STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2018AP1897-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

MORGAN E. GEYSER,
Defendant-Appellant.

ON APPEAL FROM THE FEBRUARY 1, 2018, ORDER OF COMMITMENT, FILED IN THE WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL O. BOHREN, PRESIDING.
WAUKESHA COUNTY CASE NO. 2014CF596

DEFENDANT-APPELLANT'S REPLY BRIEF

Respectfully submitted by:

Matthew S. Pinix, 1064368

PINIX & SOUKUP, LLC
1200 East Capitol Drive, Suite 360
Milwaukee, Wisconsin 53211
T: 414.963.6164
F: 414.967.9169
matthew@pinixsoukup.com
www.pinixsoukup.com

Attorneys for Defendant-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

ARGUMENT 1

I. THE STATE FAILED TO DISPROVE GEYSER'S MITIGATION DEFENSE, AND THE ADULT COURT LOST JURISDICTION. 1

II. THE EVIDENCE SHOWS THAT GEYSER'S STATEMENTS WERE UNCONSTITUTIONALLY MADE; THEY SHOULD HAVE BEEN SUPPRESSED. 4

III. THE FAILURE TO SUPPRESS GEYSER'S STATEMENT WAS NOT HARMLESS ERROR 6

A. The harmless error test does not apply. 6

B. Nonetheless, the State cannot prove the error harmless. 8

CONCLUSION 10

CERTIFICATION 10

TABLE OF AUTHORITIES

CASES

Arizona v. Fulminante, 499 U.S. 279 (1991) 10

Berkemer v. McCarty, 468 U.S. 420 (1984) 7, 8

Chapman v. California, 386 U.S. 18 (1967) 6, 7

Charolais Breeding Ranches, Ltd. v. FPC Securities Corp., 90 Wis. 2d 97, 279 N.W.2d 493 (Ct. App. 1979) 4

