STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Appellant,

v. Case No. 18 AP 858-CR

BRIAN L. HALVORSON,

Defendant-Respondent.

APPEAL FROM ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS STATEMENTS, DATED 13 APRIL 2018 AND FROM AN ORDER DENYING THE STATE'S MOTION FOR RECONSIDERATION (OF GRANTING OF DEFENDANT'S MOTION TO SUPPRESS STATEMENTS), DATED 13 APRIL 2018.
IN THE CHIPPEWA COUNTY CIRCUIT COURT, BRANCH III,
THE HONOURABLE STEVEN R. CRAY,
CIRCUIT COURT JUDGE, CHIPPEWA COUNTY, PRESIDING.

REPLY BRIEF OF PLAINTIFF-APPELLANT

Respectfully Submitted,

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ARGUMENT

I. MR. HALVERSON HAS CONCEDED THAT *HOWES V. FIELDS* HAS OVERRULED *STATE V. ARMSTRONG* ON FIFTH AMENDMENT GROUNDS AND THAT HE WAS NOT IN CUSTODY FOR MIRANDA PURPOSES SOLEY BECAUSE HE WAS IN JAIL ON AN UNRELATED MATTER.

Mr. Halverson has conceded that ***State v. Armstrong***, 223 Wis. 2d 331, 588 N.W.2d 606 (1999), and its Fifth Amendment based *per se* rule was overruled by the United

States Supreme Court in ***Howes v. Fields***, 565 U.S. 499, 132 S.Ct. 1181 (2012). (Response Brief at p. 12). In a footnote, he states that the Wisconsin Supreme Court relied on the holdings of ***Mathis v. United States***, 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 381 (1968), and its state counterpart, ***State v. Schimmel***, 84 Wis. 2d 287, 267 N.W.2d 271 (1978). 223 Wis. 2d at 353, 588 N.W.2d at 616. He then states that the United States Supreme Court "muddied" the clarity of the *Armstrong* rule.

Rather, the United States Supreme Court in ***Howes v. Fields***, 565 U.S. 499, 132 S.Ct. 1181 (2012), clarified that *Mathis v. United States* did not establish a *per se* rule that an inmate in a correctional facility was in *Miranda* custody solely for that reason. Id. at 507, 132 S.Ct. at 1188. It stated it had previously declined to adopt such a rule. Id. at 505, 132 S.Ct. at 1187.

Mr. Halverson, after conceding that pursuant to the Fifth Amendment, he was not in custody for Miranda purposes, asked this court to adopt a *per se* rule pursuant to the Wisconsin Constitution, Article I, § 8(1). He cites to ***State v. Knapp***, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899, hereinafter *Knapp II* to support his request.

However, he does not explain any concrete policy

reasons that show this extension is necessary. The extension of greater protection in *Knapp II* pursuant to the Wisconsin Constitution was based upon two sound policy reasons: a strong need to deter police misconduct and judicial integrity. Id. at ¶ 79, 285 Wis. 2d at 127, 700 N.W.2d at 920.

In *Knapp I & II*, the constitutional violation by the police was intentional[1]. Id. at ¶ 75, 285 Wis. 2d at 124, 700 N.W.2d at 918-919. The court did not believe those enforcing the law should be allowed to violate the law without consequences. Id. at ¶ 77, 285 Wis. 2d at 125-126, 700 N.W.2d at 919-920. The court felt the citizens of Wisconsin needed more protection from intentional police misconduct than the Fifth Amendment provided.

The second policy reason was to ensure judicial integrity. Id. at ¶ 79, 285 Wis. 2d at 127-128, 700 N.W.2d at 920. The judiciary should not, by its action, condone intentional violations of the rules by those who are supposed to enforce the rules by allowing the rule breakers to profit from the impropriety. Id. at ¶ 81, 285 Wis. 2d at 129, 700 N.W.2d at 921.

[1] Here the court found the violation was unintentional. (R 48: 23-24).

Neither of these policy concerns is present in this case. The Fifth Amendment does not provide incarcerated persons with insufficient protection. It simply puts them in the same position as anyone else being interviewed by law enforcement. They simply reside in a prison or a jail at the time of the interview.

