STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT IV

Case No. 2022AP000540-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GREGORY L. CUNDY,

Defendant-Appellant.

Appeal of a Judgment of Conviction entered in
Dodge County Circuit Court,
the Hon. Martin J. De Vries, Presiding

BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

A police officer investigating a hit-and-run causing minor damage to a car bumper told a witness that he would be bringing the registered owner of the car to the witness for the witness to identify. While the defendant and the officer were speaking at the threshold of the defendant's home, the defendant asked "Are we done here?" The officer responded "No, we're not," asked several more questions, and then told the defendant "I'm gonna need you to step out here for me." The officer then transported, via his squad car, the defendant to the witness, who identified the defendant as the driver of the vehicle. The officer then transported the defendant back to the house, and ordered him to answer additional questions before formally arresting the defendant and reading him his *Miranda*[1] rights.

1. Did the officer arrest the defendant at his home without a warrant, in violation of the defendant's Fourth Amendment rights?

2. Was the officer's questioning of the defendant a custodial interrogation that first required *Miranda* warnings?

3. Was the defendant identified in a suggestive procedure violating the defendant's due process rights?

The circuit court denied a suppression motion raising these issues.

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

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant would welcome oral argument to address any factual or legal issues raised by the parties. The court's opinion is unlikely to warrant publication, as the appeal involves application of facts to well-established legal principles.

STATEMENT OF THE CASE

At about 9:35 p.m. on the night of July 2, 2019, Lon Williams reported to the police that he had seen a hit-and-run accident approximately 10-15 minutes earlier. (R. 49:11-13, 48). City of Mayville Police Officer Michael Wheeler was dispatched to the location of the alleged hit and run, a restaurant, and spoke with Williams. (R. 49:11-13). Williams claimed that he saw a car, while backing up to park at "idle speed," strike a parked car and then drive away. (R. 49:16, 21-23; R. 42 at 1:38).[2]

Williams had previously given the license plate number of the vehicle to dispatch. (R. 49:23). Officer Wheeler ran a license plate check, and determined that it belonged to a black Ford Fusion that was registered to Cundy. (R. 49:24). Officer Wheeler told Williams that he knew Cundy and that Cundy was probably drunk. (R. 49:61).

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[2] Record number 42 is a data CD containing a video from Officer Wheeler's squad car that was played during the suppression hearing and entered into evidence as Exhibit 1. The file is called "Stream 0.mp4," and citations to the video are to the time elapsed in the video, as the time of day is not indicated on the video itself.

Cundy lived close by, so Officer Wheeler drove to his residence. (R. 49:26). On his way, Officer Wheeler had the following exchange with Williams through the open squad car window:

> Wheeler: Did you get a good enough look at him that if I had to bring him back here you can say "Yeah that was him"?
>
> Williams: Yeah.
>
> Wheeler: Wonderful.

(R. 42 at 20:15-21; R. 49:38).

Officer Wheeler knocked on Cundy's door at approximately 10:02 p.m. (R. 42 at 23:47; R. 49:29).[3] The audio of the subsequent interactions were captured by Officer Wheeler's squad cam.

Cundy's partner Tricia Mueller answered the door. (R. 42 at 25:25; R. 49:31). Officer Wheeler asked how long Cundy had been home, and Mueller responded "a while." (R. 42 at 25:57). When Officer Wheeler asked if that had been about a half-hour, Trish responded "No, longer than that." (R. 42 at 26:02). Cundy then came to the door, and maintained that he had been home for longer than a half-hour, and that half an hour earlier he had been asleep in his chair. (R. 42 at 26:42). According to Officer Wheeler, Cundy appeared "groggy." (R. 49:51).

After several minutes of Cundy continuing to deny that he had been driving at the time of the

[3] About 24 minutes elapsed in the squad car video (R. 42 at 23:47) when Officer Wheeler knocks on Cundy's door, meaning that the video starts at approximately 9:36 p.m.

alleged hit-and-run, Cundy asked "Are we done here?" Officer Wheeler responded "no, we're not." (R. 42 at 27:38). The complete exchange, culminating in Officer Wheeler directing Cundy to leave his house so that Officer Wheeler could transport him to the scene to be identified by Williams, is below.

