STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP590-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHNNIE MERTICE WESLEY,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT
THE HONORABLE JEFFREY A. WAGNER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent, State of Wisconsin, requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent, and because resolution of this appeal requires only

the application of well-established precedent to the facts of the case.

STATEMENT OF THE CASE, FACTS AND PROCEDURAL HISTORY

As respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2. Instead, the State will present additional facts in the "Argument" portion of its brief

ARGUMENT

I. WESLEY DID NOT UNEQUIVOCALLY INVOKE HIS FIFTH AMENDMENT RIGHT TO SILENCE. IF THIS COURT CONCLUDES HE DID, THE STATE SCRUPULOUSLY HONORED THAT INVOCATION IN ACCORDANCE WITH *MICHIGAN V. MOSLEY*.

A. Applicable legal principles and standards of review.

The rights to remain silent and to counsel are provided in the Fifth Amendment to the United States Constitution and Article 1, Section 8 of the Wisconsin Constitution. *State v. Jennings*, 2002 WI 44, ¶¶ 37-42, 252 Wis. 2d 228, 647 N.W.2d 142. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court adopted a set of procedural guidelines intended to protect the Fifth Amendment rights to remain silent and to counsel during custodial questioning. *See State v. Markwardt*, 2007 WI App 242, ¶ 23, 306 Wis. 2d 420, 742 N.W.2d 546.

A suspect's right to remain silent includes two separate protections. *Markwardt*, 306 Wis. 2d 420, ¶ 24. The first is the right, before questioning, to remain silent unless the suspect chooses to speak in the unfettered exercise of his or her own will. *Id.* The second is the right to cut off questioning. *Id.* (citing *Michigan v. Mosley,* 423 U.S. 96, 103 (1975)). *See also State v. Hartwig*, 123 Wis. 2d 278, 284, 366 N.W.2d 866 (1985) (critical safeguard is right to terminate questioning by invoking right to silence).

"[T]he admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his [or her] 'right to cut off questioning' was 'scrupulously honored.'" *State v. Ross*, 203 Wis. 2d 66, 74, 552 N.W.2d 428 (Ct. App. 1996) (*citing Mosely*, 423 U.S. at 103) (citation omitted).

Addressing the invocation of the right to *counsel*, the United States Supreme Court in *Davis v. United States*, 512 U.S. 452, 459-62 (1994), held that a suspect who has made a valid waiver of the right and agreed to talk to police without counsel must make the invocation "unambiguously." The Court explained that, if it were to require questioning to cease whenever a suspect makes a request that *might* be an invocation of counsel, "[p]olice officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong." *Davis*, 512 U.S. at 461. Further, the Court declined to require police to ask

clarifying questions whenever a suspect makes an "ambiguous" or "equivocal" request for counsel. *Davis*, 512 U.S. at 461-62. The test under *Davis* is objective: whether a reasonable officer would regard the suspect's statements and non-verbal cues to be an unequivocal invocation of the right to remain silent. *See id*, 512 U.S. at 458-59.

Indeed, if a suspect makes a remark that is ambiguous or equivocal—insofar as a reasonable officer, in light of the circumstances, would have understood only that the suspect might be invoking the right to remain silent—Wisconsin precedents do not require either the cessation of questioning or the clarification of the suspect's ambiguous remarks. *Markwardt*, 306 Wis. 2d 420, ¶¶ 26-28. *See also Ross*, 203 Wis. 2d at 78 (asking clarifying questions about remarks will often be good police practice, but Constitution does not require it).

In *Ross*, 203 Wis. 2d at 75-79, this court adopted *Davis*'s unequivocal invocation rule to assertions of the right to *silence* during a Mirandized custodial interview. In requiring unequivocal invocation of the right to silence, *Ross* followed the "nearly unanimous lead of other jurisdictions," state and federal, on the subject. *Ross*, 203 Wis. 2d at 75-76 & n.4. *Ross* established the following standard: "A suspect must, by either an oral or written assertion or non-verbal conduct that is intended by the suspect as an assertion and is reasonably

perceived by the police as such, inform the police that he or she wishes to remain silent." *Id.* at 77.

"Similar to an invocation of the right to counsel, '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." *Id.* at 78 (*quoting Davis*, 512 U.S. at 459) (citation omitted). If the suspect does not unambiguously invoke his or her right to remain silent, the police need not cease their questioning of the suspect, and need not ask clarifying questions if the suspect makes an ambiguous request to remain silent. *Ross*, 203 Wis. 2d at 77-78.

In 2010, the United States Supreme Court in *Berghuis v. Thompkins*, 560 U.S. 370, 381-82 (2010), adopted *Davis*'s "unequivocal invocation rule" for mid-interview assertions of the right to remain silent. *Thompkins*, 560 U.S. at 381-82. Relying on *Davis*, the *Thompkins* Court discussed some of the "good reason[s] to require an accused who wants to invoke his or her right to remain silent to do so unambiguously":

> A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that "avoid[s] difficulties of proof and . . . provide[s] guidance to officers" on how to proceed in the face of ambiguity. *Davis*, 512 U.S., at 458–459 []. If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression "if they guess wrong." *Id.*, at 461[].

