STATE OF WISCONSIN

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

DISTRICT I

Case No. 2015AP0590

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHNNIE MERTICE WESLEY,

Defendant-Appellant

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

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Police questioned 20-year-old Johnnie Wesley three separate times within a 36 hour period regarding a homicide. The first time police ceased questioning and took him back to his cell after Johnnie said "I ain't making no statements about no murder" and "There ain't nothing to talk about." The second time the police ceased questioning after Johnnie stated again that he did not want to talk. The third time, despite Johnnie's statements that "Ain't nothing to talk about doe," "I ain't got shit to say about no homicide" and "Can I go back to my cell right now," the police continued to question Johnnie and he confessed. Did the police fail to scrupulously honor Johnnie's requests to remain silent?

   The circuit court answered no.

2. Did Johnnie Wesley unequivocally invoke his right to silence when he said "Ain't nothing to talk about doe," "I ain't got shit to say about no homicide," and "Can I go back to my cell right now?"

   The circuit court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument would be welcomed if it would helpful to the court. The issue of whether Johnnie Wesley invoked his right to remain silent is fact-specific, and therefore, publication is likely not warranted.

STATEMENT OF THE CASE AND FACTS

A. Introduction

On February 3, 2014, Officer Thomas Ozelli was dispatched to a shooting. (2:1). At the scene, Ozelli observed Bruce Lloyd laying in the street. (*Id.*) Nearby was a parked car with the driver's side door open and keys in the ignition. (*Id.*). Inside the car, the music was playing "at a high volume." (*Id.*). Bruce was transported to the hospital where he was pronounced dead. (*Id.*). Dr. Wieslawa Tlomak conducted an autopsy and found Bruce sustained a gunshot wound to his "right lower abdomen pelvic area." (*Id.*). Dr. Tlomak stated the cause of death was "exsanguinations, loss of blood, from this gunshot wound." (*Id.*).

Two days later, on February 5, 2014, police arrested and took into custody 20-year-old Johnnie Wesley. (29:3; App. 105). After spending the night in jail, the following day, February 6, 2014, Johnnie was brought to an interrogation room and questioned regarding the homicide. (33:Exh. 1; App. 101). Within the next 36 hours, police questioned Johnnie two more times. (29:9, 19; App. 111, 121). The third time, after an hour and a half of questioning, Johnnie confessed. (33:Exh. 2:16:30; App. 102).

B. First Custodial Interrogation

On February 6, 2014, at approximately 11:43 a.m., Detective Katherine Spano interviewed Johnnie. (29:4; 33:Exh.1; App. 106, 101). Detective David Dalland was also present. (29:5, 17; App. 107, 119).

Spano asked Johnnie questions about his family background, personal background, and his health. (29:5; 33:Exh. 1:11:44-11:53; App. 107, 101).

After Johnnie smoked several cigarettes and went to the bathroom, Spano told him that "there was a homicide around 28th and Kilbourn where a man was shot and he died" and "we have reason to believe you were responsible." (33:Exh.1:11:56:14-24; App. 101). The following exchange occurred:

> JOHNNIE: You got reason to believe I was responsible?
>
> SPANO: Yes—and that's what I wanna talk to you about okay? Umm—then—there's a lot of information coming out—there's a lot of—a lot of stuff going on with this case—
>
> JOHNNIE: About me?
>
> SPANO: Yea—about you—but before I can talk to you about all of that—I have to have an understanding with you—that you're willing to chat with us about it.
>
> JOHNNIE: Hell nahh-cuz I ain't kill nobody.
>
> SPANO: Okay—so you don't want to talk to us about it—you don't want to answer my questions?
>
> JOHNNIE: I ain't making no statements about no murder—
>
> SPANO: Okay.
>
> JOHNNIE: Cuz I ain't kill nobody.
>
> SPANO: Okay—so you don't want to—so you don't wanna even hear me—can I at least read you your rights so you understand your rights?
>
> JOHNNIE: I don't know wanna know nothing about no—
>
> SPANO: Okay

