STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP997-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRADLEY L. KILGORE,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE SHEBOYGAN COUNTY CIRCUIT COURT, THE HONORABLE TERENCE T. BOURKE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF ISSUES

1. Did the police engage in a non-custodial questioning of Kilgore when they talked to him in his living room while executing a search warrant, and during the conversation the police did not have unholstered weapons, did not threaten Kilgore, and Kilgore was not handcuffed?

The trial court answered this question yes and held that the reading of the *Miranda* warning was not required.

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

This issue was not before the trial court.

.

3. Did the police have the requisite probable cause for a search warrant for Kilgore's DNA, when the alleged sexual assault occurred in his home, when he was one of two males who could have committed the assault, and K.A.B. did not know which male had assaulted her?

The trial court answered this question "yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The state believes that neither oral argument nor publication is necessary as the arguments are fully developed in the parties' briefs and the issues presented involve the application of well-settled legal principles.

STATEMENT OF FACTS

Facts Relevant to the Motion Hearing.

On April 16, 2013, the Sheboygan Police Department executed a search warrant on a residence shared by David Peters and Bradley Kilgore (90:4, 5, 20). The search warrant group consisted of Detective Tamara Remington, Captain Veeser, Detective Stewart, Officer Endsley, and some members of the SWAT team, all of whom are members of the Sheboygan Police Department (90:4-5). The search warrant was issued relevant to property that might constitute evidence of a sexual assault contrary to Wis. Stat.

§ 940.225(2)(cm), and included authority to perform a buccal swab of Kilgore's inner cheek area (1:2).

Upon arrival at the search warrant site, the SWAT team made the initial entry while the rest of the team surrounded the residence (90:6). A subject in the home, who turned out to be Kilgore, allowed the SWAT members into his home. The SWAT team had Kilgore facedown at gunpoint, securing him until the rest of the search warrant officers entered and could clear the residence (90:6-7). The SWAT team was equipped with bulletproof vests and helmets and was carrying significant weaponry (90:6-7). Kilgore was the only person present in the residence (90:7). After the residence was secured, the SWAT team left the scene (90:7-8).

Detective Remington, Captain Veeser and Kilgore then went into the living room area, while other officers searched the residence looking for evidence (90:8). Once the residence was secured, no officers drew guns on Kilgore (90:9). When Remington and Veeser started talking to Kilgore in the living room, Kilgore was sitting in a living room seat. The officers did not threaten him, handcuff him, make him any promises, or tell him that he was under arrest (90:8, 10, 17, 19). Throughout the living room conversation, Kilgore was not advised of his *Miranda* rights (90:17).

Kilgore denied any physical involvement with K.A.B. (90:12). Kilgore spent most of the time talking about David Peters and his escapades with drugs and women (90:13, 23). Kilgore was extremely cooperative and talkative, and appeared to not be intimidated by the situation (90:17, 23; 91:10). During the conversation, Detective Remington stood several feet from Kilgore, did not stand still and never stood over Kilgore (90:18). Detective Remington was not particularly concerned with Kilgore as she felt that the absent David Peters was the more likely suspect (90:18).

During the contact, Kilgore cooperated fully with the buccal swab procedure (90:12-13).

Facts Relevant to Harmless Error Argument.

The jury heard the following facts, excluding any testimony as to Kilgore's comments, upon which to render its guilty verdict:

1. K.A.B. arrived at the Kilgore/Peters residence shortly after leaving the Skipper Bar at approximately 1 a.m. (95:35-40). At the residence Kilgore gave K.A.B. an orange drink in a large white plastic cup, and when she complained of a backache Peters gave her two pills that Peters told her was ibuprofen (95:43-47).

2. K.A.B. took a selfie of her sitting on a couch with Peters, after taking the orange drink, and that was the last real memory she had of the evening (95:50, 62, 63).

3: K.A.B. was awakened at 1 p.m. by Peters telling her that she needed to get up to go work. K.A.B. then realized that she was only wearing a tank top, while her pants and underwear were lying on the floor (95:64).

4. K.A.B. left the Kilgore/Peters residence disoriented, anxious, hysterical, and could not properly drive her car to work (92:208; 93:14, 15, 17).

5. K.A.B. had to be picked up by her friend Angela Hasentein to finish the ride to work. While enroute to work, K.A.B. vomited in a strange way, emitting a white foamy substance (93:15, 21, 95:67).

