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STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT IV

Case No. 2019AP21-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEITH M. ABBOTT,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in the Rock County Circuit Court,
the Honorable Michael A. Haakenson, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Can law enforcement seize a patient's personal bag without a warrant?

   The circuit court answered yes.

2. Can an estranged wife consent to the search and seizure of her husband's clothing?

   The circuit court answered yes.

3. Is an equivocal invocation of the right to counsel during a custodial interrogation sufficient when, under the totality of the circumstances, it is clear the defendant has difficulty mentally processing information and asserting himself?

   The circuit court held the invocation of the right to an attorney must be unambiguous and unequivocal.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Abbott does not request publication because this case involves the application of established case law. Mr. Abbott anticipates the briefs will fully address the issues and therefore does not request oral argument.

STATEMENT OF THE CASE

This case is the result of the disappearance and death of Kristen Miller. Miller was the mother of Abbott's step-son's daughter. (2:2) Abbott was the court appointed third-party supervisor for a child custody exchange between his step-son and Miller. (2:2) It is alleged Abbott had a sexual affair with Miller and that Miller was blackmailing Abbott to keep the affair a secret. (2:3-4).

Miller was reported missing on January 1, 2011. (2:3). Her body was later found in Rock County on January 31, 2011 and it was determined her death was caused by multiple stab wounds to the torso. (2:3). Abbott suffered a mental breakdown on January 3, 2011, and has no recollection of events from January 1 until January 3, 2011, when he, too, was missing. (2:2, 4) Miller's blood was found on Abbott's clothing and on his truck on January 3, 2011. (2:3).

Abbott, who was charged with first-degree intentional homicide of Miller and hiding her corpse in February of 2011,[1] has been unwavering in his

[1] Abbott was originally charged in Racine County Case No. 11CF182 on February 3, 2011. *See* Criminal Court Record for Racine County Case No. 11CF182 (App. 101-103); *Kirk v. Credit Acceptance Corp.* 2013 WI App 32, ¶5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522 (this court may take judicial notice of circuit court records). However, the prosecution moved to dismiss the Racine County case because it did not believe that the evidence was sufficient to prove venue in Racine County. (App. 103). The motion for dismissal was granted and this case was refiled in Rock County on June 10, 2011. (1).

claim of innocence. In the seven years after the charges were filed, however, Abbott's competency to stand trial was heavily litigated and the proceedings were stayed on and off during periods of Abbott's incompetency. Ultimately, Abbott was found competent and in September of 2017, Abbott entered an *Alford*[2] plea to the reduced charge of second-degree intentional homicide. (223).

Prior to the plea, the defense litigated multiple suppression issues.[3] The defense won some of the suppression issues it raised. Namely, the lower court suppressed all Abbott's pre-arrest statements – the state did not meet its burden to show Abbott's pre-arrest custodial statements were voluntary (216:3-9, 215:18-22; App. 143-147); and also, the lower court suppressed the last portion of the post-arrest interrogation because it was conducted after Abbott had unequivocally invoked his right to an attorney and no attorney was present. (215:26-27; App. 151-52).

This appeal stems from three erroneous trial court rulings on the motions to suppress.[4]

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[2] *North Carolina v. Alford,* 400 U.S. 25 (1970).

[3] (See Record Documents 126, 128, 130, 133, 134, 136, 138, 141, 142 and 144 (suppression motions); 213 (evidentiary hearing); 214, 215, 216 (oral rulings)).

[4] As a matter of statute and public policy, orders denying motions to suppress are not subject to the guilty-plea-waiver rule and may be challenged on appeal. Wis. Stat. § 971.31(10); *State v. Reikkoff,* 112 Wis. 2d 119, 124-125, 332 N.W.2d 744 (1983).

Specifically: (1) the trial court erred when it ruled the seizure of Abbott's personal patient bag was lawful; (2) the trial court erred when it ruled Abbott's estranged wife could consent to the seizure of Abbott's clothing; (3) the trial court erred when it did not suppress all post-arrest custodial statements made by Abbott after he had invoked his right to an attorney.

The facts related to each suppression issue will be discussed in each claim.

ARGUMENT

When police investigated Miller's disappearance, they took several shortcuts around the constitution. Law enforcement repeatedly seized evidence without a warrant, even though there were no exigent circumstances and there was time to obtain one. In addition, law enforcement repeatedly interrogated Abbott without affording him the rights guaranteed to him by the United States Constitution and *Miranda v. Arizona,* 384 U.S. 436 (1966).

The fact that the crime under investigation was homicide and police and the public have a great interest in finding the perpetrator of such a crime does not relieve law enforcement of their constitutional duties. See *e.g. Mincey v. Arizona,* 437 U.S. 385, 394-95 (1978) (explaining there is no principled Fourth Amendment distinction between "extremely serious crimes" and less serious crimes when it comes to the requirements of the Fourth Amendment). Indeed, it is in serious crimes, where the stakes are high, that Fourth Amendment protections are most critical.