> JOHNNIE: —murder cuz I ain't kill nobody.
>
> SPANO: Okay—so you don't want to talk to me right now?
>
> JOHNNIE: About no murder no.
>
> SPANO: Okay. You don't want to hear the facts or the story—
>
> JOHNNIE: About no murder no—
>
> SPANO: —or the reasons of why we believe you were responsible?
>
> JOHNNIE: No.
>
> SPANO: Okay—that's your right—and that's one of your rights that I was going to tell you right here, okay. So what that means Johnnie, because you don't want to talk to us, I—I—I—I can't talk to you obviously—that's your right—and I'm gonna respect your rights—so umm—I will not—I will not be able to get your side of the story—that's okay with me….

(33:Exh.1:11:56:24-11:57:32; App. 102) (emphasis added).

Subsequently, Spano told Johnnie that she was going to "leave it up" to him if he wanted to talk to her and that Johnnie would be taken back to the cell. The following exchange occurred:

> SPANO: Yeah and I'd love to tell you about everything so you can defend yourself—but you –you ask not to talk to me—I'm gonna—I'm gonna leave it up to you to kinda tell me if you wanna continue talking with me

> JOHNNIE: So I'm finna[1] go back to my cell—and—just just wait basically—time—waiting.
>
> …
>
> SPANO: But if you change your mind and you wanna talk to us and tell us your side of the story—right now I understand you don't want to talk. Then we won't talk okay?
>
> JOHNNIE: There ain't nothing to talk about.
>
> SPANO: Okay, alright, well….
>
> SPANO:… so when you wanna talk you let me know okay? Alright. I'm gonna take you back to the cell. If you change your mind, you just let the jailer know okay?

(33:Exh. 1:11:58:46-56;11:59:46-12:00:04-12:02:06-15; App. 101).

The interrogation was terminated at approximately 12:02 p.m. (33:Exh. 1:12:02; App. 101). ***Miranda*** warnings were never given.

C. Second Custodial Interrogation

Approximately eight hours later, on February 6, 2014 at 9:27 p.m., Detective Kevin Klemstein spoke to Johnnie and Johnnie cut off questioning. (29:9; App. 111). According to the State, no recording exists of this second interview because Johnnie said he did not want to talk.[2] (29:9, 15; App. 111,

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[1] "Finna" generally means "going to." *See www.urbandictionary.com* (last visited at July 17, 2015).

[2] The State and the defense disputed whether Johnnie made this statement in his cell or in the interrogation room. (29:9). The circuit court did not resolve this dispute. (*See* 29:36-38).

117). There is no indication from the record that Johnnie requested to speak to the police.

D. Third Custodial Interrogation

The following day, February 7, 2014, at approximately 2:50 p.m., police brought Johnnie from his cell to the interrogation room. (29:11; App. 113). Johnnie did not request to speak to police. (*Id.*).

Detective David Dalland, who was present during the first interview, and Detective Kent Corbett spoke to Johnnie. (29:10; App. 112).The following exchange occurred:

> DALLARD: …Look, listen, let me get through what I need to do first and then then we can talk if that's what you want. Okay. Is that fair?
>
> JOHNNIE: Ain't nothing to talk about doe[3] That's what im sayin. Ya'll steady questioning me about nothing I don't know nothing about. I don't do nothing. I sit in the house all day. I don't do nothing.
>
> DALLARD: And if that's what you want to tell me, then that that is your right and I am going to listen. Okay. But like I said, I have our little rules that we have to go by okay?
>
> JOHNNIE: yeah…I feel where you coming from and all but shit
>
> DALLARD: Just lis…just listen..jus jus just hear me up. Have I treated you with anything less than respect at all times?
>
> JOHNNIE: I might. If I be getting charged with this

[3] "Doe" can mean: (1) an alternative term for the word "though"; or (2) a variation of the words "bro, homie, dog, friend, acquaintance." *See www.urbandictionary.com* (last visited at July 17, 2015).

(3:Exh. 2:15:01:45-15:02:15; App. 102) (emphasis added).

