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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP2506-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL J. H. BARTELT,

Defendant-Appellant-Petitioner.

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

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUES PRESENTED

1. After confessing to an attempted homicide or other serious crime, would a reasonable person feel free to terminate a police interview and leave an interrogation room, such that the person is not in custody for ***Miranda***[1] purposes?

The circuit court found that Daniel Bartelt was not in custody after he confessed at a police station to attacking a woman with a knife. The court therefore concluded that Bartelt's subsequent request for an attorney did not invoke the ***Miranda-Edwards***[2] rule requiring all custodial interrogations to cease. Instead, the court held that Bartelt was not in custody until he was formally placed under arrest, which occurred a short time after he requested an attorney.

On that basis, the circuit court denied Bartelt's motion to suppress statements about a separate, unrelated homicide that Bartelt made during a second police interview the next day. The court similarly denied his motion to suppress the derivative evidence that police discovered as a result of those statements. That derivative evidence comprised the core of the State's homicide prosecution in this case.

On appeal, the court of appeals affirmed in a published opinion. The court concluded that Bartelt was not in custody following his confession because police did not change the circumstances or atmosphere of the interrogation after Bartelt made his incriminating admissions.

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

[2] *See* ***Edwards v. Arizona***, 451 U.S. 477 (1981).

2. Following his confession to attacking a woman with a knife, did Bartelt clearly and unequivocally invoke his right to counsel?

Following his confession, Bartelt asked one of the detectives, "Should I or can I speak to a lawyer or anything," and the detective responded, "Sure, yes. That is your option." Bartelt then stated, "Okay. I think I'd prefer that."

The circuit court did not address this issue. The court of appeals assumed, without deciding, that Bartelt had made an unequivocal request for counsel, concluding that its decision that he was not in custody at the time he asked for an attorney rendered this issue moot.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has deemed both oral argument and publication appropriate.

STATEMENT OF THE CASE AND FACTS

A. Allegations of the criminal complaints.

The State charged Daniel Bartelt in an amended criminal complaint with the following offenses related to an assault on M.R.: (1) attempted first-degree intentional homicide; (2) first-degree recklessly endangering safety; and (3) attempted false imprisonment. The amended complaint also charged Bartelt with first-degree intentional homicide for the murder of Jessie Blodgett. (4:1-2).

With regard to the assault on M.R., the complaint alleged that, on morning of July 12, 2013, M.R. went to the

Richfield Historical Park in the Village of Richfield to walk her dog. (4:2). There, she was attacked by a male suspect with a knife who tackled her to the ground. (4:3). During the ensuing struggle, M.R. sustained multiple injuries; however, she was able to grab ahold of the blade end of the knife and disarm the suspect. (4:3). The suspect then fled the scene in his van. (4:3).

The complaint also alleged that, on July 16, 2013, police interviewed Bartelt about this incident, and he confessed to attacking M.R. (4:6-7).

With respect to the Blodgett homicide charge, the complaint alleged that Blodgett was found dead in her home in the City of Hartford on July 15, 2013. (4:4-5). According to preliminary autopsy findings, the cause of death was ligature strangulation. (4:5-6).

The complaint further alleged that police interviewed Bartelt for a second time on July 17, 2013, this time regarding Blodgett's death. (4:8). During the interview, Bartelt denied any involvement in her death. He told police he was at Woodlawn Union Park in City of Hartford on July 15, 2013. (4:8).

Thereafter, police searched the garbage receptacles at Woodlawn Union Park and discovered physical evidence that was connected to Blodgett's murder, which contained both her and Bartelt's DNA. (4:9-12).

B. Bartelt's suppression motion and evidence at the suppression hearing.

Bartelt filed a motion to suppress all his statements to law enforcement, as well as the derivative evidence police obtained as a result of those statements. (19). On April 18,

2014, the circuit court, the Honorable Todd K. Martens, conducted a ***Miranda-Goodchild***[3] hearing. The State called two witnesses: Detective Joel Clausing of the Washington County Sheriff's Department and Detective Richard Thickens of the Hartford Police Department.

Clausing testified that, as of July 16, 2013, he had identified Bartelt as a person of interest in the attack on M.R. (105:12). He explained that M.R. had stated her attacker was in a blue Dodge Caravan. (105:41). Another deputy had seen a blue Dodge Caravan at the same park early that month and had run the license plate, which revealed that the car was registered to Bartelt's parents. (105:41-42). Clausing discovered that the Bartelts had a son, and a photo of him from the Wisconsin Department of Transportation was similar to a composite sketch that was drawn at M.R.'s direction. (105:41-42).

Clausing spoke with the Bartelts at their home, and they gave him Bartelt's cell phone number. (105:12). Clausing then called Bartelt around 5:00 p.m. on July 16, 2013 and told him he was investigating an incident and that he "needed to meet with him." (105:13). Clausing stated that Bartelt was very compliant during the call and asked when and where they should meet. (105:14). Clausing told Bartelt to come to the Slinger Police Department. (105:14).

Clausing explained that the Slinger Police Department is located inside a municipal building that it shares with other offices such as Parks and Planning. (105:16). There is one main entrance for the building and, once inside, there is a specific door for the police department, neither of which are secured during normal business hours. (105:16-17). After

[3] *See* ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

one enters the door to the police department, there is a lobby and then another door that leads to the "internal portion of the police department." (105:16). This door is secured for purposes of entering; however, people can freely exit it. (105:16-17).

After Bartelt arrived at the Slinger Police Department around 5:12 p.m., he was escorted back to an interview room with Clausing and Detective Aaron Walsh. (105:16). The interview room was in the secured, internal portion of the department. (105:16). According to Clausing, the interview room was twenty to twenty-five feet beyond the secured door. (105:18).

Clausing further testified that the interview room had two doors, neither of which could be locked. (105:18). One of the doors was left slightly open during the interview. (105:23). Clausing also stated that the interview room was thirteen-and-a-half feet by ten-and-a-half feet in size and had a table and three chairs inside. (105:18-19). In addition, he stated that there were no metal detectors at the Slinger Police Department, and he did not search or frisk Bartelt before entering the interview room. (105:20).

Clausing stated that he and Walsh were wearing casual clothes; however, they both had their badges displayed on their belts, as well as their service weapons. (105:20-21). The interview was recorded by audio and video means, but Bartelt was never informed that the interview was being recorded. (105:19, 45; *see also* 28, Ex. 1).

