STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2023AP396-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

LOGAN T. KRUCKENBERG ANDERSON,

Defendant-Respondent.

APPEAL FROM AN ORDER SUPPRESSING
A CONFESSION ENTERED IN
THE GREEN COUNTY CIRCUIT COURT,
THE HONORABLE THOMAS J. VALE PRESIDING

BRIEF OF THE PLAINTIFF-APPELLANT

JOSHUA L. KAUL
Attorney General of Wisconsin

LISA E.F. KUMFER
Assistant Attorney General
State Bar #1099788

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2796
(608) 294-2907 (Fax)
kumferle@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

ISSUE PRESENTED

Two hours after her birth, Defendant-Respondent Logan T. Kruckenberg Anderson[1] put his infant daughter, Heather, in a backpack, and carried her into the woods. He placed her in a hollow log and Heather started to cry. Kruckenberg then took a .22 pistol he had stolen and shot Heather twice, execution-style, in the head. He buried her body in some snow and walked away. When asked by Heather's mother and her mother's frantic family where Heather was four days later, Kruckenberg lied and told everyone that he gave the baby to a friend he knew through SnapChat to take to an adoption agency.

We know this because while law enforcement was trying to track down any trace of this friend or the infant, Kruckenberg told them that he'd actually left Heather in the snow to die hours after her birth, and agreed to lead the officers to where he left her in the woods. He did so during an amicable, noncustodial interview that he freely consented to, and during which Kruckenberg had repeatedly been reminded that he was free to leave and was not under arrest, was asked open-ended questions, and had been provided water, bathroom breaks, a trusted adult present, and complete freedom of movement. And the next day, after Heather's body was recovered and Kruckenberg was confronted with the fact that the gunshot wounds were located in her tiny skull, Kruckenberg finally admitted to law enforcement that he shot her.

The circuit court, however, suppressed Kruckenberg's initial admissions that he abandoned the infant in the snow to die and his subsequent admission that his previous

[1] Kruckenberg Anderson typically goes by "Kruckenberg" only as his last name, (R. 111:2), and, for brevity, the State will do the same.

assertions about the SnapChat friend were lies, concluding that despite the very open nature of the settings, discussions, and circumstances, Kruckenberg was in custody during these interviews and that his ability to resist questioning was overborne by law enforcement. But the circuit court's legal determination of custody was based on what it thought Kruckenberg and the officers subjectively believed and a characterization of the circumstances that is simply not borne out by the facts, and it reached its involuntariness legal conclusion: (1) without a finding of any police misconduct; (2) by applying a non-legal definition of coercion given by a psychologist; (3) by considering things said to Kruckenberg by a third party; and (4) based upon opinions about an interrogation technique the officers did not use, but that this Court has already found non-coercive, in any event.

This decision was error. This Court should reverse the decision of the circuit court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case deals only with the application of settled law to the facts, which will be adequately addressed on briefs.

STATEMENT OF THE CASE

Around 1:30 a.m. on January 9, 2021, Green County Sheriff's Deputy Derek Whitcomb responded to a call from Mark P.[2], Lauren P.'s father, who said that his family had just learned that 14-year-old Lauren gave birth in his residence

[2] Because several relevant people in this case are juveniles, in the interests of maintaining their confidentiality, the State uses pseudonyms for all of the non-law-enforcement persons apart from the defendant.

four days earlier. (2:2; 110:11–78.) Mark reported that Lauren's 16-year-old boyfriend, Kruckenberg, had apparently taken the baby away and the baby had not been seen since. (2:2; 110:2.) Nearly all of the following was captured on video as an intense effort to find the infant ensued:

Whitcomb and Deputy Zachary Degner spoke with Kruckenberg, Lauren, and Lauren's family. (110:2–13, 49.) Lauren had named the baby "Heather." (110:69.) Kruckenberg said he gave Heather to his friend "Tyler" a few hours after her birth. (2:2; 110:5, 16.) He claimed Tyler was a roughly 22 year old mixed race male living in Brodhead who Kruckenberg met through SnapChat, and whose last name Kruckenberg did not know. (2:2; 110:5–6, 14–15.) Kruckenberg said he met Tyler at a park in Albany and gave him 60 dollars to take the baby to an adoption agency in Madison. (2:2; 110:6–7, 16.) He said Tyler had blocked him on SnapChat after Lauren's family demanded that Kruckenberg contact him. (2:2; 68:2; 110:6, 17.) The officers said this sounded extremely odd, but Wisconsin's "safe haven law" allows a person to surrender an infant at safe locations within 72 hours of birth, so if this was true, there was no crime committed; however, they needed to make sure the baby was safe. (110:19; 111:13.) Whitcomb returned Kruckenberg to his mother's house around 6:00 a.m. (151:3.)

About eight hours later, Detective Christopher Fiez and Albany Police Chief Robert Ritter went to Delores F.'s house, with whom Kruckenberg lived during the week, seeking more information. (124:24–25; 126:17; 151:3.) They asked Kruckenberg if he was willing to answer questions at the Albany PD, and he agreed. (126:18–19.) Fiez clarified that Kruckenberg was not in any trouble or under arrest. (112:9.) Kruckenberg told Ritter the same story about Tyler. (112:11–42.) Ritter beseeched Kruckenberg to tell them if something else happened and to help them locate Heather or "Tyler." (112:33–36.) Kruckenberg said he was telling them

everything he knew. (112:34.) Delores picked Kruckenberg up from the station around 5:00 p.m. (126:81.)

As no trace of "Tyler" or the newborn was found, several officers were dispatched to Delores's house to ask permission to search it. (134:6.) This included DCI Agent James Pertzborn and FBI Agent Brian Baker, who asked if Kruckenberg was willing to answer some follow-up questions at the Brodhead PD; it was less crowded and had a dedicated recorded interview room. (124:8–18; 193 (Jan. 09 video) 45:14–46:00.) Kruckenberg agreed and requested that Delores come too. (124:16–17.) The agents said "[a]bsolutely" and Delores got dressed while Kruckenberg went with Pertzborn and Baker, in an unmarked Chevy Tahoe, to Brodhead PD. (124:17–19; 193 (Jan. 09 video) 02:16–3:00.) On the way, Pertzborn said they would wait for Dolores before talking about the baby, that Kruckenberg was not in custody, that he was free to leave, and he did not have to answer any questions. (124:23–24.) Kruckenberg said he would talk to anyone who would help find the baby. (124:24.) Once at Brodhead PD, they chatted about innocuous topics while waiting for Delores. (115:1–25; 190 12:07:08–12:40:40.)

Delores arrived around 12:40 a.m., January 10th. (115:25; 190 12:40:16.) Pertzborn reaffirmed that he was with DCI, Kruckenberg was not obligated to stay, and said Delores should feel free to "jump in at any time." (190 12:42:00–12:42:17.) Pertzborn reiterated that Kruckenberg "is not under arrest. He does not have to talk to me. He can leave at any time. You guys can pick up and leave if you would like. Alright? You understand that?" (190 12:42:09–12:42:22.) Kruckenberg said he understood, and Delores said, "I recommend talking to them." (190 12:42:24.) Pertzborn offered to answer any questions from Kruckenberg or Delores, and neither had any. (190 12:43:18–12:43:42.)

Pertzborn asked if Kruckenberg knew why Pertzborn needed to talk to him, and Kruckenberg said yes, "because we

have no idea where that child is," and Pertzborn said "no, some of us do, but what I want you to do is talk to me. Alright? And walk me through this. Alright? How we got to this point." (190 12:45:10–12:45:30.) Kruckenberg said he bought Lauren a pregnancy test a few weeks previously. (190 12:46:05–12:50:14.) Kruckenberg said they discussed what to do because they did not want to keep the baby and Lauren did not want anyone to know she gave birth, including her parents. (190 12:49:01–12:50:30.) He said they landed on adoption, and he texted Tyler. (190 12:51:07–12:51:22.) Pertzborn stopped and asked for details about Tyler; Kruckenberg maintained that he met Tyler through SnapChat and did not know his last name, that Tyler was mixed race and about 23 to 24 years old, heavyset, lived in Brodhead with his mixed-race girlfriend, drove a Chevy Equinox, and that they had played darts and pool together about 18 times. (190 12:51:23–12:55:13.) Delores looked incredulous, and Pertzborn asked Delores if she'd ever heard of or seen Tyler; she said no. (124:40; 190 12:55:15–12:55:20.)

