STATE OF WISCONSIN

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

DISTRICT II

Case No. 2022AP161-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAMIAN L. HAUSCHULTZ,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING A MOTION TO SUPPRESS AND A JUDGMENT OF CONVICTION ENTERED IN MANITOWOC COUNTY CIRCUIT COURT, THE HONORABLE JERILYN M. DIETZ, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

Damian L. Hauschultz pleaded guilty to first-degree reckless homicide for causing the violent death of his seven-year-old foster brother, Ethan. Ethan's death, at the hands of Hauschultz, lasted hours, and it involved a combination of 100 strikes, hits, and kicks before Hauschultz took a shovel and buried Ethan—who was then still alive and not wearing boots or a coat—in 80 pounds of snow. As Hauschultz callously told police, he buried Ethan in "his own little coffin of snow." Further, Ethan's twin brother and Ethan's sister witnessed their brother's killing.

The sentencing court accurately summarized Hauschultz's crime: "Ethan was tortured to death."

Before pleading, Hauschultz moved to suppress statements that he made during police interviews. The court held three hearings, and it was provided both audio and video recordings of the interviews. The court ultimately denied Hauschultz's motion. Hauschultz appeals.

1. Was Hauschultz in custody during the interviews, therefore requiring police to provide Hauschultz with the *Miranda* warnings? The circuit court held, No. This Court should affirm.

2. Were Hauschultz's statements voluntarily made? The circuit court held, Yes. This Court should affirm.

3. If this Court concludes that the trial court erred in denying suppression, what is the remedy? The circuit court did not decide this issue. Should this Court determine that suppression was warranted, the only remedy would be to grant Hauschultz's motion to suppress.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

STATEMENT OF THE CASE

A. The Complaint and Factual Basis for the Plea

The State charged fourteen-year-old Hauschultz with seven counts: first-degree reckless homicide, three counts of physical abuse of a child (intentionally causing bodily harm), and three counts of substantial battery. (R. 1:1–2.) According to the complaint, on April 20, 2018, Hauschultz's stepfather (and seven-year-old Ethan's foster parent), Timothy, was punishing Ethan by requiring Ethan "to carry a heavy wooden log, weighing approximately two-thirds [of Ethan's] body weight, for two hours around a pre-determined path in a wet and snowy area outside the residence, while being monitored by [Hauschultz]." (R. 1:2.) Timothy instructed Hauschultz, who was also being punished, to ensure that Ethan's punishment was completed.[1] (R. 1:2.)

Ethan struggled carrying his log. (R. 1:2.) Over the course of 60 to 90 minutes, Hauschultz, who weighed "approximately 100 pounds more than" Ethan, hit, kicked, and poked Ethan approximately 100 times. (R. 1:2.) Hauschultz sometimes used "a belt or a stick, and [he] rolled the heavy log across [Ethan's] chest with his foot, before

[1] Timothy devised this log-carrying punishment, which was inflicted on all the children. (R. 1:3.) Usually, Timothy would be outside "to monitor the children to make sure they do the punishment." (R. 1:3.) But other times, Timothy gave Hauschultz "the responsibility to monitor the children and make sure they complete the punishment." (R. 1:3.)

repeatedly shoving [Ethan] to the ground, standing on [Ethan's] body and head while [Ethan] was face-down in a puddle, and burying [Ethan] completely in approximately 80 pounds of packed snow." (R. 1:2.) Hauschultz buried Ethan "underneath the snow for approximately 20-30 minutes." (R. 1:2.) Ethan was not wearing a coat or boots. (R. 1:2.)

In addition to beating Ethan, Hauschultz "repeatedly struck, punched and kicked" Ethan's twin brother, Adam,[2] who was also ordered by Timothy to carry a heavy log as punishment. (R. 1:2.)

An autopsy revealed that Ethan's cause of death was "hypothermia due to environmental cold exposure and other significant conditions being blunt force injuries of the head, chest and abdomen." (R. 1:3.) Ethan's injuries included acute subdural hemorrhage, rib fracture, soft tissue hemorrhage, right perinephric hemorrhage, abrasions to the chest, abdomen and back, and abrasions and contusions of the upper and lower extremities. (R. 1:3.) Imaging of his fractured rib "showed a print consistent with a boot type footwear." (R. 1:3.)

