STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2014AP1767-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN I. HARRIS,

Defendant-Appellant-Petitioner.

ON PETITION FOR REVIEW FROM A DECISION OF THE WISCONSIN COURT OF APPEALS AFFIRMING A JUDGMENT OF CONVICTION ENTERED IN THE KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL WILK PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF ISSUES

1. When the police officer asked Harris if he wished to make a statement, was this question an interrogation requiring the reading of the *Miranda*[1] warnings?

The trial court answered this question no.

The court of appeals answered this question no.

2. If the trial court erroneously admitted into evidence Harris's statements to the police, did this constitute harmless error?

This issue was not before the trial court.

This issue was not addressed by the court of appeals as they found that no police error had been made.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in any case important enough to have the petition for review granted by this Court, the State requests both oral argument and publication of the court's opinion.

STATEMENT OF FACTS

On August 13, 2011, Officer Justin Niebuhr, an 11 year veteran of police service with the last six being served with the Kenosha P.D., was dispatched to 1121 63rd Street to investigate a possible ongoing burglary. (96:5; 97:74.) The complainant was the neighbor who lived at 1123 63rd Street. (96:6.) The neighbor, Natasha Waterford, had been awakened by loud noises, sounding like metal being struck

[1] *Miranda v. Arizona,* 384 U.S. 436 (1966).

as though a person was trying to move or take something. (97:65-66.) The noises disturbed Ms. Waterford because they were loud and she knew that no one lived where the noises were coming from, 1121 63rd Street. (97:66-67.) After hearing the noises for about five minutes, Waterford called the police. They responded immediately, at approximately 3:22 a.m. (97:69, 75.)

Upon arrival and meeting with Waterford, Officer Niebuhr could hear a loud clanging of metal coming from inside 1121 and went to the front door of the supposedly vacant townhouse. (96:6.) The front door was locked. Looking through the window, Niebuhr saw only darkness. Niebuhr then tried the back door, but it too was locked. (96:6.) At this point, Officer Niebuhr observed that there were two small windows on the back of the residence that led into the kitchen and he noticed that one of the windows was cracked and the window's latch was undone at the top. (*Id.*) Niebuhr requested backup and soon Officer Arturo Gonzalez joined the scene. (96:7.)

Officer Gonzalez climbed through the small window, unlocked the back door and let Niebuhr inside. (97:78.) The metal banging continued as Officers Niebuhr and Gonzalez entered the kitchen and continued until both officers walked into the kitchen and began to make noises on the kitchen

floor. (*Id.*) The banging had appeared to come from the basement area and before going to the basement, Officer Gonzalez cleared the main floor while two other responding officers cleared the upstairs. (96:7; 97:79.) Then, Officers Niebuhr and Gonzalez began to go down to the basement. (96:7.)

As the two officers proceeded down the stairs leading to the basement, they observed an area of the basement where another set of stairs was going up. (96:7.) There was a small crawl space, on the underside of this set of stairs and from this space Officer Niebuhr could see a pair of shoes sticking out. (96:8.) Officers Niebuhr and Gonzalez demanded that if anybody was in the basement they should come out, show themselves, and to this there was no response. (*Id.*) The officers continued slowly down the stairs and Niebuhr then saw Harris underneath the staircase in a seated position. (97:81.) Officer Niebuhr then placed Harris into custody. (96:8; 97:81.)

After placing Harris into custody, Officer Niebuhr looked around the basement and saw copper piping that was previously on the ceiling lying on the ground. (96:8) Niebuhr also observed a grey duffle bag on the floor, and this duffle bag contained a saw and some replacement blades, a bolt-cutter type instrument, and some crowbars. (96:8-9.) Niebuhr also saw a flashlight on the floor that had a red lens over the light bulb and he further observed that Harris was

wearing a black pair of work styled hand gloves. (96:9.) Officer Niebuhr took Harris out of the townhouse and into his police squad. (96:9.)

Once in the squad, Officer Niebuhr attempted to contact the owner of the vacant townhouse where Harris had been found, and also attended to paperwork. (96:9.) Harris, without being questioned, began talking in the back of the squad, advising that he had been homeless for seven years, that he frequently goes to vacant houses to sleep, and that he was going to take the copper piping and sell it for money. (*Id.*) Harris also said that he often commits misdemeanor crimes to get items to sell for food, and that he was alone in the basement. (*Id.*) Harris's dialogue was not a response to any questions posed by Officer Niebuhr or any other police officer. (96:10.) Officer Niebuhr made no threats or promises to Harris and felt that Harris did not seem overly tired or intoxicated. (96:10.) Officer Niebuhr never read Harris his *Miranda* warnings. (96:11.)

