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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

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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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.

A. Under the proper legal standard, Bartelt was in custody at the time he requested an attorney.

Bartelt's initial brief argued that after he confessed at the Slinger Police Department to attacking a woman with a knife, he was in custody for ***Miranda*** purposes because no reasonable person would have felt free to terminate the interview and leave the interrogation room under those circumstances. (Br. at 18-21). Bartelt's argument was based on the traditional test for determining custody: whether, under the totality of the circumstances, "a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." *See* ***Thompson v. Keohane***, 516 U.S. 99, 112 (1995).

In response, the State asserts that the circumstances surrounding Bartelt's interrogation did not satisfy the "second part" of the custody analysis: "'whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in ***Miranda***.'" (Resp. Br. at 23) (quoting ***Howes v. Fields***, 565 U.S. 499, 509 (2012)). This argument is meritless, as it ignores the obvious fact that Bartelt's interrogation took place at a *police station*. Police station interrogations, where the suspect is objectively not free to leave, are exactly the kind of coercive environments with which ***Miranda*** was concerned. ***Miranda v. Arizona***, 384 U.S. 436, 445, 491-98 (1966). These in-custody stationhouse interrogations are, in and of themselves, "inherently coercive." *See* ***id.*** at 467.

Accordingly, in cases involving stationhouse interrogations, courts generally do not consider this "second part" of the custody analysis. *E.g.*, ***State v. Lonkoski***, 2013 WI 30, ¶ 27, 346 Wis. 2d 523, 828 N.W.2d 552; ***Keohane***, 516 U.S. at 112-14. The reason is simple—in-custody stationhouse interrogations are necessarily "the type of station house questioning at issue in ***Miranda***." *See* ***Howes***, 565 U.S. at 509. Thus, in that context, the only relevant issue is whether a reasonable person in the defendant's position would have felt free to leave.

Not surprisingly then, the State fails to cite a single case involving a stationhouse interrogation where the suspect was objectively not free to leave, but where the court nonetheless concluded that the environment was not the same "type of station house questioning at issue in ***Miranda***." Instead, the State cites cases involving two completely different contexts: (1) police questioning during routine traffic stops, ***Berkemer v. McCarty***, 468 U.S. 420 (1984); and (2) police questioning of inmates serving a prison sentence for an unrelated crime, ***Howes***, 565 U.S. 499. In these two contexts, the Supreme Court has applied the "second part" of the custody analysis and found that, although a reasonable person would not feel free to leave, the circumstances are so different from stationhouse interrogations that they do not constitute custody for ***Miranda*** purposes.

The Supreme Court provided the following reasons for these conclusions. With respect to traffic stops, the detention is presumptively brief and temporary, the motorist is unlikely to feel completely at the mercy of police, and the stop is generally conducted in public. ***Berkemer***, 468 U.S. at 437-39.

With respect to prison inmates, questioning "does not generally involve the shock that very often accompanies arrest," since inmates are already serving a prison term. ***Howes***, 565 U.S. at 511. A prisoner is also "unlikely to be lured into speaking by a longing for prompt release," as "he knows that when the questioning ceases, he will remain under confinement." ***Id.*** Finally, a prisoner "knows that the law enforcement officers who question him probably lack the authority to affect the duration of his sentence." ***Id.*** at 512.

Bartelt's interrogation was nothing like a traffic stop or the questioning of a prison inmate. After his confession—at the point where he was no longer objectively free to leave—Bartelt undoubtedly did experience the shock that often accompanies arrest. At that point, he was completely at the mercy of police, unable to leave and thus cut off from his normal life and the outside world. He was also in an "inherently coercive," "police-dominated atmosphere." *See* ***id.*** at 509, 511.

There was thus a real risk that Bartelt felt compelled to continue "to speak by the fear of reprisal for remaining silent or in the hope of [a] more lenient treatment should he" continue to cooperate. *See* ***id.*** at 512. Also, since Bartelt had not been ***Mirandized***, he may have legitimately thought that the "questioning [would] continue until he provide[d] his interrogators the answers they [sought]." *See* ***Berkemer***, 468 U.S. at 438.