Pertzborn said that Kruckenberg was not being truthful, and needed to tell him the truth or he could not help him. (190 12:55:28–12:56:01.) Delores also repeatedly urged Kruckenberg to tell the truth and that she, too, could not help him otherwise. (190 12:57:20–12:59:41.) Pertzborn said no one contacted in Brodhead had ever heard of Tyler or his girlfriend or had ever seen their vehicle. (190 12:58:35–12:58:47.) He told Kruckenberg they were going to wipe the slate clean and start over. (190 12:59:00–12:59:20.) Pertzborn told Kruckenberg that he was not a bad person and asked "[c]an we just start over and do the right thing here?" (190 12:59:42–1:00:57.)

Kruckenberg then asked if he could talk to Pertzborn, one-on-one. (190 1:00:58–1:01:16.) Pertzborn said yes and thanked Kruckenberg. (190 1:01:17.) Delores and Agent Baker left the room. (190 1:01:20–1:01:45.) Pertzborn gave

Kruckenberg another water and shook Kruckenberg's hand, told him he was going to help him through this and he knew Kruckenberg was scared, but they would "just work on fixing it from here." (124:47; 190 1:01:20–1:02:09.) Kruckenberg asked what was going to happen, and Pertzborn said he didn't know, but he'd be able to write a report saying Kruckenberg was apologetic. (190 1:02:10–1:02:32.) Pertzborn then told Kruckenberg that "[w]e need to do a couple things. We need to bury, give that precious child of yours, a proper burial." (190 1:02:33–1:02:41.) Kruckenberg said, "[a] burial. Yeah." (190 1:02:41.) Pertzborn said they needed to recover her body, and Kruckenberg asked him to open Google maps. (190 1:02:42–1:03:02.)

Kruckenberg described a park in Albany and said he and a "friend" buried Heather in the snow. (190 1:03:02–1:07:26.) Pertzborn then had Kruckenberg walk him through the morning of the 5th. This time, Kruckenberg claimed his friend "Alex" was involved, but again could not give a last name. (190 1:09:12–1:09:56.) Kruckenberg stopped and asked if he could give Delores a hug, and Pertzborn replied, "of course." (190 1:10:00–1:10:07.) Delores hugged Kruckenberg and told him everyone still loved him. (190 1:10:08–1:11:03.) Kruckenberg took a bathroom break, and Baker asked if he could return. Kruckenberg said yes. (190 1:11:14–1:13:57.)

Kruckenberg said when the baby arrived, they "just needed it out of our lives." (190 1:18:42–1:26:20.) He put the baby in a backpack and started walking when he ran into Alex. (190 1:29:24–1:34:04.) He asked Alex to drive him to Madison to surrender the baby, but Alex refused and suggested Kruckenberg abandon her in the woods. (190 1:34:04–1:41:43.) Kruckenberg said he then walked into the woods, took Heather out of the backpack and laid her in a hollow log, and she began to cry. (190 1:41:43–1:42:17.) He said he covered her with snow and left, knowing she would die. (190 1:42:14–1:43:35.)

Pertzborn thanked him, and he hoped Kruckenberg felt better telling the truth. (190 1:45:10–1:45:40.) He asked Kruckenberg to take them to Heather's body, and Kruckenberg said he would as long as he did not have to see her. Pertzborn said that was fine. (190 1:45:35–1:45:40.) Kruckenberg asked if he could ride with Delores and Pertzborn said no, but clarified that Kruckenberg was not in custody; it was so Kruckenberg could direct him to the right location, and Pertzborn asked if that was alright. (190 1:45:47–1:46:17.) Kruckenberg replied, "It's perfectly fine, I'm perfectly fine with it." (190 1:46:06–1:46:17.) The interview ended and Pertzborn thanked Kruckenberg again and asked if he was okay, and Kruckenberg replied that he was. (190 1:46:28–1:46:32.)

Kruckenberg got back into the front passenger seat of the Tahoe and directed Pertzborn to Ruben's Cave Drive. (124:48–49.) Kruckenberg located his footprints in the snow. (124:49.) Pertzborn and other officers followed Kruckenberg's footprints until they located Heather's body. (124:51; 193 (Jan. 10 video) 00:00–07:07, 12:15; 194.) Pertzborn returned and told Kruckenberg he had some further questions, but again that he was not under arrest and was under no obligation to talk. (124:51–52.) Kruckenberg agreed, and they went to the Albany PD. (124:52.) Pertzborn asked if Kruckenberg wanted Delores to join them, and Kruckenberg said no; he found it too difficult to talk about Heather in front of Delores. (124:53.)

Once there, they entered an employee break room and sat around a table; Kruckenberg chatted about his favorite sodas and used the restroom. (124:54; 195 AMBA0197 00:00–04:39.) Pertzborn had Kruckenberg confirm that he understood the door was unlocked, that he knew he was not in custody, that Kruckenberg had voluntarily been speaking with him, and never felt pressured or threatened. (195 AMBA0198 00:00–01:33.) Kruckenberg then told the officers

that he had taken the baby to the woods to get rid of her, that he "kind of figured she was going to die," and that everything he'd said about "Tyler" was a lie. (116:20,23–25; 195 AMBA0196–203.) He claimed, though, that he did not physically harm Heather. (116:23; 195 AMBA0203 03:50–03:55.) About 40 minutes later Green County Sheriff's Officers decided to arrest Kruckenberg. (196:23–24.)

Officers spoke with Kruckenberg during a *Mirandized* interview at the Rock County Juvenile Detention Center after Heather's body was examined. (117:1; 192 (video 5) 00:07–05:22.) Kruckenberg confessed that he actually shot Heather twice in the head. (117:42–47; 192 (video 5) 58:33–1:31:49.) Kruckenberg then said Lauren knew he had a pistol that he had purchased through an app called "Let Go," and Lauren asked him to shoot Heather. (117:43–63, 104; 192 (video 5) 1:13:12–1:57:25.) He said that his stories about both "Tyler" and "Alex" were false. (117:72–74; 192 (video 5) 1:25:40–1:29:45.)

SnapChat records, though, suggested that nothing Kruckenberg had told them about Lauren's involvement was true. (43.) Pertzborn and Agent Brian Hawley thus spoke to Kruckenberg the next day. (118:3–4; 190[3] 21-170-27 View 3 00:47.) After Kruckenberg claimed he left the gun at Lauren's house, Pertzborn told him that his friend Gerald had turned over the firearm. (118:5; 190 21-170-27 View 3 07:23–09:18.) Kruckenberg then admitted he gave Gerald the gun the morning of January 6th, and that he did not buy the gun but stole it from Delores's house. (118:11–12, 19.) Kruckenberg further admitted that it was his idea to shoot Heather. (118:17–19; 190 21-170-27 View 3 37:44–52:20.) And finally, when confronted with his messages with Lauren,

[3] There are three videos on this exhibit of the same interview. The State refers to the third of these and does so by timestamp.

Kruckenberg admitted that: (1) Lauren did not know he was going to shoot the baby; and (2) after he returned from the woods, he lied and said he gave Heather to Gerald's mother to take to an adoption agency. (118:38–40; 190 21-170-27 View 3 00:14:51–02:17:40.)

The State thereafter charged Kruckenberg with one count of first-degree intentional homicide and one count of hiding or burying the corpse of a child. (2:1.) Kruckenberg moved to suppress all of his statements to law enforcement, contending they were all custodial and impermissibly coerced. (83.) The circuit court held a multi-day hearing on the issue at which 11 law enforcement officers, Delores, and a defense-obtained psychologist, Dr. Brian Cutler, testified. (125; 127; 123; 132; 133; 148–150.) Videos of each of law enforcement's contacts with Kruckenberg were also played. (184–195.)

