STATE OF WISCONSIN

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

DISTRICT I

Case No. 2013AP2100-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JULIUS ALFONSO COLEMAN,

Defendant-Appellant.

On Appeal From a Judgment of Conviction Entered in the Milwaukee County Circuit Court, the Honorable Jeffrey Wagner, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

DUSTIN C. HASKELL
Assistant State Public Defender
State Bar No. 1071804

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4807
haskelld@opd.wi.gov

Attorney for Defendant-Appellant

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ARGUMENT

I. The Court Should Suppress Mr. Coleman's Second Interrogation Because It Was Tainted by the ***Miranda*** Violation During the First Interrogation.

The State concedes that Mr. Coleman's first un-***Mirandized*** statement was obtained illegally and any statements from that interrogation must be suppressed. (Respondent's Brief at 2, 7). Though this is enough for a new trial in this case (*see infra*), this court should still address whether Mr. Coleman's second interrogation must also be suppressed because it was tainted by the first, as addressed by the Supreme Court ***Missouri v. Seibert***, 542 U.S. 600 (2004).

The State, relying on the Seventh Circuit's decision in ***United States v. Stewart***, 388 F.3d 1079 (7th Cir. 2004), urges this court to adopt Justice Kennedy's subjective test from ***Seibert***. (Respondent's Brief at 12-17). Under that test, an illegal unwarned interrogation can only taint a subsequently obtained, warned interrogation if the police engaged in a deliberate strategy to evade ***Miranda***.

For the reasons discussed in his initial brief, the ***Stewart*** court's reasons for preferring the subjective test are unpersuasive, and should not be followed by this court. Indeed, in a later case, even the Seventh Circuit found flaw in the ***Stewart*** court's reasoning. In ***United States v. Heron***, 564 F. 879 (7th Cir. 2009), a different panel from the Seventh Circuit acknowledged that Justice Kennedy's test should probably be rejected because it was the poorest representative of the justice's collective opinions. ***Id.*** at 884-85. Justice Kennedy was the only justice to support a purely subjective test. The eight justices in the plurality and dissent favored an objective test. ***United States v. Rodriguez-Preciado***, 399 F.3d 1118, 1140 (9th Cir. 2005) (Berzon, J., dissenting).

The decision most reflective of the Court's holding is that of the plurality, which held that when deciding whether a second interrogation should be suppressed, the court should examine a series of objective factors: "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." ***Seibert***, 542 U.S. at 615.

Adopting Justice Kennedy's subjective test creates an anomaly. His subjective test is at odds with every other interrogation-related standard, all of which apply an objective test. ***State v. Cunningham***, 144 Wis. 2d 272, 278, 423 N.W.2d 862 (a suspect has been subject to interrogation if "an *objective observer* could foresee that the officer's conduct or words would elicit an incriminating response.") (emphasis added); ***State v. Lonkoski***, 2013 WI 30, ¶ 6, 346 Wis. 2d 523, 828 N.W.2d 552 (a person is in custody if, under the totality of circumstances, "a *reasonable person* would not feel free to terminate the interview and leave the scene.") (emphasis added); ***State v. Ross***, 203 Wis. 2d 66, 78, 552 N.W.2d 429 (Ct. App. 1996) (to invoke the right to silence, a suspect must make a statement such that "a *reasonable police officer* in the circumstances would understand the statement to be an invocation of the right to remain silent.") (emphasis added). There is no principled reason to depart from this preference for objective standards in this single circumstance. Therefore, this court should reject the subjective test and apply the plurality test from ***Seibert***.

The State argues that the plurality test does not fit the facts from this case because Detective Schumacher testified that the second interrogation was initiated by Mr. Coleman. (Respondent's Brief at 18). But that does not mean an objective test cannot be applied. Whether the suspect

reinitiated the interrogation is simply another factor the court can consider when applying the objective ***Seibert*** test.

Here, the fact that Mr. Coleman initiated the second interrogation is outweighed by the many factors in favor of suppression. The first interrogation covered essentially every detail of the case, and those details were simply confirmed in the second interrogation, leading Mr. Coleman to believe there was nothing to lose by simply confessing again. (Initial Brief at 29-30). Both interrogations were conducted by Detective Schumacher in the same room of the same police station, and they were separated by only an hour. (113). The only difference was Detective Milotzky was also present for the second interrogation. (113). Application of all of these ***Seibert*** factors weighs in favor of suppression.

This case is further aggravated because no one told Mr. Coleman that his first unwarned statement would be inadmissible. This is what the ***Seibert*** plurality found so alarming: the suspect was left to believe that the first confession was already admissible, so there was no reason not to simply confess a second time. 542 U.S. at 616. The ***Miranda*** violation in the first interrogation led directly to Mr. Coleman's thoroughness during the second interrogation because he had no reason to believe he had not already provided an admissible confession. Therefore, this court should suppress Mr. Coleman's second interrogation under ***Seibert***.

Even if this court applied a subjective test, it should still suppress the second interrogation because the record reflects a deliberate attempt to evade ***Miranda***. Detective Schumacher made virtually no effort to advise Mr. Coleman of his ***Miranda*** rights during the first interrogation, but, by the State's admission, proceeded to interrogate him. She continued talking with Mr. Coleman for 30 minutes about the evidence in this case during the first interrogation. Detective Schumacher then took no curative steps during the second interrogation to mitigate the impact of the illegal interrogation

(e.g., warning Mr. Coleman that the first interrogation would be inadmissible, and that only his ***Mirandized*** statements could be used against him). The only precaution that was taken was to advise Mr. Coleman of his ***Miranda*** rights, but even that was not enough in ***Seibert***. Therefore, even if this court applies Justice Kennedy's subjective test, it should still suppress Mr. Coleman's second interrogation.