Cundy:	Are we done here?
Wheeler:	No, we're not.
Cundy:	What's up?
Wheeler:	Okay. An incident happened down there. Alright I'm trying to get your side of the story so I don't think you're just some person that would cause a disturbance and flee a scene. So I'm giving you the opportunity to tell me what happened.
Cundy:	What disturbance?
Wheeler:	Okay. You tell me. Cause you say you were sitting here but I've got somebody that puts you down there about a half hour ago.
Cundy:	No, sir.
Wheeler:	Okay not at all. Were you driving in your vehicle at all during the last hour?
Cundy:	No.
Wheeler:	Okay. How much have you had to drink tonight?
Cundy:	Quite a few.

Wheeler:	Quite a few? Okay. So if I take you down by the witness, they're going to tell me nope that wasn't him?
Cundy:	What's going on?
Wheeler:	Okay, I'm gonna need you to step out here for me.

(R. 42 at 27:38-28:33).

Cundy complied and stepped out of his house. (R. 49:36-37). Officer Wheeler then took Cundy to his squad car and placed him in the back seat. *Id*. Officer Wheeler did not handcuff Cundy, though he may have patted him down. (R. 49:40). Officer Wheeler did not tell Cundy that he was not under arrest. (R. 49:40). Officer Wheeler then drove back to where he last saw Williams. (R. 49:37).

Officer Wheeler called Williams, asked him if he was still in the area, and then said "do you want to swing out here, and I've got the gentleman who I believe might be involved here if you can tell me if this is who you've seen?" (R. 42 at 32:52-33:05). A couple of minutes later, Williams showed up, and Officer Wheeler walked him to his squad car. (R. 42 at 35:10). Williams then identified him as the person he saw earlier. (R. 49:38).

Officer Wheeler subsequently drove Cundy back to his residence to further interview him for a possible OWI. (R. 49:40-41). After parking, Officer Wheeler said "let me get back out here and ask him some more questions" although it is not clear who he is addressing. (R. 42 at 37:30). Officer Wheeler and Cundy exit the squad car, and Officer Wheeler says "step out here and we'll go back over to the other side

over here and we'll chat a little more about this." (R. 42 at 37:40).

Officer Wheeler did most of the questioning, although another officer on the scene asked a few questions as well. Cundy admitted to the other officer of being at the Sidelines bar earlier in the day. (R. 42 at 39:45). And when asked about scuff marks on his car, Cundy pointed out that it was a 2012 model. (R. 49:45; R. 42 at 40:27). Multiple times Cundy responded to Officer Wheeler's questions about Cundy's drinking with his own question, "where are we going with this?" (R. 42 at 40:14, 40:55). Officer Wheeler at one point says that he is investigating a hit-and-run, which he asserts is a "crime." (R. 42 at 41:23). Officer Wheeler then asked several times whether Cundy would perform field sobriety tests, to which Cundy repeatedly responded "there's no reason." (R. 42 at 42:19-33). Officer Wheeler eventually placed Cundy in handcuffs, and read him his *Miranda* rights. (R. 49:46).

Officer Wheeler later applied for and obtained a warrant for a medical professional to draw Cundy's blood and test it for its alcohol content. (R. 196:3-14). In both the written application and his testimony to the warrant judge, Officer Wheeler referred to Cundy's statements and Williams's identification of Cundy. (*Id.*)

On July 3, 2019, the Dodge County District Attorney's office filed a criminal complaint charging Cundy with Operating While Intoxicated, Wis. Stat. § 346.63(1)(a). (R. 3). The State later filed an amended information charging Cundy with (1) OWI, (2) operating with a prohibited blood alcohol content,

Wis. Stat. § 346.63(1)(b), and (3) obstruction, Wis. Stat. § 946.41(1). (R. 29).

Cundy filed a motion to suppress, asserting three grounds: that he was illegally arrested without a warrant at his home; the state obtained statements in violation of *Miranda*; and the showup identification violated his due process rights. (R. 33). Cundy sought to suppress all evidence derived from the violation of his rights, including the blood draw affidavit. (R. 33; R. 49:101-102).

