STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP1350-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ULANDA M. GREEN,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A SUPPLEMENTAL POSTCONVICTION MOTION ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE TOM R. WOLFGRAM, PRESIDING

# BRIEF OF THE PLAINTIFF-RESPONDENT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

Page

**Constitutional Provisions**

## ISSUES PRESENTED

1. Did the officer violate Defendant-Appellant Ulanda M. Green's constitutional right against self-incrimination when the officer, prior to reading Green her *Miranda* rights, summarized the investigation and explained why Green was in custody?

The circuit court answered, "No."

This Court should answer, "No."

2. Did Green unequivocally invoke her right to remain silent when she stated, "[n]o, I don't know nothing" in response to the officer asking if she was willing to answer questions but then clarified, "I'll talk, but all's I got to say is I don't know nothing"?

The circuit court answered, "No."

This Court should answer, "No."

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. This case involves the application of established principles of law to the facts presented.

## INTRODUCTION

This is a confession case. Green argues that her confession should be suppressed for two reasons. First, Green claims that Detective Nicole Reaves violated her right against self-incrimination when she interrogated Green prior to reading her *Miranda* rights. Second, Green alleges that Detective Reaves violated her right to remain silent when she continued to question Green after Green allegedly invoked her right to silence. Green's claims fail.

Detective Reaves did not violate Green's right against self-incrimination because Detective Reaves's pre-*Miranda*

discussion with Green did not rise to the level of interrogation. Neither Detective Reaves's words nor conduct was designed to or reasonably likely to elicit an incriminating response. Rather, the whole of Detective Reaves's questions and statements demonstrate that she was trying to explain to Green what the police were investigating and why Green, in particular, was being questioned.

Detective Reaves also did not violate Green's right to remain silent. To avail herself of that right, Green needed to unambiguously invoke it. She did not. Although she initially responded, "no," Green made that initial "no" ambiguous when she added, "I don't know nothing." Moreover, when Detective Reaves sought clarification from Green, Green stated that she would talk.

Because Green is not entitled to suppression on either issue, this Court should affirm.

## STATEMENT OF THE CASE

*The charges*

One summer night, a black male with a stocky build and short hair snuck up behind EMM, an elderly man, as EMM walked around his neighborhood. (R. 1:2; 53:15.) The black male, who was later identified as Michael Winzer, ripped EMM's wallet from his back pocket so forcefully it tore EMM's pants. (R. 1:2.) Winzer then fled. (R. 1:2.)

No longer than thirty minutes later, a surveillance video captured two individuals, later identified as Winzer and Green, attempting to use EMM's stolen credit cards. (R. 1:2; 53:15.) A few hours after that, another surveillance video from a BP gas station captured a male, later identified as Kevin Cowser, and a female, later identified as Green,

making multiple attempts to use EMM's stolen credit cards.[1] (R. 1:2.)

Officers arrested and interviewed Cowser.[2] (R. 1:2.) Cowser told the officers that he had been staying with Green and Winzer, Green's boyfriend. (R. 1:2.) According to Cowser, Green told him that she and Winzer "had just done a lick," which he knew meant a robbery or burglary or something illegal. (R. 1:2.) Cowser relayed that Green produced a handful of credit cards and invited him to use the cards at the BP station. (R. 1:2.) Cowser stated that he and Green went to the BP station and tried to use the cards, but all were declined. (R. 1:2–3.) Cowser said that Green threw the cards into a sewer gate on their way back home. (R. 1:3.)

Officers discovered EMM's cards and other personal documents in the sewer gate Cowser described. (R. 1:3.) Officers also pulled EMM's bank records, which showed that multiple attempts were made to use EMM's card at the time the BP surveillance video showed Green and Cowser in the station. (R. 1:3.)

Officers went to Green's home to execute a warrant. Once there, they discovered Green hiding under a mattress. (R. 1:3.) They also found EMM's wallet and several other documents belonging to EMM lying beside a nearby bush. (R. 1:3.)

*Green's confession*

The State brought Green into custody and interviewed her. A recording of Green's interview is included in the record, but there is no transcript of the recording. Any quotes from the interview given in the facts and analysis

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[1] Neither surveillance video is included in the record.

[2] Cowser's interview is not included in the record.

that follow are the State's best attempt to transcribe the interview. The quotes in Green's brief appear to be Green's interpretation of the recording.

The officers took Green to a "relatively small" "standard interview room" with a table and three chairs. (R. 52:5; *see also* Ex. 1 at 6:45.)[3] The officers were "in plain clothes," "not in uniforms."[4] (R. 52:6.) Detective Reaves, the lead officer, wore a pink shirt and hat. (Ex. 1 at 7:27–7:32.) The officers removed Green's handcuffs, and Green sat at the back of the room. (R. 52:6; Ex. 1 at 6:48–7:03.) The officers sat across from her. (R. 52:6.)

Detective Reaves began by introducing herself, informing Green that Green could call her by her easier-to-remember nickname, "Sugar." (Ex. 1 at 7:27–7:32.) Detective Reaves asked Green, "Ulanda, they did a search warrant on your house and stuff today, right?" (R. 40:2; Ex. 1 at 7:35–7:38.) When Green responded with a mumble, Detective Reaves confirmed that Green was responding, "Yes."[5] (R. 40:2; Ex. 1 at 7:38–7:42.)

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[3] The video divides the interview into two parts. The State cites to the video in the record as "Ex. 1" and follows that cite with the time stamp on the recording. The State's timestamp citations are to the first part of the interview.

