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 PARTIALLY SUPPRESSING THE DEFENDANT'S CONFESSION ENTERED IN THE GREEN COUNTY CIRCUIT COURT, THE HONORABLE THOMAS J. VALE, PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT

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I. Any reasonable person would have felt free to terminate these interviews, and the relevant environment presented none of the inherently coercive pressures at issue in *Miranda*.

The State did not dispute that Kruckenberg's age "must be considered"[1] when performing the custody analysis; it plainly stated that the totality of the circumstances in this case is viewed from the perspective of a reasonable "nearly-17-year-old person." (State's Br. 19.) As the Supreme Court recognized in *J.D.B. v. North Carolina*, 564 U.S. 261, 271 (2011), however, the test still "involves no consideration of the 'actual mindset' of the particular suspect" and remains limited "to the objective circumstances of the interrogation." Indeed, the Court cautioned that its holding was "not to say that a child's age will be a determinative, or even a significant, factor in every case," and "teenagers nearing the age of majority"—like Kruckenberg—"are likely to react to an interrogation as would a 'typical 18-year-old in similar circumstances.'" *Id.* at 277 (citation omitted). And, of course, "the ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Stansbury v. California*, 511 U.S. 318, 322 (1994) (alteration in original) (citation omitted).

The record shows that under an objective assessment of these circumstances (rather than speculation about Kruckenberg's subjective view), no reasonable 16-years-and-8-months-old person would have believed he could not refuse to answer Agent Pertzborn's questions and leave, and there was never any restraint on Kruckenberg's freedom of movement at all. Nor did the relevant environment present *any* of "the same inherently coercive pressures as the type of

[1] (Kruckenberg's Br. 28.)

station house questioning at issue in *Miranda*." *Howes v. Fields*, 565 U.S. 499, 509 (2012).

It is notable that Kruckenberg makes almost no effort to defend the circuit court's custody decisions on the grounds given for them. (Kruckenberg's Br. 30–41.) Instead, he attempts to confuse this Court by discussing things that happened during earlier police contacts with Kruckenberg and that the circuit court found noncoercive to try to conjure a different picture than what the record plainly shows about these two interviews. (Kruckenberg's Br. 30–35.) Kruckenberg has materially misrepresented the circumstances under which these interviews occurred, and his arguments must fail.

The purpose of the Brodhead questioning was not to "investigate a suspected homicide." (Kruckenberg's Br. 30.) It was to locate a missing infant; no one knew what had happened to her at that point. The fact that Pertzborn suspected Kruckenberg was lying and took a chance at suggesting Heather was dead does not change the purpose of this interview.

The late hour is also nearly irrelevant in the context of this case. (Kruckenberg's Br. 30.) Unlike in *Howes*, where the interview lasted between five and seven hours long "and continued well past the hour when respondent generally went to bed,"[2] the record shows that Kruckenberg was routinely up late into the night,[3] and Kruckenberg was not asleep when the police arrived around 11:00 p.m. or even undressed. He

[2] *Howes v. Fields*, 565 U.S. 499, 515 (2012).

[3] (R. 43:17–18; 44:2–3 (showing outgoing messages from Kruckenberg to Lauren after midnight on multiple days, sometimes as late as 2:00 a.m.); 2:1–2 (police were dispatched to Lauren's house at 1:30 in the morning where Kruckenberg was awake and talkative for nearly four more hours); 191 00:00:00–03:56:39).

was playing video games, and again: he was alert and talkative; the interview was not "lengthy,"[4] it was very brief, lasting just over an hour; and Kruckenberg confessed within 20 minutes of the questioning beginning.

Kruckenberg's contention that this interview "was the type of 'inherently coercive' station house questioning at issue in *Miranda*" is completely unsupportable. (Kruckenberg's Br. 30.) Kruckenberg was not arrested and forcibly taken elsewhere; he was asked if he was willing to come answer some questions and freely agreed. *Cf. Miranda v. Arizona*, 384 U.S. 436, 491 (1966). The interview indeed took place in a police station, but Kruckenberg fails to explain how this was a "secured" interrogation room or what he even means by that term. The doors to the room remained unlocked, the exit from the building was obvious, and Pertzborn and Baker were just seated at the table. They were nowhere near the doors and did not make any kind of physically dominating moves or show of authority. Kruckenberg was not held "incommunicado" in a "police dominated atmosphere," *id.* at 456, 463, but rather had Delores with him when he wanted, and he was in the presence of only two plainclothes officers—one of whom did not even say anything.[5] He was not "run through menacing police interrogation procedures;" he was treated very courteously, and he was told repeatedly that he was not under arrest and was free to stop answering questions and leave at any time. *Id*. at 457.

