STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2023AP290-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TYLER J. CLARK,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION TO SUPPRESS, ENTERED IN DANE COUNTY CIRCUIT COURT, THE HONORABLE CHRIS TAYLOR, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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ISSUES PRESENTED

Tyler J. Clark was convicted after pleading guilty to one count of possession of child pornography. He appeals from that conviction and the denial of his two motions to suppress: one to suppress evidence obtained through execution of a search warrant, and one to suppress his statement saying his iPhone passcode out loud. The State consolidates and reframes the issues:

1. Did the circuit court properly deny Clark's motion to suppress evidence of child pornography obtained from his phone pursuant to a warrant, because the warrant was supported by probable cause; the biometrics provision did not violate Clark's Fifth Amendment privilege because it did not compel incriminating testimony and in any event, it was never executed; the warrant did not violate the Fourth Amendment because it was not overbroad or lacking particularity; and, even if portions of the warrant were invalid, they were severable?

The circuit court answered: Yes.

This Court should affirm.

2. Did the circuit court properly deny Clark's motion to suppress his statement disclosing the passcode to his phone, because officers did not violate his Sixth Amendment rights after Clark invoked his right to counsel, police ceased interrogating him, and then without any questioning or requests from officers, Clark voluntarily said his passcode out loud as he used it to open his cellphone?

The circuit court answered: Yes.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication because this Court can decide the issues based on well-established law, the record in this case, and the parties' briefs.

INTRODUCTION

After a guilty plea, Clark was convicted of one count of possession of child pornography. Law enforcement obtained evidence of child pornography from his cellphone and computer after a search pursuant to a warrant. On appeal, Clark raises two overarching claims. First, he contends that the circuit court should have suppressed the child pornography evidence for a number of reasons. He argues that the warrant violated his Fourth Amendment rights because it was overbroad and lacked particularity. He also argues that the provision compelling his passcode and biometric information violated his Fifth Amendment privilege against self-incrimination. Second, Clark contends that his Sixth Amendment right to counsel was violated when, after he asked for an attorney and officers stopped interrogating him, the officers recontacted him to explain the search warrant, gave him his cellphone at his request to contact his boss, and when he opened his cellphone, he voluntarily said his passcode out loud, without any questions from the officer.

The court denied suppression, holding that the warrant was supported by probable cause, was not overbroad or lacking particularity, and did not violate Clark's constitutional rights. The court also rejected Clark's contention that police were interrogating him when he said his passcode out loud. The court credited the officer's testimony that he did not ask Clark for his passcode and explicitly told Clark that he did not need to provide it. Additionally, Clark's statement was voluntary and not the product of police coercion. And if any portions of the warrant

were invalid, those provisions did not result in police seizing any incriminating evidence and were severable.

The court properly denied suppression of the evidence of child pornography and Clark's statement providing his passcode. This Court should affirm.

STATEMENT OF THE CASE

Criminal charges. As part of an investigation of two cyber tips, police identified Clark's home address, email address, Tumblr screenname profile URL, and IP address. (R. 1:2–4.) The investigation located multiple images and videos of child pornography associated with Clark's IP address and Tumblr account. (R. 1:4–5.) On July 11, 2019, when Clark was leaving his residence, officers detained him and executed a search warrant inside his home. (R. 1:5.) Police seized Clark's iPhone and it was turned over to a digital forensic analyst, who located a video file with several images of child pornography consistent with the images provided by Tumblr. (R. 1:6.)

The State charged Clark with three counts of possession of child pornography. (R. 1:1–2; 23.)

Motions to suppress. (R. 39; 41.) Clark filed two motions to suppress. (R. 39; 41.) In one motion, Clark moved to suppress evidence obtained as a result of the search warrant, contending that it was overbroad and lacked particularity in violation of his Fourth Amendment rights on three grounds. (R. 41.) First, he contended that the warrant, issued by the court after police located child pornography images on Clark's Tumblr accounts and determined that the IP addresses associated with those accounts were connected to his home address, was "facially overbroad." (R. 41:4–5.) Citing provisions of the warrant, Clark first contended that it lacked particularity and "the limiting language required" by the Fourth Amendment because it improperly and without

probable cause authorized the search for "any and all" documents in any format or materials that tended to evidence "the possible exploitation, sexual assault" or "enticement of children." (R. 41:5–7.) He also contended that the warrant violated the Fourth Amendment because it authorized the search of both his and his parents' vehicles. (R. 41:5–7.) Second, Clark contended that the warrant violated his Fifth Amendment right against self-incrimination because it compelled him to provide identifying information. (R. 41:7–8.) Third and finally, he contended the officers exceeded the scope of the warrant by seizing a firearm in Clark's residence. (R. 41:9.) He argued that because the warrant violated his constitutional rights "[d]ue to the overbreadth, lack of particularity and unconstitutional scope of this warrant, all evidence garnered as a result of this unconstitutionally overbroad warrant should be suppressed." (R. 41:9–10.)

In the other motion, Clark moved to suppress his statement made after he invoked his right to counsel. (R. 39:1.) He described that after he asked for an attorney, the detective stopped the interrogation, said he would not ask any more questions, but a short time later, explained to him that the search warrant authorized fingerprint or facial recognition to unlock his cellphone. (R. 39:1–2.) The detective told him he did not have to provide his passcode. (R. 39:2.) However, when Clark used his phone to contact his boss, he typed and said his passcode out loud, and the detective heard him and provided it to another detective. (R. 39:2.) Clark argued that after he invoked his right to counsel, his statement providing his passcode while he was in custody was involuntary and the result of police coercion, and thus, should be suppressed. (R. 39:5–6.)

Suppression hearing. (R. 50.) Detective Mark Hull, who investigated internet crimes against children as part of the Special Victims Unit, investigated Clark for possession of child pornography as a result of cyber tips about pornographic

images posted on Tumblr that were linked to Clark's account and the IP address at his residence. (R. 50:11–12.) Based on this information, Hull obtained a search warrant to search Clark's home, including his devices and computers, which police executed on July 11, 2019. (R. 50:12–13.) While executing the search warrant, police took Clark into custody. (R. 50:14–15.) Officer Shane Olson, whose role was to assist in the execution of the search warrant and provide security and containment, but not to question Clark, handcuffed Clark, took his cellphone to turn over to the detectives, and put him in the back of his squad car. (R. 50:68–71.) Detective Bradley Ware, who was also a detective with the Special Victims Unit, assisted Hull by sitting in on the interview with Clark, taking notes, and holding Clark's phone. (R. 50:57–58.)

After Hull and Ware removed Clark from Officer Olson's squad, they moved him to Hull's unmarked detective car, with Hull sitting in the back seat with Clark and Ware sitting in the front seat. (R. 50:16–17.) Hull read Clark his *Miranda* rights, told Clark that if he wanted "to talk, you can. That's your choice," and removed Clark's handcuffs. (R. 50:17–18.) Hull interviewed Clark for about 15–20 minutes before Clark invoked his right to counsel. (R. 50:19–20.) At that point, Hull stopped the interview, told Clark he was not going to ask him any more questions, and moved him back into Olson's squad car while police searched Clark's residence. (R. 50:20–21.) Ware testified consistently with Hull that during the interview, Clark was read his rights, "ultimately invoked his right to counsel," and was then moved back to the squad car. (R. 50:59.)