Thompkins, 560 U.S. at 381-82.

While a suspect's valid invocation of his right to silence must be "scrupulously honored," *Mosley*, 423 U.S. at 103, officers are not forever barred from resuming questioning. In determining whether a resumption of questioning is permissible, this court has considered a constellation of factors from *Mosley*:

> (1) whether the original interrogation was promptly terminated; (2) whether interrogation was resumed after a significant period of time; (3) whether the accused received *Miranda* warnings at the beginning of the subsequent interrogation; (4) whether a different officer resumed the questioning; and (5) whether the subsequent interrogation was limited to a different crime than the previous interrogation.

State v. Badker, 2001 WI App 27, ¶ 12, 240 Wis. 2d 460, 623 N.W.2d 142.

The absence or presence, however, of the *Mosley* factors is not exclusively controlling, and these factors do not establish a test which can be woodenly applied. *Id.*

Rather, the essential issue is whether, under the circumstances, the defendant's right was scrupulously honored. *Hartwig*, 123 Wis. 2d at 284-85 (*Mosley* factors provide framework of analysis). This determination turns on the particular facts of each case. *State v. Bean*, 2011 WI App 129, ¶ 29, 337 Wis. 2d 406, 804 N.W.2d 696. *See also Koput*, 134 Wis. 2d at 202 (court should consider totality of circumstances).

Nevertheless, the presence of the *Mosley* factors indicates the potentially coercive effect of the renewed attempt to question a suspect may be held to be "so low" as to justify a finding that a statement elicited through

questioning after the suspect has invoked the privilege is not the product of compulsion—the primary concern of *Miranda*. *Koput*, 134 Wis. 2d at 202. *See also State v. McNeil*, 155 Wis. 2d 24, 44-45, 454 N.W.2d 742 (1990) (presence of all five *Mosley* factors meant there was no basis for finding defendant's right to silence was abridged).

Conversely, the absence of any of the *Mosley* factors does not necessarily mean the defendant's right to silence was not scrupulously honored. *See, e.g., Bean*, 337 Wis.2d 406, ¶¶ 30-32 (fact that fifth *Mosley* factor not met did not mean defendant's right to silence was not scrupulously honored, when all other factors were met). Rather, the courts are moving toward more flexible analysis under *Mosley*. *State v. Turner*, 136 Wis. 2d 333, 356-60, 401 N.W.2d 827 (1987) (it is not determinative, absent evidence of police overbearing or coercive tactics, that all *Mosley* factors be satisfied).

This court independently reviews whether the State violated a defendant's Fifth Amendment rights, but upholds the facts as found by the lower court unless clearly erroneous. *Markwardt,* 306 Wis. 2d 420, ¶ 30.

Finally, in evaluating a circuit court's order denying a motion to suppress, a reviewing court will uphold the circuit court's findings of historical or evidentiary fact unless they are clearly erroneous. *Markwardt,* 306 Wis. 2d 420, ¶ 30 (citation omitted). Review of the application of constitutional principles to those facts is *de novo*. *Id.*

B. Application of principles and standards to facts of this case.

1. Wesley's statements that he did not want to talk about a homicide because he denied responsibility and his statement about returning to his cell do not constitute an invocation of his Fifth Amendment right to remain silent as detectives Spano, Corbett and the circuit court concluded.

Wesley contends that he invoked his right to silence during a February 6, 2014 A.M. interview and that police did not scrupulously honor this invocation because they attempted to interview him approximately nine-and-a-half hours later and did interview him on February 7, 2014 at approximately 3 p.m. Wesley's Brief at 14-17.

As is apparent from the selected portions reproduced in Wesley's brief, Wesley repeatedly engaged in a back-and-forth with Detective Katherine Spano, a homicide detective with 20 years of experience (106; A-Ap. 101, 11:56-11:57). After gathering background information from Wesley with no difficulty (*see* A-Ap. 101, 11:44-11:53), Detective Spano attempted to read Wesley his *Miranda* rights, but Wesley intervened several times, each time making statements that denied his involvement with the homicide of which he was a suspect. For example:

> WESLEY: You got reason to believe I was responsible?
>
> DET. 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—

WESLEY: *About me*?

DET. 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.

WESLEY: *Hell nahh-cuz I ain't kill nobody*.

DET. SPANO: Okay—so you don't want to talk to us about it—you don't want to answer my questions?

WESLEY: *I ain't making no statements about no murder—*

DET. SPANO: Okay,

WESLEY: --*Cuz I ain't kill nobody*.

DET. 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?

WESLEY: *I don't know wanna know nothing about no—*

DET. SPANO: Okay.

WESLEY: --*murder cuz I ain't kill nobody*.

DET. SPANO: *Okay—so you don't want to talk to me right now*?

WESLEY: *About no murder no*.

DET. SPANO: You don't wanna hear the facts or the story—

WESLEY: *About no murder no*.

DET. SPANO: --or the reasons why we believe you were responsible?

WESLEY: No.

