STATE OF WISCONSIN

COURT OF APPEALS

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.

REPLY BRIEF

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ARGUMENT

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, on February 6, 2014, Johnnie was brought to an interrogation room and questioned regarding a homicide. (33:Exh. 1; App. 101). After Johnnie stated he did not want to talk, he was taken back to his cell. (*Id.*). Later that day, police attempted to question Johnnie a second time. (29:9; App. 111). After Johnnie stated again that he did not want to talk, police ceased questioning. (29:9, 15; App. 111, 117). The following day, February 7, 2014, Johnnie was questioned a third time. (29:11; App. 113). 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," police continued to question Johnnie and he confessed. (33:Exh. 2; App. 102).

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

A. The State forfeited any argument that Johnnie did not invoke his right to remain silent during the first interrogation.

In this Court, for the first time, the State argues that Johnnie did not invoke his right to remain silent during the *first interrogation.* (State's Br. at 8-14).

This argument is forfeited. At the suppression hearing, Assistant District Attorney Mark Williams did not challenge Johnnie's invocation of the right to remain silent during the first interrogation. (29:29-30; A-App. 131-132 ("…Detective Spano interviewed the defendant on February 6. At that time the defendant indicated that he had – did not want to make a statement. Detective Spano scrupulously agreed to his request.")); *see also,* 29:33; A-App. 135). Thus, because this argument was not raised in the circuit court, it is forfeited and

should not be considered by this Court. *See* ***State v. Reese***, 2014 App 27, ¶ 14 n. 2, 353 Wis. 2d 266, 844 N.W.2d 396 ("This court need not address arguments that are raised for the first time on appeal…"); ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) (citations omitted) ("As a general rule, this court will not address issues for the first time on appeal.").

If this Court chooses to consider the State's argument, as discussed below, this Court should find that Johnnie unequivocally invoked his right to remain silent during the first interrogation.

B. Johnnie unequivocally invoked his right to remain silent during the first interrogation.

The State's brief indicates that the circuit court concluded Johnnie did *not* unequivocally assert his right to remain silent:

> …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 cell based on the totality of the circumstances, because it was an ongoing conversation with law enforcement and then of the defendant."

(State's Br. at 14 (citing 29:37) (emphasis omitted)).

To be clear, the circuit court made this conclusion regarding the *third interrogation*, not the *first interrogation*. The circuit court stated:

> 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

> unequivocable 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.

(29:37; A-App. 139) (emphasis added).

In regards to the first and second interrogation, the circuit court stated:

> Well, in that last part going upwards, the Court believes he had the ability to resist. He did so in the previous two undertakings by law enforcement in that regard.
>
> The first regard was when Detective Spano brought him down and asked him preliminary questions...
>
> His – my viewing of those tapes is that he wanted – he always denied or never had a willingness to talk about the homicide until further on in the discussions with law enforcement. It ended up in the third – the third interview.

(29:36-37; A-App. 138-139) (emphasis added).

The State argues that Johnnie's statements are "substantially the same" as those in ***State v. Lindh***, 161 Wis. 2d 324, 369, 468 N.W.2d 168 (1991). In ***Lindh***, a forensic psychiatrist, questioned the defendant about what had happened earlier in the day. ***Id.*** at 335-36. The defendant said that he had a limited amount of recall, but described shooting two men and a woman. ***Id.*** at 336. When asked why he shot them, the defendant responded that he did not know. ***Id.*** "When asked if he cared to discuss the details of the shootings, he answered in the negative." ***Id. Lindh*** held that this was not an invocation of the right to silence. ***Id.*** at 369.

In ***Lindh***, the defendant did not refuse to discuss the shootings, but refused to discuss the *details*. In contrast, here, Johnnie stated he did not want to talk about the homicide itself, not just the details. For example:

SPANO: … 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—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: 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 go back to my cell—and—just just wait basically—time—waiting.

(33:Exh.1:11:56-12:00; A-App. 101).[1]

[1] Only select portions of the audio have been included due to word limitations.

