STATE OF WISCONSIN

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

DISTRICT II

Case No. 2015AP2506-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

DANIEL J. H. BARTELT,

Defendant-Appellant.

On Notice of Appeal from a Judgment of Conviction
Entered in the Washington County Circuit Court, the
Honorable Todd K. Martens Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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I. Police Violated Bartelt's Fifth Amendment Right to Counsel By Initiating a Second Interview; as a Result, His Subsequent Statements and All Derivative Evidence Should Be Suppressed.

A. After Bartelt confessed to a serious crime at a police station, he was "in custody" for ***Miranda*** purposes when he requested an attorney.

The State argues that Bartelt's confession did not transform his custody status into one in which a reasonable person would not have felt free to leave under the circumstances. As support, the State cites ***State v. Goetz***, 2001 WI App 294, 249 Wis. 2d 380, 638 N.W.2d 386, in which this court refused to suppress the non-***Mirandized*** statements of a defendant during a warrant search of her residence. (State's Revised Resp. Br. at 5-6). ***Goetz*** is inapplicable to this case, however.

In ***Goetz***, the defendant admitted there was marijuana and drug paraphernalia in her bedroom during the warrant search. 249 Wis. 2d at 382-83. The ***Goetz*** court refused to suppress these statements, concluding that the defendant was not "in custody" simply because she had been temporarily detained during the warrant search. ***Id.*** at 389-90. However, the court never addressed the issue of whether the defendant's incriminating statements altered her custody status. Indeed, there would have been no reason for the court in ***Goetz*** to do so, since the defendant never made any additional incriminating statements after admitting there was marijuana and drug paraphernalia in her bedroom. As such, ***Goetz***

provides no guidance on the actual issue presented in this case.

The State also argues that Bartelt's confession did not transform his interview into a custodial interrogation because only police conduct can make an encounter custodial. (State's Revised Resp. Br. at 4). As support, the State relies on ***State v. Schambow***, 176 Wis. 2d 286, 500 N.W.2d 362 (Ct. App. 1993), in which this court stated that "the conditions of custody . . . are those caused or created by the authorities." ***Id.*** at 293 (citing ***State v. Clappes***, 117 Wis. 2d 277, 285, 344 N.W.2d 141 (1984)). The State misapplies ***Schambow***, as well.

In ***Schambow***, the defendant argued that, because he was in the hospital and unable to leave, he was in custody for ***Miranda*** purposes at the time police came to question him. ***Id.*** at 293. The ***Schambow*** court rejected this argument, reasoning that "[t]he limit on Schambow's freedom of action was not caused or created by the authorities." ***Id.*** at 294. Instead, his inability to leave was the result of his medical condition.

In this case, however, the limit on Bartelt's freedom to leave after his confession *was* caused by the police. Bartelt was in an interrogation room in the secured, internal portion of the Slinger Police Department. He was also in the presence of two armed police officers who were questioning him about a violent attack on M.R. Under these circumstances, no reasonable person would believe that the officers would allow them to walk out of the interrogation room and leave the police station after they confessed to attacking M.R.

Next, the State claims that the non-Wisconsin cases cited in Bartelt's brief-in-chief are inapplicable because they

reject the totality of the circumstances test and treat "a suspect's incriminating statements as dispositive." (State's Revised Resp. Br. at 2). However, none of the cases cited by Bartelt hold that a confession is a dispositive factor. Rather, like Wisconsin cases, these cases recognize that all the surrounding circumstances of an interrogation must be considered in determining whether a suspect is in custody. However, they also recognized the obvious – that a suspect's confession to a serious crime is a significant factor in this analysis. *See* ***State v. Pitts***, 936 So.2d 1111, 1124, 1134 (Fla. Dist. Ct. App. 2006); ***Jackson v. State***, 528 S.E.2d 232, 235 (Ga. 2000); ***People v. Carroll***, 742 N.E.2d 1247, 1249-50 (Ill. Ct. App. 2001); ***Ackerman v. State***, 774 N.E.2d 970, 978-79 (Ind. Ct. App. 2002); ***Commonwealth v. Smith***, 686 N.E.2d 983, 987 (Mass. 1997); ***People v. Ripic***, 587 N.Y.S.2d 776, 779-83 (N.Y. App. Div. 1992).