The Court, in *Howes v. Fields*, explained in detail why the incarcerated person may be less susceptible to the coercive atmosphere that is normally attached to custodial interrogations. 565 U.S. at 511-514, 132 S.Ct. at 1190-1192. Inmates in jails and prisons are not being denied the protection of the *Miranda* decision nor are they in need of greater protection to deter police misconduct, which may impact the judicial integrity of Wisconsin's courts. If the police intentionally fail to give the *Miranda* warning, when needed, the statement will be suppressed as well as any evidence derived therefrom.

In a case dealing with the inevitable discovery rule, the Wisconsin Supreme Court declined to extend the protection of the Wisconsin Constitution in situations where police misconduct is present, but not controlling. ***State v. Jackson***, 2016 WI 56, ¶ 70, 369 Wis. 2d 673, 709-710, 882 N.W.2d 422, 440. The court felt that the

burden of proof needed to establish the application of this exception to the exclusionary rule provided sufficient protection "without punishing the state and the public for misconduct by some officers despite independent proof of inevitable discovery of the relevant evidence." Id.

The Wisconsin Supreme Court declined to extend greater protection pursuant to the Wisconsin Constitution when it adopted a 14 day break in custody rule pursuant to the Fifth Amendment. ***State v. Edler***, 2013 WI 73, ¶ 4, 350 Wis. 2d 1, 5, 833 N.W.2d 564, 566. The court found that Edler's case did not provide "the same kind of constitutional issues as the intentional violation of *Miranda* in *Knapp.*" Id. at ¶ 30, 350 Wis. 2d at 16, 833 N.W.2d at 571-572.

The test for determining custody for *Miranda* purposes is still the same whether the person is an inmate or is not. "When a prisoner is questioned, the determination of custody should focus on all the features of the interrogation. These include the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted." 565 U.S. at 514, 132 S.Ct. at 1192.

II. THE UNCONTRADICTED TESTIMONY SHOWS THAT MR. HALVERSON, WHILE AN INMATE IN THE VERNON COUNTY JAIL, WAS NOT IN CUSTODY FOR *MIRANDA* PURPOSES WHEN OFFICER DANIELSON HAD A TELEPHONIC CONVERSION WITH HIM AND HIS ADMISSIONS WERE NOT OBTAINED IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

Mr. Halverson has also conceded that he was not in custody for *Miranda* purposes because the interrogation was conducted via a telephone call. In its brief, the state cited a number of non-Wisconsin cases holding that interrogations held during a phone call do not create custody for *Miranda* purposes. (Appellant's Brief and Appendix at pp. 13-14). Mr. Halverson did not respond to this argument in his brief.

"An argument to which no response is made may be deemed conceded for purposes of appeal. [Cite omitted]". ***Hoffman v. Economy Preferred Ins. Co.,*** 2000 WI App 22, ¶ 9, 232 Wis.2d 53, 60, 606 N.W.2d 590, 594. By his failure to respond to this argument, he has conceded its correctness.

Mr. Halverson has conceded he was not in custody for Fifth Amendment/*Miranda* purposes solely because he was an inmate in a jail being held on an unrelated matter. Mr. Halverson has also conceded he was not in custody for *Miranda* purposes during the phone call with

Officer Danielson. Based upon these concessions, Mr. Halverson was not in *Miranda* custody, and the officer was not required to give him the *Miranda* warnings.

Contrary to Mr. Halverson's assertion that the state is speculating, theorizing and engaging in conjecture, the testimony presented at the two motion hearings is uncontradicted and provides adequate proof for the state's position.

The Wisconsin Supreme Court has stated:

> Positive uncontradicted testimony as to the existence of some fact, or the happening of some event, cannot be disregarded by a court or jury in the absence of something in the case which discredits the same or renders it against the reasonable probabilities. [Cites omitted].

Thiel v. Damrau, 268 Wis. 76, 85 66 N.W.2d 747, 752 (1954).

Mr. Halverson did not testify at either of the motion hearings and no evidence was presented that contradicted the testimony of the two officers. No evidence suggested that the jail handled his phone call on 27 September 2016 any differently than Corporal Hoff description of the routine practice.