When Hull and Ware brought Clark back to Olson's squad, Olson did not interrogate him, but he made "small talk" until the detectives returned about 15 minutes later and had a second contact with Clark. (R. 50:24, 72–73.) During this second contact with Clark, based on his 10 years of experience as detective, Hull knew that he could not question

Clark after Clark had invoked his right to counsel. (R. 50:22–23.) However, he knew he could check on Clark, give him a copy of the search warrant, and explain the investigation and the search warrant to him, "without interrogating" him. (R. 50:23–24, 60.) During the second contact, Hull explained to Clark that the search warrant allowed police to compel his fingerprint or facial scan to unlock his cellphone. (R. 50:24, 60–62.) Hull and Ware both testified that they were standing outside of Olson's squad about three feet away from Clark in the backseat, with Ware standing behind Hull. (R. 50:25, 64–65.) Ware testified that he did not hear Hull ask Clark for his passcode during the officers' second contact with Clark. (R. 50:65.) When Clark asked Hull if he had to give the officers his passcode, Hull responded, "No, you don't." (R. 50:25.)

After Hull told Clark that he did not have to provide his passcode, Clark asked Hull if he could have his phone to contact his boss. (R. 50:25–26.) Hull gave Clark his phone but stayed close to him, to ensure that Clark did not damage or destroy the phone, which was "critical evidence in this case." (R. 50:26–27.) Hull did not stand close to Clark in order to see him enter his passcode, because he believed that Clark would open his phone using facial identification, "had no belief" that Clark was going "to say a passcode," and did not ask him, "[w]hat is your passcode?" (R. 50:27–28, 41–42.) When Hull gave Clark his phone, Clark entered his passcode and said it "out loud." (R. 50:27–28.) After Clark stated his passcode out loud, Hull repeated it incorrectly; Clark corrected him, saying his passcode out loud again; Hull repeated it again; and Ware, who was standing outside the squad car behind Hull, heard it and wrote it down. (R. 50:28, 61–62.) Clark texted his boss, and then Hull took his phone and gave it to Ware, who took it to the DCI analyst. (R. 50:29.)

After the search of his residence, Clark was arrested for possession of child pornography. (R. 50:30.) Police never

executed the biometric information portion of the search warrant by obtaining either facial recognition or fingerprint access to any device. (R. 50:31.) During the execution of the search warrant in Clark's home, police seized a firearm. (R. 50:44.)

The warrant authorized not only a search of Clark's vehicle, but also vehicles registered to his parents, because police did not know what vehicles Clark had access to or used. (R. 50:45.) The search warrant authorized police to obtain the biometric information not only of Clark, but anyone who had "ownership, access to, or possession of mobile devices" found in the residence; however, "ultimately" the warrant was only used to search Clark's cellphone and computer, not anyone else's devices. (R. 50:46–47.) Although Clark was the primary suspect in the child pornography investigation, the provisions of the search warrant that authorized police to search all the vehicles and obtain biometric information from anyone the residence were necessary because it could have been "someone else that is in this house" who was involved in the possession of child pornography, particularly because the IP address connected to Clark's Tumblr account was in Clark's father's name. (R. 50:47–48.) Clark and his parents lived together in this residence and it was possible that anyone using that IP address could have downloaded the child pornography. (R. 50:49–51.)

Oral decision denying motions to suppress. The court found that it did not "have to reach the constitutionality of requesting the biometrics in this warrant" because police did not obtain any evidence in this case through executing the portion of the search warrant that compelled biometric information: fingerprint or facial recognition to unlock Clark's iPhone. (R. 60:4–5.) The court addressed two issues: (1) suppression based on Clark's allegations that the warrant violated the Fourth Amendment because it lacked particularity and was overbroad, and that the provision

requiring him to provide biometric information violated his Fifth Amendment rights (R. 60:7–16); and (2) suppression of Clark's statement providing his passcode after he invoked his right to counsel. (R. 60:16–23.)

The court's findings of fact related to the first issue included the following:

- The affidavit in support of the warrant described multiple tips, of the type that police rely on frequently, that "someone with a Tumblr account registered to a TylerClark20@gmail.com had been potentially accessing child pornography." (R. 60:7, 10.)
- A subpoena to Tumblr, a social media platform where people can post and share photos and videos, provided the IP address that had accessed the pornography and was linked to Clark's father's name at a specific address, where police determined that Clark lived with his parents. (R. 60:7–8.)
- The investigation linked the email address to Clark's Facebook profile, Clark's driver's license linked Clark to the street address associated with the IP address, and a license plate check showed that Clark was the registered owner of a vehicle at the residence. (R. 60:9–10.)
- The warrant issued by the judge allowed police to search Clark's computer, phone, and other computers and devices at the address, as well as the vehicles at the residence, because although Clark was the suspect, it was not "clear as to whether others in the residence could have been engaging in this activity, given that the IP address is associated with an address and there could be other people living there." (R. 60:10.)

- The provisions of the warrant allowing police to search for evidence of child pornography on Clark's computer and cellphone were "typical" in an investigation of possession of child pornography. (R. 60:11–12.)
- The provision of the warrant compelling fingerprint and facial identification—"biometric information"—was never executed to obtain any incriminating evidence. (R. 60:12–13.)
- The incriminating evidence was all found on Clark's cellphone and Clark's computers. (R. 60:14.)
- Although officers seized a firearm during the search, it was not used as evidence to incriminate Clark in this case. (R. 60:15.)

The court made the following findings of fact related to the motion to suppress Clark's statement providing his passcode to his cellphone:

- Clark was in custody when he invoked his right to counsel. (R. 60:16–17.)
- Detective Hull did not reinitiate interrogation after Clark said he wanted an attorney; rather, Hull recontacted Clark to explain the warrant, including the biometric provision, which was extremely common. (R. 60:18, 21.)
- When Clark asked Hull if he could use his phone to call his boss, Hull gave Clark his phone and stayed close to Clark to prevent evidence tampering, not to see his passcode. (R. 60:19–20.)
- Hull did not ask Clark to provide his passcode to his phone and in fact, he "explicitly told Mr. Clark he did not need to provide the passcode." (R. 60:20.)

- When Clark entered his passcode, he said it out loud, Hull repeated it incorrectly, and "Clark rerepeated his passcode because [Hull] had switched a number." (R. 60:20.)
- The State met its burden to prove that Clark was not being interrogated when he said his cellphone passcode and Clark's statement providing his passcode was "akin to" a "spontaneous incriminating statement." (R. 60:20–21.)
- There was no evidence that Clark was coerced into providing his passcode. (R. 60:22–23.)

The circuit court denied suppression on both grounds. (R. 60:24.) By written order, the court denied Clark's motion to reconsider the decision denying suppression. (R. 77.)

