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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP319-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TIMOTHY E. DOBBS,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS AFFIRMING A JUDGMENT OF CONVICTION ENTERED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE CLAYTON PATRICK KAWSKI, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Dobbs confessed to inhaling from a spray can while driving, passing out, and losing control of his truck, which struck and killed a pedestrian. Was expert testimony about false confessions properly excluded from Dobbs's trial for homicide by intoxicated use of a vehicle?

The circuit court excluded the testimony because the expert did not apply the principles and methods behind his opinions to the facts of the case as required by Wis. Stat. § 907.02(1), and the court concluded that the testimony would not assist the jury.

The court of appeals concluded that the circuit court properly exercised its discretion by excluding the evidence.

This Court should affirm. The circuit court properly excluded the testimony because the expert did not apply the principles and methods on which his opinion was based to the facts of the case and Dobbs did not show that the evidence was nonetheless relevant and would have assisted the jury.

2. Dobbs made statements to a police officer while he was handcuffed in a squad car before he was read the *Miranda* warnings, and later to officers after he was twice read the warnings and he twice waived his rights. Were Dobbs's statements properly admitted at trial?

The circuit court admitted the statements because it concluded that the pre-*Miranda* statements were not the result of custodial interrogation, and all the statements were voluntary and not the result of improper or coercive police conduct.

The court of appeals concluded that the circuit court properly admitted the statements because Dobbs was not in custody for *Miranda* purposes when he was initially questioned, and his statements both before and after he was

given the *Miranda* warnings were voluntary and did not result from improper or coercive police conduct.

This Court should affirm. Dobbs gave his statements voluntarily, not as the result of any improper or coercive police conduct. Dobbs's incriminating statements, which he gave after he waived his *Miranda* rights, were voluntary and were properly admitted. Dobbs probably was in custody when he was initially questioned without having been given the *Miranda* warnings, and his pre-*Miranda* statements probably should have been suppressed. But those statements did not incriminate Dobbs and any error admitting them was harmless.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has indicated that oral argument and publication are appropriate.

INTRODUCTION

Timothy Dobbs inhaled an intoxicant while driving and lost control of his truck, which struck and killed a man who was walking on the sidewalk. Dobbs then drove away. A short time later, a police officer observed the truck and suspected it was involved in the crime. The officer stopped the truck, handcuffed Dobbs and placed him in the squad car. The officer observed an aerosol can of Ultra Duster in the front console of the truck and suspected that Dobbs had been inhaling or huffing from it while driving. Dobbs answered questions from the officer without *Miranda* warnings, but did not give incriminating information.

After Dobbs performed field sobriety tests and gave a blood sample, he waived his *Miranda* rights and was evaluated for impairment by another officer. The first officer then arrested him and Dobbs waived his *Miranda* rights a

second time. Dobbs then admitted that he had huffed while driving.

Later that day and the next morning, while in the presence of officers but not being questioned, Dobbs made numerous incriminating statements.

The State charged Dobbs with homicide by intoxicated use of a vehicle and hit-and-run resulting in death. The circuit court denied Dobbs's motion to suppress his statements. And it granted the State's motion to exclude expert testimony about false confessions.

A jury found Dobbs guilty of homicide by intoxicated use of a motor vehicle, but not guilty of hit-and-run resulting in death. The court of appeals affirmed Dobbs's conviction.

This Court should affirm. The expert testimony was properly excluded because the expert did not apply the principles and methods underlying his opinion to the facts of this case, and Dobbs did not show that the testimony was nonetheless relevant and would have assisted the jury.

Dobbs probably was in custody when he was initially questioned while handcuffed in the back of a squad car, and his pre-*Miranda* statements probably should have been suppressed. But some of the officer's questions were not inquisitorial, and Dobbs's responses to inquisitorial questions were not incriminating and made no difference at trial. In any event, all of Dobbs's statements were voluntary, and his post-*Miranda* incriminating statements were properly admitted. Any error in admitting the pre-M*iranda* statements was harmless.

STATEMENT OF THE CASE AND FACTS

On the morning of September 5, 2015, a truck Timothy Dobbs was driving struck and killed Anthony Minardi, who

was on the sidewalk. (R. 266:212–15, 261–63, 265.) Dobbs then drove away. (R. 266:224, 245–46.)

Rochelle Sanders was walking down the street when she witnessed the truck drive down the wrong side of the street, go onto the sidewalk, hit a man who was walking on the sidewalk, run him over, and then back over him again. (R. 266:212, 216.) She said the truck then stopped and the driver waited there. (R. 266:216.) Sanders called 911 to report the incident. (R. 266:217.)

Jeffrey Kauffeldt drove down the same street shortly after the crash. (R. 266:240–41.) He saw a body in the street next to the curb and stopped to render aid. (R. 266:238, 241–43.) Kauffeldt told Sanders that it appeared the person was dead. (R. 266:243.) Kauffeldt got the truck's license plate number and relayed it to Sanders. (R. 266:244.) He heard the driver attempting to start his vehicle so he quickly got more information about the truck, including the color, make and model, and that it had a topper, and relayed that information to Sanders. (R. 266:245.) About four minutes after the crash, while Sanders was still on the 911 call, the truck backed up and left. (R. 266:223, 226, 245.)

City of Madison Police Officer Jimmy Milton responded to a 7:23 a.m. dispatch that described the offending vehicle as a black or dark-colored van and explained the direction the vehicle was travelling. (R. 267:64–66.)[1] Dispatch reported that the victim was deceased. (R. 267:66.) As he neared the crash scene, Officer Milton observed a dark colored pickup truck with a topper stopped at an intersection. (R. 267:67.) The truck had a completely deflated front driver's side tire with an exposed rim. (R. 267:73.)

[1] The page numbers on record documents 267 through 270 in the electronic record are different than the numbers for the paper record. The citations in this brief are to the electronic record.

Officer Milton suspected that the truck may have been involved in the hit-and-run, so he stopped his squad car in front of it (approached and asked the driver to show his hands). (R. 267:74–77.) Officer Milton observed that the driver, later identified as Dobbs, was removing a splint from his arm and hand. (R. 267:77.) After Dobbs removed the splint, Officer Milton ordered him out of the truck. (R. 267:77.) Officer Milton, who was the only officer present, handcuffed Dobbs for officer safety and seated him in the back of the squad car. (R. 267:79–81.) Dobbs had an obvious injury to his hand, but he did not complain about being handcuffed. (R. 267:81–82.)

After Dobbs identified himself and Officer Milton verified his identity (R. 267:78, 82–83), Officer Milton asked Dobbs some questions. Dobbs told the officer that he was on his way home from Menards. (R. 267:83.) He said the damage to his tire was the result of his truck hitting a curb. (R. 267:83.) Officer Milton observed several scratches or bruises on Dobbs's face, and Dobbs said that those injuries did not happen during the crash, and that he did not further injure his hand when his truck struck the curb. (R. 267:99–100.) Dobbs said he had consumed a few beers the night before but had no alcohol that morning. (R. 267:84.) He said he was taking medication for anxiety and depression and painkillers for his arm, but he had not taken his painkillers that morning. (R. 267:84–85.)

Dobbs repeatedly asked Officer Milton if he had hit a person. (R. 267:85–86.) Officer Milton initially told Dobbs that he had, but when Dobbs asked the same question, Officer Milton said that an investigation was underway, so that Dobbs would not become more emotional. (R. 267:85–86.)

Officer Milton observed damage to the front end and hood of Dobbs's truck, and a can of air duster in the front center console within the driver's reach. (R. 267:89–91.)

