STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2023AP1234-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

CHRISTOPHER M. DEVENPORT,

Defendant-Respondent.

ON APPEAL FROM AN ORDER SUPPRESSING EVIDENCE ENTERED IN THE LA CROSSE COUNTY CIRCUIT COURT, THE HONORABLE ELLIOTT M. LEVINE, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

JOSHUA L. KAUL
Attorney General of Wisconsin

JOHN A. BLIMLING
Assistant Attorney General
State Bar #1088372

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-3519
(608) 294-2907 (Fax)
blimlingja@doj.state.wi.us

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INTRODUCTION

While being held in jail pending trial on the charges underlying this case, Defendant-Respondent Christopher M. Devenport made a series of incriminating statements to a jailer after the jailer expressed concern to Devenport about his wellbeing. The circuit court suppressed these statements, concluding that the jailer's conversation with Devenport violated his Fifth Amendment right to remain silent as well as his Sixth Amendment right to counsel. The court reasoned that once Devenport began making inculpatory statements, the jailer should have stopped the conversation and referred the matter to the jail's mental health professional.

The circuit court misapplied the law. The jailer's conversation with Devenport implicated neither his Fifth Amendment rights nor his Sixth Amendment rights because the conversation was neither an interrogation nor was it designed to deliberately elicit incriminating information from Devenport. Rather, the conversation followed precisely what should be expected from a jailer who has concerns about the mental health and wellbeing of an inmate—a reasonable inquiry about the inmate's need for mental health services. This Court should reverse the circuit court and remand the matter for further proceedings.

ISSUE PRESENTED

1. Did the jailer's conversation with Devenport violate his Fifth Amendment right against self-incrimination?

The circuit court concluded that it did.

This Court should reverse the circuit court's decision.

2. Did the jailer's conversation with Devenport violate his Sixth Amendment right to counsel?

The circuit court did not reach this question.

This Court should reverse the circuit court's decision.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument, as it believes the parties' briefs can fully explain the relevant facts and law. However, the State would welcome oral argument if it would assist this Court. The State does not request publication because this Court can resolve this case by applying settled legal principles to the facts.

STATEMENT OF THE CASE

In a criminal complaint dated September 18, 2020, the State charged Devenport with 19 counts related to a series of domestic violence incidents and sexual assaults perpetrated upon SD and SD's two minor daughters, AC and MC. (R. 2:1–5.) The complaint described a series of attacks on SD, AC, and MC, over the first two weeks of September of 2020. (R. 2:5–13.) These attacks included Devenport forcing SD, AC, and MC to shower in cold water for extended periods of time and then running a fan on them, hitting them, choking them, spitting food on them, burning them with cigarettes, urinating on them, exposing himself to them, and touching their intimate parts without consent. (R. 2:5–13.)

Police arrested Devenport in connection with the offenses on September 14, 2020. (R. 2:5–6.) At an Initial Appearance on September 18th, the circuit court set Devenport's bond at $10,000. (R. 8.) Thus, on September 25th, Devenport remained incarcerated at the La Crosse County Jail when the conversation underlying this appeal took place. (R. 128:3.)

On that day, Jailer Deborah Moan was working as a "rover" at the jail and was responsible for checking on the wellbeing of the inmate population. (R. 128:3.) This involves

doing "frequent and irregular" rounds around the jail to "mak[e] sure that everybody is okay[,] . . . serve meals, answer questions, talk to inmates, [and] listen to inmates." (R. 128:4.) On one such round, Jailer Moan noticed that Devenport was "sitting with his towel around his neck, and he looked to be upset." (R. 128:4.) Jailer Moan asked Devenport if he was okay, and Devenport responded by mentioning that it was his daughter's[1] sixth birthday. (R. 128:4, 7.) She asked Devenport if he had called her, and he replied that he had a no-contact order with her. (R. 128:7.) Devenport mentioned having court that day[2], and when Jailer Moan asked if she could do anything for him, he asked her for a hug. (R. 128:7–8.) When she declined, he instead asked her to pray for him because he was hoping to be released. (R. 128:8.)

After concluding her round, Jailer Moan spoke to a colleague who informed her that Devenport was facing "some pretty significant charges." (R. 128:7.) This concerned her because she thought it was unlikely that Devenport would be released on signature bond, and given that he was already upset, she "had some genuine concerns for his well-being." (R. 128:8–9.) She therefore contacted the jail's mental health professional, Ben Pfiffner, who advised her to take a "mental health slip[ ]" to Devenport for Devenport to fill out so that he could talk to Pfiffner. (R. 128:9.)