Clausing testified that, at the beginning of the interview, he told Bartelt he was not in trouble and that he was not under arrest. (105:24). He also informed Bartelt that he could get up and walk out or leave at any point. (105:24). However, he did not read Bartelt his ***Miranda*** rights.

(105:44). Clausing stated that he and Walsh used a "conversational tone" throughout the entire interview. (105:31-32).

During preliminary questioning, Bartelt told the detectives that he was nineteen years old and worked at a factory in Hustisford called Rolair Associated Engineering. (105:26-27). Clausing told Bartelt that he and Walsh were investigating an incident at a park that occurred the previous Friday. (31:7). As the interview continued, Clausing asked Bartelt a number of questions about the Richfield Park incident. (105:27). At first, Bartelt denied any involvement, stating he was off work that day and was at his girlfriend's house. (31:7-14; 105:27-28).

During the interview, Clausing and Walsh noticed an injury on Bartelt's hand, which Bartelt said happened at work. (31:11-12). As the interview progressed, the detectives explained about evidence and asked Bartelt if there was any evidence or "something [he] left there" that might show he was at the park last Friday. (31:12-13). Bartelt said there was nothing, and Clausing asked, "[w]hat if I were to tell you that there might be something that links you there." (31:13-14).

Clausing then explained Locard's exchange principle: the concept that a person leaves something of himself behind, such as fingerprints, DNA, or clothing fibers, everywhere he goes. (31:15-16). Clausing also told Bartelt they had "evidence from the person that was out there" that needed to be analyzed by the crime laboratory. (31:17). He therefore urged Bartelt to be honest with them. (31:18).

Walsh further explained that police knew Bartelt's vehicle was at the park on Friday, as well as other days that Bartelt was supposed to be at work. (31:19). Upon further

questioning, Bartelt admitted that he had not worked at Rolair since March or April 2013 and had not injured his hand at work. (31:19-20). Instead, he said he had cut his hand while cooking at home. (31:20). Clausing explained that after Bartelt was caught in this lie, he "moved [his] chair closer to [Bartelt] and got the table out of [their] way." (105:23; *see also* 28 Ex. 1 at 05:26:30 to 05:26:50). At that point, Clausing was sitting about two feet away from Bartelt. (105:24).

Clausing told Bartelt that "[n]obody in their right mind would lie about cutting themselves if it happened at home cooking." (31:21). He again urged Bartelt to "[j]ust be honest." (31:21). He told Bartelt he understood his first instinct was "self-preservation," but that he believed in second chances for people who take responsibility. (31:24-25). Clausing also stated, "[i]t's okay . . . we know what happened." (31:26). He later added, "you had to know that this would be coming. I mean, you cut yourself. Right? There is blood on the sheet [sic] that you tried to throw away," and Walsh added, and "on the beer can" and "on the knife she took away." (31:27).

Shortly thereafter, Bartelt admitted that he had, in fact, been at the Richfield Park on July 12, 2013 and that he had attacked M.R. (31:28-32; 105:27-28, 44). He stated that he "went after that girl" and "knocked her down." (31:29-32). He also admitted he had a knife in his hand when he did so. (31:32).

Clausing testified that after this confession, Bartelt "was going to be under arrest, and he probably wasn't free to get up and leave." (105:44-45, 48-49). Following the confession, Clausing then asked Bartelt to provide a written statement about the incident. (105:28). At that point,

however, Bartelt asked if he could speak to a lawyer, and Clausing told him this was his choice. Clausing testified that Bartelt then stated "he would prefer having one present." (105:28, 45-46). The video of the interview reflects that the following exchange took place in this respect:

> 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 to 05:44:55; 129).

Thereafter, at 5:45 p.m., Clausing and Walsh suspended the interview and left the room. (105:29). Before doing so, however, Clausing took custody of Bartelt's cell phone. (28 Ex. 1 at 05:45:48 to 05:46:45; 31:39-40; 105:31). Walsh also told him to stay in the interview room. (31:40-41). When the detectives returned seven or eight minutes later around 5:53 p.m., Clausing told Bartelt he was under arrest, handcuffed him, and searched him. (105:29-30).

The next witness called by the State was Detective Thickens. Thickens explained that he was lead investigator for the Blodgett murder. (105:58). He also stated that he identified Bartelt as a person of interest in his investigation following Bartelt's interview with Clausing and Walsh. (105:58).

Thickens testified that he and Detective James Wolf met with Bartelt in an interview room at the Washington County Sheriff's Department on the afternoon of July 17, 2013. (105:59-60). At this point, Bartelt was an inmate at the

Washington County Jail. (105:60). This interview was recorded by audio and video means, as well. (105:60-61; *see also* 28, Ex. 2).

Thickens testified that, before meeting with Bartelt, he knew Bartelt had been in the Washington County Jail for almost twenty-four hours. (105:73). He also knew about Bartelt's interview on July 16, 2013, as well as the fact that the interview ended when Bartelt "asked for an attorney." (105:74, 79).

Before beginning the interview, Thickens read Bartelt his ***Miranda*** rights, and Bartelt signed a waiver form and agreed to speak with the detectives. (105:63-65; *see also* 28, Ex. 3). Thereafter, Bartelt answered questions for approximately ninety minutes about his relationship with Blodgett and his whereabouts on July 15, 2013. (105:65, 68-69). During the interview, Bartelt denied being at Blodgett's house on July 15, 2013 or having any involvement with her death. (32:7, 42-49). He stated that, on the morning of July 15, 2013, he left his house around 6:30 a.m. and then drove all over, eventually ending up at Woodlawn Union Park. (32:42). The interview ended later when Bartelt asked for an attorney. (105:66, 78).

After the interview, Thickens went to Woodlawn Union Park to investigate and collected all the garbage in the park's receptacles. (109:852-53). Amongst the garbage, Thickens found a Frosted Mini-Wheats cereal box containing paper toweling, numerous types of rope and tape, and antiseptic wipes and wrappers with red stains. (109:862-71). In addition to the items in the cereal box, Thickens found more antiseptic wipes and wrappers with red stains in the garbage, as well as bandage packaging. (109:872-74, 953-54).

Evidence later presented at trial showed that several of the items found in the park's garbage contained Bartelt's DNA and Blodgett's DNA. (109:1045-59, 1072). It also showed that one of the ropes was consistent with the abrasion pattern around Blodgett's neck, and another rope was consistent with the injuries on her wrists and ankles. (114:73-77).