Officer Milton knew from his training and experience that air duster can be inhaled for getting high, and he observed that the can appeared to be ready for use. (R. 267:93–94.) Officer Milton suspected that Dobbs was under the influence of some intoxicant and that he may have inhaled from the can. (R. 267:94–95.)

After about an hour, when more officers had arrived, Officer Milton asked Dobbs if he would perform field sobriety tests. (R. 267:100–01, 103, 115.) Dobbs agreed, and Officer Milton removed the handcuffs and let Dobbs out of the squad car. (R. 267:114–15.) While performing the field tests, Dobbs asked Officer Milton if he was going to be arrested. (R. 267:126, 245.) Officer Milton said he was still investigating and had not decided whether to arrest him. (R. 267:126, 245.)

The field tests were inconclusive, but Officer Milton suspected that Dobbs might be under the influence of an inhalant, prescription drugs, or alcohol, so he asked if he would submit to a blood test. (R. 267:145–46, 247.) Dobbs agreed, and Officer Milton put him back into the squad car, without handcuffs, and drove to Meriter Hospital. (R. 267:147–48.)

Officer Milton read the Informing the Accused form to Dobbs and asked if he would give a blood sample. (R. 267:148.) Dobbs said he had anxiety about needles and wanted to take a breath test. (R. 267:149.) After Officer Milton explained the blood draw procedure, Dobbs agreed to a blood draw on the condition that he could also take a breath test. (R. 267:149.) Officer Milton agreed. (R. 267:149.)

After the blood draw, at 9:47 a.m., Officer Nicholas Pine began a drug recognition evaluation, a standardized 12-step process used to determine if a person is impaired and if so, by what type of substance. (R. 267:157; 269:37, 39–40.) Dobbs,

who was in an exam room in the hospital and not handcuffed, cooperated with the evaluation. (R. 253:82, 269:17–19, 37.)

After a preliminary breath test revealed no alcohol (R. 253:83), Officer Pine read the *Miranda* warnings to Dobbs at 10:19 a.m. (R. 253:83–84.) Dobbs agreed to answer questions. (R. 253:84–85.) He said he had not smoked marijuana for three days, and he denied using inhalants. (R. 269:100–01.) After the evaluation, Officer Pine believed that Dobbs was impaired by cannabis. (R. 269:80, 101.) Dobbs's condition also "fit closely" to one other category of intoxicants—inhalants—except for a lack of horizontal gaze nystagmus. (R. 269:80.)

Officer Milton then escorted Dobbs to his squad car, arrested him and informed him that the person he struck was deceased. (R. 267:163–66, 250–51, 54.) Dobbs started crying. (R. 267:166, 257.) Officer Milton read the *Miranda* warnings to Dobbs, who agreed to answer the officer's questions. (R. 267:168.)

Dobbs told Officer Milton he left his home at 6:30 a.m. and drove to Woodmans, and then to Menards, where he bought ten cans of air duster. (R. 267:168, 179.) Dobbs said he tested one of the cans by spraying it at the dashboard console. (R. 267:180.)

Dobbs told Officer Milton that his hand hurt while he was driving home, so he looked down and tried to take the splint off. (R. 267:182.) He said his right front tire hit the curb and that the truck may have gone over the sidewalk and may have hit a tree. (R. 267:182–83.) Dobbs said that after about 30 seconds he continued driving. (R. 267:183.) He said he did not get out to check for damage and did not see any pedestrians. (R. 267:183.) Dobbs said he had difficulty steering his truck because of the damage to the front left tire. (R. 267:184.)

Dobbs told Officer Milton that he took OxyContin, Wellbutrin, Pristiq, Gabapentin, and Clonazepam at about 1:00 a.m., and that he drank five shots of whiskey the day before. (R. 267:185–88.)

Officer Milton asked Dobbs if he knew what "huffing" was and Dobbs said it was "when you breathe in." (R. 267:196.) Dobbs denied huffing air duster. (R. 267:196–97.) But when Officer Milton told Dobbs that if he had been huffing from the can of air duster, his DNA might be on the can's nozzle, Dobbs said he licks the nozzle every time he sprays air duster from the can. (R. 267:198–99.) Officer Milton told Dobbs that he noticed that Dobbs had paused before denying huffing, and he offered Dobbs an opportunity to tell the truth. (R. 267:200–01.) Dobbs then admitted that he took a puff from the air duster while he was driving, passed out, swerved, and then left the scene. (R. 267:201.) Dobbs admitted he had been huffing air duster for a couple weeks. (R. 267:203.)

Officer Milton drove Dobbs to the City County Building where Officer Paul Fleischauer interviewed him. (R. 208:14; 267:205.)[2] Dobbs said he purchased air duster that morning, huffed from a can and lost consciousness. (R. 208:15–16.) Dobbs said he believed that he struck the pedestrian after he lost consciousness. (R. 208:16.) Dobbs had a visible injury to his hand but did not complain of pain. (R. 208:16, 21–23.)

Dobbs could not be booked into jail until he was medically cleared, so Officer Christopher Van Hove drove him back to Meriter Hospital. (R. 267:205; 268:171.) On the way, Officer Van Hove asked Dobbs when he had surgery on his hand. (R. 268:174.) Dobbs responded that he had just killed a

[2] Officer Fleischauer was deposed before trial (R. 208), and the jury viewed the recording of his deposition (R. 268:143–44).

man and could not talk at that time. (R. 268:174.) Officer Van Hove asked no further questions. (R. 268:174.)

While at the hospital, Dobbs did not complain of pain in his hand. (R. 268:177.) Officer Van Hove heard Dobbs twice, unprompted by a question, say that he had "taken a puff of DustOff and had killed a man" by striking him with his vehicle. (R. 268:178.)[3] Officer Van Hove did not ask any follow-up questions. (R. 268:179.) Officer Van Hove took Dobbs to St. Mary's Hospital, where Dobbs was admitted. (R. 268:179–80.) Dobbs asked if he could make a telephone call to his parents. (R. 268:180–81.) An officer warned Dobbs that anything he said on the call could be used in court. (R. 253:101.) Officer Van Hove overheard Dobbs tell his father he had gone to Menards, bought Dust-Off, and was traveling home when he took a puff of the Dust-Off, went over the curb, and killed a man. (R. 268:182.)

Officer Bryan Dyer was assigned to guard Dobbs's hospital room. (R. 268:199.) When Officer Dyer came into Dobbs's room to turn up the heat at Dobbs's request, Dobbs said, "I killed someone." (R. 268:200.) Dobbs said he had been huffing for two weeks and had gone to Menards and purchased some duster to huff. (R. 268:201.) Dobbs said he had taken one puff and passed out. (R. 268:201–02.) The officer said he did not ask Dobbs any questions; Dobbs started talking "out of the blue." (R. 268:200, 202.)

The next morning, Officer Linda Baehmann was guarding his room. Officer Baehmann did not question Dobbs, but he told her he had taken one puff to get relief from an injury and struck a man. (R. 268:187–89.) Dobbs said he must

[3] At times in the record the air cleaner is referred to as Dust-Off. The brand name on the can found in Dobbs's truck was Ultra Duster.

have passed out because he did not remember striking the man. (R. 268:89.)

Later that morning, Officer Dean Baldukas delivered the Informing the Accused form to Dobbs. (R. 268:193.) When the officer identified himself and said why he was there, Dobbs told him he blew "00.00 for a guy," and that he "took a puff from a duster." (R. 268:194.)

