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C O U R T O F A P P E A L S

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT I

Case No. 2013AP1901-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EDUARDO IVANEZ,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF
CONVICTION ENTERED IN THE MILWAUKEE
COUNTY CIRCUIT COURT, THE HONORABLE
JEFFREY A. WAGNER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT
AND PUBLICATION

The State does not request oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

STATEMENT OF THE CASE

Given the nature of the arguments raised in the brief of defendant-appellant Eduardo Ivanez, the State exercises its option not to present a statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a). The relevant facts and procedural history will be discussed in the argument section of this brief.

ARGUMENT

Ivanez was convicted following a jury trial of first-degree intentional homicide for killing Stephanie Romero and of being a party to the crime of hiding her corpse (5:1; 27:1; 28:1). He argues on appeal that the trial court erred when it denied his motion to suppress statements that he made while in police custody. This court should reject that argument because the record demonstrates that the police had probable cause to arrest Ivanez at the time he made the custodial statements that were introduced at trial.

I. THE POLICE HAD PROBABLE CAUSE TO ARREST IVANEZ WHEN HE WAS INTERVIEWED BY DETECTIVES ON APRIL 21, 2012.

Ivanez argues that he was under arrest when he was placed in the back of a locked squad car at the scene or, at the latest, when he was told that he was under arrest several hours later while he was in the sally port at the police station. *See*

Ivanez's brief at 16-17. He contends that the evidence presented at the suppression hearing was insufficient to establish probable cause for his arrest even at the later time.

However, the relevant question is not whether Ivanez was legally arrested when the officer told Ivanez he was under arrest but whether Ivanez was lawfully in police custody at the time he gave the statement at issue. *See State v. Felix*, 2012 WI 36, ¶¶44-50, 339 Wis. 2d 670, 811 N.W.2d 775 (although defendant was unlawfully arrested in his home, his statement given at the police station when he was lawfully in police custody was admissible). Ivanez acknowledges that that is the correct inquiry. He writes: "The question, then, is whether there was probable cause to arrest Ivanez at any time prior to the time he was interrogated." Ivanez's brief at 20.

As Ivanez also acknowledges, *see id.* at 20-21, the probable cause determination may be based not only on the information available to the arresting officer but on hearsay and the collective knowledge of the officer's entire department. *See State v. Kutz*, 2003 WI App 205, ¶12, 267 Wis. 2d 531, 671 N.W.2d 660. When reviewing an order on a motion to suppress evidence, an appellate court is not limited to the evidence at the suppression hearing. *See State v. Gaines*, 197 Wis. 2d 102, 106 n.1, 539 N.W.2d 723, 725 (Ct. App. 1995) ("When reviewing a suppression order, an appellate court is not limited to examination of the suppression hearing record. It may also examine the trial evidence, and the evidence at the preliminary

hearing” as well as “the record supporting issuance of a warrant”) (citations omitted).

Detective Carlos Negrón testified at the suppression hearing that Joel Correa, the young man who told police where he had seen a body (40:14-15), said that his friends had told him that “Smokey” was responsible for the death (40:14, 43). He also testified that Correa said that Smokey lived two houses to the east of the house where the body was located (40:17).

Detective Negrón testified that as the fire department was responding to his request for assistance in entering the building where Correa had seen the body, he saw an individual on the porch of the house where Correa said that Smokey lived, whom he identified at the suppression hearing as Ivanez, who matched Correa’s description of Smokey (40:17-22). Based on that information, Negrón then told Officer Bradley Blum to detain Ivanez in Blum’s squad car (40:21). Within two to five minutes of his first observing Ivanez on the porch, Detective Negrón spoke to Ivanez, who was then in the squad car, and asked Ivanez if he went by the nickname Smokey (40:22-23). Ivanez confirmed that he did (40:23).

Ivanez does not argue that the police lacked reasonable suspicion to detain him at that point. Rather, he argues that he was “‘under arrest’ at the point he was placed into the back of the locked squad car.” Ivanez’s brief at 16. Ivanez is wrong. See *State v. Quartana*, 213 Wis. 2d 440, 449-50, 570 N.W.2d 618 (Ct. App. 1997) (no arrest where suspect was placed in the rear of a squad car and driven approximately one mile to scene of

automobile accident). And while Ivanez was placed in handcuffs while he was in the squad car, that did not occur until after Negron's brief questioning of Ivanez, when Officer Blum transported Ivanez to a police station so that Ivanez could use the bathroom (40:38-40, 51).