Kruckenberg's contention that he "faced a high degree of restraint" is equally unjustifiable. (Kruckenberg's Br. 31–

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[4] (Kruckenberg's Br. 31.)

[5] Kruckenberg's observation that several police officers were at Delores's house and that he had contact with ten officers over the course of the day is irrelevant. (Kruckenberg's Br. 34.) These officers were not involved in the interrogation and their presence elsewhere at other times cannot possibly have any bearing on the custody analysis.

35.) There were no restraints visible or even any place to secure restraints in the room, and *no* restrictions were placed on Kruckenberg's movement. He was never even patted down. His contention that Detective Fiez's discussion with him about his phone and the police's later seizure of it indicates "isolation" and "restraint" is a red herring (Kruckenberg's Br. 33); Detective Fiez returned it to him after the first Albany interview, and Kruckenberg gave his cell phone to police multiple times and freely consented to their searching it; he even offered to unlock it for them. (R. 110:24–25; 112:1, 5, 33; 124:22–23; 193 Jan. 9 00:00–02:30.) Kruckenberg further fails to mention the fact that Delores entered and exited freely and was with him the entire time until *Kruckenberg himself* asked her to leave. (R. 190 12:40:49–1:01:00.) He was hardly kept in a "sense of isolation." (Kruckenberg's Br. 33.) This case is indeed like *State v. Lonkoski*, 2013 WI 30, ¶ 7, 346 Wis. 2d 523, 828 N.W.2d 552, where the Wisconsin Supreme Court held that a similar type of scenario was *not* a custodial interrogation. *Id.* ¶¶ 7, 26, 30–35. Kruckenberg faced no restraint and none of the inherently coercive pressures of the type at issue in *Miranda*.

The fact that Agent Pertzborn said he "*needed*" to ask some follow up questions amounts to nothing. (Kruckenberg's Br. 37.) That is common vernacular. Any reasonable person would still feel free to say no, and Kruckenberg's response was that he "was willing to talk to anybody that would help him find his child." (R. 124:16.) The fact that Agent Pertzborn expressed disbelief when Kruckenberg began lying about "Tyler" and started imploring him to tell the truth is also immaterial, and Kruckenberg's claim that Agent Pertzborn used a "sharp" tone with him is false. (Kruckenberg's Br. 38.) "An officer may express dissatisfaction with a defendant's responses during an interrogation. The officer need not sit by and say nothing when the person provides answers of which the officer is skeptical." *State v. Deets*, 187 Wis. 2d 630, 636,

523 N.W.2d 180 (Ct. App. 1994). That does not make the interview custodial.

Kruckenberg's observation that "Pertzborn employed numerous tactics and stratagems," and his laments about "the Reid Technique" of interrogation, are nothing more than another attempt at distraction. (Kruckenberg's Br. 38 n.22.) Agent Pertzborn testified that he did not even remember the Reid Technique. (R. 123:89–94, 125, 127–28.) Regardless, again, this Court has already held that use of it is not improperly coercive. *State v. Rejholec*, 2021 WI App 45, ¶ 25, 398 Wis. 2d 729, 963 N.W.2d 121. To the extent that Pertzborn used any of these "tactics and stratagems," whatever that means, it does not transform this into a custodial interview.

And the State cannot find a single case from any jurisdiction where law enforcement shaking the suspect's hand was found to be the kind of physical restraint that makes a previously noncustodial interview a custodial one. *Cf., e.g.*, *United States v. Woody*, 45 F.4th 1166, 1174 (10th Cir. 2022) ("The only touching between the officers and Mr. Woody were their handshakes at the beginning and end of the interaction, which were certainly not gestures that would indicate a person was not free to terminate the encounter.").

Nor can the circuit court's finding that Kruckenberg was in custody during the trip to the scene be sustained. Contrary to what the circuit court suggested, Kruckenberg never said anything even insinuating that he wanted to leave, and he was not ordered to go with Agent Pertzborn to the scene or anywhere else. *Compare* (R. 196:27–29), *with* (R. 190 1:45:27–1:46:16) *and* (R. 123:51–52). Agent Pertzborn merely asked him if he would show him where the baby's body was located, and after Kruckenberg asked if he could ride with Delores and Agent Pertzborn said he needed Kruckenberg to ride with him, Agent Pertzborn asked him if that was okay and if he was still willing to do so, and Kruckenberg said it

was "perfectly fine." (R. 190 1:45:27–1:46:16.) No reasonable person would have felt he was under arrest and could not turn down this request.