Police learned that Ethan and his two siblings were placed with Timothy and his wife, Tina, in September of 2017, and that Timothy and Tina were their legal guardians. (R. 1:3.)

1. Ethan's Twin Brother Witnessed the Homicide

Police talked to Ethan's twin brother, Adam, on the evening of Ethan's death. (R. 1:3.) Adam "had a scratch near his eye, a mark or slight bruise on his forehead, and bruising to his legs and abdomen." (R. 1:3.) Adam told police that "they were a result of [Hauschultz] throwing him to the ground, kicking him in the 'behind' and slapping him with wood." (R.

[2] The State uses a pseudonym.

1:3.) Adam stated that Hauschultz had also "whacked" him with a piece of wood, causing Adam to limp. (R. 1:3.)

Adam told police that on April 20, 2018, Ethan "fell backward with the log on his chest." (R. 1:4.) While Ethan was attempting to remove the log from his chest, Hauschultz "put the log back on [Ethan's] chest and rolled it up and down before he allowed it to be put to the side. [Ethan] cried but did get up and resumed carrying the log." (R. 1:4.) Hauschultz then told Ethan "to lie down and then [he] immediately shoved [Ethan] to the ground and into the big water puddle. While [Ethan] was lying on the ground with his face in the puddle, [Hauschultz] was standing on [Ethan's] back." (R. 1:4.) Ethan began to cry, Hauschultz told him to "shut up," and then "began to cover [Ethan] with snow." (R. 1:4.)

Ethan tried to get out of the snow and move his arms, but Hauschultz "restricted that." (R. 1:4.) At about this time, Adam had completed his "punishment." (R. 1:4.) Before going inside, Adam saw Hauschultz use a shovel to cover Ethan in snow. (R. 1:4.) Ethan "remained [there] for approximately 30 minutes." (R. 1:4.)

2. Ethan's Sister Witnessed the Homicide

Ethan's sister, Ivy,[3] confirmed that on April 20, 2018, Hauschultz hit both Ethan and Adam with sticks on their backs and "behinds" because they were dropping their logs. (R. 1:4.) Hauschultz beat Ethan with a belt. (R. 1:5.) Ethan cried, but he continued to carry his log. (R. 1:5.) Ivy told police that Hauschultz hit Ethan and Adam so much and so hard that a metal piece of the belt broke off. (R. 1:5.) Once the belt broke, Hauschultz hit the boys with a stick; once the stick broke, Hauschultz hit the boys with a stick that had "prickles." (R. 1:5.) At one point, Ethan stopped to take a

[3] The State uses a pseudonym.

break and said he was cold. (R. 1:5.) Hauschultz slapped him in the face, causing a bloody nose. (R. 1:5.) Ethan then dropped to his knees, but Hauschultz continued to slap him. (R. 1:5.)

Ivy told police that Hauschultz took off Ethan's boots and then started burying him in the snow with a shovel. (R. 1:4.) Ethan complained, asking Hauschultz if he could get up, but Hauschultz told Ethan to get back on the ground. (R. 1:4.) When Ethan did not immediately comply, Hauschultz shoved Ethan to the ground with his face in water. (R. 1:4.) When Ethan tried to get up, Hauschultz stood on him, at one point standing on Ethan's head while he was face down in a puddle. (R. 1:4, 5.) When he was eventually removed from the snow, Ethan was unresponsive; Hauschultz told his sister, Carol,[4] to get a bucket of *hot* water because, "if he's faking it, this will hurt." (R. 1:5.)

3. Hauschultz's Sister Witnessed the Homicide

Carol recalled Hauschultz hitting Ethan with a belt until a metal piece of the belt broke. (R. 1:6.) She also saw Hauschultz shove Ethan's face in the puddle and put his foot on Ethan's head. (R. 1:5.) When Hauschultz buried Ethan in the snow, it was deep enough that Carol could not see any part of Ethan's body. (R. 1:5.) When Carol and Ivy asked Hauschultz to uncover Ethan, Hauschultz refused. (R. 1:6.) When Ethan tried to get out of the snow, Hauschultz shoved him back down. (R. 1:6.)