(A-Ap. 101, 11:56-11:57.)

Consequently, whenever Wesley said he didn't want to talk, he followed that assertion up with the reason why: because he wasn't responsible, claimed he didn't kill the victim, and claimed to know nothing about it despite Detective Spano's indication that there was evidence suggesting he was involved. Indeed, when asked point blank whether Wesley would talk to Detective Spano "right now," Wesley again reiterated, "About no murder no." (A-Ap. 101, 11:57).

Further, immediately following that portion of the interview but cut out from Wesley's brief, Wesley affirmatively responds to Detective Spano's statement that "there are two sides to every story" and "accidents happen," stating, "Ain't no side" and "I don't kill, I fight" and "I got scars on my hands [because I don't kill I fight]" (A-Ap. 101, 11:57-11:59).

Wesley then said, "So I'm finna go back to my cell . . . and . . . just wait basically. . . ." (A-Ap. 101, 12:00). Detective Spano then explained what would happen while Wesley was waiting: a lineup would be conducted, he would be transported back to his holding cell (where he could make phone calls) while the District Attorney's office looked at the evidence as it came in. (A-Ap. 101, 12:00-12:01). Wesley said, "I'm listening" in response. *Id.* Then Detective Spano stated, "[B]ut 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." (A-Ap. 101, 12:01). Wesley then

reiterated, as he had earlier many times denying his involvement or any knowledge, "There ain't nothing to talk about." *Id*.

Indeed, as Detective Spano testified at the suppression hearing:

> I started to [read Wesley his *Miranda* warnings], but Mr. Wesley 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) (emphasis added.)

Further, on cross-examination Detective Spano specifically denied taking Wesley's statements to mean that he didn't want to talk at all, but rather "[h]e didn't say I don't want to talk further; he indicated he just did not want to talk; is that correct? *Correct, at that time*. Exactly." *Id.* at 8 (emphasis added).

In context, then, Wesley's remarks about not wanting to make a statement "[a]bout no murder" were, at most, ambiguous, and as a matter of law did not constitute a "clear articulation" of his right to silence. *Markwardt*, 306 Wis. 2d 420, ¶ 36 (no invocation of right to remain silent if *any* reasonable competing inferences can be drawn; assertion permitting reasonable competing inferences demonstrates suspect did not sufficiently invoke right to remain silent); *Ross*, 203 Wis. 2d at 75-76 (suspect must unequivocally invoke right to remain silent before police are required to stop interview or clarify equivocal remarks).

In *State v. Koput*, 134 Wis. 2d 195, 202, 396 N.W.2d 773 (Ct. App. 1986),[1] this court similarly held that a suspect's statement, "I don't want to talk to you guys anymore," did not unequivocally invoke the right to silence, because "[t]he officers could have interpreted the statement to mean that [the suspect] did not want to talk at all, or that [the suspect] was willing to talk but not to those two officers." Citing *Koput*, the Wisconsin Supreme Court later held in *State v. Lindh*, 161 Wis. 2d 324, 369, 468 N.W.2d 168 (1991), that a suspect did not invoke his right to silence by saying "only that he did not want to discuss the details of the shootings." *Id.* (defendant did not say he did not want to talk, but only that he did not want to talk about crime).

Wesley's statements are substantially the same as those in *Lindh* because Wesley never said he didn't want to talk at all; he said only that he didn't want to talk about the murder because he claimed he didn't know anything about it or have anything to do with it. That is not an unequivocal invocation because an officer could (and did here) interpret that statement to mean Wesley wouldn't talk about this homicide right now to this Detective <u>because</u> he didn't know anything, not because he wished to remain silent. *See State v. Cummings*, 2014 WI 88, ¶ 64, 357 Wis. 2d 1, 850 N.W.2d 915 ("[W]hile 'I don't want to talk about this' seems to indicate a

[1]This court's decision in *Koput* was reversed on other grounds by *State v. Koput*, 142 Wis. 2d 370, 418 N.W.2d 804 (1988).

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.")

Wisconsin's jurisprudence also makes clear that Wesley's remark about going back to his cell was also too ambiguous in context to be considered a "clear articulation" of his right to remain silent. *See, e.g., Koput*, 134 Wis. 2d at 202; *Lindh*, 161 Wis. 2d at 369. *See also United States v. Sherrod*, 445 F.3d 980, 982 (7th Cir. 2006) (suspect's statement, "I'm not gonna to talk about nothin' . . . I ain't gonna talk about shit," was as much taunt as it was invocation of right to silence).

For example, like in *Koput*, where the suspect stated, "I don't want to talk to you guys anymore," Wesley's remark—So I'm finna go back to my cell"—did not unequivocally invoke his right to silence. *Koput*, 134 Wis. 2d at 202. Rather, Wesley's remark—coupled with his earlier statements denying responsibility and that the detectives could still talk with him later—at most created an ambiguity. *Id.* Although law enforcement could have interpreted the remark to mean that Wesley did not want to talk at all, they could also have interpreted the statement to mean that Wesley was playing a waiting game with officers, trying to discern what evidence they had while denying responsibility. Indeed, the very fact that Wesley's statements are susceptible to more than one interpretation means he did not clearly

invoke his Fifth Amendment right to remain silent under *Markwardt*. *See id.*, 306 Wis. 2d 420, ¶ 36.