When Jailer Moan took a mental health slip to Devenport, he told her he was fine. (R. 128:9.) She asked him if he had someone to talk to and told him "if there was

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[1] This appears to be a reference to Devenport's daughter ND, not MC or AC, both of whom were teenagers at the time. ND is referenced in the criminal complaint, but she is not named as a victim of any of the specific charges, although she did apparently witness at least some of the incidents charged. (R. 2:5, 10–11.)

[2] Apparently in reference to his preliminary hearing, which occurred the same day. (R. 17:1.)

anything [jail staff] could do for him, that he just needed to reach out." (R. 128:10.) In response, Devenport began sharing numerous details about his life and the charges against him with Jailer Moan. (R. 128:10–11.) This included inculpatory statements in which Devenport confirmed that he had thrown urine on SD and admitted to inserting his finger into one of the girls' vaginas while trying to contextualize the assault and shift blame onto SD. (R. 128:11–13.) Overall, Devenport talked to Jailer Moan for 20 to 25 minutes. (R. 128:16.) Jailer Moan did not read Devenport his *Miranda*[3] rights at any point during her discussion with him; she later testified that she did not do so because she was not asking "any guilt-seeking questions that would incriminate" Devenport, as that would be beyond her "job description." (R. 128:16.) She also agreed with defense counsel that she never attempted to stop Devenport from sharing once he began talking to her. (R. 128:27.) After her conversation with Devenport, Jailer Moan talked to the officer who arrested Devenport about the conversation; she then prepared a report summarizing Devenport's statements to her. (R. 128:26–28.)

In May of 2023, Devenport moved to suppress his statements to Jailer Moan, arguing that the conversation between him and Jailer Moan violated his Fifth Amendment and Sixth Amendment rights, as well as their corollaries under the Wisconsin Constitution. (R. 105:1.) Devenport contended that Jailer Moan should have known that the reason Devenport was upset pertained to his criminal charges after he mentioned that he had a no-contact order with ND and could not call her on her birthday. (R. 105:2.) He therefore reasoned that Jailer Moan should have known that her further discussions with him were likely to touch on his criminal charges and thus constituted "interrogation" within the meaning of the Constitution. (R. 105:5.) Devenport also

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

claimed that his statements were involuntary because "he was in a fragile, potentially even suicidal state." (R. 105:5.) The State opposed Devenport's motion, contending that Jailer Moan's discussion with Devenport was not designed to elicit an incriminating response, but was instead merely intended to check on his mental wellbeing. (R. 107:3–4.)

The La Crosse County Circuit Court held a hearing on the suppression motion on June 27, 2023.[4] (R. 114:1.) After argument by the parties, the court began its discussion with an overview of the circumstances, including the fact that the conversation between Devenport and Jailer Moan happened shortly after Devenport's arrest and at a time when the jail was on lockdown because of COVID-19 restrictions. (R. 114:22–24.) The court thus understood "why the jailer would be concerned." (R. 114:24.) The "other part of this analysis," the court continued, "is if it was really questioning or not." (R. 114:24.) The court noted that the Fifth Amendment does not require an officer to make a conscious decision interrogation would start at a specific point. (R. 114:24.) Rather, the court said,

> [t]hese are these spontaneous -- questions or the spontaneous statement to something that was clearly not elicited to bring up any information. Or, was it -- it was, worse yet, was it -- not worse yet -- but, also which I find just as a question is, was it an accidental elicitation to start talking about things, and to have

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[4] The Honorable Elliott M. Levine presided. Due to Devenport's impending trial date, the court's availability, and Jailer Moan's availability, Jailer Moan's testimony was provided by deposition approximately two weeks before the hearing. (R. 110:1.) Shortly before the hearing, Devenport refused to appear by Zoom and threatened a deputy, so he was not produced for it. (R. 114:3.) Because Devenport's trial date was fast-approaching and the court had limited availability, the hearing proceeded without Devenport present and without any testimony being taken from him. (R. 114:4.)

> the idea that they can start confidentially saying information.

(R. 114:24.)

The court reasoned that Jailer Moan could have had Ben Pfiffner talk to Devenport instead, which would have ensured that Devenport's mental health concerns were treated with confidentiality. (R. 114:24.) Thus, the issue as the court saw it was whether, once Devenport "started to launch into stuff," Jailer Moan should have said "listen, let me get the doctor and we'll go from there" or whether she could "sit there passively and allow him to essentially spew all the information out at that point in time." (R. 114:26.) The court reasoned that while jailers do act in a caretaking function generally, and while Jailer Moan "was trying to take care of" Devenport specifically, she had to "stop and say, we'll get you a mental health person." (R. 114:27–28.) The court therefore concluded that the conversation violated Devenport's Fifth Amendment rights and granted the motion to suppress. (R. 114:28; 120, A-App. 3.)

