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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2023AP396-CR

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STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

LOGAN KRUCKENBERG ANDERSON,

Defendant-Respondent.

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Appeal From an Order Suppressing Statements,  
Entered in the Green County Circuit Court, The  
Honorable Thomas J. Vale Presiding

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BRIEF OF DEFENDANT-RESPONDENT

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## ISSUES PRESENTED

1. Whether the circuit court erred in finding that sixteen-year-old Logan Kruckenberg was subject to custodial interrogation and should have been provided *Miranda*<sup>1</sup> warnings, when he was taken from home in the middle of the night to a police station for questioning.

The circuit court suppressed the statements.

This Court should affirm.

2. Whether the circuit court erred in finding that Logan's statements were involuntary because the pressures brought to bear on him overcome his ability to resist questioning.

The circuit court suppressed the statements.

This Court should affirm.

## POSITION ON ORAL ARGUMENT AND PUBLICATION

Publication is not requested, as this appeal involves the application of well-established law to the facts of the case. Oral argument is requested because, although the case involves well-established law, the facts are relatively complicated and the applicable standards are multi-factor.

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

## INTRODUCTION

At 11:10pm on January 9, 2021, police transported sixteen-year-old Logan Kruckenberg to a police station to interrogate him for the third time in less than twenty-four hours. The State appeals the circuit court's order suppressing Logan's statements during this interrogation. The only issue on appeal is the admissibility of the statements. Thus, the State's focus on the circumstances of the crime is misplaced. (*See App. Br.* at 7). As will be demonstrated, the circuit court properly suppressed Logan's statements because police failed to provide Logan with *Miranda* warnings and Logan's statements were involuntary.

## STATEMENT OF THE CASE AND FACTS

At 2:00am on January 9, 2021, Deputy Derek Whitcomb arrived at a residence in Albany following a report of a missing infant. (R.125:8-9, 52). The infant was believed to be with the father, sixteen-year-old Logan Kruckenberg. (R.191|1:03-1:27;<sup>2</sup> R.125:11). The residence was that of Logan's girlfriend, Lauren. (R.125:11-13). Between 2:00am and 6:00am, deputies Zachary Degner and Tanner Gilbert, and Detective Christopher Fiez arrived at the residence. (R.125:13, 14, 20). Officers questioned Logan on and off for four

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<sup>2</sup> The exhibit contains multiple files. The correct one is the .mp4 file located in the folder beginning "DerekWhitcomb">"Stream 1." This brief does not reference any other files in this exhibit, and will refer to the video as (R.191).

hours. Logan explained that Lauren gave birth several days prior. Logan told police he gave the infant to his friend Tyler to take to an adoption agency. *See generally* (R.191; R.125:36-37, 72). Officers confronted Logan with disbelief and raised voices. (R.125:36-37, 69). Logan was questioned in a squad car for forty minutes. (R.126:11, 16).

Around 6:00am, Whitcomb drove Logan to his mother's apartment. (R.125:27, 29). He frisked Logan before Logan got into the locked back seat of the squad car. (R.125:28). He brought Logan to the door, had him tell his mom what was going on, and left. (R.191 | 4:06:17-4:07:15; R.125:31).

Roughly eight hours later, at 2:00pm, Fiez and Albany Police Chief Ritter showed up unannounced to Logan's friend's house, where Logan was staying. (R.127:1; R.132:92). Officers spoke with the friend's mother, Delores. (R.127:63). Fiez asked Logan to come to the Albany Police Department ("APD") for additional questioning and told him he was not under arrest. (R.127:17, 19).

Before they departed, Fiez was alone with Logan in the squad car while they waited for Ritter. (R.127:63). Fiez told Logan he was going to take his phone, but allowed Logan to play games for a few minutes before taking the phone and placing it in the front seat. (R.192 | 67710047 | 0:00-2:30; R.112:1-3; R.127:64).<sup>3</sup> Ritter got into the car, and they left for

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<sup>3</sup> Because (R.192) includes multiple videos, citations will reference "R.192 | XXXXXXXX | timestamp." "XXXXXXX"

Albany PD. (R.127:65). Neither officer attempted to contact Logan's mother or told Logan that he did not have to go with them. (R.127:62-63).

At Albany PD, officers took Logan through a locked entrance into the patrol room. They told him that he was free to leave. (R.192|67710047|11:28-11:48; R.112:9, 27). During this interrogation, Ritter indicated he did not believe Logan's story, and told him they were going to keep his phone because, "everything you ever did on this is inside of this phone, whether you deleted it or not." (R.192|67710047|37:26-38:50; 112:33). Ritter told Logan that there were people with dogs looking for the baby's "cadaver." (R.127:67; R.192|67710047|39:04-38:50; R.112:33).

Officers continued to confront Logan with incredulity. (R.192|67710047|39:12-40:57; R.112:34). Logan began to cry. (R.112:34). He asked for his phone, and Fiez said no. (R.192|67710047|43:50-44:00; R.127:83-84). Ritter told Logan that this is "not going away." (R.112:39).

Logan offered to go get the backpack he carried the baby in. (R.112:41). Fiez responded that, although he was not saying Logan was not free to go, he should "hang tight here." (R.192|67710047|49:50-50:11; R.112:41). Logan said he would bring it right to them, but Fiez said "I'll go with you." (R.192|67710049|3:30-3:53; R.114:3). Ritter told Fiez that Logan should come

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represents the eight digits at the end of the folder title. From there, the video is always the .mp4 file in the "Stream 1" folder.

back to the station afterwards. (R.192 | 67710049 | 14:48-15:07; R.114:9). Fiez drove Logan to his mom's house, escorted him to his bedroom, and seized the backpack for evidence.<sup>4</sup> (R.127:75). He then took Logan back to the station.

After returning to the station, Logan asked Fiez how long he thought it would be. Instead of telling Logan that he was free to leave—Fiez said he was not sure how long it would take. (R.192 | 67710049 | 33:41-34:02; R.114:20; R.127:77-78). When Logan asked to use the bathroom, an officer escorted him and stepped into the bathroom with him. (R.125:91-94).

At some point, Logan told Lieutenant Cody Kanable he wanted to go home. (R.132:92). Kanable told him he could not leave unless he had an adult with him. (R.132:92). At this point, it was the middle of the day and Logan was staying at two addresses within walking distance of Albany PD.<sup>5</sup>

Police called Delores to pick up Logan, which she did around 5:07pm—three hours after Logan was brought there. (R.127:81; R.100:2; App.114). Before leaving, Kanable spoke with her. (R.133:20).<sup>6</sup> Once

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<sup>4</sup> According to Google maps, Logan's mother's residence—118 N. Water St.—is 0.1 miles from the police department—206 N. Water St.

<sup>5</sup> According to Google Maps, Delores' address is 0.4 miles from the police department.

<sup>6</sup> As discussed below, Delores and Kanable testified somewhat differently. Kanable said he told her to “keep an eye on” Logan. Delores recalled being told to keep Logan at home.

they arrived at her residence, Delores told Logan he could not leave the property because police told her not to let him. (R.133:35; *see also*, R.193|42:37-42:48) (Delores telling officers that she was told to not allow Logan to leave).<sup>7</sup>

Around 11:00pm, Kanable, DOJ-DCI Special Agent James Pertzborn and FBI Special Agent Bryan Baker showed up at Delores' residence. (R.132:96-97). Pertzborn asked Logan to accompany them to the Brodhead Police Department ("Brodhead"). (R.124:8-9; R.132:98; R.148:8). A team of at least five other officers began a consensual search of Delores' home. (R.193|0:00-2:31).<sup>8</sup> Some officers were uniformed, others wore plain clothes. (R.124:9). Pertzborn and Baker both wore bulletproof vests with "POLICE" in "big white letters" and carried firearms on their hips. (R.124:72-73). Both marked and unmarked squads were present. (R.148:7, 9). Logan told Pertzborn that he had already spoken to police, (R.124:74); still, Pertzborn said he "needed" to ask Logan questions. (R.124:16). Pertzborn told Logan he was not under arrest and did not have to answer questions. (R.124:76). Logan asked that Delores be present for the interview; Pertzborn assured Logan he would not talk to him about anything without her. (R.124:24, 75).

