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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2018AP2319-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MANUEL GARCIA,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE RACINE COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL J. PIONTEK, PRESIDING

SUPPLEMENTAL BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

JOHN A. BLIMLING
Assistant Attorney General
State Bar #1088372

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-3519
(608) 294-2907 (Fax)
blimlingja@doj.state.wi.us

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INTRODUCTION

On June 20, 2019, Defendant-Appellant Manuel Garcia filed his opening brief in this appeal. On August 20, 2019, the State filed its response brief. On September 4, 2019, Garcia notified this Court that he did not intend to file a reply brief.

On March 10, 2020, this Court ordered the parties to provide supplemental briefing on two issues. The first issue is "whether the rule set forth in *Harris v. New York*, 401 U.S. 222, 225–26 (1971), applies under the circumstances of this case where the evidence was introduced during the state's case-in-chief and was not introduced to impeach the defendant's testimony." Second, this Court ordered the parties to address the application of the "rule of completeness" to the facts of this case.

As the State argued in its response brief, when a defendant seeks to use the exclusion of his inculpatory statements from the State's case-in-chief to mislead the jury about the nature of a police investigation, the rule established in *Harris* and its progeny permits the trial court to admit the confession during the State's case-in-chief in order to rehabilitate a witness. Moreover, while the rule of completeness set forth in Wis. Stat. § 901.07 and *State v. Eugenio*, 219 Wis. 2d 391, 579 N.W.2d 642 (1998), does not control the outcome in this case—the State did not seek admission of the confession under the rule—its focus on fairness supports the State's argument. This Court should affirm.

ARGUMENT

I. The admission of Garcia's inculpatory statements was proper under *Harris* and its progeny.

In his opening brief, Garcia framed the issue as whether the circuit court's evidentiary decision was "clearly erroneous." (Garcia's Br. 9; State's Response Br. 9.) The State

argued that it was not. (State's Response Br. 9.) The State understands this Court's order for supplemental briefing to focus on the constitutional question Garcia did not raise in his opening brief. In addition to constituting a proper exercise of discretion, the circuit court's decision to admit Garcia's statements to police did not violate Garcia's constitutional rights.[1]

A. The United States Constitution permits the introduction of otherwise excluded un-Mirandized statements under certain circumstances.

In its response brief, the State noted that it is "well established . . . that the State may use [statements obtained in violation of *Miranda*[2]] for the limited purposes of impeachment and rebuttal as long as the statements were voluntary." (State's Response Br. 8.) The State traced its support for that assertion back through *Knapp I*[3] to *Harris v. New York*, 401 U.S. 222 (1971).

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[1] In its opening brief, the State described the standard of review for circuit courts' discretionary decisions based on Garcia's framing of the issue. (Garcia's Br. 8–9; State's Response Br. 7.) To the extent this Court resolves this case on constitutional grounds, the standard of review differs from that discussed in the parties' previous briefs. With respect to constitutional claims, 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.*

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[3] *State v. Knapp*, 2003 WI 121, 265 Wis. 2d 278, 666 N.W.2d 881, *vacated and remanded*, 542 U.S. 952, *reinstated in material part*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899 ("*Knapp II*").

Harris involved a defendant convicted of selling heroin to an undercover police officer. *Id.* at 222–23. At trial, the defendant took the stand in his own defense, claiming that the substance he sold the undercover officer was actually baking powder. *Id.* at 223. On cross-examination, the prosecutor asked the defendant about certain un-Mirandized statements he made to officers shortly after his arrest that contradicted the testimony he gave at trial. *Id.* The trial court allowed the questioning, but it instructed the jury that the statements should be used only for determining the defendant's credibility, not as evidence of guilt. *Id.*

The United States Supreme Court affirmed the defendant's conviction. The Court commented that although certain parts of *Miranda* "can indeed be read as indicating a bar to use of an uncounseled statement for any purpose," those parts of the opinion were not central to the holding. *Id.* at 224. It continued, "[i]t does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards." *Id.*

The Court went on to note that in *Walder v. United States*, 347 U.S. 62 (1954), it "permitted physical evidence, inadmissible in the case in chief, to be used for impeachment purposes." *Harris*, 401 U.S. at 224. It then quoted *Walder* directly: "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage . . . ." *Id.* (quoting *Walder*, 347 U.S. at 65). Thus, the Court concluded, the "shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Harris*, 401 U.S. at 226.