The State now appeals.

STANDARD OF REVIEW

"Whether evidence should be suppressed [due to an alleged *Miranda* violation] is a question of constitutional fact." *State v. Knapp*, 2005 WI 127, ¶ 19, 285 Wis. 2d 86, 700 N.W.2d 899 (citation omitted). This Court reviews whether the facts demonstrate that an interaction constituted an "interrogation" of a suspect *de novo*. *See State v. Harris*, 2017 WI 31, ¶ 9, 374 Wis. 2d 271, 892 N.W.2d 663.

ARGUMENT

I. The circuit court erred when it granted Devenport's motion to suppress on Fifth Amendment grounds.

A. State agents are required to read a suspect the *Miranda* warnings only when the suspect is subjected to "custodial interrogation."

The Fifth Amendment to the United States Constitution and article 1, section 8 of the Wisconsin Constitution protect suspects from incriminating themselves in criminal matters. *State v. Ezell*, 2014 WI App 101, ¶ 8, 357 Wis. 2d 675, 855 N.W.2d 453. Accordingly, police may not interrogate a person held in custody without advising that person of his *Miranda* rights. *Id.* (citing *State v. Torkelson*, 2007 WI App 272, ¶ 11, 306 Wis. 2d 673, 743 N.W.2d 511).

Interrogation occurs in the *Miranda* context when police ask questions of a suspect that are "reasonably likely to elicit an incriminating response." *Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990). The test for determining whether an interrogation occurred is an objective one. *State v. Cunningham*, 144 Wis. 2d 272, 278–79, 423 N.W.2d 862 (1988). *Cunningham* asks "if an objective observer (with the same knowledge of the suspect as the police officer) could, on the sole basis of hearing the officer's remarks or observing the officer's conduct, conclude that the officer's conduct or words would be likely to elicit an incriminating response." *Id.* Importantly, "'[i]nterrogation' 'must reflect a measure of compulsion above and beyond that inherent in custody itself.'" *State v. Hambly*, 2008 WI 10, ¶ 46, 307 Wis. 2d 98, 745 N.W.2d 48 (citation omitted).

The State bears the burden of "establish[ing] by a preponderance of the evidence whether a custodial interrogation took place." *State v. Armstrong*, 223 Wis. 2d 331, 345, 588 N.W.2d 606 (1999) (implied overruling on other grounds recognized by *State v. Halverson*, 2021 WI 7, ¶ 21 395 Wis. 2d 385, 953 N.W.2d 847). "Statements obtained via custodial interrogation without the *Miranda* warnings are inadmissible against the defendant at trial." *Ezell*, 357 Wis. 2d 675, ¶ 8.

B. Jailer Moan did not "interrogate" Devenport.

A defendant is entitled to the *Miranda* warnings—and thus, his Fifth Amendment rights are implicated—only if he is subject to "interrogation" within the meaning of the Fifth Amendment. "Interrogation" is a term of art: it can extend beyond direct questioning to statements designed or reasonably likely to elicit an incriminating response. *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). "'Interrogation,' as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself." *Id.* at 300 (citation omitted).

Here, the record reflects that Jailer Moan was not seeking to elicit incriminating information from Devenport. That is, as she put it, "out of my job description." (R. 128:16.) Instead, she was concerned that Devenport might hurt himself and wanted to ensure that did not happen. She therefore asked if he had anyone he could talk to and suggested that he reach out to her if he needed anything. Nothing about that prompt was reasonably likely to elicit incriminating information, and it therefore was not an interrogation within the meaning of the Fifth Amendment.

Hambly is instructive. In *Hambly*, the Wisconsin Supreme Court considered whether the defendant was

interrogated within the meaning of *Miranda* after police explained to him why he had been arrested even though he had invoked his right to counsel. *Hambly*, 307 Wis. 2d 98, ¶¶ 9–10. The court first clarified that interrogation can take the form of either "express questioning" or its "functional equivalent." *Id.* ¶ 46 (citation omitted). The defendant was not subjected to express questioning because the officer's statement to him about why he was arrested was not a question at all. *Id.* ¶ 51. And the defendant was not subject to the functional equivalent of express questioning because "nothing in the record supports the suggestion that [the officer] knew or should have known that his brief response would result in the defendant's further statements." *Id.* ¶ 58.