The circuit court found that Kruckenberg was not in custody and gave voluntary statements when talking to officers when they were first investigating between 1:58 a.m. and 6:08 a.m. on January 9th. (196:9–12.) It found the same about the interview Fiez and Ritter conducted at the Albany PD on January 9th. (196:12–16.) And it found that though Kruckenberg was in custody for the January 10th and 11th interviews at the detention center, at both, law enforcement had read Kruckenberg his *Miranda* rights, Kruckenberg voluntarily waived them, and his statements were voluntary. (196:33–34.)

The court found, however, that Pertzborn's initial interview with Kruckenberg at Brodhead PD and subsequent interview at Albany PD after locating Heather's body late January 9th and early January 10th were custodial interrogations conducted without *Miranda* warnings, and that Kruckenberg's statements given during those interviews were involuntary. (196:17–29.) It suppressed the statements given in those interviews. (170.) The State appeals.

STANDARD OF REVIEW

This Court "accept[s] the circuit court's findings of historical fact unless they are clearly erroneous." *State v. Schloegel*, 2009 WI App 85, ¶ 8, 319 Wis. 2d 741, 769 N.W.2d 130. "Whether the facts demonstrate custody for *Miranda* purposes" and whether a person's statements to police were voluntary are questions of law reviewed de novo. *Id.*; *State v. Vice*, 2021 WI 63, ¶ 21, 397 Wis. 2d 682, 961 N.W.2d 1.

"In this case," though, "we have a video-recorded interrogation." *State v. Rejholec*, 2021 WI App 45, ¶ 17, 398 Wis. 2d 729, 963 N.W.2d 121. Where an interrogation is video recorded, this Court is "in the same position as the circuit court to determine what occurred during the interrogation and therefore independently make that determination." *Id.*

ARGUMENT

The circuit court erred in suppressing Kruckenberg's January 10th statements to agent Pertzborn because the interviews were noncustodial and Kruckenberg's statements were voluntary.

A. Kruckenberg was not in custody during the January 10th interviews.

1. A person is in custody for *Miranda* purposes only if their freedom of movement is restricted to a degree associated with formal arrest.

The Fifth Amendment of the United States Constitution requires law enforcement to inform suspects of their rights to remain silent and to have an attorney present

during custodial interrogations.[4] *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). "Custody," however, "is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion." *Howes v. Fields*, 565 U.S. 499, 508–09 (2012). "The test to determine custody is an objective one," and asks, "whether there is a formal arrest or restraint on freedom of movement of a degree associated with a formal arrest." *State v. Lonkoski*, 2013 WI 30, ¶ 27, 346 Wis. 2d 523, 828 N.W.2d 552 (citation omitted). "Stated another way, if 'a reasonable person would not feel free to terminate the interview and leave the scene,' then that person is in custody for *Miranda* purposes." *Id.* (citation omitted). "[T]he reasonable person [standard] through whom [the Court] view[s] the situation for *Miranda* purposes 'must be neutral to the environment and to the purposes of the investigation—that is, neither guilty of criminal conduct and thus overly apprehensive nor insensitive to the seriousness of the circumstances.'" *State v. Morgan*, 2002 WI App 124, ¶ 23, 254 Wis. 2d 602, 648 N.W.2d 23 (citation omitted).

Courts "consider a variety of factors to determine whether under the totality of the circumstances a reasonable person would feel at liberty to terminate an interview and leave." *State v. Bartelt*, 2018 WI 16, ¶ 32, 379 Wis. 2d 588, 906 N.W.2d 684. "The factors include 'the defendant's freedom to leave; the purpose, place, and length of the interrogation; and the degree of restraint' used by law enforcement." *Lonkoski*, 346 Wis. 2d 523, ¶ 28 (citation omitted). That an interview takes place in a law enforcement facility weighs toward custody, "but that fact is not dispositive." *Id.* To determine degree of restraint, the factors include "whether the suspect

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[4] The State does not dispute that Kruckenberg was "interrogated" as contemplated by *Miranda* during these interviews. *See State v. Hambly*, 2008 WI 10, ¶ 46, 307 Wis. 2d 98, 745 N.W.2d 48.

is handcuffed, whether a weapon is drawn, whether a frisk is performed, the manner in which the suspect is restrained, whether the suspect is moved to another location, whether questioning took place in a police vehicle, and the number of officers involved." *Id.* (citation omitted).

"Determining whether an individual's freedom of movement was curtailed, however, is simply the first step in the analysis, not the last. Not all restraints on freedom of movement amount to custody for purposes of *Miranda*." *Fields*, 565 U.S. at 509. Accordingly, if a court "determine[s] that a suspect's freedom of movement is curtailed such that a reasonable person would not feel free to leave," the court "must then consider whether 'the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*.'" *Bartelt,* 379 Wis. 2d 588, ¶ 33 (citing *Fields*, 565 U.S. at 509). "Any interview of one suspected of a crime by a police officer will have coercive aspects to it . . . but police officers are not required to administer *Miranda* warnings to everyone whom they question." *Id.* (citation omitted). "Therefore, '*Miranda* warnings are not required "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect."'" *Id.* (citation omitted). "And finally, 'the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.'" *Id.* (citation omitted).

2. A reasonable person would have felt free to leave the January 10th Brodhead Police Department interview.

Whether treated as a single interview or discrete events—and given the long break in questioning between the Brodhead interview and the Albany interview, the State

believes these should be treated as discrete events—the circuit court erred in finding that Kruckenberg was in custody at any point prior to his formal arrest.

Kruckenberg was not in custody during the January 10th interview at the Brodhead PD. Kruckenberg's freedom of movement was not curtailed in the slightest, and a reasonable, innocent, nearly-17-year-old person in Kruckenberg's position would have felt free to both refuse the interview in the first instance and to terminate the interview and leave.

First, the videos and testimony demonstrate that Kruckenberg went to the Brodhead PD freely and willingly. (124; 133; 148; 190; 193 (Jan. 09).) Pertzborn arrived at Delores's house as part of the team seeking consent to search the house. He was in street clothes other than a body vest that said "police," on it, and no threatening demands were made, no one was physically touched, and no weapon was ever drawn. (193 (Jan. 9).) Though it was around 11:00 p.m., Kruckenberg was awake and playing video games when the officers arrived; he was wearing regular clothes; and he was "immediately engaging," "alert" and "present in the conversation." (123:15; 133:22–23.) The purpose of the interview was made clear: Pertzborn needed to ask some follow-up questions about the missing infant, and Kruckenberg was extremely cooperative, and "[s]aid he was willing to talk to anybody that would help him find his child." (123:16–22.)

Law enforcement had been desperately following any lead to find the missing baby for nearly 24 hours at that point; there was nothing that suggested "arrest" about their wanting to ask follow-up questions to the last person known to see her. Pertzborn asked Kruckenberg if he wanted someone present with him during the interview, and when he asked for Delores, Pertzborn responded, "[a]bsolutely." (123:17–18.) Kruckenberg rode in the front passenger seat of Pertzborn's

unmarked Chevy Tahoe that unlocked from the inside and had no lights or cage in it and with only one other officer present, both in plain clothes. (123:18–27; 196:17.) He was not frisked, handcuffed, or physically restrained before, during, or after the ride. (196:17, 24–25.)

Pertzborn told Kruckenberg that they would not discuss the missing infant until Delores was present—there was no suggestion that Kruckenberg would be isolated or held incommunicado during questioning. (123:23.) Pertzborn informed Kruckenberg that he was not in custody, that he did not have to answer any questions, and that he was not under arrest. (123:23.) Kruckenberg again said he was willing to talk to anyone who would help find Heather. (123:23–24.) Pertzborn further informed Kruckenberg that he could end the interview at any time and could leave whenever he wished. (123:24.) On the way to Brodhead PD, they chatted about fishing and music. (123:26–27.)