After Hauschultz unburied Ethan, Hauschultz thought Ethan was faking, and he told Carol to get some water. (R. 1:5.) Hauschultz then "dumped it on him." (R. 1:5.) Carol told

[4] The State uses a pseudonym.

police that when Ethan was taken out of the snow, his eyes "looked like he had a stroke or seizure." (R. 1:6.)

4. Hauschultz's Statements

Police interviewed Hauschultz for the first time at the hospital. (R. 1:8.) Hauschultz admitted shoveling snow on Ethan, and when asked how much snow, Hauschultz replied that Ethan "was in his own little coffin of snow." (R. 1:6.)

Police interviewed Hauschultz a second time later that day at the police department. (R. 1:7.) Hauschultz estimated Ethan's log weighed 35-40 pounds,[5] while Hauschultz's weighed about 10-12 pounds. (R. 1:7.) As the complaint noted, Hauschultz was approximately 5'11" and weighed 168 pounds, while Ethan was approximately 4'8" and weighed 60 pounds. (R. 1:7, 9.) Hauschultz admitted that every time Ethan or Adam dropped their log, Hauschultz would get behind them and poke them with a stick. (R. 1:7.) He poked their backs, stomachs, and buttocks; Hauschultz estimated that he struck Ethan nearly 100 times. (R. 1:7.) Hauschultz also admitted giving Ethan "face-washes" in mud puddles before Ethan became unresponsive. (R. 1:7.)

After about 90 minutes, Hauschultz saw Ethan lying over his log with his legs straight out. (R. 1:7.) Hauschultz "punched, pinched and slapped" Ethan, but Ethan did not respond. (R. 1:7.) Hauschultz then covered Ethan with snow because if Ethan wanted to "play dead," he should be in a "snow coffin." (R. 1:8.)

Hauschultz estimated that 80 pounds of wet, heavy snow covered Ethan, and he left Ethan in the snow for approximately 20-30 minutes. (R. 1:8.) At one time, Ethan's arm popped up, but Hauschultz put it down to bury him

[5] The log Ethan carried the day he died was a full section of a tree trunk, weighing 44.4 pounds. (R. 1:9.)

again. (R. 1:8.) After a certain amount of time, Ethan stopped moving. (R. 1:8.) When Hauschultz unburied Ethan, he was unresponsive. (R. 1:8.) Hauschultz called Timothy. (R. 1:8.)

Later, in a third interview at the police department, Hauschultz told police about how things at home had changed when Ethan, Adam, and Ivy came to live with them. (R. 1:8.) His home had become a "boring, prison-like setting," and having the younger children in the house had taken all the "fun" out of his life. (R. 1:8.)

B. Court Denies Request for Reverse Waiver

After charges were filed against him, Hauschultz requested a reverse waiver into juvenile court. (R. 16.) After a hearing from several witnesses, the court denied his request. (R. 58.) The court opined, the "level of cruelty and total disregard for human life makes this offense exceedingly serious." (R. 58:11.) The court continued, "The outcome here was tragic, heartbreaking, and completely foreseeable given the abuse [Hauschultz] heaped upon [Ethan]." (R. 58:11.) Finally, the court determined, "This case is extraordinarily brutal, and to cede jurisdiction to the juvenile justice system would certainly depreciate the severity of the offense." (R. 58:11.)

C. The Motion to Suppress and *Miranda-Goodchild* Hearings

Hauschultz moved to suppress his statements made to police during his first three (of four[6]) interviews. (R. 61:1; 107.) The first interview was conducted at the hospital, and the latter two were conducted at the police station. Hauschultz argued in his motion that under the circumstances, he was in custody during all three interviews,

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[6] Statements made during the fourth interview are not challenged on appeal, and so the State does not discuss it.

and so the police were required to provide him his *Miranda* warnings. (R. 107:2.) He also argued that his statements to police were not "voluntarily and intelligently made under the circumstances." (R. 107:2.)