The State cites ***State v. Thomas***, 33 A.3d 494 (Md. Ct. Spec. App. 2011), as well as the supporting cases cited therein, for the proposition that a court should look at whether a confession "changed the atmosphere of the interrogation" in deciding whether a confession altered a defendant's custodial status. (State's Revised Resp. Br. at 2-3 (citing ***Thomas***, 33 A.3d at 512; ***State v. Lapointe***, 678 A.2d 942 (Conn. 1996); ***Commonwealth v. Hilton*** 823 N.E.2d 383 (Mass. 2005); ***State v. Oney***, 989 A.2d 995 (Vt. 2009)).

Thomas's "change in atmosphere" test is ill-considered, and this court should refuse to employ it. Not only is the test vague and ambiguous, it would inject a high degree of subjectivity into what would otherwise be an objective analysis. It may also lead to the appearance of arbitrary results. Asking a court to decide whether a confession "changed the atmosphere" of an interrogation is little different than asking a court to judge "the mood of a

room" or "the tension in the air." Bartelt urges this court to reject such a vague and amorphous standard.

At any rate, even under the "change in atmosphere" standard, Bartelt's confession still altered his custody status to one in which a reasonable person would not have felt free to leave. To begin with, Bartelt's tenor changed significantly after his confession. Whereas Bartelt had previously stated that he was "just numb," after his confession he told police, "I'm scared." (31:27, 29). He also made the following emotional statement:

> I'm scared because life scares me. I don't handle it well. College was stressful. I left college, and I was home and unemployed. I can't find a job right now. Life scares me. I don't particularly think I'm very good at it, and I wanted to scare someone else because everyone else is so confident. I don't understand it, and I need someone to be like me. I'm sorry if that's horrible.

(31:30).

The detectives interviewing Bartelt changed their tenor, as well. For example, after Bartelt admitted he was scared, Detective Clausing told him, "You should be." (31:29). Also, before Bartelt admitted to attacking M.R., the detectives had focused on trying to elicit a general confession from him. (31:12-28). After his confession, however, they switched gears and began asking Bartelt detailed questions about the attack. Detailed questions following a general confession are indicative of an interrogation that has become custodial in nature. *See* ***Commonwealth v. Hilton***, 823 N.E.2d 383, 388 (Mass. 2005) ("This kind of detailed questioning, with the defendant as the evident focal point of the investigation after her more general confession, transformed the previously sympathetic and nonaccursatory

interview into a custodial interrogation.”). The following are a sample of some of the detailed questions the detectives asked Bartelt after his confession:

- What were you going to do? Have sex with her?
- Do you remember what kind of car she was driving?
- And she gets out. What are you thinking?
- What were you reading?
- Did she say anything to you?
- What did you do to scare her?
- What happened with the knife?
- Did you have anything else with you lost or dropped, fall out of your pocket?
- So which way did you leave the park?
- Did you throw anything out of the car while you were driving?
- How many times did you get cut?
- What about the scrape on your knee, more the other knee?
- Why did you pick her?
- Where – this knife sheath, where is it?
- Where was the – did you have [the sheath] on your person when you attacked her?

- What color was the sheath for that?
- Why did you throw [the sheath] out?
- Where did you go after this happened?

(31:29-36).

Other aspects of the detectives' behaviors also reflected a "change in atmosphere." Before Bartelt's confession, police had allowed him to view an incoming call and retain possession of his cell phone. (28 Ex. 1 at 05:25:48-05:26:05; 31:19-20). After his confession, Clausing refused to let Bartelt answer a call and took custody of his phone. (28 Ex. 1 at 05:45:48-05:46:45; 31:39-40).

Furthermore, prior to his confession, the detectives had informed Bartelt that he was free to leave at any time. (31:2). Afterwards, they never confirmed that Bartelt was still free to go. In fact, they specifically told Bartelt he was required to stay in the interview room when they left the room. (31:40). And shortly after his confession (and as the direct and sole result thereof), Bartelt was formally placed under arrest. (31:41).