After a hearing, the court concluded that Officer Wheeler's actions did not violate Cundy's rights, and thus did not reach the question of what evidence was derivative of the alleged violations.

> **Court**: Well anyway, the Court has, I have heard all the testimony and taken notes on everything. This is an investigation of the hit and run and the OWI. And everything that the officer did was part the investigation from my observance of it. Especially up to the point when he got in the car it was clear he was not under arrest, he was free to go. He was not restrained. Then when he was told to come out of the house to talk to him, that's similar to saying, exit the vehicle I want to talk to you about what just happened. He certainly had reasonable suspicion to believe that Mr. Cundy had been involved in a hit and run, and an OWI at the time. He asked him to leave the house based on the license plate being identified and his behavior, which I have outlined already.
>
> He was, like I said, he was not retained [s*ic*]. There was nothing to indicate that he was in custody at that point in time. This is still an investigation. Then when they returned from the scene and the officer says I am still investigating, he clearly said that. And then Mr. Cundy said we're done here and nothing to my knowledge

> was said after that point in time, other than the fact that, I think he asked him if he was doing field sobriety. He said there's no reason, then he put him under arrest. Obviously at that point he was in custody and that was that. So the motion is denied. Anything else?
>
> **Prosecutor**: The motion both with regard to unlawful seizure and lack of *Miranda* warning, both of those –
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> **Court**: Correct.
>
> **Prosecutor**: -- are being denied?
>
> **Court**: Yes.
>
> **Prosecutor:** All right, thank you. Just further scheduling.
>
> **Defense Counsel**: I'm assuming the Court is also denying that we met the threshold with respect to the identification.
>
> **Court**: Rights.

(R. 49:102-104; App. 3-6).

Cundy took the case to trial. Cundy's statements were introduced at trial (R. 181:167-173) as were Williams's identification of Cundy (R. 181:167), and the results of the blood draw. (R. 182:29). In addition, Williams identified Cundy at trial. (R. 181:100). The jury eventually found Cundy guilty on all three counts. (R. 182: 270-271). This appeal follows.

ARGUMENT

I. Officer Wheeler seized Cundy at his home without a warrant and evidence derived from the illegal arrest must be suppressed.

A. Officer Wheeler improperly seized Cundy at his home without a warrant when Officer Wheeler responded "no" and kept asking Cundy questions after Cundy asked "are we done here?," or at the every least when he ordered Cundy to come with him to be identified by a witness.

The Fourth Amendment ensures that a person's home is their castle. For that reason, "[i]t is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586 (1980) (quotation marks and footnote omitted). Officer Wheeler seized Cundy, without a warrant, when he refused Cundy's request to end their interaction while Cundy was standing in his doorway. Alternatively, Officer Wheeler seized Cundy when he ordered Cundy to leave his house so that he could be identified by a witness.

While *Payton* involved a warrantless arrest inside a home, two lines of Supreme Court cases demonstrate that *Payton* also applies when an officer forces a person to submit to questioning while standing at the entryway of their home.

First, Fourth Amendment protections do not begin at a home's threshold. The Supreme Court "regard[s] the area immediately surrounding and associated with the home—what [its] cases call the

curtilage—as part of the home itself for Fourth Amendment purposes." *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (cleaned up) (holding that warrantless dog sniff on defendant's porch was a Fourth Amendment "search" of the defendant's home). For instance, the Wisconsin Supreme Court recognized that a warrantless arrest in a person's backyard violated *Payton* because the backyard was part of the home's curtilage. *State v. Walker*, 154 Wis. 2d 158, 184, 453 N.W.2d 127, 138 (1990), *abrogated on other grounds by State v. Felix*, 2012 WI 36, 339 Wis. 2d 670, 811 N.W.2d 775.

Here, during the relevant interactions Cundy was standing in his entryway and Officer Wheeler was right outside. (R. 181:166). In other words, Cundy was in his home and Officer Wheeler was in the curtilage. Officer Wheeler thus required a warrant to seize Cundy.

