STATE OF WISCONSIN

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

DISTRICT I

Appeal Case No. 2024AP001121-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

NELSON HOLMES,

Defendant-Appellant.

APPEAL FROM JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HON. JUDGE CHRISTOPHER DEE PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

John Chisholm
District Attorney
Milwaukee County

Josh Milder
Assistant District Attorney
State Bar No. 1126394
Attorneys for Plaintiff-Respondent

District Attorney's Office
821 West State Street, Room 405
Milwaukee, WI 53233-1485
(414) 278-4646

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ISSUES PRESENTED

Did the circuit court properly admit the two 911 calls and the body camera when the declarant was unavailable?

This Court should answer: Yes

Did the circuit court properly admit the defendant's statements due to the fact there was no *Miranda* issue?

This Court should answer: Yes

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat. (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat. (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE

On January 15, 2021, Nelson Holmes was arrested and charged with a second offense of operating a motor vehicle while under the influence and operating with a prohibited alcohol concentration. (R. 1). According to the criminal complaint, Mr. Holmes' vehicle struck AJL's car at 1500 North 35th Street, city of Milwaukee. GNJ was a passenger in AJL's car. GNJ and AJL believed Mr. Holmes to be intoxicated because his speech was slurred and he had difficulty standing. AJL took Mr. Holmes' car keys from him so that he would not be able to flee. (R. 1). Within three hours of the car accident, Mr. Holmes' blood sample, taken at Aurora Mt. Sinai Hospital, revealed that Mr. Holmes' blood contained 0.312 g/100 mL of Ethanol, an intoxicant. (R. 1).

Mr. Holmes set the case for trial. Before the trial date, the State filed a motion to admit the 911 calls, with the defense answering with a response. (R. 17; R. 18). The circuit court scheduled a hearing on the motions. After listening to the 911 calls, the circuit court ruled that the calls were admissible as a present sense impression or excited utterance (R. 59:12), provided that a foundational basis was presented to connect Mr. Holmes to the crime scene (R. 59:14-15).

Before the matter proceeded to trial on March 21, 2022 (R. 58), the parties engaged in a discussion on the record concerning the body camera and squad camera footage that the State intended to introduce at trial. (R. 58:9-23).

The first body camera footage pertained to the arresting officer explaining to Mr. Holmes that two people saw him driving. (R. 58:9). Judge Dee did not make a pre-trial ruling on

the admittance of this portion of body camera footage because he reasoned that it would depend on how the evidence came in at trial. (R. 58:10). The State indicated that this portion of the body camera footage would be muted. (R. 58:11).

The second portion of body camera footage pertained to various statements made by Mr. Holmes in the back of the squad car (R. 58:12-13). After viewing that portion of body camera footage, Judge Dee ruled this footage to contain relevant statements that "don't appear to be in response to any question asked; so there's no *Miranda* issue here." (R. 58:15-16).

The third body camera video footage pertained to statements Mr. Holmes made at the hospital. (R. 58:17). Judge Dee ruled that this conversation was initiated by Mr. Holmes (R. 58:20).

There was a final portion of body camera video footage pertaining to Mr. Holmes' statements at the hospital where he said: "Tell me. Look, that car hit me." (R. 58:21). After that clip was discussed, defense counsel asked for an opportunity to complete some research to potentially present that research to the court at a later juncture. (R. 58:22-23).

In the afternoon, defense counsel renewed its argument pertaining to the statements Mr. Holmes made in the hospital. (R. 69:3). Defense counsel argued that the officers tried to deliberately elicit information from Mr. Holmes like in *Brewer v. Williams* (R. 69:4). Judge Dee distinguished *Brewer*. In *Brewer*, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977), a police officer played upon the religious nature of a defendant who was in the process of being transported in a squad car. Judge Dee noted that, unlike *Brewer*, the officers in Mr. Holmes' case made no Christian burial-type speeches or anything of the kind. (R. 69:8). Speaking of Mr. Holmes' case facts, Judge Dee said: "The tone and tenor of it is he's (the police officer) not interested in having conversation at all, really." (R. 69:8). Judge Dee found that the police officer politely answered Mr. Holmes but never did anything to play upon Mr. Holmes' psyche or religious beliefs, guilt, or anything of that nature. (R. 69:8). Judge Dee found that the police officer provided short answers without continuing the

conversation. (R. 69:8). Judge Dee, therefore, ruled the statements to be admissible at the trial. (R. 69:8).

