STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP001350-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ULANDA M. GREEN,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and
an Order Denying Postconviction Relief Entered
in Milwaukee County Circuit Court,
the Honorable Tom R. Wolfgram, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
augustc@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS

ARGUMENT[1]

I. Ms. Green was subject to a constitutionally impermissible interrogation.

Both parties agree that the dispositive question in this case is whether Ms. Green was "interrogated" such that warnings under *Miranda v. Arizona*, 384 U.S. 436 (1966) were required. (State's Br. at 13). The State claims that no constitutionally cognizable interrogation occurred because "neither Detective Reaves' words nor her conduct were likely to elicit an incriminating response." (State's Br. at 17). They claim that all of her actions were aimed at providing "context and background" for law enforcement's investigation. (State's Br. at 17).

---

[1] In its statement of facts, the State points out that there are some disagreements about the words spoken on the videotape. For example, the State opts to transcribe Ms. Green's repeated utterance of "mm-hmm" or "mmm" as a "mumble." (State's Br. at 4). Elsewhere, the State opts not to use a question mark for Detective Reaves' repeated usage of the phrase, "Okay." (State's Br. at 5). Because this Court will have access to the videotape, Ms. Green will allow the Court to draw its own conclusions. However, Ms. Green will address the disagreement referenced on page eight of the State's brief. Ms. Green believes that her transcription is more correct; although on re-listening with studio headphones it appears there might have been only one "no" not the two "nos" which are transcribed in the opening brief.

Thus, the State sees nothing wrong with Detective Reaves' questions seeking to confirm that Ms. Green: (a) understood that a search warrant had been executed at her home and (b) that she lived there with her boyfriend (and presumed accomplice) Mr. Winzer. (State's Br. at 17). They deny that questions of this nature were intended to elicit an incriminating response. (State's Br. at 18). The State claims that these statements were spoken merely to explain why Ms. Green was in custody. (State's Br. at 17).

However, information that Ms. Green both resided with and was in a romantic relationship with Mr. Winzer was significant to this investigation—the State's whole theory is that the robbery had been committed by a man and woman. (1:2). Mr. Cowser's statement added more circumstantial evidence when he informed police that the robbers were a man/woman team who: (1) lived together and (2) had a romantic relationship—Ms. Green and Mr. Winzer. (1:2). Thus, in this context, Ms. Green's confirmation that she was the woman linked to Mr. Winzer—the presumed robber—therefore goes beyond mere context and is the type of response "that the prosecution may seek to introduce at trial." *Rhode Island v. Innis*, 446 U.S. 291, 301 n.5 (1980). The State is presumably aware that prosecutions usually depend on circumstantial evidence and it is therefore unclear why this question—which helps build the State's case—is any less incriminating simply because it did not directly ask whether Ms. Green committed the robbery. (State's Br. at 18-19).

The State also discerns nothing wrong with Detective Reaves' lengthy, pre-*Miranda* conversation with Ms. Green about the evidence arrayed against her, asserting that this tactic was entirely proper. (State's Br. at 19). They cite *State v. Hambly*, 2008 WI 10, 307 Wis. 2d 98, 745 N.W.2d 48 for the proposition that Detective Reaves was allowed to "confront Green with incriminating evidence and to verbally summarize the State's case against her." (State's Br. at 19). In the State's view, so long as Detective Reaves stopped short of actually asking Ms. Green whether she committed the crime, there has been no violation. (State's Br. at 19).

There are two issues with this position. First, it appears to collapse a nuanced area of law into a rigid, and legally incorrect, binary. In the State's view, there is no middle ground between, on the one hand, "matter of fact" communications about the evidence arrayed against a defendant or the basis for an arrest and, on the other, outright, deliberately incriminatory questioning (Did you do it?). That is a false dichotomy. The case law, after all, speaks of a more holistic and contextual inquiry that is not dependent on the mechanical application of rigid rules. Thus, words or actions which may be incriminatory in one context may not be incriminatory in another. For example, sometimes a relatively obscure utterance—"the man behind the man"—is sufficient to constitute interrogation, depending on the surrounding context. *See State v. Bond*, 2000 WI App 118, ¶ 15, 237 Wis. 2d 633, 614 N.W.2d 552.

That is of course the second problem with the State's position—it ignores the basic reality of this police encounter, which was anything but a neutral recitation of the basis for Ms. Green's custody. Here, Detective Reaves slowly doled out information in an ongoing, deliberate fashion. Each new incriminatory fact was capped with an "Okay?" –a signal that Ms. Green was required to affirm her receipt of this damning information before moving on to the next piece of evidence.

Moreover, the video is peppered with subtle cues intended to elicit incriminating information from Ms. Green. Here, Detective Reaves' pre-*Miranda* remarks were clearly seeking incriminatory information—statements from Ms. Green about her involvement in the robbery. To that end, Detective Reaves:

(1) Made clear to Ms. Green, in a series of revelations, that she possessed evidence of Ms. Green possessing stolen property and that her boyfriend, Michael, had been identified as the actual robber.

(2) Suggested that it was "not fair" for Ms. Green to get in trouble for something she did not actually do (the robbery).

(3) Falsely communicated that the crime which Ms. Green had allegedly been observed on video committing—possession of stolen property—"ain't no big deal."

(4) Told Ms. Green that she knew Ms. Green knew who committed the robbery, while simultaneously reminding her that it would not be fair to pin the blame on the person who was not responsible—Ms. Green.