[4] At the suppression hearing, the circuit court noted that it could not "tell from the video if [the officers were] armed." (R. 52:6.) In the court's view, Detective Reaves's holster looked empty. (R. 52:6.) The court did not comment on whether the other officer carried a weapon, but it found that "no weapons were used or drawn." (R. 52:6.)

[5] Throughout the interview, Green says, "mmm." Green transcribes this as "Mm-hmm" in her brief. (Green's Br. 5–8.) It is not always clear from the recording whether Green is signaling an affirmative "mm-hmm" or simply acknowledging receipt of information. Accordingly, the State uses the word "mumble" to describe Green's reaction.

Detective Reaves then asked, "Okay and uh you staying there with your uh boyfriend, Michael [Winzer]?" (R. 40:2; Ex. 1 at 7:42–7:46.) Green responded that she was "staying with his momma and all them." (Ex. 1 at 7:46–7:49.) In response, Detective Reaves stated, "Yeah, his momma staying but momma gonna be moving across the street in a minute, right, his sister stays down the street, Pam." Green indicated that was true. (Ex. 1 at 7:49–7:59.)

Detective Reaves went on to explain that Green was taken into custody after the search warrant because of an incident that happened a few days earlier and seemed to involve Green:

> Detective Reaves: Okay. Um. Well, when they did the search warrant, I know they took you and uh your boyfriend, uh, [Winzer], into custody.
>
> Green: [mumble]
>
> Detective Reaves: So, we have a, an incident that happened a couple of days ago, that uh, uh [Winzer] has been identified in and, um, it was a robbery and we're popping up with you as the property on the video at the BP gas station out on Highland. Okay.[6]
>
> Green: [mumble]
>
> Detective Reaves: We also have you dumping the uh, cards, and stuff into the grid. Okay. Now this is the thing. Just having the property, that ain't no big deal, okay.[7] But as far as doing the robbery, um,

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[6] Green places a question mark after this "okay," in her transcript of the recorded interview. (Green's Br. 5.) The State views Detective Reaves's use of the word "okay" here as more of a statement than a question and therefore places a period after the word "okay."

[7] Unlike Green, the State views Detective Reaves's use of the word "okay" here as more of a statement than a question and therefore places a period after the word "okay." (Green's Br. 6.)

> we know you not the one that robbed 'em, but we know you know who did, okay.[8] And it's not fair for us to try to put that on you if you ain't the one that did it, you, you feel –
>
> Green: [mumble]

(Ex. 1 at 7:57–8:54.) Detective Reaves repeated that it would be unfair for the officers to try to pin the robbery on Green when they knew she did not do it: "It's not fair for us to do that if you ain't the one that did it, right?" (Ex. 1 at 8:56–9:00.)

When Green answered, "I don't know nothing about that though," Detective Reaves asked Green to "hold on" and clarified that she was "just asking" whether it would be fair for the officers' to do that. (Ex. 1 at 9:00–9:05.) Green mumbled in response. (Ex. 1 at 9:05–9:06.)

Detective Reaves then summarized why Green was in custody, stating, "So basically, that's why we got you down here and everything. Umm, we talked with um, with [Cowser], uh, [Cowser] down here also . . . ." (Ex. 1 at 9:07–9:20.) Green blurted out, "That's who I got the cards from." (Ex. 1 at 9:20–9:22.) Detective Reaves responded, "Okay, well," and Green stated, "I don't know nothing about it." (Ex. 1 at 9:22–9:23.) Detective Reaves asked Green to "hold on," and Green interjected, "Nothing at all." (Ex. 1 at 9:23–9:25.)

Detective Reaves replied to Green: "You got rights. I don't want you to, I don't want you to violate any of your rights, you know. Sister to sister, because we going to be fair about this, okay?" (Ex. 1 at 9:25–9:32.) Green mumbled in response. (Ex. 1 at 9:25–9:32.) Detective Reaves reiterated that she wanted the process to be fair, stating, "This ain't

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[8] Unlike Green, the State views Detective Reaves's use of the word "okay" here as more of a statement than a question and therefore places a period after the word "okay." (Green's Br. 6.)

about taking another black woman, black man to jail for some humbug stuff, or whatever, we gonna be fair about this across the board, okay.[9]" (Ex. 1 at 9:32–9:39.) Green again mumbled. (Ex. 1 at 9:39–9:40.)

Detective Reaves then outlined her plan for the interview, noting that before they talked about the robbery and EMM's cards, she needed to read Green her *Miranda* rights:

> Alright, so, what's right is what's right. Okay, so. We gonna talk about, you know, the robbery and the cards and using the cards and all that kind of stuff, okay? Alright. So, um, before we do that though, because you have rights, I'm going to read you your rights, okay. And, um, we'll go from there.

(Ex. 1 at 9:40–10:00.) Green responded that she did not know anything, and Detective Reaves proceeded to read Green the *Miranda* warnings from a standard card. (Ex. 1 at 10:00–10:36; R. 52:6.)

Afterward, Detective Reaves asked if Green understood her rights. (Ex. 1 at 10:36–10:38.) Green answered that she understood her rights. (Ex. 1 at 10:38–10:41.) Detective Reaves then asked Green if she was "willing to answer questions or make a statement," and Green responded, "No, I don't know nothing." (Ex. 1 at 10:41–48.)

Detective Reaves sought clarification: "Okay, so you're telling me that you don't want to talk to me right now and you don't want to clear your name on this?" (Ex. 1 at 10:48–10:51.) Green answered, "I ain't did nothing." (Ex. 1 at 10:51–53.)

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[9] Unlike Green, the State views Detective Reaves's use of the word "okay" here as more of a statement than a question and therefore places a period after the word "okay." (Green's Br. 7.)