C. The circuit court's ruling on Bartelt's suppression motion.

The circuit court denied Bartelt's motion to suppress. The court found that Bartelt was not in custody for ***Miranda*** purposes during the July 16, 2013 interview, but had voluntarily agreed to speak with police. In this respect, the court concluded that Bartelt was not in custody until after he requested an attorney, when police told him he was under arrest and placed him in handcuffs at the conclusion of the interview. (105:97-103, 110-11; App. 129-35, 142-43). Accordingly, the court held that no ***Miranda*** warnings were required with respect to the July 16, 2013 interview. (105:96-97, 100; App. 128-29, 132). As support for this conclusion, the court relied on ***State v. Lonkoski***, 2013 WI 30, ¶ 7, 346 Wis. 2d 523, 828 N.W.2d 552, in which this Court held that the requirements of ***Miranda*** do not "apply when custody is 'imminent.'" (105:100; App. 132).

The circuit court therefore ruled that Bartelt's request for an attorney did not prohibit police from initiating the July 17, 2013 interview because, according to the circuit court, "an assertion of ***Miranda*** . . . which a person makes while they are not in custody, does not prospectively prohibit law enforcement from attempting to interview an individual later." (105:102; App. 134).

With respect to the July 17, 2013 interview, the circuit court found that, although Bartelt was in custody, he was properly ***Mirandized*** at the outset, voluntarily waived his rights, and agreed to speak with the detectives. (105:101-02; App. 133-34). In addition, the court concluded that all the statements that Bartelt had made during both interviews were "the voluntary product of his free and constrained [sic] will, the statements reflect[ed] deliberateness of choice[, and] were not coerced and not a product of improper police pressures." (105:105-08; App. 137-40). The court therefore denied Bartelt's suppression motion in its entirety.

D. Convictions and sentencing.

Prior to the commencement of trial, the circuit court ordered the Blodgett homicide charge severed from the charges related to the Richfield Park incident. (103:20-45). The homicide charge was then tried to a jury over a seven-day period beginning on August 11, 2014. (*See generally* 109; 114). Following the close of evidence, the jury returned a verdict of guilty. (109:1259-61).

Thereafter, on October 14, 2014, the circuit court sentenced Bartelt to life imprisonment without the possibility of release to extended supervision. (115:70-71).

Shortly thereafter, on October 17, 2014, the parties reached a plea agreement regarding the Richfield Park charges. In exchange for Bartelt's plea to first-degree recklessly endangering safety, the State agreed to dismiss and read in the remaining counts and recommend a consecutive prison sentence with no more than five years of initial confinement. (116:3, 5-6). Thereafter, on October 30, 2014, the circuit court sentenced Bartelt to five years of initial confinement and five years of extended supervision, consecutive to his life sentence. (117:22).

E. The court of appeals' decision.

On appeal, Bartelt argued that once he confessed to attacking M.R., a reasonable person in his circumstances would not have felt free to terminate the interview and leave the police station. In other words, Bartelt argued that his confession transformed the interview into a custodial interrogation. (Bartelt's Ct. App. Initial Br. at 18-28).

Bartelt further asserted that, because he was in custody at the time he requested an attorney, all further interrogation had to cease. Thus, on the following day, when the detectives from the Hartford Police Department approached Bartelt to question him about Blodgett's murder without counsel present, they violated his Fifth Amendment rights. (*Id.* at 28-29).

Bartelt therefore argued that all his statements during the second interview on July 17, 2013 and all derivative evidence discovered as a result of those statements should have been suppressed. (*Id.* at 29-33).

The court of appeals rejected this claim and affirmed the judgment of the circuit court. The court first concluded that the circumstances of Bartelt's initial interrogation on July 16, 2013 showed that he was not in custody. Among other things, the court noted that Bartelt had voluntarily agreed to come to the police station and, once he arrived, police told him he was "not under arrest" and was free to leave at any time. (Ct. App. Op. at 14; App. 114). The detectives did not search or frisk Bartelt, and they did not restrain him in any way. (*Id.*; App. 114). The doors to the interview room were unlocked and left slightly ajar. (*Id.*; App. 114). Also, when Bartelt's phone rang during the interview, he was permitted to answer it. (*Id.*; App. 114).

The court acknowledged that, as the interviewed progressed, the detectives increasingly treated Bartelt like the target of a serious felony investigation and they certainly applied psychological pressure to get him to confess. (*Id.* at 15; App. 115). However, the court found that the other circumstances of the interview did not suggest that Bartelt could not have terminated the interview and left at any time. (*Id.* at 16; App. 116).

The court of appeals also concluded that Bartelt's confession, when considered together with all the other circumstances, did not render him in custody because his confession did not cause police to change the circumstances or atmosphere of the interrogation. (*Id.* at 17; App. 117). Therefore, he was not in custody, according to the court of appeals, because "***Miranda*** is concerned 'with the type of interrogation environment *created* by the police.'" (*Id.* at 21-25; App. 121-25) (quoting ***State v. Clappes***, 117 Wis. 2d 277, 283, 344 N.W.2d 141 (1984) (emphasis added by the court of appeals)).

Thereafter, Bartelt petitioned this Court to review his case, and this Court granted the petition.

ARGUMENT

I. After Bartelt Confessed to a Serious, Violent Crime at a Police Station, He Was in Custody for ***Miranda*** Purposes Because No Reasonable Person Would Feel Free to Leave Under Those Circumstances.

In this case, the State's prosecution regarding the murder of Jessie Blodgett was built on tainted evidence. At the time Bartelt requested an attorney, he had already confessed to a serious and violent crime—the attack on M.R.

He was therefore in custody for ***Miranda*** purposes. No reasonable person—whether a suspect, police officer, or anyone else—could possibly believe that a person would be free to terminate a police interview and leave an interrogation room after confessing to an attempted homicide or any other serious crime.

A suspect is in custody for ***Miranda*** purposes if a reasonable person in the suspect's position "would not feel free to terminate the interview and leave the scene." ***Lonkoski***, 346 Wis. 2d 523, ¶ 27 (quoting ***State v. Martin***, 2012 WI 96, ¶ 33, 343 Wis. 2d 278, 816 N.W.2d 270); ***Thompson v. Keohane***, 516 U.S. 99, 112 (1995).

Bartelt's request for an attorney therefore should have triggered the ***Miranda-Edwards*** rule requiring all police interrogation to cease. The police, however, disregarded this rule and initiated a second interview on July 17, 2013. It was during this second interview that Bartelt admitted to being at Woodlawn Union Park on July 15, 2013. And it was this information that resulted in the discovery of all the physical evidence found in the park's garbage the next day. All this evidence was fruit of a poisonous tree; it was obtained by exploiting information obtained during an illegal police interview. Bartelt's July 17, 2013 statements and all derivative evidence should therefore be suppressed.

