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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Appellant,

Appeal No. 2017AP002243-CR
Grant County Case No. 17 CM 157

v.

CHAD D. KNAUER,

Defendant-Respondent,

ON APPEAL FROM AN ORDER SUPPRESSING DEFENDANT'S CONFESSION ENTERED BY THE CIRCUIT COURT FOR GRANT COUNTY, THE HONORABLE CRAIG R. DAY, PRESIDING

BRIEF OF DEFENDANT-RESPONDENT CHAD D. KNAUER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WISCONSIN CASES **PAGE**

WISCONSIN CASES (CONT'D) **PAGE**

FEDERAL CASES

OTHER FOREIGN CASES **PAGE**

WISCONSIN STATUTES

OTHER AUTHORITY

STATEMENT OF THE ISSUE

When the police find stolen property in a person's possession nearly two months after the property was stolen, and further, where the police do not possess any facts other than the bare fact of such possession which would allow them to infer that the person possessed the property knowing of its stolen character, and when the information the police do have in fact weighs against an inference of such knowledge on the part of the possessor, do the police have probable cause to arrest that person for knowingly possessing or retaining stolen property in violation of Wis. Stat. § 943.20(1)(a)?

The trial court answered: No.

STATEMENT OF POSITION ON ORAL ARGUMENT AND PUBLICATION

Publication is warranted, as the facts involved are materially different from those in other published opinions on the same subject, and the precise legal issue raised by the State has not been addressed directly in this context in any published opinion of the Wisconsin appellate courts, and as such, a published opinion will provide needed guidance to the courts, litigants, and the police. Oral argument is unnecessary, as the parties will have fully presented and argued the issue(s) on appeal in their respective briefs. Respondent

Chad D. Knauer does not, however, object to oral argument.

STATEMENT OF THE CASE

On April 5, 2017, an employee of Ready-Ag in Stitzer, Wisconsin, discovered that a trailer belonging to the business which had been parked in a field along the side of Grant County Trunk Highway E on or around March 26, 2017 had gone missing. (R.1:1, R.App. 1). Nearly two months later, on May 23, 2017, during a custodial interrogation of defendant-respondent Chad D. Knauer, Mr. Knauer "confessed" to having stolen a trailer from a field outside of Stitzer, Wisconsin. (R.18:34-37, R.App. 39-42). Mr. Knauer was subsequently charged with misdemeanor theft contrary to Wis. Stat. § 943.20(1)(a). (R1:1. R.App. 1). Mr. Knauer, through counsel, filed a motion to suppress his confession, alleging that it was involuntary and therefore inadmissible in evidence for any purpose. (R.11:1-3, R.App. 3-5).

After conducting an evidentiary hearing on October 2, 2017 on Mr. Knauer's motion to suppress his confession (R.32:1-28), the circuit court, the Honorable Craig R. Day presiding, rendered an oral ruling on October 10, 2017 finding that Mr. Knauers' confession was inadmissible for any purpose because it was given involuntarily and in response to improperly coercive police interrogation techniques, or more precisely, because the State had not met its burden to prove that the confession was knowing, intelligent, and

voluntarily given. (R.33:2-18, R.App. 54-74). This appeal by the State, brought pursuant to Wis. Stat. § 974.05(1)(d)3., follows.

STATEMENT OF FACTS

In support of its order suppressing the defendant's confession as involuntarily given, the circuit court found the following facts relating specifically to the officers' threats to arrest Mr. Knauer's aunt and uncle: (1) that the confession was given in response to the interrogating officers' threat to arrest Mr. Knauer's aunt and uncle if they found stolen property on the aunt and uncle's property; (2) that at the time the threat was made, the officers were aware that Mr. Knauer's aunt and uncle were very important to him; (3) that the officers knew or at the least subjectively believed that at the time that the threat was made, they would not have had probable cause to arrest the aunt and uncle based solely upon their mere possession of property which was stolen nearly two months previously; (4) that the officers would not in fact have had probable cause to arrest the aunt and uncle merely because they found that the aunt and uncle had on their property personal property of another which had been stolen nearly two months earlier; (5) that there was no need to obtain a confession in light of the fact that the officers already had information that there was in fact property which they believed Mr. Knauer had stolen being stored at Mr. Knauer's aunt

and uncle's property; and (6) that as a result, the threat was improper and coercive. (R.33:3-15, R.App. 55-68).