Given all of that, the circuit court, which had viewed all of the interviews and which presided over the suppression hearing and heard live testimony from Detective Spano and others, concluded: "Nor does the court believe that there was an unequivocal right to assert his right to silence when [Wesley] 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*." (29:37) (emphasis added). *Cf. Markwardt*, 306 Wis.2d 420, ¶ 36 (The *Ross* rule "allows no room for an assertion that permits even the possibility of reasonable competing inferences.").

2. If this court construes Wesley's statements as a valid invocation, law enforcement was well within bounds to again seek to interview him under *Michigan v. Mosley*.

Mosley makes clear that officers are not forever barred from resuming questioning, and that courts should consider the *Mosley* factors in determining whether the resumption of questioning was permissible. *See Badker*, 240 Wis. 2d 460, ¶ 12.

Here, four of the five *Mosley* factors were satisfied:

1) Police terminated the original interview promptly after Wesley indicated he did not want to listen to his *Miranda* rights or talk about the homicide (29:6);

2) Police resumed the interview after a significant[2] period of time. Officers attempted a second interview approximately nine-and-a-half hours after the first concluded, and the third did not occur until the following day at approximately 3:00 p.m., roughly twenty-seven hours after the first interview concluded (29:4-10);

3) Police gave Wesley complete *Miranda* warnings at the outset of the third interview (the second interview never occurred because Wesley refused to speak with Detective Klemstein) (*see* 29:12-13);

4) A different officer resumed questioning. Detective Dalland primarily conducted the third interview, and, although he was present during the first interview with Detective Spano, he asked no questions and only observed their interaction. (29:5, 11-14).

Cf. McNeil, 155 Wis. 2d at 44, *citing Mosley*, 423 U.S. at 104-05.

Thus, only the fifth *Mosley* factor was not present because the interviews all focused on the same crime, not different crimes. However, the absence of one *Mosley* factor is not dispositive. *McNeil*, 155 Wis. 2d at 44 (factors cannot

[2] This court has held that two hours between interviews constitutes a significant period of time. *Koput*, 134 Wis. 2d at 202-03 (citing *Mosley,* 423 U.S. at 103-04). The Wisconsin Supreme Court has also upheld intervening time periods which were significantly shorter. *See, e.g., State v. Shaffer*, 96 Wis. 2d 531, 537-41, 292 N.W.2d 370 (1980) (nine-minute interval between invocation of right to silence and resumption of questioning comports with *Mosley*).

be woodenly applied); *Hartwig*, 123 Wis. 2d at 284-85 (*Mosley* factors provide framework of analysis); *Koput*, 134 Wis. 2d at 202 (court should consider totality of circumstances). *See also Bean*, 337 Wis. 2d 406, ¶¶ 30-32 (rejecting defendant's contention that absence of fifth *Mosley* factor was dispositive).

Given that four of five factors were satisfied, and that this court has already held that the absence of the fifth *Mosley* factor does not mean the State did not scrupulously honor a defendant's invocation of his Fifth Amendment rights, Wesley's challenge fails.

II. WESLEY NEVER UNEQUIVOCALLY INVOKED HIS RIGHT TO SILENCE DURING THE THIRD INTERVIEW.

A. This court deferentially reviews the circuit court's findings and implicit credibility determinations.

As an initial matter, Wesley contends that this court should "independently determine whether [he] invoked his right to remain silent." Wesley's Brief at 18.

But that is not the test for appellate review of a suppression hearing. Both this court and the Wisconsin Supreme Court have repeatedly held that in evaluating a circuit court's order denying a motion to suppress, a reviewing court will uphold the circuit court's findings of historical or evidentiary fact unless they are clearly erroneous. *Markwardt,* 306 Wis. 2d 420, ¶ 30 (citation omitted), *Cummings*, 357 Wis. 2d 1, ¶¶ 43-44. Review of the

application of constitutional principles to those facts is *de novo*. *Id.*

Here the circuit court heard live, uncontroverted testimony[3] from Detectives Spano and Corbett (*see* 29:2). It also did so after having reviewed the tapes of both interviews (29:3, 28).

In such a situation, it would make little sense to completely reject any credibility or factual findings made by the circuit court. *Cf. Wainwright v. Witt*, 469 U.S. 412, 434 (1985) ("Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded."), *State v. Owens*, 148 Wis. 2d 922, 930, 436 N.W.2d 869 (1989) ("Sorting out the conflicts and determining what actually occurred is uniquely the province of the trial court, not the function of the appellate court. Among the things that are critical to the resolution of the factual issue presented are the nuances in the attorneys' questions and the witnesses' answers, created by, among other things, the manner in which the questions are asked or the answers given.").

[3] Wesley elected not to testify (29:29).

B. The circuit court properly concluded that Wesley never unequivocally invoked his right to silence during the third interview.