A. General legal principles and standard of review.

The right against self-incrimination is guaranteed by the Fifth Amendment to the United States Constitution and Article I, § 8 of the Wisconsin Constitution. This Court normally construes the right against self-incrimination in Article I, § 8 consistently with the United States Supreme Court's interpretation of the federal right. ***State v. Stevens***, 2012 WI 97, ¶ 40, 343 Wis. 2d 157, 822 N.W.2d 79.

In ***Miranda v. Arizona***, 384 U.S. 436 (1966), the United States Supreme Court held that the Fifth Amendment prohibits compelled self-incrimination and requires that custodial interrogations be preceded by advice that a suspect has the right to remain silent and the right to the presence of an attorney. ***Id.*** at 479. If someone is subjected to a custodial interrogation without these warnings and makes statements, whether exculpatory or inculpatory, then those statements cannot be used by the prosecution. ***Id.*** at 444.

Miranda's proscription against continued interrogation was solidified in ***Edwards v. Arizona***, 451 U.S. 477 (1981), which held that once an accused invokes his right to counsel, police must cease (and not recommence) interrogation until counsel is present, unless the accused himself initiates further communication with police. ***Id.*** at 484-85. According to the Supreme Court, the ***Edwards*** bright-line proscription "serves the purposes of providing 'clear and unequivocal' guidance to the law enforcement profession." ***Arizona v. Roberson***, 486 U.S. 675, 682 (1988). The rule is "designed to protect an accused in police custody from being badgered by police officers." ***Oregon v. Bradshaw***, 462 U.S. 1039, 1044 (1983). As the Supreme Court noted in ***Fare v. Michael C.***, 442 U.S. 707, 719 (1979), "[t]he right to have counsel present at interrogation is indispensable to the protection of the Fifth Amendment privilege under the system" established by the Supreme Court.

Accordingly, as this Court has previously noted, one of ***Miranda***'s most important conclusions is that once an individual invokes the right to counsel or the right to remain silent during a custodial interrogation, the interrogation must cease. ***Stevens***, 343 Wis. 2d 157, ¶ 48.

It is the State's burden to show by a preponderance of the evidence that police complied with the requirements of ***Miranda***, including on the issue of whether a custodial interrogation occurred. ***State v. Armstrong***, 223 Wis. 2d 331, 347-51, 588 N.W.2d 606 (1999).

Whether a defendant's ***Miranda*** rights were violated presents a question of constitutional fact. As such, when reviewing a circuit court's denial of a motion to suppress, this Court applies a two-step standard. ***Martin***, 343 Wis. 2d 278, ¶ 28. First, this Court upholds the trial court's findings of historical fact unless they are clearly erroneous. ***Id.*** Second, it reviews *de novo* the legal question of whether those facts warrant suppression, including the determination of whether a person is in custody for purposes of Fifth Amendment ***Miranda*** rights. ***Id.***; ***State v. Morgan***, 2002 WI App 124, ¶ 11, 254 Wis. 2d 602, 648 N.W.2d 23.

The historical facts in this case are uncontested. Therefore, the focus of this appeal is on whether Bartelt was in custody during the July 16, 2013 interview.

B. After his confession to a serious, violent crime, no reasonable person would feel free to leave, and therefore Bartelt's request for an attorney occurred under custodial circumstances.

Both custody and interrogation are necessary prerequisites to ***Miranda-Edwards*** protections. ***Armstrong***, 223 Wis. 2d at 344-45; ***Montejo v. Louisiana***, 556 U.S. 778, 795 (2009) ("If the defendant is not in custody then [***Miranda*** and ***Edwards***] do not apply; nor do they govern other, noninterrogative types of interactions between the defendant and the State."). When a person is not in custody, there is no requirement to cease interrogation. ***Lonkoski***, 346 Wis. 2d 523, ¶ 2.

Here, it is undisputed that Bartelt was undergoing interrogation when he asked for a lawyer. The issue is whether he was in custody.

1. Standard for determining custody.

The test to determine custody is an objective one. ***State v. Koput***, 142 Wis. 2d 370, 378-79, 418 N.W.2d 804 (1988). The inquiry is whether there is a formal arrest or restraint on freedom of movement of a degree associated with a formal arrest. ***State v. Leprich***, 160 Wis. 2d 472, 477, 465 N.W.2d 844 (Ct. App. 1991) (citing ***New York v. Quarles***, 467 U.S. 649, 655 (1984)). "Stated another way, if 'a reasonable person would not feel free to terminate the interview and leave the scene,' then that person is in custody for ***Miranda*** purposes." ***Lonkoski***, 346 Wis. 2d 523, ¶ 27 (quoting ***Martin***, 343 Wis. 2d 278, ¶ 33).

The custody determination is made under the totality of the circumstances considering many factors. ***Martin***, 343 Wis. 2d 278, ¶ 35. The following factors are relevant to the analysis: "the defendant's freedom to leave; the purpose, place, and length of the interrogation; and the degree of restraint." ***Lonkoski***, 346 Wis. 2d 523, ¶ 6. As one factor in the totality of the circumstances, an interview that takes place in a law enforcement facility such as a sheriff's department, a police station, or a jail may weigh toward the encounter being custodial. ***Id.***, ¶ 28. Where the facts are undisputed, custody is a matter of law. ***Koput***, 142 Wis. 2d at 379.

2. No reasonable person would feel free to terminate a police interview and leave an interrogation room after confessing to an attempted homicide or other serious crime.

In this case, the circuit court determined that Bartelt was not in custody at the time he asked for an attorney during the July 16, 2013 interview because he had not yet been *formally* placed under arrest. That conclusion was erroneous. Although Bartelt came voluntarily to the police station and was not in custody at the outset of the interview, his confession to the attack on M.R. transformed his custody status into one in which a reasonable person would not have felt free to leave.