A multitude of courts, including the Supreme Court, have expanded the lessons of *Harris* to other situations. For example, in 1975, the Court considered a situation where the defendant received a proper *Miranda* warning (as opposed to no warning at all, as was the case in *Harris*) but made statements to police after requesting to speak with an attorney. *Oregon v. Hass*, 420 U.S. 714, 715–16 (1975). As in *Harris*, the trial court allowed the prosecution to introduce the statements in rebuttal in response to testimony from the defendant. *Id.* at 717.

The Court found no meaningful distinction between the situation in *Harris* and the situation in *Hass*. *Id.* at 722. It noted that "the impeaching material would provide valuable aid to the jury in assessing the defendant's credibility," and commented that the exclusion of the evidence from the prosecution's case in chief served as a strong enough deterrent against police misconduct. *Id.* The Court continued: "We are, after all, always engaged in a search for truth in a criminal case so long as the search is surrounded with the safeguards provided by our Constitution." *Id.* The emphasis, the Court explained, was on whether the statement was reliable; that is, whether it was voluntary and uncoerced. *Id.* at 722–23.

Wisconsin's courts have echoed this understanding of the *Harris* rule. For example, shortly after the decision in *Harris*, the Wisconsin Supreme Court commented that the use of otherwise inadmissible statements in rebuttal "is to do no more than utilize the traditional truth-testing devices of the adversary process." *Ameen v. State*, 51 Wis. 2d 175, 181, 186 N.W.2d 206 (1971). In another case, the Wisconsin Supreme Court held that the defendant had "opened the door" to questioning about his pre-*Miranda* silence by raising the issue during cross-examination of a State's witness. *State v. Brecht*, 143 Wis. 2d 297, 313, 421 N.W.2d 96 (1988). As support, the court cited United States Supreme Court precedent finding "no violation of the Fifth Amendment for a

prosecutor to refer to [the] defendant's failure to testify where such [a] remark is a 'fair response to a claim made by defendant or his counsel.'" *Id.* at 314 (quoting *United States v. Robinson*, 485 U.S. 25, 32 (1988)). And in *State v. Schultz*, 152 Wis. 2d 408, 417–18, 448 N.W.2d 424 (1989), the Wisconsin Supreme Court noted that the Court, "in reaching this result [in *Harris*], balanced the various interests that were implicated by allowing impeachment of this sort."

In 1990, the Supreme Court revisited the introduction of evidence otherwise excluded due to violation of a defendant's constitutional rights. *See James v. Illinois*, 493 U.S. 307 (1990). In *James*, police arrested a murder suspect without probable cause and obtained inculpatory statements from him in violation of his Fourth Amendment rights, which the trial court excluded. *Id.* at 309–10. The defendant did not testify at trial, but a defense witness testified in a manner inconsistent with the defendant's excluded statements. *Id.* at 310. The prosecution then sought, and the trial court allowed, introduction of the previously excluded statements in order to impeach the defense witness. *Id.*

The Supreme Court began by reviewing the underpinnings of the exclusionary rule, giving particular attention to its holdings in *Walder* and *Harris*. *Id.* at 311–13. The Court said that it had "insisted throughout this line of cases that 'evidence that has been illegally obtained . . . is inadmissible on the government's direct case, or otherwise, as substantive evidence of guilt.'" *Id.* at 313 (quoting *United States v. Havens*, 446 U.S. 620, 628 (1980)). "However," the Court continued,

> because the Court believed that permitting the use of such evidence to impeach defendants' testimony would further the goal of truth-seeking by preventing defendants from perverting the exclusionary rule "into a license to use perjury by way of defense," and because the Court further believed that permitting such use would create only a "speculative possibility

> that impermissible police conduct will be encouraged thereby," the Court concluded that the balance of values underlying the exclusionary rule justified an exception covering impeachment of defendants' testimony.