Cudd v. Crownhart, 122 Wis. 2d 656, 364 N.W.2d 158 (Ct. App. 1985) 10

Davis v. Ayala, 135 S. Ct. 2187 (2015) 6

DeBartolo v. United States, 790 F.3d 775
(7th Cir. 2015) 8, 9

Satterwhite v. Texas, 486 U.S. 249 (1988) 6, 8

State v. Armstrong, 223 Wis. 2d 331,
588 N.W.2d 606 (1999) 7

State v. Armstrong, 225 Wis. 2d 121,
591 N.W.2d 604 (1999) 7

State v. Dunn, 121 Wis. 2d 389,
359 N.W.2d 151 (1984) 1, 2

State v. Gaines, 197 Wis. 2d 102,
539 N.W.2d 723 (Ct. App. 1995) 5

State v. Griffin, 126 Wis. 2d 183,
376 N.W.2d 62 (Ct. App. 1985) 5

State v. Head, 2002 WI 99, 255 Wis. 2d 194,
648 N.W.2d 413 .... 1, 3

State v. Jiles, 2003 WI 66, 262 Wis. 2d 457,
663 N.W.2d 798 5

State v. Klesser, 2010 WI 88, 328 Wis. 2d 42,
786 N.W.2d 144 2

State v. Martin, 162 Wis. 2d 883,
470 N.W.2d 900 (1991) 4

State v. Moore, 2015 WI 54, 363 Wis. 2d 376,
864 N.W.2d 827 7

State v. Nelson, 2014 WI 70, 355 Wis. 2d 722,
849 N.W.2d 317 7

State v. Toliver, 2014 WI 85, 356 Wis. 2d 642,
851 N.W.2d 251 .... 2, 3

State v. Traux, 151 Wis. 2d 354,
444 N.W.2d 432 (Ct. App. 1989) 5, 6

State v. Woods, 117 Wis. 2d 701, 345 N.W.2d 457 (1984) ..6

United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) 8

Weaver v. Massachusetts, 137 S. Ct. 1899 (2017).................7

STATUTES

Wis. Stat. § 805.18(2)...7

Wis. Stat. § 940.01 1

Wis. Stat. § 940.01(2)...1

Wis. Stat. § 940.01(2)(b) 1, 3

Wis. Stat. § 940.01(3)...1

JOURNAL ARTICLES

Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L. Rev. 891 (2004)..9, 10

ARGUMENT

I. THE STATE FAILED TO DISPROVE GEYSER'S MITIGATION DEFENSE, AND THE ADULT COURT LOST JURISDICTION.

Imperfect self-defense mitigates first-degree intentional homicide to second-degree intentional homicide. Wis. Stat. § 940.01(2) & (3), *State v. Head*, 2002 WI 99, ¶85, 255 Wis.2d 194, 648 N.W.2d 413. Such mitigation occurs as a matter of law when the factfinder determines that the defendant feared death and unreasonably believed that deadly force was necessary to defend against it. *Id.* The burden falls first on the defendant to produce evidence establishing the defense. *Head*, 2002 WI 99, ¶¶111-12. Once the defense is raised, if the State cannot disprove it, then, by law, the defendant has not committed attempted first-degree intentional homicide, but rather attempted second-degree intentional homicide. Wis. Stat. § 940.01(2)(b), *Head*, 2002 WI 99, ¶¶89-90, 103.

When an adult defendant is being prosecuted, whether she committed attempted first- or second-degree intentional homicide is irrelevant at her preliminary hearing. *See State v. Dunn*, 121 Wis.2d 389, 398, 359 N.W.2d 151 (1984). The commission of either nets the same result: bindover. *Id.* Whether imperfect self-defense might be available is irrelevant because the bindover question asks simply whether the defendant committed *some* felony. *Id.* Attempted first- and second-degree intentional homicide are both felonies, and thus the defendant will be bound over regardless of which she probably committed. With an adult defendant, the prosecution satisfies its preliminary hearing burden by proving an attempt to intentionally kill. *See id.*, Wis. Stat. § 940.01. Upon that showing, the prosecution's work is done and bindover is assured. *See Dunn*, 121 Wis.2d at 398. Even if an adult defendant has a mitigation defense, the prosecution need not rebut it because the matter will

be bound over regardless. *Id.* For those reasons, possible mitigation by imperfect self-defense is not relevant at an adult's preliminary hearing. *See id.*

But that is not so when a child is in adult court. *See State v. Klesser*, 2010 WI 88, ¶¶56-57, 328 Wis.2d 42, 786 N.W.2d 144. In that case, the result of the preliminary hearing is quite different depending on which crime the child probably committed. *See State v. Toliver*, 2014 WI 85, ¶10, 356 Wis.2d 642, 851 N.W.2d 251. If the child probably attempted to intentionally kill, then the case proceeds in adult court. *Id.* ¶36. On the contrary, if the child probably attempted to intentionally kill while acting in imperfect self-defense, then the case is discharged from adult court altogether. *Klesser*, 2010 WI 88, ¶57.

Recognizing those high stakes, our supreme court has said that adult-court preliminary hearings are "different" when a child is involved. *Id.* ¶55. Unlike with an adult, the law gives a child the opportunity to present a mitigation defense and, if the prosecution cannot disprove it, be discharged from adult court. *Id.* ¶¶28, 57. Thus, imperfect self-defense and its mitigating effect are relevant at a child's adult-court preliminary hearing. *Id.* ¶57. But, in Geyser's case, the State argues as though that is not the law. *See* St.'s Br. at 11-15.

The State tells this Court that the prosecution's proof that Geyser probably tried to intentionally kill the victim was enough to gain bindover. *Id.* The State wants this Court to ignore entirely the fact that the circuit court found facts establishing Geyser's mitigation defense and to uphold bindover simply because the State presented evidence of attempted intentional homicide. *See id.*

Without citation to any authority, the State tells this Court that Geyser is "confus[ing] the State's burden of production to satisfy the bind-over query at a preliminary hearing with the defendant's burden of

production to allow her to present self-defense evidence at trial." St.'s Br. at 12. But Geyser is not confused at all. The law clearly allows a child to present mitigating evidence at a preliminary hearing with the goal of depriving the court of jurisdiction. *Toliver*, 2014 WI 85, ¶10. *Head* very clearly explicates the "affirmative mitigation defense" of imperfect self-defense that is set forth in the Wisconsin statutes. 2002 WI 99, ¶89, Wis. Stat. § 940.01(2)(b). And, by the intersection of that authority, imperfect self-defense is clearly available to a child defendant who seeks to mitigate her way out of adult court at the preliminary hearing.

