STATE OF WISCONSIN

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

DISTRICT IV

CASE NOS. 2022AP1373-CR; 2022AP1374-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KALE K. KEDING,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENTS OF CONVICTIONS IN THE WOOD COUNTY CIRCUIT COURT, THE HONORABLE NICHOLAS J. BRAZEAU, JR. PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

Submitted by:

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ISSUES PRESENTED

1. Whether the circuit court applied the wrong standard when considering the Defendant-Appellant's motion to suppress statements made to law enforcement after he was formally arrested and invoked his right to counsel?

> The circuit court found that the Defendant-Appellant was not properly notified of his Miranda rights and invoked his right to counsel, but his statements were nevertheless admissible due to them being voluntary, free, and not elicited from investigative questioning.

2. Whether those statements made by the Defendant-Appellant to law enforcement should be suppressed?

> The circuit court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. It is believed that the briefs of the parties will adequately present the issue. Publication is not requested. The issue presented herein is of a nature that can be addressed by the application of long-standing principles, the type of which would not be enhanced by oral argument or publication.

STATEMENT OF THE CASE AND FACTS

The Petitioner-Respondent agrees with the statement of the case and facts as set forth in the Defendant-Appellant's brief and does not feel it is necessary to set forth any additional facts, other than as necessary in the course of its argument.

STANDARD OF REVIEW

When reviewing the denial of a motion to suppress evidence, the Court of Appeals upholds the circuit court findings unless they are clearly erroneous. State v. Eckert, 203 Wis.2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996); Wis. Stat. § 805.17(2). Whether those facts warrant suppression is a question of law that is reviewed de novo. State v. Conner, 2012 WI App 105, ¶ 15, 344 Wis. 2d 233, 243, 821 N.W.2d 267, 271 (citing State v. Hampton, 2010 WI App 169, ¶ 23, 330 Wis.2d 531, 793 N.W.2d 901).

ARGUMENT

I. The statements made by the Defendant-Appellant were not part of a custodial interrogation and outside Miranda protections.

The Supreme Court established a set of procedural warnings in order to protect those in custody from further

custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 500, 86 S. Ct. 1602, 1641, 16 L. Ed. 2d 694 (1966) ("Now, the Court fashions a constitutional rule that the police may engage in no custodial interrogation without additionally advising the accused that he has a right under the Fifth Amendment to the presence of counsel during interrogation and that, if he is without funds, counsel will be furnished him."), See also State v. Harris, 199 Wis. 2d 227, 238, 544 N.W.2d 545, 549 (1996). As such, for those protections under Miranda to apply, the accused must (1) be in custody or detained and (2) be subjected to police "interrogation." Id.

The protections under Miranda "come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." Rhode Island v. Innis, 446 U.S. 291, 301, 100 S. Ct. 1682, 1689, 64 L. Ed. 2d 297 (1980), See also State v. Hambly, 2008 WI 10, ¶ 46, 307 Wis. 2d 98, 125, 745 N.W.2d 48, 61. The "functional equivalent of express questioning" is "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." Id. In Cunningham, the Wisconsin Supreme

Court solidified the Innis test to determine whether a question or action is an interrogation.

> The Innis test can be stated as follows: if an objective observer (with the same knowledge of the suspect as the police officer) could, on the sole basis of hearing the officer's remarks or observing the officer's conduct, conclude that the officer's conduct or words would be likely to elicit an incriminating response, that is, could reasonably have had the force of a question on the suspect, then the conduct or words would constitute interrogation.

State v. Cunningham, 144 Wis. 2d 272, 278–79, 423 N.W.2d 862, 864 (1988). Wisconsin statute reflects “interrogation” requiring some conduct that would likely elicit an incriminating response as in Innis:

> “Custodial interrogation" means an interrogation by a law enforcement officer or an agent of a law enforcement agency of a person suspected of committing a crime from the time the suspect is or should be informed of his or her rights to counsel and to remain silent until the questioning ends, during which the officer or agent asks a question

> that is reasonably likely to elicit an incriminating response and during which a reasonable person in the suspect's position would believe that he or she is in custody or otherwise deprived of his or her freedom of action in any significant way.

Wis. Stat. § 968.073(1)(a). Thus, whether the accused is subject to an interrogation is based on if there is a nexus between the words or actions of the police and the reasonable likelihood that those words or actions will elicit an incriminating response from the accused. If the words or actions would be reasonably likely to elicit an incriminating response, they are an "interrogation" and the accused is protected by the Miranda safeguards and any answer is not admissible absent a valid waiver. If the words or actions would not be reasonably likely to elicit an incriminating response, they are not a police "interrogation" and Miranda safeguards do not apply making an answer to the word or action admissible.

In this case, the Defendant-Appellant was not properly read his rights under Miranda, however validly invoked his right to be represented by an attorney during custodial interrogation and told the officers that he wished to remain

silent. R21 at 21:9-10; Appellant's Brief at 12. During the booking procedures at the Marshfield Police Department, the officers observed the Defendant-Appellant throwing something into the trash but did not see what it was. R21 at 12:12-19. This led to the following interaction:

> OFFICER SCHEPPLER: What did you toss in there?
>
> KEDING: A Kleenex. It might have some residue for you.
>
> OFFICER SCHEPPLER: Alright. So, you were saying some residue might be on the Kleenex or what?
>
> KEDING: In the snot. There's going to be a little cocaine in there.
>
> OFFICER SCHEPPLER: Some cocaine?
>
> KEDING: Yeah, I did some at the bar. I forgot about it…"

Appellant's Brief at 13. The statements were made during the booking procedure. Officer Abel testified that as part of those booking procedures officers ask questions of the accused, including what they have on their person. R21 at 5:22-6:5. This is done due both as a safety concern and for the purposes of taking inventory. R21 at 6:6-12.