Plea, sentencing, and appeal. Clark agreed to plead guilty to one count of possession of child pornography, with the other two counts dismissed and read in. (R. 79; 94:2–3, 18–19.) At the plea hearing, the court found that Clark was entering his plea "knowingly, intelligently, and voluntarily," accepted his guilty plea, found him guilty of possession of child pornography, and dismissed and read in the other two counts. (R. 94:20–21.) The court sentenced Clark to the mandatory minimum of three years of initial confinement, and also ordered three years of extended supervision. (R. 93:22.) The court entered the judgment of conviction. (R. 90.) Clark appeals. (R. 95.)

STANDARD OF REVIEW

When reviewing a decision on a motion to suppress evidence, this Court upholds the circuit court's factual findings unless they are clearly erroneous, but it independently applies constitutional principles to the facts. *State v. Lonkoski*, 2013 WI 30, ¶ 21, 346 Wis. 2d 523, 828 N.W.2d 552. The deferential, clearly erroneous standard

applies to a circuit court's credibility determinations. *State v. Jenkins,* 2007 WI 96, ¶ 33, 303 Wis. 2d 157, 736 N.W.2d 24.

ARGUMENT

I. Clark was not entitled to suppression of the evidence of possession of child pornography obtained as a result of the execution of the validly-issued search warrant.

A. The warrant was facially valid and issued by the court based on probable cause of possession of child pornography.

The "warrant clause" of the Fourth Amendment to the United States Constitution provides three requirements for a valid search warrant: "(1) prior authorization by a neutral, detached magistrate; (2) a demonstration upon oath or affirmation that there is probable cause to believe that evidence sought will aid in a particular conviction for a particular offense; and (3) a particularized description of the place to be searched and items to be seized." *State v. Sveum*, 2010 WI 92, ¶ 20, 328 Wis. 2d 369, 787 N.W.2d 317. Warrants are void ab initio only when the warrant is issued without statutory authority *See State v. Kerr*, 2018 WI 87, ¶ 34, 383 Wis. 2d 306, 913 N.W.2d 787 (Ziegler, J., concurring); *see also State v. Hess*, 2010 WI 82, ¶ 32, 327Wis. 2d 524, 785 N.W.2d 568. Circuit court judges have the authority to issue search warrants upon a showing of probable cause. *See* Wis. Stat. §§ 967.02(2m); 968.12(1).

The issuing court must "determine whether, under the totality of the circumstances, given all the facts and circumstances set forth in the affidavit, 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *Sveum*, 328 Wis. 2d 369, ¶ 24 (citation omitted). Probable cause to support the warrant is not "a technical, legalistic concept"; rather, it is "a flexible,

common-sense measure of the plausibility of particular conclusions about human behavior." *Id.* ¶¶ 20, 24 (citation omitted). A reviewing court affords "great deference to the warrant-issuing judge's determination of probable cause and that determination will stand unless the defendant establishes that the facts are clearly insufficient to support a finding of probable cause." *State v. Higginbotham*, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991)).

Here, a circuit court judge issued the warrant after concluding that there was probable cause. (R. 40:1–5.) Based on its findings of fact related to the affidavit in support of the warrant (R. 60:7–10), the court concluded that under the totality of the circumstances, the warrant was supported by probable cause—"a fair probability that evidence of a crime of possession of child pornography would be found on electronic devices at the residence or on Mr. Clark's person." (R. 60:11.) Ultimately, the court denied the motion to suppress evidence of child pornography found on Clark's computer and cell phone, which was obtained as a result of the warrant. (R. 60:15–16.) The court's decision was sound.

On appeal, Clark does not claim that the warrant was issued without probable cause and thus was facially invalid. Rather, he contends that suppression was required because the warrant's "biometrics provision" violated his Fifth Amendment rights, even though it was never executed (Clark's Br. 14–19); the warrant violated the Fourth Amendment because it was overbroad and lacked particularity (Clark's Br. 19–25); the provisions of the warrant that were overbroad or lacked particularity were not severable, so the only remedy was suppression (Clark's Br. 25–27); and the good faith exception to the exclusionary rule did not apply. (Clark's Br. 27–30.) For the reason set forth below, Clark's arguments are meritless.

B. The court properly denied suppression because the warrant's biometrics provision was not executed and did not violate the Fifth Amendment; even if it did, it was severable and did not invalidate the entire warrant.

Both the United States and the Wisconsin Constitutions provide that a person may not "be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.; Wis. Const. art. I, § 8. In its decision denying Clark's motion to suppress, the court found that the provision in the warrant compelling fingerprint and facial identification was never executed, no evidence was seized as a result, and thus, the court did not need to address whether the biometrics provision in the warrant violated the Fifth Amendment. (R. 60:12–13). Regardless of whether the court correctly decided that it did not have to address the biometric provision's constitutionality, Clark's contention that the biometrics provision violates his Fifth Amendment rights fails on the merits.

A defendant's Fifth Amendment privilege against self-incrimination clause "does not protect a suspect from being compelled by the State to produce 'real or physical evidence.'" *Pennsylvania v. Muniz*, 496 U.S. 582, 588–89 (1990) (quoting *Schmerber v. California*, 384 U.S. 757, 764 (1966)). The privilege instead "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." *Id.* at 589 (quoting *Schmerber*, 384 U.S. at 761). Thus, "[t]o qualify for the Fifth Amendment privilege, a communication must be testimonial, incriminating, and compelled." *Hiibel v. Sixth Jud. Dist. Ct. of Nevada, Humboldt Cnty.*, 542 U.S. 177, 189 (2004). The accused must be required "'to disclose any knowledge he might have,' or 'to speak his guilt.'" *Doe v. United States*, 487 U.S. 201, 211 (1988)

(citations omitted). The privilege protects against the "extortion of information from the accused" and attempts to force a suspect "to disclose the contents of his own mind" and, without such an attempt, "the demand made upon him is not a testimonial one." *Id.* (citation omitted).

It does not violate the Fifth Amendment to compel someone to "put on a shirt, to provide a blood sample or handwriting exemplar, or to make a recording of his voice." *United States v. Hubbell*, 530 U.S. 27, 35 (2000). The privilege also "does not bar compulsion to submit to physical testing such as fingerprinting, photographing or measuring, writing or speaking for identification, assuming a stance, or making a particular gesture." *State v. Schmidt*, 2012 WI App 137, ¶ 7, 345 Wis. 2d 326, 825 N.W.2d 521; *see also Schmerber*, 384 U.S. at 764 ("both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting"); *State v. Doe*, 78 Wis. 2d 161, 174, 254 N.W.2d 210 (1977) (stating that a "defendant has no Fifth Amendment right to refuse to be fingerprinted"); *State v. Tew*, 54 Wis. 2d 361, 363, 195 N.W.2d 615 (1972), *rev'd on other grounds by Byrd v. State*, 65 Wis. 2d 415, 222 N.W.2d 696 (1974) (holding that State may comment at trial on a defendant's refusal to be fingerprinted because fingerprinting does not implicate the Fifth Amendment).

