

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appellate Case No. 2015AP00997-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRADLEY L. KILGORE,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

Appealed from a Judgment of Conviction Entered in the Circuit Court
for Sheboygan County, the Honorable Terence T. Bourke Presiding
Trial Court Case No. 13 CF 475

Respectfully Submitted:

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ARGUMENT

I. The Sheboygan Police Department's Interrogation of Kilgore Violated the Fifth Amendment Because He was in Custody and Not Read His Miranda Rights

This case is about custody of an individual during the execution of a search warrant. The State acknowledges that the initial circumstances surrounding the police contact with Kilgore were obviously custodial. See State's Brief at 6. The parties disagree as to whether Kilgore remained in custody during the entire execution of the search warrant. Kilgore relies on his brief for his explanation about why he was in custody during the entire interrogation and why *State v. Goetz*, 249 Wis. 2d 380, 638 N.W.2d 386 (2001) is distinguishable.

Kilgore, however, wants to take this opportunity to address a point made by the State, claiming that the *Goetz* environment was more coercive than Kilgore's

because he was not asked any accusatorial questions or showing police hidden drugs. See State's brief at 10. However, both of those situations occurred during Kilgore's interrogation. During the motion hearing on April 21st, Detective Remington acknowledged that there was some direct questioning by her or other officers regarding the sexual assault investigation. R90 at 14. He was also asked questions in relation to drugs, and discussed his roommate's use of prescription pills, and informed officers that illicit drugs would be found in their residence. R90 at 15.

II. The Denial of Kilgore's Suppression Motion was not Harmless Error

The State asserts that 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. See State's brief at 13. However, much of the trial was focused on the alleged

victim, K.A.B.'s level of intoxication from drugs and alcohol at the time of the alleged assault.

At trial, the State introduced several statements made by the defendant that were originally elicited during the custodial interrogation. Detective Remington testified that as K.A.B. arrived at the residence, the defendant observed that "she was staggering, unsteady on her feet, very unstable and obviously intoxicated. He said too drunk to drive." R95 at 187-88. The jury also heard testimony based on Kilgore's custodial admissions that K.A.B. drank Jagermeister and rum, snorted prescription medication and remained unsteady and stumbled around.

The State had the burden of proving that K.A.B. was under the influence of an intoxicant to a degree which rendered her incapable of giving consent, and that the defendant had actual knowledge that K.A.B. was incapable of giving consent. The State speculates

that Kilgore's statements were unlikely a critical factor in the verdict decision, yet recognize that 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 tainted evidence. See State's brief at 14.

Although there was toxicological evidence presented to the jury that was consistent with K.A.B.'s statements, it was highly disputed by Kilgore. The toxicological evidence could not say with specificity exactly when K.A.B. ingested the substances or when they would have rendered her unconscious. It was Kilgore's own statements served as a substantial basis for finding that K.A.B was intoxicated to such a level that she was unable to give consent.

The State's assertion that Kilgore's statements were not pivotal in deciding the verdict is inadequate to prove beyond a reasonable doubt that the erroneous

admission of Kilgore's statements "did not contribute to the conviction." *State v. Rockette*, 287 Wis. 2d 257, 704 N.W.2d 382 (2005).

III. Probable Cause Did Not Exist to Issue a Search Warrant to Obtain Kilgore's DNA

Kilgore will rely on the arguments and case law set forth in his original brief filed with the Court of Appeals to maintain his assertion that probable cause did not exist to issue a search warrant to obtain Kilgore's DNA.

CONCLUSION

For the foregoing reasons, Kilgore respectfully asserts that the trial court erred when it denied Kilgore's motion to suppress evidence based on a violation of his Miranda rights. Additionally, Kilgore respectfully asserts that the trial court erred when it denied his motion to suppress evidence based on a lack of probable cause to obtain a sample of his DNA. Therefore, Kilgore requests that this Court reverse the trial court's denial of the motions, and remand the case for a new jury trial.

Dated this 8th day of December, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I hereby 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. The text is 13 point type and the length of the brief is 1,166 words.

Dated this 8th day of December, 2015.

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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 s. 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 8th day of December, 2015.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that this brief and appendix was delivered to the Clerk, Wisconsin Court of Appeals, 110 East Main Street, Suite 215, Madison, Wisconsin, by placing a copy of the same in the U.S. Mail with proper postage affixed on December 8, 2015.

Dated this 8th day of December, 2015.

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