The circuit court's oral ruling also reflects that it went through the inquiry as to whether a confession is involuntary as that standard was enunciated in **State v. Hoppe**, 2003 WI 43, ¶¶36-40, 261 Wis.2d 294, 661 N.W.2d 407. (R.33:7-9, R.App. 60-62). The circuit court first took note that Mr. Knauer at the time of the interrogation was 32 years old, had education beyond high school, and was of at least average intelligence. (R.33:7-8, R.App. 60-61). The court then found that Mr. Knauer was "in a bit of a state about circumstances relating to a child named Maverick" who was either Mr. Knauer's child or at the least a child he had some interest in, but that there was "nothing extraordinary about his physical or emotional condition." (R.33:8, R.App. 61). The court also found in this regard that Mr. Knauer didn't want to be in jail, that he didn't want to be gone for a long time, and that he had the impression that he was perhaps going to be gone for a long time. (R.33:8, R.App. 61). The court further found that Mr. Knauer was "no stranger to contact with law enforcement." (R.33:8, R.App. 61).

With respect to the other side of the voluntariness balance, the police tactics used to extract the confession, the court began by noting that the interrogation itself took place over just under an hour

and a half, and was therefore "not a lengthy interrogation." (R.33:8, R.App. 61). The court also found that there was no issue with respect to any delay in arraignment, that the interrogation took place in a jail while Mr. Knauer was in custody, that Mr. Knauer was advised of his constitutional rights prior to being interrogated, and that there was no physical pressure brought to bear upon him during the interrogation. (R.33:9, R.App. 62).

The court then listed its findings regarding the psychological pressures brought to bear on Mr. Knauer during the interrogation. (R.33:9, R.App. 62). The court found that there was some psychological pressure brought to bear on Mr. Knauer regarding what a judge was going to do with him if he did not cooperate, regarding being able to see his son, regarding his girlfriend Megan, and regarding "how the co-actor Mr. Turpin was going to roll on him if he didn't roll on Mr. Turpin . . . ." (R.33:9, R.App. 62). The court at this point in its analysis did not believe that the balance had yet tipped in favor of finding Mr. Knauer's confession to be involuntary. (R.33:9, R.App. 62).

The court then turned to the final portion of the analysis, stating that it must analyze whether "any inducements, threats, methods, or strategy [were] used by the police to compel a response[,]" and stated that this portion is where the court thought

"the scale tips." (R.33:9, R.App. 62). The court first stated its legal conclusion "that the threat to arrest Mr. Knauer's aunt and uncle in the absence of probable cause to do so is a threat, the nature of which is an improper threat, and no matter what the personal characteristics are, if there is as is apparent from the record here a susceptibility by Mr. Knauer, it was the chink in his armor, so to speak – his love for his aunt and uncle and desire for something bad not to happen to them that tipped him to respond to the inappropriate improper threat to arrest them." (R.33:9, R.App. 62).

The circuit court explained that in reaching its conclusion that the threat to arrest the aunt and uncle was improperly coercive, it was relying on the fact that the police would not have had probable cause to do so at the time they made the threat, that the officers knew or believed as much, and ultimately that "a threat to arrest someone without probable cause to do so is such as would render an otherwise voluntary confession involuntary." (R.33:11-15, R.App. 64-68). The court then discussed the question of whether there would have been probable cause to arrest the aunt and uncle at the time the threat to arrest them was made to Mr. Knauer. (R.33:12, R.App. 65). First, the court noted that there is a legal principle to the effect that when one is found to be in possession of recently stolen property, such

possession coupled with the recency of the theft can support an inference that one is in fact the thief. (R.33:12-13, R.App. 65-66).

Relating to the question whether there was probable cause to arrest the aunt and uncle at the time the officers threatened to do so while interrogating Mr. Knauer, the court specifically found that the inference noted above was not supported by the facts for several reasons. (R.33:13, R.App. 66). It found first that the property at issue was not recently stolen. (R.33:13, R.App. 66). The court then found in addition that because Mr. Knauer was a "known thief," the strong inference arises that any stolen property found on the aunt and uncle's property was likely stolen by Mr. Knauer, not the aunt and uncle, and thus that there would not have been probable cause to arrest the aunt and uncle for theft. (R.33:13, R.App. 66).

The circuit court then went on to conclude that there also would not have been probable cause to arrest the aunt and uncle for possession of stolen property. (R.33:13-14, R.App. 66-67). It did so because it could find no factual support in the record, based on what the officers knew at the time of the threat to arrest the aunt and uncle if they found them to be in possession of stolen property, for an inference that the aunt and uncle would have known that they were in possession of stolen property, and that therefore the police would not have had probable cause to arrest the aunt and uncle for

possession of stolen property even if the police found property which was in fact stolen on the aunt and uncle's property. (R.33:14, R.App. 67). The court further found that the police intended for Mr. Knauer to believe that if he did not confess to theft of property he was storing at his aunt and uncle's place, the police would arrest his aunt and uncle. (R.33:14, R.App. 67).

STANDARD OF REVIEW

Whether there is probable cause sufficient to make an arrest when the facts are undisputed is a question of law this court reviews independently of the circuit court, but benefiting from its analysis. **State v. Secrist**, 224 Wis.2d 201, 208, 589 N.W.2d 387 (1999). If any facts necessary to the determination of probable cause are in dispute, the circuit court's findings of fact will not be disturbed on appeal unless they are clearly erroneous. **Id.** at 207.