Id. (citations omitted).

The Court then turned to the question at hand—whether the impeachment exception to the exclusionary rule extended to defense witnesses other than the defendant himself. *Id.* It reasoned that "[e]xpanding the class of impeachable witnesses from the defendant alone to all defense witnesses would create different incentives affecting the behavior of both defendants and law enforcement officers." *Id.* Defendants, the Court thought, would be "chilled" from presenting testimony from witnesses they could not control for fear that those witnesses might "make some statement in sufficient tension with the tainted evidence to allow the prosecutor to introduce that evidence for impeachment." *Id.* at 315. Police, on the other hand, would see the deterrent effect of the exclusionary rule greatly reduced by "enhanc[ing] the expected value to the prosecution of illegally obtained evidence." *Id.* at 318. Thus, the Court concluded, "[i]t is thus far more than a 'speculative possibility' that police misconduct will be encouraged by permitting such use of illegally obtained evidence." *Id.* The Court therefore held that the impeachment exception to the exclusionary rule did not extend to impeachment of other defense witnesses. *Id.*

Subsequent cases further refined the rule set forth in *Harris* and *James*. For example, shortly after its decision in *James*, the Court expanded the *Harris* exception to Sixth Amendment violations. *See Michigan v. Harvey*, 494 U.S. 344, 354 (1990); *see also Kansas v. Ventris*, 556 U.S. 586 (2009). And in one federal habeas case reviewing a decision of the Wisconsin Supreme Court, the United States District Court for the Eastern District of Wisconsin considered the introduction of an un-Mirandized statement for purposes of

impeaching a witness for the prosecution. *Kuntz v. McCaughtry*, 806 F. Supp. 1373, 1379 (E.D. Wis. 1992).

In *Kuntz*, the court reviewed the underpinnings of the Supreme Court's decisions in *Harris* and *James*, noting that "[t]he Court's concern in *James* was the chilling effect on the presentation of other defense witnesses." *Id.* at 1380. The court stated that permitting introduction of illegally obtained evidence to impeach a witness for the prosecution only enhanced this concern. *Id.* Therefore, the court ruled, the trial court improperly admitted the evidence. *Id.* The court nevertheless denied Kuntz's petition, however, because the inclusion of the un-Mirandized statement was harmless. *Id.* at 1380–81.

The lesson of all of these cases is that courts have four primary concerns when dealing with the admissibility of previously excluded evidence. First, it is necessary to ensure that the evidence is reliable. In the *Miranda* context, this means that the statements were neither involuntary nor coerced. *See, e.g.*, *Wold v. State*, 57 Wis. 2d 344, 355, 204 N.W.2d 482 (1973) ("The test for excluding testimony for impeachment purposes is untrustworthiness, not necessarily its exclusion in chief"). Second, the admission of any such evidence should nevertheless ensure that proper deterrence against government misconduct stays in place. In other words, the rule as applied must still "compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *James*, 493 U.S. at 319 (quoting *Elkins v. United State*s, 364 U.S. 206, 217 (1960)).

Third, the admissibility of previously excluded evidence should stem from something in the defendant's control so as not to preclude the defendant from presenting his best case. *Cf. James*, 493 U.S. at 314–15 ("expanding the impeachment exception to encompass the testimony of all defense witnesses likely would chill some defendants from presenting their best

defense and sometimes any defense at all—through the testimony of others."). Fourth and finally, evidence should be admitted if it meets the first three criteria and serves the court's fact-finding function. *See, e.g.*, *Hass*, 420 U.S. at 722 ("We are, after all, always engaged in a search for truth in a criminal case so long as the search is surrounded with the safeguards provided by our Constitution."); *Havens*, 446 U.S. at 626 ("There is no gainsaying that arriving at the truth is a fundamental goal of our legal system").