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<sup>7</sup> The exhibit contains multiple files. The correct one is the .mp4 file located in the folder ending "173363665">"Stream 1." This brief does not reference any other files in this exhibit, and will refer to the video using (R.193).

<sup>8</sup> (*See* R.193) (showing seven officers present when Pertzborn and Baker leave with Logan).

Delores asked if Logan could ride with her to Brodhead, and was told no. (R.133:38).

Before departing, Pertzborn asked Logan if he had a phone. Logan showed Pertzborn his phone. Pertzborn asked him how to get into it. (R.124:21-22; R.132:98).<sup>9</sup> Then, Logan was escorted to Pertzborn's vehicle. (R.193|1:58-2:02). They left at approximately 11:30pm. (R.193|0:00-0:07, 1:58-2:25). Instead of taking Logan to the nearby Albany PD, Logan was transported to the neighboring town, Brodhead, because Brodhead had recording equipment in their interrogation room. (R.132:102). Because Pertzborn and Baker were not local, they followed Kanable to Brodhead. (R.132:95-96, 102).

They arrived in Brodhead at 12:06am. (R.124:78).<sup>10</sup> An armed, uniformed officer led Pertzborn, Baker, and Logan to the interrogation room, with Logan walking between Pertzborn and Baker. (R.124:81; R.190|12:06:00AM-12:06:40AM).<sup>11</sup> Pertzborn directed Logan to sit in the chair opposite the door they entered, while Pertzborn and Baker took chairs that placed themselves between Logan and

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<sup>9</sup> This was a different phone than the one Fiez seized. (R.132:98).

<sup>10</sup> Pertzborn never explained what occurred between when they left at 11:27pm and arrived in Brodhead 39 minutes later at 12:06am—other than the “10-15 minute” drive. (R.124:78).

<sup>11</sup> R.190 contains multiple folders. “Albany Interview” videos will be designated by their “AMBAXXXX” file name. References without “AMBA” are to the “Brodhead Interview.”

each closed door. (R.190 | 12:06:24AM-12:06:50AM; R.124:81-82). Before Delores arrived, Pertzborn questioned Logan about another phone found at his mom's house. (R.190 | 12:22:04AM-12:24:20AM).

Delores finally arrived at about 12:40am.<sup>12</sup> Pertzborn told Delores and Logan that they were being recorded and pointed to the camera. (R.115:25; App.63). Pertzborn told them that he needed to talk to Logan but Logan was not under arrest and could leave. (R.115:23-26; App.61-64; R.190 | 12:38:30AM-12:42:25AM). Pertzborn immediately told Logan: "I'm a super nice guy, so I recommend talking to me because I am in a position where I can help. Okay? As time moves on, as you know, those things kind of go away, and I can't always help. Alright?" Pertzborn told Logan that things get taken out of his control, so he tries to convince people it is best to work with him early. (R.115:26-27; App.64-65; R.190 | 12:42:25AM-12:43:24AM). Pertzborn told Logan that when things go too far, he is the one "that can kind of come in and talk to them; deal with the issue and help the situation." (R.115:27-28; App.65-66; R.190 | 12:44:10AM-12:44:48AM).

Pertzborn asked Logan if he knew why he wanted to talk to him, and Logan referenced the hours-long police contact at Lauren's and being at "the cop shop the whole day." (R.115:28; App.66;

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<sup>12</sup> After Pertzborn left with Logan, video shows officers questioning Delores for 40 minutes before she was able to leave. (R.193 | 6:44-45:00).

R.190|12:44:48AM-12:45:00AM). When asked again, Logan stated “[b]ecause as of right now we have no idea where that child is.” (R.115:28; App.66). Pertzborn leaned forward, taking a more stern and authoritative tone, and said “No, some of us do.” (R.115:28; App.66; R.124:42). He told Logan that they had “a whole bunch of information,” had been doing “background,” and he needed Logan to be honest with him. (R.115:28; App.66; R.190|12:45:07AM-12:46:04AM). As Logan explained what happened, Pertzborn interrupted to tell him what Logan was saying was “inconsistent” with what Lauren had told them. Logan said he was just telling what he knew. (R.115:29-30; App.67-68; R.190|12:48:20AM-12:48:36AM).

Logan attempted to give additional information, but Pertzborn repeatedly cut him off. (R.115:35; App.73; R.190|12:55:10AM-12:55:20AM). He raised his voice and this exchange followed:

S/A Pertzborn

No hold on, I know you aren't telling me the truth at this time and I have a problem with that because how am I going to help you when you are not telling me the truth. I can disprove it. Okay? And I need you to jump on board with me because if I am going to help yah, I'm putting my neck way out there for yah. Okay? You need to step on board with me and stop with

anymore lying. You need to!  
You need to, you need to, you  
need to.

D[elores]

You gotta tell the truth  
okay?

S/A Pertzborn

Listen, I... I will listen to you  
until the cows come home.  
The problem being I will  
only listen to the things I  
know are true. I'm not going  
to listen to something that I  
know is 100% a lie, and you  
are going to go how in the  
fuck does this guy know.  
Right? You're wondering  
how does he know. I'm going  
to explain that to yah. But  
for me to be able to put in a  
report that you have been  
cooperative so that I can  
help you. You're going to  
have to come with more of  
the truth. Alright? You've  
already dug in a little bit  
a[n]d I'm just going to tell  
you right now. I'm going to  
hand my hand down to you  
and lift you out of it. Alright?  
I ain't mad at yah, because I  
knew it was going to take a  
little bit of this. Everybody

always does. You need to come forward. I can't help you, I'll step over you to help you, but you need to at least show me you are going to help yourself. a little bit, because this is like simple, you understand? Please...don't continue down this path.

Logan I'm telling.

S/A Pertzborn Don't continue

Logan the truth.

S/A Pertzborn No you are not. You're not! You know him a lot better than I do and I know I am looking at your eyes and you're going oh hell no.

D[elores] You gotta tell the truth buddy. Please...please tell the truth.

S/A Pertzborn You need...that's...I'm so glad she's here

D[elores] Honey I can't help you if you can't tell the truth.

Logan I'm telling the truth.

S/A Pertzborn Nothing

D[elores] I will do anything in my power to help you if you tell the truth honey.

S/A Pertzborn Nothing that has happened here is too far from redeeming you. I can help you still, and I am willing to

D[elores] I am too.

Logan Can I..

S/A Pertzborn There are people that are going to step up and help you, but we're not, we can't do that until you start realizing what's going on.

Logan Can I ask you what the truth is then?

S/A Pertzborn I am going to allow you the opportunity to tell me the truth. Because when I write it, if I sit there and have to say I had to do this, this and this to get you to even step on it. What kind of cooperation is that? There's no, there's no redeeming part of you that if, if you're not the one that is doing it. Right? If I have to continue to like prod you along [...] Logan I'm gonna just take a break and I'm going to let you understand something.

Every single path you take we already know a bunch of things about. Alright? I need you to bring it back and say listen Jim give me an opportunity to show you I am telling you the truth, because you're not right now, and I'm just going to forget about it and we are going to start over again. Do you understand? Please don't do this be honest for yourself. Alright?

D[elores] We can't help you if you won't tell us okay? But we will do everything in our power to help you.

S/A Pertzborn Everything in our power to help you.

D[elores] I promise Logan.

S/A Pertzborn That's why I'm here is to help you.

D[elores] I'm not your mother.

S/A Pertzborn But we can't do this anymore. We can't do the lies. I can't possibly, I can't possibly do that. Alright?

D[elores] Logan what did you guys do with the baby after she was born?

Logan I'm telling the truth.

S/A Pertzborn You aren't. You aren't telling the truth. Alright? I think you know it and we know it, and there is two types of people, there's people that do things and have a soul and realize oh my lord I've done something that I can't fix and they feel bad about it. Or there is the other person, who make a mistake and they're just evil about it, they don't give a shit. What type of person are you? What type of person are you?