After ***Miranda*** warnings were read to Johnnie, the following exchange occurred:

> DALLARD: Okay. Having those rights in line is it okay if we -
>
> JOHNNIE: Ughh-you can say -
>
> DALLARD: exchange information. Now can I ask you questions?
>
> JOHNNIE: You can say what you want, but it just, I ain't got shit to say about no homicide. I don't kill people. I never attempted to kill nobody I never…I don't do that. I'm not that type of person. I just lost my momma November 7.
>
> DALLARD: And I am sorry for your loss.
>
> JOHNNIE: I've been in the house ever since then. I go to my AODA classes, parenting classes, I got a son in foster care I am trying to get out.
>
> DALLARD: Okay.
>
> JOHNNIE: I go in that shit every day.
>
> DALLARD: Let me just make sure that its okay. Is it okay if I ask you some questions, and we have an exchange of information?
>
> JOHNNIE: Information about what?
>
> DALLARD: Well, you can pick and choose whatever you choose to respond to, and what you don't want to respond to. I'm asking for a yes or no. Do you—are you—

JOHNNIE: I aint got shit to talk about no homicide because I ain't know nothing about it. That's why im telling you now. You asking me questions about this homicide case I know nothing about it officer.

DALLARD: Okay.

JOHNNIE: Honest to God truth I don't know nothing.

DALLARD: Is it okay if we can exchange some information and maybe I can answer some of your questions and then maybe you can pick and choose and answer some of mine. Is that fair?

JOHNNIE: It don't matter cuz I just—if you guys talking about this homicide I don't know that's why you don't need it—I don't know—

DALLARD: Okay.

JOHNNIE: the honest to God truth—I can't answer something I don't know nothing about.

DALLARD: Okay—well that's fair—as long as you're willing to talk to me, I think we're good. You don't need any chips?

JOHNNIE: I can't eat cuz im—dis environment—just I ain't ate shit since I been here.

(33:Exh.2:15:04:04-15:05:25).

At approximately 3:53 p.m., the following exchange occurred:

JOHNNIE: I don't know –that's what I'm trynna tell ya'll I don't know shit about shit—I been telling ya'll that for two days I don't know. All I know is ya'll got the wrong person. I still ain't got my Newport—and we've been sitting here talking about at least 30 minutes. Chips and water but no Newport.

> CORBETT: You're two up on me? I don't have water or chips.
>
> JOHNNIE: (Inaudible 15:53:22) Can I go back to my cell now?
>
> CORBETT: Is that really going to help you?
>
> JOHNNIE: Is me telling y'all something I don't know going to help me? Well, it isn't going to help me. But me finding some information can that help me?
>
> DALLAND: Where were you? How can you vouch for where you were when this happened?
>
> JOHNNIE: At my granny house.

(33:Exh. 2:15:52:51-15:53:50; App. 102) (emphasis added).

At approximately 4:30 p.m., an hour and a half after the interview began, Detective Dalland asked Johnnie if it was in the plans that someone would get shot that night. (33:Exh. 2: 16:3; App. 102). Johnnie responded "no." (*Id.*). Detective Dalland then asked if it was in the plans that someone would get robbed that night. Johnnie responded "Yeah, but I didn't go to the robbery, but he shot himself…." (*Id.*). Johnnie then made additional incriminating statements.

The interrogation was terminated at approximately 6:31 p.m. (29:10; App. 112).

E. Complaint

Subsequently, Johnnie was charged with one count of felony murder, contrary to Wis. Stat. § 940.03. (2:1). According to the complaint, Johnnie caused the death of Bruce, while attempting to commit armed robbery, party to a crime, contrary to Wis. Stat. §§ 943.32(2) & 939.05. (*Id.*).