The court held three hearings. (R. 94; 95; 100.)

- *Lieutenant Remiker's Testimony*

Lieutenant Dave Remiker testified that he first interviewed Hauschultz at the hospital's "intake" room across the hall from the hospital's "family room." (R. 94:11–12, 14.) Timothy and Tina had agreed that Remiker could talk to Hauschultz. (R. 94:12, 24–25.) Remiker was "just trying to gather some initial information." (R. 94:11.) At the time, Remiker did not know how Ethan had sustained his injuries. (R. 94:13.)

Remiker audio-recorded the interview on his cell phone, which lasted eight minutes. (R. 94:12–14.) Remiker testified that Hauschultz was "very cooperative and he made no request to have anybody with him." (R. 94:12.) Hauschultz was not handcuffed or restrained. (R. 94:13.)

When asked on cross-examination why he would want to speak with Hauschultz and not Tina, Remiker replied, "[Hauschultz] was present at the house, [and] we'd established that Tina and Timothy were not home, so I felt that [Hauschultz] probably had more information than anyone else." (R. 94:19.)

- *Detective Bessler's Testimony*

Detective Christine Bessler testified that when she arrived at the hospital, Timothy gave her his consent to speak with Hauschultz. (R. 94:49–50.) Hauschultz also consented. (R. 94:50.) Bessler inquired if she could conduct the interview at the police department because it was "very chaotic" in the emergency room; Hauschultz agreed and Timothy did not object. (R. 94:51–52.)

Bessler transported Hauschultz in her unmarked squad car; Hauschultz was not handcuffed. (R. 94:52–53.) At this time, Bessler did not consider Hauschultz a suspect. (R. 94:53.) When they arrived at the station, Bessler took Hauschultz to a "soft interview room." (R. 94:53.) The door to the room was open when the interview started, but Bessler closed it when the area started getting noisy.[7] (R. 94:54.)

Bessler did not read Hauschultz the *Miranda* warnings because "[i]t was a fact finding, there was nothing custodial about it, he was not a suspect." (R. 94:54–55.) Bessler provided Hauschultz with coffee and told him that he could ask questions and he could stop talking whenever he want to. (R. 94:55.) During the interview Hauschultz never asked for his parents or for an attorney. (R. 94:55–56.)

Bessler testified that she had no concerns about Hauschultz's intelligence. (R. 94:57.) Similarly, Hauschultz told Bessler that he found taking tests "easy," that he was taking a foreign language class, and that he was "going to be taking a class up" at the high school even though he was in middle school.[8] (R. 94:57.)

Timothy eventually arrived at the police department and asked to see Hauschultz. Bessler allowed them to speak privately. (R. 94:59.) At Timothy's request, Bessler stopped recording. (R. 94:59.) After Timothy and Hauschultz spoke,

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[7] The video recording shows that before the interview started, Bessler asked Hauschultz if he wanted the door open or shut. He replied, "I don't care." (Video 1 at 11 seconds.) Bessler said she would leave the door open until it got noisy. (*Id.*) Bessler closed the door six minutes into the interview, when people were making noise in the hallway. (Video 1 at 6:00.)

[8] The video shows that Hauschultz told Bessler that he was going to be in accelerated math and accelerated English. (Video 1 at 13:45.)

they left the police department with the other children. (R. 94:60.)

After Hauschultz left the department, Bessler learned around 9:20 p.m. that Ethan had died. (R. 94:61.) She had no idea *how* he had died, because "[i]nitially at the hospital there was talk of he had fallen out of a tree, so absolutely no idea what the cause of death was." (R. 94:92.) After Ethan died, the department of human services became involved; they brought the children, including Hauschultz, back to the police department to be interviewed. (R. 94:61.)

