STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2023AP2102

Court Case No.: 2022JV000071

In the interest of K.R.C., a person under 18
STATE OF WISCONSIN
Petitioner-Respondent,

vs.

K R C
DOB: xx/xx/2009
Respondent-Appellant.

On Appeal from a Dispositional Order Entered in the Manitowoc County Circuit Court, the Honorable Jerilyn M. Dietz, Presiding

AMENDED BRIEF OF PETITIONER-RESPONDENT

ANGELINA R. SCARPELLI
Asst. District Attorney
State Bar No. 1107645

Manitowoc County District Attorney
1010 S. 8th Street
Manitowoc, WI 54220
(920)683-4070
Angelina.Scarpelli@da.wi.gov

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STATEMENT OF ISSUE

Were the police obligated to advise KRC of his Miranda rights when they interviewed him at his middle school?

The trial court answered this question, no, as it found that KRC was not in custody during the interview.

Were KRC's statements to the police voluntary?

The trial court ruled that the State has shown that this was a non-custodial voluntary conversation.

Did the Court erroneously admit and rely on in ruling "other acts' evidence?

The trial Court ruled that it could only accept and rely on sworn testimony and that JE testified that he did acknowledge that he told Officer Propson that [KRC] had once hit him in the balls. He testified they punched each other, it was for purposes of causing pain, not for purposes of humiliation. The Court ruled "I don't draw a lot of evidentiary value from JE testimony."

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is requested. The issues can be sufficiently set forth by the briefs. Because this is a one-judge appeal, a request for publication is not authorized. Se Wis. Stat. 752.31 (2)(e).

STATEMENT OF THE CASE

The State does not disagree with the Appellant's rendition of the Statement of the Case.

STATEMENT OF FACTS

1. The suppression hearing.

On February 3, 2023 the Court held an evidentiary hearing on the Motion to Suppress the juvenile's statement. After hearing testimony the Court ruled,

> "Thank you. Well, it's well established that a Miranda warning is required if it is custodial interrogation. The question here is whether the first interview, particularly, was custodial. The circumstances are undisputed, this is a small office, sounds like an office smaller than the officers who use it would like it to be off of the student services office. The fact that the door was closed does not seem unreasonable for privacy, given the nature of what was being talked about. I think the biggest question is the presence of the second officer, because officer Propson testified that she was there in street clothes with her vest identifying her as law enforcement, sitting at a desk, having this discussion with [KRC]. We also have a fully uniformed police officer standing in front of the door. We know here that he was there