Under the totality of the circumstances in this case, no reasonable person would have felt free to terminate the interview and leave the interrogation room after confessing to attacking M.R. To begin with, the purpose of the interrogation was clearly to question Bartelt regarding the attack on M.R. (31:7). The police treated Bartelt like the target of a serious felony investigation (31:7-28), as opposed to merely the subject of an impromptu ***Terry***[4] stop. *Compare* ***State v. Gruen***, 218 Wis. 2d 581, 582 N.W.2d 728 (Ct. App. 1998). They also tried repeatedly to get him to confess to the attack. (31:14-28). As the court of appeals acknowledged, the detectives applied "psychological pressures on Bartelt to persuade him to confess." (Ct. App. Op. at 15; App. 115). They also made it clear to Bartelt that they believed he had committed the crime. (31:26-28). Statements officers make to a suspect can be an indication of the presence of custody. *See* ***Stansbury v. California***, 511 U.S. 318, 325 (1994)

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

(finding relevant the views of the officers manifested to an individual that would affect how a reasonable person would perceive his or her situation). Furthermore, the interrogation was not commensurate in length with a routine ***Terry*** stop, which is characterized by questioning that is "presumptively temporary and brief." *See* ***Berkemer v. McCarty***, 468 U.S. 420, 437 (1984).

In addition, the place of the interview was an interrogation room located in the secured, internal portion of the Slinger Police Department, which was not accessible to the general public. (105:16-18). While the interrogation room itself was not locked and people were generally free to exit the internal portion of the department, this was still a police-dominated environment, which weighs toward the encounter being custodial. *See* ***Lonkoski***, 346 Wis. 2d 523, ¶ 28. There is also no evidence indicating that Bartelt was actually aware he could have left the internal portion of the department without the assistance of an officer.

Furthermore, although Bartelt had not been handcuffed or frisked prior to requesting an attorney, he was still in the presence of two armed police officers during the entire interview. (105:20-21). One of those officers, Detective Clausing, was sitting just two feet from Bartelt, effectively blocking the path he would have used to exit the room. (28 Ex. 1 at 05:26:30 to 05:46:46; 105:23-24). After Bartelt's confession, Clausing also took possession of his cell phone, and Detective Walsh told him he was required to stay in the interview room when they left. (28, Ex. 1 at 05:45:48 to 05:46:46; 31:39-41; 105:31). As a practical matter, therefore, Bartelt's freedom to leave the room or the police station after his confession was curtailed in a very real way.

Under these circumstances, no reasonable person would have felt feel free to terminate the interview and leave the room after confessing to attacking M.R. To the contrary, a reasonable person in Bartelt's position would have believed that they were, for all intents and purposes, under arrest at that point. And they would have reasonably expected the officers to prevent any attempt they might make to leave the room or the police station—by force, if necessary. Indeed, Detective Walsh told him in no uncertain terms that he could not leave. (31:40-41). A confession to a serious crime like attempted homicide (or aggravated battery or first-degree recklessly endangering safety) is the functional equivalent of a person turning themselves in or surrendering at a police station after an arrest warrant has been issued. No reasonable person, under either circumstance, could possibly believe that they would be free to leave afterwards. As Detective Clausing rightly acknowledged at the suppression hearing, after Bartelt confessed, he "was going to be under arrest, and he probably wasn't free to get up and leave." (105:44-45, 48-49).

Thus, contrary to the circuit court's ruling, this case is distinguishable from ***Lonkoski***. In ***Lonkoski***, the defendant argued that, although he came to the police station voluntarily and initially agreed to speak with police, once the officers zeroed in on him as a suspect, he was in custody because there was no way a reasonable person would have felt free to leave at that point. ***Lonkoski***, 346 Wis. 2d 523, ¶ 33. The defendant therefore asserted that his subsequent request for an attorney should have triggered the ***Edwards*** rule requiring the interrogation to cease. He further argued that even if he was not in custody at the time he asked for an attorney, he was undisputedly in custody a few seconds later when he was arrested, so ***Miranda*** protections should still apply. ***Id.*** ¶ 36.

This Court rejected both arguments. It stated that "a suspect's belief that he or she is the main focus of an investigation is not determinative of custody." ***Id.*** ¶ 34. It also rejected the idea that ***Miranda*** protections should apply when custody is "imminent." In this regard, the Court noted that before a suspect is in custody, "the coerciveness is substantially lessened because a reasonable person in the suspect's position would believe that he or she could end the conversation and leave at any time." ***Id.*** ¶ 38.

Relying on ***Lonkoski***, the circuit court reasoned that Bartelt was not in custody during the July 16, 2013 interview, even after police zeroed in on him as a suspect after he was caught in a lie about his employment status and the source of his injury. (105:100; App. 143). The circuit court's reasoning, however, overlooked the important fact that police here did not merely *suspect* that Bartelt had attacked M.R. at the time he requested an attorney, as in ***Lonkoski***. Bartelt had actually *confessed* at that point to the attack on M.R.

Bartelt's confession is a critical fact that distinguishes this case from ***Lonkoski***. Again, no reasonable person could believe that they would be free to get up and leave an interrogation room after confessing to an attempted homicide or other serious crime in the presence of police who are questioning them about that serious crime.

3. The court of appeals erred by adopting the "change in atmosphere" test to determine whether Bartelt was in custody after his confession.

The court of appeals, however, concluded that Bartelt was not in custody after his confession because, it believed, his confession did not change the circumstances or atmosphere of the interrogation. As support this "change in

atmosphere " test, the court of appeals relied on a handful of cases from other jurisdictions that have reached similar conclusions. (Ct. App. Op. at 23-24; App. 123-24 (citing ***United States v. Chee***, 514 F.3d 1106, 1114 (10th Cir. 2008); ***Thomas v. State***, 55 A.3d 680, 696 (Md. 2012); ***State v. Lapointe***, 678 A.2d 942, 958 (Conn. 1996)).

There are many more cases from other jurisdictions, however, that have gone the other way. These cases establish that, after a confession to a serious crime, a person should generally be considered to be in custody for ***Miranda*** purposes, regardless of whether the confession "changed the atmosphere" of the interrogation. *See, e.g.*, ***State v. Pitts***, 936 So. 2d 1111, 1134 (Fla. Dist. Ct. App. 2006) (holding that suspect was in custody after confessing to a "serious crime"); ***Jackson v. State***, 528 S.E.2d 232, 235 (Ga. 2000) ("A reasonable person in Jackson's position, having just confessed to involvement in [murder] in the presence of law enforcement officers would, from that time forward, perceive himself to be in custody, and expect that his future freedom of action would be significantly curtailed."); ***People v. Carroll***, 742 N.E.2d 1247, 1250 (Ill. Ct. App. 2001) (finding that custodial situation began when investigation had become focused exclusively on the defendant and he had inculpated himself in the crime of murder); ***Commonwealth v. Smith***, 686 N.E.2d 983, 987 (Mass. 1997) ("[A]fter the defendant told the police that he was there to confess to the murder of his girlfriend, given the information the police already had received about the murder, we conclude that if he had wanted to leave at that point, he would not have been free to do so."); ***People v. Ripic***, 587 N.Y.S.2d 776, 782 (N.Y. App. Div. 1992) (finding it "utter sophistry" to suggest that person who had just made an incriminating statement concerning a murder police were investigating would feel free to leave); ***Kolb v. State***, 930 P.2d 1238, 1244 (Wyo. 1996) ("After

[defendant] confessed to the killing, he was in custody under ***Thompson v. Keohane***, 516 U.S. at [112]. A reasonable person who confessed to a killing while being interviewed at a police station would not feel free to terminate the interview and leave the station."); *see also* ***Ackerman v. State***, 774 N.E.2d 970, 978-79 (Ind. Ct. App. 2002) (finding that admission to offense of leaving scene of an accident was a factor suggesting that defendant was in custody).