Bessler testified that Hauschultz was interviewed around "10:00 [pm] or a little after,"[9] and this time a social worker from the department of human services, Laura Zimbler, assisted Bessler in the interview. (R. 94:63, 78.) Hauschultz was not handcuffed or arrested, and he never asked for his parents or an attorney. (R. 94:63.) When asked about the tone of the conversation, Bessler testified, "it was kind of fact finding as I would talk to a witness, calm." (R. 94:64.) Bessler continued, "It did get a little excited at, kind of, midway through. But I think overwhelmingly it was a very calm factual type conversation." (R. 94:64.) No threats or promises were made. (R. 94:65.) She was not "accusatory" with him. (R. 94:79.) She testified that she didn't even think that she was challenging Hauschultz, she was just trying to figure out what happened. (R. 94:80.)

During both interviews, Bessler had no concerns about Hauschultz's intelligence level. (R. 94:85–86.) Hauschultz was "a smart kid." (R. 94:86.)

- *Laura Zimbler's testimony*

Social worker Laura Zimbler testified that on the evening of April 20, 2018, she and a detective went to

[9] The video shows that Hauschultz was interviewed at 2:43 a.m., after Bessler had interviewed the other children.

Timothy's residence, in a squad car. (R. 95:16.) They talked to Timothy and Tina for about 45 minutes; when it ended, Zimbler believed that it was necessary to interview the children. (R. 95:18.) Zimbler testified that "we usually don't interview children [in a home] when there's an unknown maltreater" there, so she wanted to conduct the interviews at the police department. (R. 95:19.) Timothy drove the kids to the department in his vehicle because he and Zimbler agreed that "it was less restrictive than the children going in the back of a squad car." (R. 95:20, 21.)

Zimbler then interviewed Hauschultz with Bessler. (R. 95:25.) Similar to Bessler's testimony, Zimbler testified that Hauschultz never asked for his parents or an attorney, and Zimbler never threatened Hauschultz. (R. 95:25.) Rather, Hauschultz answered all Zimbler's questions and made no attempt to stop or leave the interview. (R. 95:26.)

* * * *

At the end of the final hearing, the court admitted as exhibits the first interview's audio recording and the other two interviews' video recordings. (R. 100:40.)

D. The Court Denies Suppression

In its oral ruling, the circuit recognized that the issues before it were whether Hauschultz was in custody and whether his statements were voluntary. (R. 171:5.) Before making these determinations, the court made findings regarding Hauschultz's personal characteristics. These included the following: "Hauschultz is intelligent, his intelligence is apparent when he speaks in these interviews, and he told Detective Bessler about his academic successes." (R. 171:9.) "[T]here is no indication that Mr. Hauschultz suffers from any physical or emotional impairments, and no indication that he has any prior experience with the juvenile justice system, or the criminal justice system." (R. 171:9.)

There was also "no evidence that he is especially susceptible to coercion." (R. 171:9.) Hauschultz "displayed no confusion, no difficulty understanding what was going on, no difficulty with the language used during any of the interviews, he spoke freely and fluently with everyone who interviewed him." (R. 171:10.)

The court then made the following findings and conclusions regarding the interviews:

1. In the first interview, Hauschultz was not in custody, and his statements were voluntary.

The first interview occurred in the hospital's "family room" on the afternoon of April 20, 2018, by Lieutenant Remiker. (R. 171:10.) The interview lasted approximately eight minutes. (R. 171:10, 11.) During that interview, there was no "evidence that [Hauschultz's] movements were restricted, and that he wouldn't have felt free to leave under those circumstances." (R. 171:11.) Hauschultz "was not handcuffed, he was not told he had to stay put, he was not restrained in any way." (R. 171:11–12.) Also, Hauschultz's "mother was across the hall readily available to him, she knew where he was, she knew who he was speaking to." (R. 171:12.) The court found Remiker to be "credible and consistent." (R. 171:12.) There was no motivation to "coerce a statement" because police did not yet know what had happened to Ethan or who was responsible. (R. 171:12.) Therefore, "[g]iven the totality of the circumstances here including the brevity of the interview, the location of the interview, and the proximity to parents, it's clear this is not a custodial statement, and *Miranda* warnings were not necessary." (R. 171:12.)

Then, applying Hauschultz's personal characteristics to the circumstances regarding the first interview, the court found that Hauschultz's statements were voluntary. (R.

