No. 2015AP2506

In the Supreme Court of Wisconsin

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

v.

DANIEL J. H. BARTELT,
DEFENDANT-APPELLANT-PETITIONER

On Appeal From The Washington County Circuit Court, The Honorable Todd K. Martens, Presiding, Case No. 2013CF276

RESPONSE BRIEF OF THE STATE OF WISCONSIN

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ISSUES PRESENTED

1. Whether Bartelt was "in custody" for purposes of *Miranda-Edwards* when he made comments about an attorney.

The circuit court and court of appeals answered "No."

2. If Bartelt was in custody, whether his comments about an attorney constituted an unequivocal invocation of his right to counsel.

The circuit court and court of appeals did not reach this question.

INTRODUCTION

Petitioner, Daniel J. H. Bartelt, murdered Jessie Blodgett by strangling her in her bedroom. Three days earlier, Bartelt attacked a woman with a knife as she walked her dog in a local park. The woman managed to wrestle the knife away and escape, later providing police with information that ultimately led them to Bartelt. Bartelt voluntarily came to the police department at the request of police and was interviewed by two detectives regarding the incident in the park. He eventually admitted to knocking the woman down with a knife. Afterwards, Bartelt made two comments about an attorney. The detectives later arrested Bartelt for reckless endangerment. The next day, two different detectives interviewed Bartelt about the death of Ms. Blodgett, and he told them that he had been in another park the morning of the murder. This led police to that park, where they found evidence tying Bartelt to the murder. A jury later convicted Bartelt of first-degree homicide for the death of Ms. Blodgett.

Bartelt argues that his statements and evidence derived therefrom should have been suppressed because the police failed to honor his request for counsel. However, Bartelt was not in custody when he made comments about an attorney, so the police were not required to honor any request for counsel. The interview was casual and conversational. Bartelt was told that he was free to leave at any time, was not restrained, and was able to use his cell phone. Bartelt's

admissions did not change any of the objective circumstances of the interview. And even if Bartelt's statements alone could have caused a reasonable person to think he was not free to leave, his admissions did not transform the interview into an inherently coercive environment, and so Bartelt was not in custody. *See Howes v. Fields*, 565 U.S. 499, 508–09 (2012). In the alternative, if Bartelt was in custody at the time he made comments about an attorney, his comments were ambiguous and did not invoke his right to counsel.

ORAL ARGUMENT AND PUBLICATION

By granting Bartelt's petition for review, this Court has indicated that the case is appropriate for oral argument and publication.

STATEMENT OF THE CASE

1. *Detectives interview Bartelt about an assault.* According to the criminal complaint, on July 12, 2013, a knife-wielding man attacked a woman identified as M.R. as she walked her dog in a local park in Richfield, Wisconsin. R.4:2–3.[1] The man ran up behind M.R. and tackled her to the ground, at which point she grabbed the blade of the knife and, after a struggle, pulled it away from her attacker. R.4:3. The man ran off, and M.R. reported the attack to the police, who took custody of the knife. R.4:3. M.R. reported seeing a blue

[1] Bartelt pleaded guilty to a crime charged in the complaint stemming from this attack. *See* R.82.

minivan in the parking lot and a man sitting in the driver's seat before the attack. R.4:2. M.R. also gave the police a description of her attacker, from which law enforcement drew a composite sketch. R.105:42; R.4:2. Local police officers recognized the blue minivan that M.R. had described as one they had seen in the park before and that a deputy of the Washington County Sheriff's Office had run a report on several days earlier. R.105:41. The report indicated that the van was registered to Mr. and Mrs. Bartelt. R.105:41. Their son, Petitioner Daniel Bartelt, fit the description of the attacker. R.105:41–42. This made Bartelt a "person of interest" in the park attack. R.105:41–42.

Detective Clausing of the Washington County Sheriff's Office sought to speak with Bartelt about the incident. R.105:11–12. After visiting the Bartelt residence and finding Bartelt not home, Clausing received Bartelt's cell phone number from his parents. R.105:12. Clausing called Bartelt on July 16, 2013, and told Bartelt that he was "investigating an incident and needed to meet with him and speak with him about it," although Clausing did not give Bartelt any particulars. R.105:13–14. Bartelt agreed to meet with Clausing at the Slinger Police Department, "kind of a midway point" between where the two men were at the time. R.105:14.

The Slinger Police Department was located in a shared municipal building that housed other agencies, including parks and planning, and whose door was not locked during

business hours. R.105:16–17. The lobby for the police department was behind a second unlocked door, which was not equipped with any metal detectors or other similar security devices. R.105:17, 20. Another door to the back of the department was locked on the lobby side, but individuals could freely exit from within. R.105:17. The interview room was about 20 or 25 feet behind that door. R.105:18. It was 13 and a half feet by 10 and a half feet, with two doors and multiple windows, and contained a table with three chairs. R.105:18–19, 21–22. The room was equipped with automatic audio and video recording devices. R.105:19.

Clausing arrived at the department first and was later told by a secretary that Bartelt had arrived. R.105:15. After introducing himself to Bartelt, Clausing led him through the door to the back of the department and to the interview room. R.105:16–18. The door to the interview room through which Bartelt and Clausing entered connected to the secretarial area of the department and was left ajar, and the voices of other men and women working in that area could be heard during the interview. R.105:22–23; *see generally* R.28, Ex. 1. Detective Walsh of the Washington County Sheriff's Office joined them and introduced himself to Bartelt. R.105:12; R.28, Ex. 1 at 5:12:12–15.[2] No other officers entered the room during the interview. R.105:20.

[2] Citations to portions of R.28, Exhibit 1, are to the date and time stamp on the video.

After Bartelt chose his seat, Clausing and Walsh sat on either side of him. R.105:21. Bartelt's seat faced the open door and window to the secretarial area. R.105:22–23. Neither officer searched or frisked Bartelt, nor did they place him in handcuffs or restraints of any kind. R.105:20, 30. Both Clausing and Walsh were dressed in civilian clothing and wore belts containing their badges and holstered weapons. R.105:20–21. The officers did not unholster their weapons, touch their weapons, or make any reference to their weapons. R.105:21, 30.

At the beginning of the interview, Clausing told Bartelt that he was not in trouble, not under arrest, and could walk out at any time. R.31:2. The officers spoke to Bartelt in a casual, conversational tone throughout the interview and did not change their tone in response to Bartelt's statements. R.105:49; *see generally* R.28, Ex. 1. After getting some initial personal information from Bartelt, Clausing told Bartelt he had been called in to talk about an incident in a park. R.31:2–7. After Bartelt denied being at a park on the day of the incident, Clausing explained that cell phones can be tracked and told Bartelt, "I don't want any lies." R.31:7–8. Later, Clausing told Bartelt, "I'm not saying that you were involved in anything. I was just wondering if you were there." R.31:11.

