STATE OF WISCONSIN

COURT OF APPEALS

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 Conviction
in the Wood County Circuit Court,
the Honorable Nicholas J. Brazeau, Jr. Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

Shortly after Keding's arrest for possession of cocaine, while he was being booked for the offense, the arresting officer asked Keding whether he was willing to answer more of her questions. Keding responded that he needed a lawyer since he had just been arrested, and said he would have to remain silent rather than answer more questions.

At the suppression hearing, the circuit court found that Keding validly invoked his right to counsel—a finding that the State concedes. (Resp. Br. 9-10).

But then the circuit court erred when it found that Keding made a voluntary statement in response to a question that did not amount to interrogation, and ruled that the statement was admissible, even though the police officer resumed questioning Keding less than a minute after he had invoked his rights.

There are two reasons why this Court should find error. First, the circuit court erred because before it considered the voluntariness of Keding's statement, it first needed to determine whether the State met its burden of proof that Keding initiated further communication with the police. If the State does prove that Keding initiated further contact, the State than has the burden of proving that Keding knowingly, intelligently, and voluntarily waived his right to counsel. (Br., 22-23). Courts then look to the

voluntariness of the statement (which, again, the State has the burden to prove). *State v. Cole*, 2008 WI App 178, ¶¶25-27, 315 Wis. 2d 75, 762 N.W.2d 711. Second, Keding was interrogated, as the term is defined in *Miranda* and its progeny.

The State does not directly address Keding's first argument concerning the burden of proof. *See Shadley v. Lloyds of London,* 2009 WI App 165, ¶26, 322 Wis. 2d 189, 776 N.W.2d 838 ("Arguments not rebutted on appeal are deemed conceded."). Rather, the State addresses both issues by arguing that *Miranda* warnings were not required because there was no interrogation, despite Keding being in custody (another finding the State concedes). (Resp. Br. 10-11). This reply therefore focuses on the issue of interrogation.

I. Keding was interrogated when the State asked follow up questions about the residue on the tissue.

Interrogation encompasses words or actions on the part of the police, other than those that are normally attendant to arrest and custody, that the police should know are reasonably likely to elicit an incriminating response. *State v. Harris*, 2017 WI 31, ¶15, n.10, 374 Wis. 2d 271, 892 N.W.2d 663. The State's argument hinges on the exception, the "other than those [words or actions] that are normally attendant to arrest and custody."

The State argues that by following up with Keding about the residue on the tissue he had just thrown away, these were simply normal questions the police ask during booking procedures, and that the questions were related to officer safety, citing Officer Able's testimony in support. (Resp. Br. 10-11).

However, Officer Scheppler testified that suspects are routinely searched for officer safety immediately prior to being taken into custody. (R1.21:16). While the officer believed that Keding would have been patted down prior to being taken to the stationhouse, he could not definitively say that this was so. (R1.21:16). A review of the video admitted at the suppression hearing shows that Officer Scheppler was correct, and Keding was indeed thoroughly searched for weapons and contraband at the time of his arrest. (R1.11.1:10:39-1:13:00).

The State goes on to argue that the second and third questions were not investigatory, citing Officer Scheppler's characterization of his own questions. (Resp. Br. 11). On cross-examination, however, Officer Scheppler clarified that while it was not an investigatory question, he acknowledged that he was trying to get Keding to talk more about cocaine. (R1.21:17).

Interrogation can take the form of express questioning or its functional equivalent. *State v. Harris*, 2017 WI 31, ¶15-16, 374 Wis. 2d 271, 892 N.W.2d 663. The State notes that the circuit court found that the question about residue was just a

reaction and confirmation of what Keding just stated. However, it is the nature of the information that the question is trying to reach which determines whether it amounts to interrogation. *Harris*, 374 Wis. 2d 271, ¶17.

Keding asserts that the questions he was asked ("What did you toss in there?" "So, you were saying some residue might be on the Kleenex or what?" "Some cocaine?") constituted express questioning, and argues in the alternative that they were the functional equivalent of interrogation. (R1.11.1:32:35–1.32:45; 1.33.23–1.33.37).