The State charged Dobbs with homicide by intoxicated use of a vehicle and hit-and-run resulting in death. (R. 18.) Dobbs moved to suppress his statements to police. (R. 35; 66.) The circuit court, the Honorable David Flanagan presiding, denied Dobbs's motion after briefing and a hearing. (R. 67; 253; 254.) The court found that Dobbs was initially detained for an investigation, that he was not interrogated until he had been read the *Miranda* warnings, and that he understood his rights and elected to answer questions. (R. 67:4–5.) The court found that Dobbs's statements to police were voluntary and not coerced. (R. 67:4, 6.)

When the case was reassigned to the Honorable Clayton Patrick Kawski, Dobbs moved for reconsideration of the order denying his motion to suppress. (R. 68.) After briefing (R. 72), the court denied the motion, concluding that the original decision was "well supported by controlling law" and that "[t]he court correctly applied the law to the facts," (R. 256:7).

Dobbs intended to present expert testimony from Dr. Lawrence White about false confessions. (R. 80:1.) The State moved to exclude Dr. White's testimony. (R. 83.) After briefing (R. 85), and a hearing at which the parties and court questioned Dr. White about his opinion and proposed testimony, the court granted the State's motion. The court concluded that Dr. White's testimony did not satisfy the requirements in Wis. Stat. § 907.02(1) because he had not

applied the principles and methods behind his opinion to the facts of the case, and his testimony would not assist the jury. (R. 258:180–81.) The court denied Dobbs's motion for reconsideration (R. 103), again concluding that the testimony would not assist the jury because Dr. White did not review the facts of the case or apply his opinion to the case, and because Dobbs had not shown that the testimony fit the facts of this case and was relevant. (R. 265:15–17.)

At trial, the State presented evidence including testimony from the officers who heard Dobbs confess to huffing while driving, and from Amy Miles, the Director of Forensic Toxicology for the Wisconsin State Laboratory of Hygiene, who reviewed the data resulting from a test of the blood sample that Dobbs gave at the hospital. (R. 269:122, 143–56.) Miles said that testing revealed no alcohol but revealed numerous other drugs: Carboxy-THC, an inactive metabolite of marijuana; Buproprion, also known as Welbutrin, an anti-depressant; Norvenlafaxine, also known as Pristiq, another antidepressant; dextromethorphan, a cough suppressant; and Clonazepam, usually used for anxiety. (R. 269:156–58.) Miles testified that the concentration of dextromethorphan (90 nanograms per milliliter) exceeded the therapeutic concentration (10 nanograms per milliliter) and could have caused impairment. (R. 269:157, 62.)

Miles said a test of Dobbs's blood indicated the potential for difluoroethane (DFE), the propellant in canned air products. (R. 269:189–90.) She said people sometimes inhale or huff DFE to get high or to get a "euphoric analgesic sort of effect," and sometimes use the straw to spray the DFE into their mouths. (R. 269:190–93.) She said that when people huff, they can suffer from "confusion, disorientation, hallucinations, unconsciousness," and a "lack of coordination and balance." (R. 269:193.)

Miles testified that an initial screening of Dobbs's blood showed a positive result for DFE, but a confirmatory test did not. (R. 269:211.) She testified that it is normal to not have a positive confirmatory test in a DFE case because DFE dissipates so quickly, even while the blood is sitting in a vial. (R. 269:212.) Miles said Dobbs's driving behavior in this case could be consistent with the use of DFE alone, or with the use of DFE along with cannabis, dissociative anesthetics, and central nervous system depressants. (R. 269:215.)

Dobbs testified. (R. 270:4–8.) He admitted driving the truck that hit and killed Anthony Minardi. (R. 270:9.) But he denied seeing the man he killed or anyone else before he left the scene, and he denied huffing air cleaner while driving. (R. 270:140.)

Dobbs admitted he had been huffing for a couple weeks because the pain medication he was taking for his injured hand was not working well enough. (R. 270:74.) He said huffing made him "numb" and "happy." (R. 270:19.) Dobbs said he bought ten cans of Dust-Off and opened a can in the parking lot. (R. 270:21–22). He said he licked the straw, put the straw in the nozzle, and sprayed a burst into his mouth. (R. 270:22.) Dobbs was unfamiliar with this brand of duster, and he tasted it to see if he could use it as "medicine" for pain management. (R. 270:22, 74–75.) Dobbs said he did not inhale the cleaner because he was "[v]ery careful" and would not drive when he was "impaired at all or high with anything." (R. 270:75.) Dobbs put the can into the center console right next to him. (R. 270:23.)

Dobbs said that he was only a "few minutes" from home, but his hand became "very painful" and he needed some relief. (R. 270:24, 75.) He denied using the air cleaner he had just purchased to use as "medicine" and for "pain management," and that he had "tested" it and put it in the center console right next to him. (R. 270:82.) Dobbs said he took both hands

off the wheel, looked down, and took the splint off his hand. (R. 270:25–27, 80–81.) He said that pain shot through his body, and he felt a bump which he assumed was the truck hitting the curb. (R. 270:25–27, 88.) Dobbs said he remembered his truck hitting a tree, but he did not remember hitting a person. (R. 270:88–89.)

Dobbs said that when he regained consciousness he was confused and in pain. (R. 270:92.) He said he started his truck and backed up onto the road, without checking the mirrors or looking behind him or out the window. (R. 270:95–96, 100.) Dobbs denied seeing the person he had hit or anyone else. (R. 270:27–28, 99.) Dobbs noticed his flat tire but kept driving. (R. 270:28–29.)

Dobbs admitted that he told Officer Milton he huffed while driving and lost consciousness for a couple seconds. (R. 270:112, 118–19.). He admitted that he told the officer he had never passed out while huffing and he would not have huffed while driving had he known he would pass out. (R. 270:118.) Dobbs said he did not remember telling other officers, hospital staff, and his father that he had taken a puff or short burst and killed a man (R. 270:120–23), and did not remember telling his doctor 11 days after the crash that he had huffed air cleaner to relieve pain and lost consciousness (R. 270:128–29).

Dobbs said that when Officer Milton told him the person he hit had died, he "went crazy," he "couldn't handle it," he "wanted to die." (R. 270:33.) He said he told Officer Milton he had not been huffing (R. 270:34), but Officer Milton accused him of lying and he wanted to cooperate and did not want to be called a liar, so he said he huffed while driving (R. 270:35). Dobbs later acknowledged that Officer Milton had not accused him of lying. (R. 270:115.)

Dobbs said that he could not remember telling Officer Fleischauer that he opened a can, took a short burst, inhaled it while driving, lost consciousness and hit the victim. (R. 270:121.) He said he did not remember telling other officers that he took a puff of Dust-Off and killed a man, nor telling his father that he took a puff of Dust-Off and killed a 51-year-old man over near WalMart. (R. 270:121–22.) Dobbs said he told officers he had huffed while driving because he "never really thought about what happened or why." (R. 270:36.)

A jury found Dobbs guilty of homicide by intoxicated use of a vehicle but not guilty of hit-and-run resulting in death. (R. 270:310.) The circuit court entered judgment of conviction (R. 241), and sentenced Dobbs to 20 years of imprisonment, including 12 years of initial confinement (R. 271:123).

Dobbs appealed, challenging only the circuit court's decisions denying his motion to suppress evidence and granting the State's motion to exclude Dr. White's testimony. The court of appeals affirmed Dobbs's conviction in an unpublished, per curiam opinion. (P-App. 101–06.) It concluded that the circuit court properly exercised its discretion in excluding Dr. White's testimony because it "reasonably concluded that the expert would not assist the trier of fact unless the expert also applied his knowledge about false confessions to the specific circumstances in Dobbs's case." (P-App. 103.)