In short, courts must weigh these factors and, if the balance weighs in favor of presenting the evidence to the jury, admitting it does not violate the defendant's constitutional rights. *See James*, 493 U.S. at 313 (noting that the impeachment exception exists because "the balance of values underlying the exclusionary rule justified an exception").

B. The admission of Garcia's confession following his cross-examination of Investigator Spiegelhoff was constitutional.

On balance, the factors described above weigh in favor of the admissibility of Garcia's confession following his cross-examination of Investigator Spiegelhoff. The circuit court therefore did not violate Garcia's constitutional rights when it allowed the State to ask Investigator Spiegelhoff about Garcia's confession during re-direct examination.

First, the inculpatory statements in question here were reliable because Garcia made them voluntarily. Voluntariness is the key factor courts look to when determining reliability in the *Miranda* context. *See Harris*, 401 U.S. at 224. *See also Upchurch v. State*, 64 Wis. 2d 553, 563, 219 N.W.2d 363 (1974). Garcia had originally challenged the voluntariness of his statements to police, but the circuit court found that the statements were voluntary. (R. 79:20.) Garcia did not renew his voluntariness claim on appeal. Thus,

the statements meet the traditional standards of trustworthiness required for admissibility.

Second, allowing the admission of the statements in this situation would not unduly diminish the deterrent effect against government misconduct in the *Miranda* context. Unlike the situation in *James*, where the admissibility of evidence "would create different incentives affecting the behavior of both defendants and law enforcement officers," there is no such concern here. Police would not see the "expected value" of illegally obtained evidence greatly expanded for at least two reasons. First, situations where defendants mislead juries about the nature of police investigations are likely to be rare. These situations involve a specific set of facts—police not investigating certain remote possibilities about a crime because someone already confessed to the crime without a proper *Miranda* waiver—and the defendant seeking to take advantage of those facts at trial. Second, and perhaps more significantly, police and prosecutors will not be able to control when these situations do occur. The risk that police will intentionally avoid obtaining valid *Miranda* waivers in order to use un-Mirandized statements in trial rebuttal is a mere "speculative possibility" that does not warrant continued exclusion in this case. *Cf. James*, 493 U.S. at 313.

Third, admission of the statements in situations like this would not unfairly prevent defendants from presenting their best case or any case at all. In *James*, the Court's concern was that permitting prosecutors to confront defense witnesses with conflicting, un-Mirandized statements from defendants would place the admissibility of the statements beyond the defendant's own control. *See id.* Here, unlike in *James*, the trigger for the admission of the statements was Garcia's cross-examination of a prosecution witness, not an unexpected statement from a defense witness that contradicted the defense theory. A defendant is in complete

control of his own questioning of witnesses for the prosecution. The only thing admissibility of this evidence would chill defendants from doing is deliberately misleading the jury. Such an effect should be welcomed, not lamented.

Fourth, admissibility of this evidence would promote circuit courts' truth-seeking function. When a circuit court decides that a line of questioning would mislead the jury, the best way to serve the courts' truth-seeking function is to allow the matter to be clarified for the jury. In this case, that meant permitting the prosecution to explain that the reason police did not further investigate certain events leading up to the victim's death was because Garcia had confessed.

It is important to note that the prosecution used Garcia's inculpatory statements for the limited purpose of explaining the course of the investigation after Garcia's cross-examination of Investigator Spiegelhoff, not as substantive evidence of guilt. On re-direct examination, the prosecution asked Investigator Spiegelhoff, "Is there a reason why you did not continue to investigate this case as [Garcia's attorney] suggested?" (R. 79:29–30.) Investigator Spiegelhoff replied that he had interviewed Garcia and received "a plausible explanation of the injuries" when Garcia admitted that he had punched the victim several times. (R. 79:30.) After playing the video recorded interview for the jury, the prosecution asked Investigator Spiegelhoff whether he felt the need to continue his investigation into other possible sources of injury given Garcia's statement. (R. 79:32.) Investigator Spiegelhoff replied that he did not. (R. 79:33.)