because it was his first week on the job, he probably needed to observe what was going on. I don't have any evidence as to whether he was introduced, or his presence was explained to [KRC], and I think his presence is the biggest factor that I need to consider when determining whether this was a custodial interrogation or not. There is nothing in the record showing that Officer Tobison was involved in any way in the interview. I think that the office may be larger than I had originally envisioned when we were told that the distance between Officer Propson and [KRC] was slightly smaller than the distance between the officer and the district attorney in this courtroom, I'm not good at judging distance, but I would say that is about 10 feet apart. So I was envisioning a much smaller space where we have an officer, who even if he was standing there smiling, may feel menacing to a person sitting at the table, but I think this is a larger space based on that testimony than I had originally envisioned. However, we have the officer standing right by the door, because it doesn't sound like there was anywhere else for him to go. I think it is important, though, that the testimony is that nobody's voice was raised during this first conversation, it was not a bright light shining, somebody threatening violent verbal altercation of any sort, it was a conversation. The statement that this touching was witnessed. First, law enforcement use of deception is acceptable, it's legal, and also it was witnessed by the two individuals who were there, so it's not necessarily deception either. I don't think that that is a factor that weighs into this determination. The interview was recorded, which we know is required for admissibility. It really comes down to whether a reasonable person with [KRC]'s characteristics under those circumstances would have felt that he was free to leave. We do have a sign posted on the wall a foot from [KRC]'s head, there's no way for me to know whether he read it when he first came in, or whether he'd ever read it before, we don't know that, I can't know that, I wouldn't know it under any circumstances. But we do have a photograph of it in exhibit one, it is large, colorful, and easy to read letters that this is voluntary, you can leave any time you want, you're being recorded. I think that does weigh toward the voluntariness of this interview. At no time was [KRC] told that he couldn't leave, but he's at school. So he couldn't leave the premises, but he could have left that office, and that's really the consideration and I analogize it to the case law that says a person in prison can be in a non-custodial interrogation, even within the confines of a prison. Here we have a school which is far less coercive than a school building where he comes and goes -- he's required to come and go at certain times, but still far less coercive of the prison. So the Court's approval of a non-custodial interrogation in a prison setting tells me that there can equally be a non-custodial interrogation in a school setting. Again, I'm most concerned about the presence of the other officer, but the fact that he stood off to the side and didn't say anything minimizes his role. I think the fact that Officer Propson was dressed in street clothes with her vest also reduces the coercive nature of this interview, and that the principal wasn't there. This was much of more of a conversation about a touchy difficult subject, to be sure, and something that would likely be difficult for anybody to talk about, including but especially, for a 12 year old boy, or 13 year old boy, but anybody would be uncomfortable under these circumstances. But it does not appear from this testimony that any effort was used to maximize embarrassment, or to use other coercive techniques, or anything to try to trick a child who has, I will assume, no contact previously with law enforcement, no experience with law enforcement, or with being interrogated with the court or anything else. This is about as non-coercive as can be under these circumstances, except for that other officer being present. I am convinced that under the totality of the circumstances, the entire of the officer, the fact that it was within the school setting, the school where [KRC] was a student, where the fact that he did walk in of his own volition, was not escorted in, was never told he couldn't leave, was never told to do anything. The fact that he did not ever ask for a break, water, food, his phone call, his parents, he didn't ask for

any of those things, and none of those were denied to him. The fact that the other officer was off to the side and there was 10 feet, at least of space in this room leads me to find that the State has shown that this was a non-custodial voluntary conversation. It is a somewhat close case given the factors that I have discussed at length here, but I do therefore respectfully deny the defense's motion, and the statements are admissible." (R. 24:33-38)

2. The Fact-Finding Hearing.

On March 16, 2023, the Court held a fact finding hearing in this matter, A witness was called by the State named J E. The State asked him "Okay, has there been things that [KRC] has done that made you uncomfortable?" At that time counsel for KRC objected to other acts coming into evidence. The Court ruled "Well, fortunately this is a court trial, so I'm probably more able to than a jury to disregard evidence that is deemed inadmissible. So I'll ask we proceed, noting that your right to raise the objection was preserved." However, at the conclusion of the hearing the Court ruled "[JE], I think, was a very nervous witness, he didn't want to be here, he didn't want to be talking about what we were asking him to talk about, and he didn't want to do it sitting 6 feet in front of a person he's still going to have to go to school with every single day. I suspect that his testimony today was, well I know for a fact, that it was very different from the statements he gave to Officer Propson, I have to rely on the sworn testimony. He did acknowledge that he told Officer Propson that [KRC] had once hit him in the balls previously, but it hadn't happened again. He testified they punched each other, it was for purposes of causing pain, not for purposes of humiliation. I don't draw a lot of evidentiary value from Mr. Eis' testimony,"(R. 41:83-84).

I. THE POLICE WERE NOT OBLIGATED TO ADVISE KRC OF HIS MIRANDA RIGHTS AS KRC WAS NOT IN CUSTODY DURING THE JUNE 2, 2022 INTERVIEW.

A. Standard of review and applicable law.

When the suspect's confession is at issue, this court defers to the trial court's findings regarding the factual circumstances surrounding the statement, but reviews de novo whether those facts pass constitutional muster. *State v. Jerrell C.J.,* 2005 WI 105, ¶ 16, 283 Wis. 2d 145, 155, 699 N.W.2d 110. At a suppression hearing where the issue is whether the police should have read the Miranda warning, the burden is on the state to establish by a preponderance of the evidence whether or not a custodial interrogation took place. *State v. Armstrong*, 223 Wis. 2d 331, ¶ 21, 588 N.W.2d 606 (1999).