Clausing then asked about some scrapes and a cut on Bartelt's hand and arm, and Bartelt responded that he did not remember how he scraped his arm and that he stabbed his hand "with a screw at work." R.31:11. Clausing then asked

if Bartelt knew "what evidence is," gave some examples of evidence, and asked, "Is there any evidence that we just talked about which would show that you would be in this park at the time of this incident?" R.31:12–13. Bartelt said he did not think there would be, and Clausing responded that it would be better "to get ahead of it" if there were evidence that placed Bartelt at the park, "that way it takes the suspicion or the [ ] sinisterness out of it." R.31:13. Clausing then asked Bartelt, "What if I were to tell you that there might be something that links you there?" R.31:14. Clausing explained "Locard's exchange principle," which states that people leave behind "some of [them]sel[ves]" wherever they go, and disclosed that they had "evidence of a person who was out there" waiting to be analyzed and an eyewitness who might be able to identify the perpetrator from photographs. R.31:15–18. Clausing said, "I would hate to put down your picture in front of the eyewitness and have them say, that's the guy that was out there. . . . Or I'd hate to have any of the DNA or fingerprint evidence or anything like that come back to Daniel." R.31:18. After Walsh told Bartelt they knew that his vehicle had been spotted at the park on several occasions when he was supposed to be at work, Bartelt admitted that he did not have a job. R.31:19.

Bartelt's cell phone then rang, and Clausing told Bartelt that he could answer it. R.31:20, R.28, Ex. 1 at 5:25:52. Bartelt, however, chose not to. R.28, Ex. 1 at 5:26:00–03.

The conversation continued, and Bartelt admitted he had not had a job for several weeks. Walsh noted this meant Bartelt could not have cut his finger at work. R.31:20. Contradicting his earlier statement, Bartelt claimed that he had cut it with a knife while cooking at home. R.31:20. Clausing moved his chair to "g[e]t the table out of [the] way" and speak closer to Bartelt, R.105:23, and told him, "No more lies. It just makes things worse. It is spiraling out of control right now. . . . Nobody in their right mind would lie about cutting themselves if it happened at home cooking. . . . What happened? Just be honest." R.31:20–21. Bartelt explained that he had seen the "sketch on TV" but claimed "it wasn't [him]." R.31:21.

Walsh then urged Bartelt to give the victim closure: "Daniel, the truth is going to help us bring some resolution to this for everybody involved. . . . We have one scared person out there right now. . . . We want to be able to [give] some closure to them so . . . [t]hey don't have to be scared of every person they see . . . and the easiest way to put some resolution to this is [for] the [ ] person that did this to take responsibility." R.31:21–22. Walsh encouraged Bartelt to be a good person and to explain things, telling Bartelt that the incident "can be explained by the person that did it. . . . We can understand . . . when things aren't going well for people, they do things that are very out of character. . . . [T]hey are usually good people . . . and they can continue being a good person by taking responsibility for it. I think that's where we

are at right now, [ ] you are kind of hesitating on taking responsibility, and the sad part is I think you are a good person. . . . [G]ood people sometimes do things, [ ] but they can be explained when they are a good person . . . and we can understand why they do things." R.31:22–23. Clausing told Bartelt that he believed people who take responsibility "deserve[ ] a second chance . . . [because] [e]veryone screws up" and that it would be better for Bartelt "to come out now and get ahead of it so you can say later on . . . [you] told [ ] the truth." R.31:25. Clausing told Bartelt that "if you look inside your heart[,] the words that I'm saying, they make sense . . . and it makes sense to get out in front of this, right?" and, "If you made a mistake, you made a mistake." R.31:26.

After Bartelt admitted it was a mistake not telling his parents he lost his job, Clausing told Bartelt, "[W]e know what happened. I want to understand why, what was going through Daniel's mind when this happened." R.31:26. Bartelt responded that he felt numb, and both Walsh and Clausing reminded Bartelt that they had "blood" evidence and that "it's only a matter of time before all that stuff comes back." R.31:27. Bartelt asked what would happen to him, and Clausing responded, "[F]irst of all, we need to get the truth . . . [a]nd based upon what we believe the truth is, we have to go by that." R.31:28.

Bartelt then admitted to being at the park and going "after that girl" because he "wanted to scare someone." R.31:28–29. Clausing admonished Bartelt to "[t]ell the truth.

We'll go from there." R.31:29. Bartelt gave the officers details about what he was doing before the attack: that he was reading and saw the girl, and in the "spur of the moment" he decided to "run at her and knock her down and scare her." R.31:30–31. Bartelt admitted to knocking her down with "the knife," dropping the knife, and running away. R.31:32. He told the officers which way he drove from the park, that he threw empty beer cans out of the car, and that he threw away the knife sheath. R.31:33–36.

Clausing then asked Bartelt whether he would be willing to provide a written statement, and Walsh explained that the written statement would describe "in [his] own words . . . what happened . . . what [his] true intentions were" and that it would be Bartelt's chance "to apologize." R.31:37–38. Bartelt asked what would happen after the written statement, and Clausing responded that "we have to figure out where we go from there. I can't say what happens then. We'll probably have more questions for you, quite honestly." R.31:38.

Bartelt then asked, "Should I or can I speak to a lawyer or anything?" Clausing responded, "Sure, yes. That is your option." R.31:38. Bartelt then said, "I think I'd prefer that."[3] R.28, Ex. 1 at 5:44:48–51; R.129:2.

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[3] Likely due to background noise, this portion of the interview was not transcribed. *See* R.31:38; R.28, Ex. 1 at 5:44:48–51. However, after a motion to correct the record, the parties stipulated that Bartelt said these words. *See* R.129.

After getting more information about where Bartelt's van was, Clausing took Bartelt's cell phone. R.31:38–40. Clausing and Walsh then left and told Bartelt to stay in the room. R.31:40. After several minutes, R.105:29, Clausing informed Bartelt that he was under arrest for "reckless[ly] endangering safety," R.31:40–41. Clausing placed Bartelt in handcuffs, and Walsh searched Bartelt before taking him out of the department. R.105:29–30, 35, R.28, Ex. 1 at 6:06:30–53.

2. *Detectives interview Bartelt about the murder of Jessie Blodgett.* The next day, July 17, 2013, Detective Thickens of the Hartford Police Department and Detective Wolf of the Washington County Sheriff's Office interviewed Bartelt (now an inmate of the Washington County Jail) about Jessie Blodgett's death. R.32:2–3; R.105:56, 59–60. Bartelt had come to Thickens' attention because Bartelt had been at the Blodgett residence prior to his interview on July 16, and because cell phone records indicated several communications between Bartelt and Ms. Blodgett. R.105:58. Thickens began by reading Bartelt the *Miranda* warnings. R.32:2–5. Bartelt then read and signed the *Miranda* waiver form, agreeing to waive his rights to remain silent and to counsel. R.105:63–65. During the conversation, Bartelt indicated that he had been in Woodlawn Union Park the morning of the murder. R.32:42. Thickens later searched the park and found a cereal box containing "Intertape 698," "black electrical tape," "a number of different ropes," and "antiseptic wipe[s] . . . with

red staining." *See* R.109:862–71. One of the ropes contained DNA from both Bartelt and Ms. Blodgett, and matched the ligature marks on Ms. Blodgett's neck and wrists. *See* R.109:1042–76, 1204; R.114:73–77.