The State's argument about the inapplicability of *Head* and imperfect self-defense would win the day if Geyser was an adult, but she's not. In Geyser's case, the State not only had to show that she probably tried to intentionally kill the victim, but also that she probably did not do so fearing imminent death if she did not. That proof was necessary because, unless the State could rebut her imperfect self-defense, it could not prove that she probably committed a crime over which the adult court had original jurisdiction.

Under the State's argument, there is no room in a child's adult-court preliminary hearing for reliance on a mitigation defense to deprive the court of jurisdiction. Instead, once the State has proven probable cause for first-degree intentional homicide, the State's burden is satisfied and bindover required, regardless of whether the evidence also proved mitigation. But, as explained above, that is the law for an *adult's* preliminary hearing, not a child's. *Klesser* and *Toliver* establish that a child not only may, but indeed has an incentive to, present mitigation evidence at an adult-court preliminary hearing and thereby deprive the court of jurisdiction. The State's argument is thus contrary to the established law governing imperfect self-defense, as well as *Klesser* and *Toliver*. And, the State's proposed rule renders moot the statutory the language allowing a child to negate original

adult court jurisdiction by mitigation. *Contra State v. Martin*, 162 Wis.2d 883, 894, 470 N.W.2d 900 (1991) ("every word if possible should be given effect"). This Court should not accept it.

As the record clearly shows, the circuit court did not find that Geyser probably did not actually fear death at the time of her homicidal act. Quite to the contrary, the circuit court found *as a matter of undisputed fact* that Geyser *actually believed* that Slender Man would kill her or her family if she did not kill the victim. Thus, the facts found by the circuit court at Geyser's preliminary hearing prove that she probably acted in imperfect self-defense. The circuit court's factual findings thus make clear that the prosecution failed to disprove her mitigation defense, and thereby failed to prove that she probably committed attempted first-degree intentional homicide.[1] After all, one cannot have committed both attempted first-degree intentional homicide and attempted first-degree intentional homicide *while acting in imperfect self-defense*. The latter *is*, by law, attempted *second*-degree intentional homicide.

On the undisputed facts found by the circuit court, the State failed to prove that Geyser committed attempted unmitigated intentional homicide. The adult court therefore lost jurisdiction over her, and the case against her should have been discharged.

II. THE EVIDENCE SHOWS THAT GEYSER'S STATEMENTS WERE UNCONSTITUTIONALLY MADE; THEY SHOULD HAVE BEEN SUPPRESSED.

Geyser argues that her statements were unconstitutional because they were unknowing, unintelligent, and involuntary. Geyser's 1st Br. at 25-36.

[1] Importantly, the State does not contest, and thus concedes, that Wisconsin law does not recognize sole motivation as part of its self-defense law. *See Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

In response, the State says that Geyser failed to adduce "sufficient evidence at the suppression hearing" to prove that her statements were unconstitutionally made. St.'s Br. at 21. The State makes that argument despite rightly recognizing that *it* bore the evidentiary burden at the suppression hearing. *Id.* at 20 (citing *State v. Jiles*, 2003 WI 66, ¶26, 262 Wis.2d 457, 663 N.W.2d 798). Under that standard, contesting the sufficiency of Geyser's evidence is misplaced.

Furthermore, the State's sufficiency argument highlights the problems with its own proof. To prove Geyser's statement constitutional, the State relies on the interrogating officers' assessment of Geyser as "a bright, coherent, capable girl." St.'s Br. at 22. But that assessment flies in the face of the undisputed evidence that Geyser was a twelve-year-old, mentally ill child with no experience in the criminal justice system who was deemed incompetent *after* her giving her statements. *See* Geyser's 1st Br. at 7-9 (citing record). The State presented no evidence explaining how, despite those qualities, Geyser could knowingly, intelligently, and voluntarily waive her constitutional rights. Whereas the State bore the burden of proof, the absence of such evidence is devastating to its claim of constitutionality.