6. Blood collected from K.A.B. at 4 p.m. April 12th, approximately 13 hours after K.A.B. stopped drinking, had an alcohol content of .029

indicating that her blood alcohol content would have been .224 at 3 a.m. (94:118-19, 130). Tests of K.A.B at 4 p.m. April 12th also showed a concentration of zolpidem, trade-named Ambien, of 66 micrograms per liter, and also the presence of both oxycodone and oxymorphone (94:145, 147, 152). A person with zolpidem and alcohol levels similar to those K.A.B. exhibited at 3 a.m. would be in a confused state, unable to control her motor functioning, and would have wanted to fall asleep and be in a state of unconsciousness (94:171-72).

7. K.A.B. received a sexual assault examination where it was observed that she had several marks or hickeys located on her chest, two bruises along her right arm, another bruise on her right elbow, a bruise below the buttocks on her left leg, two abrasions along the right leg, a bruise located between the right buttocks and one closer to her inner thigh (94:244-45). Pictures of these injuries were shown to the jurors (94:246-47).

8. The DNA taken from the neck and chest swabs of K.A.B. clearly showed the presence of Peters' DNA but Kilgore was excluded (93:246, 249). The DNA taken from the cervical swabs, vaginal swabs, rectal swabs, and gauze showed to a reasonable degree of scientific certainty to be consistent with the standard profile that had been developed from Kilgore (93:262). Peters was excluded from all four areas (93:263).

9. The DNA samples obtained from the vaginal, rectal, gauze, and cervical swabs, which confirmed the presence of Kilgore's DNA, were three, four, five, or 20 times the level normally needed to get a reading, indicating that the contact was much more than incidental (94:62).

> Penis to vaginal intercourse without ejaculation is consistent with the levels of DNA found, and the levels clearly showed that there was time-wise and quantity-wise something more extensive going on than incidental contact (94:63-64).

ARGUMENT

INTRODUCTION

Kilgore asks this court for a remand for a new trial for two reasons: 1) Kilgore alleges that the trial court erroneously admitted into evidence statements he made to Detective Remington. Kilgore's argument is that he was in custody when he made these statements and therefore the police erred when they did not advise him of his *Miranda* protections; and 2) Kilgore further argues that the trial court improperly admitted into evidence DNA findings linking him to the assault. Specifically, Kilgore asserts that the warrant's affiant wrongfully did not advise the magistrate that she did not think Kilgore was guilty of the offense.

The state counters that though the initial circumstances surrounding the police contact with Kilgore were obviously custodial, those factors had disappeared or appreciably dissipated before the onset of the now-challenged conversation. Secondly, even if the trial court erred in admitting Kilgore's statements—which were largely a denial of any criminal activity on his part—this constitutes harmless error because of the heavy weight of other evidence presented to the jury pointing to Kilgore's guilt.

Further, the police request for the search warrant for Kilgore's buccal swab was properly drafted and issued. The state concedes that of the two possible people who could have committed this offense, David Peters or Kilgore, the police thought Peters the more likely suspect. But although there might have been more probable cause to believe that Peters was the perpetrator, that does not negate the less likely but still actual possibility, that Kilgore was involved. There were

only two possible suspects and K.A.B. had no clue who was the offender. It would be poor police work to limit the warrant to a best guess as to two viable options.

I. KILGORE'S STATEMENTS TO DETECTIVE REMINGTON WERE ADMISSIBLE BECAUSE THEY WERE VOLUNTARY AND A *MIRANDA* WARNING WAS NOT REQUIRED BECAUSE KILGORE WAS NOT IN CUSTODY.

A. Applicable Law.

Whether a person is in custody for *Miranda*[1] purposes is a question of law where the circuit court's findings of fact are given deference but the determination as to whether those facts constitute custody is reviewed de novo. *State v. Goetz,* 2001 WI App 294, ¶ 8, 249 Wis. 2d. 380, 638 N.W.2d 386. The test is whether a reasonable person in the defendant's position would consider himself or herself to be in custody given the degree of restraint present. *State v. Greun,* 218 Wis. 2d 581, 593, 582 N.W.2d 728 (Ct. App. 1998) (quoting *State v. Swanson,* 164 Wis. 2d 437, 446-47, 475 N.W.2d 148 (1991)). A custody determination for *Miranda* purposes is based on the totality of the circumstances. *California v. Beheler,* 464 U.S. 1121, 1125 (1983).