3. *The trial court denies Bartelt's suppression motion.* The State charged Bartelt with attempted first-degree intentional homicide, first-degree recklessly endangering safety, and attempted false imprisonment for the attack on M.R., and first-degree intentional homicide for the murder of Ms. Blodgett. R.4. Bartelt moved to suppress his statements to the detectives, and any evidence collected based on those statements, on the grounds that his statements were involuntary and that the officers violated his *Miranda* rights when they questioned him. R.19. The trial court held a hearing on the motion and heard from Detectives Clausing and Thickens. R.105. After hearing the evidence, the trial court held that the State had proven by a preponderance of the evidence that Bartelt was not in custody at the time he made comments about a lawyer. R.105:96–100. The court explained that Bartelt was not in custody because, among other things, he was interviewed by only two officers, he "came voluntar[ily] to the lobby of the Slinger Police Department," was dropped off and had made plans to leave, was not searched, was not "handcuffed" or "restrained in any way," the doors of the interview room were unlocked and one "remained partially open," the officers' weapons were holstered and they were not in uniform, and Bartelt was "told

. . . that he was not in trouble, not under arrest, [and] told he could walk out [at] any time." R.105:97–100. The court clarified that Bartelt was not in custody until officers "put him in handcuffs and place[d] him under arrest." R.105:110. Thus, because Bartelt was not in custody, his comments about a lawyer "did not preclude police from interviewing him on July 17th." R.105:103. After also holding that Bartelt's statements were voluntary, R.105:108, the court denied the suppression motion, R.105:105, 108.

4. *A jury convicts Bartelt of murdering Jessie Blodgett.* The circuit court severed the charges for the two incidents, R.103:45, and Bartelt was tried first for the murder of Jessie Blodgett, *see generally* R.109; R.114. After a seven-day trial, *see* R.109:1164, a jury convicted Bartelt of first-degree intentional homicide, R.66; R.109:1259–60. During the trial, the State introduced at least 20 pieces of physical evidence tying Bartelt to the murder, including a climbing rope that contained both Bartelt's and Ms. Blodgett's DNA and matched the ligature marks on Ms. Blodgett's neck. *See* R.109:1042–76, 1204; R.114:73–77. The court sentenced Bartelt to life in prison without the possibility of supervised release. R.66.[4]

5. *The court of appeals affirms the trial court's denial of the suppression motion.* Bartelt appealed his murder

[4] Bartelt later pleaded guilty to the charge of first-degree recklessly endangering safety for the attack on M.R., and was sentenced to five years' imprisonment and five years' extended supervision consecutive to his life sentence. R.82:1.

conviction on the grounds that the trial court improperly denied his suppression motion. App. 102. Specifically, Bartelt argued that all of his statements given after he made comments about an attorney were inadmissible under *Miranda-Edwards*. Because he requested counsel during a custodial interrogation, Bartelt claimed, the police could not lawfully interrogate him again about any subject until counsel was present. He argued that because he was later interrogated without counsel present, the trial court improperly denied his suppression motion. App. 110–11.

The court of appeals disagreed and affirmed the trial court's decision. App. 102. The court assumed without deciding that Bartelt's comments about an attorney were an unequivocal request for counsel. App. 112 n.6. The court held, however, that Bartelt was not in custody at the time he made those comments, and therefore the protections of *Miranda-Edwards* did not apply. App. 125.

The court looked to the totality of the circumstances, including that "Bartelt voluntarily agreed to come to the Slinger Police Department" and "did not know the reason why the police wanted to speak with him," that he was dropped off by two friends who waited for him, "suggest[ing] that he thought that he would be free to leave after the interview," the police department, while secure, could be exited freely, and the "doors to the interview room were not locked and were left somewhat ajar, which suggested that Bartelt was free to leave at any time." App. 113–14. The court also noted that

Clausing told Bartelt that he was neither in trouble nor under arrest and was free to leave at any time, and that the detectives did not search Bartelt or "restrain him in any way," and "never made any show of authority . . . other than at one point when . . . Clausing moved his chair closer to Bartelt." App. 114. The court also found it important that Bartelt was permitted to answer his phone, "which suggested a normal state of affairs, the detectives were not controlling his actions, and he was not being kept in isolation." App. 114–15. Finally, the court noted that the interview was "relatively short." App. 115. The court held that "[t]hese factors nearly all lead to the conclusion that Bartelt was not in custody." App. 115.

With regard to the fact that the detectives indicated to Bartelt that they suspected he was the perpetrator, the court found that this "did not transform the interview into a custodial interrogation" because "the other circumstances" of the interview "did not suggest that Bartelt could not have terminated the interview and left." App. 116. Likewise, the court held that Bartelt's incriminating statements did not transform the setting into a custodial one, and noted that "'no Supreme Court case supports [the] contention that admission to a crime transforms an interview by the police into a custodial interrogation.'" App. 117–19 (quoting *Locke v. Cattell*, 476 F.3d 46, 53 (1st Cir. 2007)). The court held that it is not incriminating statements, but the "police's response" to those statements, that "matters in [the custody] evaluation." App. 121–22. And because the detectives here

"did not change the circumstances of the interview after Bartelt made incriminating admissions," he remained not in custody and thus could not invoke his right to counsel under *Miranda*. App. 123–24.

Bartelt then petitioned this Court for review, which this Court granted. Order Granting Review, *State v. Bartelt*, No. 15AP2506 (June 15, 2017).

STANDARD OF REVIEW

This Court applies a "two-step standard" when reviewing a trial court's denial of a suppression motion. *State v. Lonkoski*, 2013 WI 30, ¶ 21, 346 Wis. 2d 523, 828 N.W.2d 552. This Court will "uphold the circuit court's findings of fact unless they are clearly erroneous" and will then "review de novo the application of the facts to the constitutional principles." *Id.*

SUMMARY OF ARGUMENT

I. Bartelt was not in custody when he made comments about an attorney, and therefore *Miranda-Edwards* does not apply.

The Supreme Court's landmark decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), requires law enforcement to inform suspects subjected to custodial interrogation of their rights to remain silent and to an attorney, and requires law enforcement to honor those rights. If a suspect in custody and under interrogation invokes his right to counsel, "the interrogation must cease until an attorney is present." *Id.* at

474; *accord Edwards v. Arizona*, 451 U.S. 477, 482 (1981). The *Miranda-Edwards* rule also prohibits police from engaging in subsequent, uncounseled interrogations regarding separate investigations. *Arizona v. Roberson*, 486 U.S. 675 (1988).

Miranda-Edwards applies only when a suspect is in custody. To determine custody, courts undertake a two-step inquiry, considering the totality of the objective circumstances. First, courts determine whether a reasonable person in the suspect's situation would have felt free to leave. If not, then courts determine "whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Howes*, 565 U.S. at 509. Only an environment so inherently coercive that it carries its own badge of intimidation and, in-and-of itself, undermines the voluntariness of any statement made by an interrogee can be considered "custodial" under *Miranda*. This inquiry must also focus only on the objective conditions created by law enforcement, and not on the subjective beliefs of either the suspect or police.

Bartelt argues for a new legal test for custody, but his argument ignores entirely the second half of the custody inquiry and focuses on the subjective, in contravention of this Court's caselaw, *Lonkoski*, 346 Wis. 2d 523, ¶¶ 34–35, and is for both reasons legally erroneous.