Detective Chad Buchanan of the Kenosha Police department was called upon to follow up the investigation involving Harris and the alleged burglary at 1121 63rd Street. (96:19.) Detective Buchanan met Harris in the Kenosha County Jail and asked Harris if he would like to accompany him to the detective bureau to be interviewed.

(96:19-20.)[2] Harris responded by saying, "they caught me man, I got nothing else to say." (96:20; 97:144.) Buchanan did not ask Harris any more questions and did not read Harris his *Miranda* warnings. (96:20; 97:144.) Harris's contact with Buchanan took place in a common area in the jail, just outside of some interview rooms. (97:75, 144, 150.) Buchanan did not make threats or promises to Harris, and while he was brought to Buchanan by a guard, he was not handcuffed. (96:21.)

ARGUMENT

INTRODUCTION

This case is about whether Detective Buchanan engaged in a custodial interrogation of Harris when he asked Harris if he wished to make a statement. There is little dispute about the background facts. Harris was in custody but he was not handcuffed, the police said nothing to Harris other than to ask if he wished to make a statement, and the police showed Harris no evidence of the crime or made any threats or promises. Harris more or less concedes that Buchanan did not have the intent to elicit an

[2] At trial Buchanan altered his testimony from the motion hearing slightly. Instead of asking Harris if he wanted to go to the interview room to be interviewed, the testimony at the motion hearing, Buchanan testified at trial that he asked Harris if he would like to give a statement. (97:151.) The State agrees with the court of appeals that this change does not materially alter the terrain and therefore, for purposes of clarity and consistency, the State will go with Detective Buchanan's testimony at trial as the operative fact.

incriminating response when he asked Harris his wishes about making a statement[3]. Finally, there is no dispute that Buchanan did not read the *Miranda* warnings and that Harris responded to a question about his wishes to make a statement with the comment, "they caught me man, I got nothing else to say."

The dispute is over how these salient facts are to be interpreted within the Fifth Amendment context. Harris maintains that Detective Buchanan, whatever his intent, should have known that his question as to Harris's wishes about making a statement would have the foreseeable result of producing a substantive response about criminal involvement. Conversely, the State argues, and the court of appeals held, that the question "do you wish to make a statement" is ministerial and not probing, and thus compatible with Buchanan's expressed intent to get a yes or no answer and not to elicit an incriminating response. The State submits that there is nothing in Detective Buchanan's question as to Harris's willingness to make a statement, in the undisputed questioning environment, which can be reasonably interpreted as either an expressed interrogation or the functional equivalent of an interrogation.

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[3] Harris does not explicitly state that Buchanan did or did not intentionally seek to circumvent *Miranda.* But Harris argues that if his statement to Buchanan led to the discovery of derivative physical evidence, the fact that Buchanan's *Miranda* violation *was probably not intentional,* would have some import. (Harris's Br. 16.) Harris also theorized that the Court of appeals might have not wanted to criticize Buchanan because his actions were not indicative of a clearly intentional *Miranda* violation. (*Id.*)

The court of appeals' holding, affirming the trial court, that Harris's remark, "they caught me man, I got nothing else to say," was not the product of an interrogation, was proper and consistent with the law and the facts of this case. Nevertheless, even if this Court finds the court of appeals and trial court to be in error, it was harmless error, as there was ample evidence to support the jury verdict without reference to Harris's challenged statement. Hence, at most Harris would be entitled to a remand for a *Harrison/Anson*[4] hearing to fully assess harmless error, since Harris testified at trial. *See State v. Lemoine,* 2013 WI 5, ¶ 36, 345 Wis. 2d 171, 827 N.W.2d 589.