The same is true here. Jailer Moan's statement to Devenport—that if he needed anything, he only needed to reach out to jail staff—was not express questioning because it was not a question at all. And it was not the functional equivalent of express questioning because nothing in the record indicates that Jailer Moan knew or should have known that Devenport would launch into a long non-sequitur filled with incriminating information. Quite the opposite, in fact: Jailer Moan testified to being surprised by Devenport's response. (R. 128:14.)

Devenport suggested in the circuit court that Jailer Moan should have known that he was upset because of his impending charges, and therefore, he concludes, her encouragement that he talk to someone should have been reasonably expected to touch on the subject of his charges. This reasoning is flawed for at least two reasons. First of all, even if it was apparent that Devenport was upset about his incarceration, encouraging him to talk through the difficulty of being incarcerated is not the same as encouraging him to discuss the reason for his incarceration. Second, as discussed, interrogation "must reflect a measure of compulsion above

and beyond that inherent in custody itself." *Innis*, 446 U.S. at 300. Devenport's reasoning would effectively bar jailers from talking to any upset inmate without first delivering the *Miranda* warnings due to the possibility that they are upset about the charges against them. That is not what *Innis* requires: more than custody is necessary.

Devenport also suggested in the circuit court that Jailer Moan should have known that Devenport was upset about his charges specifically because he had a no-contact order with ND and could not call her on her birthday. But although the no-contact order with ND did stem from his charges, ND was not named as a victim in those charges. Thus, even if Jailer Moan encouraged Devenport to speak about ND, there was no reason to think that any discussion about ND would yield any incriminating information. Rather, what occurred here is simple: Jailer Moan asked Devenport if he was okay, Devenport relayed that it was ND's birthday and that he could not call her because of a no-contact order, Jailer Moan learned that Devenport was facing serious charges and became more concerned about his behavior, Jailer Moan urged Devenport to reach out if he needed anything, and Devenport then launched into a 20 to 25-minute non-sequitur about things other than ND. (R. 128:10–13.) Nothing about Jailer Moan's prior conversation with Devenport indicated that might happen.

The circuit court's reasoning was flawed, as well, and can be summed up by its comments towards the end of its oral decision ordering suppression of Devenport's statements:

> [T]he fact that she wasn't thinking of writing an investigation--you know, the report at the time, wasn't think[ing] about it, et cetera. Later on she did, and she writes the report. She thinks, oh, wait, he just confessed to all this entire--this entire crime, I'm going to write a report. I think--I don't think it's nefarious. I don't think the jailer was trying to do

> something wrong. *I think she was trying to take care of him*, but at the same time that the position he was in, even if her intent was good, was not necessarily something that she should have, she as a law enforcement officer for the State, can continue to do, and *you have to stop and say, we'll get you a mental health person*.

(R. 114:27–28 (emphases added).)

This is simply not how the Fifth Amendment and *Miranda* work. Under *Miranda*, a suspect must be given the appropriate warnings if he is subjected to custodial interrogation, or any inculpatory statements will be presumed to be involuntary. *Miranda v. Arizona*, 384 U.S. 436, 457, 475 (1966). However, nothing in *Miranda* or its progeny suggests that an agent of the State has an obligation to stop a suspect's voluntary confession if it is given in response to a non-interrogation interaction. Rather, the sole question is whether the suspect was subjected to custodial interrogation. If not, *Miranda*'s presumption of involuntariness does not apply, and any given statements are admissible.

The circuit court thus based its decision on an incorrect application of the law. Under the proper application, Jailer Moan did not "interrogate" Devenport because her questions and statements were not reasonably likely to elicit an incriminating response. Instead, they were geared towards his general wellbeing and safety in the jail, as the circuit court acknowledged. Because Jailer Moan did not interrogate Devenport, she was not required to read him the *Miranda* warnings before their interaction. The circuit court improperly suppressed the statements as evidence, and this Court should reverse.

II. Devenport's inculpatory statements did not result from a violation of his Sixth Amendment rights.

A. To establish a violation of his Sixth Amendment right to counsel, a defendant must show that police deliberately elicited incriminating information after the right to counsel attached.

Separate from the Fifth Amendment right against self-incrimination, criminal defendants have a Sixth Amendment right to counsel to aid in their defense. U.S. Const. amend. VI. Once a defendant's Sixth Amendment rights have attached, the government may not deliberately elicit incriminating information from him in the absence of his attorney unless he has waived his right to have counsel present. *Massiah v. United States*, 377 U.S. 201, 206 (1964). The Supreme Court has distinguished this "deliberate-elicitation" standard from the "custodial-interrogation" standard at issue in Fifth Amendment cases. *See Fellers v. United States*, 540 U.S. 519, 524 (2004). Thus, certain post-indictment statements might be excluded from introduction at trial even if they were not obtained as the result of custodial interrogation.