The Fifth Amendment's self-incrimination clause prevents the State from compelling testimony from a person, but requiring someone to display a physical characteristic does not compel testimony "or disclose information." *Hiibel*, 542 U.S. at 189 (citation omitted); *Muniz*, 496 US. at 589. Thus, the State may compel such a display even though it might be incriminating or "that incriminating evidence may be the byproduct of obedience." *Hubbell*, 530 U.S. at 34–35. "The act of exhibiting such physical characteristics is not the same as a sworn communication by a witness that relates either express or implied assertions of fact or belief." *Id.*

Clark argues that the warrant's provision authorizing police to take action "for the purpose of attempting to unlock the devices in order to search its contents" violated his Fifth Amendment rights because this provision allowed police to seek "testimonial information from Clark." (Clark's Br. 14–15.) Clark's argument is incorrect. The warrant's provision requiring information to open Clark's cellphone—his passcode, fingerprint, or facial identification—does not violate the Fifth Amendment because the information it compels is not testimonial. The Wisconsin Supreme Court has not squarely addressed whether a suspect providing his passcode a cell phone is "testimonial."[1] The warrant's requirement for biometric information does not violate the Fifth Amendment because it requires only the display of a physical characteristic: fingerprints or facial identification. Compelling information to unlock the phone required only a physical act and did not require disclosure "the facts and operations of [their] mind." *Doe*, 487 U.S. at 211. Consistent with the precedent that the Fifth Amendment does not prevent police from obtaining a person's fingerprints, the biometrics provision of the search warrant did not require Clark to provide testimonial information to incriminate himself. *See Schmidt*, 345 Wis. 2d 326, ¶ 7.

Clark claims that the warrant's provision compelling him to provide a passcode and biometrics to open his phone was unconstitutional regardless of whether it was executed by police. (Clark's Br. 14–15.) However, Clark volunteered his passcode, making it unnecessary for police to execute the provision compelling him to provide information to open his phone. These circumstances do not change that the provision

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[1] Courts in other jurisdictions have concluded that the request for a passcode is not testimonial because the passcode itself does not communicate any information about the crime. *United States v. Robinson*, 76 M.J. 663 (A.F. Ct. Crim. App. 2017); *State v. Stahl*, 206 So. 3d 124, 134 (Fla. Dist. Ct. App. 2016).

requiring Clark to provide his passcode and biometric information does not violate his rights because it does not require testimonial, incriminating information about the crime itself. Here, the circuit found that Hull did not ask Clark to provide his passcode to his phone and in fact, he "explicitly told Mr. Clark he did not need to provide the passcode." (R. 60:20.) This finding is not clearly erroneous. Clark voluntarily stated his passcode, not as a result of execution of the provision in the warrant. There was no Fifth Amendment violation when Clark spontaneously provided his passcode to the officer.

Finally, even if the biometric provision was unconstitutional, the court held that the invalid provisions were severable and did not invalidate the entire warrant. (R. 60:13–14.) *See Sveum*, 328 Wis. 2d 369, ¶ 34. The "'severability doctrine' . . . permits reviewing courts to excise the defective portions of an otherwise valid warrant." *Id*. The evidence seized under the warrant's valid portions is admissible, and the evidence seized under the invalid portion is suppressed. *Id*. Here, the circuit court correctly concluded that, even if the provision compelling biometric information was invalid, it was never executed and police did not obtain any evidence as a result; thus, it was severable and it did not invalidate the entire warrant. (R. 60:14.)

For all these reasons, the search warrant did not violate Clark's Fifth Amendment rights. This Court should affirm.

C. The court properly denied suppression because the warrant did not violate the Fourth Amendment by overbreadth or lack of particularity.

The Fourth Amendment requires that the warrant state with particularity the place to be searched and the items to be seized. *Sveum*, 328 Wis. 2d 369, ¶ 20. The particularity requirement ensures that the warrant "enable[s] the searcher

to reasonably ascertain and identify the things which are authorized to be seized." *Id.* ¶ 27 (citation omitted). But the constitution requires only that the warrant describe "with as much particularity and specificity as the circumstances and the nature of activity under investigation permitted." *State v. Petrone*, 161 Wis. 2d 530, 541, 468 N.W.2d 676 (1991), *modified by State v. Greve*, 2004 WI 69, ¶ 31 & n.7, 272 Wis. 2d 444, 681 N.W.2d 479. "Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area." *Higginbotham*, 162 Wis. 2d at 991–92 (citation omitted). Thus, "a warrant need not be more specific than knowledge allows." *United States v. Bishop*, 910 F.3d 335, 338 (7th Cir. 2018).

Bishop is instructive on this point. There, the court upheld a warrant that permitted police to search every file on a cellphone and decide whether items they found matched the description in the warrant of the evidence of the crime, holding that it did not violate the Fourth Amendment's particularity requirement because it "was as specific as circumstances allowed." *Id.* at 336, 338. The court noted that "[c]riminals don't advertise where they keep evidence," search warrants routinely authorize the search of entire homes because it is not apparent where contraband may be hidden, and "a warrant authorizing a search for documents that will prove a crime may authorize a search of every document the suspect has, because any of them might supply evidence." *Id.* at 336–37.

Clark contends that the warrant was unconstitutionally overbroad because it allowed police to obtain biometric information from his parents, and search property belonging to his parents, who lived at the same residence, and that he had standing to challenge the warrant as applied to his parents. (Clark's Br. 19–20.) He also argues that the warrant violated the Fourth Amendment because it allowed police to seize items at the home without probable cause and gave

"*carte blanche* permission to police officers to seize anything they believe mildly helpful in showing Clark was engaged in anything wrong without specifying what it was they were to look for and seize." (Clark's Br. 19–21.) And, he contends that the warrant lacked particularity because it authorized police to search for any evidence of "possible exploitation, sexual assault and/or enticement of children," which he argues allowed police to search for evidence "far beyond simply child pornography." (Clark's Br. 22–24.) For multiple reasons, Clark's arguments fail.

First, Clark's challenge to the warrant as overbroad because it could have compelled biometric information from his parents as well as himself is unsupported, undeveloped, and meritless. He relies on a non-binding, federal case to argue that the provision compelling his parents' biometric information was constitutionally overbroad. In that case, the Eastern District of Kentucky concluded that there was no "reasonable suspicion" that other individuals present in the home had committed a criminal act and thus, the entire warrant was invalid. (Clark's Br. 20); *See In re Search Warrant No. 5165,* 470 F. Supp. 3d 715, 724 (E.D. Ky. 2020). The Kentucky case is distinguishable because it did not involve a warrant requiring biometric information of others who lived in the household. Instead, the case concerned whether the provision could compel that information from anyone present, including "a bystander, such as a roommate or even the mailman." *Id.* at 723. In contrast, here the court found that the warrant was not overbroad because Clark and his parents lived together in the residence that was linked to the child pornography posted on Tumblr, using an IP address registered to Clark's father, and it was not "clear as to whether others in the residence could have been engaging in this activity, given that the IP address is associated with an address and there could be other people living there." (R. 60:7–8, 10.) The court's findings were not clearly

erroneous. Clark cites no authority holding that a search warrant compelling biometric information from members of a household is invalid where the court found probable cause that the warrant could find evidence of a crime on any electronic devices in the residence. Given the reality that cellphones are widely used to store data, including child pornography, a conclusion that a search warrant may not compel non-testimonial, biometric information to unlock the devices of those living in the residence where there is probable cause that someone there possessed child pornography is impractical, devoid of common sense, and incompatible with modern Fourth Amendment jurisprudence.