Logan I care.

S/A Pertzborn You do care. That's why you're being given this opportunity to talk to me about this. That is why you are able to even work with me right now. Don't blow that chance. Okay? Please, you are not a bad person. You made a mistake.

(R.115:36-37; App.74-75; R.190 | 12:55:20AM-1:00:57AM).

As the interrogation continued, Pertzborn emphatically pointed his finger down at the table and Logan moved futher away from him. Logan asked if it

could be one-on-one. Pertzborn said he was “willing to do that.” Before leaving, Delores told Logan to be honest. (R.115:38; App.76; R.190 | 1:00:57AM-1:01:45AM).

Once alone, Pertzborn told Logan to come closer and grabbed Logan’s hand. (R.115:38; App.76). He told Logan that he would help him through it, as long as Logan was honest. Logan asked what would happen, and Pertzborn told him how he would be able to write in his report “how cooperative and how apologetic” Logan was, which “weighs a whole lot on where this all can go.” (R.115:38; App.76). Pertzborn concluded by saying they needed to give “that precious child of yours a proper burial,” that they needed to recover the body, and Logan needed to tell him “where she’s at right now.” (R.115:38; App.76; R.190 | 1:01:45-1:02:49). Logan told Pertzborn where to look, but Pertzborn said Logan had to show them. He told Logan that they would be together and in his car. (R.115:42; App.80; R.190 | 1:07:17AM-1:07:47AM).

Pertzborn interrogated Logan for additional details. When he asked Logan if Baker could come in, Logan said he would rather he not. (R.115:44; App.82; R.190 | 1:09:42AM-1:09:50AM). According to Pertzborn, Logan later “acquiesced” to the request. (R.124:44). Pertzborn continued questioning Logan, saying his story “absolutely smells like shit.” (R.115:67; App.105; R.190 | 1:38:15AM-1:39:54AM). Logan eventually broke down crying. (R.190 | 1:44:25AM-1:45:30AM).

As they prepared to leave, Logan asked to ride with Delores, and Pertzborn said: “No, you gotta, I gotta have you be with me. Alright? Do you mind?” Logan did not argue. (R.123:47-48). Pertzborn told him he was not in custody, but he wanted Logan to show him where the baby was. (R.190|1:45:45AM-1:46:20AM). Pertzborn and Baker took Logan to the scene, where four other officers and the coroner were present, at approximately 2:30am. (R.123:117).

After the body was found, Pertzborn told Logan he had more questions for him, but that he was free to go and not under arrest. (R.123:118). Pertzborn transported Logan to Albany PD where Pertzborn, Baker, and at least two other officers were present. (R.124:53). Logan asked to use the bathroom and said he knew where it was, but an officer escorted him, stepping into the bathroom with him. (R.190|AMBA0197:2:40-3:33; R.132:83-84).

Pertzborn had Logan agree that he had been told he was not in custody and that he had voluntarily participated. He told Logan to “verbalize it” for the camera. (R.116:4; R.190|AMBA0198|0:05-2:15). Much of the remainder of the interrogation was Logan recounting what happened. (*See generally* R.116).

At 4:10am Logan was formally arrested. In the preceding twenty-six hours police did not read him *Miranda* warnings. (R.100:3; App.115). Logan was later interrogated at the juvenile detention center. *See generally* (R.117). The State charged him with First

Degree Intentional Homicide and Move/Hide/Bury Corpse of a Child. (R.26).

Logan moved to suppress statements made during all interrogations beginning with the initial contact with police in the early hours of January 9th through the interrogation at the juvenile detention center. (R.83; R.153). The court held seven evidentiary hearings. Witnesses included law enforcement officers, as well as Delores and Dr. Ryan Cutler—a psychologist retained by Logan to discuss interrogation tactics and psychological factors that influence a person’s ability to resist questioning.<sup>13</sup>

The court issued an oral ruling. Ultimately, the court did not suppress the statements made at Lauren’s residence, the first interrogation at Albany PD, or after Logan was arrested and Mirandized. (R.170).

The court did suppress the statements taken in the middle of the night on January 10th. The court determined that, “the Brodhead interview and the Albany interview and . . . the visit to the crime scene in between . . . is a continuous interview that never ended.” (R.196:24-25; App.26-27). The court considered the following factors:

- The length and frequency of the interrogations, given that the Brodhead interrogation was part of a series of

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<sup>13</sup> Dr. Cutler also submitted a report. (R.144).

interviews all within twenty-four hours. (R.196:25; App.27).

- Delores testified “she was told to keep the defendant at home and she told the defendant the same” earlier on January 9th, signaling he was under the control of police. (R.196:25; App.27).
- Before they left for Brodhead, Logan “said something to the effect I already talked to the police meaning it seems why do I have to go again?” (R.196:25; App.27; *see* R.124:16).
- Although Logan was told he was free to leave on several occasions, “[Delores] had indicated they turned down her request to let the defendant ride with her.” (R.196:24; App.26).
- Logan “was not permitted to go to Brodhead on his own. He was taken there while not handcuffed in the police car to get there.” (R.196:25; App.27).
- “There was a period of time before [Delores] came that . . . the agents were engaging with him.” (R.196:26; App.28).

The court also relied on the “nature of the questioning,” finding that although it began “a little more open and less confrontational,” Pertzborn shifted tone and started accusing Logan of lying. He also made moral appeals, such as questioning if Logan had a soul, and told Logan that Pertzborn could help by

writing in his report that Logan was cooperative. The court took that to mean “[s]o I would be foolish not to keep talking at this point?” (R.196:26; App.28).

The court considered that Pertzborn grabbed Logan’s hand, finding it “very unusual . . . this [is] an intimidation factor to say it’s almost a passive/aggressive I got control here. . . I’m in charge . . . [A] subtle, maybe not so subtle, way of exercising that authority and control there.” (R.196:26-27; App.28-29). This was “a factor in the overall circumstances in terms of whether the defendant is in a physical, emotional state to be able to resist, as they say, these questions to exercise his own willpower.” (R.196:27; App.29).

Before they left Brodhead, Logan asked whether he could go to the scene with Delores, and was told no. (R.196:27; App.29). The court found that Logan “was never away from the police officers” and because Delores did not go to the crime scene, Logan had no other way home. (R.196:27; App.29).

The court ruled that:

Because of the totality of the circumstances, the frequency of the interviews, the length of the interviews, the nature of the interview at the Brodhead station I think that I will find that a reasonable person given the totality of the circumstances would believe that they were in custody, that they did have to go to answer those questions, and that the nature of the questions were coercive, given we’ve changed from more conversational and investigation to making

accusations and these appeals to I can help you. We can write up a report that shows you are cooperative. Let me hold your hand. Because of that I will direct that the statement made by the defendant at the Brodhead Police Department, at the crime scene, at the subsequent trip to the Albany Police Department will be suppressed.

(R.196:28-29; App.30-31).

The court also found, “due to the circumstances, the successive interviews here, the late hour, the totality of the circumstances, the nature of the questions that those statements were involuntary.” (R.196:35; App.37).

## ARGUMENT

**I. Logan was in custody when police took him from home in the middle of the night to a police station for questioning, and therefore, he should have been provided *Miranda* warnings.**

A. Legal standard and standard of review.

Police must provide *Miranda* warnings to an individual prior to any custodial interrogation. *Miranda*, 384 U.S. at 467-468. *Miranda* warnings are required in order to preserve the Fifth Amendment right against self-incrimination given that “[t]he circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of [the suspect].” *Id.* at 469. The State may not use

statements, “whether exculpatory or inculpatory,” stemming from custodial interrogation unless it proves that *Miranda* was complied with. *Id.* at 444. The State carries “the burden of establishing whether a custodial interrogation occurred such that *Miranda* warnings were required . . . by a preponderance of the evidence.” *State v. Armstrong*, 223 Wis. 2d 331, 351, 588 N.W.2d 606 (1999) (overruled on other grounds by *State v. Halverson*, 2021 WI 7, ¶3, 395 Wis. 2d 385, 953 N.W.2d 847).

