey; rather, it was Joel's friends who said that Smokey was responsible. (R:40-43)

Negron and Joel rode in the squad car, and Joel pointed out the house where he had seen the body. (R:40-13) This was at approximately 2:00 p.m. Joel also pointed out what he believed to be Smokey's house, which was two houses away from the first house. (R:40-17) Negron then took Joel back to school.

Negron returned to the house that Joel had identified as the one containing the dead body. He entered the house with other officers, including McNielly and officer Bradley Blum. The officers found a dead body in the house. (R:40-15) Thus, they summoned the Milwaukee Fire Department.

When the fire department arrived, Negron went outside to retrieve a notebook from the squad car. (R:40-19) While outside, Negron looked at "Smokey's house" and saw an older woman and two Hispanic boys on the front porch at 2504 W. Rogers. He did not recognize any of the people.

Negron went and introduced himself to the people on the

porch. (R:40-21) According to Negron, one of the boys told him (later identified as Ivanez) that he (the boy) was Smokey and that he lived at that address. (R:40-13) Negron invited Ivanez to come off the porch. On the sidewalk, Negron frisked Ivanez. (R:40-35) Negron then took Smokey by the elbow and escorted him to Officer Blum. Negron directed Blum to detain Ivanez in the back of the squad car. (R:40-39) The back doors to the squad car were locked (i.e. they cannot be opened from inside). (R:40-61) Blum testified at the motion hearing that Ivanez was in custody, and he was not free to leave.

Within minutes of being placed in the squad car, Ivanez asked to be allowed to go the bathroom. (R:40-51) Blum informed Negron of this, and Negron directed that Ivanez be taken to the District 2 police station to use the restroom, and that Blum was to maintain custody of him. *Id*. Blum placed Invanez in handcuffs. (R:40-51) Ivanez arrived at the police station at approximately 2:46 p.m.

After Ivanez used the restroom, he was escorted back to the squad car, and he was held there. The car remained parked in the sally port. At approximately 3:48 p.m., Blum received a call from a colleague directing him to arrest Ivanez. (R:40-55, 65) At 5:10 p.m., Ivanez was transported from District 2 to the Police Administration Building (PAB) in downtown Milwaukee. (R:40-67)

Thereafter, Ivanez was interrogated on three separate occasions.

Argument

I. The warrantless arrest of Ivanez was unreasonable and, therefore, any evidence gathered by the police--including Ivanez's statements-- must be suppressed.

The circuit court denied Ivanez's motion to suppress his statement because, according to the judge, Ivanez was only temporarily detained, and the police had a reasonable suspicion to detain him.

Ivanez was not temporarily detained at the scene. He was arrested. He was placed in the back seat of a locked squad car. The squad car remained at the scene for only a few minutes before it was driven to the police station so that Ivanez could use the restroom. Thereafter, Ivanez was held in the squad car in the sally port of the police station for approximately four hours. Then, according to the officer who had custody of Ivanez, the officer received a message to arrest Ivanez. There was no evidence presented at the motion hearing to establish what, if any, additional information the police obtained during the four hours that Ivanez was being held. Thus, it does not matter whether Ivanez was arrested at the scene, or arrested four hours later in the sally port.

There was no probable cause to arrest Ivanez. The only facts that the police had at the time of the arrest were that there was a girl who had apparently died from something other than natural causes; there was a rumor that Smokey had killed the girl; and Smokey lived two doors down from where the body was found. These facts are woefully inadequate to establish probable cause to arrest Ivanez for any crime.

Thus, the statements made by Ivanez while subject to police interrogation were there product of the illegal arrest. The circuit court erred in denying the motion to suppress the statements. The record demonstrates that the erroneous admission of the statements impelled Ivanez to testify at trial. Thus, appeals court need not conduct the harmless error analysis.

A. Standard of Appellate Review

The evidence relating to what occurred prior to the arrest of Ivanez is uncontroverted. Thus, the challenge presented by this appeal is whether, under those facts, the warrantless arrest of Ivanez was reasonable. Whether a warrantless arrest is reasonable is a question of constitutional fact, which the appellate court determines independently of the trial court's conclusion. *State v. Griffin*, 131 Wis. 2d 41, 62, 388 N.W.2d 535 (1986).