II. The State Has Not Met Its Burden to Prove That the Admission of Mr. Coleman's Confession Was Harmless Beyond a Reasonable Doubt.

Though the State faults Mr. Coleman for not arguing how his confession affected the verdict, he is under no obligation to do so. (Respondent's Brief at 8). Indeed, it is the State that bears the burden to prove harmlessness, not Mr. Coleman's burden to prove prejudice. ***Chapman v. California***, 386 U.S. 18, 24 (1967).

The State must prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ***Id.*** This court cannot simply examine the properly admitted evidence and determine whether there was enough to convict: "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error." ***Kotteakos v. United States***, 328 U.S. 750, 765 (1946). The question is whether the State can prove that "the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee." ***Sullivan v. Louisiana***, 508 U.S. 275, 279 (1993).

Here, Mr. Coleman is entitled to a new trial even if this court only finds a ***Miranda*** violation in the first interrogation,

where the State already concedes the violation.[1] It is not clear beyond a reasonable doubt that admission of this interrogation had no effect on the verdict. Though evidence concerning this interrogation was limited, it was extremely damaging. Detective Schumacher testified to the following concerning the first interrogation: "The main interaction between Mr. Coleman and I was him requesting to work as an informant and provide me information to get some prosecutorial consideration on the case that he was arrested for." (93:47).

This statement reflected an implicit admission of guilt by Mr. Coleman. He would have no reason to seek "prosecutorial consideration" if he were innocent, and he would have no "information" to provide if he was not already involved in criminal activity. Thus, even this isolated comment would have a significant impact on the jury. The other evidence was far from conclusive that Mr. Coleman possessed a gun. The only person who testified to seeing Mr. Coleman with the gun was the informant, Corey Long, whose testimony was inherently less reliable because it was secured in exchange for considerable prosecutorial lenience. (89:117-21). Two detectives saw Mr. Coleman get something from under the hood of his car, but could not tell what it was. (91:127; 93:44-45). And though the gun was found in the car, there is no clear evidence that Mr. Coleman ever possessed it. Considering this evidence, the effect of an implicit admission from Mr. Coleman was significant and cannot be said to be harmless.

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[1] The State falsely asserts that Mr. Coleman has not requested a new trial based on the ***Miranda*** violation in his first interrogation. (Respondent's Brief at 11 n.4). Mr. Coleman's initial brief argues at length that his statements during the first interrogation must be suppressed. (Initial Brief at 16-21). That section of Mr. Coleman's brief concludes with an express request for reversal of his conviction: "this court should find that Mr. Coleman was subject to interrogation during the first interview, reverse his conviction, and suppress his statements from that interview." (Initial Brief at 21).

Even if admission of the first interrogation was harmless, the second plainly was not. Detective Schumacher testified that Mr. Coleman admitted to planning to participate in an *armed* robbery, and he admitted telling Mr. Long that he would bring a gun to the robbery. (93:49-50). Detective Schumacher testified that Mr. Coleman denied having a gun that night, but she also testified: "Mr. Coleman when I asked him if it was his gun answered me that he wanted to keep it a hundred with me, which means that he was going to be honest with me, and I said it—I would rather him just be honest and choose not to answer the question and that was his answer." (93:57). In other words, Mr. Coleman refused to answer the question because he did not want to lie to the detective. Thus, the jury implicitly heard Mr. Coleman say that the gun was his, but he did not want to admit that fact, lest he be caught lying to the detective.

The State then relied on Mr. Coleman's statements during its closing argument, stating:

> And then finally how do you know that Mr. Coleman is a member of this conspiracy? He admitted to it. When Detective Schumacher interviewed him, he admitted, yes, I made those phone calls. We discussed the robbery. I met with Mr. Long and we discussed the robbery. He even at one point to Detective Schumacher admitted making calls the night of the 9th once he got off work into the early morning hours of the 10th admitting having calls back and forth with Mr. Long about the robbery.
>
> *He admitted to Detective Schumacher that he told Mr. Long on the phone that he would get a gun, right*. So I think the evidence is overwhelming that Mr. Coleman was the charter member of this conspiracy.

(94:28-29) (emphasis added).

Detective Schumacher's testimony showed that Mr. Coleman implicitly admitted to possessing the firearm, and the State expressly relied on that admission in closing. This

evidence cannot be said to be harmless beyond a reasonable doubt.

The State claims this admission was simply cumulative because the jury heard audio recordings of Mr. Coleman agreeing to bring a gun and heard the informant's testimony. (Respondent's Brief at 9-10). But evidence is only cumulative "when it supports a fact *established* by existing evidence." ***Washington v. Smith***, 219 F.3d 620, 634 (7th Cir. 2000) (quoting Black's Law Dictionary 577 (7th ed. 1999) (internal quotations omitted; emphasis added). Here, evidence that Mr. Coleman possessed the firearm was far from established; it was the very question at the heart of the trial. Though the recordings provided some evidence that Mr. Coleman possessed a gun, his admission that he was the person on the recordings, and his implicit admission that he brought the gun were incredibly harmful pieces of evidence that cannot be said to be harmless.

CONCLUSION

For the reasons stated in this brief and his initial brief, Mr. Coleman asks that this court reverse the decision of the circuit court, suppress the statements made during both of his interrogations, and remand for further proceedings.

Dated August 2, 2016.

Respectfully submitted,

DUSTIN C. HASKELL
Assistant State Public Defender
State Bar No. 1071804

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4807
haskelld@opd.wi.gov

Attorney for Defendant-Appellant

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 2,073 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 August 2, 2016.

Signed:

DUSTIN C. HASKELL
Assistant State Public Defender
State Bar No. 1071804

Office of State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4807
haskelld@opd.wi.gov
Attorney for Defendant-Appellant