Determining whether *Miranda* warnings were required involves application of the “custodial interrogation” standard, which has two parts: interrogation and custody. The State concedes all of the questioning here was interrogation. (App. Br. at 17 n.4).<sup>14</sup> An interrogation is “custodial” when a reasonable person would not feel free to end the encounter and leave, under circumstances presenting the same inherently coercive pressures as the type of station-house interview in *Miranda*. *Halverson*, 395 Wis. 2d 385, ¶17. This is an objective test, which considers the totality of the circumstances. *Howes v. Fields*, 565 U.S. 499, 509 (2012).

Here, because Logan was a minor, the objective standard includes consideration of his age, which is termed the “reasonable child” standard. *J.D.B. v.*

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<sup>14</sup> Interrogation is “any words or action on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

*North Carolina*, 564 U.S. 261, 271-274 (2011). This standard recognizes that children are more likely to feel pressured to submit to law enforcement than adults in similar situations. *Id.* Thus, if a juvenile's age is known to the police at the time of interviewing, this fact must be considered. *Id.* at 274.

A two-step standard of review applies. The circuit court's findings of historical fact are upheld unless clearly erroneous; however, whether a person is "in custody" for *Miranda* purposes is a question of law, reviewed de novo. *State v. Mosher*, 221 Wis. 2d 203, 211, 584 N.W.2d 553 (Ct. App. 1998).

When acting as the factfinder, the circuit court is considered the "ultimate arbiter of the credibility of a witness," and its credibility findings will not be questioned unless they are clearly erroneous. *Welytok v. Ziolkowski*, 2008 WI App 67, ¶28, 312 Wis. 2d 435, 752 N.W.2d 359 (citation omitted). When the evidence "consists of disputed testimony and a video recording, [a reviewing court] will apply the clearly erroneous standard of review when [] reviewing the trial court's findings of fact based on that recording." *State v. Walli*, 2011 WI App 86, ¶16, 334 Wis. 2d 402, 799 N.W.2d 898.

The State asks this Court to review the court's factual findings de novo based on the existence of recordings, with citation to *State v. Rejholec*, 2021 WI App 45, ¶17, 398 Wis. 2d 729, 963 N.W.2d 121. (App. Br. at 16, 27). In *Rejholec*, there was a single, fully-recorded interview that took place at one location.

There, “the relevant facts for this appeal *are all* found within the video. . .” *Id.*, ¶5. (emphasis added). While this Court can independently review the videos for the content therein, the circuit court’s factual and credibility findings were also informed by seven evidentiary hearings and testimony from thirteen witnesses. Those findings are owed deference.

B. Logan was in custody and should have been provided *Miranda* warnings.

Logan was in custody from the time he was taken from Delores’ home—around 11:00pm on January 9th—and at all points thereafter. Under the totality of the circumstances, a reasonable child would not feel “at liberty to terminate the interrogation and leave” and “the relevant environment present[ed] the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*.” *See Halverson*, 395 Wis. 2d 385, ¶17 (quoted sources omitted).

To determine custody, the relevant factors include: (1) the purpose, place, and length of the interrogation; (2) the degree of restraint; and (3) the defendant’s freedom to leave. *State v. Martin*, 2012 WI 96, ¶ 35, 343 Wis. 2d 278, 816 N.W.2d 270. Again, the inquiry utilizes a “reasonable child” standard. *J.D.B.*, 564 U.S. at 264.<sup>15</sup>

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<sup>15</sup> The State fails to acknowledge the “reasonable child” standard. Instead, the State repeatedly asserts that Logan was “only four months shy” of seventeen. (App. Br. at 19, 23, 42). The constitutional threshold is eighteen. *See J.D.B.*, 564 U.S. 261

1. Purpose, place, and length of interrogation.

The purpose of the interrogation was to investigate a suspected homicide. While the location changed, the interrogation all took place in police-dominated environments. Initially, numerous officers were present when Pertzborn took Logan from Delores' home to Brodhead. (R.193|0:00-2:31). Police took Logan to Brodhead—ten to fifteen minutes further than Albany PD, where he had previously been questioned. (R.124:26). The late hour would have suggested a gravity that a daytime interview request may not. *See Fields*, 565 U.S. at 515 (fact that it was past the hour when individuals generally went to bed supported custody argument). Logan was told he was going to be recorded, which also suggests a different and more serious purpose to the interrogation than the previous interrogations.

In Brodhead, Logan was in a secured, police station interrogation room. This fact weighs toward custody. *See State v. Lonkoski*, 2013 WI 30, ¶28, 346 Wis. 2d 523, 828 N.W.2d 552. Logan was advised that he was being recorded. He was directed to sit in the chair furthest from the door, with Baker and Pertzborn seated in front of both exits. This was the type of “inherently coercive” station house questioning at issue in *Miranda*. *See Halverson*, 395 Wis. 2d 385, ¶17.

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277. Moreover, Dr. Cutler explained, the brain continues to develop into the early or even mid-20s (R.150:15-16).

This was a lengthy interrogation that came on the heels of two other lengthy interrogations. Pertzborn picked Logan up at 11:00pm and the Albany interrogation did not end until 3:30am.<sup>16</sup> (R.100:2; App.114). Logan had spent between seven and eight of the preceding twenty-one hours under the watch of police, and had been subjected to several hours of questioning during that time. (*See* R.100:2; App.114).

Our supreme court in *In re Jerrell C.J.*, 2005 WI 105, ¶33, 283 Wis. 2d 145, 699 N.W.2d 110, emphasized the length of interrogation—five-and-a-half hours—in its custody determination. Although the interrogation in that case was in a single sitting, Logan would likewise “be left wondering ‘if and when the inquisition would ever cease,’” given that police kept coming back for more questioning. *See id.* (cited source omitted). As the circuit court found it was “rather extraordinary to do this many interviews this quickly in such a short period of time.” (R.196:25; App.27).

## 2. Degree of restraint.

Logan faced a high degree of restraint. To determine the degree of restraint, the relevant factors include: whether the suspect is handcuffed, whether a weapon is drawn, whether a frisk is performed, the manner in which the suspect is restrained, whether the suspect is moved to another location, whether

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<sup>16</sup> By the time he made incriminating statements, it had been two hours since Logan was taken from Delores’ house. (R.100:2; App.114).

questioning took place in a police vehicle, and the number of officers involved. *State v. Gruen*, 218 Wis. 2d 581, 594-96, 582 N.W.2d 728 (Ct. App. 1998).

Police took Logan to Brodhead in an imposing manner. Although Delores acknowledged that officers were polite and friendly, they were also authoritative. (R.132:165).<sup>17</sup> When Pertzborn asked Logan to come to Brodhead, Logan told him that he had already spoken to police. As the court found, these words seemed to convey “a meaning of why do I have to go again” for yet more interviewing. (R.196:25; App.27).<sup>18</sup>

Delores asked if she could drive Logan to Brodhead, and police told her no. (R.133:38). Logan was not handcuffed and no weapon was drawn. However, Pertzborn and Baker wore bulletproof vests emblazoned with “POLICE” and were armed. (R.124:72-73). *See State v. Ezell*, 2014 WI App 101,

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<sup>17</sup> The State asks this Court to look at a body cam and determine that the situation was not “authoritative.” (App. Br. at 27). However, Schuetz’s body cam does not start until police had been at the residence nearly fifteen minutes (Pertzborn tells Logan it is 11:25pm shortly into the video). (R.193|0:00-0:07).

<sup>18</sup> Despite the State’s complaint, Logan’s statement that he had already spoken to police is relevant. (*See* App. Br. at 23-24). Not only are the prior interrogations an objective factor in the custody analysis, by telling Pertzborn he had already spoken with them, and Pertzborn insisting that he “needed” to speak with Logan anyway, a reasonable child in Logan’s position would feel as though they had to acquiesce. Pertzborn confirmed that Logan said he had already spoken with law enforcement (R.124:16), whereas the State incorrectly attributes this statement only to Delores. (App. Br. at 23).