This appeal renews the defense claims that the there is no recognized exception to the warrant requirement that would permit the seizure of Abbott's clothing from his patient personal bag. He also renews the claim that his estranged wife had no authority to consent to the seizure of his clothing at his house. Lastly, Abbott renews his claim that he sufficiently invoked his right to an attorney before he was interrogated after his arrest.

The relevant facts for each claim are taken from the circuit court's findings of fact in the oral rulings following the suppression hearing (214, 215 and 216) as well as the suppression hearing itself. (213, 226).

I. Evidence Obtained from the Warrantless Seizure of the Patient's Personal Bag Must Be Suppressed Because Law Enforcement Failed to Obtain a Warrant.

When deciding whether to suppress the evidence found in Abbott's patient personal bag, the circuit court considered only the privacy interests at stake. The Fourth Amendment, however, also protects possessory interest in property and Abbott had a possessory interest in his personal property in the patient bag. Because the patient bag was not in plain view and because the incriminating nature of the evidence was not immediately apparent at the time the bag was seized, the seizure violated Abbott's possessory interests and was therefore in contravention the Fourth Amendment.

A. Facts and Lower Court Ruling Related to the Seizure of Abbott's Patient Personal Bag.

At 6:23 am on January 3, 2011, Officer Robert Gelden and Officer Gary Kovacs went to the Abbott home in response to an emergency call. (214:5; 215: 3-4; App. 108, 128-29). When they arrived, they found Abbott sitting on the floor, rocking back and forth

with his head between his knees and his face in his hands, unresponsive to questioning. (215:3; App. 128).

Abbott was transported to the hospital and was placed in a treatment room for the remainder of the day. (215:3-4; App 128-29). While in the treatment room, Abbott was on a gurney and in a hospital gown. (215:6, 8, 19; App. 131, 133, 138). Abbott's personal effects, including his shoes, socks, pants, and a shirt were placed in a clear plastic personal belongings bag. (214:8; 215:7; App. 111, 132). The bag was kept in the treatment room or somewhere near it. (214:8; App. 111).

After escorting Abbott to the emergency room, Officer Kovacs left the hospital, however at 9:30 am, Officer Kovacs received a call from an emergency room staff person "indicat[ing] she had observed some suspicious injuries on Mr. Abbott and some suspicious spots on Mr. Abbott's clothing." (215:4; App. 129). Officer Kovacs returned to the hospital, at which time the nurse showed Officer Kovacs Abbott's white socks with some brownish spots on them. (215:4; App. 129).

Officer Kovacs testified that he himself, "had no idea as to what [the spots] may be." (213:52-53). There is no evidence about what, if anything, the nurse knew about Abbott's relationship with Miller or why, at 9:30 am before police questioning, she would think the spots were suspicious.

Eight officers from "several different law enforcement agencies" interrogated Abbott that day.

(216:6). Officer Kovacs testified that he knew that Abbott was having some sort of breakdown and there was concern that Abbott may have wanted to hurt himself. (213:56). Abbott's brother reported to police that Abbott "indicated to him that he may have done something bad." (213:55). At some point, Abbott purportedly said to Officer Kovacs, "I may have hurt someone." (213:57). Abbott also purportedly acknowledged to law enforcement that he had a sexual encounter with Miller. (213:58). Officer Kovacs testified that he did not know when during the day this information came out or when he became aware Miller was missing. (213:57-58).

At some point that day, it is unclear when, hospital staff gave Officer Kovacs Abbott's patient personal belonging bag and Officer Kovacs collected the clothing as evidence. (214:8; 215:7; App. 111, 132).

At 12:30 pm the chief of police advised Officer Kovacs that they lacked probable cause to arrest Abbott. (215:8; App. 132). At 6 pm, Abbott was committed to a mental institution under Chapter 51. (214:8; App. 111).

The defense alleged the seizure of the patient belongings bag was in violation Abbott's Fourth Amendment rights and therefore evidence contained within it must be suppressed. (126, 127). The circuit court, relying heavily on *State v. Thompson,* 222 Wis. 2d 179, 585 N.W.2d 905 (Wis. App. 1998), held Abbott did not have a privacy interest in the patient belongings bag and the seizure of the evidence in the bag was therefore lawful. (214:15-17; App. 118-120).

B. Applicable Constitutional Provisions and Standard of Review.

The Fourth Amendment of the United States Constitution and Article 1, Section 11 of the Wisconsin Constitution guarantee the right to be free from unreasonable searches and seizures. The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment protects two separate and distinct interests – a privacy interest and a property interest. The prohibition against unreasonable searches and the requirement that a warrant "particularly describ [e] the place to be searched" protects an individual's privacy interests. *Horton v. California*, 496 U.S. 128, 143, (1990). The prohibition against unreasonable seizures and the requirement that a warrant "particularly describ[e] ... the ... things to be seized" protects a possessory interest in property. *Id.*

A basic and long established principle under the Fourth Amendment holds that the seizure of personal property is "per se unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause...." *United States v. Place,* 462

U.S. 696, 701, (1983). While there are several recognized exceptions to the warrant requirement, they are "narrow and well-delineated" and are to be "jealously and carefully drawn." *Flippo v. W. Virginia*, 528 U.S. 11, (1999); *Jones v. United States,* 357 U.S. 493, 499, (1958); *State v. Kieffer*, 217 Wis. 2d 531, 541–42, 577 N.W.2d 352 (1998).