"'Probable cause to arrest is the quantum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime.'" **State v. Weber**, 2016 WI 96, ¶20, 372 Wis. 2d 202, 887 N.W.2d 554 (quoting **Secrist**, 224 Wis.2d at 212). "There must be more than a possibility or suspicion that the defendant committed an offense, but the

evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not." **Id.**

The State has forfeited or waived in the circuit court any issue other than that of whether there would have been probable cause to arrest Mr. Knauer's aunt and uncle based solely on their mere possession of property which was stolen more than six weeks before, as it failed to object to the court's ruling on any other basis. (R.33:15-18, R.App.); **McKee Family I, LLC v. City of Fitchburg**, 2017 WI 34, ¶32, 374 Wis. 2d 487, 893 N.W.2d 12 ("Generally, issues not raised or considered by the circuit court will not be considered for the first time on appeal.").

In addition, the State has abandoned any other issue on appeal by failing to raise any other issue in either its statement of the issue or its brief. **See A.O. Smith Corp. v. Allstate Ins. Companies**, 222 Wis. 2d 475, 491-92, 588 N.W.2d 285 (Ct. App. 1998) (stating that "an issue raised in the trial court, but not raised on appeal, is deemed abandoned[,]" and further stating that "a party does not adequately raise an issue when it does not raise that issue in the brief-in-chief."); **see also State v. Ledger**, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993) ("On appeal, issues raised but not briefed or argued are deemed abandoned."). That said, abandonment, waiver, and forfeiture are rules of judicial

administration which this court may choose to ignore, and as such, the voluntariness of Mr. Knauer's confession shall be addressed here in case this court exercise chooses to its discretion to do so. **McKee Family I, LLC**, 374 Wis. 2d 487, ¶32 ("However, it is within this court's discretion to "disregard alleged forfeiture or waiver and consider the merits of any issue because the rules of forfeiture and waiver are rules of 'administration and not of power.'"); **see also Adler v. D & H Indus., Inc.**, 2005 WI App 43, ¶19, 279 Wis. 2d 472, 694 N.W.2d 480. ("The waiver rule is purely administrative and does not affect our power to address an issue not raised in the briefs if we so choose.").

In the event that this court chooses to exercise its discretion to ignore the State's forfeiture or waiver and subsequent abandonment, **"**[t]he question of voluntariness involves the application of constitutional principles to historical facts." **State v. Hoppe**, 2003 WI 43, ¶34, 261 Wis. 2d 294, 661 N.W.2d 407 (citing **Arizona v. Fulminante**, 499 U.S. 279, 287, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)) (brackets added). Appellate courts are to "give deference to the circuit court's findings regarding the factual circumstances that surrounded the making of the statements." **Id.** "However, the application of the constitutional principles to those facts is subject to independent appellate review." **Id.**

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT WHERE THE POLICE FIND A PERSON IN POSSESSION OF PROPERTY THE POLICE KNOW TO HAVE BEEN STOLEN FROM ANOTHER LOCATION NEARLY TWO MONTHS PREVIOUS TO THE DISCOVERY AND WHERE THE POLICE HAVE NO OTHER INFORMATION WHICH WOULD ALLOW THEM TO INFER THAT THE PERSON FOUND WITH THE PROPERTY HAD KNOWLEDGE OF THE PROPERTY'S STOLEN CHARACTER, THE POLICE DO NOT HAVE PROBABLE CAUSE TO ARREST THE PERSON FOR POSSESSING OR RETAINING STOLEN PROPERTY.

The sole issue presented to this Court in the State's appeal is whether there was probable cause to arrest Mr. Knauer's aunt and uncle for possession of or retaining stolen property at the time that the police threatened to arrest said aunt and uncle in the event that stolen property was found on the aunt and uncle's property. (Appellant's Brief at 1, 4-5). Accordingly, the issue for review is whether being found in possession of stolen property nearly two months after the property was stolen gives rise to probable cause to believe that one possessed or retained the property with knowledge of its stolen character absent additional facts bearing on one's knowledge beyond the bare fact of possession. Mr. Knauer, contrary to the State's arguments, asserts that under the circumstances of this case, the police would not have had probable cause to arrest his aunt

and uncle for possession of or retaining stolen property, and that even if the officers would have had probable cause to arrest Mr. Knauer's aunt and uncle, because the officers did not subjectively believe that they would have had such probable cause at the time the threat was made, the threat was in any event improper and unduly coercive so as to render Mr. Knauer's confession involuntary.