Detective Reaves again sought clarification: "Okay, well, that's what I'm saying. Just, just, we have to clarify that. Do you want to talk to me and clear your name or –." (Ex. 1 at 10:53–58.) Green responded, "Yeah, yeah, I'll talk, but all's I got to say is I ain't did nothing."[10] (Ex. 1 at 10:58–11:03.) After, Detective Reaves stated, "For the record, uh, uh, Ms. Green is waiving her rights and agreeing to answer questions to try to clear her name on this." (Ex. 1 at 11:03–11:11.) Green said nothing in response to this statement. (Ex. 1 at 11:11–11:12.)

Green and Detective Reaves then discussed the details of the robbery for roughly an hour, at which point they took a break and offered Green the opportunity to smoke, have a drink, and eat some food. (Ex. 1 at 1:11:18–1:11:39.) After the break, Green and Detective Reaves continued to discuss the details of the robbery for about another hour. Over the course of the interview, Green admitted to receiving the credit cards, which she assumed were stolen, (Ex. 1 at 12:48–13:07, 31:34–31:39), and to throwing the cards into the sewer, (Ex. 1 at 29:56–30:08, 32:20–32:33).

*Green's motion to suppress*

Pretrial, Green moved to suppress her interview with Detective Reaves. (R. 13.) In her motion, Green raised three arguments: (1) Detective Reaves violated her *Miranda* rights by interrogating Green before reading the *Miranda* warnings; (2) Green invoked her right to remain silent and Detective Reaves violated that right by continuing to

[10] Green and the State hear this statement very differently. Green transcribed the statement as, "No. No, you all can talk but the only thing I can say is that I ain't did nothing." (Green's Br. 8.) The circuit court did not specifically discuss this statement.

question her; and (3) Green's confession was not voluntary.[11] (R. 13:1–8.)

Before the hearing on the motion, the parties provided the court with Green's recorded interview. (R. 49:3.) Green's attorney informed the court that he would be relying solely on the video and would not, therefore, be introducing any testimony at a later hearing. (R. 49:3.)

At the hearing, the circuit court discussed only the invocation and voluntariness arguments.[12] (R. 52:5–9.) As to the invocation issue, the court ruled that Green did not unambiguously invoke her right to remain silent when she said, "No, I don't know nothing." (R. 52:7.) The court reasoned that Green's follow up statement—"I don't know nothing"—rendered her initial "no" ambiguous. (R. 52:7.) As a result, the court deemed the invocation "ambiguous." (R. 52:7.)

On the voluntariness issue, the circuit court concluded that Green voluntarily confessed. (R. 52:8.) The court found that the officers made no threat or promises, nor did they display any force. (R. 52:8.) The court acknowledged that the interview lasted "some duration" but noted that the officers' provided Green with a break to eat, drink, and have a cigarette. (R. 52:8.) Given that information, the court concluded that nothing "about the circumstances of the interview g[a]ve [it] any pause or concern." (R. 52:8–9.) Upon

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[11] Green abandons her voluntariness argument on appeal.

[12] In her brief on appeal, Green comments that the circuit court "indicated that this was a 'difficult' motion." (Green's Br. 9.) In context, it appears the court commented that the last issue was "most difficult" because of the number of issues raised, not the substance of the claims made. (R. 52:5 ("The last one was perhaps the most difficult. There's a couple of issues that are presented here by the [d]efense.").)

concluding its discussion, the circuit court asked the parties if there was anything else they needed the court to comment on, and both the State and Green's attorney responded in the negative. (R. 52:9–10.)

*Green's guilty plea and sentencing*

Green later pled guilty to one count of harboring or aiding a felony and one count of receiving stolen property. (R. 16:1; 53:9–10.) The parties immediately proceeded to sentencing, where the State recommended a total of four years of imprisonment, and Green recommended probation. (R. 53:12, 22.) On the aiding a felon count, the circuit court sentenced Green to three-and-a-half years of imprisonment. (R. 53:30–31.) On the receiving stolen property count, the court imposed a concurrent sentence of nine months jail time. (R. 53:31.)

*Green's postconviction motions*

After sentencing, Green filed a postconviction motion on two grounds.[13] (R. 27.) First, she sought to withdraw her plea on the grounds that the circuit court gave an inadequate colloquy. (R. 27:3.) Second, she sought resentencing on the grounds that her sentence was unduly harsh. (R. 27:6.) The circuit court denied Green's motion. (R. 28.)

Green then filed a motion with this Court, asking to dismiss her appeal and allow her to file a supplemental postconviction motion. (R. 34.) This Court granted her motion. (R. 32.)

Green's supplemental postconviction motion resurrected her argument that Detective Reaves

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[13] On appeal, Green abandons both of the claims raised in her postconviction motion. (Green's Br. 11 n.4–5.)

impermissibly interrogated Green before reading her *Miranda* warnings. (R. 36:2.) Green asked the circuit court to rule on the *Miranda* issue. (R. 36:2.)

The circuit court denied Green's supplemental postconviction motion via written order. (R. 40:3.) The court reasoned that "[t]he whole of the detective's pre-*Miranda* discussion with the defendant was contextual—i.e. explaining to the defendant what the police were investigating and why she was being questioned." (R. 40:3.) As a result, it concluded that "[n]othing in the detective's preliminary discussion with the defendant c[ould] reasonably be construed as an interrogation." (R. 40:3.)

Green now appeals.