I. Detective Buchanan's asking Harris if he wished to make a statement is neither an expressed interrogation or the functional equivalent of an interrogation

A. Applicable law.

The State must show by a preponderance of the evidence whether or not a custodial interrogation took place. *State v. Armstrong,* 223 Wis. 2d 331, 345, 588 N.W.2d 606 (1999). Interrogation is defined as questioning by the police

[4] In *Harrison v. United States,* 392 U.S. 219 (1968) the Court held that when statements later to be 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 was compelled by the admission of the illegally obtained statements. *Id.* at 224-25. In *State v. Anson,* 2005 WI 96, 282 Wis. 2d 629, 698 N.W.2d 776, the 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.

that is designed to elicit an incriminating response. *Rhode Island v. Innis,* 446 U.S. 291, 301 (1980). An interrogation includes not only expressed questioning of a suspect but also conduct or words that are the functional equivalent of an expressed interrogation. *Id.*; *State v. Cunningham,* 144 Wis. 2d 272, 277, 423 N.W.2d 862 (1988). The functional equivalent of express questioning is any words or police conduct that the police should reasonably foresee are reasonably likely to elicit an incriminating response. *Cunningham,* 144 Wis. 2d at 278. The objectively foreseeable standard properly considers the police knowledge of the particular susceptibility of the defendant to police words or actions.

The functional equivalent test hinges on whether the police words or conduct could reasonably have the force of a question designed to elicit an incriminating response. *State v. Fischer*, 2003 WI App 5, ¶ 25, 259 Wis. 2d 799, 656 N.W.2d 503.

If a defendant makes a statement that is not a response to expressed questioning or its functional equivalent, the police are not prohibited from listening to this voluntary statement, even without the reading of the *Miranda* warning. *Edwards v. Arizona,* 451 U.S. 477, 485 (1981).

A fair summary of the law is that an interrogation is typically expressed questioning designed to elicit an incriminating response. But questioning or conduct that is

not expressly confrontational has the functional equivalent of interrogation when, under the circumstances, it is objectively foreseeable that the words or conduct are reasonably likely to elicit an incriminating response. If a defendant makes a voluntary statement that is not the product of an expressed or functional equivalent of interrogation, such statements are admissible, even if the suspect was not advised of his *Miranda* warnings.

B. Application of facts to the law.

There is little dispute as to the facts concerning Harris's statement to Detective Buchanan. There is no dispute that Harris was in custody, that Buchanan did not read the *Miranda* warning, that the interaction took place outside the interview room, and that the lone question Buchanan asked was whether Harris wished to make a statement. It is also agreed that Harris replied that since he was caught, he had nothing to say. The issue is whether Detective Buchanan provoked Harris's comment, and objectively should have foreseen the incriminating reply he received.

On its face, "Do you wish to make a statement?" is not an expressed question designed to elicit an incriminating response. The question can very reasonably be interpreted as an inquiry as to whether or not Harris wished to talk to the police. The State argues for this interpretation. Nor was the question the functional equivalent of an interrogation. The State submits that an objective observer would have

concluded that Detective Buchanan's inquiry was far more likely to generate a "yes" or "no" response than it would produce an incriminating one. And there was nothing particular about Harris's emotional state, or the attendant circumstances, that made him more susceptible to such a benign question.

Harris relies in part on the Kansas case of *State v. Hebert,* 277 Kan. 61, 82 P.3d 470 (Kansas Supreme Court-2004), which he alleges is similar to his case and is helpful to the analysis. The State agrees with Harris that *Hebert* is instructive, but disagrees that it presents a similar scenario to the one before this Court. In *Hebert,* the defendant, a few hours after allegedly being involved in the shooting of a police officer, was taken into the interview room with Special Agent Brad Cordts. Before reading the *Miranda* warning, Agent Cordts told Hebert that he wanted to speak to him to get both sides of the story, that he wanted the defendant's input and in the defendant's own words, to explain what happened. *See Hebert*, 277 Kan. at 67. After explaining his desire for the defendant to give his side of the story, Agent Cordts then said to the defendant, "Would you like the opportunity to tell me your side of the story?" (*Id.*) From this, the defendant said, "[t]he officer and the dog came up the stairs and he stuck his head out there and I shot him." (*Id.*)

The Kansas Supreme Court suppressed all the statements the defendant made before the *Miranda* warning

was read. The *Hebert* court found that Agent Cordts should have foreseen that the defendant would respond in the manner that he did. The key for the *Hebert* court was that Agent Cordts had expressed his wish to have the defendant explain himself before asking the defendant for his version of events. *See Hebert*, 277 Kan. at 70. The court observed, "*Before asking*, Would you like the opportunity to tell me your side of the story', Agent Cordts told the defendant that he would like to hear his side of the story in his own words. This is exactly what the defendant did." *Id.* (emphasis added.) The court opined that Cordts question was designed to gather incriminating information as the question was "preceded by several requests by Agent Cordts that he wanted to hear the defendant's side of the story…" (*Id.*)

Our case is factually distinguishable from *Hebert*. Hebert was already in the interrogation room and Harris was not, Hebert was handcuffed and Harris was not, and Hebert encountered Agent Cordts within hours of the alleged shooting and had stress over the physical condition of the officer he had allegedly shot (*see Hebert*, 277 Kan. at 67) while Harris met Detective Buchanan a day after being caught in the act of a burglary. By any measure, Hebert was facing a more stressful environment than was Harris. But leaving aside the differences in the ambiance, there were also critical differences between the officer/subject verbal interactions in *Hebert* as compared to the instant case.