Second, the court concluded that Clark did not have standing to bring a motion to suppress based on his claim that the provisions allowing police to search his parent's person, car and devices and items were overbroad because he did not have a reasonable expectation of privacy and regardless, there was no incriminating evidence seized from his parents. (R. 60:12); *see Minnesota v. Olson*, 495 U.S. 91, 95–96 (1990) (standing to raise a Fourth Amendment claim requires a reasonable, "legitimate expectation of privacy.") The court was correct. Clark failed to show by a preponderance of the evidence that he had a subjective expectation of privacy in his parents' property that was objectively reasonable under the totality of the circumstances. *See State v. Guard*, 2012 WI App 8, ¶¶ 16–17, 338 Wis. 2d 385, 808 N.W.2d 718.

Third, if the portion of the search warrant compelling biometric information from and authorizing the search of others in the home besides Clark violated the Fourth Amendment, it does not invalidate the entire warrant because it was never executed and it is severable. *See Sveum*, 328 Wis. 2d 369, ¶ 34. The provision is severable from the rest of the warrant, because no incriminating evidence used to prosecute Clark for possession of child pornography was obtained as a result of anyone's biometric information, or as a

result of searching Clark's parents' devices, belongings, or vehicle. (R. 60:12.)

Fourth, suppression is not warranted based on Clark's contention that the warrant lacked particularity because it authorized police to search for any evidence of "possible exploitation, sexual assault and/or enticement of children." (Clark's Br. 22.) As an initial matter, Clark's contention that the State "conceded" that the warrant lacked particularity (Clark's Br. 22) is belied by the record. In its response to Clark's suppression motion, the State outlined why the warrant complied with the Fourth Amendment's particularity requirement. (R. 52:3–6.) It authorized police to search Clark's residence, Clark himself, the vehicles and "all electronics" belonging to both Clark and his parents, based on probable cause that "someone" at Clark's address was "accessing child pornography," using the IP address registered to Clark's father and a Tumblr account associated with Clark, and it was unclear "exactly who at the address" was doing so, what devices or computers were being used, or "what vehicle was being used by who." (R. 52:4–5.) Based on this information, the issuing court properly determined "that there was a fair probability of uncovering evidence of Possession of Child Pornography" at Clark's residence, in the vehicles, and in all electronics including computers and cellphones, "based on common sense and reason." (R. 52:5.) The State's argument in opposition to Clark's motion to suppress demonstrates that the State did not concede that the warrant lacked particularity.

And in any event, Clark failed to support the merits of his claim that the warrant lacked particularity on the ground that it did not "limit the items to be searched." (Clark's Br. 23.) Clark contends that "particularity challenges" are sustained "when a warrant does not specifically state what crime the search is being conducted to find evidence of or" if "the search is not limited to that

particular enumerated crime." (Clark's Br. 23.) He relies on *United States v. Galpin*, 720 F.3d 436, 439 (2nd Cir. 2013), where the court held that the warrant lacked particularity because it was not limited to "evidence of child pornography but expanded its breadth" to allow police to search for sex offender "registration offenses in general." (Clark's Br. 23.) Clark argues that here, the warrant's provision allowing police to search for evidence of "possible exploitation, sexual assault and/or enticement of children" lacked the requisite particularity, because the offense of possession of child pornography "is a narrow subset of child exploitation related crimes" and "does not equate to sexual assault of child." (Clark's Br. 23–24.) He further contends that the warrant improperly authorized police to search for evidence "far beyond simply child pornography and in effect, allows officers to rummage for whatever they desire." (Clark's Br. 23–24.) Clark is wrong.

The circuit court correctly concluded that the warrant's terminology authorizing the search of Clark's computer and cellphone for "language, images, or visual depictions representing the possible exploitation, sexual assault, enticement of children" properly described "what child pornography is." (R. 60:11.) It was "typical" for such a warrant in a child pornography investigation to authorize the search for such evidence on electronic devices "when there is an allegation that someone is downloading child pornography." (R. 60:11–12.) The search warrant did not lack particularity because it authorized the search for evidence of the crime Clark had been charged with—possession of child pornography—and the court issued it based on probable cause that the search would uncover evidence of this crime.

Finally, Clark contends that "due to this overbroad language," police improperly "believed they had the authority to seize a firearm." (Clark's Br. 24.) But if seizing the firearm exceeded the scope of the warrant, the circuit court correctly

concluded that it did not provide "a basis to strike down the entire warrant." (R. 60:15.) Even if there was no probable cause to search for handguns, that evidence was not used to charge Clark with a crime. The remedy would simply be to strike the portion of the warrant: "those severable phrases and clauses that are invalid for lack of probable cause." *Sveum*, 328 Wis. 2d 369, ¶ 51 (citation omitted). But "the other portions of the order remain." *Id.* (citing *State v. Noll*, 116 Wis. 2d 443, 445, 343 N.W.2d 391 (1984)). Therefore, even if the search for and seizure of handguns exceeded the scope of the warrant, the remainder of the warrant was facially valid, based on probable cause to search for child pornography on Clark's person, his cellphone, computers and devices in his home, and the vehicles at the residence.

In sum, the warrant was not overly broad or lacking particularity with respect to the search and seizure of Clark, his cellphone, and the devices, computers, and vehicles belonging to both Clark and his parents. And, any improper or overbroad portions of the search warrant that did not result in the recovery of any incriminating evidence are severable and do not invalidate the entire warrant. *Sveum*, 328 Wis. 2d 369, ¶ 51. But the portions of the warrant that were supported by probable cause of possession of child pornography—Clark's cell phone and computers that were searched and where child pornography was found—would remain. *Id.* The circuit court correctly upheld the search warrant and denied suppression. This Court should affirm.

D. Any error in denying suppression of evidence seized pursuant to the warrant was harmless.

The harmless-error rule applies not only to appellate review of convictions obtained after trials, but also to appellate review of convictions obtained after a guilty or no-contest plea. *See State v. Armstrong,* 225 Wis. 2d 121, 121–22,

591 N.W.2d 604 (1999). Because Clark pled guilty to possession of child pornography, he is only entitled to withdraw his plea if the error in denying suppression was not harmless: if there was a "reasonable probability that, but for the trial court's failure to suppress the disputed evidence, [the defendant] would have refused to plead and would have insisted on going to trial." *State v. Semrau*, 2000 WI App 54, ¶ 26, 233 Wis. 2d 508, 608 N.W.2d 376. To determine if the error in denying suppression was harmless, this Court considers several factors, including the strength of the state's case, the comparative weakness of the defense case, the defendant's incentive for pleading guilty, and the thoroughness of the plea colloquy. *Id.* ¶ 22; *State v. Rockette*, 2005 WI App 205, ¶¶ 27–31, 287 Wis. 2d 257, 704 N.W.2d 382. Here, if any of the warrant's provisions violated Clark's constitutional rights, any error in denying suppression was harmless for several reasons.