## STANDARD OF REVIEW

Appellate courts "employ a two-step process in reviewing a circuit court's denial of a motion to suppress." *State v. Harris*, 2017 WI 31, ¶ 9, 374 Wis. 2d 271, 892 N.W.2d 663. First, the court reviews "the circuit court's factual findings and uphold them unless they are clearly erroneous." *Id.* Second, the court applies "constitutional principles to those facts de novo, without deference to the courts initially considering the question, but benefiting from their analyses." *Id.*

"Even if the circuit court does not make an explicit factual finding, [this Court] assume[s] that the court made the finding in a manner that supports its final decision." *State v. Pallone*, 2000 WI 77, ¶ 44 n.13, 236 Wis. 2d 162, 613 N.W.2d 568, *overruled on other grounds by State v. Dearborn*, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97.

## ARGUMENT

### I. Detective Reaves did not violate Green's constitutional right against self-incrimination.

On appeal, Green first argues that Detective Reaves violated her right against self-incrimination by interrogating her before reading her the *Miranda* warnings. Because Detective Reaves did not, however, interrogate Green before reading Green her *Miranda* rights, Detective Reaves did not violate Green's right against self-incrimination.

#### A. The law requires *Miranda* warnings only when the State interrogates a suspect in police custody.

Both the United States and the Wisconsin Constitutions provide that no person may "be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.; Wis. Const. art. I, § 8. To safeguard that constitutional protection, courts require an officer to formally instruct a suspect of her constitutional rights before conducting an in-custody interrogation. *Harris*, 374 Wis. 2d 271, ¶ 13. These instructions, known as *Miranda* warnings, inform the suspect that she "has the right to remain silent, that anything [s]he says can be used against h[er] in a court of law, that [s]he has the right to the presence of an attorney, and that if [s]he cannot afford an attorney one will be appointed for h[er] prior to any questioning." *Id.* (quoting *Miranda v. Arizona*, 384 U.S. 436, 479 (1966)).

That said, officers are not required to give *Miranda* warnings to every suspect for all police encounters. Rather, *Miranda* warnings are required only when the State interrogates a suspect in police custody. *Harris*, 374 Wis. 2d 271, ¶ 11; *see also State v. Bartelt*, 2018 WI 16, ¶ 30, 379 Wis. 2d 588, 906 N.W.2d 684 ("[T]he *Miranda* safeguards apply only to custodial interrogations under both

constitutions." (citation omitted)). Both requirements will be discussed further below.

### B. Although Green was in custody, Detective Reaves did not interrogate Green before reading Green her *Miranda* warnings.

#### 1. Officers took Green into custody when they formally arrested her.

A suspect is in custody when an officer executes a "formal arrest" or restrains a suspect's "freedom of movement" to "a degree associated with a formal arrest." *Bartelt*, 379 Wis. 2d 588, ¶ 31 (citation omitted).

In this case, there is no question that Green was in custody because officers formally arrested her. Rather, the question here is whether Detective Reaves interrogated Green prior to reading the *Miranda* warnings.

#### 2. Detective Reaves's pre-*Miranda* discussion with Green did not rise to the level of interrogation.

"[I]nterrogation can take the form of either express questioning or its functional equivalent." *Harris*, 374 Wis. 2d 271, ¶ 15; *see also Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) ("[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."). Both express questioning and its functional equivalent will be discussed in greater detail below.

### a. Express questioning covers questions designed to elicit incriminating responses.

It goes without saying that express questioning encompasses questions posed by a police officer to a suspect. Importantly, though, express questioning "does not encompass every inquiry directed to the suspect;" instead, "it covers only those questions 'designed to elicit an incriminatory admission.'" *Harris*, 374 Wis. 2d 271, ¶ 16 (quoting *Pennsylvania v. Muniz*, 496 U.S. 582, 602 n.14 (1990)). In other words, even a direct question posed by an officer will not constitute "express questioning" if the question does not seek "incriminating evidence." *Id.* ¶ 19. "It is the nature of the information the question is trying to reach, therefore, that determines whether it is inquisitorial. If that information has no potential to incriminate the suspect, the question requires no *Miranda* warnings." *Id.* ¶ 17.

For example, as the Wisconsin Supreme Court explained in *Harris*, asking a suspect a direct question such as "[w]ould you like to give me a statement," does not qualify as express questioning, despite the fact that the question is "certainly designed to obtain a response." *Harris*, 374 Wis. 2d 271, ¶ 40. This is because the only information sought was "whether Mr. Harris would like to make a statement; it did not seek the statement itself." *Id.*

The *Harris* court explained, "The response to such a question is either a 'yes' or a 'no,' and neither would have any testimonial significance whatsoever." *Harris*, 374 Wis. 2d 271, ¶ 18. The fact that Harris volunteered more information than requested did not transform the question into an interrogation. *Id.* Because the officer was not "search[ing] for incriminating evidence," the question did not constitute express questioning. *Id.*

By contrast, when an officer asks a suspect if incriminating evidence belongs to him, the officer's question is designed to elicit an incriminatory response. *State v. Martin*, 2012 WI 96, ¶ 36, 343 Wis. 2d 278, 816 N.W.2d 270. This was so in *Martin*, where the supreme court held that the officer violated *Miranda* when he presented evidence, there a gun, to the suspect *and asked to whom it belonged*. *Id.* There, the officer's question was designed to elicit an incriminating response because it asked who owned the incriminating evidence. *Id.*

In short, to qualify as interrogation, an express question must be designed to elicit an incriminating response. If the question itself does not seek out incriminating evidence, then the question does not rise to the level of interrogation.