The rationale for construing exceptions narrowly is the principle deeply rooted in American jurisprudence that "the informed and deliberate determinations of magistrates … are to be preferred over the hurried action of officers." *Georgia v. Randolph*, 547 U.S. 103 at 117 (2006) (quoting *United States v. Lefkowitz*, 285 U.S. 452, (1932)). Where an unlawful search or seizure occurs, the remedy is to suppress the evidence produced. *State v. Carroll*, 2010 WI 8, ¶19, 322 Wis. 2d 299, 778 N.W.2d 1; *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

The state bears the burden to prove that one of the narrowly drawn exceptions to the warrant requirement applies. *State v. Denk*, 2008 WI 130, ¶36, 315 Wis. 2d 5, 758 N.W.2d 775. "Whether police conduct has violated the constitutional guarantees against unreasonable searches and seizures is a question of constitutional fact." *State v. Tomlinson,* 2002 WI 91, ¶ 19, 254 Wis. 2d 502, 648 N.W.2d 367. While deferring to the circuit court's findings of evidentiary and historical fact, appellate courts "independently apply those historical facts to the constitutional standard." *Id.*

C. Law Enforcement Seized Abbott's Patient Personal Bag in Violation of the Fourth Amendment.

1. The Fourth Amendment protects possessory interests in a patient's personal bag and the plain view doctrine therefore governs the seizure of the patient bag.

Simply being admitted to the emergency room does not mean that a patient's personal belongings can be turned over to the government without a warrant. The circuit court reasoned, however, that the facts and holding of *State v. Thompson,* 222 Wis. 2d 179, direct that Abbott had no privacy interest in the emergency room and therefore the seizure of Abbott's patient personal was lawful. *Thompson,* however, addressed a very different fact scenario and offers an incomplete analysis on the property interests at stake when a patient's personal effects are seized by law enforcement.

In *Thompson,* the defendant swallowed multiple bags of cocaine in an effort to conceal the contraband from law enforcement during a traffic stop and as a result, Thompson developed seizures and was taken to the hospital. *Thompson,* 222 Wis. 2d at 182. At the hospital, Thompson's clothing was removed and dropped on the floor along with his pager and a $100 bill. *Id.* A police officer seized the clothes, the pager and the $100 bill. *Id.*

A doctor then advised the officer that without surgery to remove the ingested drugs, Thompson

risked death. *Id.* Hospital staff provided the officer with a surgical gown and the officer observed the surgery. *Id.* After the cocaine was removed, the cocaine was placed in a jar and given to the officer. *Id.* at 182-83.

The defense in *Thompson* alleged the officer's presence in the operating room and the seizure of the evidence from the operating and emergency rooms violated Thompson's Fourth Amendment rights. The *Thompson* court held that Thompson had no reasonable expectation of privacy in the emergency room or the operating room. *Id.* at 195. Accordingly, the *Thompson* court held, the Fourth Amendment was not implicated and the officer's actions were lawful. *Id.*

The United State Supreme Court has held, however, that the Fourth Amendment protects against unreasonable seizures of property even when privacy interests are not implicated. *See Horton v. California,* 496 U.S. at 133-134 (1990); *Texas v. Brown,* 460 U.S. 730, 739 (1983) (Rehnquist, J., plurality). "If the boundaries of the Fourth Amendment were defined exclusively by rights of privacy, 'plain view' seizures would not implicate that constitutional provision at all. Yet, far from being automatically upheld, 'plain view' seizures have been scrupulously subjected to Fourth Amendment inquiry." *Soldal v. Cook County, Ill.* 506 U.S. 56, 66 (1992). Thus, the absence of a privacy interest notwithstanding, "[a] seizure of the article ...

obviously invade[s] the owner's possessory interest." *Id.,* at 134; *Brown,* 460 U.S., at 739, (Rehnquist, J., plurality).

Under *Thompson,* 222 Wis. 2d 179, it is clear that Abbott did not retain any legitimate expectation of privacy when he was admitted into the emergency room. Law enforcement personnel were lawfully present in the emergency room and therefore had the authority to conduct any reasonable search. Abbott did, however, retain a possessory interest in his personal effects. Unlike *Thompson,* the items seized in this case were not in plain view and the incriminatory nature was not immediately apparent. Absent consent or another exception to the warrant requirement, a warrantless seizure can be justified only if it meets the probable-cause standard required of the plain view doctrine. *Arizona v. Hicks,* 480 U.S. 321, 326-327, (1987). Because the plain-view doctrine was inapplicable to the facts of this case and no other exception to the warrant requirement applied, the seizure of Abbott's personal patient bag was unlawful.