1. "Ain't nothing to talk about Doe"

Wesley made the above statement near the beginning of the third interview (A-Ap. 102, 15:01) after Detective Dalland attempted to explain what was going on in the case and read Wesley his *Miranda* rights (*id*).

Wesley pointed to a picture of female and asked, "She in jail[4]?" (*id*). As excerpted in his brief (*see* Wesley's Brief at 6-7) Detective Dalland did not engage Wesley on this point, but rather began the interview by providing Wesley with his *Miranda* rights before anything substantive occurred (A-Ap. 102, 15:01-15:02). It is at that point that Wesley said, much like he did several times in the first interview at which Detective Dalland was present, "Ain't nothing to talk about doe. That's what I'm 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." *Id*. *Cf*. *Cummings,* 357 Wis. 2d 1, ¶ 64 ("[W]hile '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 [a defendant's] innocence. *Such a proclamation*

[4] Wesley actually had his mail, telephone and visitation privileges revoked because it was discovered through recorded phone calls that he was calling various potential witnesses trying to figure out who "told on him" stating "I'm going to find out who told on me when I do I want you to take care of it" and a conversation with a woman named Tonya, who said "I never told on you the detectives are lying." (5:1-3).

of innocence is incompatible with a desire to cut off questioning.") (emphasis added).

On cross-examination, Detective Dalland testified how he perceived this and similar statements made by Wesley:

> Well, he—that's [Wesley indicating he didn't want to talk about the homicide] not accurate. He would say that he didn't have anything to say about a homicide because he claimed he didn't know anything about a homicide and denied any involvement in a homicide. That is how he was phrasing it when talking about not having anything to say about a homicide, because he was explaining to us he didn't have anything to offer about his knowledge of a homicide.
>
> ATTORNEY PATTERSON: So is it your testimony today that you interpreted what he had to say as not an unwillingness to speak with you, but an unwillingness to offer any information because he didn't have any information to offer?
>
> DET. DALLAND: That's correct.
>
> ATTORNEY PATTERSON: Now, during the course of that first hour and half, he said several times, did he not, that he didn't want to talk about a homicide?
>
> DET. DALLAND: Well, again, it was—he would say that he didn't have any information regarding the homicide. He didn't say that he didn't want to speak to us any longer about anything.

(29:18-19.)

The test under *Davis, Ross*, and *Markwardt* is objective: whether a reasonable officer would regard the suspect's statements and non-verbal cues to be an unequivocal invocation of the right to remain silent. *See Davis,* 512 U.S. at 458-59, *Ross*, 203 Wis. 2d 66, 70, *Markwardt*, 306 Wis. 2d 420, ¶ 27.

Here, Detectives Spano and later Dalland, two experienced homicide investigators, testified without contradiction that they thought Wesley was not invoking his right to remain silent or cut off questioning, but engaging in a verbal back-and-forth with officers as he did throughout the first and third interviews. Thus, even if Wesley intended to invoke his right to silence, he did not do so unequivocally as required. That Detectives Spano and Dalland could both interpret Wesley's statements to be merely exculpatory means that Wesley did not unequivocally invoke his right to remain silent. *See Markwardt*, 306 Wis. 2d 420, ¶ 36 (The *Ross* rule "[A]llows no room for an assertion that permits even the possibility of reasonable competing inferences.").

2. "I ain't got shit to say about no homicide."

The same is true of Wesley's subsequent statement "I ain't got shit to say about no homicide." (A-Ap. 102, 15:04). Wesley made that statement after Detective Dalland read Wesley his *Miranda* rights and he affirmatively waived them (A-Ap 102, 15:03).

While about to be read those rights, Wesley said to Detective Dalland, "Go ahead, man. I wanna know about my bitch." (A-Ap. 102, 15:03). Again, he sought to know what law enforcement knew and from whom they knew it. Wesley then had an exchange with Detective Dalland as reproduced in his brief, *see* Wesley's Brief at 7-8, in which he said, "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." (A-Ap. 102, 15:04). Wesley then followed that statement with more denying responsibility and setting up his alibi: "I've been in the house ever since [my momma died]. I go to my AODA classes, parenting classes, I got a son in foster care I am trying to get out . . . I go in that shit every day." (A-Ap. 102, 15:04). When asked directly later where he was when the shooting occurred, Wesley said he was at his AODA class, and then at his grandmother's (*see* A-Ap. 102, 15:54-15:59).

Much like his earlier statements like "[a]in't nothing to talk about doe" and "I ain't making no statements about no murder . . . cuz I ain't kill nobody[]" (A-Ap. 101, 11:56, A-Ap. 102, 15:01), Wesley was not just saying he didn't want to talk to law enforcement at all, he was affirmatively stating that he is not responsible in the face of evidence and witnesses suggesting that he is. *Cf. Cummings,* 357 Wis. 2d 1, ¶ 64 ("[W]hile '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 [a defendant's] innocence. *Such a proclamation of innocence is incompatible with a desire to cut off questioning*.") (emphasis added).