Once at the Brodhead PD, Pertzborn, Kruckenberg, and Agent Baker were led to the interview room "which was located directly in front of the front door of the police department." (123:27.) The exit to the lobby was clear and the room was a "[s]oft interview room": a plain room with a table and four chairs—no restraints or places to fasten restraints, no bars on the doors, nor anything where someone could be secured. (123:29–30; 190 12:04:26–12:04:30.) Kruckenberg was again not frisked, handcuffed, or restrained in any way. (190 12:06:01–12:06:42.) Pertzborn removed his bulletproof vest and offered Kruckenberg something to drink. (123:31–32; 190 12:06:41–12:07:12, 12:07:40–12:09:07.) The doors to the interview room remained unlocked throughout the interview. (123:30.) Pertzborn again assured Kruckenberg that they would not discuss anything without Delores, and other than asking him if a phone they found at his mother's house was his, they made small talk until she arrived. (190 12:06:42–12:40:13.) The atmosphere remained cordial, even friendly,

with Kruckenberg telling stories and at times laughing. (190 12:06:42–12:40:13.)

Once Delores arrived, she sat next to Kruckenberg and Pertzborn again advised them both: (1) that the interview was being recorded and where the camera was, (190 12:40:49–12:41:00); (2) that he was with the DOJ Department of Criminal Investigation, and who Agent Baker was, (190 12:41:40–12:42:05); (3) that Delores should "feel free to jump in at any time," (190 12:42:06–12:42:09); and (4) that Kruckenberg "is not under arrest, he does not have to talk to me," and he "just can leave at any time, you guys can pick up and leave, if you'd like," (190 12:42:09–12:42:20). Pertzborn asked whether Kruckenberg and Delores understood, and they both said yes. (190 12:42:20–12:42:24.) *Delores* then told Kruckenberg that she "recommend[s] talking to them" to which Kruckenberg replied, "yeah, I know." (190 12:42:22–12:42:25.) Pertzborn said he recommended talking to him too, asked if either of them had any questions before the interview began, and they both said they did not. (190 12:43:25–12:43:41.)

No reasonable person would have felt his freedom of movement had been restricted to a degree associated with a formal arrest under these circumstances. No restraint on Kruckenberg's movement, isolation, threats, intimidation, or abuse were levied at Kruckenberg at any point. He casually chatted with the officers until Delores arrived, and they responded in kind. And after Delores arrived, he was again told he was free to leave, was not under arrest, did not have to answer any questions, and no restriction of his movement was imposed. Neither officer even stood up from their seats during the interview, let alone drew a weapon or loomed around blocking the doors. The doors remained unlocked throughout and Kruckenberg was offered water and coffee. And Kruckenberg had a trusted adult present throughout the

interview until Kruckenberg himself asked that she leave. (190 1:01:00–1:01:15.)

To be sure, there are three factors present here that typically weigh in favor of custody. Kruckenberg had been questioned before, the interview took place at the Brodhead PD, and Kruckenberg was moved from Delores's house to get there. But none of those facts are dispositive, and must be viewed in the totality of the circumstances. *Lonkoski*, 346 Wis. 2d 523, ¶ 28.

None of the interviews were lengthy; each occurred at least six to eight hours apart; and Kruckenberg was released to go about his day after the previous two. (100:2.) He was not continuously grilled for hours or kept at a law enforcement agency until the Brodhead interview. Though the repeated questioning may have interrupted Kruckenberg's day, contrary to what the circuit court found, it does not support a finding that the Brodhead interview was custodial.

The interview was indeed conducted at Brodhead PD (and, as Kruckenberg could not drive, he was transported there), but that was principally because they had a dedicated interview room with recording equipment. (124:18–20.) Given the search taking place and several other occupants and animals at Delores's house, conducting a recorded interview there would have been impractical, if not impossible. (193 (Jan. 09).) The videos show Kruckenberg went there of his own free will and no threats were made, no restraint on his movement was imposed at any time, and there was never even a suggestion of detention made by the police. Kruckenberg *offered* to talk to "anyone that would help him find" the child; he was told that no discussion about the investigation would take place until his support person arrived, which was honored; he was assured twice before the interview that he was not in custody, did not have to answer anything, and was free to leave at any time; and Pertzborn never threatened, screamed at, or otherwise bullied him.

(123:16–19, 23–24; 190 12:41:15–1:46:24; 196:17.) The tenor of the interview never changed to indicate that Kruckenberg could not leave, even after Kruckenberg admitted to leaving Heather to die. (190.) Kruckenberg was permitted to hug Delores when he asked, and left the interview room entirely to take a bathroom break afterward. (190 1:10:00–1:11:32.) He was again told that he was not in custody before they left to find Heather's body. (190 1:45:23–1:46:24.) And though Kruckenberg was a juvenile, he was old enough to understand what Pertzborn told him and assess the circumstances rationally—he had no cognitive deficiencies, (50:4–5), and was only four months shy of his 17th birthday.

This interview simply cannot be custodial under the totality of the circumstances. If what took place here was enough to make an interview custodial, no one given a ride to a police station could ever be interviewed without being considered "in custody." The circuit court's rationale in finding otherwise was flawed in multiple ways, and thus it erred as a matter of law in finding that this interview was custodial.

a. The circuit court did not apply the correct legal standards.

The court first erred in a fundamental, overarching respect: it based its finding of custody on what it thought Kruckenberg subjectively believed at the time about his custodial status. The court focused entirely on "whether [Kruckenberg] *thought he was in custody*." (196:24–29 (emphasis added).) For example, the court referenced Kruckenberg's having "said something to the effect [of] I already talked to the police,"—which was reported only by Delores, whose credibility should have been virtually nil in light of the videos, as the State explains below—and interpreted that as "meaning it seems why do I have to go again," and that he had "been told through [Delores] you stay

in this house," and factored those into its custody determination. (196:25.)

That is the wrong standard. Custody is an objective test, not a subjective finding about what the defendant thought at the time. *J.D.B. v. North Carolina*, 564 U.S. 261, 271 (2011) (the test for custody "involves no consideration of the 'actual mindset' of the particular suspect subjected to police questioning" (citation omitted)). Though the court later said "a reasonable person" would feel that way, none of the court's findings were based on what a reasonable person would think about the circumstances; they were all based on what it believed *Kruckenberg* thought. (196:17–29.)

Second, the circuit court muddled the "custody" and "involuntariness" analyses and used its findings on the psychological pressures it thought Kruckenberg subjectively experienced during the interview to make its custody finding. (196:16–29.) But whether the defendant's personal characteristics were sufficient to resist improperly coercive questioning is part of the test for voluntariness, not for the custodial status of the interview itself. *State v. Hoppe*, 2003 WI 43, ¶¶ 36–40, 261 Wis. 2d 294, 661 N.W.2d 407. An interview does not become custodial until the objective circumstances surrounding the interview would cause a reasonable person to feel that his freedom of movement has been restricted to the degree associated with formal arrest. *State v. Pounds*, 176 Wis. 2d 315, 321–22, 500 N.W.2d 373 (Ct. App. 1993). Any pressures Kruckenberg may have subjectively felt, such as his alleged sleep deprivation,[5] have no bearing on custody. *Bartelt,* 379 Wis. 2d 588, ¶ 33.

[5] (196:21.) The circuit court further failed to recognize that Kruckenberg was at home for hours over the previous day and could have slept at any time he desired; any alleged sleep deprivation cannot be laid at law enforcement's feet.

b. The circuit court considered improper and irrelevant facts.