171:12.) The court noted that the interview "was brief, it was during the day, in a public building with many people coming and going just outside of the door." (R. 171:12.) There was also "no indication that [Hauschultz] was deprived of any physical comforts, and he agreed to walk into the room and speak with Lieutenant Remiker, and [he] had ready access to either or both of his parents if he wished." (R. 171:12–13.) The tone of the interview was "calm, conversational, and pleasant." (R. 171:13.) There existed "no indication of any coercion of any sort during this brief conversation, to the contrary, the evidence shows that this was a comfortable, calm, quick discussion." (R. 171:13.) Regarding Hauschultz's age, the court noted that "case law does not establish a bright line rule that no 14 year old is competent to give a voluntary statement," and that "every other factor points to the voluntariness" of his statement. (R. 171:13.)

2. In the second interview, Hauschultz was not in custody, and his statements were voluntary.

The court next turned to the second interview, conducted by Bessler, which occurred in the early evening of April 20, 2018, at the department. (R. 171:13.) Bessler had initially approached Timothy at the hospital and asked him if she could speak with Hauschultz; Timothy gave her permission. (R. 171:14.) Bessler then asked both Timothy and Hauschultz if she could converse with Hauschultz at the sheriff's department, and they agreed. (R. 171:14.)

The court found that Bessler drove Hauschultz to the department in her unmarked squad car with a normal back seat, and Hauschultz "was not handcuffed, and the travel time was less than four minutes." (R. 171:14.) At the time, Bessler did not consider Hauschultz a suspect, and she was not contemplating arresting Hauschultz. (R. 171:14–15.)

Bessler interviewed Hauschultz in the station's "soft room," which was "furnished with couches and comfortable furniture." (R. 171:15.) "[T]he room was open and the door was open so long as they were the only people in the area." When other people arrived and made noise, Bessler shut the door. (R. 171:15.) Bessler did not read Hauschultz his *Miranda* warnings because "it was a fact finding, there was nothing custodial about it, he was not a suspect." (R. 171:15.) Bessler provided Hauschultz coffee and told him that if he didn't want to talk any longer, to let Bessler know. (R. 171:15.)

Hauschultz did not ask for any breaks. (R. 171:15.) He did not ask for his parents. (R. 171:15.) He did not ask for a lawyer. (R. 171:15.) He was never handcuffed and he was never denied a request to leave. (R. 171:15.) As Hauschultz's and Bessler's discussion progressed, Timothy arrived and asked to see Hauschultz. (R. 171:15–16.) Bessler escorted Timothy to Hauschultz, and then they left the station. (R. 171:16.) It was only after Hauschultz left with Timothy that Bessler found out that Ethan had died. (R. 171:16.)

The court found, "this interview was initiated with the explicit consent of [Timothy] and [Hauschultz] himself, it was recorded, and there were no indicators of custody." (R. 171:16.) Not only was Hauschultz free to leave, but he *did* leave. (R. 171:16.) Bessler placed no restraints on Hauschultz and told him he was free to end the interview. (R. 171:16.) Therefore, the court determined, "the totality of the circumstances show this was not a custodial interrogation." (R. 171:16.)

The court next determined that the totality of the circumstances "demonstrate that this was a voluntary discussion." (R. 171:16.) Bessler "conducted a straight forward free of coercion, free even of deception" interview. (R. 171:16.) The court found Bessler's testimony "credible." (R. 171:16.) It also found that Hauschultz "did not appear at all uncomfortable during the interview," and while Hauschultz

"is young," all other factors show "this being a voluntary discussion." (R. 171:17.)

3. In the third interview, Hauschultz was not in custody, and his statements were voluntary.

Finally, the court turned to the third interview, which occurred after 10:00 p.m. on April 20, 2018, after Timothy and Tina drove Hauschultz to the sheriff's department. (R. 171:17, 20.) The court noted that it occurred after police became aware that Ethan had died. (R. 171:17.)