Again, this court must consider Wesley's statement in context with his other statements and the circumstances. *See Cummings*, 357 Wis. 2d 1, ¶ 54 (question about equivocal or

unequivocal nature of statement should be considered in the context of ongoing back and forth between officers and defendant). Here, Wesley repeatedly maintained that he knew nothing about the homicide and had nothing to do with it, despite law enforcement's indication to him that there was evidence indicating he was involved. As noted above, Wesley also made repeated attempts to find out what law enforcement knew about the crime and who (or what) the source of that information was. Indeed, Wesley asks Detective Dalland if the people he has pictures of are in jail or out, including his "bitch" (Valencia), his sister, and an "Erika" whom law enforcement later learned threatened to "chop it up" (sic) because Wesley suspected "that he knew a person that told on him and her name was Erika." (5:3; A-Ap. 102, 15:06-15:09).

Wesley repeatedly made similar statements in a verbal back-and-forth with Detective Dalland in which he alternated between denying any knowledge or involvement, questioning evidence that linked him to the crime, and actively seeking further information from law enforcement. For example:

- "It don't matter cuz I just--if you guys talking about this homicide, I can't answer it. I can't answer something I don't know." (A-Ap. 102, 15:05)
- "Y'all weren't there and I wasn't there." (A-Ap. 102, 15:16)
- "I got balls to kill somebody?" (A-Ap. 102, 15:17)

- "You [and these witnesses] tryin' to say I killed . . . one two three four people . . . these four people got some type of information on me? Where the other photos at?" (A-Ap. 102, 15:17-15:18).
- "You got [found] a weapon?" (A-Ap. 102, 15:18).
- "Y'all got cameras everywhere in Milwaukee? These would show my face if I did it, right? You can't tell me there aren't cameras on Wells and Wisconsin . . . the cameras should show me there, killin' somebody then." (A-Ap. 102, 15:18-15:19).
- "What side of the story? That's what I keep trying to tell you. . . ." (A-Ap. 102, 15:19).

Detective Dalland then explained to Wesley that he was linked to the crime by videotape, and that his cell phone reflected a call to the victim's phone within a minute before he was shot (A-Ap. 102, 15:19). Wesley came back with, "How you know it was me [talking on the cell phone?]" (A-Ap. 102, 15:20).

Given this verbal sparring, and Wesley's continued interest in finding out more information while at the same time attempting to discredit the information that indicated his guilt, it is clear that the statement "I ain't got shit to say about no homicide" was not an unequivocal assertion of his right to remain silent. Detective Dalland testified that he took this statement and others like it to deny culpability and profess innocence in the face of evidence against him:

> He would say that he didn't have anything to say about a homicide because he claimed he didn't know anything

> about a homicide and denied any involvement in a homicide. That is how he was phrasing it when talking about not having anything to say about a homicide, *because he was explaining to us he didn't have anything to offer about his knowledge of a homicide.*

(29:18) (emphasis added.)

As set forth above, the fact that Wesley's "I ain't got shit to say about no homicide" is susceptible to more than one interpretation makes it by definition not an unequivocal invocation of the right to remain silent. *Cf. Markwardt*, 306 Wis. 2d 420, ¶ 36 (The *Ross* rule "[A]llows no room for an assertion that permits even the possibility of reasonable competing inferences."). Consequently, the circuit court, having reviewed the tapes and listened to Detectives Spanos and Dalland's testimony, correctly concluded that Wesley did not intend to invoke his right to remain silent.

3. "Can I go back to my cell now?"

Wesley thereafter continued to spar with Detectives Dalland and Corbett (*see, e.g.,* A-Ap. 102, 15:20). The detectives intimated that the victim had identified Wesley before he died (A-Ap. 102, 15:21). In response, Wesley said, "Dude [the victim] don't know my name. . . . Dude don't know me period." (A-Ap. 102, 15:22). Wesley continued, saying, "I don't play with guns . . . I never caught a gun case. . . . I never loaded a gun . . . I don't do that. I'm not that type of dude." (A-Ap. 102, 15:22).

Detective Corbett then explained that the District Attorney's office would look at all the evidence that placed

Wesley at the scene of the shooting and "compare it to what Wesley said[]" (A-Ap. 102, 15:23). In response, Wesley pushed back again, saying, "[T]o be honest, if I knew anything that happened . . . I woulda told y'all. If I knew anything, I woulda said something, to be honest." (A-Ap. 102, 15:24).

Detective Corbett then explained that he thought the evidence against Wesley thus far formed a "very strong case." A-Ap. 102, 15:25). Wesley responded, "I don't see how it is [a strong case] against me if I ain't do shit." (A-Ap. 102, 15:25).

Detective Corbett then told Wesley that he thought Wesley did know something about this homicide. (A-Ap. 102, 15:26). In response, Wesley then exclaimed, "Y'all got phone records, video tapes, y'all got all these witnesses . . . my sister told on me, Erika told on me. . . . my bitch told on me . . . if you got all that, what's the point of y'all trying to get something out of me. . . . What the fuck y'all trying to get outta me . . . I'm saying if I knew anything about dude and how he died or anything, I woulda told you . . . I told you that yesterday . . . I can't give you no information I don't got." (A-Ap. 102, 15:26-27).