The State seems to take umbrage with the fact that some of the evidence on which Geyser relies comes from hearings other than suppression hearing. St.'s Br. at 21-22. But that argument is without merit. *See State v. Griffin*, 126 Wis.2d 183, 198, 376 N.W.2d 62 (Ct. App. 1985). "When reviewing an order on a motion to suppress evidence, an appellate court is not limited to examination of the suppression hearing record." *State v. Gaines*, 197 Wis.2d 102, 106 n.1, 539 N.W.2d 723 (Ct. App. 1995). Other testimonial evidence is properly considered. *State v. Traux*, 151 Wis.2d 354, 360, 444 N.W.2d 432 (Ct. App. 1989). Geyser's reliance on evidence from other hearings is entirely appropriate because it was of record *prior* to the suppression hearing and presented to *the same judge*

that ruled on the motion to suppress. *See id.* In those circumstances, the court was *unquestionably aware* of that evidence when ruling on the suppression motion. To ignore evidence in the record that is both relevant to the suppression issue and known to the trial judge when deciding the motion would be an affront to the independent, "totality of circumstances" review that is due. *See State v. Woods*, 117 Wis.2d 701, 722, 345 N.W.2d 457 (1984).

Whereas the State cannot prove that Geyser's statements were knowing, intelligent, and voluntary, they should have been suppressed.

III. THE FAILURE TO SUPPRESS GEYSER'S STATEMENT WAS NOT HARMLESS ERROR.

The burden of proving any federal constitutional error harmless falls squarely on the State. *Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988). The State must be able to show that the error "'did not contribute to the [result].'" *Id.* (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)) (textual alteration added). And, its burden of proof is substantial. *Chapman*, 386 U.S. at 24. The "harmlessness standard" requires the reviewing court to "'be able to declare a belief that [the error] was harmless *beyond a reasonable doubt*.'" *Davis v. Ayala*, 135 S. Ct. 2187, 2197 (2015) (quoting *Chapman*, 386 U.S. at 24) (emphasis and alteration added). Thus, to prove an error harmless, the State must prove beyond a reasonable doubt that it did not contribute to result. *Chapman*, 386 U.S. at 24.

A. The harmless error test does not apply.

As a threshold matter, Geyser disputes application of the federal harmless error standard to her case. First, the State points to no precedential authority applying *Chapman*'s harmless error test to an unconstitutionally obtained statement when the case ends with a guilty plea. Importantly, the Supreme Court has before "rejected" application of the harmless error test under

those very circumstances. *Berkemer v. McCarty,* 468 U.S. 420, 444 (1984). *Berkemer* recognized that a guilty plea following the denial of suppression motion creates "a procedural posture that makes the use of harmless-error analysis especially difficult." *Id.* A guilty plea deprives the court of "a complete record of a trial and the parties' contentions regarding the relative importance of each portion of the evidence presented." *Id.* "Without the benefit of such a record," *Berkemer* "decline[d] to rule that the trial court's refusal to suppress [the defendant]'s postarrest statements 'was harmless beyond a reasonable doubt.'" *Id.* at 444-45 (quoting *Chapman*, 386 U.S. at 24). Consistent with *Berkemer*, *Chapman* should not apply in Geyser's case. *Id.*

It is true that the Wisconsin Supreme Court has before applied Wisconsin's *statutory* harmless error test. *State v. Armstrong*, 223 Wis.2d 331, 368, 588 N.W.2d 606 (1999) (citing Wis. Stat. § 805.18(2)), *State v. Armstrong*, 225 Wis.2d 121, 121-22, 591 N.W.2d 604 (1999); *see State v. Moore*, 2015 WI 54, ¶¶92-94, 363 Wis.2d 376, 864 N.W.2d 827 (same). However, Geyser protests a violation of her federal constitutional rights not her statutory rights, and the State did not aver the statutory harmless error test or rely on authority that did. *See* St.'s Br. at 25-26 (citing *State v. Nelson*, 2014 WI 70, ¶44, 355 Wis.2d 722, 849 N.W.2d 317). Given *Berkemer* and the State's non-reliance on statutory harmless error, this Court should reject the State's harmless error argument.

Second, "the effects of the error" of which Geyser complains "are simply too hard to measure" in the context of her guilty plea. *See Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017). The State's argument that Geyser would have entered the exact same plea regardless of suppression is entirely speculative. *See* St.'s Br. at 26. The State does not point to any statements by Geyser or her attorneys showing that her plea would have been the same even if her statement had been suppressed. Instead, the State speculates that Geyser would have pleaded

guilty because the prosecution had other evidence that it could have used to convict her at trial.