In *Hebert,* Agent Cordts clearly expressed his wishes to have Hebert talk to him before asking Hebert as to what his preferences might be. It is this fact that was determinative to the *Hebert* court. Here, Detective Buchanan did not express any personal feelings or wishes about getting both sides to the story, or any side of the story for that matter. Detective Buchanan did not precede his straight-forward "yes or no" question, with any comments that might skewer the question into an interrogation. Indeed Detective Buchanan did not do anything or say anything to Harris before asking him if he wished to make a statement. The State believes that, under the logic employed by the *Hebert* court, if Agent Cordts acted and spoke to Hebert as Detective Buchanan did to Harris, the Kansas Supreme Court would have reached a different result.

State v. Bond, 2000 WI App 118, 237 Wis. 2d 633, 614 N.W.2d 552, supports the State's contention that there was no interrogation in this case. In *Bond,* the defendant was arrested in public and escorted to the police department. The defendant repeatedly asked the police what he was being arrested for and the police kept telling him that he would be told in a few minutes. Finally, one of the arresting officers told Bond that "you're the man behind the man." *See Bond*, 237 Wis. 2d 633, ¶ 5. Bond responded to this remark by saying "[a]h, so that's what this is about." (*Id*.)

In a vacuum, the comment "you're the man behind the man" seems odd but not provocative. But under the facts of

the case the comment, while brief, was specifically tailored to elicit an incriminating response. The police believed that the defendant had threatened them by phone, when he wrongly thought them to be narcotic dealers. During those threatening phone calls, the defendant had referred to himself as the "man behind the man." *See Bond*, 237 Wis. 2d 633, ¶ 5. The police throwing the defendant's own words back at him was an obvious stratagem to prod a reaction. So transparent was the officer's motivation, that another officer, who witnessed the comment, testified that he believed the comment was designed to elicit a response from the defendant. *See Bond*, 237 Wis. 2d 633, ¶ 7. As the *Bond* court properly noted, this Court in *Cunningham* fleshed out the *Innis* "foreseeability" test to include the officer's intent, at least to the extent as that intent would be deduced from an impartial observer. "If an impartial observer perceives the officer's purpose to be something other than eliciting a response, the suspect is also likely to view the officer's purpose that way." *See Bond*, 237 Wis. 2d 633, ¶ 13, *quoting Cunningham,* 144 Wis. 2d at 280. So, since in *Bond* a partial observer gleaned the officer's provocative intent, it was easy for the court to conclude that an impartial observer would have concluded similarly, leading to the conclusion that Bond viewed the comment as an invitation for a response.

Here, there were none of the factors that were so persuasive in *Bond*. Harris had not been just arrested as Bond was, and he did not have to ask what he was being

arrested for. Bond, from his point of view, had arbitrarily been taken into custody and forcibly escorted from his environment, while Harris was non-handcuffed and had been arrested over a day earlier. Harris was not faced with the tense dynamic environment Bond encountered. Most critically, Harris was not confronted with any inside information, was not taunted, and was not confronted with any of his prior behavior. To fit under *Bond,* Detective Buchanan would have had to say something akin to "so, they caught you red handed" or "I guess everybody has to make a living in some way." Detective Buchanan said nothing like that; he merely said something to the effect of "do you wish to make a statement." Unlike the officer in *Bond* there was no intent to prod a burst of spontaneous comment from Harris. Bond's reaction was foreseeable, as it was egged on. Harris's reaction was not, as under the facts surrounding Detective Buchanan's generic question, only a yes or no answer could be reasonably expected.