Applying the correct law of custody to the facts of this case, Bartelt was not in custody when he made comments

about an attorney during his July 16 interview. Bartelt came to the police department voluntarily and was not restrained, the doors were left unlocked and one ajar, Clausing told Bartelt that he was free to leave, Bartelt could use his cell phone, and the two detectives who interviewed Bartelt used a calm, conversational tone throughout the approximately 30-minute interview. Bartelt himself concedes that the interview was not custodial, at least initially. Even after Bartelt made admissions about the attack in the park, the interview continued to be calm and conversational, the door remained open and Bartelt unrestrained, and the detectives did not indicate in any way that Bartelt was no longer free to leave. Thus, the interview remained non-custodial.

Bartelt's claims that the atmosphere of the interview changed after his admissions are unavailing. Even if Bartelt was objectively no longer free to leave after his admissions, he has failed to explain how his admissions altered the interview to the point that it "present[ed] the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*," *Howes*, 565 U.S. at 509, and has therefore failed to show that his admissions placed him in custody.

II. In the alternative, Bartelt's comments about an attorney did not constitute an unequivocal request for counsel, and thus the police were not prohibited from continuing to question him without counsel.

Even if this Court holds that Bartelt's admissions placed him in custody, his comments about an attorney were

not specific enough to invoke his right to counsel under *Miranda*. In order to invoke the right to counsel, a suspect must "unambiguously request counsel" in a "sufficiently clear[ ]" way so that "a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis v. United States*, 512 U.S. 452, 459 (1994). If the statement indicates "'only that the suspect *might*'" be requesting counsel, then the statement is ambiguous and cannot be an invocation of the right to counsel. *State v. Edler*, 2013 WI 73, ¶ 34, 350 Wis. 2d 1, 833 N.W.2d 564 (quoting *Davis*, 512 U.S. at 459). This Court and courts around the country have held that both questions regarding an attorney and hedging statements about an attorney are ambiguous.

Here, Bartelt asked Clausing, "Should I or can I speak to a lawyer or anything?" These are precisely the kind of questions that courts have found ambiguous. Asking "should I speak to a lawyer" seeks advice from the police, and "can I speak to a lawyer" seeks clarification of one's rights. Especially as these two questions were asked as one, a reasonable police officer would not have understood these questions to be an unambiguous request for counsel. After Clausing told him it was his option to speak to a lawyer, Bartelt said, "I think I'd prefer that." This Court has held that nearly identical hedging statements are not unequivocal requests for counsel. *State v. Jennings*, 2002 WI 44, ¶¶ 33, 36, 252 Wis. 2d 228, 647 N.W.2d 142. And this is entirely

correct, as a reasonable officer hearing this kind of statement about a probable preference would understand only that the suspect might be requesting counsel.

Bartelt fails to address many of the cases holding that similar comments are ambiguous, and claims that his ambiguous questions somehow cured the ambiguity in his subsequent ambiguous statement. But, as other courts have held, even when combined with ambiguous questions, hedging statements like Bartelt's are still ambiguous.

ARGUMENT

I. Bartelt's Comments About An Attorney Did Not Invoke The Protections Of *Miranda-Edwards* Because Bartelt Was Not In Custody

The protections of *Miranda-Edwards* apply only when law enforcement has placed a suspect in custody. *Lonkoski*, 346 Wis. 2d 523, ¶ 5. To determine custody, courts engage in a two-part inquiry, taking into account the totality of the circumstances and determining (1) whether the police restrained the suspect's freedom of movement, and, if so, (2) whether the situation was of the inherently coercive kind that *Miranda* was concerned with. *Howes*, 565 U.S. at 509. In this analysis, courts look only to the objective circumstances of the environment, as created by law enforcement. *See State v. Clappes*, 117 Wis. 2d 277, 285, 344 N.W.2d 141 (1984). Bartelt's request for a new rule is erroneous because it ignores the second half of this inquiry and because it focuses on the subjective states of mind of both the suspect and police.

Applying the correct law of custody to the facts of this case, Bartelt was not in custody until after he made comments about an attorney. Bartelt's arguments that, once he made admissions, the atmosphere of the interview changed so drastically as to render him in custody are unavailing.

A. Custody Turns On Whether The Police Have Objectively Restrained The Suspect Under Inherently Coercive Circumstances

1. In *Miranda*, the United States Supreme Court held that any person in custody and under interrogation is entitled to warnings about their rights to remain silent and to have counsel present, and that any statement not preceded by those warnings is inadmissible. *See* 384 U.S. at 444, 476. The Court required warnings out of concern for the effect of "incommunicado" police interrogations on the interrogee's constitutional right not to be "compelled . . . to be a witness against himself," U.S. Const. amend. V.[5] *See Miranda*, 384 U.S. at 445–59. Thus, the Court decided that procedural safeguards must be employed in "police custodial questioning" to protect the "privilege against self-incrimination." *Id.* at 458. The Court also held that, if an interrogee in custody requests counsel, "the interrogation must cease until an attorney is present." *Id.* at 474. In *Edwards*, the Court clarified that police may not "reinterrogate" the individual "if

[5] This Court generally interprets Article I, Section 8 of the Wisconsin Constitution consistently with the Fifth Amendment. *State v. Ward*, 2009 WI 60, ¶ 18 n.3, 318 Wis. 2d 301, 767 N.W.2d 236.

he has clearly asserted his right to counsel," unless the individual voluntarily reinitiates the conversation. *Edwards*, 451 U.S. at 485. This is true even if the later interrogation is part of a separate investigation. *Roberson*, 486 U.S. 675.

Importantly, the protections of *Miranda* and *Edwards* do not apply unless the individual is "in custody." It is the "inherently compelling" nature of in-custody interrogations that necessitates "the accused [ ] be . . . apprised of his rights and the exercise of those rights [ ] be fully honored," *Miranda*, 384 U.S. at 467—thus custody is a necessary precondition to *Miranda-Edwards*, *see State v. Armstrong*, 223 Wis. 2d 331, 344–45, 588 N.W.2d 606 (1999). If an individual is not in custody, the police are not required to honor his request for counsel, *Lonkoski*, 346 Wis. 2d 523, ¶ 5, and he cannot invoke his rights under *Miranda* anticipatorily, before he is taken into custody, *McNeil v. Wisconsin*, 501 U.S. 171, 182 n.3 (1991); *see also Lonkoski*, 346 Wis. 2d 523, ¶ 24.

To determine custody under *Miranda*, courts apply a two-part test. "The test to determine custody is an objective one," taking into account the totality of the circumstances. *Lonkoski*, 346 Wis. 2d 532, ¶¶ 27–28. "[T]he initial step is to ascertain whether, in light of the objective circumstances of the interrogation, a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave." *Howes*, 565 U.S. at 509 (citations omitted). In determining how a reasonable person would have "gauged his freedom of movement," *id.* (citation omitted), this Court looks

to several factors, including "the purpose, place, and length of the interrogation," "whether the suspect is handcuffed, whether a weapon is drawn, whether a frisk is performed, the manner in which the suspect is restrained, whether the suspect is moved to another location, whether questioning took place in a police vehicle, and the number of officers involved." *Lonkoski*, 346 Wis. 2d 523, ¶ 28 (citation omitted).