According to the complaint, Johnnie made the following statements:

- He planned to rob Bruce of his marijuana and whatever else he had.
- On the day of the homicide, Bruce told Johnnie to meet him in front of Johnnie's girlfriend's apartment.
- Johnnie took his black colored .45 caliber pistol with him.
- Johnnie saw Bruce pull up in his white Intrepid.
- Bruce told Johnnie to come out.
- Johnnie came out and went into the front passenger seat of Bruce's car.
- Bruce gave Johnnie a three gram bag of marijuana and stated he wanted $50 in return.
- Johnnie then "upped the pistol" on Bruce to rob him of whatever else he had.
- Bruce grabbed the barrel of the gun and "they began to struggle over the gun and the gun went off."
- Bruce began screaming "Ah help me" and got out of the Intrepid.
- Johnnie got out of the passenger seat and ran.
- Johnnie stated that he did not intend on shooting Bruce, only wanted to rob him.
- Johnnie stated that he was broke and needed the money so he planned on robbing Bruce.

(2:2; *see also*, 26:8-9, 11).

F. Suppression Hearing

Trial counsel filed a motion to suppress "all statements, oral or written, allegedly made by the defendant" and "exclusion from use as evidence all derivative evidence." (7:1-2). The motion argued that Johnnie's statements "were not voluntarily given in that they did not reflect deliberateness of choice, but rather, a conspicuously unequal confrontation in which repeated and persistent pressures were brought to bear on [Johnnie] by law enforcement officers until they exceeded [Johnnie's] ability to resist." (7:3). The motion noted that Johnnie stated words to the effect, "I ain't got shit to say," and that Johnnie requested to "go back to his cell," nonetheless law enforcement continued to ask questions. (*Id.*). Trial counsel attached the videotaped recordings of the first interrogation and the third interrogation. (*Id.*).

In response, the State argued that Johnnie's statements were voluntary. (8:4-7). The State also argued that Johnnie's statement that "I ain't got no shit to say about no homicide…" meant that Johnnie was denying involvement and Johnnie's statement "Can I go back to my cell now?" was analogous to asking "are we done now?" (8:7).

A hearing was held. The videotapes of the first and third interrogation were moved into evidence. (29:28; App. 130). Detective Katherine Spano and Detective Kent Corbett testified for the State. Detective Spano, who was present at the first interrogation, testified that Johnnie "said that he would not answer any questions. That he refused to talk with us about any – any homicide because he was not involved." (29:6; App. 108). Spano stopped the questioning. (*Id.)*.

Detective Klemstein, who questioned Johnnie the second time, was not present. The State asked if the defense would stipulate that "On February 6, at 9:27 p.m.…Detective

Klemstein went to talk to the defendant. And the defendant said 'I do not want to talk.' And then Detective Klemstain did not bring him downstairs. He just left him in the cell." (29:9; App. 111).

After consulting with Johnnie, trial counsel stated that "…Mr. Wesley is not prepared to stipulate to that because he was taken to the interview room. He did not refuse to leave his cell." (29:9; App. 111).

Detective Corbett, who was present at the third interrogation, testified that there were no threats or promises made to Johnnie. (29:14-15; App. 116-117). Corbett testified that he interpreted Johnnie's statements as an unwillingness to offer any information, not an unwillingness to speak with the officers. (29:18-19, 25; App. 120-121, 127). When Johnnie said, "Can I go back to my cell now," Corbett thought that Johnnie "may have thought that the interrogation was over because of the pause and the silence." (29:20, 26; App. 122, 128).

The circuit court, the Honorable Jeffrey A. Wagner, denied the motion to suppress. The circuit court found that Johnnie "had the ability to resist," there was no misconduct on the part of law enforcement, and his statements were voluntary. (29:36-38; App. 138-140). In addition, the circuit court found that he did not unequivocally invoke the right to remain silent. (29:37; App. 139). The circuit court stated in pertinent part that:

> And in that third interview, he may have stated that the statement that he wasn't involved in – and I can't remember the exact terminology – but the Court doesn't take that as an unequivocal assertion of his right to silence. Nor does the Court believe that there was an unequivicable right to assert his right to silence when he

> suggested that he wanted to go back to the cell based on the totality of the circumstances, because it was an ongoing conversation with law enforcement and then of the defendant.
>
> And the defendant, I believe, if I recall correctly, viewed some photographs and had some discussion about those photographs, had some discussion about his girlfriend.
>
> And correct me if I'm wrong, whether or not she was in custody or not in custody, there was a number of different colloquies that were going on that included questions from the defendant to law enforcement, where law enforcement tried to answer those questions and continued to question the defendant.