Among the relevant factors that a court examines in a *Miranda* custody determination are: 1) whether the defendant was handcuffed; 2) whether a gun was drawn on the defendant; 3) whether a *Terry*[2] frisk was performed; 4) the manner in which the defendant was restrained; 5) whether the defendant was moved to another location; 6) whether the questioning took place in a police vehicle; and 7)

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

[2] *Terry v. Ohio*, 392 U.S. 1 (1968).

the number of police officers allowed. *Greun,* 218 Wis. 2d at 594-95 (footnotes omitted).

A person detained during the execution of a search warrant has not suffered a restraint to the degree associated with a formal arrest, and is not in custody for purposes of a *Miranda* analysis. *Goetz,* 249 Wis. 2d 380, ¶ 12. Detention in a person's home lacks the inconvenience or shame associated with a compelled visit to the police station. *Id.*

A fair summary of the applicable law is that the test as to whether a person is in custody for *Miranda* purposes is an objective one based on the totality of the circumstances. Among the relevant circumstances is whether the subject is arrested, is handcuffed, is at gun point, has been subjected to a frisk, has been moved to another location, is questioned in a police car or station, and the number of officers involved. The detention inherent to an execution of a search warrant is viewed as far less restrained than an arrest and, without other factors, is not considered custody for *Miranda* purposes.

B. Application of Facts to the Law.

Kilgore does not argue that his statements were involuntary. As there is no dispute that Kilgore was not advised of his *Miranda* protections, the admissibility of his statement hinges solely on whether he was in custody when he talked to Detective Remington.[3]

[3] At the motion hearing the state argued that, regardless of custody, the statements should be admissible since they were not the product of an interrogation. The trial court did not rule on this issue, finding instead that Kilgore was not in custody. On appeal, the state concedes that no matter how friendly the discussion and how cooperative and eager Kilgore was to talk, the discussion touched areas where Kilgore could be potentially exposed to self-incrimination.

This case involves a radical transformation from a dynamic, high-risk SWAT-team-assisted execution of a search warrant to a relaxed non-confrontational conversation in Kilgore's living room, where Kilgore was not under arrest, was not handcuffed, was sitting in his living room chair and was asked very few, if any, questions of an accusatorial nature. So, at the beginning of the contact, there is no question that Kilgore was in custody for *Miranda* purposes, and, in a vacuum, there would be little question that Kilgore was not in custody when he talked to Detective Remington. The issue therefore is whether the initial environment was so coercive that it was incapable of being tempered to a non-custodial ambiance, no matter the intervening mitigating factors. The state concedes that it is generally an uphill climb to morph a situation where the police draw guns, handcuff a subject and place him on the floor, while a heavily armed SWAT team secures the home, to a non-custodial setting. But the subsequent factors here, after the home was secured, are so compelling that this difficult hurdle is cleared.

After the home was secured, the heavily armed SWAT team left the scene. This not only served to diffuse the danger of the situation but sent a clear message that the police no longer felt they were in a threatening situation. Police removed Kilgore's handcuffs, again sending a dual message; his restraint was lessened and the police's trust in him had increased. Only two officers stayed with Kilgore and the scene moved to the comfortable setting of Kilgore's living room. Kilgore sat in one of his living room chairs while Detective Remington walked about and never stood over him. Kilgore's phone rang often and the police allowed Kilgore to answer his phone (90:14). Kilgore told the police about problems he was having with his landlord and Detective Remington offered to intervene on his behalf in the dispute (90:13). There was a lot of small talk about computer games Kilgore liked to play and about Kilgore's daughter. Throughout the contact, Kilgore was cooperative and very talkative (90:13-14). All of these circumstances are typical of

a detention pursuant to the execution of a search warrant and not of custody for *Miranda* purposes.

Pursuant to the search warrant, the police explained to Kilgore that they needed a buccal swab, Kilgore said "no problem," and cooperated with the procedure. Kilgore told Remington that he never touched K.A.B. and his DNA would not be on her or in her (90:12). Indeed for all his talking, Kilgore said nothing inculpatory, steadfastly denying any knowledge of or any participation in any assault on K.A.B. Throughout the contact, the officers did not threaten or promise Kilgore anything or treat him in a manner suggesting that they did not believe him.

Kilgore criticizes the trial court for leaning heavily on *Goetz* in reaching its conclusion that Kilgore was not in custody for *Miranda* purposes (Kilgore's brief at 13-14). Kilgore is correct that there are factual differences between the two cases. In *Goetz,* the police handcuffed the defendant after he talked, while here the police handcuffed Kilgore before he talked. In both cases, neither subject was handcuffed during the interview. In *Goetz,* police told the subject that she was not under arrest, and never drew a gun on her person. Here Remington never told Kilgore that he was not under arrest, though the nature of the contact and the discussion in the living room would make this self-evident. The police initially drew a gun on Kilgore, but the officers holstered their weapons during the living room contact.

