STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 4

Appeal No. 2015AP160 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JEANETTE M. JANUSIAK, Defendant-Appellant

APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE, ENTERED IN THE SAUK COUNTY CIRCUIT COURT, THE HONORABLE PATRICK J. TAGGART PRESIDING.

DEFENDANT-APPELLANT'S REPLY BRIEF

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ARGUMENT

I. State has not responded to arguments made by Janusiak and therefore must be deemed to have conceded such arguments.

It is well-established that where a party fails to directly respond to arguments such party must be deemed to have conceded the arguments. See **State v. Anker**, 2014 WI App 107, ¶2, ¶13, 357 Wis.2d 565, 855 N.W.2d 483. This Court will not abandon its neutrality to develop arguments for the parties. See **Id.** at ¶13.

In this case, the State has failed to respond to certain arguments made by Janusiak. First, as discussed in Janusiak's brief-in-chief at p.18, as this Court conducts its de novo review, it is the State that bears the burden of proving by a preponderance of the evidence that Janusiak's statements were voluntary. The State however wholly fails to address the preponderance of the evidence burden and explain what evidence sustains such burden.

Similarly, the State fails to examine the evidence in light of legal factors which bear upon the finding of whether the statement is voluntary. Quite simply, the State wholly fails to examine, as Janusiak does, the factors set forth in **State v. Hoppe**, 2003 WI 43, 261 Wis.2d 294, 661 N.W.2d 407.

The first considerations are the pressures imposed upon the defendant by law enforcement. **Id**. at ¶38. In this case, Janusiak, at pp.25-38 of her brief-in-chief, discusses with particularity the significance of Coppernoll's physical presence in the interrogation as well as specific statements made by Coppernoll, Stetler and Becker. The State however fails to respond to Janusiak's arguments about Coppernoll's presence in the interrogation and to Janusiak's arguments about the statements made by Coppernoll, Stetler and Becker. Curiously, the State does not even mention Coppernoll, Stetler or Becker in its brief. It is hard to conceive how the State can possibly persuade this Court that Coppernoll, Stetler and Becker did not place improper pressure on Janusiak when the State wholly fails to address their actions and statements. It is similarly hard to conceive how the State can possibly persuade this Court that the conduct of Coppernoll, Stetler and Becker was not impermissible when the State wholly fails to address such conduct in context of relevant case law. In this regard, Janusiak's brief-in chief at pp.18-25 discusses the conduct of Coppernoll, Stetler and Becker in reference to **Lynumn v. Illinois**, 372 U.S. 528, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963), **United States v. Tingle**, 658 F.2d 1332 (9th Cir. 1981), **Stanton v. Commonwealth**, 349 S.W.3d 914 (Ky.2011), **People v. Medina**, 25 P.3d

1216 (Colo. 2001), **People v. Richter**, 54 Mich. App. 598, 221 N.W.2d 429 (Mich. App. 1974), **State v. Brown**, 37 Kan. App.2d 726, 157 P.3d 655 (Kan. App. 2007). Janusiak recognizes that most of these authorities do not bind this Court. But Janusiak also believes that such authorities may be instructive or persuasive to this Court as they pertain to standards for voluntariness in the context of threats made or pressures applied by law enforcement involving a suspect's children. **Lynumn**, as a United States Supreme Court case, is however binding on this Court. See **State v. Beauchamp**, 2010 WI App 42, ¶17, 324 Wis.2d 162, 781 N.W.2d 254; **State v. Webster**, 114 Wis.2d 418, 426, 338 N.W.2d 474 (1983). Janusiak has argued that this Court "cannot square the holding in **Lynumn**, **Tingle**, **Richter**, **Medina**, **Brown**, and **Stanton**, with the facts of this case and make any conclusions other than that Janusiak's statements were coerced and involuntary." See Janusiak's brief-in-chief at p.44. The State's only response to Janusiak's argument based on **Lynumn** and the related cases is to argue, based on **Phillips v. State**, 29 Wis.2d 521, 530, 139 N.W.2d 41 (1966), that there is a "distinction between motivation and compulsion." See State's brief at p.7. If anything however, **Phillips** supports Janusiak's position not the State's. **Phillips** involved threats made to a 22 year old suspect about

taking his girlfriend into custody. **Id.** at 529. The Wisconsin Supreme Court characterized such threats as being "dangerously close to those disapproved in **Lynumn** (citation omitted). **Id**. at 530. As discussed in Janusiak's brief-in-chief at pp.35-37 and p.44, the conduct of Coppernoll, Stetler and Becker exceeded the conduct found to be impermissible in **Lynumn**, **Tingle**, **Richter**, **Medina**, **Brown**, and **Stanton.** If law enforcement's actions in **Phillips** were "dangerously close to those disapproved in **Lynumn**," law enforcement's actions in this case easily surpassed such standard.