First, because the provisions of the warrant requiring passcodes and biometric information to unlock devices were never executed, there was no incriminating evidence obtained as a result. Thus, Clark cannot show that he would not have gone to trial if the evidence obtained as a result of those provisions was suppressed. Second, the State's case against him that he possessed child pornography was strong, based on the evidence of child pornography obtained as a result of execution of the search warrant to download the images from his phone and computer, but not as a result of the provisions that he alleged were overbroad and lacked particularity that allowed the search of his parents' devices, property and vehicles. In other words, the child pornography images found on Clark's cellphone and computer were not obtained as a result of the disputed provisions of the warrant. Third, Clark cannot show that he would not have pled and would have gone to trial because he had a strong incentive to plead guilty. In exchange for his agreement to plead to one count of possession

of child pornography, the State agreed to dismiss two other counts, which greatly reduced his exposure. (R. 79; 94:2–3.) During the thorough colloquy, Clark said he understood his plea, his rights, and the elements of the crime, and agreed that he committed the offense of possession of child pornography. (R. 94:5–18.) Based on all these factors, the record demonstrates that any error by the court denying suppression based on the Clark's contention the warrant's biometrics provisions were invalid and that the warrant was overbroad and lacked particularity was harmless.

E. If the warrant was partially invalid, the exclusionary rule does not apply because officers relied on the search warrant in objectively reasonable good faith.

Clark incorrectly assumes that a decision by this Court invalidating the provisions of the warrant he disputes mandates exclusion of the child pornography seized and suppression of his statement voluntarily providing his passcode. However, if the court had concluded that the warrant's provisions were unconstitutional as he claimed, this would not automatically trigger the exclusionary rule's application to the evidence seized, if the officers acted in good faith reliance on a facially valid warrant. *United States v. Leon*, 468 U.S. 897, 922 & n.23 (1984). Because the circuit court held that the search warrant was valid, it did not address the good faith exception to the exclusionary rule. On appeal, Clark argues that the exclusionary rule applies because the entire warrant was invalid as overbroad and lacking particularity, and that the good faith exception is inapplicable. (Clark's Br. 27–29.) Clark's argument fails.

The Fourth Amendment to the United States Constitution "contains no provision expressly precluding the use of evidence obtained in violation of its commands." *Arizona v. Evans*, 514 U.S. 1, 10 (1995). Rather, courts exclude such evidence pursuant to a judicially created rule

designed to deter future Fourth Amendment violations by police. *See id.* at 11–15. Because the exclusionary rule is a judicially created deterrent rather than a right, it is not normally applicable to judicial errors because a judicial officer has no stake in the outcome of any particular case. *Leon*, 468 U.S. at 917. "Thus, the threat of exclusion of evidence could not be expected to deter such individuals from improperly issuing warrants, and a judicial ruling that a warrant was defective [is] sufficient to inform the judicial officer of the error made." *Illinois v. Krull*, 480 U.S. 340, 348 (1987). Exclusion is "warranted only where there is some present police misconduct, and where suppression will appreciably deter that type of misconduct in the future." *State v. Burch*, 2021 WI 68, ¶ 17, 398 Wis. 2d 1, 961 N.W.2d 314.

The "good-faith" exception to the exclusionary rule is derived from these principles. The exception provides that the exclusionary rule does not apply when police act with "objectively reasonable reliance" on a warrant that is later determined to be invalid. *Leon*, 468 U.S. at 922 & n.23. Courts should not apply the good-faith exception if: (1) the court "was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth"; (2) the court "wholly abandoned [its] judicial role in the manner condemned" by the Court in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979)[2];

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[2] *In Lo-Ji Sales*, police obtained an open-ended search warrant authorizing "the seizure of '[t]he following items that the Court independently [on examination] has determined to be possessed in violation of [obscenity laws],'" but no items were listed. *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 321–22 (1979). Instead, the warrant-issuing judge accompanied the police to the store to be searched, participated in the search himself, and told the police which items to seize. *Id.* at 322–23. By essentially acting as an officer conducting the search, the warrant-issuing judge failed to "manifest that neutrality and detachment demanded of a judicial officer." *Id.* at 326.

(3) "no reasonably well trained officer should rely on the warrant" because the affidavit was "so lacking in indicia of probable cause"; or (4) the warrant was "so facially deficient" that "the executing officers cannot reasonably presume it to be valid." *Leon*, 468 U.S. at 923 (citation omitted). "[U]nder *Leon*'s good-faith exception, [the Court has] 'never applied' the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct." *Davis v. United States*, 564 U.S. 229, 240 (2011) (citation omitted).

The Wisconsin Supreme Court adopted the good-faith exception to the exclusionary rule under article I, section 11 of the Wisconsin Constitution, with two additional requirements. *State v. Eason*, 2001 WI 98, ¶¶ 63, 66, 74, 245 Wis. 2d 206, 629 N.W.2d 625. First, "the State must show that the process used attendant to obtaining the search warrant included a significant investigation." *Id.* ¶ 63. Second, the warrant must have been "review[ed] by a police officer trained in, or very knowledgeable of, the legal vagaries of probable cause and reasonable suspicion, or a knowledgeable government attorney." *Id.*

Here, the record shows that the officers who executed the search warrant relied in good faith on the warrant that was approved by a judge. Clark does not claim that the warrant was issued based on false information, that the issuing court was misled by false information, that the issuing court "wholly abandoned [its] judicial role," or that the affidavit was "so lacking in indicia of probable cause" that no reasonable officer would presume it to be valid. *Leon*, 468 U.S. at 923 (citation omitted). Rather, he claims that the warrant was invalid and that the good faith exception did not apply because Detective Hull, based on his training, should "have known the items he requested were too broad and lacked particularity," and that suppression was an appropriate remedy "to deter police misconduct." (Clark's Br. 28–29.)

Clark's contention that the warrant was so facially deficient that the executing officers could not reasonably presume it to be valid is unsupported. He entirely failed to show egregious deficiencies, such as those in *Groh v. Ramirez*, 540 U.S. 551 (2004), where the warrant to search a home for weapons simply said, "'single dwelling residence . . . blue in color.' In other words, the warrant did not describe the items to be seized *at all*." *Id.* at 557–58. This is the type of obvious facial deficiency that leads to the application of the exclusionary rule. *Id.* at 565; *Leon*, 468 U.S. at 923. In contrast, here the warrant described in detail the residence to be searched, including photographs of the apartment building and the front door, and of the vehicles registered to the residents, Clark and his parents. (R. 40:1–2.) It also contained a careful list of the items to be seized and details of what the officers were authorized to do in connection with the search warrant. (R. 40:2–4.) The warrant was not so facially deficient that the officers were culpable for relying on it because they could not reasonably presume it to be valid. *See Leon*, 468 U.S. at 923.

