STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

LOWER CASE NO. 2011CF797

APPEAL NO. 2014AP1767-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN I. HARRIS,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

Kathleen M. Quinn
Attorney for Defendant-Appellant
State Bar No. 1025117

Kathleen M. Quinn, Attorney
207 E. Buffalo Street, Suite 514
Milwaukee, WI 53202
414-765-2373; Fax: 414-765-0828
quinnkathleen@4law.com

TABLE OF AUTHORITIES

Cases

Defendant-appellant, Brian Harris, relies upon and incorporates herein the arguments and authorities set forth in his brief-in-chief. In addition, he submits this reply brief to address a few aspects of the State's response brief.

Harris's concern was and is that the trial court utterly failed to take into account in any manner the unwarned custodial questioning of Harris by Officer Niebuhr - - questioning which the State concedes was unlawful. The trial court conducted only a voluntariness analysis of the statements and completely ignored the illegal questioning that occurred just moments before the inculpatory statements were elicited.

The State wrongly asserts that an attenuation analysis is somehow improper in this case because there was no *second* act of police illegality beyond the unlawful questioning of Harris. The State misapplies *State v. Hogan*, 2015 WI 76, ___ Wis. 2d ___, ___ N.W.2d ____, to suggest that no attenuation analysis is necessary or proper in Harris's case.

In *Hogan*, the defendant was lawfully stopped for a seat belt violation. *Id.* ¶ 2. The deputy who conducted the stop observed what he thought was indicia that Hogan was using drugs. *Id.* ¶2. The deputy wrote citations for Hogan and his passenger's seatbelt violations and then extended the traffic stop to perform field sobriety tests. *Id.* ¶¶ 2- 4. Following the defendant's successful completion of the tests, the deputy told the defendant he was free to leave and thereby ended the traffic stop. *Id.* ¶ 4. Some sixteen seconds after Hogan was told he was free to leave and the traffic stop was concluded, the deputy re-approached Hogan to ask for and receive consent to search Hogan's vehicle. *Id.* ¶ 5. Drugs and guns were found. *Id.*

Hogan filed a motion to suppress the physical evidence based on three grounds: 1) the deputy did not have reasonable suspicion to extend the traffic stop to conduct an investigation into whether Hogan was under the influence of drugs; 2) Hogan's consent to search his truck was tainted by the prior illegal extension of

the stop; and 3) Hogan was constructively seized without reasonable suspicion when the deputy re-approached him to request consent to search the truck.

The Court of Appeals, like the circuit court before it, conducted a full blown attenuation analysis and concluded that, although the deputy illegally extended the stop when he administered the field sobriety tests, Hogan's consent "was sufficiently attenuated from the taint of the illegal detention." *Id.* ¶¶ 28, 30. The Supreme Court could not postulate that the end of a traffic stop will *always* render attenuation analysis unnecessary in cases involving illegal extensions of traffic stops followed by the granting of consent for vehicle searches that turn up evidence of crime. However, the Supreme Court indicated that the end of a stop will be a significant factor in determining the necessity of attenuation analysis in such cases. *Id.* ¶ 67, 68.

In Hogan's particular case, the Supreme Court concluded that attenuation analysis was unnecessary because the extension of the stop could not be said to be a but-for cause of Hogan's consent because the traffic stop was ended, the deputy told Hogan he was free to leave, encouraged Hogan to wear his seat belt, advised him to get his windshield fixed, returned to his squad car, and waited approximately 16 seconds before re-engaging Hogan. *Id.* ¶ 69. As the Court indicated:

> The end of a traffic stop is important to two of the factors in the attenuation analysis. First, the circumstances giving rise to the end of a traffic stop will often (though perhaps not always) include the passage of time, which implicates the first attenuation factor. Second, and more important, the end of a traffic stop is a <u>significant</u> intervening event for purposes of attenuation analysis. *Id.* at ¶ 64 (emphasis in original).