To begin, it is axiomatic that in order for a person to be guilty of possession or retention of stolen property, it must be shown that the person knew the stolen character of the property he or she possessed or retained. **State v. Johnson**, 11 Wis.2d 130, 139, 104 N.W.2d 379 (1960); **see also** Wis. JI-Criminal 1441 and Wis. Stat. § 943.20(1)(a). Probable cause "is that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime." **State v. Woods**, 117 Wis. 2d 701, 710, 345 N.W.2d 457 (1984). "The question is whether the "facts and circumstances . . . were such that police officers of reasonable caution could have believed the defendant probably committed the crime."" **Id.** at 710-11 (quoting **Johnson v. State**, 75 Wis.2d 344, 350, 249 N.W.2d 593 (1977)) (ellipsis in original). "A violation of sec. 943.20(1)(a), Stats., occurs when a person "intentionally takes and carries away, uses, transfers, conceals, or retains possession of movable property of another without his consent and with intent to

deprive the owner permanently of possession of such property." **Woods**, 117 Wis.2d at 711.

Of crucial importance, in either case, a person who possesses or retains stolen property, in order to be guilty of a crime, must know that the property possessed or retained was in fact stolen. **See, e.g.**, Wis. JI-Criminal 1441 (stating that knowledge of the proper owner's nonconsent to the property being taken and carried away is an essential element of any version of theft described in Wis. Stat. § 943.20(1)(a), including theft by retaining possession of stolen property). Thus, in order for there to have been probable cause to believe that Mr. Knauer's aunt and uncle possessed or retained stolen property in violation of Wis. Stat. § 943.20(1)(a), there must be facts or reasonable inferences available to the police such that "police officers of reasonable caution could have reasonably believed" that the aunt and uncle knew of the stolen character of the trailer at issue here. **Woods**, 117 Wis.2d at 711.

First, and contrary to the State's position, an inference of knowledge of the stolen character of property cannot be rationally supported without something more in the surrounding circumstances than mere possession of stolen property; although Wisconsin has long held that unexplained possession of *recently* stolen property may raise an inference of knowledge of the stolen character of the

property on the part of the possessor, such recent possession standing alone has also long been held to be of at best weak probative value as to knowledge. **See, e.g.**, **Ingalls v. State**, 48 Wis. 647, 4 N.W. 785, 792 (1880) ("In the first place, if the fact of possession stands alone, wholly unconnected with any other circumstances, its value or persuasive power is very slight, for the real criminal may have artfully placed the article in the possession or upon the premises of an innocent person, the better to conceal his own guilt; whether it be the instrument of homicide, burglary, or other crime, or the fruits of robbery or larceny; or it may have been thrown away by the felon in his flight and found by the possessor, or have been taken away from him in order to restore it to the true owner, or otherwise have come lawfully into his possession."); **see also State v. Johnson**, 11 Wis. 2d 130, 139, 104 N.W.2d 379 (1960) ("Mere possession of stolen property raises no inference of guilt, but Wisconsin from early times has followed the rule that unexplained possession of ***recently*** stolen goods raises an inference of greater or less weight, ***depending upon the circumstances***[,] that the possessor is guilty of the theft[.]") (emphasis and brackets added).

Here, as an initial matter, the court found as a fact that the property at issue had not been recently stolen, (R.33:13, R.App. 66),

and this finding is not clearly erroneous, as it was stolen in late March or very early April of 2017, but the interrogation at issue here took place on May 23, 2017, nearly two months after the alleged theft. (R.1:1, R.App. 1; R.11:1-3, R.App. 3-5). Further, nothing else in the record supports an inference that the aunt and uncle would have known that the property was stolen; in fact, the court found, contrary to the State's position, that the fact that Mr. Knauer was a known thief cuts against an inference that the aunt and uncle knew anything about or had anything to do with the theft of the property. (R.33:13, R.App. 66). Finally, it is of great significance that the court found as a fact that the police did not believe that they in fact would have had probable cause to arrest the aunt and uncle based solely on their possession of the stolen property at issue here. (R.33:6-7, R.App. 59-60). **See, e.g.**, **State v. Artic**, 2010 WI 83, ¶41, 327 Wis. 2d 392, 786 N.W.2d 430 ("Threatening to obtain a search warrant does not vitiate consent if "the expressed intention to obtain a warrant is genuine ... and not merely a pretext to induce submission.""). The court did not clearly err in so finding.

The State in its brief notes, correctly, that police are not required to rule out innocent explanations in evaluating whether probable cause exists, citing **United States v. Funches**, 327 F.3d

582, 587 (7th Cir. 2003). That said, however, for the inference in favor of probable cause to be reasonable, and therefore in fact supportive of probable cause to believe that a person is in knowing possession of stolen property, it must be based on some facts in addition to mere possession of same. First, all of the Wisconsin cases noted above focus strongly on the *recency* of the theft of the property as a circumstance relevant to knowledge. This is quite sensible, as the longer the interval between a theft and discovery of the property stolen in the possession of another person (and thus, the greater the chance that the thief transferred the property to an innocent third party), the less likely it is that the person found with the property was the thief, or even someone who knew of the stolen character of the property. Second, the reasonableness of any given inference has been described in Wisconsin law as follows:

> An elementary principle is that an inferred fact is a logical, factual conclusion drawn from basic facts or historical evidence. It is the probability that certain consequences can and do follow from basic events or conditions as dictated by logic and human experience. Building on this elementary principle is the principle that a reasonable inference is a conclusion arrived at by a process of reasoning. This conclusion must be a rational and logical deduction from facts admitted or established by the evidence when such facts are viewed in the light of common knowledge or common experience. Further, an inference ***is not supposition or***

> ***conjecture; it is a logical deduction from facts proven and guesswork cannot serve as a substitute***.