Second, the Supreme Court has also explained that a person does not have to be formally arrested and placed in handcuffs to be "seized" under the Fourth Amendment. Instead, a person is seized if "the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *Florida v. Bostick*, 501 U.S. 429, 439 (1991). To be sure, officers are just as free as anyone else to "knock and talk" with the residents of a home. *City of Sheboygan v. Cesar*, 2010 WI App 170, ¶ 13, 330 Wis. 2d 760, 773, 796 N.W.2d 429, 436. However, "even if an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at any time." *Kentucky v. King*,

563 U.S. 452, 470 (2011). That is, "no seizure occurs when police ask questions of an individual… so long as the officers do not convey a message that compliance with their requests is required." *Bostick*, 501 U.S. at 437.

Officer Wheeler certainly "conveyed a message that compliance with [his] requests" for Cundy to speak to him was "required." *Bostick*, 501 U.S. at 437. Officer Wheeler was at Cundy's home after 10 p.m., well after an uninvited guest might knock on a person's door. (R. 49:29). And Officer Wheeler knocked for several minutes before someone answered the door. (R. 49:49). The time at night, and Officer Wheeler's persistence, suggested that he would not go away.

Thus, with this context, when Cundy asked "Are we done here?," he was asking for permission to end the encounter. And when Officer Wheeler responded "No," Officer Wheeler was denying him that permission. Officer Wheeler "conveyed a message that" Cundy was required to comply with his request to answer his questions, and that Cundy could not just close the door and go back to sleep. *Bostick*, 501 U.S. at 437. That is, Officer Wheeler had then effectively "seized" Cundy for the purposes of the Fourth Amendment.

But even if he was not seized at that point, Cundy certainly was seized when Officer Wheeler ordered him out of his house. Officer Wheeler told Cundy "I'm gonna need you to step out here for me." (R. 42 at 27:38-28:33). This was not an invitation that Cundy was free to decline. Officer Wheeler "need[ed]" Cundy to step outside, *i.e.* it was necessary. A

reasonable person would not believe that they were "free to decline the officers' requests or otherwise terminate the encounter." *Bostick*, 501 U.S. at 439. A reasonable person would believe that there would be significant consequences, legal or otherwise, if the person instead just stepped back from the threshold and closed the door in the officer's face. Officer Wheeler's order was a seizure, by any measure.

B. Because Officer Wheeler lacked probable cause to arrest Cundy for a crime, evidence derived from the illegal arrest must be suppressed.

The exclusionary rule gives practical meaning to the Fourth Amendment by excluding from evidence information gained through the government's violation of the Fourth Amendment. In *New York v. Harris*, 495 U.S. 14, 21 (1990), the Supreme Court recognized an exception to the exclusionary rule when the violation is a warrantless arrest at a person's home.

> [W]here the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of *Payton*.

Harris, 495 U.S. at 21. Thus, because police had probable cause to arrest Harris for murder, his statements made after his warrantless arrest were not barred under the exclusionary rule.

In *State v. Felix*, 2012 WI 36, ¶ 46, 339 Wis. 2d 670, 700, 811 N.W.2d 775, 790, the Wisconsin Supreme Court applied *Harris* to statements and physical evidence obtained after an illegal,

warrantless arrest at the defendant's home. Because "police had probable cause to arrest Felix prior to going to Felix's home" – multiple witnesses told police that Felix had admitted stabbing the murder victim – the statements and physical evidence obtained after his warrantless arrest were not excluded. *Id*.

Officer Wheeler did not have probable cause to arrest Cundy prior to arriving at Cundy's home. "Police have probable cause to arrest if they have information which would lead a reasonable police officer to believe that the defendant probably committed a crime." *Felix*, 2012 WI 36, ¶ 28 (quotation marks and citation omitted).

Williams at most observed a hit-and-run causing property damage to another car, which only results in a forfeiture. Wis. Stat. §§ 346.68 and 346.74(3). "Conduct punishable only by a forfeiture is not a crime." Wis. Stat. § 939.12. Indeed, Officer Wheeler admitted at the suppression hearing that the hit-and-run he was investigating was not a crime. (R. 49:55).

Nor did Officer Wheeler have probable cause to arrest Cundy for operating while intoxicated or with a prohibited blood alcohol content. The only bad driving Williams reported was Cundy striking a parked car while he backing into a parking spot, a fairly unremarkable accident that happens all the time when drivers are stone cold sober. Williams did not report any weaving or other erratic driving behavior suggesting the driver was impaired.