It is thus clear that the prosecution's use of Garcia's inculpatory statements was within the bounds contemplated by *Harris* and its progeny. The prosecution did not offer Garcia's statements as substantive evidence of guilt. *See James*, 493 U.S. at 313. Rather, the statements only served to fill out the picture for the jury so its members would not be

led astray by Garcia's questioning of Investigator Spiegelhoff during cross-examination.

Garcia then put the substance and meaning of those statements at issue when he testified. He claimed that he was "trying to say during the interview that [he] spanked [the victim] as opposed to punched [the victim]" but that his poor English skills caused a misunderstanding. (R. 79:76.) And he said that he never hit the victim in the stomach. (R. 79:77.) The prosecution did not cross-examine Garcia. (R. 79:81.) Thus, the expansion of the significance of Garcia's statements to police from providing context for the police investigation to substantive evidence of guilt was based on Garcia's own testimony following the lawful admission of the statements for limited purposes.

In sum, the circuit court properly admitted Garcia's voluntary, inculpatory statements when it concluded that doing so was necessary to prevent the jury from being misled by Garcia's cross-examination of Investigator Spiegelhoff. The introduction of the statements did not violate Garcia's constitutional rights. This Court should affirm.

II. The importance of fairness and clarity to the jury identified by rule of completeness demonstrates why the outcome in this case was correct.

In its response brief, the State commented that the rule of completeness supported the circuit court's decision in this case. (State's Response Br. 8, 11–12.) To be clear, the State did not seek admission of Garcia's statements under the rule of completeness and does not argue that the rule dictates the outcome here. However, the rule of completeness

demonstrates how the concept of "fairness" comes into play when courts consider evidentiary questions.[4]

Wisconsin Stat. § 901.07 allows for the introduction of portions of writings or recorded statements "which ought in fairness to be considered contemporaneously with [previously introduced portions] to provide context or prevent distortion." In other words, when a party introduces part of a writing or recorded statement, the adverse party may introduce the remainder of that writing or statement in order prevent the jury from being misled.[5] At the core of the rule is the idea of fairness: "fairness should prohibit a party from presenting an inaccurate depiction of an event through the admission of partial evidence which is taken out of context." *Eugenio*, 219 Wis. 2d at 408–09.

This focus on fairness and context echoes the discussions in many of the *Harris* line of cases. For example, the Wisconsin Supreme Court in *Brecht* mentioned the permissibility of a comment on the defendant's silence when it was a "fair response to a claim made by defendant or his counsel." *Brecht*, 143 Wis. 2d at 314 (quoting *Robinson*, 485 U.S. at 32). And the Supreme Court's concerns about fairness—both to prosecutors and to defendants—were apparent in *Harris* and *James*. *See Harris*, 401 U.S. at 224; *James*, 493 U.S. at 314–15.

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[4] In its response brief, the State presented the rule of completeness argument in answer to Garcia's claim that the circuit court erroneously exercised its discretion in admitting Garcia's inculpatory statements. The State did not and does not argue that the rule of completeness alone can overcome a *Miranda* violation. However, such a determination is not necessary to the resolution of this case.

[5] The rule embodied in Wis. Stat. § 901.07 has a counterpart in Wis. Stat. § 906.11 for oral statements. *See State v. Eugenio*, 219 Wis. 2d 391, 579 N.W.2d 642 (1998).

A rule permitting defendants to mislead juries—intentionally or otherwise—would be anathema to broadly understood principles of evidence, such as the rule of completeness, and widely accepted principles of constitutional law. Although the rule of completeness does not dictate the outcome here, its teachings illuminate the questions presented. This Court should affirm.

CONCLUSION

For the reasons discussed here and in the State's response brief, this Court should affirm Garcia's judgment of conviction.

Dated this 22nd day of May 2020.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

JOHN A. BLIMLING
Assistant Attorney General
State Bar #1088372

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-3519
(608) 294-2907 (Fax)
blimlingja@doj.state.wi.us

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 3,700 words.

Dated this 22nd day of May 2020.

_____
JOHN A. BLIMLING
Assistant Attorney General

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 22nd day of May 2020.

_____
JOHN A. BLIMLING
Assistant Attorney General