"Routine" evidence is admissible to prove that a person or organization acted in conformity with that routine on a particular occasion. Sec. 904.06(1),

Stats., and ***French v. Sorano***, 74 Wis. 2d 460, 466, 247 N.W.2d 182, 185-186 (1976). Because this evidence was uncontradicted, this testimony is sufficient proof that the call involving Mr. Halverson was handled the same as any other routine call handled by the Vernon County Jail staff. The trial court's refused to "presume" the jail staff's actions were consistent on the day of Mr. Halverson's call, (R49: 32). If deemed a factual finding, it would be clearly erroneous and should be reversed. ***State v. Bartelt***, 2018 WI 16, ¶ 25, 379 Wis. 2d 588, 603, 906 N.W.2d 684, 691.

Mr. Halverson describes the conditions surrounding his telephone call as being coercive. (Response Brief at pp.16-17). While the program room, aka, the jail library, was locked, it was locked because, as he admits, and the testimony shows, he was not free to roam around the secured jail. The door would have been locked had he been there for a religious or educational activity or a police interview. (R 49: 20). The jailers would have been outside the room capable of seeing into the room no matter why he was in the room. (R49:20). These actions by the staff were not added limitations on his freedom of movement due solely to the police interview. 565 U.S. at 512-

513, 132 S.Ct. 1191-1192.

What the jailers provided was not a coercive environment. The jailers provided him with privacy in which to conduct his phone call. He was free to conduct the call in the manner in which he wanted. His call was not monitored or recorded or limited.

According to the Court's decision, what actions the staff took during the interview is not a factor in determining if the interview was custodial. How the person was summoned to the interview is a factor. Id. at 514, 132 S.Ct. at 1192. Deputy Hoff testified that prior to leaving the living pod the inmate would have been told he or she had received a phone call and from whom. The inmate is asked if he or she wants to answer the call or return the call. (R 49: 17-19). No inmate is coerced or forced to talk to anyone. Id. The walk to the room is the same whether they are going to make a call or going there for a religious or educational activity. Id. at 20. They are placed in the room and the door is closed. Id.

The inmate in *Howes v. Fields* was taken to the interview room without knowing why he was going there. He was not told in advance he could refuse to talk to the officers and did not consent to the interview in

advance. The two officers were armed and on occasions used a “very sharp tone” and/or profanity. 565 U.S. at 514-515, 132 S.Ct. at 1192-1193. The interview lasted five to seven hours. The officers told him that if he did not want to cooperate, he would be taken back to his cell. The Court held he was not in custody for *Miranda* purposes.

By contrast, Mr. Halverson was told in advance that an officer had called him and he could refuse to take or return the call. He consented to speak to the officer. The phone conversation lasted less than five minutes. Mr. Halverson could have hung up the phone at any time and Officer Danielson could have done nothing about it. Officer Danielson had no control over Mr. Halverson’s actions or his future. Mr. Halverson was returned to his then normal residence.

Mr. Halverson argues that since he was not told by Officer Danielson that he was free to hang up and to leave, it was a custodial interrogation. He notes that the Court placed much emphasis on this action by the two armed interrogators, who told Fields, after he had already been escorted to the interview room, that he was free to leave and repeated the admonition during the interview.

In Mr. Halverson's case, this admonition was not necessary since he was told this by the jailer, who escorted him to the phone call. He had already consented to talk to the officer. Officer Danielson did not need to repeat this since Mr. Halverson freely called him back.

Mr. Fields's more restrictive interview was held not to be custodial. Given the totality of the circumstances it stands to reason that Mr. Halverson's four minute phone call could not be deemed to have been custodial.

CONCLUSION

WHEREFORE, THE STATE, requests this court to reverse the trial court's two rulings and to return this matter back to the trial court for further proceedings.

Dated this 6th day of September 2018.

Respectfully Submitted,

Roy La Barton Gay
Asst. District Attorney
Atty. # 1002794

CERTIFICATION

I certify that this Brief and Appendix conforms to the rules contained in sec. 809.19(8)(b) & (c), Stats., for a brief produced using the following font:

> Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on right and left margins with 1 inch margin on top and bottom. The length of this brief is 12 pages, including this one.

Dated this 6th day of September 2018.

_____
ROY LA BARTON GAY
Assistant District Attorney
Attorney # 1002794

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 September 2018.

_____
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