Cundy is not aware of any cases suggesting that a minor traffic accident creates probable cause to arrest a person for drunk driving. For instance, in

State v. Wille, 185 Wis. 2d 673, 684, 518 N.W.2d 325, 329 (Ct. App. 1994), the defendant struck a disabled vehicle on the shoulder of a highway, causing multiple injuries. First responders smelled alcohol, but could not determine that the source was Wille until he was taken to the hospital. Wille confided in one of the officers that "I have to quit doing this." The combination of the significant accident, the smell of alcohol coming from Wille, and his tacit admission of some sort of wrongdoing created probable cause to arrest Wille for a drunk driving arrest. *Id*. at 684.

The state may argue that Officer Wheeler developed probable cause in the few moments before the knock and talk turned into a seizure, as Officer Wheeler smelled alcohol on Cundy's breath. However, Officer Wheeler arrived at Cundy's house at least 35-40 minutes after the alleged hit-and-run. There was more than enough time for Cundy to drink multiple alcoholic beverages. This is not a case, like in *Wille*, where officers detected alcohol while the driver was still at the scene of the accident, and had no time to drink after the incident.

In sum, unlike in *Harris* and *Felix*, here the government did not have probable cause to arrest Cundy for a crime when Officer Wheeler seized Cundy at his home without a warrant.

C. The burden is on the government to show that evidence derived from Cundy's illegal arrest – including his statements, the identification, and the blood draw warrant – should not be excluded.

Because the government lacked probable cause to arrest Cundy, the *Harris* rule does not apply.

Harris, 495 U.S. at 21. Cundy was thus entitled to the suppression of all evidence derived from his illegal arrest, unless the State could show that any particular piece of derivative evidence was so attenuated from the illegal arrest that the "taint" of the illegality had dissipated. *Brown v. Illinois*, 422 U.S. 590, 592 (1975); *State v. Tobias*, 196 Wis. 2d 537, 545, 538 N.W.2d 843, 845 (Ct. App. 1995).

Cundy argued in circuit court that three categories of evidence were derived from the illegal arrest: Cundy's statements; Williams's showup identification of Cundy as well as any in-court identification; and the results of the blood draw warrant. (R. 33; R. 49:101-102). The State only argued that the arrest was legal, and did not argue in the alternative that the evidence was not derived from the illegality or was attenuated under *Brown*. (R. 49). The circuit court did not address the "derivative" question, because it held that none of Officer Wheeler's actions violated Cundy's rights. (R. (R. 49:102-104; App. 3-6).

If this court agrees that Cundy was seized when Officer Wheeler responded "no" to Cundy's question "are we done here?," then Cundy's remaining statements while standing at the threshold of his house would be derivative of the illegal seizure. These statements include Cundy's denial of driving within the last hour, as well as his admission that he had "quite a few" to drink. (R. 42 at 27:38-28:33). Cundy's later statements, when he was brought back to his house after the identification, would also be derived from the illegal arrest. These include his admission of being at the Sidelines bar earlier in the day, statements about his

driving that evening, as well as his refusal to perform field sobriety tests. (R. 42 at 39:45-42:33). If the court instead holds that Cundy was not seized until he was was ordered to leave his home, then only the latter statements, *i.e.* when he was returned to his home and then questioned, would be derivative.

Williams's identification of Cundy is clearly derivative of his illegal seizure. Cundy would not have been in the squad car for Williams to identify him if he had not been illegally seized. Accordingly, both Williams's initial identification and his subsequent in-court identification of Cundy (R. 181:100) should have been suppressed.

The blood draw warrant was also derived from the illegal arrest. Officer Wheeler's application for the warrant relies on Cundy's statements as well as Williams's identification of Cundy, both in Officer Wheeler's written application and in his sworn testimony to the judge over the phone. (R. 196:3-14).

Cundy's statements, Williams's identification of Cundy, and the results of the blood draw were all introduced as evidence at Cundy's trial. (R. 181:100, 167-173; R. 182:29). As the beneficiary of the circuit court's erroneous ruling admitting the evidence, it is the State's burden to show that the error was harmless beyond a reasonable doubt. *State v. Martin*, 2012 WI 96, ¶45, 343 Wis. 2d 278, 816 N.W.2d 270.