B. Ivanez was under arrest when he was placed into the back of the locked squad car.

Three factors are relevant to the question of whether an arrest has occurred: (1) whether the person's liberty or freedom of movement is restricted; (2) whether the arresting officer intends to restrain the person; and (3) whether the person believes or understands that she or he is in custody. *State v. Washington*, 134 Wis.2d 108, 124-25, 396 N.W.2d 156, 163 (1986); *State v. Disch,* 129 Wis.2d 225, 236-37, 385 N.W.2d 140, 144-45 (1986). These factors are applied regardless of whether the arrest is challenged under the fourth amendment (*Washington*) or statutorily (*Disch*). Arrest hinges, in part, on custody. The central idea of an arrest is the taking or detaining of a person by word or action in custody so as to subject his liberty to the actual control and will of the person making the arrest. *Huebner v. State*, 33 Wis.2d 505, 516, 147 N.W.2d 646, 651 (1967). Ultimately, whether a person has been seized is determined by an objective test; a person is seized only if, in view of all the circumstances, a reasonable person would have believed he was not free to leave. *Florida v. Royer*, 460 U.S. 491, 501-02 (1983); *State v. Kramar*, 149 Wis.2d 767, 781, 440 N.W.2d 317, 322 (1989).

Here, then, Ivanez was plainly “under arrest” at the point he was placed into the back of the locked squad car at the scene. This is especially true since he was th en taken to the

police station in order to use the restroom.

Firstly, Ivanez's freedom of movement was severely restricted. He was confined in the backseat of a locked squad car. This was clearly a show of official police force. Additionally, Officer Blum testified that it was his intention to maintain custody of Ivanez. Any person in the position of Ivanez would reasonably believe that he was under arrest.

In any event, the state concedes that after Ivanez had been detained for four hours, he was placed under arrest and put into a bullpen. (R:43-55) The state did not identify what, if any, additional evidence was gathered during the intervening four hours that permitted the "temporary detention" to be converted to an arrest.

Nevertheless, the circuit court found that, prior to the time Ivanez was interrogated, this was merely a "temporary detention", not an arrest. (R:43-4; Appendix) This conclusion is wholly contrary to law for several reasons. The most obvious reason is that, prior to the time Ivanez was interrogated, even the state concedes that he was arrested (while in the sally port).

Another reason is that a temporary detention must take place in the vicinity where the person was stopped. *See*, Sec. 968.24, Stats. On this point, the court of appeals has explained:

> During the course of a *Terry* stop, officers may try to obtain

> information confirming or dispelling their suspicions. [internal citations omitted] By its express language, § 968.24, Stats., authorizes the police to move a suspect short distances during the course of a temporary investigation. The statute states that the police may temporarily detain and question an individual "in the vicinity where the person was stopped." *See id.* Therefore, it is clear that the law permits the police, if they have reasonable grounds for doing so, to move a suspect in the general vicinity of the stop without converting what would otherwise be a temporary seizure into an arrest. [internal citations omitted] Thus, when a person under investigation pursuant to a *Terry* stop is moved from one location to another, there exists a two-part inquiry. First, was the person moved within the "vicinity?" Second, was the purpose in moving the person within the vicinity reasonable?

State v. Quartana, 213 Wis. 2d 440, 446, 570 N.W.2d 618, 621 (Ct. App. 1997). In *Quartana*, an accident scene approximately one mile away was found to be "within the vicinity." However, it was important that moving Quartana to the scene was integral to the investigation.

Here, though, Ivanez was moved to the police station. This was in no way necessary to the investigation. The reason given by the police was that Ivanez needed to use the restroom. No compelling explanation was given, though, as to why Ivanez could not have been allowed to use the restroom in his house, which was nearby.[3] This fact, then, strongly

[3] The circuit court speculated that this was "probably" for officer safety. There was no testimony presented at the hearing though, as to why Ivanez could not have been allowed to use his own bathroom.

suggests that the detention was anything but temporary. The conduct of the police officers in this regard demonstrates their subjective belief that Ivanez was under arrest.

A second reason is that a temporary detention must take place in a "public place." Sec. 968.24, Stats. Even if one were to accept that the back seat of a locked squad car parked on a public street is a "public place"[4], it certainly ceased to be a public place once the squad car was parked in the garage of the police station. Much less was it a public place when Ivanez was moved to the interrogation room of the PAB.

Finally, the detention may last only so long as is necessary for the police to dispel their suspicion. As the court in *Quartana* explained:

> "The police [may not] seek to verify their suspicions by means that approach the conditions of arrest." [internal citation omitted] Moreover, the detention must at all times be temporary and last no longer than necessary to effectuate the purpose of the stop. [internal citation omitted] . In assessing the permissible length of a stop, we must determine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the person.