Third, the circuit court erred in finding that *Delores* telling Kruckenberg that he was not to leave her property after speaking to Ritter weighed in favor of his having been in custody during the Brodhead PD interview. (196:14–15, 25.) However, the court credited Deputy Kanable's testimony that he told Delores to "keep an eye on" Kruckenberg "because he had been through a lot throughout the day" and never indicated at any point that she should restrict his movements. (132:93–95.) *Delores* said she interpreted Kanable's statement as "he couldn't leave," and claimed *she* told that to Kruckenberg, which the court then found weighed in favor of custody. (196:14–15, 25; 133:20–21.) But conditions or restriction of movement considered for the custody analysis are limited to "those caused or created by the authorities," not through the actions of non-state actors or forces. *State v. Clappes (Clappes I)*, 117 Wis. 2d 277, 285, 344 N.W.2d 141 (1984); *see also Miranda*, 384 U.S. at 478 (emphasis added) (*Miranda* warnings are required if the person has been "deprived of his freedom *by the authorities*"). Even assuming her testimony were true, Delores's misinterpretation of Kanable's statement cannot be attributed to the police and thus has no bearing on the custody analysis.

Fourth, though the circuit court was correct that Pertzborn told Kruckenberg he needed to ride with him to the location of Heather's body instead of Delores, the court erroneously found that this weighed in favor of the *entire interview* being custodial from the outset, even though it occurred *after* Kruckenberg's confession. (196:27–29.) That statement cannot be considered as a factor weighing into whether Kruckenberg was in custody before that. At best, it would simply add weight to an argument that the interview became custodial *at that particular point*. *See State v. Grady*, 2009 WI 47, ¶¶ 2–7, 317 Wis. 2d 344, 766 N.W.2d 729

(observing that a noncustodial interview became custodial two and a half hours later when the defendant was formally arrested and then questioning continued). But something that happens partway through an interview cannot possibly color a reasonable person's view of whether they were free to leave before that, and all of Kruckenberg's statements during this interview were given before that point in time.

c. Several of the circuit court's findings are clearly erroneous in light of the video evidence.

Fifth, a de novo review of the videos reveals several simply unsupportable findings by the circuit court.

The circuit court's finding that Pertzborn's shaking Kruckenberg's hand was "an intimidation factor" and "a passive/aggressive I got control here. I'm taking a hold of your hand," (196:26–27), is clearly erroneous as a matter of plain American norms, but even further so in light of the video. The video reveals that after Kruckenberg indicated that he would tell Pertzborn what happened to Heather by asking to speak to him alone, Pertzborn offered his hand across the table, shook Kruckenberg's hand, and told him, "I'm going to help you through it, alright? I'm going to help you through it," and Kruckenberg said "[o]kay." (190 1:01:48–1:01:54.) Pertzborn then told him, "I know you're scared. I know. And I'm going to help you. Just be honest with me, you got that? Let's work from, we know what happened, let's just work on fixing it from here. Thank you." (190 1:01:55–1:02:08.) They then released the handshake and Kruckenberg asked what was going to happen, and Pertzborn told him he did not know, but he knew he'd be able to write a report saying how cooperative and apologetic Kruckenberg was, which can do "a whole lot on where this all can go." (190 1:02:08–1:02:32.)

Taking someone's hand, offering help, and telling them you're going get through something difficult together is not

intimidating and it is certainly not a threat or "passive aggressive" control mechanism. It is a universally acknowledged method in American culture of displaying trust and support. The circuit court failed to explain how an officer offering a gesture of trust and support to a person being questioned would make a reasonable person feel as though their freedom of movement was restricted to a degree associated with formal arrest. (196:26–27.)

Additionally, Officer Schuetz's bodycam from Delores's house and the video from the Brodhead interview show that Delores's testimony should not have been given any weight. *See Rejholec*, 398 Wis. 2d 729, ¶ 17. Her testimony was flatly contradicted by the videos, and she was quite clearly saying on the stand whatever she thought would get Kruckenberg's statements suppressed. The officers were hardly projecting an "authoritative"[6] atmosphere when they arrived at her house and simply asked permission to search it and asked Kruckenberg if he'd be willing to answer more questions—indeed, Delores herself chatted, joked, told stories, and giggled while both talking to the officers at her house and to Pertzborn at the station. (193, 190 12:40:42–12:43:26.) There was nothing on either video to suggest some aura of intimidation projected by police; everything was extremely casual.

And there were no visible "nonverbal cues"[7] given by Pertzborn or Baker that Kruckenberg could not terminate the interview and leave; Pertzborn remained seated the entire time, maintained a friendly, though sometimes adamant, tone when he thought Kruckenberg was lying to him—which Delores clearly believed as well, given that throughout the interview *she* urged Kruckenberg to start telling the truth—

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[6] (133:24–25.)

[7] (196:19.)

and Agent Baker was casually leaning back taking notes. (190.)

In short, the circuit court simply erred in finding that Kruckenberg was in custody during the Brodhead interview. The totality of the circumstances and video evidence show that any reasonable person would not feel that their freedom of movement had been restricted to the degree associated with a formal arrest.

3. The circuit court erred in finding Kruckenberg was in custody during the drive to find Heather's body and the Albany interview.

Kruckenberg was not in custody during the Brodhead portion of the questioning, as shown above. The circumstances did change throughout the evening, though, so these events must also be examined to determine if the interview(s) became custodial at some point.

Doing so shows that Kruckenberg was not in custody when Pertzborn told him that he needed to ride with Pertzborn to locate Heather's body. This single instance of telling Kruckenberg "no" to a request did not make everything custodial from this point out.

After Kruckenberg confessed to leaving Heather in the snow, Pertzborn said he needed to collect Heather's body, and he then *asked* Kruckenberg "Would you take us there? And show us? Direct me to it?", and Kruckenberg replied that he would as long as he did not have to see her. (190 1:45:27–1:45:39.) Pertzborn promised that he did not have to see her. (190 1:45:40.) Kruckenberg then asked if he could ride with Delores and Pertzborn very calmly said no, that Kruckenberg needed to ride with Pertzborn, and asked, "Do you mind?" (190 1:45:41–1:45:54.) Before they left Pertzborn again asked, "Do you mind riding with me?" and Kruckenberg said "It's perfectly fine." (190 1:46:02–1:46:08.) Pertzborn then

immediately explained, "you understand, I'm not, you're not in custody, I'd like you to ride with me because I want you to show me where this baby is." (190 1:46:08–1:46:16.)

A reasonable person who was calmly asked by police if they would lead them somewhere, with no physical restraints placed on them, no change in the tone of the interview, and after explicitly being told they were not in custody, and asked "Do you mind?" riding with police, would feel free to simply refuse and end the matter, or say it was not okay that he had to ride with Pertzborn and that he wanted to leave.

a. The circuit court again applied the wrong legal standard to find that the visit to the scene was custodial.

The circuit court again committed two critical errors in finding that Kruckenberg was in custody once Pertzborn told him he could not ride with Delores to the scene and was thus "in custody" during the ride and the entire Albany interview.

First, a large part of the reason it found that Kruckenberg was in custody at this point was because he had already confessed to a murder, and the court believed the police wanted to ensure he didn't simply drive off, therefore they kept him in the presence of law enforcement officers. (196:27.) It further based its finding on the fact that Kruckenberg *himself* may not have felt free to leave because he must have been thinking "I have confessed to a crime essentially." (196:28.) But again, these are improper considerations. The custody analysis "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned," *Bartelt,* 379 Wis. 2d 588, ¶ 33 (citation omitted). *Bartelt* further teaches that an interrogation does not become custodial just because the defendant admits to committing a crime; the question is

whether the tenor of the interview changes to indicate restraint once the suspect does so. *Id.* ¶¶ 47–53. Here, Pertzborn never changed the tenor of the interviews or his treatment of Kruckenberg to something suggesting arrest after Kruckenberg confessed; if anything, he treated him even more placidly than before.