If a court determines that a reasonable person would not have felt free to leave, the court must then move to the second part of the custody analysis: determining whether the atmosphere was so inherently coercive that *Miranda* protections were necessary. Assessing the person's "freedom of movement . . . is simply the first step in the analysis, not the last," as "restraint[ ] on freedom of movement" is "a necessary [but] not a sufficient condition for *Miranda* custody." *Howes*, 565 U.S. at 509 (citation omitted). A reviewing court must answer "the additional question [of] whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*," *id.*, such as where the "interrogation [is] frequently [ ] prolonged, and . . . the detainee often is aware that questioning will continue until he provides his interrogators the answers they seek," or where "an unscrupulous policeman [could] use illegitimate means to elicit self-incriminating statements," or where the suspect "fear[s] that, if he does not cooperate, he will be subjected to abuse," *Berkemer v. McCarty*, 468 U.S. 420, 438 (1984).

The familiar example of a traffic stop illustrates the proper application of the custody standard. It is "nothing short of sophistic to state" that a motorist "would feel free . . . to leave the scene of a traffic stop." *Berkemer*, 468 U.S. at 436 & n.25 (citation omitted). But the Supreme Court has held that these everyday encounters are not custodial. *Id.* at 435–40. That is because, in the circumstances of an average traffic stop, "the danger that a person questioned will be induced to speak where he would not otherwise do so freely" does not rise to a level necessitating the protections of *Miranda*, as a traffic stop does not present "pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights." *Id.* at 437 (citation omitted). Accordingly, the "temporary and relatively nonthreatening detention involved in a traffic stop or *Terry* stop does not constitute *Miranda* custody." *Maryland v. Shatzer*, 559 U.S. 98, 113 (2010) (citation omitted). Indeed, even "imprisonment alone is not enough to create a custodial situation within the meaning of *Miranda*." *Howes*, 565 U.S. at 511.

Hence the "'ultimate inquiry [as to custody] is [] whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest,'" *Lonkoski*, 346 Wis. 2d 523, ¶ 6 (quoting *Stansbury v. California*, 511 U.S. 318, 322 (1994) (per curiam)), and whether the "environment presents the same inherently coercive pressures as the type of station house questioning at

issue in *Miranda*." *Howes*, 565 U.S. at 509. However, *Miranda* is not implicated "simply because the questioning takes place in the station house," or because the "police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime." *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977). Instead, formal arrest and similar situations involve a "detention [that] represents a sharp and ominous change" from an individual's normal life, "and the shock may give rise to coercive pressures." *Howes*, 565 U.S. at 511. "[T]he person who is questioned may be pressured to speak by the hope that, after doing so, he will be allowed to leave and go home." *Id.* Thus, formal arrest or similar situations that are also inherently coercive require the protections of *Miranda*, but other situations, even ones where reasonable persons may not feel free to leave, *see Berkemer*, 468 U.S. at 435–40, do not, *see Howes*, 565 U.S. at 509.

This analysis ensures that custody will be found "only in those types of situations in which the concerns that powered [*Miranda*] are implicated." *Berkemer*, 468 U.S. at 437; *accord Roberts v. United States*, 445 U.S. 552, 560–61 (1980). *Miranda* was concerned with situations in which a person "[is] thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures"; an "atmosphere [that] carries its own badge of intimidation" will runs an inherent risk the person's statements are not "truly the product of free choice." 384 U.S. at 456–58. "The purposes of the safeguards prescribed by *Miranda* are to ensure that

the police do not coerce or trick captive suspects into confessing [and] to relieve the inherently compelling pressures generated by the custodial setting itself, which work to undermine the individual's will to resist." *Berkemer*, 468 U.S. at 433 (citations omitted); *see also State v. Hambly*, 2008 WI 10, ¶ 48, 307 Wis. 2d 98, 745 N.W.2d 48 ("the purpose of *Miranda* . . . is to prevent government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment" (citation omitted)). As such, the term "custody," for *Miranda* purposes, "is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion." *Howes*, 565 U.S. at 508–09.

2. When determining whether a suspect was in custody, courts look objectively at the environment created by law enforcement, not the suspect. Because the "conditions of custody" for *Miranda* purposes are only "those caused or created by the authorities," *Clappes*, 117 Wis. 2d at 285; *see also Armstrong*, 223 Wis. 2d 331, ¶ 25, it is ultimately the actions of law enforcement that create custody. It follows, then, that a suspect's incriminating statements cannot themselves render an interrogation custodial. For one thing, even if those statements lead the police to suspect the interrogee's guilt, an officer's suspicions "do not affect the objective circumstances of an interrogation or interview and thus cannot affect the *Miranda* custody inquiry" unless they "are communicated or otherwise manifested to the person

being questioned." *Stansbury*, 511 U.S. at 324. Indeed, "[t]he threat to a citizen's Fifth Amendment rights that *Miranda* was designed to neutralize has little to do with the strength of an interrogating officer's suspicions." *Id.* at 324–25 (citation omitted). "It was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning was conducted, which led the [Supreme Court] to impose the *Miranda* requirements with regard to custodial questioning." *Beckwith v. United States*, 425 U.S. 341, 346–47 (1976) (citation omitted).

And if officers articulate their suspicions, this will not always create a custodial situation. "Even a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue." *Stansbury*, 511 U.S. at 325. In order to affect the custody inquiry, the officer's words or actions must have "affected how a reasonable person in that position would perceive his or her freedom to leave." *Id.* Further, even if the officer's words or actions did have that effect, they must also have created an "environment [that] presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*" in order to place the suspect in custody. *Howes*, 565 U.S. at 509.

It is not enough to show even that the suspect's incriminating statements caused the police to form an intent to make an arrest. That is because, like any other subjective

fact, "[a] policeman's unarticulated plan has no bearing on the question [of] whether a suspect was 'in custody' at a particular time." *Berkemer*, 468 U.S. at 442; *see also State v. Koput*, 142 Wis. 2d 360, 379, 418 N.W.2d 804 (1988). Until the officers somehow convey to the suspect their intent to arrest, their subjective intentions cannot affect how a "reasonable man in the suspect's position would have understood [the] situation," *Stansbury*, 511 U.S. at 323–24, and do not create any "inherently coercive pressures," *Howes*, 565 U.S. at 509.

Indeed, it would be unreasonable to make assumptions about whether the police will be arresting a suspect. As the Supreme Court has observed, "some suspects are free to come and go until the police decide to make an arrest." *Stansbury*, 511 U.S. at 325. For example, in *Thompson v. Keohane*, the suspect was allowed to leave even after confessing to murder, 516 U.S. 99, 103–04 (1995); in *California v. Beheler*, the suspect was allowed to leave after confessing to involvement in a murder, 463 U.S. 1121, 1122 (1983); and in *Mathiason*, the suspect was allowed to leave after confessing to burglary, 429 U.S. at 493–94. A confession does not always mean that the police are going to restrain the suspect or prevent him from leaving. Thus, without any objective indications from law enforcement, a suspect's apprehensions that he may not be permitted to leave after confessing are mere conjectures and have no dispositive bearing on the custody inquiry. "[T]he [ ] determination of custody depends on the objective circumstances of the interrogation, not on the subjective

views harbored by either the interrogating officers or the person being questioned." *Stansbury*, 511 U.S. at 323.