Quartana, 213 Wis. 2d at 448.

Here, Ivanez was "detained" for four hours (R:43-47)

[4] There is good reason to believe that this level of restraint is not appropriate, though. For example, the appellate courts have held that even, [R\easonable suspicion of drug activity is not, by itself, generally a sufficient indicator of dangerousness to justify,' handcuffing the defendant and placing him in the back of a squad car. *State v. Pickens,* 2010 WI App 5, 323 Wis. 2d 226, 241, 779 N.W.2d 1, 8

before the police suddenly decided to arrest Ivanez[5]. There was no evidence presented at the motion hearing as to why it took so long to make the decision to arrest Ivanez. Much less was there any evidence presented at the motion hearing concerning any additional facts that were collected during the time that Ivanez was "detained" in the squad car.

C. There was no probable cause to arrest Ivanez either at the scene or, later, in the sally port.

The question, then, is whether there was probable cause to arrest Ivanez at any time prior to the time he was interrogated. The standard is, of course, well-settled: probable cause for an arrest exists "when the totality of the circumstances within the arresting officer's knowledge would lead a reasonable police officer to believe that the defendant probably committed a crime." *State v. Kutz*, 267 Wis. 2d 531, 671 N.W.2d 660 (2003). "While the information must be sufficient to lead a reasonable officer to believe that the defendant's involvement in a crime is 'more than a possibility,' it 'need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not.'" *Id.* To determine whether probable cause to arrest existed, the court must consider "the information available to the officer," including

[5] Recall that Officer Blum testified that while Ivanez was in the squad car parked in the sally port he suddenly received a call from a supervisor to arrest Ivanez. No explanation was given as to what additional information was gathered to support an arrest determination.(R:47-55)

hearsay and "the collective knowledge of the officer's entire department." *Id.*

Here, at the suppression hearing, the state presented no evidence as to what, if any, additional information was gathered during the four hour period that Ivanez was “detained” before the police made the determination to officially “arrest” him.[6]

Thus, the only “facts” that the police possessed at the time Ivanez was arrested-- whether the court pinpoints the time of arrest as being at the scene or four hours later in the sally port-- was that there was a dead body in an abandoned house, and that the child, Joel, had heard through the grapevine that Smokey was responsible for killing the girl. The police also had reason to believe that Ivanez was known as Smokey, and that he lived two houses away from the abandoned house.

This, of course, is woefully inadequate to establish probable cause to believe that Ivanez was guilty of any crime related to the death of the girl. Ivanez was illegally arrested.

[6] Unlike in some cases, we know from the trial testimony that there was no additional evidence collected during those four hours that tended to incriminate Ivanez. During the time that Ivanez sat in the squad car, the police were busy processing the scene. They did not locate the eyewitness (Santiago) within that first four hours. The DNA analysis of the biological material taken from Stephanie’s breast was not available within the first four hours. At the time that Ivanez was arrested, the police did not even know how Stephanie died.

D. The interrogation of Ivanez was the fruit of the poisonous tree and, therefore, it should have been suppressed.

The next question, then, is whether Ivanez's statement to police was "attenuated" from this original illegality. The State bears the burden of establishing attenuation. *United States v. Ienco*, 182 F.3d 517, 526 (7th Cir. 1999). This is a question of law. The appellate court need not pay any deference to the conclusion of the trial court.

Under the attenuation doctrine, the relevant inquiry is, "[W]hether [the] statements were obtained by exploitation of the illegality of [the police conduct]." *Brown v. Illinois*, 422 U.S. 590, 600, 1975). If there is a close causal connection between the illegal conduct and the statements, the statements are inadmissible under the Fourth Amendment. *See Brown*, 422 U.S. 603-04. To permit the admission of a statement and evidence obtained by police exploitation of their own illegal conduct would destroy the policies and interests of the Fourth Amendment. *Brown*, 422 U.S. at 602.

In an attenuation analysis, the court must consider both the temporal proximity, and any intervening circumstances. "Under the temporal proximity factor, [the court must] analyze both the amount of time between the prior searches and the conditions that existed during that time." *State v. Anderson*,

165 Wis. 2d 441, 449 (Wis. 1991). If the defendant was in custody, for example, even a lengthy period may not be enough to attenuate the statement. As the United States Supreme Court has noted, "[I]nterrogation in certain custodial circumstances is inherently coercive." *New York v. Quarles*, 467 U.S. 649, 654 (1984).