2. The facts do not support a finding that the patient bag was lawfully seized under the plain view doctrine.

Above all, the state did not argue, or present evidence, that police had probable cause to seize the patient personal bag. The state has therefore forfeited the argument because it has failed to raise it below, and thus failed to meet its burden that an exception to the warrant requirement applies. *See*

A.O. Smith Corp. v. Allstate Ins. Cos., 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998).

Notwithstanding that the plain view exception argument was forfeited because it was not raised below, the facts do not support a finding that police had probable cause to believe the bag contained evidence of a crime at the time it was seized. For the plain-view doctrine to apply, the state must show (1) the evidence was in plain view, (2) the officer had a lawful right of access to the object itself, and (3) the object's incriminating character must be immediately apparent. *State v. Guy,* 172 Wis. 2d 86, 101–02, 492 N.W.2d 311 (1992) (citing *Horton,* 496 U.S. at 136–37). Here, the only prong that is met is prong (2): Abbott had no privacy interest in the emergency room and therefore law enforcement had a right to be there.

The state fails to meet its burden on the other two prongs for several reasons. First, the suspected blood on the socks was not in plain view. Abbott's personal effects were sequestered in a bag, out of sight. Law enforcement only became aware of the socks when a nurse notified Officer Kovacs the socks were suspicious. It is not apparent, however, why the suspected blood on clothing in an emergency would be suspicious or what other information the nurse possessed that would lead her to that conclusion. Second, even when the socks were brought to Officer Kovacs attention, the incriminatory nature was not evident to him. Officer Kovacs testified he had "no idea" what the spots on the socks might be. (213:52-53).

In short, spots of blood on clothing in an emergency room, in and of itself, is not enough to establish that the clothing is evidence of a crime. If it were, it would mean the government could seize the clothing of any a patient who came to the emergency room after being bloodied in an accident. This would be an untenable invasion of possessory interests protected by the Fourth Amendment.

The *Thompson* court, unfortunately, did not discuss the defendant's possessory interest in the items seized or how the plain view doctrine applied to the facts of the case. The facts of that case show, however, that the defendant would not have had a possessory interest in the seized bags of cocaine, a restricted controlled substance, and also the incriminatory nature of a pager and $100 belonging to an individual who had just swallowed four bags of cocaine would have been immediately apparent. Unlike Abbott's clothing which was tucked away in a bag, the items seized in *Thompson* scattered about the emergency room or were otherwise in plain view.[5]

[5] Significantly, the *Thompson* court noted that the alleged Fourth Amendment violation in that case was not that the officer improperly rifled through Thompson's belongings but rather that it was improper for the officer to be in the treatment rooms in the hospital. *Thompson*, 222 Wis. 2d at n.8. The record did not establish whether the pager and $100 bill were in plain view or whether they were concealed in the clothing that had been removed. *Id.* The *Thompson* court declined to address the legality of the search had the items been concealed. *Id.*

There is no question regarding probable cause to seize under the facts of *Thompson.*

In addition to the fact that the record shows the seized items were not in plain view, the record below also does not support a finding that police had probable cause to seize Abbott's bag at the time it was taken. The state provided no evidence about when during the day the bag was seized. All that is known from the record below is that the bag was seized sometime between 9:30 am and 6:00 pm. (214:8; App. 111). What is clear, however, is at the end of the day, police did not have probable cause to believe Abbott had committed a crime. (215:8; App. 132). (In other words, police did not have "that quantum of evidence which would lead a reasonable police officer to believe that [Abbott] probably committed a crime." *State v. Anker,* 2014 WI App 107, 357 Wis. 2d 565, 855 N.W.2d 483.) Indeed, at this point in the investigation, police knew nothing about Miller's disappearance and considered Abbott a possible victim of a crime. (213:58, 59).

The state may argue on appeal that statements allegedly made while in the emergency room contribute to a probable cause finding, however, the record simply does not support this contention. As noted by the circuit court, "Unfortunately on this record I have no idea what happened or what was said in the examination room when these other officers met with Mr. Abbott, and I have no idea when Mr. Abbott made his statements to Officer Kovacs…" (216:8). The state simply did not present evidence regarding what they knew when.

Seizing patients' personal bags without warrants or a clear showing of probable cause significantly infringes on patients' possessory rights in the personal items brought with them to the hospital. It may be in Abbott's case that the nurse had good reason to believe the spots were blood and to consider the spots "suspicious" and Officer Kovacs may have had good reason to find the nurse's suspicions credible. But the incriminatory nature was not immediately apparent and these inferences were not drawn by a neutral and detached magistrate. *See Johnson v. United States*, 333 U.S. 10, 13-14 (1948). ("The point of the Fourth Amendment … is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate.")

Abbott, like any patient in a hospital, had a possessory interest in his clothing that was removed from his body. Without first obtaining a warrant and without a showing of probable cause at the time of the seizure, the seizure of Abbott's clothing from his patient bag was in violation of the Fourth Amendment. The evidence should therefore be suppressed.

II. Evidence Obtained During a Warrantless Seizure of Abbott's Sweatshirts Must Be Suppressed Because Abbott's Wife Cannot Consent to the Seizure of His Personal Effects.