The court of appeals relegated its discussion of these cases to a footnote, in which it asserted that at least two the cases are not persuasive because they treat a defendant's confession as a dispositive factor in the custody analysis. (Ct. App. Op. at 22 n.10; App. 122 (citing ***Jackson***, 528 S.E.2d at 235, and ***Ripic***, 587 N.Y.S.2d at 782)). None of these cases, however, actually hold that a confession is a dispositive factor—that is, they do not hold (or imply) that a confession is controlling in all cases or under all circumstances. 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. They also recognized the obvious—that a suspect's confession to a serious crime is a significant factor in this analysis. *See* ***Pitts***, 936 So. 2d at 1124, 1134; ***Jackson***, 528 S.E.2d at 234-35; ***Carroll***, 742 N.E.2d at 1249-50; ***Smith***, 686 N.E.2d at 987; ***Ripic***, 587 N.Y.S.2d at 779-83; ***Kolb***, 930 P.2d at 1243-44; *see also* ***Ackerman***, 774 N.E.2d at 978-79.

But to say that a confession is a significant factor is not the same as saying it is a dispositive one. Indeed, there are many circumstances in which a confession would not necessarily transform an otherwise noncustodial interview into a custodial interrogation, and the supporting cases cited by Bartelt do suggest otherwise.

For example, a confession to a misdemeanor, as opposed to a serious or violent crime, would not likely cause a reasonable person to believe they were no longer free to leave. *See* ***State v. Oney***, 989 A.2d 995, 1000 (Vt. 2009) ("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."). Similarly, if police reassured a suspect that they would still be free to leave after a confession (and then honored that assurance), the suspect would be hard pressed to claim that the interview had become custodial. *See, e.g.*, ***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).

An incriminating statement that is made at a person's home, rather than at a police station, may also be less likely to cause a reasonable person to believe they are effectively in custody. *See* ***United States v. Williams***, 760 F.2d 811, 815 (8th Cir. 2014) (explaining that courts are less likely to find the circumstances custodial when the suspect is questioned "on his own turf") (quoting ***United States v. Rorex***, 737 F.2d 753, 756 (8th Cir. 1984)). Also, there may be situations when a confession does not alter a person's custody status because the confession is simply implausible or because police lack sufficient background information to determine if the confession is genuine or credible. *See* ***Koput***, 142 Wis. 2d at 382 (after defendant's confession, the officers questioned whether he was really the killer or just "a crackpot").

None of these moderating circumstances were present in this case, however. Again, Bartelt confessed to a serious, violent crime at a police station, in the presence of detectives were questioning him about that very crime, and there was no suggestion by the detectives that he would still be free to leave after he confessed. Under these circumstances, no reasonable person would have felt free to leave.

At least one Wisconsin case supports this conclusion. *See* ***Koput***, 142 Wis. 2d 370. In ***Koput***, this Court held that the defendant in that case was not in custody for ***Miranda*** purposes at the time he confessed to murdering the victim. ***Id.*** at 377-80. The Court noted that the defendant had come to the police station voluntarily. It also noted that there was testimony that, had he desired, the defendant could have left the station at any time prior to giving his inculpatory statement. ***Id.*** at 377. This Court therefore upheld his conviction. Nevertheless, the Court indicated that the defendant's custody status changed after (and because) of his confession:

> Therefore, the facts show that the defendant was not in custody until after his confession, sometime after 4:15 P.M. *It was only then that a reasonable person viewing the situation objectively would conclude that he was not free to leave but was in custody*.

Id. at 380 (emphasis added). The italicized portion of this quotation strongly suggests that a reasonable person in the defendant's position would not have believed he was free to leave after confessing to a homicide in the presence of police. The court of appeals, however, omitted this italicized language from its opinion. (*See* Ct. App. Op. at 24; App. 124).

The court of appeals ultimately concluded that Bartelt's confession did not alter his custody status because the confession did not cause police to change the atmosphere or circumstances of the interrogation. As further support for its change in atmosphere test, the court cited ***Clappes***, 117 Wis. 2d at 283, in which this Court stated that ***Miranda*** is concerned "with the type of interrogation environment *created* by the police." (Ct. App. Op. at 21; App. 121) (emphasis added by the court of appeals). ***Clappes*** is distinguishable from this case, however. In ***Clappes***, the defendant argued that, because he was in a hospital emergency room (and thus unable to leave), he was in custody for ***Miranda*** purposes at the time police came to question him. The Court in ***Clappes*** rejected this argument, reasoning that the defendant had not been "deprived of his freedom by the authorities." ***Id.*** at 285-87. Instead, his inability to leave was the result of his medical condition and/or the treatment he was receiving from hospital personnel.

In this case, by contrast, 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. The detectives had requested that Bartelt come and speak with them, and they chose this location for the interview, thereby ensuring that the interview would take place on their home turf.

During the interview, Bartelt was consistently in the presence of two armed police detectives who questioned him about a violent attack on M.R. The detectives treated Bartelt as the target of a serious felony investigation, openly expressed their belief that he was guilty, and applied psychological pressures that ultimately induced his confession. Under these circumstances, no reasonable person

would believe that the detectives would allow them to walk out of the interrogation room and leave the police station after they had confessed to attacking M.R.

Moreover, it is not at all clear why a confession would need to change the atmosphere of an interrogation to alter a defendant's custody status. A confession standing alone—particularly one to a violent crime at a police station—could certainly cause a reasonable person to believe they were no longer free to leave. So why should police necessarily need to do something additional to change the atmosphere of an interrogation room after someone has confessed to a crime? The decision of the court of appeals provides no good answer to this question. In fact, the court of appeals never even asserted that a reasonable person in Bartelt's position would have actually believed they were free to terminate the interview and leave the interrogation room after having confessed to attacking M.R. The change in atmosphere test the court of appeals adopted thus seems more designed to simply render a confession irrelevant than it does to actually create a suitable framework for deciding whether a reasonable person would feel free to leave under the circumstances.