The court of appeals rejected Dobbs's claim that his statements before he was *Mirandized* should have been suppressed, concluding that Dobbs was detained but not arrested when he was first put into the squad car and was not entitled to *Miranda* warnings. (P-App. 104.) The court of appeals further concluded that Dobbs failed to show that his post-*Miranda* statements were involuntary because he did not identify any improper or coercive police conduct, and his

emotional and physical condition was not so severe that the interrogation exceeded his ability to resist. (P-App. 105–06.)

This Court granted Dobbs's petition for review.

STANDARD OF REVIEW

An appellate court reviews a circuit court's decision to admit or exclude expert testimony as a matter of discretion. *State v. Schmidt*, 2016 WI App 45, ¶ 70, 370 Wis. 2d 139, 884 N.W.2d 510. It "will not reverse the court's decision 'if it has a rational basis and was made in accordance with accepted legal standards in view of the facts in the record.'" *State v. Smith*, 2016 WI App 8, ¶ 4, 366 Wis. 2d 613, 874 N.W.2d 610 (citation omitted).

Review of an order denying a motion to suppress evidence is a two-part process. This Court reviews a circuit court's findings of evidentiary or historical fact under the clearly erroneous standard but decides de novo whether the circuit court's application of the facts passes constitutional muster. *State v. Harris*, 2017 WI 31, ¶ 9, 374 Wis. 2d 271, 892 N.W.2d 663. This Court determines whether a person is in custody for *Miranda* purposes under the same two-part test. *State v. Bartelt*, 2018 WI 16, ¶ 25, 379 Wis. 2d 588, 906 N.W.2d 684.

ARGUMENT

I. The circuit court properly exercised its discretion when it excluded expert testimony from a witness who did not apply the principles and methods underlying his opinion to the facts of the case, and Dobbs did not show that the opinion fit the facts of the case.

A. To be admissible, expert testimony must be reliable and relevant and assist the jury.

A witness may testify about his or her "scientific, technical, or other specialized knowledge" if (1) the testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue"; (2) the witness is "qualified as an expert by knowledge, skill, experience, training, or education"; (3) "the testimony is based upon sufficient facts or data"; (4) "the testimony is the product of reliable principles and methods; and (5) "the witness has applied the principles and methods reliably to the facts of the case." Wis. Stat. § 907.02(1). The Legislature adopted this standard, set forth in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), in 2011. *State v. Giese*, 2014 WI App 92, ¶ 17, 356 Wis. 2d 796, 854 N.W.2d 687.

"The [*Daubert*] standard is flexible but has teeth. The goal is to prevent the jury from hearing conjecture dressed up in the guise of expert opinion." *Id.* ¶ 19. "The court's gate-keeper function under the *Daubert* standard is to ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues." *Id.* ¶ 18.

The proponent of evidence has the burden of showing why it is admissible. *State v. Jenkins*, 168 Wis. 2d 175, 187–88, 483 N.W.2d 262 (Ct. App. 1992). "The party seeking to introduce the expert witness testimony bears the burden of demonstrating that the expert witness testimony satisfies the

[*Daubert*] standard by a preponderance of the evidence." *Krik v. Exxon Mobil Corp.*, 870 F.3d 669, 673 (7th Cir. 2017); *see also Daubert*, 509 U.S. at 592 n.10; *Seifert v. Balink*, 2017 WI 2, ¶ 18, 372 Wis. 2d 525, 888 N.W.2d 816 (lead opinion).

B. The circuit court properly excluded Dr. White's testimony because he did not apply the methods and principles underlying his opinion to the facts of the case, and the evidence was not relevant and would not have assisted the jury.

Dobbs wanted to call Dr. Lawrence White "to testify generally about false confessions and situations in which false confessions are more likely to arise." (R. 80:1.) He acknowledged that Dr. White had "not prepared a report specific to this case." (R. 80:1.)

The State moved to exclude Dr. White's testimony (R. 83), asserting that the testimony "is not relevant because there is nothing linking his proffered testimony about 'false confessions and situations in which false confessions are more likely to arise' to the facts of this particular case," (R. 83:3). Therefore, "[b]ecause the proffered testimony is general and there is no link to the facts of this case, the proffered testimony will not assist the jury in any way, nor does it tend to make any fact more or less probable." (R. 83:3.)

The parties and court questioned Dr. White at a hearing. (R. 258.) Dr. White said his opinion could accurately be summarized as "false confessions occur under certain circumstances." (R. 258:83.) He acknowledged that he had not reviewed any reports or documents specific to this case and could not offer an opinion as to the truthfulness or falseness of any confession in this case. (R. 258:28, 43–44, 63, 83–84. 87.)

The court granted the State's motion to exclude Dr. White's testimony because it found that the testimony "will not assist the trier of fact to determine a fact in issue." (R. 258:180.) The court concluded that Dr. White is qualified as an expert in psychology, with "a particular scholarly interest in the area of false confessions." (R. 258:181.) The court was skeptical whether Dr. White's methodology is scientifically reliable, but it took "no definite position" on that issue. (R. 258:182.) The court excluded the testimony, reasoning that the testimony did not satisfy Wis. Stat. § 907.02(1) "because the principles and methods were not in any way tied to the facts of this case." (R. 258:183.)

Dobbs moved for reconsideration, asserting that the decision excluding the testimony "because it was not 'in any way tied to the facts of this case' constituted a manifest error of law," and "is in direct conflict with *Smith*, [366 Wis. 2d 613]." (R. 103:4.)

The circuit court denied the motion, again concluding that Dr. White's testimony "would not assist the trier of fact in determining any fact at issue." (R. 265:12–17.) The court gave two related reasons for its ruling. First, "Dr. White did not review the facts of Mr. Dobbs's case," and "[h]e could not, and did not tie his expert opinions regarding false confessions to the facts of Mr. Dobbs'[s] case." (R. 265:15.) Second, Dr. White's "opinions regarding false confessions as a general matter, even for educational purposes, did not fit the particular facts of Mr. Dobbs'[s] case." (R. 265:16.) The court noted that the defense "made no showing that the types of tactics that were employed in Mr. Dobbs'[s] case would correspond to any of the generalized opinions that Dr. White holds about false confessions and police interrogations." (R. 265:16.) The court concluded that "Dr. White's opinions, while interesting, would not assist the trier of fact because

they were not shown to relate to any conduct that occurred in Mr. Dobbs'[s] case." (R. 265:16.)

On appeal, Dobbs argued that the circuit court erred in excluding the expert testimony because it considered "whether Dr. White had specific opinions based on the specific facts of this case," rather than whether the testimony "would assist the jury." (Dobbs's Court of Appeals Br. 17.)

The court of appeals acknowledged that a court has discretion to admit expert testimony that does not satisfy the standards of Wis. Stat. § 907.02(1). (P-App. 103). But the court rejected Dobbs's argument that the circuit court was required to admit evidence that did not meet the statutory standards. (P-App. 103.) It concluded that the circuit court properly exercised its discretion in excluding the evidence because it "reasonably concluded that the expert would not assist the trier of fact unless the expert also applied his knowledge about false confessions to the specific circumstances in Dobbs's case." (P-App. 103.)

The circuit court and the court of appeals were correct. For expert testimony to satisfy Wis. Stat. § 907.02(1), the expert must have "applied the principles and methods" underlying the testimony "reliably to the facts of the case." A person can give expert testimony if it will assist the jury, the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, *and* the witness has applied the principles and methods reliably to the facts of the case. Dr. White's proposed testimony plainly did not satisfy these standards. Because Dobbs did not even claim that the proposed testimony satisfied the statutory requirements, the circuit court properly exercised its discretion in excluding the evidence.