Second, the court found that Kruckenberg was in custody at the scene because it was too far for him to walk home if he wished and he was always in the presence of law enforcement, so he didn't have the "practical ability" to leave. (196:27–28.) But "[t]he inability to leave and terminate the conversation, however, is not enough on its own to trigger" custody. *State v. Halverson*, 2021 WI 7, ¶ 17, 395 Wis. 2d 385, 953 N.W.2d 847. It is "only a necessary and not a sufficient condition for *Miranda* custody." *Id.* (citation omitted). "Instead, courts proceed to the second step in the custody analysis where they ask 'whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*.'" *Id.* (citation omitted). Nothing about how this trip transpired suggests that a reasonable person would not have felt free to refuse to show Pertzborn where the body was, and nothing about the trip itself presented "the same inherently coercive pressures as the type of station house questioning in *Miranda*" that would have led to a conclusion that Kruckenberg was already in custody by the time he agreed to answer more questions in Albany.

Delores testified that she was initially following the Tahoe and decided to go home[8]. The police did not prevent her from going with them. Kruckenberg was then asked if he wanted her present again and Kruckenberg said he did not because he found it too difficult to talk about killing the baby in front of her. (124:53.) Nothing suggested that Kruckenberg

[8] (133:27.)

was being kept away from her and held "incommunicado . . . in a police dominated atmosphere"[9] thereafter—she left of her own accord, and he was offered to have her present and he said he did not want her there. (123:53.) Kruckenberg again walked to and got into the front seat of the Tahoe and was never frisked, handcuffed, or physically restrained at any point during the trip, and he exited and entered the Tahoe of his own accord. (123:48–53; 194.) Multiple officers were there, but the video shows that most of them went out to look for the infant and Kruckenberg and two officers in plain clothes merely stood around watching from the road. (194.) No one asked Kruckenberg any questions while at the scene. (194.)

True, by the time of the Albany interview, Kruckenberg had been with Pertzborn for about three hours, and it was very late. (100:2–3; 196:28–29.) But there was an hour-long break in the interviews while they went to the scene, and each respective interview was short. The Brodhead interview was only about an hour and half, and the Albany interview lasted only an hour. (100:2–3.) And before they left for the Albany interview, Pertzborn again told Kruckenberg that he was not under arrest and had no obligation to answer any questions, and he *asked* Kruckenberg if he was willing to answer some follow up questions, and he answered yes. (123:23–25.)

In short, "the relevant environment" presented none of "the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*.'" *Halverson*, 395 Wis. 2d 385, ¶ 17 (citation omitted). Kruckenberg was not in custody during the trip to the scene.

[9] *Miranda v. Arizona*, 384 U.S. 436, 445 (1966).

b. The circuit court's finding that Kruckenberg was in custody during the Albany interview is unsupported by the record.

Nor was Kruckenberg in custody during the Albany follow-up interview. He again was chatting casually with the officers about sodas and video games, was not frisked or handcuffed, and no weapon was drawn. (195 AMBA0196–AMBA0210.) The interview was conducted in an employee break room, and the doors were unlocked, which Kruckenberg was told repeatedly. (195 AMBA0196–AMBA0210.) Snacks, drinks, and access to the bathroom were all available. (195 AMBA0196–AMBA0210.) No threats were made, and really, very little questioning even took place; Pertzborn just had Kruckenberg confirm what had happened to the baby and asked for clarifying details. (195 AMBA0196–AMBA0210.) Pertzborn again told Kruckenberg he did not have to answer questions, could leave if he wished, and confirmed that he was speaking with them voluntarily. (195 AMBA0198.) Three officers were present, but all were in plain clothes and were sitting around the break room drinking coffee. (195 AMBA0196–AMBA0210.) Kruckenberg was not placed under arrest until 40 minutes after this interview ended. (100.) Nothing that took place prior to that suggested that Kruckenberg's freedom of movement was restricted to a degree associated with formal arrest.

The circuit court's characterization of the totality of these circumstances simply cannot be reconciled with the record and is clearly erroneous. (196:27–29.) Contrary to what the circuit court found, Kruckenberg never asked, "Can I go home," nor said anything suggesting that he wanted to leave. (196:28; 190; 193; 195.) Nor did any officer ever tell Kruckenberg anything resembling, "No, you can't. You must come with us, and we're going to the crime scene, and now we're going down to the police station." (196:28.) Kruckenberg

was *asked* if he was willing to show Pertzborn where Heather's body was and said yes; he was *asked* if he would be willing to answer questions at the Albany PD and said yes; and he was *asked* if he'd mind answering some follow-up questions in Albany and said no. Each time, he was informed that he was not under arrest, was free to leave, and did not have to answer anything. And each time, Kruckenberg never even gave any equivocal answers—he freely agreed each time. He was never frisked, handcuffed, physically led anywhere or even touched—apart from a handshake. He was given breaks and drinks, and snacks were available. (190; 195 AMBA0196–AMBA0210.) It was late, but Kruckenberg was alert and talkative.

There is simply no proper basis for the circuit court's finding that these interviews were custodial. This Court should reverse the circuit court.

B. All of Kruckenberg's statements were voluntary and not coerced by law enforcement.

The circuit court again erred in finding that these statements were coerced. It never even should have considered Kruckenberg's personal characteristics in this case, because the record shows that there were no improper police pressures or actual coercion placed on him that would have triggered the balancing test under which personal characteristics become relevant. This Court should reverse the circuit court.

1. A finding of improper police tactics used to extract a confession is a necessary prerequisite to finding a confession involuntary.

The Fifth and Fourteenth Amendments require "that a confession be voluntary to be admitted into evidence." *Dickerson v. United States*, 530 U.S. 428, 433 (2000). A

defendant's statements are voluntary if they are "the product of a 'free and unconstrained will, reflecting deliberateness of choice,'" as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist. *State v. Clappes (Clappes II)*, 136 Wis. 2d 222, 236, 401 N.W.2d 759 (1987) (citation omitted); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973) (A confession is voluntary if it is the product of a free and unconstrained choice.).

Improper police conduct is a necessary prerequisite for finding a confession involuntary. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986); *Clappes II*, 136 Wis. 2d at 239. There must be an "essential link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other." *Connelly*, 479 U.S. at 165. "[V]oluntariness . . . has always depended on the absence of police overreaching, not on 'free choice' in any broader sense of the word." *Id.* at 170. "[V]ery few incriminating statements, custodial or otherwise, are held to be involuntary, though few are the product of a choice that the interrogators left completely free." *United States v. Rutledge*, 900 F.2d 1127, 1129 (7th Cir. 1990).

Courts consider the totality of the circumstances in determining whether a defendant's statements are voluntary. *Clappes II*, 136 Wis. 2d at 236; *Bustamonte*, 412 U.S. at 226. If there was actual coercion or improper police tactics used to procure the confession, courts then "balance the personal characteristics of the defendant against the pressures imposed" by law enforcement officers. *Clappes II*, 136 Wis. 2d at 236.

Accordingly, courts "must first examine the threshold matter of coercion." *Vice*, 397 Wis. 2d 682, ¶ 31. "The presence or absence of actual coercion or improper police practices is the focus of the inquiry because it is determinative." *Id.*

(citation omitted). If the facts do not "reveal coercion or improper police pressures, there is no need . . . engage in the balancing test between the suspect's personal characteristics and those nonexistent pressures." *Id.*

"[C]oercion can be mental as well as physical," *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960), but only techniques that "overcome the defendant's free will" are prohibited, such as "psychological intimidation," *United States v. Dillon*, 150 F.3d 754, 757 (7th Cir. 1998), or "outright fraud," *Hadley v. Williams*, 368 F.3d 747, 749 (7th Cir. 2004). Short of that, the police are allowed "to pressure and cajole, conceal material facts, and actively mislead." *Rutledge*, 900 F.2d at 1131. "[M]erely telling somebody to tell the truth is not coercive." *Etherly v. Davis*, 619 F.3d 654, 663 (7th Cir. 2010). Police officers are permitted to suggest that the suspect will reap a "net benefit" so long as they do not make specific promises of leniency that amount to outright "fraud." *Rutledge*, 900 F.2d at 1130–31; *Etherly*, 619 F.3d at 663–64 (police did not promise a "specific benefit . . . in exchange for . . . cooperation"). Other factors that cut against a finding of psychological coercion include the police giving *Miranda* warnings, *Missouri v. Seibert*, 542 U.S. 600, 608–09 (2004) (plurality opinion), and the suspect correcting police suggestions, *Lyons v. Oklahoma*, 322 U.S. 596, 605 (1944).