After Detective Corbett implored Wesley to give him the information he does have, Wesley then explained that he bought weed from the victim months earlier but it was "bullshit" so Wesley denied having further contact with him. (A-Ap. 102, 15:27). The detectives and Wesley then went

back-and-forth extensively regarding how much contact Wesley had with the victim because Wesley insisted the victim didn't really know him despite the fact that he was buying weed from him via text messages (A-Ap. 102, 15:30-34).

When asked what he did for work, Wesley said he didn't go out of the house, stating, "I don't do shit . . . being in the streets shit like this happens. . . . Every time you turn around motherfuckers' dyin'." (A-Ap. 102, 15:36).

Wesley then asked, "When we get done, and I go back to my cell, we got like 48 hours…I'm charged with homicide right?" (A-Ap. 102, 15:38). Detective Corbett then explained to Wesley that he had taken the facts of the matter before a court commissioner who agreed that Wesley could continue to be held because he probably committed the crime (A-Ap. 102, 15:39). Detective Corbett explained that it said first degree homicide on the document, so it was likely Wesley would be charged with some form of homicide. *Id*.

Wesley then exclaimed again, "Ain't no point in keep talking . . . if I knew anything, I'd tell you." (A-Ap. 102, 15:40). Wesley then stated that a homicide is a homicide, but Detective Corbett explained that it's not that simple, and that there are multiple forms of the crime depending on the culpability of a defendant and the like. (A-Ap. 102, 15:40-42).

Wesley then asked, "You're telling me you know for sure I was with dude?" (A-Ap 102, 15:42). Detective Corbett

said, "Yep." *Id*. Wesley asked, "What'd he say?" *Id*. Detective Corbett would not tell Wesley what the victim said because he wanted to get Wesley's own statement. *Id*.

Wesley then exclaimed, "You know for sure I shot him though? Right? . . . What's the point of us sitting here?" (A-Ap. 102, 15:43). Detective Corbett responded, "We want to know did the victim do something to provoke you?" *Id*. Wesley responded incredulously, "If you know for sure that I did this shit, what's the point of me sitting here?" (A-Ap. 102, 15:44).

Wesley followed that statement up with, "Whatever the witnesses said, they can stand in court and convict me of a homicide." (A-Ap. 102, 15:49) and "If I killed dude I woulda told you, 'I smoked 'em.'" *Id*. Detective Corbett then asked if Wesley had told anyone that he shot the victim. (A-Ap 102, 15:50). Wesley again challenged Corbett, asking, "What's the point of me sitting here? Ain't no fighting against y'all word." *Id*.

Again, Detective Corbett explained that there are multiple forms of homicide with multiple penalties. (A-Ap. 102, 15:51). Detective Corbett said, "This [homicide charges] is not one size fits all." (A-Ap. 102, 15:52).

After this extensive verbal sparring, Wesley complained about not yet having a Newport cigarette yet despite speaking with the detective for what he thought was more than a half hour, sat still for four to five seconds and

then said, "Can I go back to my cell now?" (A-Ap. 102, 15:53). Detective Corbett asked back, "Is that really going to help you?" *Id.*

Wesley again responded with a denial of knowledge or responsibility, as he had repeatedly throughout questioning, stating, "Is me telling you something I don't know going to help me? But me finding some information can that help me?" (A-Ap. 102, 15:53). Detective Dalland then asked, "Where were you? How can you vouch for where you were when this happened? *Id.* Wesley then provided his alibi, "At my granny house." *Id.*

As the suppression hearing, Detective Corbett testified that he took Wesley's "[c]an I go back to my cell now?" statement as follows:

> in the context of what was occurring during that particular time of the interview, we were discussing homicide charges. At one point, Mr. Wesley even brought up and said words to the effect the homicide is a homicide; it's 20 years. And we offered explanations as to varying degrees of homicide and even -- I recall that I even offered a personal experience with a recent case during that time period that contradicted what he had just said.
>
> Detective Dalland and I were discussing that type of questions by Mr. Wesley during that portion of the interview. And then there was a point at that time that nobody spoke. We were all sitting there quietly.
>
> As far as I was concerned, I was waiting for a response from Mr. Wesley regarding the things that we had just discussed. And that's when he made the statement where -- with the question "Can I go back to my cell?" It was -- it, at least to me, it appeared to me that he may have thought that the interrogation was over because of the pause and the silence. *I did not interpret it, that*

> *question by him. It wasn't a statement. It was a question. "Can I go back to my cell now? I didn't interpret that as anything more than that, just a question.*

(29:19-20) (emphasis added.) *Accord. Ross*, 203 Wis. 2d at 77 ("A suspect must, by either an oral or written assertion or non-verbal conduct that is intended by the suspect as an assertion and is reasonably perceived by the police as such, inform the police that he or she wishes to remain silent."), *Davis*, 512 U.S. at 458-59 (the test is objective: whether a reasonable officer would regard the suspect's statements and non-verbal cues to be an unequivocal invocation of the right to remain silent.).