To be clear, as the court of appeals recognized, a circuit court has discretion to admit expert testimony that does not

fit neatly under Wis. Stat. § 907.02(1). (P-App. 103.) Expert testimony may be admissible to educate the factfinder about general principles, even if the expert has not applied the principles to the specific facts of the case. *Smith*, 366 Wis. 2d 613, ¶ 9.

But the expert testimony must be relevant. *Schmidt*, 370 Wis. 2d 139, ¶ 76; Wis. Stat. § 904.01. Here, the circuit court correctly concluded that Dobbs failed to show that Dr. White's expert opinions related to the facts of the case.

Before trial Dobbs claimed that his numerous confessions were involuntary. (R. 35; 62; 63; 66.) But he did not claim that they were false. In his response to the State's motion to exclude Dr. White's testimony (R. 85), and at the hearing on the motion (R. 265), Dobbs argued that the circuit court should admit Dr. White's testimony. But he never asserted that his confessions were false, or even asserted that applying Dr. White's proposed testimony to his confessions would tend to show that the confessions were false. He did not show that the evidence about false confessions would have fit the facts of the case.

Dr. White's testimony itself demonstrated that his opinion would not have assisted the jury. Dr. White testified that jurors commonly do not know how often confessions are false. (R. 258:25–28.) But he acknowledged that the number of false confessions "is very small" compared to the total number of confessions, and that no one knows how often people falsely confess. (R. 258:21, 45–46.)

Dr. White testified that there are three different types of false confessions: coerced internalized, coerced compliant, and voluntary. (R. 258:54–55.) Coerced internalized false confessions are those in which innocent people are subjected to misleading claims about the evidence, become confused, begin to question their own innocence and infer their own

guilt, and sometimes even make up false memories that include their guilt. (R. 258:55.) Most internalized false confessions occur when police fabricate evidence. (R. 258:56.)

Coerced compliant false confessions are those in which an innocent person makes self-incriminating statements in order to achieve an immediate gain or benefit, like being able to go home or go to sleep or to have the police stop questioning. (R. 258:56–58.) One characteristic of false confessions is that as soon as a person leaves the interrogation room and talks to somebody else, the person typically will retract their confession. (R. 258:58.)

Voluntary false confessions are those in which an innocent person offers self-incriminating statements about their own guilt without pressure from police (R. 258:59–60), to protect another person or because they are seeking notoriety (R. 258:59).

Dr. White did not offer an opinion as to whether Dobbs's confessions fit into any of these categories. And Dobbs provided nothing showing that they did. He did not show that police fabricated evidence or deceived him, or that he confessed in order to gain something, to protect anyone else, or to gain notoriety. And Dobbs did not retract his first confession—he proceeded to tell his father, hospital staff, and officers what he had done.

Dr. White said that isolation, confrontation, minimization, lengthy questioning, and inducement to confess are factors that increase the likelihood of a confession, whether it is a "truthful confession" or a "false confession." (R. 258:52.) He said isolation is when police bring somebody to the police station and put them in a room and different police officers will come in and out, but the suspect sees only police. (R. 258:39.) Confrontation occurs when police confront a person with his or her guilt. (R. 258:51.) Minimization

occurs when investigators try to lessen the perceived culpability or perceived responsibility of the suspect. (R. 258:72–73.) Lengthy questioning is questioning when a person has been in custody for more than six hours. (R. 258:70–71.) And inducements to confess include things like implying a lenient treatment or telling a person that if he tells police want happened, he can go home or go to sleep. (R. 258:72–73.)

Dobbs did not show that any of these factors—except perhaps confrontation—apply in this case. He did not show that he was isolated for any length of time, that police tried to lessen his culpability, that he was in custody for more than six hours or questioned for any significant length of time, or that he was given any inducement to confess. Dobbs was confronted with his guilt. But Dr. White did not testify that a person confronted with his guilt is more likely to falsely confess—he said, "If the suspect is guilty, then it's a truthful confession." (R. 258:52.) And he said that if police "have good, valid evidence of guilt" they "definitely want to present it to the suspect in order to elicit a confession." (R. 258:86.)

Dr. White said that characteristics that make people more vulnerable to confessing—whether truthfully or falsely—include the age of the suspect, their level of intelligence, the degree of suggestibility and compliance, mental disorders like anxiety disorders or depression, and physical exhaustion. (R. 258:75.)

Dr. White explained that persons 25 years of age or younger and with low I.Q.s are more likely to confess. (R. 258:75–76.) Dobbs was 36 years old and was a certified nursing assistant. (R. 2:1; 270:28.) Dr. White said that some mentally ill persons confess because they come to believe they have committed crimes that, in fact, they have not. (R. 258:79.) Dobbs did not claim that he was unusually

suggestible or compliant, or that he was convinced that he committed the crimes even though he did not.

Dr. White said that sleep-deprived individuals are more suggestible to affirming what an officer says, and less able to cope with pressures that are placed upon them than by police officers during questioning. (R. 258:79.) Dobbs asserted that he was sleep deprived. But he did not show that police pressured him, or that he confessed because he was tired.

Dr. White's opinion was that false confessions "are more likely to occur under certain circumstances." (R. 258:83.) But Dobbs did not show or even allege that his confessions fit any of the categories of false confessions.

Even if Dr. White's testimony had been admitted, it would have made no difference at trial. Even if the jury had heard Dr. White testify that "false confessions occur under certain circumstances" (R. 258:83), on cross-examination, when confronted with the facts of the case, Dr. White seemingly would have testified that Dobbs's confessions were inconsistent with those circumstances.

While Dr. White's testimony might have helped explain why Dobbs confessed, it would not make it more likely that his confessions were false. Dobbs did not show that the testimony was relevant and would assist the jury, and the circuit court reasonably excluded it.

C. Dobbs's arguments that the circuit court erred by excluding the expert testimony are wrong.

Dobbs asserts that the circuit court erroneously exercised its discretion because it considered whether Dr. White "had specific opinions based on the specific facts of this case," not "whether Dr. White would assist the jury." (Dobbs's

Br. 20.) But the court did determine that the evidence would not assist the jury. (R. 265:15–17.)

Dobbs argues that the court of appeals opinion is contrary to *Smith*, 366 Wis. 2d 613, which "is directly on point," and under which the circuit court was required to admit the expert testimony. (Dobbs's Br. 20–23.)

But as the court of appeals recognized, *Smith* does not hold that a circuit court is required to admit expert testimony that does not satisfy Wis. Stat. § 907.02(1). (P-App. 3.) And the issue in *Smith* was whether the evidence was reliable—not whether it was relevant. *Smith*, 366 Wis. 2d 613, ¶¶ 7–9.

In *Smith*, the court of appeals noted that the State "provided a sufficient factual basis for the court's decision on whether to admit [the] testimony." *Id.* ¶ 6. In other words, the proposed testimony was relevant. The defense in *Smith* conceded that the expert testimony about common behaviors of child sexual assault victim behavior, including delayed reporting, was relevant because defense counsel was going to question the victim about the manner in which she disclosed the assault. (Brief of Plaintiff-Respondent at 15–16, *Smith*, 366 Wis. 2d 613.) The evidence fit the facts of the case and the circuit court properly admitted it even though it did not satisfy all the requirements of section 907.02(1).

Dr. White's proposed testimony was general—there are different types of confessions, and the rare instances in which people falsely confess are usually under certain circumstances. Dr. White candidly acknowledged that he knew nothing about this case and could not say whether Dobbs falsely confessed, or even whether the circumstances of the case were consistent with the rare instances in which a confession is more likely to be false. And Dobbs did not show or even allege that he falls into the category of people who are

more likely to falsely confess, or that the circumstances which sometimes surround false confessions occurred here.