A. Facts Related to the Seizure of Abbott's Sweatshirts From the Abbott Home.

After Officer Kovacs received the call from the nurse regarding the suspicious spots on the socks, Officer Gelden returned to Abbott's residence and was observing Abbott's truck parked outside the residence when Abbott's estranged wife, Ermelinda Cruz, waived officer him into the house. (214:4; App. 107). At this time, Cruz told Officer Gelden that Abbott had told her he had been having an affair with Miller and that Miller may have been blackmailing Abbott. (214:7; App. 107). She also said that Miller was missing and that she believed Abbott may have killed someone. (214:7; App. 110). Cruz further told Officer Gelden that she was divorcing Abbott and that he was sleeping in the basement. (214:App. 110).

Cruz then specifically consented to Officer Gelden's request to seize the sweatshirts Abbott had been wearing before rescue personnel removed them. (213:29; 214:6, 15; App. 106, 118).

The circuit court held Cruz had the ability to consent to the seizure of the sweatshirts. (214:14; App. 117).

B. The Consent Exception to the Fourth Amendment Warrant Requirement.

Third-party consent is a recognized exception to the warrant requirement. *United States v. Matlock,* 415 U.S. 164, 171 (1974). A third party has actual authority to consent when s/he "possesses common authority over or other sufficient relationship to the premises or effects sought to be inspected." *Matlock,* 415 U.S. at 171. "Common authority" in this context is not merely a question of property interest. *Id.* at 171 n.7. Rather, it requires evidence of "mutual use" by one generally having "joint access or control for most purposes." *Id.* Such use makes it "reasonable to recognize that any of the co-[users] has the right to permit the inspection in h[er] own right and that the others have assumed the risk that one of their number might permit the common [effects] to be [seized]." *Id.*

A third party has apparent authority to consent when it appears to a reasonable person, given the information that law enforcement possessed, that s/he had common authority over the property. *United States v. James,* 571 F.3d 707, 714 (7th Cir. 2009). As with other factual determinations bearing upon search and seizure, determination of consent must "be judged against an objective standard: would the facts available to the officer at the moment ... 'warrant a man of reasonable caution in the belief' " that the consenting party had authority over the property." *Illinois v. Rodriguez,* 497 U.S. 177, 188. "Whether the basis for such authority exists is the sort of recurring factual question to which law

enforcement officials must be expected to apply their judgment; and all the Fourth Amendment requires is that they answer it reasonably." *Id.* at 186.

Typically, when there is a marriage relationship, there is presumption that a spouse can to consent to the search of all areas of the marital homestead. *See U.S. v. Duran*, 957 F.2d 499, 504-05, (1992); see also *U.S. v. Ladell,* 127 F.3d 622, 624 (7th Cir.1997) ("A third-party consent is also easier to sustain if the relationship between the parties … spouse to spouse … —is especially close."). However, this presumption is rebuttable because not all "spouses surrender all privacy or other individual interests with respect to one another." *Duran,* 957 F.2d at 505. Many courts have found limits on a spouse's ability to consent to the search and seizure of the other spouse's personal effects because the personal effects were not subject to mutual use or control. *See e.g. U.S. v. Rodriguez,* 888 F.2d 519, 524 (7th Cir. 1989) (holding the wife could consent to the search of the closet but not to the search of her husband's briefcase and file box found within the closet); *State v. Evans,* 372 P.2d 365, 372 (Haw. 1962) (holding the wife could not consent to a search of her husband's cuff link case that was recovered during a search of the couple's bedroom dresser drawer because while the wife could consent to a general search of the couple's house, she had no authority to consent to a search of her husband's personal effects absent a showing that she exercised "as much control as the husband" over the property searched).

Thus, applying general principles governing authority to consent, Cruz could consent to the seizure of Abbott's sweatshirts if she (1) had joint control or access to the clothes (actual authority) or (2) it was reasonable for police to believe she had joint control or of access to the clothing (apparent authority). *United States v. James*, 571 F.3d 707, 714 (7th Cir. 2009).

Whether a person has authority to consent is dependent on the totality of the circumstances, and the state has the burden of proving valid third-party consent by clear and convincing evidence. *State v. Tomlinson,* 2002 WI 91, ¶¶ 21, 31, 254 Wis. 2d 502, 648 N.W.2d 367.

C. Abbott's Estranged Wife Did Not Have the Authority to Consent to the Seizure of Abbott's Sweatshirts.

The state presented no evidence that Cruz had mutual authority over Abbott's clothes or that she wore or used Abbott's clothes in any way. On the contrary, the evidence shows she did not have even apparent authority to consent to the seizure. Typically, even in a marriage, clothing is a personal item, selected based on individual taste and necessary size without deference to a spouse. While it is possible Cruz might have worn Abbott's clothes, under the totality of the circumstances known to the officer, including the facts that Abbott had an affair, was living in the basement and that they were divorcing, it is unlikely that she would have common authority over his clothes.

Even in a marriage that is not marred by affairs and estrangement, married individuals maintain authority over their own clothes and other personal effects. For example, unlike most any item in a marital household (e.g. a couch, dressers, a lamp etc.) a spouse would not seek permission from the other spouse to dispose of or give away an article of clothing. A spouse maintains an individual possessory interest in personal effects, and in particular clothing, that are never used or shared with the spouse.