If improper police coercion is found, the court then weighs its effects against the defendant's personal characteristics. *Vice*, 397 Wis. 2d 682, ¶ 31. The relevant personal characteristics of the defendant include the defendant's age, education and intelligence, physical and emotional condition, and prior experience with law enforcement. *Id.* ¶ 30. The personal characteristics are balanced against the police pressures and tactics which were used to induce the statements, such as: the length of the questioning, "the general conditions under which the [statements] took place, any excessive physical or

psychological pressure brought to bear on the [defendant], any inducements, threats, methods or strategies utilized by the police to compel a response, and whether the [defendant] was informed of his right to counsel and right against self-incrimination." *Clappes II*, 136 Wis. 2d at 236–37.

Courts also look to the content of a confession for evidence of voluntariness. Because the ultimate question is whether police conduct "overb[ore] petitioner's will to resist," *Rogers v. Richmond*, 365 U.S. 534, 544 (1961), a suspect's demonstrated ability to resist police questions even after confessing "strongly suggests" that a person's will was not overborne. *Minnesota v. Murphy*, 465 U.S. 420, 438 (1984). Thus, a statement is more likely to be found voluntary when "answers to [police] questions . . . contain statements correcting and supplementing the questioner's information and do not appear to be mere supine attempts to give the desired response to leading questions." *Lyons*, 322 U.S. at 605.

2. The video shows that police used no improper tactics to procure Kruckenberg's confessions during either interview.

The videos again prove that there was absolutely no improper police coercion used here. Kruckenberg was repeatedly reminded that he did not have to answer any questions before the interviews took place. The substantive part of each interview only lasted about an hour; the interview rooms remained unlocked; Kruckenberg was allowed to have a support person present if he wished; and he was offered drinks, breaks, and snacks. (190 12:06:17–1:46:25; 195.) He was not made any specific promises of leniency if he confessed, nor was he threatened in any manner. Pertzborn just pushed back when he believed Kruckenberg was lying to him and urged him to tell the truth. There is nothing at all improper about that.

There were no promises of leniency made to Kruckenberg in exchange for his confession. During the Brodhead interview Pertzborn simply told Kruckenberg that Pertzborn could "help" him "deal with it" at this point but "things get taken out of his control" so it was better to talk to him now. (190 12:42:32–12:44:45.) That is not a specific promise of anything. Pertzborn then implied that police already knew what happened to Heather after Kruckenberg said no one had any idea what happened to her, (190 12:44:45–12:45:18)—which they almost certainly did considering the wild implausibility of Kruckenberg's story—but even if they did not, police are permitted to "actively mislead" suspects without it being improper coercion. *Rutledge*, 900 F.2d at 1131.

Through the rest of the Brodhead interview, Pertzborn merely stopped Kruckenberg when he tried to pin the baby's disappearance on "Tyler," told Kruckenberg that Pertzborn knew he was lying to them about giving Heather to "Tyler" because the details of his story about "Tyler" had not checked out, and pleaded with him to tell the truth. (190 12:45:37–1:00:58.) Though Pertzborn was adamant, he barely even raised his voice and simply appealed to Kruckenberg's sense of morality, telling him he was not a bad person and asking him to "please" "do the right thing here." (190 12:45:37–1:00:58.) But "the fact that [Pertzborn] was at times confrontational . . . is not improper police procedure and does not, by itself, establish police coercion." *State v. Markwardt*, 2007 WI App 242, ¶ 42, 306 Wis. 2d 420, 742 N.W.2d 546 (footnote omitted).

After Kruckenberg asked if he could talk to Pertzborn alone, Pertzborn shook Kruckenberg's hand and told him they'd "get through this together," (190 1:00:00–1:02:10), which is a gesture of support and certainly not an improper tactic. And when Kruckenberg asked what would happen after he told the truth, Pertzborn told him he did not know,

but he knew he'd be able to write a report saying how cooperative and apologetic Kruckenberg was which can do "a whole lot on where this all can go." (190 1:02:08–1:02:32.) Which, again, is not a specific promise of leniency if Kruckenberg confessed. Pertzborn then suggested the baby was dead by telling Kruckenberg that they already knew what happened and that they needed to give Heather a proper burial, and Kruckenberg offered to show him where she was located. (190 1:02:48–1:05:55.) Again, that is nothing more than saying that the police already know what happened, which is wholly permissible during an interrogation. *Rutledge*, 900 F.2d at 1131.

The above is everything that happened during the entire roughly twenty minutes between the beginning of the Brodhead questioning and the point when Kruckenberg confessed to killing Heather and told Pertzborn where to find her body. (190 12:45:37–1:05:39.) And after that, Pertzborn simply asked Kruckenberg to now tell him truthfully what happened, and Kruckenberg told Pertzborn the story about finding "Alex" and abandoning the baby, with Pertzborn merely asking clarifying questions. (190 1:08:10–1:46:37.) Pertzborn then asked Kruckenberg if he was willing to direct him to where the body was, and Kruckenberg said yes; afterward, Pertzborn thanked Kruckenberg again and asked him if he was okay, telling him he hoped he felt better telling the truth. (190 1:45:00–1:46:37.) There was no "psychological intimidation" or improper tactics used whatsoever.

The Albany interview was even more casual; Pertzborn barely even asked any questions. It was conducted in a break room at the Albany PD and snacks, coffee, water and sodas were offered and available. (195 AMBA0197.) Officer Dennis chatted with Kruckenberg about his favorite sodas. (195 AMBA0197.) Kruckenberg was never frisked, handcuffed, or restrained. He was given a bathroom break before the interview began. (195 AMBA0197.) The door to the break

room remained unlocked, and the other officers were in plain clothes, seated, chatting with Kruckenberg, and drinking coffee. (195 AMBA0197.) Pertzborn sat down and in a friendly and casual tone explained that he was going to go through the story to make sure he had it right and told Kruckenberg to correct him on anything that was not. (195 AMBA0197 04:39–04:50.) He explained that the door was closed simply for privacy, asked Kruckenberg if that was okay, again reiterated that he was not in custody and could leave anytime he wanted, and reaffirmed that Kruckenberg was speaking voluntarily, all of which Kruckenberg confirmed. (195 AMBA0198.) Pertzborn then calmly summarized what had unfolded up to that point, with Kruckenberg confirming details and frankly stating that the story about "Tyler" was a lie. (195.)

Literally nothing that occurred during these interviews has ever been enough to find psychological intimidation or improper coercion by police. *Rutledge*, 900 F.2d at 1131; *Etherly*, 619 F.3d at 663; *Markwardt*, 306 Wis. 2d 420, ¶ 42. The circuit court thus never should have reached any of Kruckenberg's personal characteristics[10]: absent improper police conduct "it is improper to consider [Kruckenberg's] personal characteristics because consideration of [his] personal characteristics is triggered *only* if there exists coercive police conduct against which to balance them." *Markwardt*, 306 Wis. 2d 420, ¶ 50. Kruckenberg's statements cannot be deemed involuntary on this record.

The circuit court's findings to the contrary were again fundamentally flawed in several important respects.

First, and critically, the circuit court employed the wrong definition of "coercion" to reach its conclusion. (196:17–

[10] (196:20 (considering Kruckenberg's demeanor during the questioning).)

18.) The legal definition of coercion for an assessment of voluntariness means that the police did something improper that created an aura of intimidation and turned the interview into a conspicuously unequal confrontation between the defendant and the police. *See State v. Owen*, 202 Wis. 2d 620, 642, 551 N.W.2d 50 (Ct. App. 1996); *Clappes II*, 136 Wis. 2d at 238 (recognizing that "[w]hile coercive police activity may arguably take subtle forms," some evidence of improper police conduct is required to find coercion).