Thus, the proper standard should remain the traditional totality of the circumstances test that this Court has consistently employed. Under this standard, all the relevant circumstances—including a confession—should be considered in determining whether a reasonable person would have felt free to leave. No one factor should be deemed dispositive, as the court of appeals rightly noted. But no one factor should be deemed irrelevant either. The change in atmosphere test does exactly that—it renders a confession irrelevant, unless it is augmented by additional police conduct that further alters the circumstances of the interrogation. Bartelt therefore submits that the cases from other

jurisdictions relied on by the court of appeals are ultimately less persuasive, because they are inconsistent with the traditional totality of the circumstances test.

The court of appeals asserted in its opinion that, "[i]f it were as Bartelt argues, then at the moment of the first incriminating statement, the police would have to stop questioning the subject and administer ***Miranda*** warnings." (Ct. App. Op. at 21; App. 121). This mischaracterizes Bartelt's argument. Bartelt does not argue that all incriminating statements render a person in custody as a matter of law. Some statements, no doubt, may be incriminating only to a limited degree, and they may or may not create probable cause to arrest. Whether such statements would cause a reasonable person to feel that they are no longer free to terminate a police interview thus depends on the nature of the incriminating statement and all the particular facts of a given case. Bartelt does not suggest otherwise.

Nor does Bartelt claim that police are required to cut a person off once they begin making a voluntary incriminating statement or indicate they want to confess. *See* ***Miranda***, 384 U.S. at 478 ("There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime . . . . Volunteered statements of any kind are not barred by the Fifth Amendment.").

Rather, Bartelt simply asserts that after his *confession* to a serious crime, he was in custody given the particular facts of this case. A confession is a special type of evidence that is different than other types of incriminating statements or evidence. A confession is direct proof of guilt from the defendant's own mouth, and it is very difficult, if not impossible, to rebut at a later time. "Anyone that has any experience with criminal justice at the trial of a criminal

case—either as a judge or trial counsel—knows that the confession once admitted is tantamount to conviction." *See* ***Lapointe***, 678 A.2d at 967-68 (Berdon, J., *dissenting*). Thus, after a person confesses to a serious crime in the presence of law enforcement at a police station, it will likely be "utter sophistry" to pretend that the person could reasonably believe that they would be free to leave afterwards. *See* ***Ripic***, 587 N.Y.S.2d at 782. Police should therefore ***Mirandize*** such a person before they proceed with further interrogation.

4. Even under the change in atmosphere standard, Bartelt was in custody when he requested an attorney.

Even assuming that the court of appeals is correct that the change in atmosphere standard should apply, Bartelt was still in custody at the time he requested an attorney because his confession *did* change the circumstances of his interrogation. To begin with, Bartelt's tenor changed significantly after he confessed. 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, 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, 397 (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 non-accusatory 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 to 05:26:05; 31:19-20). After his confession, Clausing refused to let Bartelt view a missed call and took custody of his phone. [5] (28 Ex. 1 at 05:45:48 to 05:46:45; 31:39-40).

In addition, prior to his confession, the detectives had informed Bartelt that he was free to leave at any time. (31:2).

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[5] The court of appeals dismissed this point because Clausing did not confiscate Bartelt's cell phone until after he requested an attorney. (Ct. App. Op. at 24-25; App. 124-25). But this misses the point. Bartelt does not claim that the seizure of his cell phone altered his custody status. Rather, he asserts that this event reflected the change in atmosphere that had already occurred as the result of his confession. All the events after a confession—including those at the very end of the interrogation—are relevant in deciding whether a confession changed the atmosphere of an interrogation. *See* ***United States v. Chee***, 514 F.3d 1106, 1114 (10th Cir. 2008) (consider fact that suspect freely left after police-station interrogation to be significant); *see also* ***State v. Oney***, 989 A.2d 995, 1000 (Vt. 2009) (same).

Afterwards, they never confirmed Bartelt that was still free to go. In fact, they specifically told him 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 of it), Bartelt was formally placed under arrest. (31:41).

In contrast, in the cases cited by the court of appeals, where the courts found no change in atmosphere, the circumstances following the confessions were quite different. *See* ***Chee***, 514 F.3d at 1114 ("Mr. Chee was told that he was free to leave and did leave thereafter."); ***State v. Thomas***, 33 A.3d 494, 499 n.4, 510 (Md. Ct. Spec. App. 2011) (after confession, police told defendant that, "although he might be arrested 'at some point,' he was 'not going to go to jail tonight.'"), *aff'd*, 55 A.3d 680; ***Lapointe***, 678 A.2d at 948-52 (after confession, defendant was reassured he was still free to leave, was allowed unrestrained and unaccompanied movement about the police station, and was allowed to leave after the interview).

Accordingly, this Court should hold that Bartelt was in custody for ***Miranda*** purposes following his confession, and that his subsequent request for an attorney triggered the ***Miranda-Edwards*** rule requiring all police interrogation to cease.

C. Because police failed to scrupulously honor Bartelt's request for an attorney, his subsequent statements to law enforcement and all derivative evidence should be suppressed.

Because Bartelt requested an attorney during a custodial interrogation, all of his subsequent statements to law enforcement should be suppressed. ***Miranda*** requires that all custodial interrogations must cease immediately (and not recommence) if a suspect says he wants an attorney.

Miranda, 384 U.S. at 474; ***Edwards***, 451 U.S. at 485. A suspect's invocation of his right to counsel must be "scrupulously honored." *See* ***Michigan v. Mosley***, 423 U.S. 96, 103 (1975).

Once a criminal suspect invokes his right to counsel during a custodial interrogation, judicial inquiry into voluntariness, i.e., whether the subsequent statements were actually coerced, is "beside the point." ***Smith v. Illinois***, 469 U.S. 91, 99 n.8 (1984). "[T]he voluntariness of a consent or an admission on the one hand, and a knowing and intelligent waiver on the other, are discrete inquiries." ***Edwards***, 451 U.S. at 484.