With further respect to Coppernoll's presence in the interrogation and her statements to Janusiak, Janusiak has also argued that the trial court clearly erred in failing to consider such historical or evidentiary facts in its decision. See Janusiak's brief-in-chief at p.16. The State's brief wholly fails to address this argument.

Next, in terms of the pressures imposed by law enforcement, Janusiak has argued that the length of the interrogation and its custodial nature made the interrogation coercive. See Janusiak's brief-in-chief at pp.33-38. Nonetheless, the State wholly ignores Janusiak's argument as to the interrogation's length and custodial nature. It is hard to understand how the

State could persuade this Court that there was no improper pressure from law enforcement without discussing the length of the 7 hour interrogation especially in light of the authorities cited by Janusiak in her brief-in-chief at pp.33-34.

After considering the pressures brought upon the defendant by law enforcement, **Hoppe** requires that a court consider the personal characteristics of the defendant especially those which may have made the defendant "uncommonly susceptible" to police pressures. See **State v. Hoppe**, 2003 WI 43 at ¶39 and ¶46. Toward this end, Janusiak has argued at pp.38-44 of her brief-in-chief that her status as a mother of four young children and her advanced pregnancy made her especially vulnerable to the pressures placed upon her by law enforcement. The State has not responded to Janusiak's argument in this regard nor has it even addressed the "personal characteristics" factors in general.

Perhaps the State has failed to respond to Janusiak's arguments because it knows that based on the facts and the applicable law it cannot make any credible counter-arguments. For whatever the reason, this Court should take

the State's failure to respond to Janusiak's arguments as a tacit admission of such arguments. See **Industrial Risk Insurers v. American Eng'g Testing, Inc.,** 2009 WI App 62,¶25, 318 Wis.2d 148, 769 N.W.2d 82.

II. Janusiak's statements were the result of improper pressure and coercion.

In pages 2 through 7 of the State's brief, the State attempts to fashion arguments that Janusiak's statements were not coerced. Janusiak will respond to such arguments here.

First, the State asserts that Janusiak's statements were actually exculpatory and not a confession. See State's brief at p.2. The State argues that Janusiak made the statements in order to "deflect any suggestion that she was guilty of a criminal act." See State's brief at p.2. Such argument misses its mark. As even the State ultimately recognizes, see State's brief at p.2, an ostensibly exculpatory statement can ultimately be incriminating. Indeed, it is a specific interrogation technique to posit an exculpatory scenario to a defendant in the hope of eliciting an incriminating statement. We know from the Reid authors

that "Step 2" in the "Reid Nine Steps of Interrogation" is "theme development:"

> This involves, in large measure, presenting a "moral excuse" for the suspect's commission of the offense or minimizing the moral implications of the conduct. Some themes may offer a "crutch" for the suspect as he moves toward a confession.[1]

The Reid authors enumerate at least 7 different "themes" which can be presented to suspects:

> "Theme 1: Sympathize with the Suspect by Saying that Anyone Else Under Similar Conditions or Circumstances Might Have Done the Same Thing;"
>
> "Theme 2: Reduce the Suspect's Feeling of Guilt by Minimizing the Moral Seriousness of the Offense;"
>
> "Theme 3: Suggest a Less Revolting and More Morally Acceptable Motivation or Reason for the Offense Than That Which Is Known or Presumed;"
>
> "Theme 4: Sympathize with Suspect by Condemning Others;"
>
> "Theme 5: Appeal to Suspect's Pride by Well-Selected Flattery;:
>
> "Theme 6: Point out Possibility of Exaggeration on Part of Accuser or Victim, or Exaggerate Nature and Seriousness of the Event Itself;"
>
> "Theme 7: Point out to the Suspect Grave Consequences and Futility of Continuation of Criminal Behavior."[2]

In this case, Stetler presented a theme based on accidental scenarios which possibly explained P.S.'s injuries, for example that P.S. fell or that Janusiak dropped P.S. 111:153. In accordance with such theme, Stetler informed

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[1] Inbau, Fred. E, John E., Buckley, Joseph P., & Jayne, Brian C., Criminal Interrogation and Confessions, (5th Ed. 2013) at 208.
[2] Id. at 210, 211, 214, 230, 232, 238.