The defense counsel raised a further objection, arguing that, since the police officers took possession of Mr. Holmes' car keys, Mr. Holmes was in-custody during the time frame when he made certain statements to police officers on scene. (R. 64:13). Judge Dee ruled that "the fact they came into the keys, they didn't take them themselves, civilians gave them to them, doesn't turn that into an arrest or a custodial situation. What I saw of that video, no, I would not conclude that Mr. Holmes was under arrest at that point." (R. 64:14).

In its case-in-chief, the State called victim ALJ (R. 64:45), who testified that GNJ called 911. (R. 64:48-49). Through witness Officer Kunya, the State entered Exhibit 2, which was the officer's body camera. (R. 64:67).

During a break, the State noted that the body camera footage was intentionally muted so that the officer's statement of "Two witnesses saw you do this" was removed. The State requested that the circuit court reserve its ruling as to whether that statement could later be shared with the jury, if the proper foundation was laid. (R. 64:92).

The next witness called by the State was Officer Madrigal. (R. 64:117). Exhibit 10, the body camera of Officer Madrigal from the hospital, was entered into evidence. (R. 67:13-14).

Outside the presence of the jury, Judge Dee entertained arguments, once again, pertaining to the 911 call. (R. 64:73-74). Judge Dee "ruled that the introductory part is fine. It's when she starts talking about observations specific to the man with the other car, that I can't tell whether she's actually seeing that." (R. 64:79).

Judge Dee decided that the State could play the 911 call from the start until right before the female caller said that "the man's trying to leave" the first time. Judge Dee then allowed the State to resume the recording when the female caller described her location at 35th and Cherry Street. Judge Dee, once again, enabled the State to play the recording until the

female caller stated that "he's trying to leave" on a second occasion. (R. 64:84). Thus, the State was allowed to play the 911 call recording from 00 to 00:40 seconds and from 2:59 to 3:23 seconds.

Before closing arguments, the State asked Judge Dee for permission to play the part of Officer Kunya's body camera footage unmuted. Again, this portion of body camera footage depicted Officer Kunya saying: "I have two witnesses there who say you were driving." (R. 68:3-4). Judge Dee stated that: "[T]he basic problem is, they're resting; so there's no more case to put on in evidence. We've hit the end of that trial; so I wouldn't let it in for that reason." (R. 68:4). After closing arguments, the jury returned verdicts of guilty as to both of the charges. (R. 64:79).

When Mr. Holmes raised a *Miranda* rights violation following the verdict, Judge Dee explained to Mr. Holmes that the jury viewed Mr. Holmes making statements that were not in response to any questions. Judge Dee explained that *Miranda* would not apply in that circumstance. (R. 68:92). Judge Dee also took the time to explain to Mr. Holmes that when the officers approached him on the street, this marked the beginning of their investigation, and once again, *Miranda* warnings would not yet be applicable. (R. 68:91).

STANDARD OF REVIEW

A trial court's decision to receive evidence is vested within its discretion, and we will not reverse if that decision is one that a reasonable judge could make. *Wittig v. Hoffart*, 2005 WI App 198, ¶ 12, 287 Wis. 2d 353, 363–364, 704 N.W.2d 415, 419. A circuit court's findings regarding the historical facts surrounding a defendant's detention will not be overturned unless they are clearly erroneous. Wis. Stat. § 805.17(2); *State v. Nash*, 123 Wis. 2d 154, 161, 366 N.W.2d 146 (Ct.App.1985); *State v. Smith*, 119 Wis. 2d 361, 366, 351 N.W.2d 752 (Ct.App.1984).

ARGUMENT

I. The Trial Court Properly Admitted the 911 Call.

A. Legal Principles.

Statements in a 911 call are admissible under hearsay exceptions for present sense impressions and excited utterances. Regardless of whether the declarant is available as a witness, Wis. Stat. § 908.03(1) allows for the introduction of 911 evidence under the circumstances presented under the following hearsay exception:

> PRESENT SENSE IMPRESSION. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

Statements made during 911 calls in which callers are describing events they are perceiving or just observed are admissible as present sense impressions. *State v. Ballos*, 230 Wis. 2d 495, 505, 602 N.W.2d 117 (1999).

Second, regardless of whether the declarant is available as a witness, Wis. Stat. § 908.03(2) allows for admissibility of 911 evidence through the excited utterance hearsay exception:

> EXCITED UTTERANCE. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

Statements made during 911 calls in which callers are "under the stress of excitement caused by the event" are admissible as excited utterances. *Ballos* at 506.

Under the United States Constitution, criminal defendants are entitled to confront their accusers: "In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." U.S. CONST. amend. VI. The same right is guaranteed by the Wisconsin Constitution. WIS. CONST. art 1, § 7.