In contrast, in cases where courts have found no "change in atmosphere," the circumstances following the confession were generally very different. *Compare* ***Thomas***, 33 A.3d at 494 n.4, 510 (after confession, police told defendant that, "although he might be arrested 'at some point,' he was 'not going to go to jail tonight.'"); ***Lapointe***, 678 A.2d at 948-52 (after confession, defendant was repeatedly reassured that he was still free to leave, was allowed unrestrained and unaccompanied movement about the police station, and was allowed to leave the station after the interview without being arrested); ***Oney***, 989 A.2d at 997

(after confession, police confirmed that defendant was still free to leave at any time and, after the interview, he was "given a citation and told he was free to go.").

The State also cites ***Locke v. Cattell***, 476 F.3d 46 (1st Cir. 2007). (State's Revised Resp. Br. at 2). ***Locke*** was a federal habeas case in which the First Circuit Court of Appeals upheld a state court's determination that the defendant was not in custody after he admitted to participating in a robbery. Under the deferential standard of review for habeas cases, the First Circuit concluded that the state court's determination was not an unreasonable application of clearly established federal law. ***Id.*** at 53. Nonetheless, the ***Locke*** court offered the following opinion regarding the merits of the case:

> If this case were before us on de novo review, we might well reach a different result. We believe it likely that a reasonable person would not have felt that he was at liberty to terminate the interrogation and leave after confessing to a violent crime and learning that a co-defendant has implicated him. Reluctantly, however, we conclude that such a holding by the state court is not an unreasonable application of clearly established federal law.

Id. at 54.[1] Unlike the federal court in ***Locke***, however, this court must independently review the question of whether Bartelt was in custody after his confession. *See* ***State v. Morgan***, 2002 WI App 124, ¶ 11, 254 Wis. 2d 602, 648 N.W.2d 23.

The State further claims Bartelt was not in custody after his confession because he only admitted to a

[1] ***Yarborough v. Alvarado***, 541 U.S. 652 (2004), also cited by the State, was a federal habeas case, as well.

misdemeanor battery. (State's Revised Resp. Br. at 8). This claim might have weight if Bartelt had actually confessed to nothing more than a misdemeanor. *See* ***Oney***, 989 A.2d at 1000 ("We acknowledge that once a suspect confesses to committing a serious criminal act, this fact is significant in this evaluation"; however; the "mere confession to what defendant believed to be three misdemeanors would not necessarily lead a reasonable person in defendant's circumstances to believe that he was not free to leave."). However, Bartelt confessed to a serious and violent crime. He admitted that he "went after that girl" and "knocked her down." (31:29-32). He also admitted that he had a knife in his hand when he did so. (31:32). According to the complaint, M.R. sustained multiple injuries during the attack, including six lacerations to her right hand, three of which required a total of fifteen stiches. (1:3). Moreover, the State initially charged Bartelt with first-degree recklessly endangering safety, aggravated battery, substantially battery, and attempted false imprisonment, all of which are felonies. (1:1-2). And it later amended the charges to include attempted first-degree intentional homicide. (4:1). Given the nature of the attack, the injuries sustained by M.R., and the charges filed against Bartelt, the State's current claim that Bartelt only admitted to a misdemeanor battery is truly odd.

B. Bartelt's request for an attorney was a clear and unambiguous invocation of his right to counsel.

The State also argues that Bartelt's request for an attorney was too ambiguous to constitute a clear invocation of his right to counsel. (State's Revised Resp. Br. at 9-15). The entirety of Bartelt's request was as follows:

> Mr. Bartelt: Should I or can I speak to a lawyer or anything?

Det. Clausing: Sure, yes. That is your option.

Mr. Bartelt. Okay. I think I'd prefer that.

Det. Clausing: All right.

(28 Ex. 1 at 05:44:38-05:44:55; 31:38; 129).

The State argues that Bartelt's use of the word "think" made his request ambiguous. (State's Revised Resp. Br. at 12). It is possible that under other circumstances, the prefatory word "think" might cause a subsequent remark about an attorney to be ambiguous. However, in the context of this case, it is clear that Bartelt used the word "think" simply as a filler, as is typical in common parlance.