Dobbs argues that application of a discretionary standard to determine whether to admit expert testimony would mean that "the gate freely swings to and fro without any real set standards," and one court could admit the evidence while another excludes it. (Dobbs's Br. 21.)

But expert testimony should be admitted in some cases and excluded in others, depending on whether the evidence fits the facts of the case. If a person claims that his confession was false and shows that applying expert testimony to the circumstances of his confession make it more likely that the confession was false, the evidence should be admitted. But Dobbs did not assert that his confessions were false and did not show that applying the expert testimony to the circumstances of his confessions would make it more likely that they were false. Accordingly, the evidence was properly excluded.

II. Dobbs's confessions to huffing while driving were voluntary and were properly admitted at trial, and any error in admitting statements he made before he waived his *Miranda* rights was harmless.

Dobbs moved to suppress "all statements made by the defendant in response to custodial interrogation on or about September 5, 2015," the day the truck he was driving hit and killed Anthony Minardi. (R. 35:1.) He asserted that he was in custody when he was searched, told he was being detained, handcuffed, and put in a squad car, so statements he made before he waived his *Miranda* rights should be suppressed. (R. 35:3.) Dobbs acknowledged that officers later read him the *Miranda* warnings, and that he agreed to answer questions, but he asserted that his statements after he was *Mirandized*

were "involuntary due to his physical and emotional distress." (R. 35:3–4.)

The circuit court denied Dobbs's suppression motion after a hearing and briefing. The court concluded that Dobbs was not in custody when he was initially in the squad car, and that he was not interrogated until he had been read the *Miranda* warnings. (R. 67:5.) The court also concluded that Dobbs's statements were voluntary. (R. 67:4–6.)

Dobbs moved for reconsideration. (R. 68.) The circuit court denied the motion without a hearing, concluding that the decision was "well supported by controlling law" and that "[t]he court correctly applied the law to the facts." (R. 256:7.)

The court of appeals rejected Dobbs's assertion that he was in custody upon being placed in the squad car, concluding that Dobbs was detained but was not in custody. (P-App. 104–05.) The court also rejected Dobbs's claim that his post-*Miranda* statements were involuntary because Dobbs pointed to no police coercion or misconduct, and it was "unable to conclude that Dobbs was in such a severe state that even an ordinary interrogation exceeded his ability to resist." (P-App. 105–06.)

Dobbs's statements fall into three categories: statements before he waived his *Miranda* rights, statements to police during interrogation after he waived his *Miranda* rights, and statements that were not the result of interrogation.

As the circuit court concluded, Dobbs's statements were voluntary. (R. 67:6.) There is no evidence of improper or coercive police conduct, and no basis for a conclusion that any statement was involuntary.

Dobbs's statements after he waived his *Miranda* rights were properly admitted. Dobbs's statements in response to inquisitorial questions before he waived his *Miranda* rights

probably should have been suppressed because Dobbs was probably in custody at some point while he was being questioned. But Dobbs did not say anything incriminating, and some of his pre-warning statements formed the basis of his defense. Any error in admitting those statements did not taint his voluntary post-*Miranda* statements and was harmless.

A. All of Dobbs's statements were voluntary.

1. A statement is not involuntary unless it results from improper or coercive police conduct.

"A defendant's confession must be voluntary; the State's use of an involuntary confession for purposes of prosecution violates the defendant's due process rights." *State v. Moore*, 2015 WI 54, ¶ 55, 363 Wis. 2d 376, 864 N.W.2d 827. A defendant's confession is voluntary if it is "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.* (quoting *State v. Lemoine*, 2013 WI 5, ¶ 17, 345 Wis. 2d 171, 827 N.W.2d 589).

When a defendant challenges the voluntariness of a statement to police, the State has the burden of showing by a preponderance of the evidence that the statement was voluntary. *Id.* "Voluntariness is evaluated in light of all the circumstances surrounding interrogation and decided under a totality of the circumstances, weighing the suspect's personal characteristics against the actions of the police." *Id.* ¶ 56 (footnote omitted).

"[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment."

Colorado v. Connelly, 479 U.S. 157, 167 (1986). A court cannot properly find a statement involuntary unless there is "some affirmative evidence of improper police practices deliberately used to procure a confession." *Moore*, 363 Wis. 2d 376, ¶ 56 (quoting *State v. Clappes*, 136 Wis. 2d 222, 239, 401 N.W.2d 759 (1987)). "In other words, a suspect's personal characteristics alone cannot form the basis for finding that the suspect's confessions, admissions, or statements are involuntary." *Id.*

2. Dobbs's statements before and after he waived his *Miranda* rights were voluntary.

The circuit court concluded that "[e]ach of the statements made by the defendant to Officers Milton, Pine, Kleinfeldt, Van Hove, Dyer, Baldukas, and Baehmann has been demonstrated to have been voluntary and not the product of coercion in any degree." (R. 67:6.) The court of appeals affirmed, recognizing that "Dobbs does not clearly identify any specific police conduct that he wants us to conclude was improper or coercive." (P-App. 106.)

Dobbs asserts that the court of appeals "misstated the standard used in determining the voluntariness of a confession." (Dobbs's Br. 34.) He claims that "[d]etermining voluntariness is a totality of the circumstances review that requires balancing the defendant's characteristics with the police actions." (Dobbs's Br. 34 (citing *Clappes*, 136 Wis. 2d at 236; *State v. Hoppe*, 2003 WI 43, ¶ 38, 261 Wis. 2d 294, 661 N.W.2d 407)). Dobbs argues that the court of appeals "erred in narrowly looking at only the police conduct," and "completely overlooked the significance of Mr. Dobbs'[s] mental and physical conditions." (Dobbs's Br. 34.)

Dobbs relies on *Clappes* and *Hoppe*. But this Court held in both cases that improper police conduct is required for a

statement to be involuntary. In *Clappes*, this Court recognized that the United States Supreme Court held in *Connelly* that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the fourteenth amendment." *Clappes*, 136 Wis. 2d at 241 (citing *Connelly*, 479 U.S. at 167). In *Hoppe*, this Court recognized that "[t]he pertinent inquiry is whether the statements were coerced or the product of improper pressures exercised by the person or persons conducting the interrogation." *Hoppe*, 261 Wis. 2d 294, ¶ 37. And this Court stated that "[c]oercive or improper police conduct is a necessary prerequisite for a finding of involuntariness." *Id.* (citing *Connelly*, 479 U.S. at 167).

This Court has since repeatedly said that improper or coercive police conduct is necessary for a statement to be involuntary. *See, e.g.*, *State v. Ward*, 2009 WI 60, ¶ 33, 318 Wis. 2d 301, 767 N.W.2d 236 ("[P]olice coercion is a necessary prerequisite to finding that a defendant's statement was involuntarily made."); *Moore*, 363 Wis. 2d 376, ¶ 56 ("[T]o justify a finding of involuntariness, there must be some affirmative evidence of improper police practices deliberately used to procure a confession.").

Dobbs asks this Court to conclude that his statements to police were involuntary without any evidence of improper police conduct or coercion because of the pain he was suffering due to his hand injury, and his "impairing mental conditions." (Dobbs's Br. 32–34.)