Belich v. Szymaszek, 224 Wis. 2d 419, 425, 592 N.W.2d 254 (Ct. App. 1999) (internal citations omitted, emphasis added).

Where, as here, there are no facts at all other than the mere fact of non-recent possession of stolen property from which to infer the possessors' knowledge of the stolen character of the property, an inference of knowledge is necessarily unreasonable and thus cannot support probable cause. This is so because the rationale given by courts which have found probable cause to believe a person has stolen a given piece or property when they are found to be in possession of such property soon after the property was stolen is that it is reasonable to believe that because the thief would not have had time to transfer or otherwise dispose of the property, the contrary inference that the person does not know of the stolen character of the property is unreasonable. **See, e.g.**, **Ingalls**, 4 N.W. at 792 (implying that the recency of the theft must be sufficiently close in time to discovery of possession of stolen goods to negate an inference that the possessor did not know of the stolen character of the property); **see also State v. Davis**, 965 P.2d 525, 538 n. 6 (Utah Ct. App. 1998) (In holding that the passage of a year between a theft and the discovery that the defendant was in possession of the stolen item

could not reasonably support an inference that the defendant knew the item was stolen, explaining that "[t]he time intervening between the theft and the router's discovery significantly undermines any inference that Davis's mere possession of the router suggests that he would have had a reasonable belief that it was probably stolen. The situation would be different if, for example, the router had been stolen from Middleton the day before its discovery in Davis's shed."). Accordingly, the State is clearly wrong when it argues that there was in fact probable cause to arrest Mr. Knauer's aunt and uncle for possession or retention of stolen property in violation of Wis. Stat. § 943.20(1)(a).

Courts addressing this question have, when finding that the inference was sufficient to allow a conviction, relied not just upon a short interval between a theft and the discovery of stolen property in a suspect's possession, but also on the presence of other circumstances that tend to negate any innocent inferences. In that regard, the State's reliance upon the facts in **Woods** to support its position that there would have been probable cause to arrest Mr. Knauer's aunt and uncle upon finding that they were in possession of stolen property which was stolen nearly two months previously without any other facts to indicate that the aunt and uncle knew that

the property at issue was stolen is misplaced, as **Woods** involved additional facts beyond the mere possession of stolen property which tended to negate an inference of innocent possession.

In that case, the police knew, beyond the fact that the property had been stolen many months previously, that Woods had contacted an acquaintance he barely knew to try to sell a chainsaw worth $134.00 to said acquaintance for the unreasonably low price of $20.00, and also, that Woods' offer to sell the chainsaw was unsolicited by the acquaintance. **Woods**, 117 Wis.2d at 711. This is in stark contrast to the situation here, wherein the State relies upon the mere fact of possession of property which has in fact been stolen, which position, if accepted, would improperly eliminate the State's burden to prove knowledge of the stolen character of the property and thereby transform the crime of possession of stolen property into a crime of strict liability, contrary to the intent of the legislature in requiring such knowledge. **See, e.g.**, **United States v. Howard**, 214 F.3d 361, 364 (2nd Cir. 2000) ("The inference pressed by the government – possession of a stolen gun suffices to show knowledge that it was stolen – would essentially render the statute's knowledge requirement superfluous and expose individuals possessing stolen guns to strict liability, contrary to the statute's express language and history.").

As has been repeatedly noted in decisions regarding this issue,

> if the fact of possession stands alone, wholly unconnected with any other circumstances, its value or persuasive power is very slight, for the real criminal may have artfully placed the article in the possession or upon the premises of an innocent person, the better to conceal his own guilt; whether it be the instrument of homicide, burglary, or other crime, or the fruits of robbery or larceny; or it may have been thrown away by the felon in his flight and found by the possessor, or have been taken away from him in order to restore it to the true owner, or otherwise have come lawfully into his possession.

Ingalls v. State, 48 Wis. 647, 4 N.W. 785, 792 (1880); **see also State v. Johnson**, 11 Wis. 2d 130, 139, 104 N.W.2d 379 (1960) ("Mere possession of stolen property raises no inference of guilt, but Wisconsin from early times has followed the rule that unexplained possession of ***recently*** stolen goods raises an inference of greater or less weight, ***depending upon the circumstances***[,] that the possessor is guilty of the theft[.]") (emphasis and brackets added).