Bartelt's interrogation therefore occurred in precisely the same kind of stationhouse environment at issue in ***Miranda***. He was therefore in custody after his confession.

B. After his confession, Bartelt was objectively in custody because no reasonable person would feel free to leave under the circumstances.

The State argues that Bartelt was not in custody after his confession because, "[w]ithout 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." (Resp. Br. at 30-31).

Contrary to the State's claim, Bartelt's argument does not in any way focus on "the subjective states of mind of both the suspect and police." (*Id.* at 20). Rather, Bartelt's argument rests on an objective inquiry—would a reasonable person in Bartelt's position have felt free to leave after confessing to attacking M.R.?

The answer to that question is a categorical "no." From the outset of the interview, the detectives' questions focused on the violent attack of a woman in a park. (31:7). The detectives treated Bartelt like the target of a serious felony investigation. (31:7-28). They repeatedly pressured him to confess. (31:14-28). And they made it abundantly clear they believed he had committed the crime. (31:26-28). Moreover, Bartelt knew the detectives had a composite sketch of the attacker, which "closely resembled" him. (31:21; 105:41-42).

Additionally, the interview occurred in an interrogation room in the secured, internal portion of the Slinger Police Department. (105:16). This is the very type of "inherently coercive" environment at issue in ***Miranda***. *See* ***Howes***, 565 U.S. at 509. The internal portion of the department was also located beyond a door that was locked for purposes of entry. (105:16-17). Although the door was unlocked for purposes of exiting, there is no evidence that

Bartelt was aware the door had a one-way lock. Given that the door required unlocking for Bartelt to gain entry, a reasonable person in his position would not have known they could freely exit the same door without a police officer there to unlock it. *See* ***People v. Barritt***, 899 N.W.2d 437, 440 (Mich. Ct. App. 2017) (where the doors to the sheriff's office were locked on the outside but not the inside, "the record did not reveal whether it was objectively apparent that the doors were not locked from the inside").

Under these circumstances, no reasonable person would have felt feel free to terminate the interview and leave the interrogation room after confessing to attacking M.R. The State does not even directly dispute this point. Instead, it attempts to evade the issue by focusing on the "casual and conversational" nature of the interview *before* Bartelt's confession. (Resp. Br. at 34-36). The State then suggests that "[n]othing about Bartelt's admissions" altered the objective circumstances of the interview. (*Id.* at 37). That is simply absurd. Bartelt's confession changed everything. "[I]t is utter sophistry to suggest that a person in [Bartelt's] position, having made such an incriminating statement to police officers concerning the very [crime] they were investigating, would feel that []he was not under arrest and was free to leave." *See* ***People v. Ripic***, 587 N.Y.S.2d 776, 782 (N.Y. App. Div. 1992).

The State notes there are a handful of cases in which suspects have been allowed to leave police stations after confessing to violent crimes. (Resp. Br. at 28). But that has no bearing on an objective custody analysis. Regardless of whether certain police officers have released suspects who confessed to violent crimes—on whatever subjective, idiosyncratic (and unreasonable) bases—the fact remains that a reasonable person would not feel free to leave an

interrogation room after confessing to an attempted homicide or other serious crime.

This case is thus distinguishable from ***Lonkoski***. In ***Lonkoski***, at the time the suspect asked for a lawyer, he had not confessed, but simply believed he was the main focus of law enforcement's investigation. 346 Wis. 2d 523, ¶¶ 33-34. Nor had police told him he was under arrest or no longer free to leave. ***Id.***, ¶¶ 11-14. Under those circumstances, the suspect's belief that he was no longer free to leave was entirely subjective. ***Id.***, ¶ 35.