¶¶2, 13, 357 Wis. 2d 675, 855 N.W.2d 453. (although defendant was not handcuffed, the fact that the officers' handcuffs and badge were visible weighed toward custody).

In addition to being moved from Delores' house to Brodhead, within the preceding twenty-one hours, police moved Logan four other times: from Lauren's house to his mother's house; from Delores' house to Albany PD; from Albany PD to his mother's house; and from his mother's house back to Albany PD. (*See* R.100; App.114). Police maintained control of Logan's movement during their interactions with him. *See State v. Pounds*, 176 Wis. 2d 315, 321-22, 500 N.W.2d 373 (Ct. App. 1993) (fact that defendant was transported from the scene to another location in a squad car weighed toward custody).

The seizure of Logan's cell phones is also relevant to the degree of restraint. *See State v. Bartelt*, 2018 WI 16, ¶54, 379 Wis. 2d 588, 906 N.W.2d 684 (interrogation became custodial when police took the defendant's phone and instructed him to remain in the room). Losing one's phone creates a sense of isolation. When Pertzborn and Baker were at Delores' house, before taking Logan to Brodhead, Pertzborn asked Logan if he had any cell phones. Logan showed them to a phone in his bedroom. (R.124:21). Pertzborn took the phone. (R.124:21-22; R.132:98). This was the second time that police took one of Logan's phones. Earlier in the day, Ritter took Logan's phone saying, "we're going to have to keep your telephone because everything you ever did on this is inside of this phone,

whether you deleted it or not.” (R.192|38:32-38:50; R.112:33).

The number of officers involved also weighs heavily toward a finding that Logan was in custody when he was taken to Brodhead. At least seven officers were present when police took Logan from the house. (R.193|0:00-2:31; R.124:9). *See United States v. Smith*, 3 F.3d 1088, 1098 (7th Cir. 1993) (presence of at least seven police officers supported conclusion that defendant was in custody). Pertzborn and Baker outnumbered Logan in the vehicle as they drove to Brodhead. (R.124:20). They were escorted to Brodhead by Kanable, who was in full uniform and driving a marked police vehicle—creating a police caravan. (R. 132:98-100).

In the interrogation room, both Pertzborn and Baker were present while Pertzborn interrogated Logan—until Logan ultimately asked if Baker could leave (though he would later return against Logan’s wishes). And in the preceding twenty-one hours, at least ten officers<sup>19</sup> from four different law enforcement agencies interacted with Logan.

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<sup>19</sup> Pertzborn, Baker, Kanable, Fiez, Ritter, Whitcomb, Degner, Gilbert, Officer Jamy Dennis, Deputy Mark Binger, and Deputy Daniel DeNure all interacted directly with or supervised Logan. Special Agent Holmes, Agent Leck, and Deputy Erdmann were also present at Delores’ house. (R.148:14-15).

### 3. Freedom to leave.

Under the totality of the circumstances, a “reasonable child” in Logan’s position would not have felt free to refuse questioning.<sup>20</sup> Logan acknowledges that Pertzborn told him that he was free to go and not under arrest; however, these words are not talismanic. *See State v. Uhlenberg*, 2013 WI App 59, 348 Wis. 2d 44, ¶11, 831 N.W.2d 799 (officer told suspect he was not under arrest but the totality of the circumstances established custody); *see also* Wayne R. Lafave, 2 Criminal Procedure § 6.6(d) at 737 n. 64 (4th ed. 2022) (being told by the police that you are not under arrest and can leave at any time “will not carry the day where it is, in effect, nullified by other police conduct”).

Pertzborn’s statements would have appeared illusory, given the circumstances. Logan’s preceding interactions with police in the past twenty-one hours involved repeated restrictions on his freedom of choice, which provide context to how a reasonable child in his position would have felt. While at Albany, Logan brought up getting his backpack—located one block away—but he was told to stay where he was, to let officers finish what they need to do, and that they would go with him. (R.192|3:30-3:50, 49:50-50:11;

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<sup>20</sup> Contrary to the State’s assertion, the circuit court did not “base[] its finding of custody on what it thought [Logan] subjectively believed at the time about his custodial status.” (App. Br. at 23). The court sometimes used first-person language to describe how someone in Logan’s position would feel, but applied an objective standard, finding that a “reasonable person” would not feel free to refuse. (R.196:27-28; App.29-30).

R.112:41; R.114:3; R.127:71-72). Later, Logan asked Fiez how long it would be, and—instead of telling Logan that he was free to leave—Fiez said he was not sure. (R.192|33:41-34:02; R.114:20; R.127:77-78). Eventually, Logan asked Kanable if he could leave. (R.132:92). But Kanable told him he could not leave without an adult. (R.132:92; R.133:4). Then, police called Delores, and when she arrived, Kanable told her to not let Logan leave the house. (R.133:4; R.133:20; R.193|45:40-46:05).<sup>21</sup> Delores testified that she relayed that message to Logan. (R.133:134-35). Every time Logan actually attempted to move freely, he was shut down.

It is against this backdrop that the court must evaluate Logan’s freedom to decline questioning. No “reasonable child” in Logan’s circumstances would feel

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<sup>21</sup> The court acknowledged that there was a “little” discrepancy between Delores’ and Kanable’s testimony about what he told her. (R.196:14; App.16). Kanable testified that he told Delores to “keep an eye” on Logan. (R.132:93). The State argues that Delores’ testimony was not credible. (App.’s Br. at 25, 27). It is not this Court’s “function to review questions as to weight of testimony and credibility of witnesses.” *Matter of Dejmal’s Estate*, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980). Moreover, contemporaneous evidence supports Delores’ account. At her house, prior to leaving for Brodhead, Delores recounted that she was previously told by an officer: “‘Keep him inside your house.’ and I said ‘Porch?’ and he said ‘Not without you.’” (R.193|42:37-42:48). The State argues that Delores misinterpreted Kanable’s statement. (App. Br. at 25). Yet, under the circumstances an objective listener would interpret “keep an eye on him” as a direction to keep him at home.

like they could refuse questioning. Logan was in custody beginning from when he was taken from Delores' house to Brodhead.

If this Court disagrees, multiple additional factors during the interrogation suggest that, at the very latest, Logan was in custody when Pertzborn changed the tone of the interrogation and subjected him to sharp and accusatory questioning. At the outset, Pertzborn's statements during the interrogation undermined his prior statements that Logan was free to leave. He was not consistent in his language and engaged in confusing double-speak.

When Pertzborn first contacted Logan at Delores' house prior to taking him to Brodhead, he told Logan he "*needed* to ask some follow-up questions. . ." (R.124:16) (emphasis added). He also said Logan was "not in custody," and that he did not have to answer questions. (R.124:23-24). But given that he had just said that he "needed" to speak to Logan, a "reasonable child" would not have felt free to say no.

Then, in the interrogation room, Pertzborn told Delores he *needed* to talk to Logan, saying: "[w]ell you're here because he asked you to be here and I need to talk to him and he's agreed to talk to me . . . I have already explained to him he is not under arrest. He does not have to talk to me. He can leave at any time." (R.115:26; App.64). Yet, Pertzborn followed up with how he "recommend[s] talking to me []because I am in a position where I can help." (R.115:26-27; App.64-65).

Throughout the interrogation, Pertzborn referenced the “need” to talk to Logan, the “need” for Logan to tell the truth, and the “need” for Logan to help him eighteen times. (R.115:2, 26, 27, 28, 35, 36, 37, 38; App. 40, 64, 65, 66, 73, 74, 75, 76). The repeated insistence that Logan needed to speak, help, and be truthful undermined that he was free to refuse, and notably, nearly all of the above instances came after the last time Logan was told he could leave. (R.115:26; App.64).