The test for determining whether a person is in custody for Miranda purposes is whether a reasonable person in the defendant's position would have considered himself or herself to be in custody, given the degree of restraint under the circumstances. *State v. Greun*, 218 Wis. 2d 581, 593, 582 N.W.2d 728 (Wis. Ct. App. 1998). The relevant factors in a Miranda custody analysis are the defendant's freedom to leave the scene; the purpose, place and length of the interrogation, whether the defendant was handcuffed, whether a gun was drawn on the defendant, whether a Terry2 frisk was performed, the manner in which the defendant was restrained, whether the defendant was moved to another location, whether the questioning took place in a police vehicle, and the number of police officers involved. Id. at 594-95. The United States Supreme Court has held that at least in juvenile interrogations, the age of the suspect is a factor in a Miranda analysis. *J.D.B. v. North Carolina*, 564 U.S. 261, 131 S. Ct. 2394, 2399 (2011).

A fair summary of the applicable law is that the state must show by a preponderance of the evidence that a suspect was not in custody for Miranda purposes. The factors to be considered are the

suspect's freedom to leave the scene, whether the police showed their firearms or otherwise restrained the suspect, the purpose, place, and length of the interrogation, whether the suspect was moved or frisked, the number of police officers involved, and in cases where the suspect is not an adult, the age of the suspect.

B. Application of the law to facts of this case.

It is undisputed that KRC was not advised of the Miranda rights. Therefore, the issue is whether the state can show by a preponderance of the evidence that Oligney was not in custody for Miranda purposes when the police interviewed him at L.B. Clarke Middle School on June 2, 2022.

The relevant factors in a Miranda custody inquiry are well established in Wisconsin law. An excellent listing of these factors is articulated in Greun. A look at these factors and comparing them to the facts of this case, show that the state easily meets its burden in showing that KRC was not in custody for Miranda purposes. The factors are as follows:

a) The defendant's freedom to leave the scene. In this case, there was a sign on the wall int eh office that stated "You can leave at any time, you're being recorded. The police never told [KRC] that he could not leave. The state counters that while there is an inherent authority associated with the police, the officer in this case who was questioning KRC was not in uniform, did not show their weapons, no voices were raised during the first conversation. It was in fact a conversation. KRC left the interview by himself when it was concluded. There is no testimony of KRC's feelings, however whatever KRC's subjective feelings might have been, it is unreasonable, under the circumstances, for KRC to feel that he was sufficiently restrained so as to trigger the Miranda warning requirement.

b) The purpose, place, and length of interrogation. The state concedes that the police were seeking information about a serious matter, a sexual assault. However, the interview did not take place at a police station or in a police squad car, but rather at a school. Moreover, the police did not drag KRC out of class, but rather Mr. Errata or Ms. Ingstrom, school employees made contact with him in as fair and non-disruptive way as possible. Also, the first interview took ten minutes, which is a brief period of time and is a reasonable one. The second interview lasted three minutes.

c) Whether the defendant was handcuffed. The record is clear that KRC was not handcuffed or otherwise restrained during the interview.

d) Whether a gun was drawn on the defendant. While both officers involved in the interview were armed, neither ever showed their gun to KRC.

e) Whether a Terry frisk was performed. KRC was not subjected to a Terry frisk or to any other kind of search.

f) The manner in which the defendant was restrained. No overt measures were used to restrain KRC and though the door of the room where the interview took place was closed, it waws closed for privacy.

g) Whether the defendant was moved to another location. KRC was not moved, as the entire interview took place in the school resource office.

h) Whether the interview took place in a police squad. The entire interview took place at KRC's middle school.

i) The number of police officers involved. There were two officers involved. This is the only factor, of all the relevant circumstances, that arguably supports KRC's position that he was in custody for Miranda purposes. However, one officer was only there for training and did not speak or interact with KRC in any manner during either interview.

j) The age of the suspect. Since Oligney is a minor, his age is a factor in a Miranda analysis. KRC was believed to be 12 or 13 years old by Officer at the time of the interview. KRC did not have any issues understanding what was going on and was able to answer questions appropriately. The case that brought a minor's age into the custody analysis, J.D.B. v. North Carolina, involved a suspect who was thirteen years old.