(29:37-38; App. 139-140).

G. Plea and Sentencing

On May 27, 2014, Mr. Wesley pled guilty to felony murder with the underlying crime of attempted armed robbery, party to a crime. (30:10). In exchange, the State agreed to recommend "substantial confinement in the Wisconsin State Prison System leaving that within the good wisdom and discretion of the court." (30:9; 10:2). At the time of sentencing, the State "would be free to argue any mitigating or aggravating facts of the case," the family of the victim would be "free to make any recommendation they want," the defense would be "free to argue any sentence," and Mr. Wesley would pay a reasonable restitution. (30:9-10).

On July 2, 2014, at sentencing, the Honorable Jeffrey A. Wagner imposed a prison sentence of 27 years (20 years confinement and 7 years supervision). (31:27; 1:1).

Additional relevant facts are referenced below.

ARGUMENT

I. Police Did Not Scrupulously Honor Johnnie Wesley's Invocation of His Right to Remain Silent.

A. Legal principles and standard of review.

"Both the United States and Wisconsin Constitutions protect persons from state compelled self-incrimination." ***State v. Cummings***, 2014 WI 88, ¶ 46, 357 Wis. 2d 1, 850 N.W.2d 915 (citation omitted); see also, U.S. Const. amend. V; Wis. Const. art. I, § 8.

"The critical safeguard of the right to silence is the right to terminate questioning by invocation of the right to silence." ***State v. Hartwig***, 123 Wis. 2d 278, 284, 366 N.W.2d 866 (1985). After a suspect has invoked the right to silence, the State may interrogate him again if his right to silence was "scrupulously honored." ***Id***.

In ***Michigan v. Mosley***, 423 U.S. 96, 104-07 (1975), the United States Supreme Court set forth several factors to analyze whether an individual's rights were scrupulously honored, or if, instead, police interrogation resulted in a constitutional violation. The five ***Mosley*** factors are:

> (1) The original interrogation was promptly terminated. (2) The interrogation was resumed only after the passage of a significant period of time (In ***Mosley*** it was two hours) (3) The suspect was given complete Miranda warnings at the outset of the second interrogation. (4) A different officer resumed the questioning. (5) The second interrogation was limited to a crime that was not the subject of the earlier interrogation.

Hartwig, 123 Wis. 2d 278, 284.

The ***Mosley*** factors do not establish a test which can be "woodenly" applied. ***Id.*** at 285. Rather, the factors provide a framework of analysis to aid in determining whether a defendant's right to silence was scrupulously honored. ***Id.*** at 284-85.

A determination of whether a defendant's right to silence was scrupulously honored requires the application of constitutional principles to the facts of the case and is subject to independent review. See ***State v. McNeil***, 155 Wis. 2d 24, 44, 454 N.W.2d 742 (1990).

B. Police did not scrupulously honor Johnnie's invocation of the right to remain silent.

In this case, police did not scrupulously honor Johnnie's invocation of the right to remain silent.

After spending the night in jail, Johnnie was interrogated three separate times in less than 36 hours regarding the same subject—the homicide. (33; 29:7, 9, 11; App. 106, 111, 113). *Contra with* ***State v. McNeil***, 155 Wis. 2d 24, 454 N.W.2d 742 (1990) (noting in its discussion of the ***Mosley*** factors that the second and subsequent interrogations of the defendant were restricted to a crime that had not been the subject of the initial interrogation).