Following invocation, the key issue becomes whether the right to counsel was effectively waived. A suspect may, of course, choose to waive his right to counsel, but even suspect-initiated conversation does not constitute *a priori* proof of waiver. ***State v. Harris***, 199 Wis. 2d 227, 250-51, 544 N.W.2d 545 (1996). A valid waiver of an asserted right "cannot be established by showing only that [the suspect] responded to further police-initiated custodial interrogation even if he has been advised of his rights." ***Edwards***, 451 U.S. at 484. Moreover, if the authorities reinitiate contact, "it is presumed that any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the 'inherently compelling pressures' and not the purely voluntary choice of the suspect." ***Roberson***, 486 U.S. at 681.

Furthermore, the ***Miranda-Edwards*** right to counsel is not offense-specific. Rather, once the right is invoked for a particular offense, police may not approach the suspect for interrogation regarding any other offense without counsel

present. ***State v. Coerper***, 199 Wis. 2d 216, 223, 544 N.W.2d 423 (1996).

Here, Bartelt did not reinitiate discussions after his request for an attorney. It was police who initiated the second interview on July 17, 2013 to gain information about Blodgett's murder. The second interview therefore violated the ***Edwards*** rule requiring all police interrogation to cease. All statements made by Bartelt during this interview should therefore be suppressed.

In addition, all derivative evidence that police obtained as a result of Bartelt's July 17, 2013 statements should also be suppressed. An ***Edwards*** violation, unlike a mere ***Miranda*** warnings violation, triggers the "fruit of poisonous tree" doctrine and requires the suppression of all physical evidence proximately derived from the violation. ***Harris***, 199 Wis. 2d at 231; *but see* ***Oregon v. Elstaad***, 470 U.S. 298, 308 (1985) (the "poisonous tree" doctrine does not apply to ***Miranda*** warnings violations). In ***Harris***, this Court held as follows:

> We find that there is a critical difference between a mere defect in the administration of ***Miranda*** warnings "without more" and police-initiated interrogation conducted after a suspect unambiguously invokes the right to have counsel present during questioning. The latter is a violation of a constitutional right. As such, an ***Edwards*** violation triggers the fruit of the poisonous tree doctrine requiring the suppression of the fruit of that constitutional violation.

Harris, 199 Wis. 2d at 248; *see also* ***United States v. Hubell***, 530 U.S. 27, 37 (2000) (Fifth Amendment "protection encompasses compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence.").

It was during the July 17, 2013 interview that Bartelt told police he was at Woodlawn Union Park on July 15, 2013. All the physical evidence discovered in the park's garbage the following day was therefore obtained as a direct and proximate result of Bartelt's statements. Without the statements, police would not have known Bartelt was at Woodlawn Union Park that day, and they would have had no reason to the collect the garbage.

This Court should therefore reverse in part the circuit court's order denying Bartelt's suppression motion and order the suppression of all his statements made to police on July 17, 2013. In addition, it should order the suppression of all the physical evidence found in the Woodlawn Union Park garbage, as well as all other derivative evidence obtained as a result of Bartelt's statements. To accomplish this purpose, the Court should remand the case to the circuit court with instructions to hold an evidentiary hearing to determine which specific items of derivative evidence should be suppressed.[6]

II. Bartelt Clearly and Unequivocally Invoked His Right to Counsel During the July 17, 2013 Interview.

A suspect's request for counsel must be unambiguous, in that he must "'articulate his desire to have counsel present

[6] In his suppression motion, Bartelt specifically requested the suppression of "all derivative evidence," in addition to the suppression of his statements. (19:1). He also requested a hearing at which the State would be required to prove that police obtained his statements in a lawful manner, and in the event the State failed to meet this burden, an order "declaring the statements and any evidence gained therefrom as inadmissible at trial." (19:1-2). However, because the circuit court ruled that all of Bartelt's statements were admissible, it never had the opportunity to address the derivative evidence issue. As such, this Court should remand the matter to the circuit court with instructions to hold an evidentiary hearing on this issue.

sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.'" ***State v. Jennings***, 2002 WI 44, ¶ 30, 252 Wis. 2d 228, 647 N.W.2d 142 (quoting ***Davis v. United States***, 512 U.S. 452, 459 (1994)). However, "a suspect need not 'speak with the discrimination of an Oxford don.'" ***Id.*** (citing ***Davis***, 512 U.S. at 459).

The sufficiency of a suspect's invocation of his right to counsel is a question of constitutional fact reviewed under a same two-part standard discussed in the previous section. ***State v. Edler***, 2013 WI 73, ¶ 20, 350 Wis. 2d 1, 833 N.W.2d 564. First, this Court upholds the circuit court's findings of fact unless clearly erroneous. ***Id.*** Second, it independently applies constitutional principles to those facts. ***Id.***

Again, the entirety of Bartelt's request for counsel in this case 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 to 05:44:55; 129).

Before the court of appeals, the State argued that Bartelt's use of the word "think" made his request ambiguous. According to the State, the use of the word "think" makes what follows it inherently ambiguous. (State's Ct. App. Revised Resp. Br. at 12).

It is possible that under other circumstances, the word "think" might cause a subsequent remark about an attorney to

be ambiguous, by suggesting that the speaker is still merely considering the possibility of requesting an attorney. *See, e.g.*, ***Jennings***, 252 Wis. 2d 228, ¶ 36 (finding the statement, "I think maybe I need to talk to a lawyer," to be insufficient); ***State v. Wentela***, 95 Wis. 2d 283, 292, 290 N.W.2d 312 (1980) (finding the statement, "I think I need an attorney" or "I think I should see an attorney," to be sufficient), *overruled by* ***Jennings***, 252 Wis. 2d 228, ¶ 33.

In the context of this case, however, 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 too far a reach to suggest that Bartelt could have meant that he was still only considering the possibility of speaking to a lawyer. No reasonable police officer could have realistically believed that.

Before the court of appeals, the State also insisted that the word "prefer" made Bartelt's request ambiguous, as well. (State's Ct. App. Revised Resp. Br. at 12-13). The State offered 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 a 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.

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 these reasons, Daniel Bartelt respectfully requests that this Court reverse the opinion of the court of appeals, reverse the judgment of the circuit court regarding the homicide charge involving Jessie Blodgett, order the suppression of all Bartelt's statements to police on July 17, 2013, along with all derivative evidence proximately obtained as a result of those statements, and remand the case to the circuit court with instructions to hold an evidentiary hearing on the derivative evidence issue and, thereafter, a new trial.

Dated this 17th day of July 2017.

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 10,064 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 parties.

Dated this 17th day of July 2017.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 17th day of July 2017.

Signed:

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