The manner of an interrogation and the treatment of the individual is relevant to the custody determination and whether a person would feel free to leave. *Fields*, 565 U.S. at 514. In particular, armed police using a “sharp” tone has been found to contribute to the sort of coercive atmosphere required for an interrogation to be custodial. *Id.* at 515. Psychological pressures used by an interrogating officer are also a factor in the custody determination. *See Bartelt*, 379 Wis. 2d 588, ¶40.<sup>22</sup>

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<sup>22</sup> Pertzborn employed numerous tactics and stratagems. *See State v. Mosher*, 221 Wis. 2d 203, 214 n3, 584 N.W.2d 553 (Ct. App. 1998) (use of strong-arm tactics or deceptive stratagems are more generally associated with arrest and are indicium of custody). The “Reid” method of interrogation was specifically discussed in *Miranda* as having psychologically coercive techniques. *Miranda*, 384 U.S. at 448-455, 449 n9. While Pertzborn disclaimed using the Reid technique, Dr. Cutler explained how the tactics Pertzborn employed lined up. (R.144:9; R.124:42-43); *see also*, (R.146) (chart comparing the Reid techniques with tactics used by Pertzborn). While not using the term, Pertzborn admitted engaging in “denial management,”

Although the exchange began more conversational, there was a dramatic shift in the tone of Pertzborn's questioning. As the circuit court found, "[a]t approximately 12:54 a.m. there is a period in the interview where Agent Pertzborn becomes more confrontational with the defendant." (R.196:20; App.22). Pertzborn raised his voice, cut off Logan's responses, told him he was lying, forcefully pointed his finger into the table, and leaned in close. (R.115:36-37; App.74-75; R.190 | 12:55:20AM-12:57:08AM).

Pertzborn refused to accept Logan's answers: "I need you to bring it back and say listen Jim give me an opportunity to show you I am telling you the truth, because you're not right now, and I'm just going to forget about it and we are going to start over again." (R.115:36-37; App.74-75; R.190 | 12:57:08AM-1:00:57AM). A reasonable child would not feel free to stop questioning or terminate the interrogation. Instead, they would feel obligated to continue answering questions to Pertzborn's satisfaction or be forced to start over.

While Pertzborn may have "asked" Logan to accompany him to Brodhead and said he was free to go, the reality of the situation demonstrates that "freedom" was illusory—including the fact that it was 11pm, other officers were arriving to search the house, Logan's phones were seized, Logan was not allowed to ride with Delores, police had doggedly interrogated

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essentially trying to prevent Logan from denying wrongdoing, to stop him from changing his position. (R.124:41; R.144:5).

Logan over the preceding twenty-one hours, and had moved him four times to various locations.<sup>23</sup> The court correctly determined that a reasonable child in Logan's position "would believe that they were in custody, that they did have to go to answer those questions." (R.196:28-29; App.30-31).

From that point on, the custodial nature of the interrogation continued. From Brodhead, police took Logan to the scene. When Logan asked to ride with Delores, he was told no. (R.123:47-48). Numerous officers were at the scene. After locating the body, officers took Logan to Albany PD where they continued interrogating him.<sup>24</sup> (R.124:53).

The purpose, place, length of interrogation, degree of restraint, and freedom to leave escalated throughout the night. While officers sprinkled in more statements that Logan was not under arrest and was free to leave, these statements rang hollow. Logan was not allowed to ride with Delores. He had no way to leave the scene on his own in the middle of the night. He had confessed to a homicide.<sup>25</sup> Arrest would have

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<sup>23</sup> As will be discussed further in the voluntariness section, Pertzborn presented as a parental figure (R.196:27; App.29), and anyone with children can attest that oftentimes asking them to do something is akin to an order.

<sup>24</sup> These facts are important, not because they establish that custody began before they occurred (App. Br. at 25-26), but because they establish that custody did not cease at any point, despite Pertzborn telling Logan otherwise. (*See e.g.* R.116:4).

<sup>25</sup> The State is wrong to fully discount Logan's confession. While a confession alone does not create custody, it is still a

seemed inevitable. And yet, officers did not give Logan *Miranda* warnings until the Albany interrogation ended at 4:00am—which was approximately five hours after they picked him up from Delores’ house.

The totality of the circumstances demonstrate Logan was in custody and police violated his constitutional rights by failing to provide him *Miranda* warnings. The circuit court correctly suppressed his statements. *Id.*

## **II. Logan’s statements were involuntary.**

### **A. Legal standard and standard of review.**

The Due Process clause of the Fourteenth Amendment forbids the State from using involuntary statements against an accused. *State v. Jiles*, 2003 WI 66, ¶32, 262 Wis. 2d 457, 663 N.W.2d 798. Statements are involuntary if they are not the product of free will but are instead the “result of 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. Hoppe*, 2003 WI 43, ¶36, 261 Wis. 2d 294, 661 N.W.2d 407.

In determining voluntariness, a court considers a defendant’s personal characteristics and police pressure, in a totality of the circumstances test. *Id.*, ¶¶38-39. This test “reflects a recognition that the

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relevant factor if it changes the tone or atmosphere of the interrogation. *Bartelt*, 379 Wis. 2d 588, ¶33.

amount of police pressure that is constitutional is not the same for each defendant.” *Id.*, ¶40. A prerequisite for a finding of involuntariness is “coercive or improper police conduct.” *Id.*

“If a defendant’s condition renders him or her uncommonly susceptible to police pressures, those pressures may be coercive even though under another set of circumstances, they might not be coercive.” *State v. Agnello*, 2004 WI App 2, ¶10, 269 Wis. 2d 260, 674 N.W.2d 594. “[A]s interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor . . .” *Colorado v. Connelly*, 479 U.S. 157, 164 (1986). A confession’s truth or falsity has no direct bearing on the determination of voluntariness. *Agnello*, 229 Wis. 2d 260, ¶10.<sup>26</sup>

Relevant personal characteristics include: age, education and intelligence; physical and emotional condition; and prior experience with law enforcement. *Hoppe*, 261 Wis. 2d. 294, ¶39. The individual’s personal characteristics are balanced against the police pressures and tactics used to induce the statements, such as: the length of the questioning; any

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<sup>26</sup> This Court should reject the State’s attempt to use the purported truth of Logan’s statements to find them voluntary. (App. Br. at 42-44). As the United States Supreme Court stated, use of “evidence of confessions which are involuntary . . . cannot stand . . . [t]his is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law . . .” *Rogers v. Richmond*, 365 U.S. 534, 540-541 (1961).

delay in arraignment; 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 used by the police to compel a response; and whether the defendant was informed of the right to counsel and right against self-incrimination. *Id.*

It is the State's burden to prove by a preponderance of the evidence that statements are voluntary. *State v. Vice*, 2021 WI 63, ¶29, 397 Wis. 2d 682, 961 N.W.2d 1.

A two-step standard of appellate review applies. *Agnello*, 269 Wis. 2d 260, ¶8. The circuit court's findings of fact are upheld unless they are clearly erroneous; application of the legal standard is de novo. *Id.*

B. Coercive police pressure overcame Logan's ability to resist questioning.

Logan's statements were not the product of his unconstrained free will but were instead the result of a conspicuously unequal confrontation in which the pressures brought to bear on him overcame his ability to resist. *See Hoppe*, 261 Wis. 2d 294, ¶36.

Courts must consider an individual's personal characteristics in order to determine voluntariness. The State sets forth a skewed legal standard, when it claims that the court "never should have reached" Logan's personal characteristics prior to making its findings about which police actions were coercive.

(App. Br. at 39). As support, the State presents what is essentially a two-step standard, whereby police actions are viewed in isolation to determine if they are inherently coercive. (App. Br. at 33-35).

Whether tactics are coercive is not a determination that can be completely divorced from the individual's personal characteristics. Instead, "pressures that are not coercive in one set of circumstances may be coercive in another set of circumstances if the defendant's condition renders him or her uncommonly susceptible to police pressures." *Hoppe*, 261 Wis. 2d 682, ¶46. *See State v. Triggs*, 2003 WI App 91, ¶¶14-18, 264 Wis. 2d 861, 663 N.W.2d 396 ("[w]e disagree with the State's contention that because police misrepresentations are not inherently coercive, it was error for the trial court to engage in a totality of the circumstances analysis.").