The state respectfully submits that an examination of the above recited factors when compared to the facts of this case clearly shows by a preponderance of the evidence that KRC was not in custody for Miranda purposes when he was interviewed by the police at his school. Accordingly, the trial court correctly held that KRC was not in custody and that the police did not have to read him the Miranda warning. The state asks this court to affirm this trial court holding.

II. THE POLICE DID NOT COERCE KRC AND HIS STATEMENTS WERE VOLUNTARY.

A. Standard of review and applicable law.

The review of the voluntariness of a statement examines the application of constitutional principles to historical facts. *State v. Hoppe*, 2003 WI 43, ¶ 34, 261 Wis. 2d 294, 661 N.W.2d 407. This court defers to the trial court's findings of fact but reviews de novo the application of these facts to constitutional principles. *State v. Clappes*, 136 Wis. 2d 222, 235, 401 N.W.2d 759 (1987). At a suppression hearing, where the voluntariness of a confession is challenged, the burden is on the state to show by a preponderance of the evidence that the confession was voluntary. *State v. Hoppe*, 261 Wis. 2d 294, ¶ 40.

A suspect's statements are voluntary if they are the product of free will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the state exceed the defendant's ability to resist. Id. ¶ 36. A necessary prerequisite for a court finding of involuntariness is coercive or improper police conduct. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). This police misconduct need not be egregious or outrageous but it must exceed the defendant's ability to resist. *Jerrell*, 283 Wis. 2d 145, ¶ 19. The voluntariness of a confession is based on the totality of the circumstances surrounding the confession. Id. ¶ 20. This analysis involves a balancing of the personal characteristics of the suspect with the pressure and tactics used by the police. The factors as to the defendant include his age, education and intelligence, physical and emotional condition, and prior experience with law enforcement. The factors as to police conduct include the length of questioning, any delay in arraignment, the general conditions under which the statements take place, any physical or psychological pressures brought to bear on the suspect, and 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. When employing this balancing test to a juvenile interrogation, there is a need to exercise special caution when assessing the voluntariness of the confession, particularly when there is prolonged or

repeated questioning or when the questioning occurs in the absence of a parent, lawyer, or other friendly adult. Id. § 21.

A fair summary of the law is that the state must show by a preponderance of the evidence that the defendant's statements were voluntary. Voluntariness is determined by balancing the characteristics of the suspect with tactics employed by the police. Ultimately, the court must determine whether under the totality of the circumstances the police tactics were too much for the defendant to bear. Special caution must be used in evaluating the voluntariness of a juvenile confession.

B. Application of the facts to the law.

KRC correctly points to Jerrell as a seminal case in evaluating the voluntariness of a juvenile confession. However, KRC is wrong when he presumes that Jerrell supports his contention that his statement was involuntary and the product of police coercion. A contrast of the facts in Jerrell to the facts in the instant case reveals that Oligney's statements were voluntary while Jerrell's statements were coerced.