**b. The functional equivalent of express questioning covers words or conduct that an officer should know is reasonably likely to elicit an incriminating response.**

The "functional equivalent" of express questioning which also constitutes interrogation, includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Harris*, 374 Wis. 2d 271, ¶ 19 (quoting *Innis*, 446 U.S. at 301). Courts assess whether an officer's words or actions constitute the functional equivalent of express questioning by inquiring into how a third-person observer would expect a suspect to react to the officer's words or actions:

> [I]f an objective observer (with the same knowledge of the suspect as the police officer), could, on the sole basis of hearing the officer's remarks or observing

> the officers conduct, conclude that the officer's conduct or words would be likely to elicit an incriminating response, that is, could reasonably have had the force of a question on the suspect, then the conduct or words would constitute interrogation.

*Id.* ¶ 22 (quoting *State v. Cunningham*, 144 Wis. 2d 272, 278–79, 423 N.W.2d 862 (1988)). Courts must also consider "the entire context within which the dialogue took place." *Id.* ¶ 23.

Same as express questioning, an officer's statements or conduct "must exert a compulsive force on the suspect" to qualify as the functional equivalent of express questioning. *Harris*, 374 Wis. 2d 271, ¶ 30. "Interrogation must reflect a measure of compulsion above and beyond that inherent in the custody itself." *State v. Hambly*, 2008 WI 10, ¶ 46, 307 Wis. 2d 98, 745 N.W.2d 48 (quoting *Innis*, 446 U.S. at 300).

Confronting a suspect with incriminating physical evidence or verbally summarizing the State's case against the suspect is not necessarily compulsive enough to constitute the functional equivalent of express questioning. *Hambly*, 307 Wis. 2d 98, ¶ 57.

For example, in *Easley v. Frey*, the Seventh Circuit concluded that an investigator's comment that the suspect could receive the death penalty if convicted of the murder he was suspected of committing did not qualify as the functional equivalent of interrogation. *Easley v. Frey*, 433 F.3d 969, 971 (7th Cir. 2006); *see also id.* at 974 ("[W]e do not believe that the provision of information, even if its weight might move a suspect to speak, amounts to an impermissible 'psychological ploy.'"). And in *Hambly*, the supreme court ruled that telling a suspect that he was under arrest because he had sold drugs to an informant, did not qualify as the functional equivalent of express questioning. *Hambly*, 307 Wis. 2d 98, ¶¶ 10, 57.

### c. Detective Reaves engaged in neither express questioning nor its functional equivalent.

Detective Reaves did not interrogate Green via express questioning or its functional equivalent during their pre-*Miranda* discussion, because neither Detective Reaves's words nor her conduct were likely to elicit an incriminating response. Instead, the record demonstrates that Detective Reaves sought to provide context and background as to why the police were investigating Green.

To the extent Detective Reaves asked direct questions, her questions called for yes-or-no background answers. Specifically, Detective Reaves confirmed that officers executed a search warrant at Green's home and asked if she was living there with her boyfriend, Winzer. (Ex. 1 at 7:35–7:59.) These questions were designed to explain to Green why the officers took her into custody—because officers executed a warrant at the home she shared with Winzer, who had been identified in a robbery. (Ex. 1 at 7:35–7:59.)

Similarly, Detective Reaves's subsequent statements, which contained a brief explanation of the evidence the police possessed, explained why Detective Reaves wished to interview Green—because a surveillance video captured her attempting to use credit cards taken during the robbery. (Ex. 1 at 7:57–8:54, 9:07–9:20.)

This reading of Detective Reaves's pre-*Miranda* discussion is confirmed by her summation, where she stated, "So, so basically that's why we got you down here and everything." (Ex. 1 at 9:07–9:10.) Detective Reaves's reference to Cowser right after her summation can be attributed to her remembering an additional reason that Green was in custody—because of Cowser's statements to the police.

At that moment, Detective Reaves was attempting to transition from background discussion to interrogation and a reading of Green's *Miranda* rights, but Green interrupted her with a volunteered statement that she received the stolen cards from Cowser. (Ex. 1 at 9:19–9:22.) Notably, the moment Detective Reaves thought Green was starting to divulge incriminating information, she asked Green to "hold on" because she did not want to violate Green's rights. (Ex. 1 at 9:23–9:29.) Detective Reaves then immediately read Green her *Miranda* rights. (Ex. 1 at 9:55–10:38.)

Here, the whole of Detective Reaves's pre-*Miranda* discussion with Green was contextual. Detective Reaves's questions and statements demonstrate that she was trying to explain to Green what the police were investigating and why she, in particular, was being questioned. Accordingly, Detective Reaves's background questions and statements did not qualify as interrogation, as they were not designed to or reasonably likely to elicit an incriminating response.

Green argues that Detective Reaves engaged in impermissible express questioning when she asked if Green lived with her boyfriend, Winzer. (Green's Br. 15.) According to Green, Detective Reaves "wished to establish" that Green "lived with" and was "romantically linked to" her boyfriend, a suspect. (Green's Br. 15) That information, Green said, "support[ed] the State's theory that Ms. Green was an accomplice to her boyfriend's robbery." (Green's Br. 15.)

That Detective Reaves asked Green a direct question does not mean she interrogated her. A direct question (i.e., express questioning) must be "*designed* to elicit an incriminating response." *Harris*, 374 Wis. 2d 271, ¶ 16 (quoting *Muniz*, 496 U.S. at 602 n.14) (emphasis added). Here, Detective Reaves's question could not have been designed to elicit an incriminating response because simply living with or being romantically involved with an alleged criminal does not automatically make you an accomplice.

What made Green an accomplice here, and what resulted in the aiding a felon charge, was her destroying evidence by tossing the stolen credit cards into the sewer. (R. 53:4.)