There are also differences that made the *Goetz* environment more coercive than what was present here. In *Goetz*, police asked the subject pointed accusatorial questions about her drug involvement. No accusatorial questions were posed to Kilgore. The subject in *Goetz* even admitted to drug activity and showed the police where her drugs were hidden and was not *Mirandized.* Here, there were no admissions, and no escorting of the police to incriminating evidence. No matter the differences, *Goetz* is illuminating for this case, because it holds that the detention

inherent to the execution of a search warrant is not custody for *Miranda* purposes. And the only factor suggesting custody in this case, during the living room contact, was the fact that Kilgore was not free to go because of the ongoing execution of the search warrant. Accordingly, the trial court properly referenced *Goetz* as support for the notion that detention during a search warrant does not by itself constitute custody for *Miranda* purposes (91:9). The trial court noted how dramatically things changed from the initial police contact with Kilgore to the living room questioning. The court observed,

> And Mr. Kilgore's conduct was, in the words of Detective Remington, very cooperative. He was very cooperative. So it doesn't appear that he was intimidated by the situation. So as I look at all the factors, I believe that he was not in custody. This was not a situation where a reasonable person would think that this was more than a temporary detention.

(91:10).

The state respectfully submits that the court properly admitted Kilgore's statements to Detective Remington at trial.

II. IF THIS COURT DETERMINES THAT THE COURT SHOULD HAVE SUPPRESSED KILGORE'S STATEMENTS, IT IS A HARMLESS ERROR AND THIS COURT SHOULD STILL AFFIRM THE JUDGMENT OF CONVICTION.

As argued above, the state believes that the trial court was correct in admitting Kilgore's statements at trial since he was not in custody for *Miranda* purposes when he talked to Detective Remington. But if this court finds that the trial ruling on this issue was improper, such a mistake constitutes harmless error and therefore should not trigger a remand for a new trial. Kilgore's statements were of limited

utility to the prosecution, since he denied any wrongdoing and did not say anything that even hinted at self-incrimination. Indeed, the only value Kilgore's statements seemed to have for the prosecutor is that Kilgore's denial provided an easy launching point for the argument that Kilgore knew that K.A.B. was incapable of giving consent, since he denied the contact rather than attempting to explain it. (*See* prosecutor's closing argument at 95:245.) But, as will be discussed below, there was other evidence from which the jury could easily infer that Kilgore must have known that K.A.B. was too disabled to give consent.

A. Applicable Law.

The test for harmless error is whether the beneficiary of the error proves beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Hunt,* 2014 WI 102, ¶ 26, 360 Wis. 2d 576, 851 N.W.2d 434. In other words, an error is harmless if it is clear beyond a reasonable doubt that absent the error, the jury would still have found the defendant guilty.

An assertion of harmless error is not defeated simply by showing that the jury likely relied on the erroneously admitted evidence. Instead the reviewing court should consider the error in the context of the whole trial and consider the strength of the untainted evidence. *State v. Thoms,* 228 Wis. 2d 868, 873, 599 N.W.2d 84 (Ct. App. 1999). The courts weigh the effect of the inadmissible evidence against the totality of the other evidence supporting the verdict. *State v. Britt,* 203 Wis. 2d 25, 41, 553 N.W.2d 528 (Ct. App. 1996).

A fair summary of the law is that an error is considered harmless if without the tainted evidence, the state can show beyond a reasonable doubt that the jury would have reached the same verdict. Even if the jury appeared to rely to any extent on the tainted evidence, a harmless error finding is still viable, if within the context of

the whole trial, the totality of the non-tainted evidence supports the verdict.