Based upon Detective Corbett's testimony and the extensive verbal sparring between he and Wesley regarding the evidence in the case and his explanation of the types of homicide charges Wesley was facing, it is clear that Wesley's "[c]an I go back to my cell now?" was as much a question about whether the interview was over as it was a statement intending to end the interview. And, at a minimum, it was not an unequivocal invocation of the right to remain silent because it could be interpreted to mean more than one thing, *i.e.* is this interview over? is this all you've got on me? I'm not guilty despite your evidence that says I am, so why waste our time?

Thus Wesley's "[c]an I go back to my cell now?" is akin to "[w]ell, then, take me to my cell. Why waste your time? Ya know?" that was at issue in *Cummings*. *See id.*, 357 Wis. 2d

1, ¶ 53. The Wisconsin Supreme Court concluded that such a statement was, at best, an equivocal one:

> In the context of the ongoing back and forth between Cummings and the officers, this statement was susceptible to at least two "reasonable competing inferences" as to its meaning. *Markwardt,* 306 Wis.2d 420, ¶36, 742 N.W.2d 546. Cummings is correct that his statement could be read literally: as a request that he be removed from the room because he was no longer interested in talking to the officers. Another possibility, however, is that his statement was a rhetorical device intended to elicit additional information from the officers about the statements of his co-conspirators. Indeed, the plain language of the statement seems to be an invitation to the *officer* to end the interrogation, presumably because continued questioning would prove fruitless unless the officer provided additional information to Cummings. Such a statement is not an unequivocal assertion that Cummings wanted to end the interrogation.

Id., 357 Wis. 2d 1, ¶ 54.

The same is true here: Wesley repeatedly engaged in a back-and-forth with the detectives to find out how much they knew and from whom (or what) they knew it. The context of the multitude of statements made a few minutes earlier in the interview shows that Wesley had obtained some information regarding what law enforcement knew (*i.e.* they knew his location because of his cell phone and witnesses who said they saw him, plus the fact that the victim had identified him before dying). Thus, a logical interpretation of Wesley's "[c]an I go back to my cell now?" remark could be that Wesley had gotten what he could from officers or if they might divulge more if they kept talking, or, alternatively asking if the interview was over now that law enforcement had laid their evidence bare before him.

Wesley's statement is also therefore a lot like the one in *Markwardt*, where a defendant engaged in verbal sparring with law enforcement, saying "[t]hen 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." *Id.* 306 Wis. 2d 420, ¶ 35. As the *Cummings* court observed:

> [T]he suspect in *Markwardt* made her statement during a sequence of verbal "fencing," wherein the interrogating officer repeatedly caught the suspect "in either lies or at least differing versions of the events." *Id.,* ¶ 36. Because of this context, the court of appeals concluded that the suspect's statement was subject to "reasonable competing inferences" as to its meaning. As a result, the court of appeals concluded that the suspect's statement was not an unequivocal invocation of the right to remain silent, and thus did not serve to cut off questioning. *Id.*
>
> Cummings' statement—"Well, then, take me to my cell. Why waste your time? Ya know?"—similarly occurred during a period of verbal back and forth between Cummings and the officers, and is thus similarly subject to reasonable competing inferences.

Id., 357 Wis. 2d 1, ¶ 58.

The same is true here: Wesley's statement came in the context of a vigorous back-and-forth with officers during which law enforcement confronted Wesley with evidence that called into question his insistence that he didn't really even know the victim, wasn't anywhere near him when he was shot, and Wesley's claim that he would have told officers any information if he had any. *See also id.*, 357 Wis. 2d 1, ¶¶ 57-58 (Cumming's statement was not like the one in *State v. Goesch*, 186 Wis. 2d 1, 7, 519 N.W.2d 634 (1994) where defendant affirmatively stated he did not want to speak with police, defendant was exhausted and had disengaged from

the conversation, and said, "[I] don't want to talk about this any more. I've told you, I've told you everything I can tell you . . . . Throw me in jail, I don't want to think about this.").

The circuit court agreed, concluding that, "[T]he Court does [not] believe that there was an unequivocal right to assert his right to silence when he suggested that [Wesley] 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." (29:37) *Cf. Cummings*, 357 Wis. 2d 1, ¶ 54 (question about equivocal or unequivocal nature of statement should be considered in the context of ongoing back and forth between officers and defendant).

Even if the circuit court and Detective Corbett's interpretation is not correct, that there are multiple possible inferences defeats any claim that Wesley's "[c]an I go back to my cell now?" was an unequivocal invocation of his right to remain silent. *See Markwardt*, 306 Wis. 2d 420, ¶ 36 (The *Ross* rule "allows no room for an assertion that permits even the possibility of reasonable competing inferences."); *Cummings*, 357 Wis. 2d 1, ¶ 51 ("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.'") (citing *Markwardt*, 306 Wis. 2d 420, ¶ 36). Given this heavy burden, Wesley's challenge fails.

CONCLUSION

For the foregoing reasons, this court should affirm Wesley's judgment of conviction.

Dated this 9th day of November, 2015.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,747 words.

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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 9th day of November, 2015.

_____
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