Furthermore, the circuit court plainly based its finding that Kruckenberg was in custody during this trip on speculation that the police wanted to keep Kruckenberg in their presence and speculation about what Kruckenberg himself might have thought at the time, along with his physical inability to leave the area because it was too far to walk home—which are flatly contrary to long-standing law. (R. 196:27–28.) Both the United States Supreme Court and the Wisconsin Supreme Court recognized decades ago that "the objective standard used to determine custody as not considering the 'unarticulated plan' of police or the subjective beliefs of the suspect who may know he was guilty and should be in custody." *Lonkoski*, 346 Wis. 2d 523, ¶ 35 (quoting *State v. Koput*, 142 Wis. 2d 370, 379, 418 N.W.2d 804 (1988) and *Berkemer v. McCarty*, 468 U.S. 420, 422 (1984)). And physical inability to leave has never been the test. *State v. Halverson*, 2021 WI 7, ¶ 17, 395 Wis. 2d 385, 953 N.W.2d 847 (citing *Maryland v. Shatzer*, 559 U.S. 98, 112 (2010)).

Review of the video of the trip to the scene shows that Kruckenberg had complete freedom of movement during that trip: he was not restrained in any way, was merely standing around watching the officers looking for Heather's body, and at one point left the officers and got in the Tahoe on his own volition. (R. 193 11:58–12:58; 194 00:00–22:56.) And again, Delores left of her own accord (R. 133:27), and Kruckenberg told Agent Pertzborn he did not want her to return (R. 124:53); Kruckenberg was not kept away from anyone. None of the pressures inherent in *Miranda* were placed on Kruckenberg during this time, and no one even asked him anything until Agent Pertzborn asked if he was willing to answer some follow up questions in Albany and again told him he was not under arrest and was free to say no. (R.

123:51–52.)[6] There is no possible way that Kruckenberg was in custody at that time.

The Albany interview was even less formal than the Brodhead interview. It was not even in an interview room but in an unlocked employee break room at the police station. (R. 195 AMBA0197–210.) The three officers present were in plain clothes; Kruckenberg again was not frisked, handcuffed, or even touched; and he was offered drinks and a trip to the restroom. (R. 195 AMBA0197–AMBA0210.) Kruckenberg said he understood he was not under arrest, did not have to answer anything, could leave whenever he wanted, and that all of his interactions with Agent Pertzborn that evening had been voluntary. (R. 195 AMBA0197–AMBA0198.) And Agent Pertzborn barely asked any questions. He simply confirmed what Kruckenberg had told him earlier about Heather's death. (R. 195 AMBA0198–AMBA0210.)

Kruckenberg has not pointed to any facts that would suggest otherwise, and he has not even attempted to refute the State's argument that the bases for the circuit court's determination that he was in custody during the ride, at the scene, and during the Albany interview were in plain contravention of the controlling case law. (Kruckenberg's Br. 40.) He merely observes that he was not allowed to ride with Delores, that there were several officers at the scene, and that he was questioned again at the Albany Police Station. (Kruckenberg's Br. 40.) Agreed. But none of those facts establish custody in the totality of the circumstances here.

There is simply no legal basis for the circuit court's finding that Kruckenberg was in custody during any of these

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[6] While preparing this brief, undersigned counsel noticed that she mistakenly cited to (R. 123:23–25) for this proposition in her opening brief. (State's Br. 31.) That was incorrect. Agent Pertzborn's testimony on this point is found at (R. 123:51–52). Counsel apologizes to this Court for the error.

interviews. None of the case law nor any of the facts support Kruckenberg's position. The record shows that Kruckenberg was not in custody until he was arrested by Green County Sheriff's Officers, because "[i]t was only then that a reasonable person viewing the situation objectively would conclude that he was not free to leave." *Koput*, 142 Wis. 2d at 380. The circuit court must be reversed.

II. There was no improperly coercive police conduct, therefore Kruckenberg's statements cannot be found involuntary as a matter of law.