II. Cundy's statements after he was ordered out of his house and taken by squad car to be identified by a witness were the result of a custodial interrogation without the requisite *Miranda* warnings.

A. In order to protect a person's Fifth Amendment right against self-incrimination, *Miranda* requires that a person must be warned of the rights they are giving up if they make statements during a custodial interrogation.

The Fifth Amendment prohibits the government from compelling a person to "be a witness against himself" in a criminal case. In order to ensure that statements are given willingly during a custodial interrogation, the Supreme Court has declared that the government "may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). These "procedural safeguards" became known as the *Miranda* warnings. *Id*.

Officer Wheeler interviewed Cundy at his front door after 10 p.m., ordered him into his police car, brought him to the scene of an alleged hit-and-run so he could be identified by a witness, and then was brought back to his house in the squad car where he was questioned by Officer Wheeler and another officer. It was only after Cundy said there was no need to submit to field sobriety tests that Officer Wheeler read Cundy his rights and placed him in handcuffs. However, Cundy was in *Miranda* custody

well before then. Cundy's statements from when he was ordered out of his house must be suppressed. *State v. Dobbs*, 2020 WI 64, ¶ 61, 392 Wis. 2d 505, 545, 945 N.W.2d 609, 629.

B. Cundy was in custody when he was ordered out of his home.

Miranda was premised on the notion that "in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." 384 U.S. at 467. The Supreme Court has repeatedly observed that the potential for "coercion" when a suspect is subjected to the government's use of force will give rise to *Miranda* custody. *See, e.g., Illinois v. Perkins*, 496 U.S. 292, 296 (1990); *Berkemer v. McCarty*, 468 U.S. 420, 433 (1984). On the other hand, "the temporary and relatively nonthreatening detention involved in a traffic stop … does not constitute *Miranda* custody." *Maryland v. Shatzer*, 559 U.S. 98, 113 (2010).

Instead, a person is in *Miranda* custody when "a reasonable person would have considered himself restrained to a degree associated with formal arrest." *Dobbs*, 2020 WI 64, ¶ 61. This is a totality of the circumstances test that considers numerous factors, including "the defendant's freedom to leave; the purpose, place, and length of the interrogation; and the degree of restraint." *Id.* at ¶ 54 (citations and quotation marks omitted). Further, when courts evaluate the "degree of restraint," the courts consider "whether the suspect is handcuffed, whether a weapon is drawn, whether a frisk is performed, the manner in which the suspect is restrained, whether

the suspect is moved to another location, whether questioning took place in a police vehicle, and the number of officers involved." *Id*. (citation and quotation marks omitted). Each factor is discussed in turn below.

Freedom to leave. No reasonable person in Cundy's circumstances would believe that they were free to leave Officer Wheeler. When Cundy asked for permission to end the conversation, Officer Wheeler said "no." Officer Wheeler then ordered Cundy to get into the officer's squad car. No reasonable person would believe they could have ignored Officer Wheeler's command. "A reasonable person is less likely to believe he or she is in custody when he or she is asked, rather than ordered, to do something by a police officer." *State v. Gruen*, 218 Wis. 2d 581, 596, 582 N.W.2d 728, 733–34 (Ct. App. 1998).

Officer Wheeler, after transporting Cundy back and forth from Cundy's home to the scene of the alleged hit-and-run, then subjected Cundy to more questioning. Officer Wheeler did not tell Cundy that he was free to leave, or that he was not under arrest. A reasonable person in Cundy's shoes would believe that they were not free to leave the scene or otherwise ignore Officer Wheeler's questioning.

Purpose, place, and location of questioning. Cundy was initially questioned while he was in his home, then was ordered to leave his house to go via squad car to the scene of the alleged incident, and then was brought back to his house where he was questioned further. Transporting a person to two locations by squad car is more akin to a formal arrest then a routine traffic stop. *Dobbs*, 2020 WI 64, ¶ 64.

Also, the purpose of the questioning was clearly to build an OWI case against Cundy, and not, for instance, to protect the public. *New York v. Quarles*, 467 U.S. 649, 655 (1984).

