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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP2319-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

MANUEL GARCIA,

Defendant-Appellant.

ON APPEAL FROM A DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT II, REVERSING A JUDGMENT OF CONVICTION ENTERED IN THE RACINE COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL J. PIONTEK, PRESIDING

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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ARGUMENT

The parties' briefs reveal three main areas where they disagree: (1) whether a defendant can open the door to the State's use of his previously excluded but voluntary confession through his cross-examination of a State's witness, (2) whether Garcia's cross-examination of Spiegelhoff opened the door here, and (3) whether showing the entire video of Garcia's confession was proper. The State maintains that the impeachment exception is not the sole exception to the exclusion of a defendant's un-Mirandized statements; where a defendant's cross-examination of a witness seeks to exploit the exclusion of his confession, he has opened the door and the State may introduce the confession as a fair response to the defendant's line of questioning. Here, the circuit court properly determined that Garcia sought to take advantage of the exclusion of his confession by misleading the jury into believing that police conducted a shoddy investigation. The court agreed with the State that Garcia's tactic opened the door to the use of his confession, and the State used Garcia's confession to rehabilitate its witness. This Court should reverse the court of appeals.

I. A criminal defendant's cross-examination of a witness may open the door to the introduction of previously excluded statements.

A. The impeachment exception is not the sole exception to the exclusionary rule for un-Mirandized statements; opening the door is a distinct exception.

Garcia argues, "[t]he Supreme Court has made clear that the *only* way a defendant can raise his or her suppressed statements in such a way that waives the constitutional protection afforded to unconstitutionally

obtained *statements* is by testifying in a manner that contradicts the statements." (Garcia's Br. 40.) In other words, Garcia believes that the impeachment exception is the only exception to the exclusionary rule for un-Mirandized statements. The State disagrees. Neither this Court nor the United States Supreme Court has ever announced such a holding. Garcia contends that this "clear" rule is evident from the fact that the cases cited by the State in its opening brief discuss a defendant's silence rather than his un-Mirandized statements (Garcia's Br. 23–30), yet he cites no case holding that the impeachment exception is the sole exception to the exclusionary rule for un-Mirandized statements; no such case exists.

Garcia argues that the reasoning underpinning impeachment exception cases show that the impeachment exception is both "narrow" and reflective of "a careful balance of competing values." (Garcia's Br. 23–28.) This argument confuses the issue in this case, which is not the breadth of the impeachment exception but the availability and use of the opening-the-door exception. As discussed, nothing contained in the impeachment exception cases mandates that impeachment is the *only* exception to the exclusionary rule for *Miranda*[1] violations. Moreover, as the State argued in its supplemental brief to the court of appeals, those cases instead illustrate why the admission of Garcia's confession did not run afoul of constitutional principles.

Garcia argues that because neither this Court nor the United States Supreme Court has ever directly addressed the application of the opening-the-door exception to the use of a defendant's un-Mirandized statements, the court of

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

appeals "appropriately . . . analyzed this case in light of the governing precedent." (Garcia's Br. 29.) Here again, Garcia echoes the court of appeals' confusion of the issue. This is not an impeachment case. Garcia's inculpatory statements were not introduced to impeach anyone. The impeachment exception—and its limitations—are not the "governing precedent" on this issue.

B. Opening the door applies equally to statements and silence.

Garcia correctly points out that "opening the door" is the same concept that is sometimes referred to as the "fair response" doctrine described in *Robinson*.[2] (Garcia's Br. 30.) Garcia argues, however, that *Robinson* and its progeny are inapposite because they consider a defendant's silence rather than his statements. (Garcia's Br. 30–38.) This argument misunderstands the fundamental nature of *Miranda*, which did not create its own set of constitutional rights but merely created a prophylactic rule designed to protect suspects' right to remain silent. *See, e.g.*, *New York v. Quarles*, 467 U.S. 649, 654 (1984). The exclusionary rule protects a defendant's Fifth Amendment right to remain silent by excluding un-Mirandized, custodial statements made in response to interrogation. Other rules protect a defendant's Fifth Amendment right to remain silent by prohibiting commentary on the defendant's silence while in custody or at trial. However, as the State discussed in its opening brief, courts have readily held that through cross-examination of a State's witness, a defendant can waive his Fifth Amendment rights as they pertain to commentary on his *silence*. There is

[2] *United States v. Robinson*, 485 U.S. 25 (1988).

no reason that the defendant cannot similarly waive his Fifth Amendment rights pertaining to his *statements*.