Moreover, Johnnie's statements in the first interrogation contrast to the defendant's statement in ***State v. Koput***, 134 Wis. 2d 195, 396 N.W.2d 773 (Ct. App. 1986), *rev'd on other grounds by* 142 Wis. 2d 370, 418 N.W.2d 804 (1988). In ***Koput***, the defendant stated "I don't want to talk *to you guys anymore*." ***Id.*** at 202 (emphasis added). The Court found that this statement was ambiguous because the officers could have interpreted the statement to mean that: (1) the defendant did not want to talk at all or (2) that the defendant was willing to talk but not to those two officers. ***Id.***

In contrast, here, there is no indication that Johnnie was willing to talk, but not to Detective Spano or Detective Dallard. Rather, Johnnie's statements reflect he did not want to talk at all.

The State also asserts that Johnnie stated the "detectives could still talk with him later." (State's Br. at 13). While it is true that Detective Spano used the words "right now" during the interrogation and testified at the suppression hearing that Johnnie did not want to talk "at that time,"[2] the State provides no record citation where *Johnnie* stated that "detectives could still talk with him later."

Lastly, the State indicates that Detective Spano testified "without contradiction" that she thought Johnnie was not invoking his right to remain silent. (State's Br. at 20). Once again, the State provides no record citation for this assertion. Rather, Detective Spano's statements during the

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[2] Detective Spano's testimony at the suppression hearing on re-direct examination was:

> PROSECUTOR: He didn't say I don't want to talk further; he indicated he just did not want to talk; is that correct?
>
> SPANO: *Correct, at that time. Exactly*.

(29:8; A-App. 110) (emphasis added).

interrogation, her termination of the interrogation, and her testimony at the suppression hearing seems to support that Johnnie unequivocally invoked the right to remain silent during the first interrogation. *See* ***State v. Cummings***, 2014 WI 88, ¶ 50, 357 Wis. 2d 1, 850 N.W.2d 915. For example, during the interrogation, Detective Spano stated:

> 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….
>
> …
>
> 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
>
> …
>
> 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.1:11:56-12:02; App. 101).

Likewise, at the suppression hearing, Detective Spano testified:

> SPANO: I started to [read Mr. 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.
>
> PROSECUTOR: Okay. And what did you do at that point?
>
> SPANO: I stopped the interview. I advised Mr. Wesley that if he changed his mind and he wanted to talk with us

> again, that he should let someone in the jail or have somebody get a hold of the detectives in the case.

(29:6; A-App. 108) (emphasis added). Similarly, on cross-examination, but absent from the State's brief, Detective Spano also testified:

> DEFENSE COUNSEL: And he made it very clear to you, by the words he chose, that he did not wish to talk further, correct?
>
> SPANO: He said he did not want to talk, yes.
>
> DEFENSE COUNSEL: And at that point you testified that you told him if he wanted to talk, he should tell somebody and then somebody would come to see him; is that correct?
>
> SPANO: Correct.

(29:7-8; A-App. 109-10) (emphasis added).

Therefore, Johnnie unequivocally invoked his right to remain silent during the first interrogation.

C. Johnnie Wesley's invocation of his right to remain silent was not scrupulously honored.

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 State argues that four of the five ***Mosley*** **factors** were satisfied. (State's Br. at 14-16). This is incorrect. Only three of the five ***Mosley*** factors were satisfied.

As the State acknowledges (at 15), all three interrogations focused on the same crime—the homicide.

In addition, the same officer, Detective Dallard, was present during the first interrogation and the third interrogation. (29:5, 10, 17; App. 107, 119, 112).

The State suggests that Detective Dallard's presence at the first interrogation does not count because he did not ask any questions. (State's Br. at 15). However, the State points to no case law supporting this proposition.

Therefore, as discussed in Johnnie's initial brief, his right to remain silent was not scrupulously honored. (*See* A-Br. at 15-17).

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. This Court should independently review the recordings.

Contrary to the State's argument (at 16-17), this Court should independently review the recordings and decide whether the words Johnnie used were sufficient to invoke his right to silence. 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). 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) (The Wisconsin Supreme Court conducted its own review of a recorded interrogation); ***State v. Walli***, 2011 WI App 86, ¶ 18, 334 Wis. 2d 402, 799 N.W.2d 898 (This Court reviewed a police squad car camera).

B. 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?"

"'[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 discussed in Johnnie's initial brief (at 19-22), 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. Like in ***State v. Goetsch***, 186 Wis. 2d 1, 519 N.W.2d 634 (Ct. App. 1994), Johnnie clearly expressed a desire not to speak to police.

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 23rd day of December, 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 --- 2,378 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 23rd day of December, 2015.

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