Of course, Harris's case has nothing to do with traffic stops, extensions of traffic stops, or grants of consent to search. Unlike the encounter with law enforcement had by Hogan, the encounter between Harris and Officer Niebuhr was uninterrupted and the time between the illegal questioning of Harris by Niebuhr and the time of Harris's inculpatory statements was not broken by any intervening

events or any passage of time beyond the moments it took for Niebuhr to escort the in-custody and handcuffed Harris from the duplex basement to the squad car.

As explained in Harris's brief-in-chief, the squad car statements were not sufficiently attenuated from the illegal basement questioning by Niebuhr, just moments before, so as to purge the statements of the taint of the illegal questioning.

Harris was found in a vacant house into which entry had been made through a damaged window, surrounded by tools and damaged pipes. Probable cause for the arrest was present. Questioning Harris about what he was doing in the house was custodial interrogation for which *Miranda* warnings were required. The taint of the improper questioning on the statements that were directly responsive to the unwarned questioning was not cured by any possibility that the statements were *otherwise* voluntary. As the product of unwarned custodial interrogation, the statements should have been suppressed from use in the state's case-in-chief.

As for Buchanan's question to Harris ("Do you wish to make a statement?") which elicited the directly responsive inculpatory statement, "They caught me, man, I got nothing else to say," it is the State's position that because one may also respond to this question with a simple "Yes," or "No," the question is "more ministerial than probing."

Buchanan's question was reasonably likely to and, in fact, *did* elicit an incriminating response from Harris. An objective observer could conclude that Buchanan's *question* would be likely to elicit an incriminating response - - that is, "could reasonably have had the *force of a question* on the suspect," and, so, under *Fischer*, Buchanan's words constituted interrogation. *State v. Fischer*, 2003 WI App 5, at ¶27, 259 Wis. 2d 799, 656 N.W.2d 503. The question Buchanan posed was objectively and reasonably understood by Harris as a request for a statement and his incriminating response should have easily been anticipated. Because the statement was elicited in direct response to a question posed by law enforcement while Harris was in custody and without *Miranda* warnings, it should not have been admitted in the State's case in chief.

Harris concurs with the State that the admission at trial of statements taken in violation of *Miranda* are to be analyzed under the rubric of harmless error. *State v. Martin*, 2012 WI 96, ¶ 44, 343 Wis. 2d 278, 816 N.W.2d 270. Harris further agrees that, because he testified at trial, on remand the State bears the burden of proving beyond a reasonable doubt that the erroneous admission at trial of Harris's statements did not impel his testimony, and that he would have made the same damaging admissions at trial even if the prosecution had not already put his unwarned statements before the jury. *See Harrison v. United States*, 392 U.S. 219, 224-26, 88 S. Ct. 2008 (1968); *State v. Anson*, 2005 WI 96, ¶¶ 38-40, 58, 282 Wis. 2d 629, 698 N.W.2d 776.

Dated this 1st day of September, 2015.

Respectfully submitted:

s / Kathleen M. Quinn

Kathleen M. Quinn
Attorney at Law, SBN 1025117
207 E. Buffalo Street, Suite 514
Milwaukee, WI 53202
414-765-2373; Fax: 414-765-0828
quinnkathleen@4law.com

CERTIFICATION OF CONFORMITY
WITH § 809.19(8)(b) and (c)

I, Kathleen M. Quinn, hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. The length of this brief is 1,158 words according to the word count function of the word processor available in WordPerfect 9.

Dated this 1st day of September, 2015.

s / Kathleen M. Quinn
Kathleen M. Quinn
Attorney for Defendant-Appellant,
Brian Harris

CERTIFICATION OF COMPLIANCE WITH
§ 809.19(12)

I, Kathleen M. Quinn, hereby certify that I have submitted an electronic copy of the brief which complies with the requirements of § 809.19(12). I further certify that the electronic brief is identical in content and format to the printed form of the brief filed.

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

Dated this 1st day of September, 2015.

s / Kathleen M. Quinn
Kathleen M. Quinn
Attorney for Defendant-Appellant,
Brian Harris