The State agrees with Ivanez that the evidence presented at the suppression hearing did not establish probable cause to arrest him at the scene or while he was in the sally port of the police station, when Office Blum's sergeant instructed Blum to place Ivanez under arrest (40:70). However, the record in this case establishes that the police had probable cause to arrest Ivanez well before Detectives Caballero and Dalland interviewed Ivanez the next day, on April 21, 2012, at 1:00 p.m. (48:47, 50). Ivanez's statements during that interview were introduced at trial through a video recording and transcript of the interview (48:52-55).

The criminal complaint describes in detail interviews that detectives conducted the day before, on April 20, 2012, with Eduardo Garcia and Augustin Santiago (2:2-3). Both Garcia and Santiago told the police that they saw Ivanez choke and stab the victim (*id.*). Garcia gave Detectives Paul Lough and Erik Gulbrandson the following information:

Garcia stated that he knew the victim as Stephanie and that on Friday, April 13, 2012, he was with Stephanie and the defendant Eduardo Ivanez. They went to Garcia's house and during the afternoon, the defendant, who he knows as "Smokey," left with the victim. Smokey told Garcia to meet him at the "trap house" in 35 minutes. Garcia explained that

the "trap house" is where they smoke weed and that is the house where the victim's body was found.

Garcia further states that sometime around 10:00 p.m. that he and his cousin Augustin Santiago and his brother Lucian Hernandez went to the trap house which is on Rogers. Garcia stated that he knocked on the back door and the defendant stated, "Hold on fool, let me put on some pants." Garcia then replied, "What the fuck are you doing?" and Smokey said, "I'm fucking this bitch right now." At that point Smokey came to the door and let all three of them in and they entered the house.

Garcia stated when he walked into the living room he saw the victim, Stephanie, lying on the floor. Garcia stated, "I thought she was possessed," because her face looked really black. He got a real close look about 5 inches from her face and he noticed that she was still breathing a bit and she was bleeding from her mouth. He looked to see if she was still alive. His brother Luciano stood back by the wall and was kind of freaked out.

Garcia states that the victim was lying on her back with her arms above her head. . . . Garcia states when he realized she was still breathing he got startled and jumped back and stated, "What the fuck?" and at this time Smokey stomped on her face once with his foot. He stated that Smokey then got on top of her and squeezed her throat with both his hands for approximately 2 minutes, choking her. He stated that spit and blood came gurgling out of her mouth.

Luciano then stated, "I'm out of here," and Smokey stated, "Stay and help us put the body in the bathroom." Smokey then grabbed the victim's legs while Garcia grabbed the victim's right arm. . . . All three of them

dragged her into the bathroom. While he was still dragging her, he could feel a pulse on her arm and her chest was rising as if she was still breathing. He stated that he knew she was alive at this time. They then placed her in the bathroom with her left leg bent and the other leg on the bathtub.

Garcia stated that Smokey then went to the living room and obtained a knife from the victim's black leather purse. Garcia stated it was a wooden handled knife with a bent blade. Smokey then got on top of the victim and stabbed her once in the neck and then stabbed her in the left eye.

(2:2; some paragraph breaks added.)

Augustin Santiago provided this account to Detectives Erik Gulbrandson and Paul Formolo:

Santiago states that he, Garcia and Hernandez on April 13, 2012, all walked to a trap house in the area of 25th and Rogers. . . . Santiago states that he, Hernandez and Garcia all walked into the house where Ivanez was located. Santiago states that all of them walked into the living room where the victim appeared to already be deceased.

Santiago states that Ivanez then started to kick and choke the victim but Santiago did not observe any response from her. Santiago states that Ivanez choked the victim until blood came out of her mouth. . . .

Santiago states that they carried the victim into the bathroom. . . . Santiago states that while carrying the victim he did not believe that she was alive. Santiago states that he did not hear her breathe or feel her move while carrying her. Santiago further states that once the victim was on the floor Ivanez said, "Dude, she's still breathing."

Santiago states that Ivanez then ran up stairs and returned a short time later carrying a small knife. Ivanez used this knife to stab the victim 5 or 6 times to the front of her neck.

(2:3; paragraph breaks added.)