Improperly coercive police conduct is required before a person's statements can be found involuntary. *State v. Vice*, 2021 WI 63, ¶¶ 31, 32, 397 Wis. 2d 682, 961 N.W.2d 1. The State advanced a "two-step standard"[7] because the test for voluntariness *is* a two-step standard:

> Before [the court] balance[s] personal characteristics against police pressures, [the court] must first examine the threshold matter of coercion. . . . If [the court's] analysis of the facts does not reveal coercion or improper police pressures, there is no need for [the court] to engage in the balancing test between the suspect's personal characteristics and those nonexistent pressures.

Vice, 397 Wis. 2d 682, ¶ 31; *State v. Markwardt*, 2007 WI App 242, ¶ 50, 306 Wis. 2d 420, 742 N.W.2d 546 ("it is improper to consider Markwardt's personal characteristics because consideration of Markwardt's personal characteristics is triggered *only* if there exists coercive police conduct against which to balance them."). That Kruckenberg would prefer the improper coercion inquiry rely on his personal characteristics does not relieve this Court from following the law.

Kruckenberg has entirely failed to show that there was any improperly coercive police conduct during any of his

[7] (Kruckenberg's Br. 44.)

questioning and, like the circuit court, he improperly relies on his personal characteristics and subjective view to claim that the benign police procedures used here were coercive. (Kruckenberg's Br. 43–55.) Every one of the things he deems improperly coercive have been found not to be coercion as a matter of law, including when used while interrogating a juvenile. *See Dassey v. Dittmann*, 877 F.3d 297, 304 (7th Cir. 2017) ("[T]he [Supreme] Court has held that officers may deceive suspects through appeals to a suspect's conscience, by posing as a false friend, and by other means of trickery and bluff" and collecting cases); *Deets*, 187 Wis. 2d at 636 (expressing disbelief of suspect's story); *State v. Owen*, 202 Wis. 2d 620, 642, 551 N.W.2d 50 (Ct. App. 1996) (confrontational tone and accusations of lying); *Etherly v. Davis*, 619 F.3d 654, 663 (7th Cir. 2010) (telling suspect to tell the truth); *Fare v. Michael C.*, 442 U.S. 707, 727 (1979) (general indications that cooperation would be to the juvenile's benefit); *United States v. Miller*, 984 F.2d 1028, 1031–32 (9th Cir. 1993) (appealing to suspect's morality). Additionally, the Supreme Court has unequivocally rejected the argument that pressure from a third party like Delores can be factored into the analysis. *Colorado v. Connelly*, 479 U.S. 157, 166 (1986); *see also United States v. Erving L.*, 147 F.3d 1240, 1251 (10th Cir. 1998) ("To the extent that E.L.'s will was overborne, it was overborne by the actions of his parents. . . . This type of non-government pressure does not render a confession involuntary.").

The law permits every action taken by police in this case, and police treated Kruckenberg with the "special care" attendant to his age. *Dassey*, 877 F.3d at 305. He was treated extremely gently by police. The simple fact that in hindsight Kruckenberg may regret confessing does not mean his confessions were involuntarily given.

Kruckenberg's contention that the State attempted to "use the purported truth of [Kruckenberg]'s statements to find

them voluntary" demonstrates a misunderstanding of both the State's argument and the law. (Kruckenberg's Br. 42 n.26.) The State did not argue that the fact that Kruckenberg's confessions were true makes them voluntary. Rather, the fact that even after confessing to killing Heather, Kruckenberg repeatedly lied to the police about easily disprovable facts and maintained those lies until confronted with irrefutable evidence that they were false shows that *his will to resist questioning was not overborne*. It shows a demonstrated ability to resist police questions. *Minnesota v. Murphy*, 465 U.S. 420, 438 (1984). Accordingly, even if the police *had* used any improper coercion, the record shows Kruckenberg's statements were still voluntary. [8] *Id.*

There is simply no basis in the law or the record for the circuit court's conclusions to the contrary. Its ruling must be reversed.

[8] The State otherwise relies on its analysis of Kruckenberg's characteristics given in its opening brief.

CONCLUSION

This Court should reverse the circuit court's order suppressing Kruckenberg's statements.

Dated this 8th day of December 2023.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,998 words.

Dated this 8th day of December 2023.

Electronically signed by:

Lisa E.F. Kumfer
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CERTIFICATE OF EFILE/SERVICE

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

Dated this 8th day of December 2023.

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