The first interrogation in this case was terminated at approximately 12:02 p.m. on February 6, 2014, after Johnnie invoked his right to silence. (29:6; App. 108). No ***Miranda*** warnings were given. (*Id.*). That same day, less than ten hours later, police again attempted to question Johnnie. (29:9, 15; App. 111, 117). There is no indication from the record that ***Miranda*** warnings were given. Johnnie again invoked his right to remain silent. (*Id.*). Nonetheless, the following day, February 7, 2014 at approximately 3:00 p.m., police

questioned Johnnie a third time regarding the homicide. (29:11; App. 113). At the outset of the third interrogation, Johnnie said "Ain't nothing to talk about doe." (33:Exh. 2:15:01; App. 102). The officers continued to speak to Johnnie. ***Miranda*** warnings were given. Johnnie then said "I ain't got shit to say about no homicide," and later "Can I go back to my cell now?" (33:Exh. 2:15:04, 15:53; App. 102). However, the officers did not cease questioning. (*Id.*). An hour and a half after the interrogation started, Johnnie confessed. (*Id.*).

Moreover, the same officer, Detective Dallard, was present during the first interrogation and the third interrogation. (29:5, 10, 17; App. 107, 119, 112). A "defendant receives little assurance that his invoked right to silence will be honored when the officer who had just questioned him and who was informed of the defendant's desire to remain silence is present as another officer again questions the defendant." See ***State v. Hartwig***, 123 Wis. 2d 278, 285, 366 N.W.2d 866 (1985).

In addition, significantly, during the third interrogation, prior to his confession, Johnnie used language similar to the language he used in the first interrogation to cut off questioning. During the first interrogation, Johnnie said "I ain't making no statements about no murder" and "There ain't nothing to talk about" and police ceased questioning. (33:Exh. 1:11:56-12:02; App. 101). During the third interrogation, Johnnie similarly stated "Ain't nothing to talk about doe," and "I ain't got shit to say about no homicide." (33:Exh. 2:15:01, 15:04; App. 102). However, unlike in the first interrogation, in the third interrogation, the police continued to question him.

This continued questioning in the third interrogation despite his statements—"Ain't nothing to talk about doe," and "I ain't got shit to say about no homicide"— coupled with the repeated and persistent attempts to question Johnnie, likely made it clear to Johnnie that regardless of what he said the police were not going to honor his right to remain silent.

Thus, in this case, the police failed to scrupulously honor Johnnie's invocation of his right to remain silent and this Court should reverse and order his statements suppressed.

II. Johnnie Wesley Unambiguously Invoked His Right to Remain Silent During the Third Interrogation When He Said "Ain't Nothing to Talk About Doe," "I Ain't Got Shit to Say About No Homicide," and "Can I Go Back to My Cell Now?"

A. Introduction.

A suspect must "unequivocally" invoke the right to remain silent in order to "cut off questioning." ***State v. Cummings***, 2014 WI 88, ¶ 48, 357 Wis. 2d 1, 850 N.W.2d 915; ***Berghuis v. Thompkins***, 560 U.S. 370, 398 (2010). Whether a suspect has unequivocally invoked the right to remain silent turns on the person's statements "[i]n the full context of [the] interrogation." *See* ***Cummings***, 357 Wis. 2d 1, ¶ 61. If a suspect's statement is susceptible to "reasonable competing inferences" as to its meaning, then the suspect did not sufficiently invoke the right to remain silent. ***State v. Markwardt***, 2007 WI App 242, ¶ 36, 306 Wis. 2d 420, 742 N.W.2d 546.

Once a suspect has invoked the right to remain silent "all police questioning must cease—unless the suspect later validly waives that right and 'initiates further communication'

with the police." ***State v. Ross***, 203 Wis. 2d 66, 74, 552 N.W.2d 428 (Ct. App. 1996).

As discussed below, in this case, during the third interrogation, Johnnie unequivocally invoked his right to remain silent when he said "Ain't nothing to talk about doe," "I ain't got shit to say about no homicide," and "Can I go back to my cell now?" Consequently, police should have ceased questioning.