First, Jerrell was in custody during his challenged interrogation while KRC, as argued above, was not. Secondly, Jerrell was interrogated in a police department while KRC was interviewed at his school. Thirdly, prior to the interrogation, Jerrell was left alone for two hours in a room while handcuffed to a wall. See *Jerrell*, 283 Wis. 2d 145, ¶ 33. Here, KRC was never left alone, never handcuffed, and never overtly restrained in any way. Fourthly, Jerrell's police contact lasted seven-and-one-half hours (two hours waiting in handcuffs and a subsequent five-and-one-half-hour interrogation. See id. By contrast KRC's first interview lasted 10 minutes and his second interview lasted three minutes. Fifthly, Jerrell was fourteen years old while KRC's date of birth was July 1, 2009 thus making him 12 years and 11 months old. Sixthly, Jerrell asked several times for permission to call his parents and this repeated request was consistently denied. Id. ¶ 10. KRC never once asked about his parents. Oligney tries to find refuge in Jerrell on this issue by arguing that the police's failure to notify a parent is an important factor in a voluntariness analysis. The problem with this argument is that Jerrell repeatedly asked about his parents; naturally the police turning a deaf ear to a fourteen-year old's repeated request would trouble the high court. However, Jerrell never articulates a rule requiring the police to ask a juvenile suspect if he wants his parents, and patently rejected Jerrell's argument that the court develop a bright-line rule excluding juvenile confessions as per se involuntary if the suspect is not given an opportunity to confer with a parent. See id. ¶¶ 37-43. Moreover, Jerrell when promoting his "no parents equals involuntary" rule made the dividing line, children under the age of sixteen. Seventhly, Jerrell was an eighth grader with an IQ of eighty-four, indicating a low average range of intelligence. See id. ¶ 27. In the instant case, KRC was a student and the record is silent as to his intellect, though the officer's involved testified that he appeared to fully understand what was going on.

As can be clearly seen, the connection between Jerrell and our case is limited to the legal issue involved; there is a sharp contrast to the pertinent factual circumstances. Arguably, the only factual similarity between the two cases is that the Officer Propson told KRC that there was a witness of someone saw his gran the victims' groin which was false. Nevertheless, no matter how controversial this tactic may or may not be, it pales to all the other relevant circumstances which point clearly to Oligney being treated totally differently and in a far less coercive manner than was Jerrell. It is totally compatible with Jerrell for this court to hold that KRC's statements were voluntary.

Ultimately, voluntariness is based on a balancing of the defendant's characteristics with the police tactics employed. KRC was a twelve-year-old student, and with no characteristics other than

being a minor that would make him particularly vulnerable to a police contact. The police did not use coercive tactics in handling the interview; KRC was not seized from a classroom, was never handcuffed or otherwise restrained, there was a sign on the wall that told him he was free to leave, was never denied any requests, was never threatened and was allowed to leave the interview room by himself when the interview was concluded. The state respectfully submits that, after accounting for KRC's characteristics and the police tactics employed, it has shown by a preponderance of the evidence that Oligney's statements were voluntary and not the involuntary product of police coercion.

III. THE COURT DID NOT ERROUNEOUSLY ADMIT AND RELY ON IN RULING "OTHER ACTS" EVIDENCE.

Wisconsin Stat. § 904.04 generally prohibits the admission of evidence of other acts to prove a defendant's character, and to prove that the defendant acted in conformity with that character, but provides a non-exhaustive list of when other acts evidence is allowed, namely, "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Evidence is not "other acts" evidence if it is part of the panorama of evidence needed to completely describe the crime that occurred and is thereby inextricably intertwined with the crime. *See* Jason M. Brauser, *Intrinsic or Extrinsic?: The Confusing Distinction Between Inextricably Intertwined Evidence and Other Crimes Evidence Under Rule 404(b),* 88 N.W. U.L.Rev. 1582, 1606 (1994) (discussing Fed.R.Evid. 404(b), which governs the admissibility of other crimes, wrongs or acts). In fact, "simply because an act can be factually classified as 'different'—in time, place and, perhaps, manner than the act complained of—that different act is not necessarily 'other acts' evidence in the eyes of the law." *State v. Bauer,* 2000 WI App 206, ¶ 7 n. 2, 238 Wis.2d 687, 617 N.W.2d 902 (noting a trend in criminal cases to misidentify evidence as other acts evidence).2007 WI App at ¶ 28, 303 Wis.2d at 227-28. Intent is a listed permissible purpose in 904.04(2)(a). *See* Blinka, § 404.712 at 239-42 for a discussion of this permissible purpose.