In *Clappes*, this Court rejected an argument that pain and mental issues—without improper or coercive police conduct—can render a statement involuntary. This Court recognized that in *Connelly*, the United States Supreme Court "properly focused on the 'crucial element of police overreaching' in deciding that a murder confession could not be involuntary simply because it was arguably motivated

solely by defendant's mental condition." *Clappes*, 136 Wis. 2d at 241 (citing *Connelly*, 479 U.S. at 164, 167). This Court explained that finding a statement involuntary because of a defendant's pain or mental condition without improper police conduct or coercion "could effectively result in the establishment of a per se rule of involuntariness (and inadmissibility) whenever an officer questions a defendant who is suffering from serious pain and undergoing medical treatment at the time the questioning takes place." *Id.* at 242. This Court rejected that argument and held that coercive or improper police tactics are necessary for a finding that a statement was involuntary. *Id.* at 245.

As the circuit court found, Dobbs's statements were "voluntary and not the product of coercion in any degree." (R. 67:4.) And as the court of appeals concluded, Dobbs has not identified any improper or coercive police conduct. (P-App. 106). There is no evidence of improper or coercive police conduct, so all of Dobbs's statements were voluntary.

B. Dobbs's statements after he waived his *Miranda* rights were properly admitted.

1. Dobbs's post-*Miranda* confessions during interrogation were properly admitted.

Dobbs confessed to Officer Milton and Officer Fleischauer that he huffed while driving. (R. 67:4.) When Dobbs was interviewed by Officer Milton, he "admitted to huffing the Dust-off while driving which caused him to pass out and lose control of the vehicle." (R. 67:3.) Then, when he was interviewed by Officer Paul Fleischauer, Dobbs "admitted to huffing the Dust-Off while driving which caused him to pass out." (R. 67:3.) Dobbs made these confessions after he was twice read the *Miranda* warnings and twice agreed to answer questions.

Dobbs challenged the admission of his post-*Miranda* statements only on the ground that they were not voluntary. (R. 35:2, 4; Dobbs's Br. 31–35.) He did claim that his post-*Miranda* statements were coerced. Because the statements did not result from improper or coercive police conduct, they were voluntary. Accordingly, Dobbs's post-*Miranda* statements were properly admitted.

2. Dobbs's post-*Miranda* statements not during interrogation were properly admitted.

After confessing to both Officer Milton and Officer Fleischauer under questioning, Dobbs made many numerous other incriminating statements spontaneously. While Officer Van Hove was driving Dobbs to the hospital, Dobbs said that he had just killed a man. (R. 268:174.) While at the hospital, Officer Van Hove heard Dobbs, unprompted by a question, say twice that he had "taken a puff of DustOff and had killed a man" by striking him with his vehicle. (R. 268:178.) Officer Van Hove also heard Dobbs tell his father that he had bought Dust-Off at Menards and was traveling home when he took a puff of it, went over the curb, and killed a man. (R. 268:182.)

The officers who guarded Dobbs's hospital room heard him make incriminating statements. Officer Bryan Dyer heard Dobbs say, "I killed someone," and that he had been huffing for two weeks, he went to Menards and purchased some duster to huff, and he took one puff and passed out. (R. 268:200–02.) Officer Linda Baehmann heard Dobbs say he had taken one puff to get relief from an injury and struck a man, but he must have passed out because he did not remember it. (R. 268:89.) And when Officer Dean Baldukas delivered paperwork to Dobbs, he heard Dobbs say he blew "00.00 for a guy," and that he "took a puff from a duster." (R. 268:193–94.)

None of these statements was subject to *Miranda*, which "is called to duty whenever the State interrogates a suspect in police custody," *Harris*, 374 Wis. 2d 271, ¶ 11, because none of the officers questioned him. (R. 67:3.) And as explained above, each of these statements was voluntary. Because Dobbs challenges the admission of these statements only on the ground that they were not voluntary (R. 35:2, 4; Dobbs's Br. 31–35), his claim that they were improperly admitted fails.

C. Dobbs's statements before he waived his *Miranda* rights probably should have been suppressed.

1. A suspect who is interrogated while in custody is entitled to *Miranda* warnings.

The protection against self-incrimination under both the United States Constitution and the Wisconsin Constitution "is called to duty whenever the State interrogates a suspect in police custody." *Harris*, 374 Wis. 2d 271, ¶ 11. Law enforcement is required "to inform suspects of their rights to remain silent and to have an attorney present during custodial interrogations." *Bartelt*, 379 Wis. 2d 588, ¶ 27 (citing *Miranda v. Arizona*, 384 U.S. 436, 458 (1966)).

"[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." *Rhode Island v. Innis*, 446 U.S. 291, 300 (1980). "[B]efore conducting an in-custody interrogation," a law enforcement officer is required "to formally instruct the suspect of his constitutional rights and then conduct themselves according to how he elects to preserve or waive them." *Harris*, 374 Wis. 2d 271, ¶ 13.

A person is in custody for *Miranda* purposes when there is "a formal arrest or restraint on freedom of movement of a

degree associated with a formal arrest." *State v. Lonkoski*, 2013 WI 30, ¶ 27, 346 Wis. 2d 523, 828 N.W.2d 552 (citation omitted); *Bartelt*, 379 Wis. 2d 588, ¶ 35; *State v. Morgan*, 2002 WI App 124, ¶ 16, 254 Wis. 2d 602, 648 N.W.2d 23.[4] A court determines objectively whether a person was in custody under the totality of circumstances, considering whether "a reasonable person would not feel free to terminate the interview and leave the scene." *Bartelt*, 379 Wis. 2d 588, ¶ 31 (quoting *State v. Martin*, 2012 WI 96, ¶ 33, 343 Wis. 2d 278, 816 N.W.2d 270).

Factors include "the degree of restraint; the purpose, place, and length of the interrogation; and what has been communicated by police officers." *Id.* ¶ 32. When assessing the degree of restraint, courts consider "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." *Id.* (quoting *Morgan*, 254 Wis. 2d 602, ¶ 12.

Whether the questioning of a person who is in custody constitutes interrogation depends on "the nature of the information the question is trying to reach." *Harris*, 374 Wis. 2d 271, ¶ 17. "If that information has no potential to incriminate the suspect, the question requires no *Miranda* warnings." *Id.* However, if the question is "designed to elicit incriminatory admissions," the answer to that question must be suppressed. *Id.* ¶¶ 15–16.

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[4] This Court has ordered the parties to address whether *Morgan* should be overruled. *Morgan* appears to accurately distinguish between custody under the Fourth Amendment and custody under the Fifth Amendment, and this Court relied on it in *State v. Bartelt*, 2018 WI 16, ¶ 32, 379 Wis. 2d 588, 906 N.W.2d 684. The State does not believe that *Morgan* needs to be overruled.

2. Some of the questions Dobbs was asked when he was in custody in the squad car were inquisitorial; his responses therefore should have been suppressed.

Officer Milton stopped the truck Dobbs was driving because it "fit the description of the hit and run vehicle and had significant visible damage to the front end, including a completely deflated front driver's tire and tree branches imbedded on the truck." (R. 67:1.) Officer Milton was the only officer on the scene, so he ordered Dobbs out of his truck, handcuffed him, and placed him in the back of his squad car. (R. 67:2; 270:77, 80.) Officer Milton told Dobbs that he was being detained as part of an accident investigation. (R. 67:2.)

The circuit court concluded that this was a detention for investigative purposes, but not a custodial arrest. (R. 67:4.) The court found that Officer Milton asking Dobbs "who he was, where he was coming from, where he was going and what happened to his truck," "was not a criminal interrogation requiring a *Miranda* warning." (R. 67:4.)