Degree of restraint. The circuit court focused on the lack of handcuffs in holding that Cundy was not in custody. (R. 49:102-104; App. 3-6). However, whether a suspect has been placed in handcuffs that is only one of several degree-of-restraint factors enumerated by the courts. *Dobbs*, 2020 WI 64, ¶ 64. While Officer Wheeler was not positive, he believed "a frisk [was] performed" before Cundy was placed into the squad car. (R. 49:40). "The manner in which [Cundy was] restrained" – again, being ordered into a police car and then ordered to stand outside his home to answer more questions – supports a conclusion that he was in custody. *Dobbs*, 2020 WI 64, ¶ 64 In addition, Cundy was "moved to another location" twice, first to the scene of the alleged hit-and-run and then back to his house. *Dobbs*, 2020 WI 64, ¶ 64. Also, two "officers [were] involved" in questioning Cundy, not just Officer Wheeler. *Dobbs*, 2020 WI 64, ¶ 64. Finally, Cundy was never told that he was not under arrest. *Cf. State v. Quigley*, 2016 WI App 53, ¶¶36-43, 370 Wis. 2d 702, 883 N.W.2d 139 (holding defendant was not in *Miranda* custody when he was repeatedly told was not under arrest and was free to leave).

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Police showed up at Cundy's home late at night and used their authority to order Cundy out of his home, to transport him to multiple places in their squad car, and to require Cundy to answer their

questions. This significant use of governmental authority created the kind of coercive atmosphere that runs the risk of making any statements by the suspect compulsory, in violation of the Fifth Amendment. *Perkins*, 496 U.S. at 296; *Berkemer*, 468 U.S. at 433. Any reasonable person in Cundy's shoes would "have considered himself restrained to a degree associated with formal arrest." *Dobbs*, 2020 WI 64, ¶ 61. Cundy was in *Miranda* custody when he gave his statements to the police in front of his house.

C. Cundy's statements were in response to a *Miranda* interrogation.

"The term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *State v. Dobbs*, 2020 WI 64, ¶ 66, 392 Wis. 2d 505, 547–48, 945 N.W.2d 609, 630 (cleaned up).

There is no question that Officer Wheeler was "interrogating" Cundy. Cundy's statements were not spontaneous. They were responses to Officer Wheeler's pointed, and often repeated, questions about when and where Cundy had been driving and when and how much Cundy had been drinking. (R. 42 at 37:40-42:33).

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Officer Wheeler's questioning of Cundy after he ordered Cundy out of his home constituted a custodial interrogation of Cundy in violation of *Miranda*. Accordingly, Cundy's statements in

response to Officer's Wheeler's interrogation should have been suppressed. It is the State's burden to show that the admission of those statements at trial were harmless beyond a reasonable doubt. *Martin*, 2012 WI 96, ¶45.

Because the circuit court erroneously concluded that the government did not violate *Miranda*, the court did not reach the question of whether any evidence derived from the interrogation should be suppressed. Evidence derived from statements obtained in violation of *Miranda* must be suppressed when the statements are involuntary, *United States v. Patane*, 542 U.S. 630, 640 (2004), or when the *Miranda* violations were deliberate. *State v. Knapp*, 2005 WI 127, ¶ 73, 285 Wis. 2d 86, 123, 700 N.W.2d 899, 918. Because these are fact-intensive inquiries not addressed by the court, remand would be appropriate to determine if Cundy's statements were involuntary or if the government's decision not to read Cundy his Miranda rights were deliberate, and that derivative evidence (such as the blood draw warrant) should be suppressed as a consequence.

III. Cundy's identification by Williams was unduly suggestive, as Officer Wheeler told Williams that Cundy was probably intoxicated, promised to bring Williams the person whom Officer Wheeler was involved, and then showed Cundy to Williams while Cundy was in the back of Officer Wheeler's squad car.

It is no secret that human brains are not security cameras, able to record and playback whatever they see with perfect fidelity. Like it or not, our perceptions and memories are plastic, prone to

shaping by internal biases and external pressures. Numerous studies have confirmed that erroneous eyewitness identifications are one of the main contributors to wrongful convictions. *See, e.g.*, Keith A. Findley, *Implementing the Lessons from Wrongful Convictions: An Empirical Analysis of Eyewitness Identification Reform Strategies*, 81 Mo. L. Rev. 377, 379 (2016).