Courts have consistently considered an individual's age in evaluating coercion. In *Jerrell C.J.*, 283 Wis. 2d 145, ¶26, our state supreme court emphasized that, when the individual is a child, "we will scrutinize police questioning tactics to determine if excessive coercion or intimidation or simple immaturity that would not affect an adult has tainted the juvenile's confession." The court highlighted "the need to exercise 'special caution' when assessing the voluntariness of a juvenile confession, particularly when there is prolonged or repeated questioning or when the interrogation occurs in the absence of a parent, lawyer or other friendly adult." *Id.*, ¶21 (quoted source omitted).

Although a confession will not be suppressed as involuntary unless there is 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 167), police conduct does not need to be egregious or outrageous to be coercive. *Hoppe*, 261 Wis. 2d. 294, ¶58. Thus, it was appropriate for the circuit court to consider the totality of the circumstances when identifying coercion and engaging in the balancing test. The State’s invitation to ignore consideration of Logan’s personal characteristics—especially his age—by only addressing police tactics, is an incorrect application of the law.

Logan’s age, lack of experience with law enforcement, and the repeated questioning all made him particularly vulnerable to police interrogation tactics. Logan was only sixteen years old at the time. In *Haley* “the juvenile’s ‘tender and difficult age’ of 15 was a significant factor favoring the Supreme Court’s suppression of his confession.” *Jerrell C.J.*, 283 Wis. 2d 145, ¶25 (quoting *Haley v. Ohio*, 332 U.S. at 599). The Seventh Circuit has also recognized “[t]he difficulty a vulnerable child of 14 would have in making a critical decision about waiving his Miranda rights and voluntarily confessing cannot be understated.” *Jerrell C.J.*, 283 Wis. 2d 145, ¶25 (quoting *Hardaway v. Young*, 302 F.3d 757, 764 (7th Cir. 2002)).

The circuit court credited Dr. Cutler’s expert testimony about “[t]he factors that diminish an individual’s ability to self-regulate includ[ing] age and mental abilities, physical conditions such as fatigue,

hunger, pain and situational factors such as the setting and duration of interrogation as well as any specific personal or persuasive tactics.” (R.196:8-9; App.10-11). Youth is correlated with impulsivity, susceptibility to social influence, compliance to authority, and temporal discounting (focusing on immediate benefits while discounting more distant consequences). (R.150:14).<sup>27</sup>

The late hour would weaken any person’s resolve, let alone a sixteen-year-old. Earlier that day, police questioned Logan on and off from 2am to 6am. (R.100:2; App.114). They questioned him again from 2:00pm to 5:00pm. Regardless of whether Logan theoretically could have napped (*see* App. Br. at 24 n5), what matters is that Pertzborn knew Logan was exhausted. After Pertzborn complained, “this is fucking taking forever I need sleep,” Logan said, “me too.” (R.115:15-16; App.53-54). Police may not have had ill will in keeping Logan up all night, but they caused his sleep deprivation and exploited it by proceeding with a third interrogation in the middle of the night.

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<sup>27</sup> The State claims that the circuit court purportedly relied on “Dr. Cutler’s *psychological* definition of ‘coercion,’ meaning things that can socially influence someone to do something.” (App. Br. at 40). The court did not apply a psychological definition of coercion. The court explicitly stated that it was not deferring to Dr. Cutler on coercion. (R.196:9; App.11) (“We don’t just simply accept a psychologist’s report to say this person was coerced or not. . .” (R.196:15; App.17)).

Logan did not have prior experience with law enforcement that would make him less susceptible to their tactics. “In cases where courts have found that prior experience weighs in favor of a finding of voluntariness, the juvenile's contacts with police have been extensive.” *Jerrell C.J.*, 283 Wis. 2d at ¶28 (citing cases where a child had been arrested 19 times and another who had been on probation for four years and had spent time in corrections). Logan’s experience with police, if any, was minimal and not of the degree needed to resist police pressure.

Logan was coming off of two other lengthy, high-pressure interrogations. The first series of questioning at Lauren’s residence lasted roughly four hours. (R.100:2; App.114). During that interrogation, Degner said he was not “buying” Logan’s story and raised his voice while confronting him. (R.125:36-37, 69). Later that day, Logan was interrogated by Fiez and Ritter at Albany PD, where he remained for another three hours. (R.100:2; App.114). During that interrogation police continued challenging Logan’s version of events and made emotional pleas. Ritter said, “it’s a brand-new baby. It’s your daughter. It’s a human life. . . she can’t defend herself . . . you need to tell us, man.” Fiez chimed in, “doesn’t she deserve it?” At that point, Logan broke down crying. (See R.112:34; R.192 | 39:12-40:23). Ritter told Logan that this is “not going away.” (R.112:39).

Under these circumstances, Logan was particularly vulnerable to coercive tactics when Pertzborn arrived at Delores' house at 11:00pm to take him to the police station for yet another interrogation.

The State skirts an analysis of the totality of the circumstances by implying that because individual tactics were not found to be coercive in other cases, the sum of the parts could not possibly be coercive. (*See* App. Br. at 39). The State fails to acknowledge that while certain tactics may be *lawful*, police who employ them do so at the risk of crossing the line into coercion, as Pertzborn did here. *See Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (misrepresentations by police alone are not grounds for reversal, but they weigh toward custody); *see also U.S. v. Rutledge*, 900 F.2d 1127, 1131 (7th Cir. 1990) (noting that “the law permits the police to pressure and cajole, conceal material facts, and actively mislead—all up to limits not exceeded here.”). And determining whether statements are voluntary “requires more than a mere color-matching of cases.” *Reck v. Pate*, 367 U.S. 433, 442 (1961).

The State, continuing its refusal to acknowledge the relevance of Logan's young age, relies exclusively on analysis of tactics in adult cases and ignores the difference in circumstances. The United States Supreme Court has stated that children “generally are less mature and responsible than adults” and “are more vulnerable or susceptible to . . . outside pressures than adults.” *J.D.B.*, 564 U.S. at 272 (internal citations and quotations omitted). This Court must balance the tactics used against Logan's personal

characteristics. *See State v. Clappes*, 136 Wis. 2d 222, 236, 401 N.W.2d 759 (1987) (*Clappes II*).

The tactics Pertzborn used were coercive, and ultimately, overbore Logan's ability to resist questioning. Pertzborn aggressively and repeatedly challenged Logan's honesty, cut off all attempts to explain or deny, made implicit promises of leniency, presented himself as a parental figure to exploit Logan's age and vulnerability, manipulated him with emotional pleas, and cornered him into a confession by forcing him into the choice between good and evil. Pertzborn failed to advise Logan of his right to an attorney or right to remain silent. *See Hoppe*, 261 Wis. 2d. 294, ¶39 (failing to provide *Miranda* warnings as coercive tactic). All of these tactics were used under circumstances where Logan was sleep-deprived and subject to repeated questioning over the preceding 21-hour period.

Pertzborn aggressively and repeatedly challenged Logan's honesty and interrupted any attempt to deny or explain. As the interrogation proceeded, Pertzborn's tone drastically shifted from when they were casually talking at the outset.<sup>28</sup> (*See* R.190 | 12:55:10AM-1:00:54AM). The State claims that there was "no change in tone of the interview." (App. Br. 29). However, Pertzborn acknowledged that at a certain point the interrogation changed from

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<sup>28</sup> Yet, it should be noted that even the more-friendly chat is recognized as a tactic that police are trained in—rapport building. (R.150:38-39).

conversational to confrontational, (R.123:39-41), and he “definitely . . . had a more raised—stern tone.” (R.123:42).

Pertzborn repeatedly told Logan that he was not being truthful during the interrogation and explicitly accused him of lying. *See e.g.* (R.115:35; App.73). He told Logan the information that he gave was inconsistent with what Lauren had told them. (R.115:29; App.67). When Logan said “we have no idea where that child is,” Pertzborn challenged him, “[n]o some of us do.” (R.115:28; App.66).