B. Application of Facts to the Law.

In this case, the non-tainted evidence against Kilgore was straightforward and compelling. The jury heard that K.A.B., after drinking at two clubs, went to the Kilgore/Peters residence in the early morning hours. There she remembered Kilgore giving her an orange drink and Peters providing her two pills, supposedly ibuprofen. Shortly thereafter she passed out and had no recollection until she was awakened at 1 p.m. Upon leaving the Kilgore/Peters residence and attempting to drive to work, K.A.B. found herself disoriented, dizzy, and unable to drive. She pulled over and called a friend to help her. K.A.B. was observed to be incoherent, hysterical, and confused, and had pronounced hickeys on her face and chest area. K.A.B. was ultimately taken to Sheboygan Memorial Hospital where she was examined for a possible sexual assault. K.A.B. had various bruises on her legs, arms, and buttocks area and had a blood alcohol level of .029 as well as the presence of zolpidem in her system. The jury heard that, based on her alcohol and zolpidem levels at 4 p.m., it could be determined that the amount of each drug in her system, when she claimed to have passed out would be sufficient to render her seriously depressed, disoriented, and at a point where her body would seek an unconscious state. Male DNA was found in the cervical, vaginal and rectal areas, and on gauze swabs taken from K.A.B. The jury heard that this male DNA, to a reasonable degree of scientific certainty, belonged to Bradley Kilgore. And the jury heard that the amount of Kilgore's DNA found in K.A.B was consistent with sexual contact, such as penile penetration.

The allegedly tainted evidence, Kilgore's statements to Detective Remington, add very little to the above-described picture of a sexual assault of a person incapable of giving consent. Kilgore's statements were presented to the jury

through the testimony of Detective Remington. Kilgore's statements do place him at the scene, but it was his residence, K.A.B. placing him there, and his presence when K.A.B. arrived that were not in dispute. Kilgore's statements did show that there was drinking, but that also was not in dispute. Indeed, Kilgore's statements emphasized how much K.A.B. had been drinking and how she had been the instigator in her consumption of both alcohol and drugs (95:188-89). Kilgore's statements denied any real involvement with K.A.B., explaining that her contact was primarily with Peters (95:190). Kilgore's statements included a complete denial of any physical contact with K.A.B. So, the allegedly tainted statements exposed the jury to Kilgore's denial of any wrongdoing or any physical contact with K.A.B. And the statements showed K.A.B. as a willing participant in drinking and the taking of drugs with David Peters. It is hard to see how these statements pushed the needle towards a guilty verdict.

The value of Kilgore's statements to the prosecution is that it removed an argument that Kilgore did not know K.A.B. could not grant consent—one of the elements of the charged crime. But there was ample untainted evidence to make this point. K.A.B. testified that she blacked out and remembers nothing until she woke up many hours later at 1 p.m. While this testimony could be dismissed as self-serving, it was supported by the toxicological evidence presented to the jury, showing that her alcohol and zolpidem intake was consistent with the amount necessary to render her unconscious.

The state recognizes that during its deliberations the jury asked to have the court read to it the portion of Detective Remington's testimony dealing with what Kilgore told her during the execution of the search warrant—the allegedly tainted evidence (95:286). It is difficult to guess what the jurors' concerns might have been but it is not surprising that they would want to be sure as to what Kilgore said, as this was the only direct evidence of Kilgore's point of view. The jury again heard Kilgore's denial of

wrongdoing. It is unlikely that this proved critical in its deliberations but even if it was a factor, a harmless error argument is not defeated by a showing that the jury likely relied on the tainted evidence, *see Thoms,* 228 Wis. 2d at 873, if, as is the case here, in the context of the entire trial there is sufficient strength in the untainted evidence, by itself, to support the jury verdict.

In sum, the trial court was correct in admitting into evidence Kilgore's statements. But if this court deems the trial court was wrong on this issue, those statements constituted harmless error.

III. THE SEARCH WARRANT FOR A BUCCAL SWAB OF KILGORE'S INNER FACIAL CHEEK WAS BASED ON PROBABLE CAUSE AND WAS PROPERLY ISSUED BY THE MAGISTRATE.

Kilgore argues that since the police had initially felt Peters was more likely than Kilgore to have committed the assault, the police only should have sought a search warrant for Peters' DNA sample. It is no secret that the police thought that Peters was the better candidate to be the perpetrator. But as will be argued below, when the police are faced with two possible perpetrators of a serious crime, and the victim cannot identify one of them as the criminal, the sensible thing to do is to investigate both possibilities.[4]

A. Applicable Law.

A search warrant may be issued only upon a finding of probable cause by a detached magistrate. *State v. DeSmidt,* 155 Wis. 2d 119, 131, 454 N.W.2d 780 (1990). The issuing

[4] The DNA evidence was crucial to the jury's verdict. Accordingly, the state does not make a harmless error claim, in the event this court rules that the search warrant was improvidently granted.

judge's determination of probable cause is accorded great deference. *State v. Higginbotham,* 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991).