The record thus demonstrates that the day before Detectives Caballero and Dalland interviewed Ivanez on April 21, which produced the statements that the State introduced at trial, Garcia and Santiago told the police that they witnessed Ivanez choke and stab the victim. That information abundantly established, prior to the interview at issue, probable cause to believe that Ivanez killed the victim.

Ivanez argues that his interrogation was the “fruit of the poisonous tree” of his unlawful arrest and that his statements were not sufficiently attenuated from the unlawful arrest to be admissible. *See* Ivanez’s brief at 22-23. The flaw in that argument is that even assuming that Ivanez was unlawfully arrested on the afternoon of April 20, 2012, by that evening the police had probable cause to arrest him. Detective Paul Formolo testified that he interviewed Santiago from 11:13 p.m. on April 20 until 12:58 a.m. on April 21 (50:30). By that point, at the very latest, the police had probable cause to arrest Ivanez based on Santiago’s statement. Thus, when Detectives Caballero and Dalland interviewed Ivanez at 1:00 p.m. on April 21 (48:47, 50), he was lawfully in custody and had been for at least twelve hours.

II. IF THE COURT DETERMINES THAT IVANEZ'S STATEMENTS SHOULD HAVE BEEN SUPPRESSED, IT SHOULD REMAND THIS CASE TO ALLOW THE CIRCUIT COURT TO CONDUCT A *HARRISON/ANSON* ANALYSIS.

The State believes that if this court were to decide that the circuit court erred by admitting Ivanez's statements to the police, it could carry its burden of demonstrating that the error was harmless. Even without those statements, the evidence was compelling. Augustin Santiago testified at trial that he witnessed Ivanez choking and stabbing the victim (49:81-86). Ivanez's girlfriend, Jessica Hernandez, testified that around midnight on the night of April 13-14, 2012, Ivanez told her that he needed money for a bus because he had "stabbed a lady" (47:52-54). And Ivanez's DNA was found on the victim's breast (49:53-55).

Ivanez is incorrect, therefore, when he asserts that without his statement to the police, "the state had only the testimony of Santiago, which certainly had credibility problems; and the evidence of Ivanez's DNA on Stephanie's breast." Ivanez's brief at 25 (footnote omitted). The State also had Ms. Hernandez's testimony that Ivanez admitted stabbing a lady, and Ivanez offers no reason why the jury would question her credibility.

Ivanez correctly points out, however, that our supreme court has held that when a defendant testifies after his statements have been

improperly admitted, “[o]nly after a *Harrison/Anson* analysis does the court proceed to a harmless error analysis.” *State v. Lemoine*, 2013 WI 5, ¶36, 345 Wis. 2d 171, 827 N.W.2d 589. The *Lemoine* court described that analysis as follows:

In *Harrison v. United States*, 392 U.S. 219 (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. 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., ¶36 (quoting *State v. Anson*, 2005 WI 96, ¶14, 282 Wis. 2d 629, 698 N.W.2d 776).

In this case, Ivanez did not file a postconviction motion and never claimed at any time in the circuit court that the reason he testified at trial was to overcome the impact of the allegedly illegally obtained and used statements. Thus, the circuit court never had an opportunity to make the findings of fact required under a *Harrison/Anson* analysis.

This court has no authority to make factual findings when the facts are in dispute. *See Wurtz v. Fleischman*, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980). The State disputes Ivanez's assertion his trial testimony "was impelled by the erroneous admission of his statements to police," Ivanez's brief at 24, because there is nothing in the record to support it. When the court conducted a colloquy with Ivanez about his decision to testify, neither Ivanez nor his lawyer said anything to suggest that that decision was affected by the admission of his statements to the police (50:26-27).

Accordingly, if this court agrees with Ivanez on the suppression issue, it should remand this case to the circuit court to make appropriate factual findings and conduct a *Harrison/Anson* analysis. *See State v. Anson*, 2002 WI App 270, ¶29, 258 Wis. 2d 433, 654 N.W.2d 48. After the circuit court has done that, the parties should be given an opportunity to brief the harmless error issue. Of course, if this court concludes that Ivanez's statements were properly admitted, "there is no need to proceed to a *Harrison/Anson* or a harmless error analysis." *Lemoine*, 345 Wis. 2d 171, ¶36.

CONCLUSION

For the reasons stated above, the court should affirm the judgment of conviction.

Dated this 30th day of January, 2014.

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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 2,604 words.

Jeffrey J. Kassel
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 30th day of January, 2014.

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