Green also takes issue with Detective Reaves "recap[ing] the investigation" and "confront[ing] Ms. Green" with the following facts: (1) the police believed Winzer committed the robbery; (2) the police had surveillance of Green attempting to use the stolen cards; and (3) the police knew Green threw the stolen cards in the sewer. (Green's Br. 15–16.)

But the law allowed Detective Reaves to confront Green with incriminating evidence and to verbally summarize the State's case against her. *Hambly*, 307 Wis. 2d 98, ¶ 57 ("Confronting a suspect with incriminating physical evidence, or verbally summarizing the State's case against the suspect, does not necessarily constitute the functional equivalent of express questioning."); *see also id.* ¶ 57 n.61 ("[T]he *Innis* definition of interrogation is not so broad as to capture within *Miranda*'s reach all declaratory statements by police officers concerning the nature of the charges against the suspect and the evidence relating to those charges." (quoting *United States v. Payne*, 954 F.2d 199, 202 (4th Cir. 1992)).

Compare what Detective Reaves did to a hypothetical situation. Here, Detective Reaves simply informed Green that she was depicted on the surveillance video. Had Detective Reaves told Green she appeared to be using the stolen credit cards in the surveillance video *and then asked her if she used the stolen cards*, her questioning would have violated *Miranda*. In that scenario, Detective Reaves's questioning would have been designed to and reasonably likely to elicit an incriminating response; it would have asked Green to admit to receiving stolen property. *See Martin*, 343 Wis. 2d 278, ¶ 36 (confronting a suspect with a gun and asking whether the gun belongs to the suspect

qualifies as interrogation); *State v. Bond*, 2000 WI App 118, ¶¶ 16–17, 237 Wis. 2d 633, 614 N.W.2d 552, *aff'd by an equally divided court*, 2001 WI 56, 243 Wis. 2d 476, 627 N.W.2d 484 (confronting a suspect with a unique phrase the officer heard the suspect use during his investigation and which only the suspect would understand was reasonably likely to elicit an incriminating response and thus constituted interrogation).

Green further complains about Detective Reaves repeatedly asking Green if it would be fair for the police to hold her accountable for the robbery if they knew she did not commit it. (Green's Br. 16.) But that question called for a non-incriminating yes-or-no answer. The only information sought in the question was whether Green believed it would be fair for the police to pin her with a crime they knew she did not commit. The response to such a question is either a "yes" or a "no," and neither would have any testimonial significance.

Green also accuses Detective Reaves of "intentionally mislead[ing] Ms. Green by telling her that [she] would not get in trouble for merely possessing the stolen property" and by "suggesting that Ms. Green could help herself by giving up information about the robbery itself or how she had come into possession of those items." (Green's Br. 18.) Green's accusations read words into Detective Reaves's statements that simply are not there.

Detective Reaves did not tell Green that she "would not get in trouble for merely possessing the stolen property." (Green's Br. 18.) Detective Reaves said, "Just having the property, that ain't no big deal, okay." (Ex. 1 at 8:35–8:39.) Detective Reaves was communicating the crime of receiving stolen property is less of a "big deal" when compared to robbery. She never said or implied that Green could not be charged with and punished for that crime, though.

Detective Reaves also did not suggest "that Green could help herself" by giving up information about the robbery. (Green's Br. 18.) Detective Reaves said that she knew Green did not commit the robbery and that it would not be fair to pin the robbery on Green. (Ex. 1 at 8:39–9:06.) Detective Reaves also communicated that she believed Green knew who committed the robbery. (Ex. 1 at 8:45–8:47.) At no point, though, did Detective Reaves suggest that Green could help herself if she gave up the robber. Nor did Detective Reaves suggest, as officers sometimes will, that she would help Green down the road if Green gave her information about the robbery.

Finally, Green argues that Detective Reaves sought an incriminating response when she notified Green that the police spoke with Cowser. (Green's Br. 16, 18.) Green accuses Detective Reaves of "linger[ing]" on that information, and she points to Green's subsequent incriminating statement as proof Detective Reaves interrogated Green. (Green's Br. 16, 18.)

But the fact that a suspect makes an incriminating statement does not prove that the suspect was interrogated. Officers are allowed to present incriminating evidence to a suspect and to verbally summarize the State's case. *Hambly*, 307 Wis. 2d 98, ¶ 57. Furthermore, the recording of the video shows that Detective Reaves paused during this statement to check her notes, which were sitting on the table to her left, not to implement some sort of interrogation tactic. (Ex. 1, 9:11–9:20.) Detective Reaves did nothing more than inform Green of one more reason why she was in custody being questioned. Detective Reaves had no way of knowing that Green would volunteer that she received the stolen cards from Cowser. *See Arizona v. Mauro*, 481 U.S. 520, 529 (1987) ("Volunteered statements of any kind are not barred by the Fifth Amendment . . . ." (quoting *Miranda*, 384 U.S. at 478)).

In sum, Detective Reaves did not interrogate Green prior to reading her the *Miranda* warnings. During the short pre-*Miranda* discussion, Detective Reaves provided context and background as to what the police were investigating and why they were questioning Green. Moreover, the second Detective Reaves thought Green was starting to divulge incriminating information, she asked Green to "hold on" because she did not want to violate Green's rights. (Ex. 1 at 9:23–9:29.) Because none of Detective Reaves's background discussion with Green was designed to or reasonably likely to elicit an incriminating response, such discussion cannot—and does not—rise to the level of interrogation. Accordingly, Green is not entitled to suppression on that issue.