The court found that Timothy and Tina chose not to accompany the children inside the police department, even though they had the option to do so. (R. 171:21.) According to the court, this "further bolsters the view that Timothy, Tina, and [Hauschultz] all believed this was a noncustodial fact finding interview." (R. 171:21.) Additionally, "[n]obody had any reason to believe that this interview wouldn't end the exact same way the earlier interview at the [department] ended, with [Hauschultz] walking out the door, and he did." (R. 171:21.) The court recognized that "[a]lthough it was late at night [Hauschultz's] parents knew where he was, they knew that he was speaking to law enforcement and a social worker, they knew what he was speaking to them about, they knew that he had previously spoken with the same detective." (R. 171:21.)

Although Bessler admitted that the conversation got a little "excited" midway through, the court noted that Bessler also testified that the interview was "overwhelmingly calm." (R. 171:21.) Hauschultz "was not threatened, restrained, handcuffed, or deprived of any of his creature comforts," and he "agreed to talk to Ms. Zimbler and Detective Bessler." (R. 171:21–22.) The court found "no coercive tactics employed to illicit [sic] a statement." (R. 171:22.) The court also recognized that while Hauschultz was at the department "until the early

morning hours," that "he was not interrogated that entire time." (R. 171:22.) Rather, Hauschultz was in a room with the other children until arrangements were made for them to have somewhere safe to go; it was not "a tactic to deprive Mr. Hauschultz of sleep to convince him to confess." (R. 171:22.) The court found that no threats or promises were made. (R. 94:65.) Bessler was not "accusatory" with Hauschultz. (R. 94:79.)

The court found that Zimbler testified that Hauschultz never asked for his parents or an attorney, and that Zimbler never threatened Hauschultz. (R. 95:25.) Rather, Hauschultz answered all of Zimbler's questions and made no attempt to stop or leave the interview. (R. 95:26.)

The court concluded that "[t]he totality of the circumstances in light of the entire day all lead to the conclusion that this was not a custodial interrogation, *Miranda* warnings were not required." (R. 171:22.)

The court next concluded that for "the same reasons this interview was also voluntary." (R. 171:22.) "[Hauschultz] was not deprived of any of his creature comfort measures, his prior experience earlier that day showed him that the interview could be terminated at any time, and this all indicates that [Hauschultz], despite his youth, was able to and did, in fact, freely consent to the voluntary interview." (R. 171:22–23.)

E. Plea and Sentencing

Hauschultz pleaded guilty to first-degree reckless homicide. (R. 132:1.) The State agreed to recommend a sentence in the range of 12 to 17 years of initial confinement. (R. 132:2; 169:19.)

At the sentencing hearing, the court recognized that Ethan was "tortured to death." (R. 169:38.) It noted that despite the fact that Ethan "was so exhausted he could not

carry out the punishment," Hauschultz "continued to hit, to kick, to physically torment this little boy." (R. 169:38.) And, while Timothy was the authority figure, "[n]o one has said that Timothy ordered [Hauschultz] to kick, or hit, or poke with a stick, or bury in snow, or put in a mud puddle." (R. 169:39.) The court opined that "to escalate and maintain the level of anger and callousness towards a very young child needed to create this situation, to do what was done in this case continuously over such a long period of time is staggering." (R. 169:43.) The court sentenced Hauschultz to 20 years of initial confinement followed by 10 years of extended supervision. (R. 169:47.)

Hauschultz now appeals his judgment of conviction and the court's order denying his suppression motion. (R. 184:1.)

STANDARD OF REVIEW

"Whether evidence should be suppressed is a question of constitutional fact." *State v. Johnson*, 2007 WI 32, ¶ 13, 299 Wis. 2d 675, 729 N.W.2d 182 (citation omitted). This Court reviews a circuit court's findings of historical fact under a clearly erroneous standard and applies constitutional principles to those historical facts independently. *State v. Rejholec,* 2021 WI App 45, ¶ 16, 398 Wis. 2d 729, 963 N.W.2d 121. The question of the voluntariness of Hauschultz's statements involves the application of constitutional principles to historical facts. *Id.*

In this case, there are two video-recorded interrogations. This Court has applied the *de novo* standard when it reviews recorded video statements, including statements made under Wis. Stat. § 908.08. *State v. Marks*, 2022 WI App 20, ¶ 19, 402 Wis. 2d 285, 975 N.W.2d 238. As it has explained, "where the evidence to be admitted is a videotape, 'we are in as good a position as' the circuit court to determine whether the [child's] recorded statement conforms to [section 908.08](3)(c) and (d)." *Id.* ¶ 19 (quoting *State v.*

Jimmie R.R., 2000 WI App 5, ¶ 39, 232 Wis. 2d 138, 606 N.W.2d 196).