Here, without any additional facts beyond the mere possession of stolen property which went missing from its rightful owner more than six weeks previously, there is no reasonable inference available which would give an ordinarily prudent person, acting rationally, probable cause to believe that the aunt and uncle knew that the trailer had been stolen. Hence, there would not have

been sufficient probable cause to believe that the aunt and uncle committed the crimes of either knowing possession of stolen property or knowing retention of stolen property, and as such, the police threat to do so made to Mr. Knauer was improper and coercive, tipping the balance such that Mr. Knauer's confession was involuntarily given.

Finally, even if it could be said that the police would have had probable cause to arrest Mr. Knauer's aunt and uncle based solely on the fact that the aunt and uncle were in possession of property which was stolen nearly two months before from a location in a different state, the circuit court here found as a fact, which finding is not clearly erroneous, that the officers making the threat to arrest the aunt and uncle ***did not believe that they would have had probable cause to make such an arrest***. (R.33:6-7, R.App. 59-60).

This is significant because in Wisconsin, while it is true that "[t]hreatening to obtain a search warrant does not vitiate consent if "the expressed intention to obtain a warrant is genuine ... and not merely a pretext to induce submission[,]"" **Artic**, 327 Wis.2d 392, ¶41 (brackets added), it is clearly also true that where the police threaten to arrest someone close to a defendant if the defendant does not confess where the police do not believe that they would have had probable cause to arrest the defendant's loved one, then such a threat

is "merely a pretext to induce submission" which would therefore "vitate consent . . . [because] the expressed intention to [arrest is not] genuine." **Id.** (brackets added).

In either event, the threat was improper and coercive, overbore Mr. Knauer's will to resist, and rendered his confession involuntarily given, and as such, the trial court was correct in ruling that Mr. Knauer's confession was involuntary and therefore inadmissible for any purpose at Mr. Knauer's trial. **See State v. Hoppe**, 2003 WI 43, ¶36, 261 Wis. 2d 294, 661 N.W.2d 407.

II. THE STATE HAS ABANDONED, WAIVED, OR FORFEITED ALL OTHER POTENTIAL ISSUES, BUT IN THE EVENT THIS COURT CHOOSES TO ADDRESS THE ABANDONED, WAIVED, OR FORFEITED ISSUES, IN LIGHT OF THE TOTALITY OF THE CIRCUMSTANCES, MR. KNAUER'S CONFESSION WAS INVOLUNTARY AND THEREFORE INADMISSIBLE FOR ANY PURPOSE AT TRIAL.

Although, as is noted above, the State has abandoned, waived, or forfeited on appeal any quibble it may have with the circuit court's ruling in the event that this court agrees with Mr. Knauer that the officers interrogating him would not have had probable cause to arrest his aunt and uncle at the time they threatened to do so, because the abandonment/waiver/forfeiture rule is not absolute but rather a rule of judicial administration, Mr.

Knauer shall address the more general issue of the voluntariness of his confession here. **See, e.g.**, **Adler v. D & H Indus., Inc.**, 2005 WI App 43, ¶19, 279 Wis. 2d 472, 694 N.W.2d 480 ("The waiver rule is purely administrative and does not affect [this court's] power to address an issue not raised in the briefs if we so choose.") (brackets added). Regardless, here, examining the totality of the circumstances surrounding and leading to the confession, said confession cannot be said to have been voluntarily given, and therefore the circuit court's ruling must be affirmed.

When a defendant moves to suppress his confession on the ground that it was taken from him involuntarily, the State bears the burden to show by a preponderance of the evidence that the defendant's confession was voluntary. **State v. Hoppe**, 2003 WI 43, ¶40, 261 Wis.2d 294, 661 N.W.2d 407. "A defendant's statements are voluntary if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist." **Id.** "The pertinent inquiry is whether the statements were coerced or the product of improper pressures exercised by the person or persons conducting the interrogation."

Id., ¶37. "Coercive or improper police conduct is a necessary prerequisite for a finding of involuntariness." **Id.**

Courts reviewing whether a confession was voluntarily given apply a totality of the circumstances analysis, which "involves a balancing of the personal characteristics of the defendant against the pressures imposed upon the defendant by law enforcement officers." **Id.**, ¶38. "The relevant personal characteristics of the defendant include the defendant's age, education and intelligence, physical and emotional condition, and prior experience with law enforcement." **Id.**, ¶39. "The personal characteristics [of the defendant] are balanced against the police pressures and tactics which were used to induce the statements, such as: the length of the questioning, any delay in arraignment, the general conditions under which the statements took place, any excessive physical or psychological pressure brought to bear on the defendant, any inducements, threats, methods or strategies used by the police to compel a response, and whether the defendant was informed of the right to counsel and right against self-incrimination." **Id.** (brackets added).