Janusiak that "those are accidents, those aren't intentional things, you know, it's not what people go to, get in trouble for…" 111:153. Of course, Janusiak adopted the theme presented by Stetler which was the intent of the interrogation strategy. In adopting the theme, Janusiak made incriminating statements. That Janusiak's statements were not an actual confession of the crime charged by the State is irrelevant. If anything, Janusiak's statements made in the course of adopting Stetler's themes show that such statements were plainly not voluntary but part and parcel of a sophisticated interrogation technique.

The State next argues, based on **Herring v. United States,** 555 U.S. 135 (2009) that "the mere fact that the police acted improperly does not necessarily mean that evidence obtained following that impropriety should be suppressed" and that "suppression should be a last resort instead of a first impulse." The State's reliance on **Herring** is misplaced. **Herring** involved the issue of whether a search was reasonable for purposes of the 4th Amendment. The **Herring** court acknowledged that there were certain exceptions to exclusionary rule such as the "good-faith" exception. **Herring v. United States**, 555 U.S. at 142-143. The State fails to cite any

case or articulate any recognized legal theory under which an involuntary statement may be admissible under an exception to the general rule of inadmissibility. Janusiak maintains there is none. The question of voluntariness is a threshold issue. If a defendant's statements are not voluntary, their admission violates due process under the Fourteenth Amendment of U.S. Constitution and Article I, Section 8 of the Wisconsin Constitution. **State v. Hoppe**, 2003 WI 43 at ¶36.

The State next argues that "The record shows that not only did the police not coerce Janusiak into making these statements, they actually tried to get Janusiak to abandon or retract them." See State's brief at p.4. Such argument is disingenuous and contradicted by the record. It is ludicrous to think that the police would insist on bringing Janusiak to the police station, conduct a 7 hour interrogation, involve a number of law enforcement personnel, and record the interrogation, if the police did not intend to use whatever tactics they could to obtain a confession or incriminating statement. Even the prosecutor himself admitted in closing argument that the purpose of the interrogation was to get Janusiak to make a confession. 96:1316.

The only fair and accurate reading of the record is that Janusiak, after 5 and one half hours of expressing a lack of knowledge as to P.S.'s injuries, finally became worn out by the interrogation tactics and embraced Stetler's and Becker's inducement of going home to her children if she "gave them something to work with." Janusiak then adopted Stetler's theme of a fall (111:153) and made the incriminating statements about such a fall (111:224). But the incriminating statements themselves are interspersed with other statements which plainly indicate that Janusiak was simply telling the police what she thought they wanted to hear:

"I don't know what you want me to tell you." 111:214.

"I'll lie cause I, do you know what I mean." 111:214.

"I don't even, you know what I mean, I don't even know, I'm guessing." 111:251.

"I am trying to tell you and you're telling me that I'm not. You know, I come out and tell you and it's still not enough." 111:263.

"Do you want me to tell you that I threw her and she (unintelligible)…" 111:268.

"I mean you want me to tell you I did something to her and I didn't." 111:269.

"What else do you want to know?" 111:270.

Clearly, law enforcement's tactics worked. Janusiak wanted to maintain custody of her children and she wanted to go home to them, so she gave Stetler and Becker "something to work with." As discussed in Janusiak's brief-in-chief at pp.45-49, that "something to work with" is more accurately called a "false compliant confession."

III. Error in admitting Janusiak's statements was not harmless.

The State's case against Janusiak was entirely circumstantial. There was no eyewitness testimony against Janusiak. There was no physical or biological evidence which directly linked Janusiak to P.S.'s injuries or death. There was no character evidence which depicted any ill will, malice or bad intentions on behalf of Janusiak. Given the paucity of direct evidence against Janusiak, there is little wonder why law enforcement spent over 7 hours attempting to extract a confession from her. Without any incriminating statements or a confession, Janusiak arguably would not even have been charged with the offense. Yet immediately after obtaining Janusiak's statements, the State charged her with first degree intentional homicide. At trial, Janusiak's statements took on a prominent role. The prosecutor referred to Janusiak's statements extensively during opening

statement, 89:70-74, and even more extensively during closing argument, 96:1315, 1316, 1325, 1326, 1327, 1328, 1329, 1330, 1331, 1335. Of course, the prosecutor played the entire 7 hour CD for the jury. 91:624. The admission of the statements allowed the State to comment about Janusiak's demeanor, 96:1326, the inconsistencies in Janusiak's statements, 96:1315-1326, and Janusiak's perceived untruthfulness. The prosecutor characterized the inconsistencies as "lie, after lie, after lie, after lie." 96:1326. The State's position that the statements did not "contribute" to Janusiak's conviction, is therefore plainly contradicted by the prominent role the State gave such statements at trial.