But here, Bartelt was not merely *the main focus* of the investigation at the time he requested an attorney. Bartelt had given a *complete confession* at that point. There was thus no question in anyone's mind that Bartelt was the person who committed the crime. Under these circumstances, Bartelt's custodial status was not a matter of mere subjectivity—i.e., something Bartelt simply suspected. His custodial status was an objective fact, because no reasonable person could believe they would be free to get up and leave a police interrogation room after confessing to an attempted homicide or other serious, violent crime in the presence of police who were questioning them about that very crime.

Bartelt's argument that he was objectively in custody at that point is not based on any "new rule," as the State insists. (Resp. Br. at 29). It is simply based on the traditional totality of the circumstances test—a test in which the relevant inquiry has always been whether a reasonable person would feel free to leave under the circumstances. Contrary to the State's belief, this test is not "unclear" or "unworkable."[1] (*Id.*

[1] The State claims it is confusing why some confessions, like those to a misdemeanor, might not render a person in custody. (Resp. (continued)

at 33-34). Courts and police must simply ask whether a reasonable person would have felt free to leave under the totality of all the circumstances, including a confession.

C. The court of appeals erred in adopting the "change in atmosphere" test.

The State claims that "without any objective indications from law enforcement," a person cannot be in custody. (Resp. Br. at 28). This argument is substantially similar to the "change in atmosphere" test adopted by the court of appeals. Under this standard, a defendant cannot be in custody after a confession unless police do something additional to change the atmosphere of the interrogation. (Ct. App. Op. at 21-24; App. 121-24).

However, it is not clear why police need to do something additional after a confesion to alter a person's custody status. The purpose of ***Miranda***'s safeguards is to protect people who are objectively not free to leave from the "inherently compelling pressures generated by the custodial setting." ***Berkemer***, 468 U.S. at 433. A confession standing alone—particularly one to a violent crime at a police station—would certainly cause a reasonable person to believe they are no longer free to leave. Neither the State nor the court of appeals offer any persuasive reason to doubt that.

Br. at 33-34). The answer is obvious—some confessions simply would not cause a reasonable person to believe they are no longer free to leave. For example, after a confession to a misdemeanor, a reasonable person might believe that police would exercise their discretion and not charge them, or that they might be summoned to court instead of being arrested. The State also expresses confusion as to why a complete confession would render someone in custody, but a statement that was incriminating only to limited degree might not. (*Id.* at 33-34). Unlike a confession, which removes all (or most) doubt about a person's guilt, a statement that is incriminating only to a limited degree would be less likely to cause a reasonable person to believe they are no longer free to leave.

It is not surprising then that numerous courts have concluded that a defendant was in custody following a confession to a serious crime. And contrary to the State's claim, none of those cases held that a confession is a dispositive factor. Rather, they all considered the confessions as one factor under the totality of all the circumstances. *See* ***Jackson v. State***, 528 S.E.2d 232, 234-35 (Ga. 2000) (describing circumstances surrounding Jackson's confession, and stating "[a] reasonable person *in Jackson's position*, having just confessed . . . would, from that time forward, perceive himself to be in custody") (emphasis added); ***People v. Carroll***, 742 N.E.2d 1247, 1249-50 (Ill. Ct. App. 2001); ("a court must consider all of the circumstances surrounding the questioning"); ***State v. Pitts***, 936 So. 2d 1111, 1134 (Fla. Dist. Ct. App. 2006) (similar); ***Com. v. Smith***, 686 N.E.2d 983, 987-88 (Mass. 1997); (similar)[2]; ***Ripic***, 587 N.Y.S.2d at 779-83 (similar); ***Kolb v. State***, 930 P.2d 1238, 1243-44 (Wyo. 1996); (similar).