Garcia further argues that statements are fundamentally different from silence in that silence is not "obtained" so there is no need to deter police misconduct with respect to defendants' silence. (Garcia's Br. 45.) However, cases in the Fourth Amendment context, where the exclusionary rule is also meant to deter police misconduct, recognize that illegally obtained evidence may nevertheless be introduced in response to defense tactics that seek to take advantage of the fact of suppression. *See, e.g.*, *United States ex rel. Castillo v. Fay*, 350 F.2d 400, 402 (2d Cir. 1965) (defense question regarding whether drugs were found in a search "opened the door" to introduction of suppressed physical evidence); *People v. Payne*, 456 N.E.2d 44, 49 (Ill. 1983) (defense cross-examination suggesting drugs were not found in a search "opened the door" to introduction of suppressed physical evidence); *Commonwealth v. Wright*, 339 A.2d 103, 88 (Pa. 1975) (admission of suppressed physical evidence proper after defense cross-examination designed to place prosecution on "horns of a dilemma"); *see also* 6 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 11.6(b) (6th ed.). Un-Mirandized statements are no different from illegally obtained physical evidence in this context, and their treatment should be no different, either.

Garcia's argument on this point also fails to consider the perverse incentives it would create if this Court were to adopt his position. According to Garcia, a defendant whose voluntary confession is obtained after an invalid *Miranda* waiver would have carte blanche to deliberately mislead the jury by taking advantage of the missing spot in the State's case. This cannot be the law: *Miranda* is a shield, not a sword. *See Harris v. New York*, 401 U.S. 222, 226 (1971).

Garcia argues that the State's position would create situations where evidence would become admissible during the State's case-in-chief even though that same evidence would not be admissible to impeach a witness other than the defendant during the defendant's case. (Garcia's Br. 50–51.) This argument misses the point. The fact that evidence would not be admissible under a particular exception during the defendant's case has nothing to do with whether it is admissible under a separate exception during the State's case.

II. Garcia's cross-examination of Spiegelhoff opened the door to the introduction of Garcia's confession.

Garcia argues that even if a defendant can open the door to the introduction of a previously excluded confession, he did not do so in this case. (Garcia's Br. 41–44, 52–53.) Garcia's argument on this point seems to be summed up in one sentence: "No subjective explanation from the Investigator [Spiegelhoff] was required to answer the question, period." (Garcia's Br. 53.) However, the court's decision admitting the confession properly concluded that Garcia had opened the door to its use.

Payne is instructive here. In that case, the defense asked a police officer whether the defendant had been searched at the time of his arrest. *Payne*, 456 N.E.2d at 49. When the officer replied that he was, the defense ended its questioning. *Id.* The Illinois Supreme Court affirmed the trial court's decision allowing introduction of a previously excluded firearm located in the defendant's possession during the search. It saw "no reason to disturb the trial judge's . . . finding that the purpose and effect of the cross-examination was to create the clear and unmistakable impression that nothing was recovered." *Id.* at 50. The court

continued, "[t]he trial judge was in a better position than we to judge the purpose and effect of the cross-examination . . . we cannot say that the trial judge's assessment was unreasonable. Nor do we think that the trial judge erred in allowing the State to rebut the false implication." *Id.*

Here, the circuit court's lengthy discussion when it admitted the confession demonstrates why its admission was proper. The court noted that the question was whether Garcia "opened the door or, [to] put it in legal terms, put the issue into controversy as to whether or not the investigator can explain why he didn't investigate these things." (R. 79:10.) "[T]o not allow the jury . . . to hear Investigator Spiegelhoff's reasoning or rationale behind his decision to not investigate further would cause the jury to be misled." (R. 79:21.) It therefore concluded that "the only way" for Spiegelhoff to explain his rationale—and thus avoid misleading the jury—was "to explain that he had this statement in hand, what the statement said, and he felt he didn't need to go any further with looking for other potential causes." (R. 79:22.)