The State's speculation shows the difficulty in measuring the effect of the failure to suppress on Geyser's plea. *Berkemer*, 468 U.S. at 444-45. The harmless error test is an evidentiary one; it asks what effect the error likely had on the verdict given the other trial evidence. *Satterwhite*, 486 U.S. at 258-59. Here, there is no verdict and no trial evidence; there is only Geyser's choice to plead guilty. *See Berkemer*, 468 U.S. at 444. Assessing the impact of the suppression error thus necessitates speculation on what choices Geyser might have made differently. *Cf. United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (structural error where impossible "quantify the impact of . . . different choices on the outcome"). But, when it comes to a defendant's personal choice of trial versus plea, "[j]udges and prosecutors should hesitate to speculate on what a defendant would have done in changed circumstances." *DeBartolo v. United States*, 790 F.3d 775, 778 (7th Cir. 2015). The effect of not suppressing Geyser's statement is simply too hard to measure on the record before this Court, and thus the error is structural. *See Gonzalez-Lopez*, 548 U.S. at 150. This Court should not apply harmless error. *See Berkemer*, 468 U.S. at 444-45.

B. Nonetheless, the State cannot prove the error harmless.

Even if this Court applies *Chapman*'s harmless error test, the State cannot satisfy its burden. The State says any error was harmless because "[i]t is not credible to suggest that Geyser would not have entered the pleas that she did had the court suppressed her own inculpatory statement." St.'s Br. at 26. But that mischaracterizes the harmless error test. It is not Geyser's responsibility to prove that she otherwise would not have entered her plea. Instead, it is the State's responsibility to prove that the failure to suppress had *no*

effect on her choice to plead guilty. There is substantial evidence that the suppression ruling contributed to Geyser's choice to plea.

For one thing, Geyser's chances at trial were terrible with her statement in evidence. Research has shown that, "[i]f the defendant's case goes to trial, the jury will treat the confession as *more probative* of the defendant's guilt than *virtually any other type of evidence*, especially if—as in virtually all high profile cases—the confession receives negative pre-trial publicity." Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L. Rev. 891, 922 (2004) (footnotes and cited authority omitted). With the admission of Geyser's statement, a guilty verdict was a forgone conclusion. And thus, she pleaded guilty to the crime with which she was originally charged. The State did not amend the charge to a lesser offense, and it reserved the right to recommend the maximum at sentencing. With her statement admitted, all that Geyser avoided was a trial at which the State would have had to do little more than play her statement for the jury.

Taking Geyser's statement out of the evidentiary equation would have bettered her chances at trial. With her statement suppressed, she may have avoided liability altogether or convinced the jury to convict her of a lesser offense. She could have sought to minimize her involvement or to shift blame to her non-testifying codefendant. With suppression, Geyser, at trial, may have come out ahead of her guilty plea; she certainly would have done no worse. Thus, her choice to undergo a trial from which her statement was omitted would risk little and would "not [be] an irrational or even a reckless one." *DeBartolo*, 790 F.3d at 780.

Furthermore, a possibly better result at trial is not the only benefit that Geyser would have gotten from suppression. Research shows that "[w]hen there is a confession, prosecutors . . . are far less likely to initiate or

accept a plea bargain *to a reduced charge*." Drizin, *False Confessions*, 82 N.C.L. Rev. at 922 (emphasis added). Such prosecutorial inflexibility showed true in Geyser's case. If the "most probative and damaging evidence" against her was suppressed, Geyser likely could have negotiated a *more favorable* resolution with the State. *See Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (quoted authority omitted). There is thus every reason to think that the suppression ruling contributed to the outcome of this case.

Ultimately, though, on the record before this Court, discerning what Geyser might have done differently necessitates speculation. And, speculation does not amount to proof beyond a reasonable doubt. *See Cudd v. Crownhart,* 122 Wis.2d 656, 662, 364 N.W.2d 158 (Ct. App. 1985) ("mere speculation" insufficient to satisfy even civil burden). The State's speculative harmless error argument is thus not proof beyond a reasonable doubt.

CONCLUSION

For those reasons and the ones set forth more fully in her opening brief, Geyser asks this Court to grant her the relief she has requested.

Dated this 17th day of May, 2019.

PINIX & SOUKUP, LLC
Attorneys for Defendant-Appellant

____

By: Matthew S. Pinix, SBN 1064368

CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of

minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,990 words, as counted by the commercially available word processor Microsoft Word.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Section 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 17th day of May, 2019.

PINIX & SOUKUP, LLC
Attorneys for Defendant-Appellant

____
By: Matthew S. Pinix, SBN 1064368