## II. Detective Reaves did not violate Green's right to remain silent.

Green's second argument on appeal concerns the statements she made after receiving her *Miranda* rights. Green claims that Detective Reaves violated her right to remain silent when Detective Reaves continued to ask Green questions after she allegedly invoked her right. Because Green did not, however, properly invoke her right to remain silent, Detective Reaves could continue to question Green.

### A. A suspect must unequivocally invoke her right to remain silent.

A suspect's Fifth Amendment right to remain silent includes two separate protections: (1) the right to remain silent prior to any questioning and (2) the right to cut off questioning. *State v. Hampton*, 2010 WI App 169, ¶ 46, 330 Wis. 2d 531, 793 N.W.2d 901 (citing *Miranda*, 384 U.S. at 460, and *Michigan v. Mosley*, 423 U.S. 96, 103 (1975)). To avail herself of either protection, the suspect must "unequivocally" invoke the right to remain silent. *State v. Markwardt*, 2007 WI App 242, ¶ 36, 306 Wis. 2d 420, 742

N.W.2d 546 ("[A] suspect's claimed unequivocal invocation of the right to remain silent must be patent.").

"If the suspect does not unambiguously invoke his or her right to remain silent, the police need not cease their questioning of the suspect." *State v. Ross*, 203 Wis. 2d 66, 78, 552 N.W.2d 428 (Ct. App. 1996). Indeed, "the police need not even ask the suspect clarifying questions" if he or she makes an ambiguous statement regarding the right. *Id.*

To unequivocally invoke the right, "[a] suspect must, by either an oral or written assertion or nonverbal conduct that is intended by the suspect as an assertion and is reasonably perceived by the police as such, inform the police that he or she wishes to remain silent." *Ross*, 203 Wis. 2d at 78. The suspect's articulation of her desire to remain silent or cut off questioning must be "sufficiently clear[ ] that a reasonable officer in the circumstances would understand the statement to be an invocation of the right to remain silent." *Id.* (quoting *Davis v. United States*, 512 U.S. 452, 459 (1994)). When "a suspect's statement is susceptible to 'reasonable competing inferences' as to its meaning, then the 'suspect did not sufficiently invoke the right to remain silent.'" *State v. Cummings*, 2014 WI 88, ¶ 51, 357 Wis. 2d 1, 850 N.W.2d 915 (quoting *Markwardt*, 306 Wis. 2d 420, ¶ 36).

Even a clear statement like, "I don't want to talk about this," can become ambiguous when coupled with a statement like, "I don't know nothing about this." *Cummings*, 357 Wis. 2d 1, ¶ 64. This is because a statement such as "I don't know nothing about this" is an exculpatory statement proclaiming innocence, and "such a proclamation of innocence is incompatible with a desire to cut off questioning." *Id.* Accordingly, in *Cummings*, the supreme court concluded that "the mere fact that [the defendant's] statements *could* be interpreted as proclamations of innocence or selective refusals to answer questions [was]

sufficient to conclude that they [were] subject to 'reasonable competing inferences' as to their meaning." *Id.* ¶¶ 68, 64.

Finally, "[t]here is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously." *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010). Namely, the requirement "results in an objective inquiry that 'avoid[s] difficulties of proof and . . . provide[s] guidance to officers on how to proceed in the face of ambiguity. *Id.* (citing *Davis*, 512 U.S. at 458–59). "If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequences of suppression 'if they guess wrong.'" *Id.* at 382 (citing *Davis*, 512 U.S. at 461). "Suppression of a voluntary confession [under those] circumstances would place a significant burden on society's interest in prosecuting criminal activity." *Id.*

### B. Green did not unequivocally invoke her right to remain silent.

Here, Green did not unequivocally invoke her right to remain silent, because her statement was susceptible to reasonable competing inferences as to its meaning.

After reading Green her *Miranda* rights, Detective Reaves asked Green if she was "willing to answer questions or make a statement," and Green responded, "No, I don't know nothing." (Ex. 1, 10:41–48.) Although Green's initial "No," was clear, her addition of the phrase, "I don't know nothing," created ambiguity. A proclamation of innocence, such as "I don't know nothing," is "incompatible with a desire to cut off questioning." *Cummings*, 357 Wis. 2d 1, ¶ 64. Accordingly, such a statement creates a reasonable competing inference. *See id.* ¶ 68; *see also State v. Kramar*, 149 Wis. 2d 767, 788, 440 N.W.2d 317 (1989) ("A defendant's

disclaimer of any knowledge of the death of a victim does not constitute an invocation of the defendant's right to silence.").

Although not required to do so by law, Detective Reaves sought clarification twice. After receiving Green's ambiguous statement, Detective Reaves asked, "Okay, so you're telling me that you don't want to talk to me right now and you don't want to clear your name on this?" (Ex. 1 at 10:48–10:53.) Green answered, "I ain't did nothing." (Ex. 1 at 10:48–10:53.) After receiving this second ambiguous statement, Detective Reaves further asked, "Okay, well, that's what I'm saying. Just, just, we have to clarify that. Do you want to talk to me and clear your name or–."(Ex. 1 at 10:53–11:03.) Green responded, "Yeah, yeah, I'll talk, but all's I got to say is I ain't did nothing." (Ex. 1 at 10:53–11:03.)

It was only at that point—when Detective Reaves received an affirmative, "I'll talk"—that Detective Reaves stated for the record that Green waived her rights and was willing to answer questions. Presumably, if Green did not want to answer questions, she would have corrected Detective Reaves's statement that had she agreed to do so, but Green said nothing in response.