(5) Told her that her accomplice was also in custody, deliberately pausing after communicating this information to Ms. Green. It was during that pause that Ms. Green admitted to possessing the stolen property.

Any reasonable third-party observer would fairly conclude that Ms. Green had therefore been "interrogated" for the purposes of the Fifth Amendment.

The State disagrees and complains that Ms. Green reads too much into the words and actions of Detective Reaves. (State's Br. at 20-22). They take issue with some of her interpretations offered in the brief in chief. (State's Br. at 20). They exert tremendous energy attempting to contrive superficially reasonable contrary explanations. However, actual review of the video through the lens of everyday experience and commonsense shows that the State's explanations are simply not credible. Any reasonable third-party observer would conclude that the entire tone and tenor of the police encounter was designed to elicit evidence related to the robbery and related crimes (such as the possession of stolen property and attempted use of the stolen cards). Police believed Ms. Green to be involved in that crime

and to have evidence they could use in their investigation. They sought that evidence via a series of suggestive words and actions. Any other interpretation simply ignores commonsense.

Just because police never asked Ms. Green "Did you do it?" that does not mean she was not interrogated. Here, police deliberately suggested that Ms. Green could help herself by providing information about the crime being investigated. The State should not be allowed to pretend that Ms. Green's subsequent incriminatory statements were somehow unexpected. In applying basic commonsense to this police encounter, it becomes clear that Ms. Green was subjected to an interrogation prior to having her *Miranda* warnings read to her. That is a constitutional violation meriting suppression of her incriminating statements.

Therefore, for all of the reasons outlined in both the brief in chief and the reply, Ms. Green asks this Court to reverse the ruling of the circuit court.

II. Ms. Green's invocation was unequivocal.

Here, Ms. Green was asked if she wished to speak with detectives. Her answer? No. Accordingly, Ms. Green's statement made it "sufficiently clear" to any reasonable listener that she wished to remain silent and that the interrogation was required to cease. *See State v. Ross*, 203 Wis. 2d 66, 78, 552 N.W.2d 428 (1996). (A defendant "must articulate his or her desire to remain silent or cut off questioning 'sufficiently clearly that a reasonable police officer in

the circumstances would understand the statement to be' an invocation of the right to remain silent.")

Of course, the State disagrees. (State's Br. at 24). They claim that her additional statement—"I don't know nothing"—created ambiguity. (State's Br. at 24). They offer several arguments.

First, the State cites *State v. Cummings,* 2014 WI 88, 357 Wis. 2d 1, 850 N.W.2d 915, for the flat rule that her "proclamation of innocence" was "incompatible with a desire to cut off questioning." (State's Br. at 24). However, as Ms. Green has already argued, the addendum makes sense in context and does not create any ambiguity: Prior to being read her rights, Detective Reaves had already suggested at numerous points in the conversation that Ms. Green had information and they were "gonna talk about" the crime. It makes sense, then, that Ms. Green would embellish her "no" answer with an explanatory addendum—that, contrary to the police suggestion, she had nothing to tell.

In addition, Ms. Green has also argued that *Cummings* is easily distinguished. The State does not meaningfully respond to that argument. (State's Br. at 26). In *Cummings*, the invocation was inherently ambiguous because, at that point, the defendant had already waived their rights and was engaged in a back and forth with officers. *Cummings*, 2014 WI 88, ¶53. Here, Ms. Green's was not engaged in any such back and forth and was instead replying to the initial reading of her rights. That context matters and the State cannot prevail simply by ignoring it.

Second, the State looks for post-invocation evidence to support its conclusion. (State's Br. at 25-26). However, the State cites no case law for the proposition that statements made *after* a contested *Miranda* invocation should be used to cast doubt on the validity of the invocation. That position is also contrary to the policy of *Miranda*, which treats the invocation as a stop sign (instead of a yield sign, as the State seems to believe). It is Ms. Green's position that allowing Courts to look at potentially compelled statements in order to ascertain the validity of a constitutional invocation seems very backward indeed.

The State also takes issue with Ms. Green's hypothetical. (State's Br. at 27). Ms. Green's entire point is that, in evaluating speech, this Court should not abandon its commonsense interpretations. Rather than striving to find ambiguity—in order to uphold a potential law enforcement violation—this Court should hold true to an everyday understanding of how people talk. As Ms. Green argued at length in her opening brief, that everyday understanding defeats any claim of ambiguity.

Finally, the State cursorily dismisses the persuasive case law cited in the brief in chief. While the State is correct that this Court has no obligation to follow case law from other jurisdictions, Ms. Green nonetheless believes that these cases are helpful, as they involve substantially similar invocations. Ms. Green therefore asks this Court to consider their holdings in deliberating on this case.

Thus, for all of the reasons outlined in both the brief in chief and this reply, this Court should therefore find the statement to be an unambiguous invocation of her rights. Her ensuing statements were inadmissible. Accordingly, this Court should reverse the circuit court's ruling.

CONCLUSION

Ms. Green therefore respectfully requests that this Court reverse the ruling of the circuit court, suppress all statements obtained as a result of unlawful interrogation procedures and permit her to withdraw her guilty plea.

Dated this 20th day of November, 2018.

Respectfully submitted,

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
augustc@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,965 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated this 20th day of November, 2018.

Signed:

_____

Christopher P. August
Assistant State Public Defender