3. Bartelt largely rests his appeal on an erroneous request for a new rule: after admitting to a "serious crime," "[n]o reasonable person . . . could possibly believe [they] would be free to terminate a police interview and leave," and therefore they are in custody. Opening Br. 13–14, 16–21. In other words, Bartelt asks this Court to hold that a suspect can place himself in custody by making admissions. Under this new rule, Bartelt argues that he was "in custody" once he confessed to "the attack on M.R." Opening Br. 13–14, 16–21. Bartelt's argument suffers from two fatal flaws.

First, Bartelt's argument rests entirely on viewing the test for custody as merely whether a reasonable person would feel free to leave. *See* Opening Br. 14 ("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." (citations omitted)); *see also* Opening Br. 17. But, as the United States Supreme Court has explained, this is only part of the test. *Howes*, 565 U.S. at 509. Because Bartelt fails to explain how his contentions satisfy the rest of the custody inquiry—that the situation be so inherently coercive as to require the protections of *Miranda*, *id.*—his argument must fail.

Second, Bartelt's argument is foreclosed by this Court's precedent. This Court has already rejected a defendant's nearly identical test because it "focus[ed] on the subjective

beliefs of both police and the suspect." *Lonkoski*, 346 Wis. 2d 523, ¶ 35. In *Lonkoski*, this Court rejected the defendant's argument that, "because the interrogation had gotten to the point that the officers knew and could prove [the defendant] was responsible for his child's death, no one would believe he was free to leave, and therefore, he was in custody." *Id.* ¶ 25. This Court explained that "a suspect's belief that he or she is the main focus of an investigation is not determinative of custody," not only because "this theory" had been "rejected" by the United States Supreme Court, but also because it "would necessarily focus on the subjective." *Id.* ¶¶ 34–35. Such a theory, this Court explained, "is inconsistent with the objective test created for custody." *Id.* ¶ 35.

Bartelt's argument is materially identical to the test rejected in *Lonkoski*, and likewise "turns too much on the suspect's subjective state of mind and not enough on the objective circumstances of the interrogation." *Yarborough v. Alvarado*, 541 U.S. 652, 669 (2004) (citation omitted). Bartelt argues that, after his admissions, "the interrogation had gotten to the point that officers knew . . . he was responsible" for the attack on M.R., and therefore "no one would believe he was free to leave." *Lonkoski*, 346 Wis. 2d 523, ¶ 25. Bartelt claims that his argument is distinguishable from *Lonkoski* because his case involves a confession, Opening Br. 21, but Bartelt's argument suffers from the same defect: reliance on the subjective. Without any objective indication from law enforcement that the suspect is not free to leave, Bartelt's

argument relies entirely upon the subjective apprehensions of the suspect. This "is inconsistent with the objective test created for custody." *Lonkoski*, 346 Wis. 2d 523, ¶ 35.

Consistent with *Lonkoski* and established principles of *Miranda* custody, several courts have rejected the argument that incriminating statements place a suspect in custody without some objective response from law enforcement. For example, the Tenth Circuit in *United States v. Chee*, held that a defendant was not in custody "even after [he] confessed" because "the environment did not change." 514 F.3d 1106, 1114 (10th Cir. 2008). The Tenth Circuit explained that "'[n]o Supreme Court case supports [the] contention that admission to a crime transforms an interview by the police into a custodial interrogation.'" *Id.* (quoting *Locke*, 476 F.3d at 53). Several state courts have also held that a confession or other incriminating statement cannot render a situation custodial unless the police changed the atmosphere of the interrogation. *See Thomas v. Maryland*, 55 A.3d 680, 696 (Md. 2012); *Graham v. United States*, 950 A.2d 717, 731 (D.C. 2008); *Massachusetts v. Hilton*, 823 N.E.2d 383, 396–97 (Mass. 2005); *Connecticut v. Lapointe*, 678 A.2d 942, 958 (Conn. 1996).

The cases that Bartelt relies on do not help him overcome this fatal flaw in his argument. Opening Br. 22–23. As an initial matter, in light of the Massachusetts Supreme Court's decision in *Hilton*, 823 N.E.2d at 396–97, *Massachusetts v. Smith*, 686 N.E.2d 983, 987 (Mass. 1997), is

no longer good law. Many of the other cases Bartelt relies on treat an incriminating statement as dispositive of custody. The courts in those cases concluded that, as soon as an incriminating statement was made and regardless of the surrounding circumstances, the person was automatically in custody because they would not have felt free to leave. *New York v. Ripic*, 182 A.D.2d 226, 235–36 (N.Y. App. Div. 1992) (declaring without explanation that the suspect's single incriminating statement placed her in custody); *Jackson v. Georgia*, 528 S.E.2d 232, 235 (Ga. 2000) (similar); *Kolb v. Wyoming*, 930 P.2d 1238, 1244 (Wyo. 1996) (similar); *Florida v. Pitts*, 936 So. 2d 1111, 1134 (Fla. Ct. App. 2006) (similar); *Illinois v. Carroll*, 742 N.E.2d 1247, 1250 (Ill. Ct. App. 2001) (similar). But as the court of appeals correctly noted, those decisions did not assess "the impact of that statement on the conditions in the interrogation room created by the police that bear on custody." App. 122 n.10. Additionally, all of these cases failed to undertake the full custody inquiry as described in *Howes*, incorrectly "accord[ing] talismanic power" to whether the suspect would have felt free to leave. 565 U.S. at 509 (citation omitted). Notably, these cases were decided before the Supreme Court's decision in *Howes*, 565 U.S. 499 (2012), which clarified the two-part test for custody. Finally, the court in *Akerman v. Indiana*, 774 N.E.2d 970, 978–79 (Ind. Ct. App. 2002), merely treated the suspect's admissions as relevant in the totality of the circumstances, and did not

even imply that admission to a crime alone transforms an otherwise non-custodial interview into a custodial one.

Like his out-of-state cases, *Koput*, 142 Wis. 2d 370, is of no help to Bartelt. There, Koput argued that he was in custody "by the time he gave [an] inculpatory statement to [law enforcement] at 4:15 p.m." *Id.* at 378. This Court disagreed and held that Koput was not in custody until "after his confession, sometime after 4:15 P.M." *Id.* at 380. This Court never held, or even implied, that the confession placed Koput "in custody." Quite the contrary, this Court's statement that Koput was not in custody until "sometime" "after his [4:15 P.M.] confession" implies that it was something other than the confession that ultimately placed Koput in custody. *Accord* App. 124.

In addition, Bartelt's foreclosed test is unworkable. "The benefit of the objective custody analysis is that it is designed to give clear guidance to the police" who "must make in-the-moment judgments as to when to administer *Miranda* warnings." *J.D.B. v. North Carolina*, 564 U.S. 261, 271 (2011). In contrast, Bartelt's test creates more confusion in an area that is "not always clear." *See State v. Grady*, 2009 WI 47, ¶ 24, 317 Wis. 2d 344, 766 N.W.2d 729. Bartelt himself cannot articulate the bounds of his test. For example, he claims that a suspect would not be in custody if they confessed to only a misdemeanor, if the confession took place at their home rather than a police station, if the confession was "implausible," or if "police lack[ed] sufficient background

information to determine if the confession [wa]s genuine or credible"—but he fails to explain why or how any of these factors should be relevant. Opening Br. 23–24. Bartelt also claims that "not all incriminating statements [would] render a person in custody," yet fails to explain what differentiates statements that lead to custody from those that do not. Opening Br. 28. To the extent Bartelt argues that incriminating statements that give police "probable cause" to arrest place a suspect in custody, Opening Br. 28, this argument is contrary to caselaw, *see* 2 Wayne R. LaFave, et al., Crim. Proc. § 6.6(a) (4th ed.) (nn.5–7 and accompanying text). Thus, aside from being legally erroneous, Bartelt's amorphous, unsupported test would utterly fail to provide any guidance to law enforcement when making on-the-spot judgments about whether and when *Miranda* applies.