When Logan described Tyler and his girlfriend, Pertzborn cut him off, asked Delores if she had ever heard of Tyler, and then told Logan he knew Logan was not telling the truth; when Logan attempted to say he was telling the truth, Pertzborn again cut him off—taking a much more matter-of-fact and authoritative tone and at times raising his voice for emphasis—and told him he “knows” Logan is lying, and that he can “disprove” Logan’s story. (R.115:35; App.73; R.190 | 12:55:15AM-12:56:00AM).

For over five minutes, Pertzborn re-emphasized that he knew Logan was lying, stated that Logan needed to “tell the truth” in order for Pertzborn to help him, and referenced that Delores also did not believe Logan. (R.190 | 12:55:10AM-1:00:54AM). Logan ultimately resorted to asking Pertzborn to lead him to the so-called truth, asking “[c]an I ask you what the truth is then?” (R.115:37; App.75).

Logan had an adult with him, which can sometimes be a protective factor; yet, Delores did not act protectively here. She repeatedly told Logan to “tell the truth,” implying she believed he was lying, and said she could not help him if he did not tell the truth. (See R.115:36-38; App.74-76). She joined in relay questioning with Pertzborn. (R.115:36-38; App.74-76). Pertzborn exploited her presence, turning to her when he did not believe Logan, “[y]ou know him a lot better than I do and I know I am looking in your eyes and you’re going oh hell no.” (R.115:36; App.74). When Delores said, “please tell the truth,” Pertzborn said, “I’m so glad she’s here.” (R.115:36; App.74). See, *State ex rel. A.S.*, 203 N.J. 131, 136 (NJ 2010) (holding the minor’s confession inadmissible where her adoptive mother badgered the minor in front of police and “became a de facto agent of the police”).

Our state supreme court has recognized that the refusal to believe “repeated denials of guilt” and use of a “strong voice” over a prolonged period of time can render a confession involuntary. *Jerrell C.J.*, 283 Wis. 2d 145, ¶35. Pertzborn further pressured Logan into a confession by making repeated, implicit promises of leniency. He extended his promise to help Logan, but of course, only if Logan told the “truth.” (R.115:27, 28, 35, 36, 37, 38; App.65, 66, 73, 74, 75, 76). He echoed Delores in saying he would do “everything in [his] power to help” Logan. (R.115:37; App.75).

Pertzborn indicated to Logan that it would benefit him for Pertzborn to write in his “report” that Logan was “cooperative.” (R.115:35; App.73). Before

providing incriminating statements, Logan asked Pertzborn what was going to happen; to that, Pertzborn replied “I don’t know, but . . . I am going to get to . . . write a report saying how cooperative and how apologetic you are for what happened . . . Which weighs [] a whole lot on where this all can go.” (R.115:35; App.73). Pertzborn made it clear, however, that he would only help Logan if Logan confessed, and confessed promptly: “because when I write it, if I sit there and have to say I had to do this, this and this to get you to even step on it. What kind of cooperation is that?” (R.115:36; App.74). Pertzborn told Logan not to “blow that chance.” (R.115:37; App.75). Pertzborn admitted he was telling Logan he could help mitigate whatever wrong was done. (R.123:93).

These implied promises of leniency or receiving a benefit from telling Pertzborn the so-called truth were coercive. While police may choose to use guilt-presumptive tactics to pressure, cajole, and mislead, those activities are psychologically coercive and risk crossing the line into unconstitutional territory. See *Miranda*, 384 U.S. at 451, 455 (guilt-presumptive stratagems can take “a heavy toll on individual liberty and trades on the weakness of individuals”).<sup>29</sup>

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<sup>29</sup> In *In re Elias V.*, 237 Cal. App. 4th 568, 593 (Cal. App. 2015), the court held statements by a fourteen-year-old extracted in a school-setting using the same guilt-presumptive tactics employed by Pertzborn in Logan’s case were involuntary.

Promises of leniency have been found to be unduly coercive for an individual who had “no previous experience with the criminal law.” *See e.g. Lynumn v. Illinois*, 372 U.S. 528, 532-34 (1963) (statement was involuntary after police told a defendant that her children could be taken away if convicted unless she cooperated and that they “would be willing to recommend to the State leniency in her case”).

The State asserts that Logan “was not made any specific promises of leniency if he confessed” (App. Br. at 26). However, Pertzborn repeatedly offered the incentive of writing a favorable report. (R.115:35, 38; App.73, 76). He created a sense of urgency by stating if Logan did not tell the truth, the opportunity could go away. (R.115:27; App.65). He told Logan that “if I am going to help yah, I’m putting my neck way out there for yah.” (R.115:35; App.73). While not an express promise of leniency, Logan was a child without prior experience in the system. Offering illusory benefits in exchange for incriminating statements was unduly coercive.<sup>30</sup>

Another tactic employed by Pertzborn was one the circuit court noted—presenting as a trustworthy, parental figure. (R.196:27; App.29). Pertzborn pressured Logan into confessing by exploiting his youth and the deferential posture children take to

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<sup>30</sup> Dr. Cutler testified that Pertzborn crossed the line into territory beyond what is condoned by guilt-presumptive training protocols when he sated he would stick his neck out for Logan. (R.150:44-45).

authority figures.<sup>31</sup> Pertzborn repeatedly offered to help Logan and linked his promises of help to Delores' offers to help. (R.115:36-37; App.74-75). In addition, the circuit court determined that Pertzborn's unusual act of taking hold of Logan's hand was a control tactic. (R.196:27; App.29).

This was not something that the court had seen, not something it thought would be done if Logan was an adult, and an action that exuded an air of "authority and control." (R.196:27; App.29). The State misleadingly characterizes this as Pertzborn "offering" his hand to Logan. (App. Br. at 26). In fact, Pertzborn *told* Logan to give Pertzborn his hand, told Logan to be honest, told Logan that "we" know what happened, and were going to work on fixing it. (R.190|1:01:45AM-1:02:08AM; R.115:38; App.77). This was clearly not the sort of friendly greeting or handshake the State characterizes it as. (*See* App. Br. at 26). It was a tactic used to demonstrate Pertzborn's authority and control.

Finally, after repeatedly accusing Logan of lying, giving him no chance to deny or explain, and making implied promises of leniency, Pertzborn used emotionally charged pleas to overbear Logan's will. Among the most powerful, was the binary moral choice between good and evil.<sup>32</sup> Pertzborn presented Logan

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<sup>31</sup> Pertzborn acknowledged he wanted to be "likeable." (R.123:125).

<sup>32</sup> Dr. Cutler identified this as the "alternative question" tactic. (R.146:5). (*See also* R.123:104) (Pertzborn describing this as binary choice).

with only two options: having a soul and feeling bad about what he had done or being a person who made a mistake “and they’re just evil about it, they don’t give a shit. What type of person are you.” (R.115:37; App.75). In this situation, having “a soul” meant confessing. When Logan said he cared, Pertzborn responded that Logan was not a bad person, he made a mistake. (R.115:37; App.75; R.144:6). Pertzborn told Logan that they needed to “give that precious child of yours, a proper burial.” (R.115:38; App.76). According to Pertzborn, he saw Logan’s “eyes well up” during this exchange. (R.123:110). It is only after this, that Logan began making incriminating statements. Pertzborn broke Logan down and cornered him into a position where confession was the only option.

Logan did not choose to make incriminating statements with free and unconstrained will reflecting deliberateness of choice. A police officer with nearly 30-years’ experience and over a decade with the Department of Criminal Investigations, (R.123:6), used a panoply of guilt-presumptive techniques on an emotionally vulnerable, sleep-deprived, sixteen-year-old to extract inculpatory statements. These statements, and the continuing statements in Albany, were unconstitutionally obtained, and must be suppressed.

## CONCLUSION

For the reasons stated herein, this Court should affirm the circuit court's suppression order.

Dated this 27th day of October, 2023.

Respectfully submitted,

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## CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 10,925 words.

## CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 27th day of October, 2023.

Signed:

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