Because these cases employed the traditional totality of the circumstances test and considered all the relevant factors—including a confession—they are ultimately more persuasive than the cases relied upon by the State and the court of appeals. They are also more persuasive because they do not engage in the "sophistry" of pretending that a reasonable person, having just confessed to a serious crime in

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[2] The State is wrong that ***Com. v. Smith***, 686 N.E.2d 983 (Mass. 1997), is no longer good law in light of ***Com v. Hilton***, 823 N.E.2d 383 (Mass. 2005). ***Hilton*** did not overrule or even mention ***Smith***. Rather, the court in ***Hilton*** simply refused to conclude that the defendant was in custody at the moment she said "her son would hate her and never forgive her." ***Id.*** at 397. That is quite different from the defendant's statement in ***Smith*** that he "was there to confess to the murder of his girl friend." ***Smith***, 686 N.E.2d at 987.

the presence of police, would actually believe they are still free to leave a police station. *See* ***Ripic***, 587 N.Y.S.2d at 782.

II. Bartelt Unequivocally Invoked His Right to Counsel.

During his initial interview, Bartelt asked the detective if he could speak to a lawyer. After the detective told him this was an option he had, Bartelt stated, "Okay. I think I'd prefer that." (129). In this context, that statement had only one possible meaning: that Bartelt was choosing the option of speaking to a lawyer—the option the detective had just advised him he had.

Bartelt did not "hedge" in his request for a lawyer, as the State suggests. (Resp. Br. at 41-43). He did not say he "might" or "maybe" wanted a lawyer. *See* ***Davis v. United States***, 512 U.S. 452, 462 (1994) (finding statement, "Maybe I should talk to a lawyer," to be insufficient); ***State v. Jennings***, 2002 WI 44, ¶ 44, 252 Wis. 2d 228, 647 N.W.2d 142 (finding the statement, "I think maybe I need to talk to a lawyer," to be ambiguous).

And, Bartelt's use of the word "think" did not make his request any less clear. Again, Bartelt had already asked the detective if he could speak to a lawyer. After the detective advised him this was his option, Bartelt chose that option by stating, "Okay. I think I'd prefer that." This combination of Bartelt's question, the detective's answer, and Bartelt's follow-up statement specifically choosing the option to speak to a lawyer, removed any possible ambiguity from the situation.

This exchange distinguishes this case from others in which courts have found the term "I think" to be ambiguous. The statements "I think I should see an attorney" or "I think I need a lawyer" are arguably ambiguous because they imply

that the suspect is still considering the possibility of requesting a lawyer. *See* ***Jennings***, 252 Wis. 2d 228, ¶ 33. The defendant's statements in ***United States v. Mohr***, 772 F.3d 1143 (8th Cir. 2014), were similarly ambiguous. There, the defendant asked, "Should I get a lawyer at this time," then answered his own question by stating, "I think I should get one." ***Id.*** at 1145-46. That answer, in combination with his prior question, only indicated that the defendant was contemplating and seeking advice about whether he should get a lawyer.

But where a suspect asks if he can speak to lawyer, is advised he can, and then states, "Okay. I think I'd prefer that," no reasonable police officer could believe the suspect was still only considering the possibility of speaking to a lawyer. Following such an exchange, any reasonable police officer would understand the suspect was requesting an attorney. The detective questioning Bartelt certainly understood that. After Bartelt said, "Okay. I think I'd prefer that," the detective did not display any confusion. He said, "All right," and ended the interrogation. He clearly understood—like any reasonable police officer would—that Bartelt had invoked his right to counsel.

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 from 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.[3]

Dated this 2nd day of October 2017.

Respectfully submitted,

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[3] The State requests that if this Court rules in Bartelt's favor, that it remand the case for a harmless error determination. (Resp. Br. at 44 n.7). The State could have raised a harmless error defense at any point in this appeal. It chose not to do so. It has therefore forfeited its right to raise this defense. *See* ***Ansul, Inc. v. Employers Ins. Co. of Wausau***, 2012 WI App 135, ¶ 20 n.5, 345 Wis. 2d 373, 826 N.W.2d 110 ("Issues not raised on appeal are deemed abandoned.").

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,996 words.

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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 2nd day of October 2017.

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