Additionally, the warrant was issued after a "significant investigation" and review by a trained and knowledgeable police officer. *Eason*, 245 Wis. 2d 206, ¶ 63. Detective Hull testified about his thorough police investigation, based on cyber tips about pornographic images on Clark's Tumblr account, which linked the account to Clark and identified the IP address as connected to Clark's residence. (R. 50:11–13.) Hull had at least 10 years of experience as a detective. (R. 50:22.) Clark admits that Hull had significant training as a police officer: he "presumably has several years of experience in law enforcement prior to his promotion to a detective in 2012" and had been part of the special victims unit investigating internet crimes against children "for about five years." (Clark's Br. 29.) Clark's claim that, if the warrant was invalid, the good faith exception

should not apply because it "promotes further police misconduct" and that the exclusionary rule should apply based on "Hull's knowledge, combined with the warrant's blatant lack of particularity," is meritless. (Clark's Br. 30.)

In sum, even if this Court determines that the warrant was defective, the evidence is not subject to exclusion because the officers acted in good faith. *Krull*, 480 U.S. at 348. Because it is the State's burden to prove that the good-faith exception to the warrant requirement applies, *Eason*, 245 Wis. 2d 206, ¶ 63, if this Court finds the warrant invalid and disagrees that the current record supports the good faith exception, the proper remedy is not suppression, but rather remand for the State to introduce evidence of good faith regarding the search of Clark's computer and cellphone for child pornography.

II. Clark was not entitled to suppression of his voluntary statement of his passcode after he invoked his right to counsel, because it was not the result of interrogation or coercion.

A. A suspect's Fifth and Sixth Amendment rights are not violated when the suspect invokes the right to counsel, but then voluntarily makes an incriminating statement, not as a result of any interrogation or its functional equivalent.

Miranda[3] warnings inform a suspect who is in custody both of the Fifth Amendment right against self-incrimination, which includes the right to remain silent, and the Sixth

[3] *Miranda* warnings inform the suspect of "the right to remain silent, that anything" the suspect "says can be used against him [or her] in a court of law, that" the suspect "has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning." *State v. Harris*, 2017 WI 31, ¶ 13, 374 Wis. 2d 271, 892 N.W.2d 663 (quoting *Miranda v. Arizona*, 384 U.S. 436, 479 (1966)).

Amendment right to have a lawyer present. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966); *State v. Santiago*, 206 Wis. 2d 3, 19, 556 N.W.2d 687 (1996). The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. Once an accused invokes his right to counsel during a custodial interview, any custodial interrogation must cease until counsel has been made available to the accused, "unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona* 451 U.S. 477, 485 (1981). A custodial interrogation is "express questioning or its functional equivalent." *See Rhode Island v. Innis*, 446 U.S. 291, 300–01 (1980). Express questioning "does not encompass every inquiry directed to the suspect;" instead, it "covers only those questions 'designed to elicit incriminatory admission.'" *State v. Harris*, 2017 WI 31, ¶ 16, 374 Wis. 2d 271, 892 N.W.2d 663 (citation omitted). The "functional equivalent" of a police interrogation includes any "words or actions . . . (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.* at ¶ 19.

Whether an officer's words or actions constitute the functional equivalent of an interrogation turns on an objective foreseeability test: if an objective observer could foresee that the officer's conduct or words would elicit an incriminating response and "reasonably have had the force of a question on the suspect, then the conduct or words would constitute interrogation." *Harris*, 374 Wis. 2d 271, ¶ 22 (citing *State v. Cunningham*, 144 Wis. 2d 272, 278, 423 N.W.2d 862 (1988)). Courts must consider "the entire context within which the dialogue took place." *Harris,* 374 Wis. 2d 271, ¶ 23. To be considered an interrogation or its functional equivalent of express questioning, the officer's statements or conduct "must exert a compulsive force on the suspect." *Id.* ¶ 30.

"'Interrogation' 'must reflect a measure of compulsion above and beyond that inherent in custody itself.'" *State v. Hambly*, 2008 WI 10, ¶ 46, 307 Wis. 2d 98, 745 N.W.2d 48 (citation omitted). Verbally summarizing the State's case against the suspect is not necessarily compulsive enough to constitute the functional equivalent of express questioning. *Id.* ¶ 57.

Whether the officer "should have known" that the suspect "would suddenly be moved to make a self-incriminating response" depends on the facts; merely because an officer's comments might strike a "responsive chord" with a suspect or the suspect was subjected to "subtle compulsion," is not enough to find the functional equivalent of interrogation. *Innis*, 446 U.S. at 303. "Volunteered statements of any kind are not barred by the Fifth Amendment." *Arizona v. Mauro,* 481 U.S. 520, 529 (1987) (citation omitted). Even if the officer may hope the suspect will incriminate himself or herself, this does not by itself render the officer's words and actions an "interrogation." *Id.*

B. The court properly denied suppression because Clark's constitutional rights were not violated when, after he asked for counsel, and without any interrogation or coercion by police, he voluntarily said his iPhone passcode out loud.

Given the specific and extensive factual findings made by the postconviction court, Clark's claim that police violated his constitutional rights because they were interrogating him after he invoked his right to counsel and said his passcode out loud is without merit. Clark's arguments to the contrary fail.

Clark admits that at the suppression hearing, Hull testified that he "reinitiated contact to explain the warrant and to explain the biometric provision" and that Hull gave Clark his phone to "allow Clark the opportunity to text his boss that he would not be at work that day." (Clark's Br. 30–

31.)[4] But Clark argues that Hull's testimony that he did not tell Clark that he had to provide his passcode was "unreliable," that "Hull's intention for reinitiating contact was to have Clark unlock the iPhone," and that Hull's testimony that he allowed Clark to call his boss and did not expect Clark to recite his passcode was "not true" and was "unreasonable." (Clark's Br. 31.) Clark ignores the court's credibility findings: that Hull testified that the second contact with Clark was not to reinitiate the interrogation after Clark said he wanted an attorney, but rather to check on him and to explain the warrant, including the biometric provision, which he was allowed to do and was "extremely common," and that Hull did not ask Clark for his passcode. (R. 60:18, 21.) The court found that the officers credibly testified that Hull did not ask Clark to provide his passcode and in fact, "explicitly" told Clark "that he did not need to provide the passcode," and Clark voluntarily said his passcode out loud when he entered it. (R. 60:20–21.) The court's findings of fact and credibility determinations are to be given great deference and are not clearly erroneous. *Jenkins,* 303 Wis. 2d 157, ¶ 33.

Despite the court's findings, Clark argues that "Hull should have known that Clark would then incriminate himself." (Clark's Br. 31.) He claims that this case is distinguishable from *Innis*, 446 U.S. 291, where the court denied suppression of the defendant's confession, holding that it was voluntary and not the result of interrogation or its functional equivalent, because there, the officers did not know "that their conversation was reasonably likely to elicit an

[4] Clark erroneously claims that Hull testified that he reinitiated contact with Clark to "position his cellphone in front of his face to unlock the phone[.]" (Clark's Br. 31.) It was Detective Ware, not Hull, who testified that police recontacted Clark to give him "a copy of the warrant and then position his cellphone in front of his face to unlock the phone which was allowed by the warrant." (R. 50:60.)

incriminating response" or that the suspect was "unusually disoriented or upset." *Id.* 302–303. Clark insists that here, Hull recontacted Clark with "the intention of unlocking the cellphone," that Clark was "upset" and "likely nauseated," and that Clark's "perspective" was that "he must unlock his phone, so he did so," which "was not the 'subtle compulsion' noted in *Innis*." (Clark's Br. 32.)