Harris characterizes Detective Buchanan's quick inquiry as to whether Harris wished to make a statement, made outside the interview room and with no preceding discussion, as a "pre-interview" interrogation. As such, Harris argues, it is interrogation because it unfairly locks the suspect into a position on his *Miranda* rights before the suspect is read the rights. (Harris's Br. 14-16) Harris finds comfort in this position in the Hawai'i case of *State v. Eli,* 126 Hawai'i 510, 273 P.3d 1196 (2012) In *Eli,* the Hawai'i

Supreme Court, relying on the Hawai'i Constitution, held that if the police ask a defendant if he wants to give his side of the story, without first advising the suspect of the *Miranda* warning, the police are denying the defendant his right to remain silent, by attempting to commit him to make a statement before being advised of his right. *Id*. at 1209.

There are several problems in relying on *Eli*, in considering this case. First, again there are the factual differences; the interaction between the police and the defendant took place in the interview room whereas in our case it was outside the room, and the police explained to the defendant that he was under arrest for assaulting his daughter, while in our case there was no discussion about the charges. The police added the phrase that it was a chance for the defendant to give his version of the events while in our case there was no comment on any benefit to giving a statement. And most significantly, in *Eli* the defendant merely stated that he was willing to talk and then the rights were read to him before he made any substantive statements, while in our case Harris blurted that he had been caught and therefore he had nothing to say, and therefore no questioning was conducted.

Second, *Eli* is not really an *Innis-Cunningham* case as the Hawai'i court did not have to consider whether the police were interrogating the defendant when they asked him if he wished to speak, since he did not respond to the question with any information. Instead the defendant responded to

the question about his willingness to speak, in the manner that any objective observer would reasonably anticipate; he answered the "yes or no" query with a yes or no response. Indeed, the defendant's response in *Eli* is the same kind of response the State now submits Detective Buchanan reasonably anticipated from Harris, instead of the response Harris actually gave. The issue for the *Eli* court was not whether asking a person if he wished to talk is an interrogation, but rather whether doing so, before the warnings are read, somehow vitiates the *Miranda* safeguards and thus circumvents *Miranda's* purposes. This is not the argument Harris raised at the court of appeals or raises here; his argument is that Buchanan's question violates *Innis* and *Cunningham,* as it constituted either an express question or the functional equivalent of one, designed to elicit an incriminating response, and not because it would make his subsequent waiver of rights unfairly prompted. Harris could not make the *Eli* argument since he never did waive his rights, just as Eli could not make Harris's argument since he did not respond substantively to the question about his willingness to speak.

Even if this Court chooses to expand its inquiry from the court of appeals holding on appeal, to include a review as to whether a person being asked if he/she wishes to make a statement invalidates a subsequent *Miranda* waiver, relying on *Eli* is a problematic exercise. *Eli* was based on the Hawai'i Constitution, whose interpretation of *Miranda* is

incompatible with how this Court has interpreted *Miranda* under the Wisconsin Constitution. For example, under Hawai'i's Constitution, if there has been a *Miranda* violation, statements by the accused may not be used as either direct evidence or to impeach the defendant's credibility during rebuttal or cross examination. *See Eli*, 126 Hawai'i at 1206 referencing *State v. Ketchum,* 97 Hawai'i 107, 117, 34 P.3d 1006 (2001) By contrast, this Court held in *State v. Knapp,* 2003 WI 121, ¶ 111, 265 Wis. 2d 278, 666 N.W.2d 881, that while *Miranda* violative statements are inadmissible in the State's case in chief, they are available for purposes of impeachment and rebuttal, if they are voluntary. *See also Harris v. New York,* 401 U.S. 222 (1971) So, *Eli* involves a different fact pattern, raises a different legal issue, and is based on a constitution that interprets *Miranda* differently than both the U.S. and Wisconsin Constitutions.

Harris concludes his argument by urging this Court to adopt a "bright line" rule prohibiting the police from inquiring as to whether a suspect wishes to make a statement before the reading of the *Miranda* warnings. Harris reasons that such a rule "will underscore for police and courts that unwarned questioning of persons in custody about whether or not they will provide a statement *is* interrogation." (Harris's Br. 18.) It makes perfect sense that Harris seeks adoption of such a rule, since without it he is hard pressed to demonstrate, under the facts of this case,

that Detective Buchanan's one-question inquiry constitutes either an expressed or functional equivalent of an interrogation.

There are problems with Harris's proposed rule. First, it asks this Court to adopt a bright line rule to an extensive jurisprudence developed by a fact-intensive, totality-of-the-circumstances, case-by-case analysis. Indeed, the objective foreseeability test articulated by *Innis* and refined by this Court in *Cunningham,* involves a review of many factors, including the subject's perspective, the officer's intent, the length of the discussion, the officer's knowledge of the suspect's susceptibility and the suspect's emotional state. It does not work to insert a "bright line" rule into such a dynamic mosaic.