The admission of other acts-evidence is within the circuit court's discretion. *Hurley,* 2015 WI at ¶ 28, 361 Wis.2d at 554. A reviewing court reviews a circuit court's admission of other-acts evidence for an erroneous exercise of discretion/using the erroneous exercise of discretion standard-a reviewing court determines whether the circuit court erroneously exercised its discretion when it allowed the admission of other-acts evidence. *Dorsey,* 2018 WI at ¶ 24, 379 Wis.2d at 404; *Hurley,* 2015 WI at ¶ 28, 361 Wis.2d at 554; *Payano,* 2009 WI at ¶ 40, 320 Wis.2d at 376.

The circuit court's decision to admit or exclude other-acts evidence is entitled to great deference. *Dorsey,* 2018 WI at ¶ 37, 379 Wis.2d at 414. A reviewing court will uphold a circuit court's evidentiary ruling if it examined/reviewed the relevant facts, applied a proper standard of law and, using a rational process, reached a reasonable conclusion/a conclusion that a reasonable judge could reach. *Hurley,* 2015 WI at ¶¶ 28, 37, 361 Wis.2d at 554; *Payano,* 2009 WI at ¶ 41, 320 Wis.2d at 376-77. Improperly admitted evidence of other-acts is subject to a harmless error analysis. *McGowan*, 2006 WI App at ¶ 25, 291 Wis. 2d at 224.

The Court ruled that she overruled the objection on the basis because I don't think the evidence, as that came in was as potentially prejudicial as it may have appeared from the onset. " (R. 41:74). In the case at hand if JE's testimony was erroneously allowed by the Court (and the State is not conceding that it is), it would be viewed as harmless error. As the Court indicated in her ruling, "I suspect that his testimony today was, well I know for a fact, that it was very different from the statements he gave to Officer Propson, I have to rely on the sworn testimony. He did acknowledge that he told Officer Propson that Keegan had once hit him in the balls previously, but it hadn't happened again. He testified they punched

each other, it was for purposes of causing pain, not for purposes of humiliation. I don't draw a lot of evidentiary value from [JE]'s testimony,"

However, when dealing with sexual assault cases the legislature has made it very clear that other acts evidence should be allowed under certain circumstances. Section 904.04(2)(b)1 provides that:

> **(b)** *Greater latitude.*
>
> **1.** In a criminal proceeding alleging a violation of s. 940.302 (2) or of ch. 948, alleging the commission of a serious sex offense, as defined in s. 939.615 (1) (b), or of domestic abuse, as defined in s. 968.075 (1) (a), or alleging an offense that, following a conviction, is subject to the surcharge in s. 973.055, evidence of any similar acts by the accused is admissible, and is admissible without regard to whether the victim of the crime that is the subject of the proceeding is the same as the victim of the similar act.

Therefore, testimony that the juvenile respondent had hit another juvenile in "his balls" would be relevant to this case at hand and under the greater latitude or for the purposes motive, opportunity, plan, or absence of mistake. Mistake was KRC's defense as he admitted touching the victim but said that it was an accident.

CONCLUSION

The Petitioner-Respondent respectfully requests this Court find that the Court applied the proper law in a Motion to Suppress hearing and should defer to the trial court's findings of facts. The facts as applied to the applicable law shows that the juveniles statement to law enforcement was voluntary and should not be suppressed. The Petitioner -Respondent further asks the Court to find that the trial court did not erroneously exercise her discretion when allowing the other acts evidence to come in as it was not prejudicial to the juvenile. Additionally, if the evidence was allowed in erroneously it did not provide evidentiary value to the Court and was harmless error. Therefore, Petitioner-Respondent requests this Court deny the request to reverse the delinquency order and remand with directions to the circuit court to grant KRC's suppression motion.

Dated April 12, 2024

Respectfully submitted,
Electronically signed by
Angelina R. Scarpelli
Asst. District Attorney
State Bar No. 1107645
Manitowoc County District Attorney
1010 S. 8th Street
Manitowoc, WI 54220
(920)683-4070
Angelina.Scarpelli@da.wi.gov

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 5,106 words.