In *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court held a defendant's confrontation rights are violated if the trial court received evidence of out-of-court statements by someone who does not testify at trial if those statements are "testimonial" and the defendant had no prior opportunity to cross-examine the witness. *Crawford* articulated two overlapping considerations for determining whether an out-of-court statement was testimonial: "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id*. at 51.

The Supreme Court elaborated on the distinction between testimonial and non-testimonial statements in *Davis v. Washington*, 547 U.S. 813, 822, 826-27, 125 S. Ct. 2266, 165 L. Ed. 2d 244 (2006), which involved, in part, a recording of a 911 call. The *Davis* court stated:

> Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially related to later criminal prosecution.

Id. at 822.

The Court concluded that statements in the 911 recording were non-testimonial. *Id.* at 829. The Court noted that the 911 caller was describing events as they were happening, not merely past events, and "any reasonable listener would recognize that [the caller] was facing an ongoing emergency." *Id*. at 827. The Court further stated that the call was "plainly a call for help against bona fide physical threat," and "the nature of what was asked and answered again viewed objectively, was such that the elicited statements were necessary to be able to resolve the present emergency, rather than to simply learn what had happened in the past." *Id*. [emphasis omitted]. The primary purpose of the call "was to enable police assistance to meet an ongoing emergency. [The

caller] was not acting as a witness; [the caller] was not testifying." *Id*. at 828 [emphasis omitted].

B. The 911 calls fall into a hearsay exception and were not testimonial.

Judge Dee properly found that the 911 calls fall into the hearsay exception of excited utterance and present sense impression. The circuit court said, "[T]hese things are going on, or have just gone on, in front of the caller's face. She gets in an accident. She's calling to report it. Her present sense impression being an emergency is just describing what they see without being prompted by questioning from law enforcement. Could it be excited utterance? Yeah, actually, oddly enough, the second call more so than the first." (R. 59:12).

Thus, the 911 calls go to present sense impression because the caller is describing what is happening including the fact that an emergency occurred. (R. 59:12). The 911 calls are also non-testimonial because they describe an on-going emergency regarding two cars that just got into an accident with one person attempting to leave the area. Just like in *Davis v, Washington*, 547 U.S. 813, (2006), the primary purpose of the 911 call was to enable police assistance to meet an ongoing emergency. Therefore, the circuit court properly ruled that the statements fall into a hearsay exception and were not testimonial.

C. The Court did not violate the Confrontation Clause because the 911 calls were not testimonial.

The Court found that the 911 calls were part of a hearsay exception and were not testimonial. (R. 59:12). As *State v. Nieves*, 2017 WI 69, ¶¶ 28-30, 376 Wis. 2d 300, 318, 897 N.W.2d 363, 371–72, states:

> [T]he Court in *Crawford* "held a defendant's right to confrontation is violated if the trial court receives into evidence out-of-court statements by someone who does not testify at the trial if those statements are 'testimonial' and the defendant has not had 'a prior opportunity' to cross-examine the out-of-court declarant." *Mattox*, 2017 WI 9, ¶ 24, 373 Wis. 2d 122, 890 N.W.2d 256; *see also*

> *Crawford*, 541 U.S. at 68, 124 S.Ct. 1354 ("Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").
>
> The Court in *Crawford* did not directly address the application of the Confrontation Clause to nontestimonial statements. However, subsequent Supreme Court cases have seized on what *Crawford* insinuated; the Confrontation Clause applies only to testimonial statements. *See Davis v. Washington*, 547 U.S. 813, 823, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). It follows that the Confrontation Clause does not apply to nontestimonial statements. *Id.*; *see also Michigan v. Bryant*, 562 U.S. 344, 359, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011) (reasoning "the admissibility of a [non-testimonial] statement is the concern of state and federal rules of evidence, not the Confrontation Clause"); *Whorton v. Bockting*, 549 U.S. 406, 420, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007) ("Under *Crawford*, on the other hand, the Confrontation Clause has no application to [non-testimonial] statements....").
>
> Consequently, as a threshold matter, a defendant cannot show that his or her rights under the Confrontation Clause were violated

State v. Nieves, 2017 WI 69, ¶¶ 28-30, 376 Wis. 2d 300, 318, 897 N.W.2d 363, 371–72.

As a result, the unavailability of the 911 caller is immaterial given that the statements in the call are non-testimonial.

D. Body Camera with the police officer's statement: "Those two people back there said they saw you."

Mr. Holmes' brief raises a concern about the statements in the officer's body camera, namely: "Those two people back there said they saw you." Upon a close review of the trial transcripts from this case, it is the State's position that the portion alluded to was never played with volume during the trial. The prosecutor muted that portion, as directed by Judge Dee. The State's position is based upon the record related to several portions of the trial transcripts.