Under the circumstances, a reasonable officer, knowing that the marriage was highly estranged and rife with animosity would not presume that Cruz had the authority to consent to the seizure of Abbott's clothing. Officer Gelden should have sought a warrant[6] and failure to do so violated Abbott's Fourth Amendment rights. The evidence should be suppressed.

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[6] Cruz unquestionably had authority to consent to a search of the marital home. Notably, however, the sweatshirts were not seized under the plain view doctrine pursuant to a consent search. It cannot be said that Abbott left the sweatshirts in his wife's care and that he was therefore assuming the risk that she might consent their seizure. The sweatshirts were forcibly removed from him during a medical emergency. Furthermore, the officer did not take the sweatshirts while searching the house pursuant to a consent search. The evidence shows the sweatshirts were seized because Officer Gelden specifically asked for them and Cruz specifically consented to the seizure. (213:29). Further, there was no testimony that the clothing was incriminating or that officers otherwise had probable cause to believe it was evidence of a crime.

III. Evidence Obtained in Violation of *Miranda* Must Be Suppressed Because Abbott Invoked His Right to Attorney.

A. Facts Related to Custodial Invocation of Right to Counsel.

On February 1, 2011, Abbott was arrested and taken into custody and questioned by Detective Thomas Knaus and Officer Christopher Schmaling. (213:84-85). The interview was recorded and received as an exhibit at the evidentiary hearing.[7] (226: Ex. 4, 5, and 6).

Throughout the entire recording, Abbott's right arm is uncontrollably shaking. (See 226: ex. 4, 5 and 6). At times his head ticks and he is continuously rolling his fingers with his left hand. (See 226: ex. 4, 5 and 6). Abbott's voice is breathy and weepy throughout. (See 226: 4, 5, and 6). Abbott rarely makes eye contact. (See 226: 4, 5, and 6).

The interrogation commences at one hour a forty-four minutes on the first DVD. (226: Ex. 4: 1:44:00). Officer Schmaling begins by reading Abbott his rights followed by approximately twenty minutes or so of the officers trying to ascertain whether Abbott would talk to them without his attorney. (226:Ex. 4:1:46:01-2:06:08). During these twenty minutes, Abbott makes 7 references to his attorney,

[7] Exact references to particular portions of the interrogation footage will be indicated by "226:Ex. 4, 5, or 6" followed by the time at which the particular event referenced appears in the recording.

Michael Phelgley, and tells the officers, among other things, "I don't know if its ok [to talk to them], ask Michael" and "I don't want to get in trouble with Michael" (215:12-17; 226: Ex. 4: 1:48:42 and 1:49:11). When directly asked if he would agree to talk to them without his attorney, Abbott's responses are either unintelligible, non-responsive or he says "I want to go home" or "I don't know why I am here." (226: Ex. 4: 1:47:07; 1:47:39; 1:54:26). Unable to obtain an answer, the officers decided to proceed with the interrogation. (213:89-90).

A transcript of the interrogation was not prepared, however the circuit court provided a detailed summary of the first twenty minutes in its findings of fact:

> …At 1 hour and 44 minutes, Detective [Knaus] starts reading Mr. Abbott his rights. He basically reads a sentence from the card and confirms Mr. Abbott understands. After going through the rights at 1 hour and 46 minutes, Mr. Abbott says, I've got a lawyer. And Detective [Knaus] responds, I just want to ask you some questions now. Mr. Abbott basically says, Michael Phegley. Detective [Knaus]: Is that okay if we talk now without Michael? Abbott, not sure – I'm not sure if he said anything, because Sheriff Schmaling started to talk. Sheriff Schmaling suggests making a gentleman's agreement, that if he decides to talk with them, at any point he can say, I don't want to answer those questions, and Mr. Abbott can pick and choose. You can pick and choose the questions you answer. Sheriff Schmaling talks about Ms. Miller's children. Mr. Abbott again mentions his attorney again: Michael wants me – and then he trails off.

At around 1 hour 48 minutes, in exhibit one, Sheriff Schmaling basically asks: Are you saying it's okay without Attorney Phegley being here just to talk with us? Are you okay with that? And Mr. Abbott doesn't really kind of respond. He says, attorney said to have – says attorney said to have him there. Detective [Knaus] says, I understand that, you're a grown man, it's your decision. Mr. Abbott: I want don't want to get in trouble with Michael. Detective [Knaus]: I'm more concerned about you right now. Detective [Knaus]: We don't know what questions you're willing to answer or not answer until we ask them. Mr. Abbott: Ask Michael if it's ok. I don't know. I don't want to get in trouble. Sheriff Schmaling: It is up to you. If you say, Tom, Chris, I don't want to talk to you, I want my lawyer, or you or you say: Tom, Chris, I have a lawyer right now but I chose not – choose to speak – and then it kind of trails off. Are you willing to answer questions or don't you care? And, once again, it's not clear that Mr. Abbott is answering any of those questions. Detective [Knaus] says at different points: We need to ask you some questions. At 1 hour and 53 minutes 13 seconds: Are you willing to talk with us? Detective [Knaus] asks. Mr. Abbott says: I don't know. More time passes. Detective [Knaus] says – reviews with Mr. Abbott – reviews with Mr. Abbott that he can stop. Are you willing to talk with us? Mr. Abbott: I don't know what to do. Question mark. Since I'm not sure that's what he said. Mr. Abbott then confirms he understands his rights. Detective [Knaus] goes through the last part of the rights. You can stop whenever you want. I'd like to start with you. Mr. Abbott says: What if I get in trouble? Detective [Knaus] later says: Well, this is your