The courts have thus long recognized that the state's use of overly suggestive identification procedures can violate a defendant's right to the due process of law. The Supreme Court succinctly described the issue over 50 years ago:

> The suggestive elements in this identification procedure made it all but inevitable that David would identify petitioner whether or not he was in fact 'the man.' In effect, the police repeatedly said to the witness, 'This is the man.'

Foster v. California, 394 U.S. 440, 443 (1969).

More recently, in *State v. Roberson*, 2019 WI 102, ¶ 27, 389 Wis. 2d 190, 202, 935 N.W.2d 813, 818–19, the Wisconsin Supreme Court adopted a two-step process for determining whether a "showup" identification – i.e., when police "show up" with the suspect, and ask a witness to confirm that the suspect is the person the witness saw earlier – is improper. First, "the burden [is] on the defendant to show that the method law enforcement chose to employ to identify a suspect as the perpetrator was an unnecessarily suggestive identification procedure, such that there was a very substantial likelihood of misidentification." *Id.* at 27 (cleaned up). Second, if the defendant meets this burden, the burden shifts to the State to prove that "prove that under the totality

of the circumstances the identification was reliable even though the confrontation procedure was suggestive." *Id*. at ¶ 35 (cleaned up).

As this presents a constitution question, this court reviews findings of historical fact for clear error, but applies those facts to the legal standard independent from the circuit court. *Id*. at 66. The circuit court did not make any specific findings regarding the identification, and only held that Cundy failed to meet his initial burden. (49:103-104; App. 5-6).

In any event, the historical facts relating to identification were undisputed, and captured on Officer Wheeler's squad cam. They demonstrate that this was precisely the kind of suggestive identification that will violate a defendant's due process rights. Officer Wheeler's statements and actions made it clear to Williams that Officer Wheeler believed Cundy was the guilty person, *i.e.* that "this was the man," in the parlance of *Foster*. 394 U.S. at 443.

First, after Officer Wheeler learned that Cundy was the registered owner of the vehicle, he told Williams that he knew Cundy and that Cundy was probably drunk. (R. 49:61). This clearly put the idea in Williams' head that Officer Wheeler believed that Cundy was a criminal and was the person responsible for the hit-and-run. Officer Wheeler then made it clear to Williams that he was going to retrieve who Officer Wheeler believed was the responsible party, as he had this exchange with Williams on his way to Cundy's house.

> Wheeler: Did you get a good enough look at him that if I had to bring him back here you can say "Yeah that was him"?
>
> Williams: Yeah.
>
> Wheeler: Wonderful.

(R. 42 at 20:15-21; R. 49:38).

After ordering Cundy into his car, Officer Wheeler called Williams, and asked him to come back to the scene of the incidence because "I've got the gentleman who I believe might be involved here if you can tell me if this is who you've seen." (32:52-33:05). This was not just "suggestive": it was an explicit statement that Officer Wheeler believed that Cundy was the driver. Finally, when Williams shows up, Officer Wheeler walks him to his squad car where Cundy is sitting inside. (R. 42 at 35:10). Placement inside a squad car is likewise suggestive of the officer's belief that the suspect is the guilty party.

In sum, Officer Wheeler told Williams that he believed Cundy was probably drunk, told Williams that he was going to get Cundy so that Williams could identify him, told Williams that he had the "gentlemen who I believe may be involved," and then showed Cundy to Williams while Cundy was sitting in Officer Wheeler's squad car. "In effect, the police repeatedly said to the witness, 'This is the man.'" *Foster*, 394 U.S. at 443. The identification was unduly suggestive, and the burden shifts to the state to show that it was nonetheless reliable.

CONCLUSION

For the reasons stated above, Cundy is entitled to a new trial.

Dated this 21st day of September, 2022.

Respectfully submitted,

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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 6,028 words.

I hereby certify that filed with this brief is an appendix that complies with s. 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 s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules 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 or 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 21st day of September, 2022.

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