When considering whether to issue a search warrant, the magistrate makes a common sense decision, whether given all the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence will be found in a particular place. *Illinois v. Gates,* 462 U.S. 213, 238 (1983). The issuing magistrate must be apprised of sufficient facts to excite an honest belief in a reasonable mind that objects sought will be found in the place to be searched. *State v. Schaefer,* 2003 WI App 164, ¶ 5, 266 Wis. 2d 719, 668 N.W.2d 760. The probable cause determination is made on a case-by-case basis, based on the totality of the circumstances. *Id.* ¶ 17.

A critical omission in an affidavit supporting a search warrant permits an attack on the warrant's validity. *Franks v. Delaware,* 438 U.S. 154, 155-56 (1978); *State v. Mann,* 123 Wis. 2d 375, 385-86, 367 N.W.2d 209 (1985).

A fair summary of the law is that a search warrant must have sufficient probable cause to lead a reasonable magistrate to believe there is a fair probability that evidence will be found in a particular place. Great deference is given by the reviewing court as to the issuing magistrate's probable cause determination. A reckless or willful omission of a material fact in the affidavit supporting the search warrant can invalidate portions or all of the warrant.

B. Application of the Facts to the Law.

It is unclear whether Kilgore feels that the affidavit, as presented to the magistrate, lacked probable cause. Kilgore mentions that most of the warrant dealt with David Peters, and had little information linking him with the crime, but Kilgore seemingly stops short of claiming that the

magistrate improperly issued the warrant. Instead, Kilgore argues that the magistrate was misled since the affiant did not tell him that she was seeking to exclude Kilgore (Kilgore's brief 19), and the affiant also did not tell the magistrate that she did not believe she had probable cause connecting Kilgore to the crime (Kilgore's brief at 21).

The issuing magistrate properly determined that there was probable cause for a search warrant for Kilgore's buccal swab. The affidavit showed that K.A.B. had been at Kilgore's residence when the alleged sexual assault occurred. There were two people present, other than the victim, when the crime occurred: Peters and Kilgore. K.A.B. passed out before being victimized and did not know which of the two men had assaulted her. Indeed, she did not know if only one man perpetrated the assault. Each man had equal opportunity, access, and motive to commit the crime. It is entirely reasonable for the magistrate to believe that there was a fair probability that probative DNA evidence could have been found through a buccal swab on both men.

The police thought it was more likely that Peters was the perpetrator, but this belief was based more on his prior criminal history than on the circumstances of this particular crime (90:18). When faced with two possible options, each totally viable, the magistrate properly did not engage in a guessing game to select the one to be searched at the exclusion of the other. The trial court properly concluded that the search warrant established that the sexual assault occurred, that it occurred in Kilgore's residence, that there were only two people with the victim, and the victim did not recall any details of the assault, and properly held there was a fair probability that there would be DNA evidence found in Kilgore (91:47). The trial court aptly observed that the fair probability that evidence would be found in Kilgore did not have to be a better probability than that for Peters. There is ample information in the search warrant affidavit supporting the issuing magistrate's determination that there was probable cause for Kilgore's buccal swab.

Kilgore alleges that the magistrate was misled because the affiant did not inform him that she was only requesting a search warrant for Kilgore to exclude him. While Detective Remington might have expected the DNA to exclude Kilgore, she was in no position to exclude him from the testing process. As she noted in the motion hearing, it was Kilgore's home, Kilgore was present, and she also had information from a David Peters text to K.A.B, wondering if K.A.B. had been raped by Kilgore (90:5-6, 20).

Kilgore argues that Remington should have informed the magistrate that she did not believe there was probable cause to connect Kilgore with the crime (Kilgore's brief at 21). In effect, Kilgore is saying that in a search warrant purporting probable cause for seizing Kilgore's DNA sample, Remington should have asserted that she had no probable cause that anything would be found in Kilgore's DNA. This makes little sense. Again, Remington had two potential suspects; she had a stronger belief about one than the other. But she felt that a proper investigation required her to pursue both possibilities, which she did. Detective Remington was following an elementary investigatory principle: not to prejudge a case and let prejudices compromise a thorough examination of all the reasonable possibilities.

The state submits that the search warrant for Kilgore's DNA sample was a proper one and the trial court properly admitted the evidence the search warrant generated.

CONCLUSION

For all the reasons stated above, the state asks this court to affirm the judgment of conviction.

Dated this 24th day of November, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,927 words.

Dated this 24th day of November, 2015.

_____
David H. Perlman
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 24th day of November, 2015.

_____
David H. Perlman
Assistant Attorney General