decision that you have to make for yourself. And then later on Detective [Knaus] asks: Are you willing to talk to us? And they make – Detective [Knaus], along with the Sheriff Schmaling earlier, make this comment: I can't answer your questions until you agree to talk to me. Is that fair enough? And then Mr. Abbott says something, and I'm not sure what he says at that point. Sheriff Schmaling says: Putting your attorney aside, are you still willing to talk to us? Mr. Abbott: I don't know. Sheriff Schmaling later says: You've mentioned Mike's name, but it's up to you to decide whether you're willing to talk to us now. Once again, they talk about a gentleman's agreement. The Sheriff says: It's your decision. I need to ask you specifically without Mike Phegley being here. Would you be willing to answer questions at this time? Mr. Abbott: I don't know. Time passes. Once again, they confirm that Mr. Abbott understands his rights. Sheriff Schmaling: You can ask me some questions. And then he indicates that they found Ms. Miller. Mr. Abbott says: I was helping Ms. Miller, later on. Detective [Knaus]: I need you to tell us what happened. Are you willing to do that now? Mr. Abbott responds: I don't know. There's some noise. I can't tell you what Mr. Abbott's response was. Detective [Knaus]: Is it okay if we start and you can stop at any time? Mr. Abbott mentions attorney again. If it's okay with him. I don't want to get in trouble. Mr. -- or Detective [Knaus] says: I can't ask Mike. He's not here. You're the only one I can talk to. And Mr. Abbott said: Ask Mike if it's okay. Detective [Knaus]: Is it okay if we step out for a few minutes for you to think? And then the detective and the Sheriff leave at approximately 2 hours, 3 minutes and 30 seconds to let him think and to

> make a decision. They return about 2 hours and 6 minutes. And at that point they ask him if he wants something to drink, and then at that point Detective [Knaus] basically starts -- says: I'm going to be as straight forward as possible. Then they start going through the information that they have. And they basically ask him to confirm the information they have, and they start with some background information. He was helping with a transfer. At no time during – after that return at two hours and six minutes do they ask his whether he wants to talk to him -- talk with them without an attorney. (215:12-17; App. 137-42).

The interview then continues for several hours without any mention of an attorney. At one point, -- at one hour, 34 minutes and 25 seconds of Ex. 6 -- Abbott was reminded of his right to an attorney. (226: Ex.6: 1:34:25). Abbott responds "I want [Attorney] Mike to be here." (226: Ex. 6: 1:34:25). Questioning of Abbott continued.

At the evidentiary hearing, Detective Knaus testified that he knew Abbott prior to this criminal investigation. (213:84). He knew Abbott to be a well respected business man – a cabinet maker – and in fact, he personally had hired Abbott to install kitchen cabinets in his home. (213:84, 94, 97). In his prior contacts with Abbott, Abbott was not uncontrollably shaking his arm and was able to answer questions directly. (213:97). Detective Knaus also testified that at the time of the interrogation, he was aware that Abbott had been committed under Chapter 51 on January 3, 2011. (213:104).

The defense moved to suppress all Abbott post-arrest statements, alleging that he had sufficiently invoked his right to an attorney and that the interrogation continued without affording him this right. (128, 129). The circuit court ruled that Abbott did not "clearly and succinctly state[] he wanted his attorney" until he said "I want Mike to be here" towards the end of the third disk. (215:26; 226: Ex. 6; 1:34:20; App. 151). The court therefore ruled that Abbott's statement made after he said "I want Mike to be here" would be suppressed, but the rest of the interrogation was lawful. (215:29-30; App. 154-155).

B. Applicable Constitutional Provisions and Standard of Review.

In *Miranda v Arizona*, 384 U.S. 436, the United States Supreme Court recognized the right to have counsel present during a custodial interrogation to safeguard the right against compulsory self-incrimination under the Fifth and Fourteenth Amendments. *See also State v. Jennings*, 2002 WI 44, ¶26, 252 Wis. 2d 228, 647 N.W.2d 142. Police must immediately cease questioning when a suspect clearly invokes his right to counsel during an interrogation. *Id.*

The cessation of questioning is not required if a suspect makes reference to an attorney that is ambiguous or equivocal. *Davis v. United States*, 512 U.S. 452, 459 (1994). "Although a suspect need not 'speak with the discrimination of an Oxford don,' he must articulate his desire to have counsel present

sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.*

However, many courts have held "once it has been determined that a person taken into custody is too upset to assert or waive his rights knowingly and intelligently under *Miranda,* all questioning should cease until such time as that person is clearly capable of responding." *Sample v. Eyman,* 469 F.2d 819, 821 (1972); *See also Mincey v. Arizona*, 437 U.S. 385 (1978); *Payne v. Arkansas*, 356 U.S. 560 (1958); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Morales v. State*, 427 S.W.2d 51, 55 (Tex.Cr.App.1968).