Of particular importance here, when the police make an unfounded or feigned threat of harm or adverse consequences regarding someone close to the defendant if he does not confess,

courts consider such a threat to be highly coercive. **See, e.g.**, **Phillips v. State**, 29 Wis.2d 521, 530–31, 139 N.W.2d 41 (1966) ("We think the statement in reference to the girl friend was motivation more than coercion because the defendant in his testimony stated he considered it was threat more to her than to him. This threat is dangerously close to the threats disapproved in [various Supreme Court of the United States cases]." (citing **Lynumn v. Illinois**, 372 U.S. 528, 534, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963) (unfounded threat that defendant would be disentitled to public assistance (ADC) and would lose custody of her child if she did not cooperate); **Rogers v. Richmond**, 365 U.S. 534, 541-45, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961) (police threatened to take accused's wife into custody without a basis for doing so); **and Haynes v. Washington**, 373 U.S. 503, 514, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963) (police refusal to allow suspect to call his wife)); **see also Bosket v. State**, 55 Wis.2d 121, 124, 197 N.W.2d 767 (1972) (holding that threat to arrest ill and pregnant wife of defendant, if proved, would render confession involuntary, but affirming on the basis of the circuit court's determination that the officers' denials of making such threats was more credible).

This is particularly so where either (1) the threat is one to arrest a person close to the defendant made when there was not

probable cause to do so and/or (2) the same threat is one made without a genuine intent to do so, but rather is made solely as a pretextual measure aimed at inducing a confession. **See, e.g.**, **State v. Kiekhefer**, 212 Wis.2d 460, 473-74, 569 N.W.2d 316 (Ct. App. 1997) (stating that "Police may not threaten to obtain a search warrant when there are no grounds for a valid warrant, but [w]hen the expressed intention to obtain a warrant is genuine . . . and not merely a pretext to induce submission, it does not vitiate consent[,]" and holding that because the police threat to obtain a search warrant was not supported by probable cause to search, not only was the defendant's subsequent consent to search rendered involuntary, but so too were any of his subsequent statements) (internal citations and quotation marks omitted, first set of brackets and ellipsis in original); **cf. State v. Artic**, 2010 WI 83, ¶41, 327 Wis. 2d 392, 786 N.W.2d 430 ("Threatening to obtain a search warrant does not vitiate consent if "the expressed intention to obtain a warrant ***is genuine . . . and not merely a pretext to induce submission***."") (internal citations omitted, emphasis added, ellipsis in original). **see also United States v. Bolin**, 514 F.2d 554, 560 (7th Cir. 1975) (**"**In view of the fact that the defendant signed the consent form while undergoing custodial interrogation and only after he had been impliedly threatened that his

girlfriend would be arrested if he did not sign, we hold that the consent was involuntary and therefore invalid.").

For purposes of this argument, Mr. Knauer will not reiterate the argument in section I above regarding the issue of whether the threat to arrest the aunt and uncle was unsupported by probable cause except to note that Mr. Knauer agrees with the trial court that this unfounded and improper threat is the most critical circumstance bearing on the (in)voluntariness of the defendant's confession. (R.33:9, R.App. 62) ("Any inducements, threats, methods, or strategy used by the police to compel a response and it's there where I think the scale tips.").

Regarding the personal characteristics of the defendant, the trial court made all of the following findings, as noted above in the statement of facts: (1) Mr. Knauer at the time of the interrogation was 32 years old, had education beyond high school, and was of at least average intelligence, (R.33:7-8, R.App. 60-61); (2) Mr. Knauer was "in a bit of a state about circumstances relating to a child named Maverick" who was either Mr. Knauer's child or at the least a child he had some interest in, but that there was "nothing extraordinary about his physical or emotional condition," (R.33:8, R.App. 61); (3) Mr. Knauer didn't want to be in jail, didn't want to be gone for a long time, and had the impression that he was perhaps going to be

gone for a long time, (R.33:8, R.App. 61); and (4) Mr. Knauer was "no stranger to contact with law enforcement." (R.33:8, R.App. 61).

Regarding the other side of the balance, leaving to one side for the moment the findings regarding the threat to arrest Mr. Knauer's aunt and uncle, the trial court found all of the following: (1) the interrogation itself took place over just under an hour and a half, and was therefore "not a lengthy interrogation," (R.33:8, R.App. 61); (2) there was no issue with respect to any delay in arraignment, (R.33:9, R.App. 62); (3) the interrogation took place in a jail while Mr. Knauer was in custody, (R.33:9, R.App. 62); (4) Mr. Knauer was advised of his constitutional rights prior to being interrogated, (R.33:9, R.App. 62); (4) there was no physical pressure brought to bear upon him during the interrogation. (R.33:9, R.App. 62); and (5) there was some psychological pressure brought to bear on Mr. Knauer regarding what a judge was going to do with him if he did not cooperate, regarding being able to see his son, regarding his girlfriend Megan, and regarding "how the co-actor Mr. Turpin was going to roll on him if he didn't roll on Mr. Turpin . . . ." (R.33:9, R.App. 62). The court at this point in its analysis did not believe that the balance had yet tipped in favor of finding Mr. Knauer's confession to be involuntary, (R.33:9, R.App. 62), and only concluded that his will to resist had been overborne by adding

the effect of the improper and baseless threat to arrest Mr. Knauer's aunt and uncle on Mr. Knauer's resistance to the calculus. (R.33:9, R.App. 62).