B. Neither Bartelt's Interview Nor His Admissions Objectively Conveyed That The Police Had Restrained His Freedom Of Movement Or Had Created An Inherently Coercive Environment

1. Under the proper principles of *Miranda*, Bartelt was not in custody when he made comments about an attorney.

It is undisputed that Bartelt was not in custody for much of his July 16 interview. Opening Br. 18 (admitting Bartelt "was not in custody at the outset of the interview"). Bartelt came to the police department voluntarily, the door to exit the police department was not locked, nor were the doors in the interview room, and the door to the secretarial area was

left ajar and Bartelt could see and hear people in that area. *See* R.105:97–100; *Lonkoski*, 346 Wis. 2d 523, ¶¶ 30–31; *Koput*, 142 Wis. 2d at 381–82; *Mathiason*, 429 U.S. at 493, 495. Bartelt was not searched and was not restrained in any way. R.105:98; App. 114; *Lonkoski*, 346 Wis. 2d 523, ¶ 32; *Koput*, 142 Wis. 2d at 381. Bartelt was interviewed by only two police officers who were not in uniform and whose service weapons were holstered and never touched or alluded to. *See* R.105:98; *Lonkoski*, 346 Wis. 2d 523, ¶ 32; *Koput*, 142 Wis. 2d at 381. The officers spoke to Bartelt in a calm, conversational tone and told him at the outset that he was not in trouble, not under arrest, and was free to leave at any time. *See* R.105:31–32, 98; *Lonkoski*, 346 Wis. 2d 523, ¶ 30. And, while the officers told Bartelt that they had evidence from the crime scene and an eyewitness, they also told him the evidence had not yet been analyzed and that the eyewitness had not yet made an identification—conveying that they did not have the evidence to arrest anyone yet. *See* R.31:17–18. Importantly, Bartelt was allowed to use his cell phone during the interview, although he chose not to. App. 114–15; *See State v. Lemoine*, 2013 WI 5, ¶ 31, 345 Wis. 2d 171, 827 N.W.2d 589 (finding it significant that the defendant "had access to his cell phone, and [ ] was explicitly informed that he could use it"). Finally, the interview lasted only approximately 30 minutes. App. 115; *Lonkoski*, 346 Wis. 2d 523, ¶ 31.

The circumstances of Bartelt's July 16 interview at the Slinger Police Department were nothing like the custodial,

incommunicado interrogations that *Miranda* was concerned with. The situations that implicate *Miranda*, those that "carry [their] own badge of intimidation," *Miranda*, 384 U.S. at 457, are incommunicado interrogations: interrogations conducted in secret, where the suspect is removed from the outside world, isolated and subjected entirely to the whims of the interrogating officers, and where the suspect knows (or at least reasonably suspects) that the interrogation will not cease until he tells them what they want to hear. *See Miranda*, 384 U.S. at 457; *Berkemer*, 468 U.S. at 438; *Howes*, 565 U.S. at 511; *Clappes*, 117 Wis. 2d at 287. Here, Bartelt "was not questioned in a coercive atmosphere of isolation created by the police giving rise to overbearing compulsion." *Clappes*, 117 Wis. 2d at 287. The interview was not conducted in secret, and Bartelt was not cut off from the outside world. The door was left ajar allowing Bartelt to see and hear people not involved in the interview, and Bartelt was free to answer his cell phone if he wished and to communicate with whomever was calling. Likewise, Bartelt had no reason to think the interrogation would continue until he confessed. Bartelt was told that he was free to leave, and acknowledged that he understood this. The officers also told Bartelt that the evidence from the crime scene had not been analyzed yet, and if Bartelt did not speak to them now, they would wait until the evidence was analyzed and would interview Bartelt again if the evidence pointed to him. In short, Bartelt knew he did not need to confess in order to leave the interview room.

Nothing about Bartelt's admissions regarding the attack on M.R. created an incommunicado, police-dominated atmosphere where Bartelt's right to remain silent would have been at risk. The circumstances of the interview remained exactly as they had been. The doors remained unlocked and the door to the secretarial area remained ajar, Bartelt remained unrestrained, the officers remained where they were seated, they continued to use a calm, conversational tone, and they never told Bartelt that he was no longer free to leave. Bartelt's admissions did not alter the objective circumstances of the interview to the point that it was so coercive as to require *Miranda* protections. Indeed, his admissions did not alter the objective circumstances of the interview at all.

2. Bartelt has "failed to explain how [his admissions] transformed a routine interview into an inherently coercive setting." *Minnesota v. Murphy*, 465 U.S. 420, 431 (1984). He simply claims that the "atmosphere" of the interview changed once he admitted to the attack because the detectives asked detailed questions about it, focusing on his involvement. Opening Br. 30–31. In the case that Bartelt relies on, the interview ceased after the suspect's initial admission so that a new "expert[ ]" investigator could be brought in to question her regarding the details of her crime, *Hilton*, 823 N.E.2d at 397, a change in circumstances that did not occur here. And, in any event, it is well-settled that a suspect's being the

"focus" of the investigation is not enough to create custody. *See* LaFave, *supra*, § 6.6(a).

Bartelt also claims that the objective circumstances of the interview at the time he made comments about an attorney were affected by the fact that, later in the interview, the detectives took his cell phone and told him to stay in the room. Opening Br. 31–32. However, arguing that later events somehow affected the circumstances at an earlier time is "unsound" "as a matter of logic." LaFave, *supra*, § 6.6(c).[6] These later actions did not affect the objective circumstances of the interview at the time Bartelt made comments about an attorney, and are therefore not relevant to whether he was in custody at that time.

In any event, even if Bartelt were objectively no longer free to leave after his admissions, Bartelt has not explained how this made the environment so much more coercive than it had been as to render it custodial, and has thus failed to show that he was in custody once he made admissions. *Howes*, 565 U.S. at 509.

[6] While courts do consider whether a suspect was later released, this is the only later-in-time event that the United States Supreme Court has deemed relevant to the custody inquiry. *See Howes*, 565 U.S. at 509; *but see* Tammy R. Pettinato, *The Custody Catch-22: Post-Interrogation Release as a Factor in Determining Miranda Custody*, 65 Ark. L. Rev. 799 (2012) (discussing and questioning this practice); LaFave, *supra*, § 6.6(c) (same).

II. Even If Bartelt Had Been In Custody, His Comments About An Attorney Were Not An Unambiguous Invocation Of His Right To Counsel

A. *Miranda* and *Edwards* guarantee to individuals a Fifth and Fourteenth Amendment right to counsel during custodial interrogations, but "the suspect must unambiguously request counsel" to invoke the right. *Davis*, 512 U.S. at 459. If a suspect in custody does invoke his right to counsel, the police must honor his request. All interrogation must cease, and police are not allowed to reinterrogate the suspect, even about a separate crime, unless counsel is present. *State v. Kramar*, 149 Wis. 2d 767, 785–86, 440 N.W.2d 317 (1989); *Roberson*, 486 U.S. 675. If police fail to honor the suspect's request, no statement made or evidence derived from such a statement is admissible by the prosecution. *State v. Harris*, 199 Wis. 2d 227, 251–52, 544 N.W.2d 545 (1996).