The test for whether a suspect has sufficiently invoked the right to counsel is an objective one, in consideration of the circumstances surrounding the request. *State v. Edler,* 2013 WI 73, ¶34, 350 Wis. 2d 1, 833 N.W.2d 564. Whether a defendant sufficiently invokes his right to counsel mid-way through his custodial interrogation is a question of constitutional fact that is reviewed under a two-part standard. *Jennings*, 252 Wis. 2d 228, ¶9. This court upholds the circuit court's findings of historical or evidentiary fact unless they are clearly erroneous, but independently the lower court's application of constitutional principles to those evidentiary facts. *Id.* The legal sufficiency of a defendant's invocation of the right to counsel during a custodial interrogation is determined by the application of a constitutional standard to historical facts. *Id.,* ¶25.

C. Abbott Sufficiently Invoked His Right To Counsel

The high bar for requesting one's attorney without any equivocation applies to situations where there is no reason to question the suspect's mental faculties. Here, as noted by the court, Abbott "was certainly upset. He had a difficult time processing things." (215:29; App. 154). Under the circumstances, a reasonable officer interviewing Abbott would have recognized that Abbott did not have all his faculties and would have ceased questioning when Abbott was unable to answer whether he would agree to questioning without his attorney present.

The officers were aware Abbott was having difficulty responding to the question and also that he was not affirmatively agreeing to talk to them without his attorney. A reasonable officer would have noted Abbott's responses were nonsensical. Abbott's repeated references to his attorney without saying whether he wanted him there or not was odd and childish. Making statements like "I don't want to get in trouble" after being placed under arrest for a homicide is not the uttering of a rational human being. In addition, Abbott made comments like "I want to go home" and "I don't know why I am here" or was otherwise completely nonresponsive to the question being asked. His comments were inappropriate for the situation and in combination with the physical ticks and shaking, they would lead a reasonable officer would conclude that Abbott was not capable of asserting his right to his attorney.

In addition, in this case, Officer Schmaling was aware that Abbott was not a man of limited intelligence. He knew that Abbott was once capable of running a business and answering questions directly. The officers were further aware that Abbott had recently suffered a mental breakdown. A reasonable officer would have noted the marked change in Abbott's demeanor and abilities and would have concluded this change prevented Abbott from asserting his right to counsel.

While Abbott stated he understood his rights under *Miranda,* his actions and words revealed he did not have all his faculties. As such, law enforcement should have recognized Abbott was unable to assert his rights and ceased all questioning until he could directly answer the question of whether he wanted his attorney present or until the attorney was present. The failure to do so violated Abbott's Fifth Amendment right against self-incrimination and as a result, Abbott's statements should be suppressed.

* * *

Improperly admitted evidence is subject to a harmless error analysis. *State v. Semrau,* 2000 WI App 54, ¶21, 233 Wis. 2d 508, 608 N.W.2d 376. A court will find harmless error unless "an examination of the entire proceeding reveals that the admission of the evidence has 'affected the substantial rights'' of the party seeking the reversal." *Id.*, ¶22. 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." *Id*. The erroneous admission of disputed evidence contributed to the conviction if there is a reasonable probability that but for the error, "the defendant would have refused to plead and would have insisted on going to trial." *Id.* It is the state's burden to show the error is harmless. *Id.* ¶21.

Here, the disputed evidence consists of significant pieces of the state's case against Abbott. There is at least a reasonable probability Abbott would not have entered the plea if the state could not use the evidence of the victim's blood on Abbott's clothing and/or any of Abbott's incriminating statements. Abbott has long maintained his innocence, as underscored by the decision to enter an *Alford* plea. When he entered the plea, Abbott was not admitting guilt, but rather, he agreed to enter the plea based on the strength of the state's evidence against him as the evidentiary picture looked on September 27, 2017. (223). While it is true the state has other evidence against Abbott, crucial evidence is missing – namely the state has no evidence about what actually happened to Miller or when it happened. If this court agrees that additional evidence should have been suppressed, the evidentiary picture is altered, making it reasonably possible that that change would affect Abbott's decision to plea. The errors were therefore not harmless.

CONCLUSION

For the reasons stated, Keith M. Abbott respectfully requests that the court reverse his conviction and remand to the circuit court with instructions to permit him to withdraw his no-contest plea.

Dated this 2nd day of May, 2019.

Respectfully submitted,

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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 7,500 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 2nd day of May, 2019.

Signed:

FRANCES REYNOLDS COLBERT
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 2nd day of May, 2019.

Signed:

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A P P E N D I X

INDE X
TO
APPENDIX

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