In discussing the evidence of P.S.'s injuries, the State argues that "(t)he only reasonable inference from this undisputed evidence is that the baby was fatally injured when her head was bashed against the wall at least three separate times." See State's brief at p.9. The State additionally argues that Janusiak was the only adult in house when the child was injured, and was therefore the only person who could have possibly inflicted the injuries sustained by the child. See State's brief at p.11. Contrary to the State's position, other inferences may be easily drawn from the evidence. The

fingertip contusions on the chest, abdomen and hips could be explained by the back thrusts and CPR performed by the first responders. 89:178,180. As for the skull fractures, the timing of such injuries was plainly disputed at trial. Dr. John Plunkett, Janusiak's expert, dated the injuries at 2 days prior to collapse. 94:1120. The State's evidence urged that the child died from an acute head injury that was immediately lethal. 91:548, 93:866, 94:1054-55. Even if we accept, arguendo, the State's evidence regarding the timing of the injuries and the immediate onset of death, such evidence still allows for other inferences as to the infliction of the injuries. The three skull fractures could have been inflicted during contact with Janusiak's 7 year old, 5 year old, or even 4 year old child. Dr. Plunkett testified that it does not take a great deal of force to fracture a child's skull. 94:1126. Dr. Plunkett testified that it takes 10 percent of the force per unit area needed to fracture an adult's skull. 94:1126.[3] In Janusiak's interrogation, she told Stetler that the children were all alone in the bedroom, 111:239, and that one of the children could have thrown something at P.S. or dropped her

[3] Studies indicate that the resistance to fracture for an adult is 11 times greater than for the neonate. See A.K. Ommaya, W. Goldsmith & L. Thibault, Biomechanics and neuropathology of adult and paediatric head injury. *British Journal of Neurosurgery* 2002; 16(3) 220-242 at 223. In one study, a researcher dropped 15 infant cadavers on stone, tile, carpeted and linoleum covered floors. See id. at 229. The fall heights were consistently 82 cm with the cadaver in a horizontal position with head strike at the parieto-occipital zone. Id. Fractures were found in every case. Id.

while playing rough. 111:250,252,314. It is also possible that the 7 year old, 5 year old or even 4 year old, could have repeatedly hit P.S. in the head with some type of heavy object. This inference would in fact be entirely consistent with the State's own medical evidence regarding the rapid onset of death. This inference would similarly be consistent with the washcloth with P.S.'s blood on it and the trace amounts of blood found on the wall. Just because a person cleans up blood does not mean he or she caused it to spill. Of course, investigators also found bloodstain from one of Janusiak's own children, Kendall, 94:741-742, so the mere presence of bloodstain means little. Finally, any inference that one of Janusiak's children inflicted the fatal injuries would be consistent with an effort by Janusiak to protect that child. As for the injuries to the child's rectum and anal areas, the State fails to explain why the mother herself did not notice such injuries or seek medical treatment for them. If the injuries were not apparent or cause for concern to the mother, it is unclear why the State thinks that "no one could have honestly mistaken" them.

To establish harmless error, the State must prove beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the

error. **State v. Jorgenson**, 2008 WI 60,¶23, 310 Wis.2d 138, 754 N.W.2d 77. The State has not met such burden.

Conclusion

For all reasons stated in this brief and Janusiak's brief-in-chief, this Court should vacate the judgment of conviction and sentence, and remand the case for a new trial with instructions that Janusiak's statements are to be suppressed as involuntary.

Dated this _____day of _____ 2015.

Respectfully submitted,
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CERTIFICATION

I hereby certify that this petition meets the form and length requirements of Wis. Stat. Rules 909.62(4) and 809.19(8)(b) and (d) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 2978 words.

Dated this _____day of August 2015

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic petition 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 upon all opposing parties.

Dated this ____day of August 2015.

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