Remember that, prior to the commencement of the trial, Judge Dee heard arguments related to the body camera and squad camera that the State sought to introduce. (R. 58). The first portion related to the officer telling Mr. Holmes that "two people back there said they saw you." (R. 58:9). Judge Dee did not make a decision at that juncture. (R. 58:10). Whereupon, the State agreed to mute that portion of the body camera footage. (R. 58:11).

Later, the State noted for the record that the body camera was intentionally muted; therefore, the "Those two people back there said they saw you" line was never heard by the jury. The State asked to revisit the issue later in the trial, once the foundation had been laid. (R. 64:92).

Finally, prior to closing arguments, the State again asked that the issue pertaining to the unmuted portion of Officer Kunya's body camera footage be addressed, particularly, the statement: "Those two people back said they saw you." (R. 68:3-4). The court did not allow that portion to be introduced into evidence, ruling that: "[T]he basic problem is, they're resting; so there's no more case to put on in evidence. We've hit the end of that trial; so I wouldn't let it in for that reason." (R. 68:4)

While Mr. Holmes raises this issue on appeal, it does not appear that the unmuted portions were ever played or presented to the jury. So, there can be no hearsay violation related to evidence that was never admitted.

II. The Court Properly Admitted Statements made by Mr. Holmes.

A. Legal Principles.

The landmark case of *Miranda v. Arizona*, 384 U.S. 486, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), requires warnings be given to an accused before any custodial interrogation may take place. In order for *Miranda* to be triggered, the accused must be (1) in custody and (2) interrogated. *Id*. If the defendant is not in custody, there is no *Miranda* issue. Similarly, if there is no interrogation, there is no *Miranda* issue.

The *Miranda* safeguards were designed to vest a suspect in custody with protections against coercive police practices, without regard to objective proof of the underlying intent of the police. *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 1690, 64 L. Ed. 2d 297 (1980). Coercive police activity is a "necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986); *United States v. Huerta*, 239 F.3d 865, 871 (7th Cir. Ind. 2001). Thus, "a confession is voluntary and admissible if, 'in the totality of circumstances, it is the product of a rational intellect and free will and not the result of physical abuse, psychological intimidation, or deceptive interrogation tactics that have overcome the defendant's free will.'" *United States v. Stadfeld*, 689 F.3d 705, 709 (7th Cir. 2012) (quoting *United States v. Gillaum*, 372 F.3d 848, 856 (7th Cir. 2004)).

The first prong of the *Miranda* test concerns whether the defendant was in custody. Whether a person is in custody is an objective test, inquiring how a *reasonable person in the suspect's position* would have understood the situation. *State v. Morgan*, 2002 WI App 124, ¶ 10, 254 Wis. 2d 602, 648 N.W.2d 23. Someone is in custody when their freedom to act is restricted to a "degree associated with formal arrest." *Berkemer v. McCarty* 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984). In other words, to be in custody, the accused has to be formally arrested or its equivalent. In determining whether an individual is "in custody" or its functional equivalent, courts look to several factors including whether the suspect had freedom to leave, the purpose, place and length of the interrogation, and the degree of restraint on the suspect during the interrogation process. *State v. Torkelson*, 2007 WI App 272, 306 Wis. 2d 673, 743 N.W.2d 511. When evaluating the "degree of restraint," we consider; "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 questioning took place in a police vehicle, and the number of officers involved." *State v. Morgan*, 2002 WI App. 124, at ¶ 12, 254 Wis. 2d 602, 648 N.W.2d 23.

The second prong of the *Miranda* test is whether the defendant was subject to an interrogation, meaning express questioning designed to elicit an incriminating response. *Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682 (1980). This is an objective standard: an interrogation only occurs when "an objective observer could foresee that the officer's conduct or words would elicit an incriminating response." *State v. Cunningham*, 144 Wis. 2d 272, 278, 423 N.W.2d 862 (1988). Interrogation can take two forms: express questioning or its functional equivalent. *State v. Dobbs*, 2020 WI 64, ¶ 66, 392 Wis. 2d 505, 547, 945 N.W.2d 609, 630, citing *State v. Harris*, 2017 WI 31, ¶15, 374 Wis. 2d 271, 892 N.W.2d 663; *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682 (1980).