Whether the Defendant-Appellant was in custody is not in dispute. Officer Abel herself told him that he was in

custody. Appellant's Brief at 12. However, the interaction does not rise to the level of an "interrogation." Officer Scheppler asked the Defendant-Appellant what he threw in the wastebasket. Such a question is reasonable and neutral without a reasonable likelihood of producing the response he got. Furthermore, the question was related to the booking procedure in that it was about what was on the Defendant-Appellant's person. Applying the Innis test, an objective observer would see that it was a question that would not elicit an incriminating response with the officer's knowledge.

Arguendo, it is also a question normally attendant to arrest and custody. The question was during the booking procedure, where the officers ask questions about what the accused have on their person. One of the reasons for those procedures is safety. Due to the officer not seeing what was thrown away that the Defendant-Appellant had in their possession, it would be a normal question to ask during custody. Due to the question not being an "interrogation," it and the response fall outside Miranda's safeguards.

The second and third questions asked by Officer Scheppler are not an "interrogation." Officer Scheppler testified that the second question was not investigatory,

but rather a laugh and repeating what the Defendant-Appellant just said. R21 at 13:14-22. Indeed, the circuit court pointed out that the question is a reaction and confirmation of what the Defendant-Appellant just stated. R21 at 21:23-24:1; 23:3-4. The third question was a mere restatement of a word that the Defendant-Appellant used. R21 at 13:18-22. The written record does not reflect what kinds of voice inflections, tones, or cadences occurred during those questions. Neither, "on the sole basis of hearing the officer's remarks" would elicit an incriminating response, as it was more a statement in disbelief of what the Defendant-Appellant just said. State v. Cunningham, at 278–79.

None of the questions are an "interrogation" and, thus, are not subject to the protections provided by Miranda. Therefore, they were properly deemed admissible.

II. The circuit court did not err in its findings.

Cole is not applicable in this case. There, Cole was arrested for battery against his wife and taken into custody. He was ordered to have no contact with his wife, but wrote letters and made phone calls to other family members instructing them to prevent his wife from coming to

his trial. The Milwaukee Police Department learned of this after opening one of his letters and a detective interrogated him. The detective advised Cole of his Miranda rights, and interrogated him after he waived them. He was subsequently charged with two counts of intimidation of a witness. State v. Cole, 2008 WI App 178, ¶¶ 4-7, 315 Wis. 2d 75, 81–82, 762 N.W.2d 711, 714–15.

Here, there was no interrogation so there need not be a voluntary waiver. Rather, it is appropriate for a court to find that the State showed that the statements were made outside of Miranda.

The circuit court ultimately made a finding that is consistent that the statements were made outside of the Miranda safeguards. Specifically, the circuit court found: (1) the officers did not give the proper Miranda warnings (R21 at 21:9-10), (2) there could be no more interrogation (R21 at 21:10-12), (3) that the Defendant-Appellant provided a voluntary statement (R21 at 21:13-14), (4) that the officer asking what the Defendant-Appellant threw in the trash was reasonable (R21 at 21:15-20), (5) the questions were not part of an investigation (R21 at 21:22; 25), and (6) the responses were not elicited by an officer (R21 at 22:3-4).

A court need not use "magic words" when making a finding. See Marathon County v. D.K., 2020 WI 8, ¶66, 390 Wis. 2d 50, 937 N.W.2d 901 (Rebecca Grassl Bradley, J., concurring) ("We do not impose a " 'magic words' " requirement in the law and this court has repeatedly rejected them." (citations omitted)); see also State v. Lepsch, 2017 WI 27, ¶36, 374 Wis. 2d 98, 892 N.W.2d 682 (rejecting "magic words" requirement in the context of a circuit court inquiring about juror bias); State v. Wantland, 2014 WI 58, ¶33, 355 Wis. 2d 135, 848 N.W.2d 810 (rejecting "magic words" requirement in context of withdrawing consent under the Fourth Amendment (citation omitted)); Elections Bd. v. Wisconsin Mfrs. & Com., 227 Wis. 2d 650, 654, 669-70, 597 N.W.2d 721 (1999) (rejecting "magic words" requirement in context of what is required to be "express advocacy"); ECO, Inc. v. City of Elkhorn, 2002 WI App 302, ¶23, 259 Wis. 2d 276, 655 N.W.2d 510 ("None of these statutes requires a [public records] request to contain any 'magic words' nor do they prohibit the use of any words."). Here, the findings made by the circuit court were sufficient to show the conclusion that it found the statements to be outside the safeguards of Miranda.

CONCLUSION

For the reasons set forth above, it is respectfully requested that this court affirm the trial court's denial of the suppression motion.

Dated this 14th day of February, 2023.

Respectfully submitted:

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CERTIFICATION OF BRIEF

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a monospaced font. The length of this brief is 11 pages.

I hereby certify that there is no appendix filed with this brief.

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 14th day of February, 2023.

Respectfully submitted:

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Electronically signed by:

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