However, to the extent that there is a distinction between interrogation under the Fifth Amendment and deliberate elicitation under the Sixth Amendment, deliberate elicitation refers to situations where police "knowingly circumvent[ ] the accused's right to have counsel present in a confrontation between the accused and a state agent." *Maine v. Moulton*, 474 U.S. 159, 176 (1985). In case law, this tends to involve the police use of informants or undercover agents, often in prison. *See, e.g.*, *id.*; *Massiah*, 377 U.S. at 202–03; *State v. Arrington*, 2022 WI 53, ¶ 43, 402 Wis. 2d 675, 976 N.W.2d 453; *State v. Lewis*, 2010 WI App 52, ¶¶ 13–14, 324 Wis. 2d 536, 781 N.W.2d 730. In such cases, courts use a

three-factor test to determine whether information was deliberately elicited: (1) whether the person eliciting the statement was acting "as a paid informant", (2) whether the person was "ostensibly no more than a fellow inmate," and (3) whether the defendant "was in custody and under indictment at the time" of the conversation. *Arrington*, 402 Wis. 2d 675, ¶ 42.

Moreover, unlike Fifth Amendment claims where the government bears the burden of establishing whether a custodial interrogation took place, it is the defendant's burden to establish that police or their agents deliberately elicited inculpatory statements in violation of his Sixth Amendment rights. *See Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986) ("the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks"), *superseded by statute on other grounds as recognized in Banister v. Davis*, 140 S. Ct. 1698 (2020); *see also Moore v. United States*, 178 F.3d 994, 999 (8th Cir. 1999).

B. Jailer Moan did not deliberately elicit incriminating information from Devenport.

The circuit court did not directly rule on Devenport's Sixth Amendment claim, instead confining its ruling to the Fifth Amendment.[5] As discussed, the absence of "interrogation" does not mean that there was no Sixth Amendment violation *per se*. But the situation here does not present a typical deliberate elicitation question like those in *Moulton*, *Massiah*, *Arrington*, *Lewis*, and others because it does not involve an undercover informant, a surreptitious recording, any attempt to mislead Devenport, or any of the

[5] The circuit court's only mention of the Sixth Amendment was in confirming that his right to counsel had attached. (R. 114:26.)

other hallmarks of such cases. Instead, Devenport knew exactly who Jailer Moan was and what her role was. Jailer Moan was not acting at the behest of officers investigating Devenport when she had the conversation with him. Devenport thus cannot show either that Jailer Moan was acting as an agent for investigators or that she was posing as nothing more than a fellow inmate. *See Arrington*, 402 Wis. 2d 675, ¶ 42. There was no knowing circumvention of Devenport's rights. *See Moulton*, 474 U.S. at 176

Even if this Court takes a broader view of deliberate elicitation and considers it to apply to situations beyond those in *Moulton*, *Massiah*, *Arrington*, *Lewis*, the similarity between interrogation within the meaning of the Fifth Amendment and "deliberate elicitation" as it would be commonly understood enables this Court to reject Devenport's Sixth Amendment claim as a basis for suppressing his statements.

Jailer Moan was clear in her deposition about her purpose in talking to Devenport: she was concerned for his well-being and wanted to offer him a "mental health slip[ ]" to begin contact with the jail's mental health professional. (R. 128:8–9.) She was not investigating Devenport's charged offense when she spoke with him, nor did she expect her question to lead to Devenport's inculpatory statements. (R. 128:14.) In her words, she does not ask inmates any "guilt-seeking questions" because it is "out of [her] job description." (R. 128:16.) It is thus clear that there was no deliberate act on the part of Jailer Moan intended to elicit incriminating information. It follows that there was no Sixth Amendment violation. This Court should reverse.

CONCLUSION

For the reasons discussed, this Court should reverse the circuit court's order suppressing Devenport's statements and remand the matter for further proceedings.

Dated this 6th day of November 2023.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

John A. Blimling
JOHN A. BLIMLING
Assistant Attorney General
State Bar #1088372

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-3519
(608) 294-2907 (Fax)
blimlingja@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,913 words.

Dated this 6th day of November 2023.

Electronically signed by:

John A. Blimling
JOHN A. BLIMLING
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

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

Dated this 6th day of November 2023.

Electronically signed by:

John A. Blimling
JOHN A. BLIMLING
Assistant Attorney General