Here, Bartelt had already asked Clausing if it was possible for him to speak to a lawyer. After Clausing told Bartelt that this was, in fact, an option he had, Bartelt stated, "*Okay. I think I'd prefer that*." In this context, that statement had only one possible meaning – that Bartelt was choosing the option to speak to a lawyer, the option that he and Clausing had just discussed. It is a reach too far to suggest that Bartelt could have meant that he was still only considering the possibility of speaking to a lawyer.

The State next asserts that the word "prefer" also made Bartelt's request ambiguous. (State's Revised Resp. Br. at 12-13). The State offers the following analogy to bolster this claim: "For instance who hasn't gone into a restaurant and said something like, I prefer Coke but I'll be willing to take Pepsi." (*Id.* at 12).

This analogy is flawed, however, because Bartelt never said he was still willing to speak to the detectives, notwithstanding his preference for having an attorney. Thus, a more fitting analogy would be if a customer went to a

restaurant and asked the waiter, "What kind of light beers do you have on tap?" and the waiter responded, "Miller Lite and Bud Light." If the customer then said, "Okay. I think I'd prefer a Miller Lite," no reasonable person would think this was anything other than a clear request for a Miller Lite.

The supporting cases cited by the State suffer from the same flaw – they all involve situations where defendants stated they would prefer having a lawyer, but also that they were still willing to speak to police without one. *See* ***Oldham v. State***, 467 N.E.2d 419, 424 (Ind. Ct. App. 1984) (defendant "stated that although he would prefer to have his lawyer present, he would go ahead with the [polygraph] test"); ***State v. Carr***, 2010 WL 2473337, ¶ 18 (Ohio Ct. App. June 18, 2010) ("I would prefer a lawyer *but I want to talk to you now*.") (emphasis in original); ***Stiltner v. Carter***, 268 Fed. App'x 496, 498 (8th Cir. 2008) (defendant told police over the phone that he would prefer to have his attorney, but then showed up at the police station without a lawyer, signed a ***Miranda*** waiver form, and answered questions); ***Delashmit v. State***, 991 So.2d 1215, 1221 (Miss. 2008) ("I prefer a lawyer . . . but I will . . . you know . . . I will go ahead.").[2]

Finally, the State argues that it was not clear whether Bartelt's statement was a request for counsel before any further interrogation or just in connection with a written statement. (State's Revised Resp. Br. at 13-14). However, Bartelt never stated (or implied) that he was invoking his

[2] In ***Smith v. State***, 546 So.2d 61 (Fla Dist. Ct. App. 1989), which was also cited by the State, the court held that the defendant's remarks, which included "I probably could [represent myself] if I had to, but I choose not to. I would prefer to have an attorney," did not constitute a clear and unequivocal statement sufficient to show that he knowingly and intelligently waived his right to counsel. ***Id.*** at 63. This case is therefore inapplicable.

right to counsel only for the limited purpose of assistance with a written statement. Rather, after being informed that it was his option to speak to a lawyer, Bartelt stated, "Okay. I think I'd prefer that." This was a general invocation of the right to counsel, which Bartelt never qualified in any way. This case is thus distinguishable from ***Connecticut v. Barrett***, 479 U.S. 523, 525 (1987), where the defendant stated "he would not give the police any written statements but he had no problem in talking about the incident."

Accordingly, Bartelt unambiguously and unequivocally invoked his right to counsel while in custody during the July 16, 2013 interview. His subsequent statements during the July 17, 2013 interview and all derivative evidence discovered as a result of those statements should therefore be suppressed.

CONCLUSION

For the foregoing reasons, Daniel Bartelt respectfully requests that this court reverse the circuit court's judgment and order regarding the homicide charge in this case, order the suppression of all of Bartelt's statements to police on July 17, 2013, along with all derivative evidence described in his brief-in-chief, and remand the case to the circuit court for a new trial. Should this Court decline to decide the issue of which specific items of derivative evidence should be suppressed, then Bartelt requests that this Court remand the case to the circuit court with instructions to hold an evidentiary hearing on the issue and, thereafter, a new trial.

Dated this 17th day of October 2016.

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 2,955 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

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

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

Dated this 17th day of October 2016.

Signed:

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