Clark's argument is flawed because it relies on his own findings of fact, not on the circuit court's findings. Based on the testimony and its credibility determinations, the court concluded that Hull did not intend for Clark to provide his passcode and that Hull did not engage in conduct or words that he "should have known were reasonably likely to invoke an incriminating response" from Clark. (R. 60:18–19.) When Clark requested his phone to contact his boss, Hull "accommodated this" but "stayed in close proximity" in order "to prevent possible evidence tampering," but not to obtain Clark's passcode. (R. 60:19–20.) There was no evidence that "Hull knew or that it was reasonably likely," after he handed Clark his phone, that "Clark would state his passcode out loud." (R. 60:20.) Hull did not ask Clark to provide his passcode and in fact, told him more than once that he did not have to provide it; thus, the court determined that "there was no interrogation when Mr. Clark said his cellphone . . . passcode, not once but twice." (R. 60:21–22.) The court properly concluded that police were not interrogating Clark, nor was there the "functional equivalent" of an interrogation, when Clark voluntarily stated his passcode. (R. 60:21.)

Fifth, Clark argues that his statement providing his passcode was an involuntary, "incriminating statement" because it was procured by coercive police conduct. (Clark's Br. 33–34.) He contends that the "facts contributed to render Clark's statement involuntary," that Hull testified that "he made contact with Clark to unlock the iPhone," that Clark "stating his passcode aloud is a foreseeable consequence" of

Hull "informing him that he must provide biometric data to unlock his phone," and that "Hull signaled that Clark did not have the right to not incriminate himself." (Clark's Br. 34–35.) Clark mischaracterizes Hull's testimony. Hull testified that he recontacted Clark to check on him and to explain the search warrant's biometric provision, not to have him unlock his iPhone. (R. 50:23–24.) When Clark asked if he had to provide Hull his passcode, Hull unequivocally responded, "[n]o, you don't." (R. 50:23–25.) Based on this testimony, the court concluded that Clark's statement providing his passcode was a "spontaneous incriminating statement[ ]" and there was no compulsion by police because Clark voluntarily provided his passcode when he said it out loud "not in response to questioning." (R. 60:20–21.) Clark was not coerced into providing his passcode because "[n]o one asked him for it. He was told he did not have to provide it. He even asked several times if he had to provide it and he was told no." (R. 60:22–23.) While Clark may "regret" that he volunteered his passcode, "there was no interrogation" and no "evidence of coercion." (R. 60:23.) The court's findings that supported its conclusion that officer were not interrogating Clark and there was no coercion are not clearly erroneous. *See In re Disciplinary Proc. Against Boyle*, 2015 WI 110, ¶ 41, 365 Wis. 2d 649, 872 N.W.2d 637 (citation omitted) (factual findings are clearly erroneous only when "they 'strike us as wrong with the force of a five-week-old, unrefrigerated dead fish.'")

In sum, the circuit court properly concluded, based on its factual findings that were not clearly erroneous, that Hull's voluntary statement of his passcode was not in response to an interrogation or its functional equivalent and it was not coerced. Thus, the officers did not violate Hull's constitutional rights.

C. Even if the court erred by not suppressing Clark's statement of his passcode, the State would have inevitably discovered the information and any error was harmless.

The court did not err by denying suppression of Clark's voluntary statement saying his passcode out loud. However, if it did, suppression is not appropriate because the State would have inevitably and lawfully discovered his passcode. The inevitable discovery doctrine precludes suppression if the evidence sought to be suppressed inevitably "would have been discovered by lawful means," which the prosecution must prove by a preponderance of the evidence. *Nix v. Williams*, 467 U.S. 431, 444 (1984); *State v. Jackson*, 2016 WI 56, ¶¶ 47, 66, 369 Wis. 2d 673, 882 N.W.2d 422. This doctrine is based on the commonsense notion that, since the evidence would have been discovered by lawful means, the deterrence rationale behind the exclusionary rule is not furthered and exclusion adds nothing to the integrity or fairness of the criminal trial. *Id.* ¶¶ 51–52. Suppression under these circumstances would, indeed, put the State in a *worse* position than it would have been without the police misconduct. *Id.*; *Nix*, 467 U.S. at 447. The good or bad faith of the officer who illegally obtained the evidence is irrelevant so long as the evidence inevitably would have been discovered by lawful means. *Jackson*, 369 Wis. 2d 673, ¶ 67.

At the suppression hearing, the digital forensics examiner testified that as part of her duties at the Department of Justice Division of Criminal Investigation, she on a frequent basis worked with law enforcement related to search warrants. (R 50:83–84.) In that role, "every day" she extracted data from cellphones, based on the warrants that allowed her to download the cellphone's contents. (R. 50:84.) Sometimes she had the cellphone's passcode, which made it easier, but if she did not, she had a decryption tool called "GrayKey" that she could connect to the phone to find the

passcode. (R. 50:85–86.) She assisted the police with the forensic examination of Clark's iPhone pursuant to the search warrant and was provided with Clark's passcode. (R. 50:88–89.) However, if she had not had the passcode, she would have been able to extract and download data from Clark's phone using the "GrayKey" software. (R. 50:90.) Based on this unrefuted testimony, the forensic examiner lawfully had possession of the phone through the search warrant and could have used the decryption tool to locate the passcode, if it had not been provided to her. Thus, even if Hull obtained Clark's passcode in violation of the Sixth Amendment, because the State would have inevitably, lawfully obtained it through decryption, suppression of Clark's statement is not warranted.

Moreover, even if the court should have suppressed Clark's statement, it was harmless error. Clark would have pled guilty even if his statement of his passcode was suppressed, because the State would have been able to obtain the evidence of child pornography by other lawful means. Based on the *Semrau* factors outlined in Section I.D above, it was not reasonably likely that Clark would not have pled guilty if his statement of his passcode had been suppressed. *Armstrong*, 225 Wis. 2d at 121–22. Thus, the court's order denying suppression of Clark's passcode does not entitle Clark to plea withdrawal because it was not reasonably probable that he "would have refused to plead and would have insisted on going to trial." *Semrau*, 233 Wis. 2d 508, ¶ 26.

Finally, Clark seeks an order that this Court "reverse the circuit court's orders denying his motions" to suppress. But he does not specify what relief he is requesting. Because Clark pled guilty, if this Court concludes that the court erred when it denied suppression, that the inevitable discovery doctrine does not apply, and that any error was not harmless, this Court should remand for further proceedings, such as a plea withdrawal motion.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the circuit court's denial of Clark's suppression motion and the judgment of conviction.

Dated this 21st day of September 2023.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,618 words.

Dated this 21st day of September 2023.

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 21st day of September 2023.

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