B. This Court should independently determine whether Johnnie unequivocally invoked his right to remain silent.

When determining whether a defendant sufficiently invoked his right to remain silent, an appellate court engages in a two-step analysis. ***State v. Cummings***, 2014 WI 88, ¶ 44, 357 Wis. 2d 1, 850 N.W.2d 915. The circuit court's findings of evidentiary or historical facts are upheld unless clearly erroneous. ***Id.*** The application of constitutional principals to the facts is reviewed independently. ***Id***.

In this case, the parties did not present testimony to the circuit court regarding the precise words Johnnie used to invoke his right to remain silent. Rather, the videotapes of the first and third interrogation were moved into evidence. (29:28; App. 130). Because the recordings were admitted into evidence, this Court may make its own review of the recordings like any other evidence in the record. See ***State v. Billings***, 110 Wis. 2d 661, 671, 392 N.W.2d 192 (1983); ***State v. Walli***, 2011 WI App 86, ¶ 18, 334 Wis. 2d 402, 799 N.W.2d 898. Thus, this Court should independently review the recordings and decide whether the words Johnnie used were sufficient to invoke his right to silence.

C. Johnnie Wesley unequivocally invoked his right to remain silent when he said "Ain't nothing to talk about doe," "I ain't got shit to say about no homicide," and "Can I go back to my cell now?"

There is no single accepted way or phrase to invoke the right to remain silent. "'a suspect need not speak with the discrimination of an Oxford don,' but must articulate his or her desire to remain silent or cut off questioning 'sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be' an invocation of the right to remain silent." ***State v. Markwardt***, 2007 WI App 242, ¶ 28, 306 Wis. 2d 420, 742 N.W.2d 546 (quotation omitted). As one appellate court has stated, defendants do not have "the duty of uttering the talismanic incantation: 'I hereby invoke my constitutional rights pursuant to the United States Supreme Court decision in ***Miranda v. Arizona***.'" ***People v. Carey***, 183 Cal. App. 3d 99, 104-05, 227 Cal. Rptr. 813 (Cal. Ct. App. 1986).

Here, Johnnie's statements "Ain't nothing to talk about doe," "I ain't got shit to say about no homicide," and "Can I go back to my cell now?" made it sufficiently clear that he wanted to remain silent and the interrogation needed to stop. *See, e.g.*, ***Carey***, 183 Cal. App. 3d 99, 104-05 (finding "I ain't got nothin' to say" invoked the right to remain silent); ***Martin v. State***, 987 So.2d 1240, 1241 (Fla. Dist. Ct. App. 2008) (defendant unequivocally invoked his right to silence when he said "Really I ain't got nothing to say. I really don't got nothing to say," and later "nothing to talk about" and "nothing for me to say."); ***Buster v. Commonwealth***, 364 S.W.3d 157, 163 (Ky. 2012) (finding unequivocal assertion of the right to remain silent when interrogator testified that the defendant said "she did not have nothing to say to me").

While there is no published law in Wisconsin addressing Johnnie's precise statements, four cases—***State v. Goetsch***, 186 Wis. 2d 1, 519 N.W.2d 634 (Ct. App. 1994), ***State v. Markwardt***, 2007 WI App 242, 306 Wis. 2d 420, 742 N.W.2d 546, ***State v. Smith***, 2014 WI 88, 357 Wis. 2d 1, 850 N.W.2d 915, and ***State v. Cummings***, 2014 WI 88, 357 Wis. 2d 1, 850 N.W.2d 915—have addressed similar statements.

In ***Goetsch***, the defendant told the police "I don't know, I don't know, I don't want to talk about this anymore, I've told you, I've told you everything I can tell you. You just ask me any questions and I just want to get out of here. Throw me in jail, I don't want to think about this." 186 Wis. 2d 1, 7. This Court held that the defendant unambiguously invoked his right to silence because his statement in the context of the entire interrogation made it clear that he "did not consent to continued questioning." ***Id.***, at 8.

In ***Markwardt***, the defendant simply told the police "Then put me in jail. Just get me out of here. I don't want to sit here anymore, alright. I've been through enough today." 306 Wis. 2d 420, ¶ 35. This Court held that because the statement was made during a sequence of verbal "fencing," the statement was not an unequivocal invocation of the right to remain silent. ***Id.***, ¶ 36.