Garcia argues that because the State first raised the issue of J.E.M.'s fall at the laundromat,[3] he did not open the door to his confession by asking about it. (Garcia's Br. 42.) He further argues that the cross-examination of Spiegelhoff "was not a deliberate trial strategy designed to take advantage of the suppression of his statements" and that his questioning was directly related to the State's inquiry on

[3] Spiegelhoff testified that J.E.M.'s mother told him that J.E.M. fell out of a laundry cart and that afterwards "a little bit of blood may have been on the lip. And she said that she gave him a hug or two or similar. And then after that he was fine and then running around again." (R. 77:162.)

direct. (Garcia's Br. 42.) The record paints a different picture.

The State initially asked Spiegelhoff why he did not investigate the laundromat further and Spiegelhoff explained that based on his conversation with Dr. Biedrzycki, he did not believe that what happened at the laundromat caused J.E.M.'s injuries. (R. 77:163.) Garcia's cross-examination, however, not only clearly took aim at Spiegelhoff's investigation, but also invoked Spiegelhoff's questioning of Garcia:

> Q Okay. So you never even spoke to the pathologist about the basket incident?
>
> A No, I did not.
>
> Q So then the pathologist has no idea, as far as you know, that—let me rephrase that. You've never spoke to the pathologist about the incident at the laundromat?
>
> A No. I personally have not spoke to her.
>
> Q So you were not—you didn't take any—did you do any investigation of the laundromat?
>
> A No, I did not.
>
> Q Did anyone from the Racine Police Department go to the laundromat?
>
> A Not to my knowledge.
>
> Q Did anyone from the Police Department take any photographs of the basket?
>
> A Not to my knowledge.
>
> Q Did anyone at the—from the Police Department go and interview the boy that was pushing [J.E.M.] when he fell out of the basket?
>
> A I believe [he] was interviewed.
>
> . . .

> Q And the only thing you presented to the pathologist is the two incidences in which you asked [Garcia] about in terms of any injuries that the child may have sustained recently; am I right?
>
> A Correct.
>
> Q So you didn't go back to—did you ask him, for example, that Friday preceding the child's death, did you—did you inquire from Lawanda or from [Garcia] or from any family members regarding that Friday, anything that may have happened specifically that Friday?

(R. 77:167–69.)

The circuit court—observing this testimony directly—concluded that it was likely to mislead the jury unless Garcia's confession was admitted. That conclusion was based on a lengthy discussion of the record and was completely reasonable. This Court should not overturn it.

III. The State's use of Garcia's confession was proper.

Finally, Garcia argues that even if he did open the door to the introduction of his confession, it was improper to play the entire video of his interview with police for the jury because it was a "significantly unbalanced response to" the cross-examination. (Garcia's Br. 52–53.) However, the record shows that in introducing the video and asking Spiegelhoff about it, the State constrained its questioning to asking about why Spiegelhoff felt it was unnecessary to investigate what happened at the laundromat. (R. 79:29–33.) Playing the interview itself was the clearest way to avoid the jury

being further misled by showing the full context of Spiegelhoff's decision-making process.[4]

CONCLUSION

For the reasons discussed, this Court should reverse the court of appeals and reinstate Garcia's judgment of conviction.

Dated this 12th day of April 2021.

Respectfully submitted,

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[4] Although he does not return to the point in his argument, Garcia's statement of the facts quotes certain portions of the State's closing argument discussing the interview. (Garcia's Br. 15–16.) It is important to note that those comments were made *after* Garcia testified; to the extent this Court considers those comments at all, it should do so in the full context of their responsiveness to Garcia's testimony.

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 2,222 words.

Dated this 12th day of April 2021.

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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 12th day of April 2021.

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