The test to determine whether officers engage in the functional equivalent of interrogation for *Miranda* purposes is an objective one, and is not limited to express questioning by the officer, but turns on whether the officers' statements and conduct, other than those normally attendant to an arrest and custody, would lead a reasonable person to believe such conduct and statements are an "interrogation." *Id.* A police officer may well be aware of the possibility that a custodial defendant may make an inculpatory statement, but this is insufficient to establish the functional equivalent of interrogation for the purposes of a *Miranda* warning, as the police officer's subjective intent to solicit inculpatory statements is not determinative. *State v. Hambly*, 2006 WI App 256, 297 Wis. 2d 851, 726 N.W.2d 697.

Judge Dee ruled correctly that Mr. Holmes' *Miranda* rights were not violated at the scene, either in the hospital or in the squad car. (R. 58:12-16; R. 69:8).

B. Holmes was not in custody when he first spoke with officers on scene.

The circuit court decided that Mr. Holmes was not in custody when he first spoke with officers. (R. 64:14). In evaluating whether Holmes was in custody at the time of an interview for the purposes of triggering *Miranda* protections, the Court should consider the totality of the circumstances. *California v. Behler*, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983). The totality of the circumstances

include whether the defendant was free to leave the scene; the purpose, place and length of the interrogation; and the degree of restraint. *State v. Leprich*, 160 Wis. 2d 472, 477, 465 N.W.2d 844 (Ct. App. 1991). An examination of the totality of the circumstances should include such relevant factors as: 1) whether the defendant was handcuffed, 2) whether a gun was drawn on the defendant, 3) whether a *Terry* frisk was performed, 4) the manner in which the defendant was restrained, 5) whether the defendant was moved to another location, 6) whether the questioning took place in a police vehicle, 7) the number of police officers involved. *State v. Gruen*, 218 Wis. 2d 581, 592-598, 582 N.W.2d 728, 732-34 (Ct. App. 1998).

Judge Dee ruled that, based on what was observed in the video, Mr. Holmes was not in custody. The circuit court found several facts noteworthy, including that civilians seized the car keys and provided those car keys to the police. Judge Dee found that the actions of the civilians "doesn't turn that into an arrest or custodial situation. What I saw of that video, no, I would not conclude that Holmes was under arrest at that point." (R. 64:14). Judge Dee clarified (after the verdict) that, when the officers approached Mr. Holmes in the street, it was the beginning of an investigation, a time not yet ripe for *Miranda* warnings. (R. 68:91).

C. Holmes was not questioned when he made statements in the hospital and in the squad car.

Judge Dee found that Mr. Holmes' statements to officers were not the result of interrogation because Mr. Holmes was talking with the officer without the officer trying to engage with Holmes. (R. 69:8). Just like in *State v. Kramar*, 149 Wis. 2d 767, 440 N.W.2d 317 (1989), an officer's "small talk" with a defendant was not an interrogation within the meaning of *Miranda* because the officer's conversation with the defendant was not reasonably likely to elicit an incriminating response from the defendant. Similarly, Mr. Holmes' incriminating statements to the officer were not the product of an interrogation; but rather, the product of an unsolicited, wholly spontaneous, volunteered action on the part of Mr. Holmes.

Judge Dee held that the defendant's statements were properly admitted because the "officers tone and tenor of it is he's not interested in having the conversation at all. He's politely answering Holmes he's not doing anything to play upon Holmes' psyche or religious beliefs or guilt." (R. 69:8). The officer provided short answers without continuing the conversation. *Id*. When Mr. Holmes spoke to the officers in the car, Judge Dee found that the statements "don't appear to be in response to any question asked." (R. 58:15-16). Because the officers were not asking Mr. Holmes questions when he was in the squad car, he was not subject to interrogation, as the court found. Applying the law, Judge Dee correctly determined that Mr. Holmes' rights were not violated.

CONCLUSION

The State asks this Court to deny Mr. Holmes' claims and affirm the circuit court's findings of fact and conclusions of law.

Dated this 21st day of November, 2024.

Respectfully submitted,

JOHN CHISHOLM
District Attorney
Milwaukee County

Electronically signed by:

Josh Milder
JOSH MILDER
Assistant District Attorney
State Bar No. 1126394

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 4280.

Dated this 21st day of November, 2024

Electronically signed by:

Josh Milder
JOSH MILDER
Assistant District Attorney
State Bar No. 1126394

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 21st day of November, 2024

Electronically signed by:

Josh Milder
JOSH MILDER
Assistant District Attorney
State Bar No. 1126394

P.O. Address:
Milwaukee County District Attorney's Office
821 West State Street, Room 405
Milwaukee, Wisconsin 53233-1485
(414) 278-4646
Attorneys for Plaintiff-Respondent