On appeal, Dobbs argued that he was in custody when Officer Milton "placed him in handcuffs, put him in the back of the squad car, and told him he was being 'detained.'" (Dobbs's Court of Appeals Br. 21, 23.) The court of appeals rejected Dobbs's argument, relying on *State v. Blatterman*, 2015 WI 46, ¶ 30, 362 Wis. 2d 138, 864 N.W.2d 26. The court concluded that if the defendant in *Blatterman* was not under arrest when he was placed in a squad car in handcuffs, Dobbs similarly was not in *Miranda* custody when he was placed in a squad car in handcuffs and told he was being detained. (P-App. 104.)

The circuit court and court of appeals were correct that the stop began as a temporary investigation detention. Under *Terry v. Ohio*, 392 U.S. 1, 22 (1968), a police officer may, under

certain circumstances, temporarily detain a person "for purposes of investigating possible criminal behavior even though there is not probable cause to make an arrest." The *Terry* standard is codified in Wisconsin Stat. § 968.24, which provides that an officer may conduct a temporary investigatory detention when "the officer reasonably suspects that a person is committing, has committed, or is about to commit a crime. The statute authorizes officers to "demand the name and address of the person and an explanation of the person's conduct." Wis. Stat. § 968.24.

A police officer who detains a person for investigatory purposes is not required to read the person the *Miranda* warnings. But police cannot "seek to verify their suspicions by means that approach the conditions of arrest." *Blatterman*, 362 Wis. 2d 138, ¶ 20 (citing *Florida v. Royer*, 460 U.S. 491, 499 (1983)). "Consequently, the detention 'must be temporary and last no longer than is necessary to effectuate the purpose of the stop.'" *Id.* (quoting *Royer*, 460 U.S. at 500). And a detained person who is "in custody" for Fifth Amendment purposes is entitled to *Miranda* warnings. *State v. Gruen*, 218 Wis. 2d 581, 593, 582 N.W.2d 728 (Ct. App. 1998); *Morgan*, 254 Wis. 2d 602, 617–18.

A reasonable person in Dobbs's position would not have felt free to terminate the encounter and leave the scene. *Bartelt*, 379 Wis. 2d 588, ¶ 31. But that is true of any traffic stop—any temporary investigative detention. *Berkemer v. McCarty*, 468 U.S. 420, 436–37 (1984). And persons temporarily detained for ordinary traffic stops "are not 'in custody' for the purposes of *Miranda*." *Id.* at 440.

Officer Milton was the only officer present. He told Dobbs that he was being detained rather than arrested, and Dobbs understood that he had not been arrested—he asked Officer Milton during the field sobriety tests if he was going to be arrested. (R. 267:126, 245.)

However, a person is in custody for *Miranda* when there is a "restraint on freedom of movement of a degree associated with a formal arrest." *Lonkoski*, 346 Wis. 2d 523, ¶ 27; *Bartelt*, 379 Wis. 2d 588, ¶ 35. Dobbs was frisked and handcuffed, and the detention in the squad car took around one hour. At some point, the detention probably became custodial.

Even if Dobbs was in custody, most of the questions Officer Milton asked him were not inquisitorial. Dobbs points out that Officer Milton asked him for identification, where he was coming and where he was going, and how he broke his hand. (Dobbs's Br. 6–7.) Those questions were not "designed to elicit incriminatory admissions" from a person in custody. *Harris*, 374 Wis. 2d 271, ¶¶ 16–17 (citation omitted). Accordingly, they were not inquisitorial.

Officer Milton also asked Dobbs about damage to his vehicle, his depression and anxiety, and injuries to his face. (Dobbs's Br. 6–7.) Those questions were at least arguably inquisitorial. Dobbs's responses to those questions perhaps should have been suppressed. *Id.* However, even if Dobbs's statements in response to inquisitorial questions before he waived his *Miranda* rights should have been suppressed, it made no difference because Dobbs's statements were not incriminating. And Dobbs's incriminating post-*Miranda* statements were still properly admitted.

D. Dobbs's post-*Miranda* statements were properly admitted even if his pre-*Miranda* statements were not.

Even if Dobbs's statements to police while he was initially in the squad car—before he waived his *Miranda* rights—should have been suppressed, his statements to police after he waived his *Miranda* rights were properly admitted at trial.

When law enforcement fails to administer the *Miranda* warnings to a defendant who makes a statement while in custody, requiring suppression of the statement, a subsequent statement after waiver of *Miranda* rights need not be suppressed unless the second statement was coerced. *Oregon v. Elstad*, 470 U.S. 298, 309 (1985). "[A]bsent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion." *Id.* at 314. Therefore, "[a] subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." *Id.* The "admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made." *Id.*

Dobbs probably was in custody when he was in the squad car in handcuffs, and police probably should have administered the *Miranda* warnings before questioning him. But as the circuit court recognized, there is no evidence of coercion by police in regard to any of Dobbs's statements, before or after he waived his *Miranda* rights. Therefore, even if Dobbs's pre-*Miranda* statements should have been suppressed, his voluntary statements after he waived his *Miranda* rights were properly admitted.

E. Any error in admitting Dobbs's pre-*Miranda* statements was harmless.

An error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *State v. Mayo*, 2007 WI 78, ¶ 47, 301 Wis. 2d 642, 734 N.W.2d 115. To show that an error is harmless, the beneficiary of the error must prove "beyond a

reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* (citation omitted).

The jury verdict in this case did not rely on Dobbs's pre-*Miranda* statements—those statements were not incriminating or in any way important. The jury heard that Dobbs told Officer Milton "he had gone to Menards and he was on his way home." (R. 267:83.) But an officer testified he searched Dobbs's truck and found a Menards receipt for UltraDuster dated September 5. (R. 268:28–29.)

Dobbs "admitted to having hit a curb." (R. 267:83.) But Rochelle Sanders witnessed the crash and testified about it. (R. 266:212, 216.) The jury heard that Dobbs had a few beers the previous evening. (R. 267:84.) But it also heard that testing revealed no alcohol in his system. (R. 269:156.) The jury heard that Dobbs "suffered from depression and anxiety and he took medications for those conditions, as well as painkillers," but that he hadn't taken his painkillers. (R. 267:84–85.) Dobbs's medical conditions and prescriptions were crucial to his defense that he crashed because of the pain he felt when he removed his splint. The jury heard that Dobbs told Officer Milton that "none of the injuries on his face were as a result of the accident," and he had not sustained any injuries in the crash. (R. 267:99–100.) But the jury heard that Officer Milton observed Dobbs's injuries. (R. 267:99.) When Dobbs was injured made no difference.

The only disputed issue at trial in regard to the homicide by intoxicated use of a vehicle charge was the cause of the crash. The jury heard that after he waived his Miranda rights, Dobbs confessed numerous times to having huffed right before he crashed. As explained above, many of Dobbs's confessions were unquestionably admissible evidence because Dobbs did not make them in response to any questioning by police. Indeed, Dobbs made some of those confessions spontaneously to family and hospital staff. The jury also

heard Dobbs testify that he had been huffing for two weeks, that he purchased ten cans of Dust-Off for pain management that morning, that he "tested" a can and then put the can in the console next to him, and that on the way home he felt extreme pain. And then he lost consciousness and crashed his truck. Any reasonable juror would find that Dobbs huffed the air duster he had just purchased. And Amy Miles testified that an initial screening of Dobbs's blood indicated the presence of DFE, and that Dobbs's driving behavior was consistent with using an inhalant and losing consciousness. Any error in admitting Dobbs's pre-*Miranda* statements was harmless.

CONCLUSION

This Court should affirm the court of appeals' decision.

Dated this 6th day of March 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,997 words.

Dated this 6th day of March 2020.

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

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 6th day of March 2020.

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