An invocation of the right to counsel requires an unequivocal statement that the interrogee "desire[s] to deal with the police only through counsel." *Edwards*, 451 U.S. at 484. "[H]e must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis*, 512 U.S. at 459. A statement is "'ambiguous or equivocal [if] a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel.'" *Edler,* 350

Wis. 2d 1, ¶ 34 (quoting *Davis*, 512 U.S. at 459). "[I]f a suspect is indecisive in his request for counsel, the officers need not always cease questioning." *Davis*, 512 U.S. at 460 (citation omitted).

When determining whether a suspect's statements were an unequivocal request for counsel, this Court performs an "objective test," "examin[ing] the circumstances surrounding the request." *Edler*, 350 Wis. 2d 1, ¶ 34.

Courts generally do not treat questions regarding a lawyer as an invocation of the right to counsel. *Edler*, 350 Wis. 2d 1, ¶ 70 (Ziegler, J., concurring in part, dissenting in part). Courts typically dismiss the question, "Should I talk to a lawyer?" as an attempt "to seek the advice of police," and not an unequivocal invocation of the right to counsel. Marcy Strauss, *Understanding* Davis v. United States, 40 Loy. L.A. L. Rev 1011, 1036–37 (2007) (collecting cases); *see also Clark v. Murphy*, 331 F.3d 1062, 1072 (9th Cir. 2003), *overruled on other grounds by Lockyer v. Andrade*, 538 U.S. 63, 71 (2003). In *State v. Ward*, this Court addressed whether an interrogee's question, "Does that mean I need a lawyer right now?" invoked her right to counsel under *Miranda*. 318 Wis. 2d 301, ¶ 29. This Court held that the question was not an unequivocal request for counsel, as the interrogee had simply "asked the detectives what they thought she should do." *Id.* ¶ 43. Such advice-seeking, this Court held, was an "equivocal reference to an attorney" and therefore "did not require [the officers] to cease questioning." *Id.* And with regard to the

question, "Can I talk to a lawyer?" "[m]any courts have found this type of question to be ambiguous, and a way of simply asking for clarification of one's rights." Strauss, *supra*, at 1037 (collecting cases).

Like questions, general statements about an attorney are also often found to be ambiguous. In *Davis*, the United States Supreme Court held that the statement, "Maybe I should talk to a lawyer," was not an unequivocal request for counsel. 512 U.S. at 462. After *Davis*, this Court held that statements such as, "I think I need an attorney," "I think I should see an attorney," and, "I think maybe I need to talk to a lawyer," are not unequivocal requests for counsel as they are "nearly identical" to the statement at issue in *Davis*. *Jennings*, 252 Wis. 2d 228, ¶¶ 33, 36. Such statements are ambiguous because they would lead a reasonable police officer to understand "only that the suspect *might* be invoking the right to counsel." *Id.* ¶ 36 (citation omitted). Indeed, courts around the country are in accord, finding "hedges" such as, "I think," or, "I guess," to be ambiguous, "indicat[ing] that the person is contemplating making a request, but is not making a definitive one now." Strauss, *supra*, at 1041–42 (collecting cases). Courts have also found the term "rather" or similar preference-indicating terms to be ambiguous. Strauss, *supra*, at 1042–43 (collecting cases). And while law enforcement may choose to ask clarifying questions in response to such ambiguous statements, they are not required to do so. *Jennings*, 252 Wis. 2d 228, ¶ 31 (citing *Davis*, 512 U.S. at 461).

Even when a question is combined with a hedging statement, courts have found this does not amount to an unequivocal request for counsel. *See, e.g.*, *United States v. Mohr*, 772 F.3d 1143, 1145–46 (8th Cir. 2014) (finding the phrases, "Should I get a lawyer at this time? . . . I think I should get one," to be ambiguous).

B. Bartelt's comments about an attorney fall into the categories that this Court and courts around the country have held to be ambiguous. Bartelt first asked Clausing, "Should I or can I speak to a lawyer or anything?" R.31:38. Asking, "Should I speak to a lawyer?" clearly falls into the category of ambiguous advice-seeking. *See Clark*, 331 F.3d at 1072. And, "Can I speak to a lawyer?" is likewise not an unambiguous request for counsel, but is instead a request for clarification of the right to counsel. *See Dormire v. Wilkinson*, 249 F.3d 801, 805 (8th Cir. 2001). Especially given that Bartelt asked both of these questions concurrently, a reasonable officer would not have understood them to be an unambiguous invocation of the right to counsel.

After Clausing told Bartelt that speaking to a lawyer was his "option," Bartelt responded, "I think I'd prefer that." R.129. This statement was not an unequivocal request for counsel. Bartelt's statement is materially identical to the statements this Court held to be equivocal in *Jennings*. *Compare* R.129:2 ("I think I'd prefer [to talk to a lawyer]"), *with Jennings*, 252 Wis. 2d 228, ¶ 33 ("I think I should see an attorney"). A reasonable police officer would have understood

this statement to mean only that Bartelt may have wanted to invoke his right to counsel. Clausing could have asked Bartelt a follow-up question to clarify, but he was under no obligation to do so. *Davis*, 512 U.S. at 461.

C. Bartelt has no meaningful response to the holdings of this Court and courts around the country finding questions and statements nearly identical to the ones he made here to be equivocal. Bartelt does not address *Ward* at all, and attempts to distinguish *Jennings* by claiming that his ambiguous questions preceding his ambiguous statement, "I think I'd prefer that," somehow cured the statement of its ambiguity. Opening Br. 35–37. But combining an ambiguous question with an ambiguous hedging statement does not cure the ambiguity in either. *See Mohr*, 772 F.3d at 1145–46. At most, Bartelt's questions simply clarified what he meant by "that" in his statement, "I think I'd prefer that"—i.e. to "talk to a lawyer." But, "I think I'd prefer to [talk to a lawyer]," is still just as ambiguous as the statements this Court addressed in *Jennings*. If Bartelt wanted counsel present, "all [he] had to do was unequivocally ask for an attorney." *Ward*, 318 Wis. 2d 301, ¶ 43.

CONCLUSION

The decision of the court of appeals should be affirmed.[7]

Dated this 7th day of September, 2017.

Respectfully submitted,

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[7] If this Court disagrees with both of the State's arguments, the State respectfully requests this case be remanded for a determination of whether the introduction of Bartelt's statements and derivative evidence was harmless, *Harris*, 199 Wis. 2d at 252–63, and whether any of the evidence could be admitted under the exceptions to the "fruit of the poisonous tree" doctrine, *see, e.g.*, *State v. Jackson*, 2016 WI 56, ¶¶ 74–91, 369 Wis. 2d 673, 882 N.W.2d 422.

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 10,821 words.

Dated this 7th day of September, 2017.

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

I hereby certify that:

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Dated this 7th day of September, 2017.

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