Most recently, the Wisconsin Supreme Court examined potential invocations of the right to remain silent in ***State v. Smith***, 2014 WI 88, 357 Wis. 2d 1, 850 N.W.2d 915, and in ***State v. Cummings***, 2014 WI 88, 357 Wis. 2d 1, 850 N.W.2d 915.

In ***Smith***, the Wisconsin Supreme Court considered whether the statement—"See, I don't want to talk about, I don't want to talk about this. I don't know nothing about this"—was an unequivocal invocation of the right to remain

silent. 357 Wis. 2d 1, ¶ 60 (emphasis added). Stating that this was a "relatively close call," the Court concluded that "in the full context of his interrogation," Smith's statements did not unequivocally invoke his right to remain silent. ***Id.***, ¶ 61. The Court found in pertinent part that "[w]hen placed in context it is not clear whether Smith's statements were intended to cut off questioning about the robberies, cut off questioning about the minivan, or cut off questioning entirely…. In some instances Smith seems to mean the van when he uses the words 'this' or 'that,' but in other instances it seems he means the robberies." ***Id.***, ¶¶ 62-63. In addition, the Court noted that "while 'I don't want to talk about this' seems to indicate a desire to cut off questioning, 'I don't know nothing about this' is an exculpatory statement proclaiming Smith's innocence. Such a proclamation of innocence is incompatible with a desire to cut off questioning." ***Id.***, ¶ 64.

In ***Cummings***, the Wisconsin Supreme Court examined whether the statement "Well, then, take me to my cell. Why waste your time? Ya know?" was an unequivocal invocation of the right to remain silent. 357 Wis. 2d 1, ¶ 53. The Court found that Cummings' statement was "more similar, in terms of context," to the statement in ***Markwardt*** than in ***Goetsch***. ***Id.***, ¶ 58. The Court stated that, like in ***Markwardt***, Cumming's statement "occurred during a period of verbal back and forth between Cummings and the officers," and thus was subject to competing inferences." ***Id.***, ¶¶ 57-59. In contrast, in ***Goetsch***, the suspect "in additional to referencing jail, clearly stated that he did not wish to speak with police, " expressed exhaustion and disengaged from the conversation, and had nothing to gain from being thrown in jail except the end of the interview. ***Id.***, ¶ 57.

In this case, the "full context" of the interrogation reflects that Johnnie unequivocally invoked his right to

remain silent. Johnnie's statements "Ain't nothing to talk about doe," "I ain't got shit to say about no homicide," and "Can I go back to my cell now?" are most similar to the statements in ***Goetsch***. Like in ***Goetsch*** (and unlike in ***Markwardt*** and ***Cummings***), Johnnie clearly expressed a desire not to speak to the police by stating "Ain't nothing to talk about doe" and "Ain't got no shit to say about no homicide"—and also requested to go back to his cell.

Moreover, unlike in ***Smith***, Johnnie's statements were clearly intended to cut off questioning entirely, not selectively. The focus in this case was a single crime—a homicide. Johnnie's statements "Ain't nothing to talk about doe," and "I ain't got shit to say about no homicide," clearly were intended to cut off questioning entirely, not selectively. Contrast also with ***State v. Wright***, 196 Wis. 2d 149, 156-58, 537 N.W.2d 134 (Ct. App. 1995) (finding the statement "I'm going to do what [the public defender] told me and plead the Fifth on that one" a selective refusal).

Therefore, Johnnie unequivocally invoked his right to remain silent and questioning should have ceased. This Court should reverse and suppress Johnnie's statements.

CONCLUSION

For the reasons stated, Johnnie Wesley respectfully requests that this court vacate the judgment of conviction, reverse the circuit court's denial of the suppression motion, and suppress all statements, and the fruits of those statements, made subsequent to the invocation of his right to silence.

Dated this 17th day of July, 2015.

Respectfully submitted,

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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 5,322 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 this 17th day of July, 2015.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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