In *State v. Harris*, the Wisconsin Supreme Court considered whether a police question, "Would you like to give me a statement?" was express questioning or the functional equivalent. *Harris*, 374 Wis. 2d 271, ¶¶6, 15-23. The *Harris* court found that the question, while seeking a response, did not constitute express questioning because it sought only whether the defendant wanted to make a statement, not the statement itself. *Id.*, ¶18.

The test for determining whether it is the functional equivalent is not as straightforward as it may seem, noted the *Harris* court. *Id.*, ¶20. The test inquires into what the police officer should know, but also accounts for the suspect's perception of the events, to determine whether such conduct was reasonably likely to elicit an incriminating response. *Id.*, ¶¶20-21. "In Wisconsin, we implement the 'functional equivalency' standard by positing a reasonable

third-person observer and inquiring into how such a person would expect the suspect to react to the officer's words and actions. *Id*., ¶22.

In determining whether the dialogue between the police and the suspect was the functional equivalent of an interrogation, the *Harris* court noted that it would consider more than just the bare words of the question—it considered the entire context within which the dialogue took place. *Id*., ¶23. Then the *Harris* court asked whether the reasonable observer would conclude that the suspect in the vignette would understand the officer's words and actions as reasonably likely to elicit an incriminating response. *Id*.

The *Harris* court then went on to note that the police found the suspect hiding in the basement of someone else's home, with copper piping and "burglarious tools" around him, in the very early morning hours. *Id*., ¶24. After he was taken into custody and placed in the back of the squad car, the suspect then made incriminatory statements. *Id*. The statements were unprompted, and at the time he made them, the police believed Harris was not intoxicated, overly tired, and otherwise in control of his faculties. *Id*., ¶25.

The police then transported the suspect in *Harris* to the jail, and later that morning, a detective went to interview him. *Id*., ¶26. The detective met the suspect in a common area just outside the interview

rooms and asked him the question at issue, whether Harris would like to give the detective a statement. *Id.*

In finding that no functional equivalent of interrogation had occurred, the *Harris* court noted that there must be some compulsive force on the suspect. *Id.*, ¶30. The court distinguished between cases where compulsion was achieved through means such as an officer's cryptic remarks about information in which only the perpetrator of the crime would recognize, and when an officer was giving unresponsive answers to a suspect's questions with the intent of provoking an incriminating response. *Id.*, (internal citations omitted). The *Harris* court also noted that the circuit court must pay attention to the atmosphere in which the suspect incriminates himself.

Here, as discussed above, Keding was searched prior to being placed in the back of the squad car and taken to the stationhouse. Keding was then taken to the stationhouse, where, while he was being booked, he was told that police had more questions for him. He invoked his right to counsel, and confirmed that he would stay silent since he had been arrested.

It is important to note, that just like the defendant in *State v. Hambly*,[1] Keding "expressed a desire for the assistance of an attorney *in dealing with custodial interrogation by the police*" when his interrogation was imminent. 2008 WI 10, ¶37,

[1] *State v. Hambly*, 307 Wis. 2d 98, is discussed at length in appellant's brief-in-chief. (Br. 20-22).

307 Wis. 2d 98, 745 N.W.2d 48 (internal quotation omitted, emphasis in original).

A reasonable police officer would know that, in a cocaine possession case, a tissue the suspect just threw away "that might have some residue on it,"[2] would likely have evidentiary value. And that reasonable police officer would also know that getting the suspect to talk more about that residue would likely lead to the type of incriminatory statement we have here.

[2] R1.11.1:32:35–1:32:45.

CONCLUSION

For the reasons above, and those in the appellant's brief-in-chief, Keding respectfully requests that this Court reverse the circuit court's determination that Keding's stationhouse statements were admissible. Keding asks that this Court remand the cases with directions to grant Keding's suppression motion in full.

Dated this 13th day of March, 2023.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

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 1,468 words.

Dated this 13th day of March, 2023.

Signed:
Electronically signed by
Carlos Bailey
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