Green argues that her additional "I don't know nothing" statement did not render her "no" ambiguous. (Green's Br. 20.) Green claims that when read in context, "the explanatory addendum is not a superfluous invocation of innocence giving rise to ambiguity, but rather a sensible (and polite) response to the ongoing interrogation." (Green's Br. 20–21.) The State disagrees.

Here, as in *Cummings*, the phrase "I don't know nothing" was a proclamation of innocence, and such proclamations are "incompatible with a desire to cut off questioning." *Cummings*, 357 Wis. 2d 1, ¶ 64.

At numerous points, Green could have said that she wanted to remain silent or that she did not want to talk. *Berghuis*, 560 U.S. at 382 ("[The defendant] did not say that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would have invoked his 'right to cut off questioning.'" (quoting *Mosley*, 423 U.S. at 103)). Instead, she said she did not know anything. But not knowing information is different than not wanting to talk about information. Green could have known nothing about the robbery and still been willing to talk about it.

And the record demonstrates that Green was willing to talk about the robbery. Upon requesting clarification, Green told Detective Reaves, "I'll talk." (Ex. 1 at 10:59–11:03.) And the context of Green's sentence makes clear that she was indicating that she would talk, but did not know anything about it. (Ex. 1 at 10:53–11:03.)

Green also argues that *Cummings* is distinguishable because Green's statement was not "coupled with a demonstrated desire to converse about other topics." (Green's Br. 23.) It is true that the *Cummings* court had two bases for concluding that the defendant's statements were subject to reasonable competing inferences: (1) the statements could be interpreted as proclamations of innocence and (2) the statements could be interpreted as selective refusals to answer questions. *Cummings*, 357 Wis. 2d 1, ¶ 68.

But the court did not require that a proclamation of innocence be coupled with a demonstrated desire to talk about another topic. This is indicated by the court's use of the word "or": "The mere fact that [the defendant's] statements *could* be interpreted as proclamations of innocence *or* selective refusals to answer questions is sufficient to conclude that they are subject to 'reasonable competing inferences' as to their meaning." *Cummings*, 357

Wis. 2d 1, ¶ 68 (second emphasis added). Thus the fact that Green's statement could have alone been interpreted as a proclamation of innocence was sufficient to conclude that her statement was subject to reasonable competing inferences.

In a footnote, Green presents a hypothetical. (Green's Br. 21 n.6.) Green asks this Court to "[i]magine asking a coworker to lunch: 'Would you like to eat lunch with me?'" (Green's Br. 21 n.6.) The coworker responds, "No. I am not hungry." (Green's Br. 21 n.6.) Green alleges that "[n]o reasonable human being could, with a straight face, claim to detect any ambiguity as to whether or not the person desires to dine with them." (Green's Br. 21 n.6.) In the State's view, a more analogous answer to Green's hypothetical would be, "No, I do not have any food." The lack of having any food does not necessarily mean the coworker does not want to have lunch. Similarly here, allegedly not knowing anything about the crime did not necessarily mean that Green did not want to talk to Detective Reaves.

Finally, Green lists a series of cases in which she claims various courts have found substantially similar invocations unambiguous. (Green's Br. 24–25.) As a preliminary matter, a majority of the cases cited by Green come from other jurisdictions and are, therefore, not binding on this Court. *State v. Quiroz*, 2009 WI App 120, ¶ 24, 320 Wis. 2d 706, 772 N.W.2d 710 ("[A]lthough a Wisconsin court may consider case law from other jurisdictions, such case law is not binding precedent in Wisconsin, and a Wisconsin court is not required to follow it."). Substantively, the cases cited by Green are distinguishable; in all of the excerpts provided by Green, the defendants clearly state that they do not want to communicate with the officers, rather than simply disclaim any knowledge of the crime. (Green's Br. 24–25.)

In sum, because Green did not unequivocally invoke her right to remain silent, Detective Reaves could continue

to question Green. As a result, Green is also not entitled to suppression on this issue.

### C. Green is not entitled to suppression, but if this Court disagrees, her remedy should be limited to suppression of the evidence.

Should this Court reverse the circuit court's decision and judgment, Green asks that she be permitted "to withdraw her guilty plea." (Green's Br. 26.) But a decision from this Court directing the circuit court to grant Green's motion to suppress does not automatically entitle Green to plea withdrawal. "In a guilty plea situation following the denial of a motion to suppress, the test for harmless error on appeal is whether there is a reasonable possibility that the erroneous admission of the disputed evidence contributed to the conviction." *State v. Semrau*, 2000 WI App 54, ¶ 22, 233 Wis. 2d 508, 608 N.W.2d 376. Said another way, the question is whether there is a "reasonable probability that, but for the trial court's failure to suppress the disputed evidence, [the defendant] would have refused to plead and would have insisted on going to trial." *Id*. ¶ 26.

If this Court concludes that the circuit court erred when it denied Green's motion to suppress evidence, the remedy is to remand the case to the circuit court to enter an order granting her motion to suppress evidence. The circuit court may then entertain a motion from Green to withdraw her guilty plea. The circuit court should grant plea withdrawal only if the State cannot meet its burden of demonstrating that the circuit court's error in refusing to suppress error was harmless, guided by the factors this Court identified in *Semrau*. *Semrau*, 233 Wis. 2d 508, ¶ 22. This Court should decide the suppression question only and leave the matter of plea withdrawal to the circuit court on remand, if necessary.

## CONCLUSION

This Court should affirm the judgment of conviction and the circuit court's order denying Green's supplemental postconviction motion.

Dated this 5th day of November, 2018.

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 7,952 words.

Dated this 5th day of November, 2018.

_____
JENNIFER R. REMINGTON
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## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 5th day of November, 2018.

_____
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