Under the relevant analysis, Mr. Knauer agrees that the court's ruling was in the main correct, with the exception that the court appears to have failed to give sufficient weight to the promises of leniency and implied threats of the opposite engaged in by the police leading up to the threat to arrest the aunt and uncle. Under some circumstances, police promises of leniency in exchange for cooperation or threats of harsher treatment absent cooperation (which is saying the same thing twice in different fashion) can render a confession involuntary. **See** **State v. Clappes**, 136 Wis. 2d 222, 239, 401 N.W.2d 759 (1987) (citing **Pontow v. State**, 58 Wis. 2d 135, 139, 205 N.W.2d 777 (1973) (noting that promises of leniency coupled with other coercive pressures can render a confession involuntary)).

This is particularly true where, as here, the promises of leniency are followed shortly thereafter with a baseless threat to arrest the defendant's parental figures made knowing that the threat would hit home particularly intensely with the defendant. **See, e.g.**, **United States v. Tingle**, 658 F.2d 1332, 1336-37 (9th Cir. 1981) (holding that combination of promises of leniency, threats of the

opposite without cooperation, and threats of adverse consequences to the defendant's children in combination rendered confession involuntary); **see also United States v. Long**, 852 F.2d 975, 978 (7th Cir. 1988). ("leading the defendant to believe that he or she will receive lenient treatment when this is quite unlikely is improper.").

It is also significant that here, the promises of leniency in the event of cooperation and threats of harsher treatment in the event of noncooperation were followed not long afterwards by the threats to arrest the aunt and uncle. (R.18:6-7, 10-13, 29-34, R.App. 12-13, 16-19, 35-40). In addition, the threats to arrest the aunt and uncle were made multiple times and only after Mr. Knauer had assured the officers that no stolen property would be found at the aunt and uncle's residence. (R.18:29-34, R.App. 35-40). The timing of these events is significant because it signifies a purpose on the part of the officers to extract a confession regardless of Mr. Knauer's resistance to giving one and, this inference is strengthened because the threats came after Mr. Knauer had ceased cooperating and had in fact insisted that there would not be any stolen property on his aunt and uncle's land. (R.18:30-31, R.App. 36-37); **see, e.g.**, **Kiekhefer**, 212 Wis. 2d at 472 ("The fact that Kiekhefer initially refused to consent to a search of his room also militates against a finding of voluntariness[]" regarding the second request for consent).

Accordingly, the confession was involuntary and thus is inadmissible in evidence for any purpose at the trial of this matter.

CONCLUSION

For the reasons stated above, the circuit court was correct in ruling that at the time that the officers threatened to arrest Mr. Knauer's aunt and uncle in the event that they merely found stolen property being stored on the aunt and uncle's property, the officers would not have had probable cause to do so, and further, the officers subjectively *knew* they would not have been able to lawfully arrest the aunt and uncle for possession of stolen property without something more than the bare fact of possession more than six weeks after the actual theft of the property took place.

Accordingly, as the circuit court correctly ruled, the officers' threat to arrest the aunt and uncle, which immediately preceded and was the direct cause of Mr. Knauer's confession, was improper and coercive, and as a result, Mr. Knauer's confession was involuntary and therefore inadmissible for any purpose at the trial of this matter. Because the State has abandoned any other challenge to the circuit court's ruling, this court should affirm that ruling and remand for further proceedings not inconsistent with this court's opinion.

In the event that this court determines that although the State has forfeited, waived, and/or abandoned any other issue regarding the circuit court's ruling, this court will nonetheless review the entire ruling, the above discussion shows that the circuit court was ultimately correct in ruling that Mr. Knauer's confession was involuntary and therefore inadmissible for any purpose, including impeachment, (R.27:1, R.App. 75), at the trial of this matter. This court should in either event affirm the circuit court's ruling and remand for further proceedings not inconsistent with this court's opinion.

Dated this ___ day of January, 2018.

Respectfully submitted,

_____

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for a brief produced using a 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, maximum of 60 characters per full line of body text. The length of this brief is 7,128 words.

Dated this ___ day of January, 2018.

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CERTIFICATION REGARDING APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with Section 809.19(2)(a), Stats., and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; 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 first names and last initials 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.

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I hereby certify that:

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Dated this ___ day of January, 2018.

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APPENDIX