But the circuit court never found that the police engaged in any improper conduct during these interviews. (196:14–29, 35.) Instead, it based its coercion finding on: Kruckenberg's state of mind, which it should not have reached without finding improper police conduct; things *Delores* did, such as telling Kruckenberg he had to stay home and repeatedly urging him to tell the truth during the Brodhead interview; Dr. Cutler's testimony about "the Reid Technique" of interrogation—which Pertzborn testified he did not remember or use[11] and which, at any rate, this Court has already held is *not* improperly coercive, *Rejholec*, 398 Wis. 2d 729, ¶¶ 25–27; and Dr. Cutler's *psychological* definition of "coercion," meaning things that can socially influence someone to do something. (150:9–10; 196:14–29, 35.) Dr. Cutler even testified frankly that his definition is *not* the legal definition of coercion. (150:9.)

This was clear error. Asking questions in a way that typically causes people to want to answer them is not improper coercion. The law recognizes that "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it." *Bartelt,* 379 Wis. 2d 588, ¶ 33 (citation omitted). Yet "voluntariness" of a confession "has always depended on the absence of police overreaching, not on 'free choice' in any broader sense of the word." *Connelly*, 479 U.S. at 170. The

[11] (123:89–94, 125, 127–28.)

mere fact that Dr. Cutler found that Kruckenberg was questioned in ways that typically get people to respond is utterly irrelevant to the coercion analysis from a legal perspective. With no improper police conduct, there is simply no coerced confession under the law. *Id.* at 167. And every police questioning technique that was employed during these interviews has been repeatedly sanctioned by the courts. *Rutledge*, 900 F.2d at 1131; *Etherly*, 619 F.3d at 663; *Markwardt*, 306 Wis. 2d 420, ¶ 42.

Moreover, the Supreme Court has flatly rejected the notion that pressure applied by a third-party like Delores can be factored into the voluntariness of a confession. *Connelly* at 166 ("The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause."). The fact that Kruckenberg faced pressure from Delores should have had no bearing at all on the circuit court's analysis. (195:22–23.)

Again, taking Kruckenberg's hand during the Brodhead interview and giving him assurance that Pertzborn and Kruckenberg would "get through it together" was not a threat, was not intimidation, and was not at all improper. Nor was Pertzborn's telling Kruckenberg that police already knew what happened, promising to help him, and imploring him to tell the truth. Kruckenberg's age was also not enough to render his confession was involuntary. (196:26–27.) The Supreme Court has "held that a sixteen-year-old could make a statement intelligently and voluntarily, even without the presence of a friendly adult." *Etherly*, 619 F.3d at 662–63 (quoting *Ruvalcaba v.Chandler*, 416 F.3d 555, 561 (7th Cir. 2005)) (citing *Fare v. Michael C.*, 442 U.S. 707, 725 (1979)). Kruckenberg had the presence of a friendly adult when he wanted one, and Pertzborn did nothing other than tell Kruckenberg he knew he wasn't being honest when Kruckenberg gave Pertzborn information that Pertzborn

believed was false. And Pertzborn never even contradicted Kruckenberg about anything during the Albany interview—he merely asked for additional details about what Kruckenberg was saying. (195.) There is nothing improper about any of that.

In short, police did nothing during either of these interviews that could even conceivably be described as "overreaching." *Connelly*, 479 U.S. at 170. And without police overreach, a confession is voluntary. *Id.* This Court should reverse the circuit court's finding to the contrary.

3. Even if any of the police's conduct during these interviews could be considered improper, they clearly did not overcome Kruckenberg's ability to resist the questioning.

Even assuming for the sake of argument that something police did here was improper, the record shows that whatever it was did not outbalance Kruckenberg's personal characteristics and thus his ability to resist the questioning.

Kruckenberg was young, but he was almost 17 years old, and he was treated with courtesy and openness. He had no cognitive or developmental deficiencies, was an average student who was doing poorly in high school only due to his non-attendance, and was alert, talkative, and responsive. (50:2, 4–5.) The interviews were not long—again, the Brodhead interview lasted roughly an hour and a half (and Kruckenberg confessed to leaving Heather to die within 20 minutes), and the Albany interview was only an hour, with an hour long break in the questioning in between. (190; 193; 195.) No physical pressure was placed on him, and the only psychological pressure placed on him was being told that he's not a bad person and should do the right thing—no threats were made at all nor any promises given by police. (190; 193;

195.) Though Kruckenberg was not given *Miranda* warnings, he was repeatedly told he could leave at any time and did not have to answer anything. (190; 193; 195.) He had Delores present with him when he decided to confess, and he was permitted to hug her when he heard her crying in the hallway. (190 12:45:37–1:13:00.) None of the factors present suggest that his will to resist the questioning was overborne by any improper coercion.

Moreover, the content of these confessions show that Kruckenberg's ability to resist the questioning was not overborne because he *repeatedly and consistently* lied to all of the officers throughout all of them, both before and after his arrest. *Murphy*, 465 U.S. at 438. The only times Kruckenberg ever told the truth about what happened to Heather was after he was pointedly confronted with irrefutable facts disproving what Kruckenberg had just told the officers during these interviews.

For instance, Kruckenberg maintained the lie that he gave Heather to "Tyler" from SnapChat through multiple sets of questioning until Pertzborn told him they knew this wasn't true because they had canvassed Brodhead and no one had ever heard of anyone resembling Kruckenberg's description of Tyler—including Delores. (191; 192; 190 12:49:15–12:58:55.) Kruckenberg then admitted that he left Heather in the woods, but made up an entirely new lie about what happened and maintained it until his interview the next day with Fiez and Fernandez: he said Lauren insisted that he "get rid of" the baby, swore that his friend "Alex" was involved and told him to abandon the baby, and said over and over again that he did not physically harm Heather and just left her in the snow, which was also false. (190 1:18:40–1:45:43; 195 AMBA0196–AMBA0203.)

Kruckenberg insisted upon that version of events all through the Brodhead and Albany interviews and for over an hour during the interview with Fiez and Fernandez the next

day until Fiez pointed out that they knew Heather had been shot. (192 (video 5) 58:33–1:31:49.) Kruckenberg then abandoned the "Alex" story and admitted *that* was false, but then lied again to Fiez and Fernandez about where he got the gun, lied about where he put the gun after shooting Heather, and lied about Lauren telling him to shoot the baby. (192 (video 5) 58:33–1:31:49.) He maintained those lies throughout this interview and up through the next day until Pertzborn told him that Gerald turned over the gun and they knew it was Delores's father-in-law's. And even when Pertzborn later confronted Kruckenberg with his SnapChat messages with Lauren showing that she had no idea that Kruckenberg shot Heather, Kruckenberg still lied and insisted that she did. (190 21-170-27 View 3 14:51–02:17:40.)

Clearly Kruckenberg's ability to resist the questioning was not overborne by police, because he never once told them the truth unless and until they confronted him point-blank with facts he could not deny. If Kruckenberg's ability to resist were overborne by coercion during the Brodhead and Albany interviews he would have actually confessed—and he did not. Nothing he told Pertzborn was true except where Heather's body was. Between Kruckenberg's personal characteristics, the general tenor of these interviews, and the record showing that he did not tell the officers the truth until irrefutably confronted with it, the record shows that he was perfectly capable of overcoming any improper coercive pressure placed on him. His Brodhead and Albany statements were voluntary.

CONCLUSION

This Court should reverse the decision of the circuit court.

Dated this 12th day of September 2023.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Lisa E.F. Kumfer
LISA E.F. KUMFER
Assistant Attorney General
State Bar #1099788

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2796
(608) 294-2907 (Fax)
kumferle@doj.state.wi.us

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 10,987 words.

Dated this 12th day of September 2023.

Electronically signed by:

Lisa E.F. Kumfer
LISA E.F. KUMFER
Assistant Attorney General

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 12th day of September 2023.

Electronically signed by:

Lisa E.F. Kumfer
LISA E.F. KUMFER
Assistant Attorney General