The state made no attempt to establish that Ivanez's statements were in any way attenuated from the original illegal arrest. Certainly, this is because there is no such evidence.

E. The erroneous admission of Ivanez's custodial statement is prejudicial error.

The harmless error doctrine applies to the erroneous admission of a defendant's custodial statement to police. *See, e.g. State v. Armstrong,* 223 Wis. 2d 331, 368, 588 N.W.2d 606, 622 opinion modified on denial of reconsideration, 225 Wis. 2d 121, 591 N.W.2d 604 (1999).

In, *State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222, 231-32 (1985), the Wisconsin Supreme Court explained:

> We conclude that, in view of the gradual merger of this court's collective thinking in respect to harmless versus prejudicial error, whether of omission or commission, whether of constitutional proportions or not, the test should be whether here is a reasonable possibility that the error contributed to the conviction. If it did, reversal and a new trial must result. The burden of proving no prejudice is on the beneficiary of the error, here the state

Where the defendant's statement to police is at issue,

though, the Wisconsin Supreme Court recently pointed out that:

> In *Harrison v. United States,* 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968), the United States Supreme Court found that when statements later determined to be inadmissible are used at trial and the defendant takes the stand and testifies, there must be a determination of whether the defendant's testimony at trial was impelled by the admission of the illegally obtained statements in violation of the Fifth Amendment. *Id.* at 224–25, 88 S.Ct. 2008. In *State v. Anson,* 2005 WI 96, 282 Wis.2d 629, 698 N.W.2d 776, this court held that the review required by *Harrison* is a paper review where the circuit court makes historical findings of fact based on the entire record. *Id.,* ¶ 13. The test laid out in *Anson* requires the State to prove beyond a reasonable doubt the following:
>
> First, the circuit court must consider whether the defendant testified "in order to overcome the impact of [statements] illegally obtained and hence improperly introduced[.]" *Harrison,* 392 U.S. at 223, 88 S.Ct. 2008. Second, even if the court concludes that the defendant would have taken the stand, it must determine whether the defendant would have repeated the damaging testimonial admissions "if the prosecutor had not already spread the petitioner's confessions before the jury." *Id.* at 225–26, 88 S.Ct. 2008.
>
> *Id.,* ¶ 14. Only after a *Harrison/Anson* analysis does the court proceed to a harmless error analysis.

State v. Lemoine, 2013 WI 5, 345 Wis. 2d 171, 192-93, 827 N.W.2d 589, 599-600.

Here, Ivanez's trial testimony was impelled by the erroneous admission of his statements to police. In

retrospect, the theory that Ivanez acted in self-defense was unlikely to succeed. In fact, it did not succeed. Once the jury heard the statement Ivanez made to police, though, Ivanez had no choice but to testify. In order to receive a self-defense instruction, the defendant must testify as to his subjective belief that deadly force was necessary to terminate an unlawful interference with his person.

If the custodial statement had not been admitted, though, much stronger theories of defense were available to Ivanez. For example, he could have chosen not to testify, and then rely upon the state's burden of proof. In the absence of the police statement, the state had only the testimony of Santiago, which certainly had credibility problems[7]; and the evidence of Ivanez's DNA on Stephanie's breast.

For these reasons, the court should find that Ivanez's trial testimony was impelled by the erroneous admission of his statement to police. As such, the court never reaches the harmless error analysis.

Conclusion

For these reasons, it is respectfully requested that the court of appeals reverse the order of the circuit court denying

[7] Because of the fact that he claimed to be present at the scene and never called the police, he never defended Stephanie, and by his own admission, he help hide the body. This, of course, would have permitted Ivanez to argue to the jury that Santiago's testimony was colored by his desire to avoid being charged with being a party to the crime of Stephanie's death.

Ivanez's motion to suppress his statement to police. The court should find that the erroneous admission of this statement impelled Ivanez's trial testimony and, therefore, the court should order a new trial.

Dated at Milwaukee, Wisconsin, this _____ day of November, 2013.

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Certification as to Length and E-Filing

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Dated this _____ day of November, 2013:

_____

Jeffrey W. Jensen

State of Wisconsin
Court of Appeals
District 1
Appeal No. 2013AP1901-CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Eduardo Ivanez,

Defendant-Appellant.

Defendant-Appellant's Appendix

A. Record on Appeal

B. Excerpt of circuit court's oral decision denying the motion to suppress (R:43-2, et seq.)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the

administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this ____ day of November, 2013.

_____

Jeffrey W. Jensen