Second, even if any "bright line" rule could coexist with long standing legal precedent avoiding one, the rule that Harris proposes would not be it. The likely foreseeable response when one is asked if he wishes to make a statement is a yes or no answer. Harris's asking this Court to prohibit such a question in all custodial pre-*Miranda* circumstances does not change this reality. That is not to say that such a question can never be an interrogation; that will depend on the attendant circumstances. In most cases, and in this one, the objective foreseeable response to a "yes or no" question is yes or no. To adopt a rule saying otherwise, removes the objective foreseeable test and replaces it with a judicial fiat. It might make things clearer for the police and for future

courts but it does so at the expense of extensive legal precedent, without furthering the principles of *Miranda* and *Innis*. As this Court aptly noted,

> In deciding whether particular police conduct or words are interrogation, the court must keep in mind the purpose behind the *Miranda* and *Innis* decisions. These decisions were designed to prevent law enforcement officers from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment.

Cunningham, 144 Wis. 2d at 283.

The evaluation as to whether an officer is improperly exploiting the subject's confinement with a particular question can only be effectively made through a totality of circumstance lens.

In this case, without any preceding comments or acts, Detective Buchanan asked a non-handcuffed Harris, outside the interview room, if he wished to make a statement. This is not a case where Detective Buchanan told Harris that he wanted him to make statement, or where Buchanan said he was offering Harris an opportunity to tell his side of the story, or where Buchanan was confronting Harris with inside information or taunting him with his own words. This is not a case where Buchanan either had the expressed intent or the objectively perceived intent of making an end-run from *Miranda* to extract an incriminating response. The State respectfully submits that the court of appeals correctly held that Detective Buchanan did not interrogate Harris

when he asked if he wished to make a statement, and that Harris's unexpected response was admissible.

II. If this Court determines that Harris's statement should have been suppressed, the case should be remanded 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 and court of appeals erred by admitting Harris's statement to Detective Buchanan, it could carry its burden of demonstrating that the error was harmless. Even without the challenged statement, and without Harris's trial testimony, the evidence to support the jury verdict was compelling. Harris was caught "red-handed." Officer Niebuhr was dispatched to investigate an ongoing burglary. (97:75.) Once at the scene Niebuhr heard a consistent loud banging noise, sounding like the clanging of metal together. (97:76.) The police noted that the doors of the home were locked and that entry was achieved by breaking one of the kitchen windows. (97:77.) Eventually Niebuhr along with other police officers found their way into the basement areas where the noises were coming from and discovered Harris. (97:81.) The police found no one else other than Harris. (*Id.*) By Harris, the police found a duffel bag containing burglarious tools, and they also observed copper piping that used to be on the ceiling now on the basement floor. (97:82-83.) Harris was found attempting to hide and he was wearing black work-styled gloves on his hands. (97:80, 81, 83.)

The owners of the vacant home testified that the last time they had checked the basement the copper was properly in place, the windows were intact, and that they gave no one permission to enter the town house or to damage the home or take the copper. (97:47, 48, 49, 51, 52.)

Also, the State has as evidence the incriminating statements Harris made to the police, shortly after his arrest.[5]

This Court has held that when a defendant testifies, as Harris did here, after his statements have been improperly admitted, "[o]nly after a *Harrison/Anson* analysis does the court proceed to a harmless error analysis." *Lemoine,* 345 Wis. 2d 171, ¶ 36. In this case, the circuit court never had an opportunity to make the findings of fact required under a *Harrison/Anson* analysis. Accordingly, if this Court agrees with Harris on the suppression issue, it should remand this case to the circuit court to make appropriate factual findings and conduct a *Harrison/Anson* analysis. Of course, if this Court concludes, as the State argues, that Harris'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.

[5] Harris appealed the trial court's decision to admit these statements, and the court of appeals affirmed. Harris does not reprise this argument to this Court, in effect conceding the point.

Conclusion

For all the reasons stated above, the State asks this Court to affirm the court of appeals, affirming the judgment of conviction.

Dated this 22nd day of June, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 5,041 words.

_____
DAVID H. PERLMAN
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 22nd day of June, 2016.

_____
DAVID H. PERLMAN
Assistant Attorney General