ARGUMENT

I. Hauschultz was never in custody during the interviews, so the police were not required to provide *Miranda* warnings.

Hauschultz argues that his statements should be suppressed because he was in custody during all three interviews, but the police never gave him *Miranda* warnings. (Hauschultz's Br. 27, 30.) As will be argued below, this Court should affirm the circuit court's decision because under the totality of the circumstances, Hauschultz was never in custody, so *Miranda* warnings were not required.

A. If a defendant was not in custody when he spoke to law enforcement, he cannot have his statements suppressed.

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. Police may not interrogate a person held in custody without advising that person of his or her *Miranda* rights. *Id.* (citing *State v. Torkelson*, 2007 WI App 272, ¶ 11, 306 Wis. 2d 673, 743 N.W.2d 511). "Statements obtained via custodial interrogation without the *Miranda* warnings are inadmissible against the defendant at trial." *Id.*

"Custody is a necessary prerequisite to *Miranda* protections." *State v. Lonkoski*, 2013 WI 30, ¶ 23, 346 Wis. 2d 523, 828 N.W.2d 552. If a defendant was not in custody when he spoke to police, he cannot have his statements suppressed under *Miranda*, even if the police interview constituted an interrogation. *Id.* ¶ 24. In Wisconsin, at a *Miranda-Goodchild* hearing "the State must establish 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).

"Custody," as used in the *Miranda* context, is a term of art specifying circumstances that generally "present a serious danger of coercion." *Howes v. Fields*, 565 U.S. 499, 508–09 (2012). "A court must examine all of the circumstances surrounding the interrogation, but the ultimate inquiry is simply whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Lonkoski*, 346 Wis. 2d 523, ¶ 6 (citation omitted).

The first step is to determine "whether, in light of 'the objective circumstances of the interrogation,' a 'reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.'" *Fields*, 565 U.S. at 509 (citations omitted). This assessment of the suspect's objective "freedom of movement" requires a totality-of-the-circumstances analysis weighing "the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning." *Id.* (citations omitted); *see also State v. Bartelt*, 2018 WI 16, ¶ 32, 379 Wis. 2d 588, 906 N.W.2d 684 (listing factors as "degree of restraint; the purpose, place, and length of the interrogation; and what has been communicated by police officers").

Facts that bear on degree of restraint include "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." *Bartelt,* 379 Wis. 2d 588, ¶ 32 (citation omitted).

Other facts are relevant when assessing freedom to leave. An officer's advisement that a person is free to leave

and not in custody strongly suggests a lack of custody. *Id.* ¶ 40. Although not dispositive of a custody inquiry, this type of advisement is "highly probative" and "of substantial importance." *Id.* ¶ 38 (citations omitted). When a person confirms his understanding that he is free to leave, this fact bolsters the conclusion that he is not in custody. *Id.* ¶ 41. So, too, do the facts that the person never asked for the interview to end, *id.*, and that the door to the interview room was unlocked. *Lonkoski*, 346 Wis. 2d 523, ¶ 30. A child's age is also a factor to consider when determining custody. *J.D.B. v. North Carolina*, 564 U.S. 261, 275–77 (2011).

B. The circuit court properly determined that under the totality of the circumstances, Hauschultz was not in custody.

Hauschultz argues that "a reasonable 14-year-old would have felt compelled to sit through, and try to answer, law enforcement's questions." (Hauschultz's Br. 28.) He also argues that he was subjected to "the coercive pressures *Miranda* warning were designed to address." (Hauschultz's Br. 33.) The State disagrees. It will respond to Hauschultz's arguments regarding each interview separately.

1. The first interview

While Hauschultz argues that the hospital interview was "in a high-stress environment" (Hauschultz's Br. 34), it did not take place in the emergency room, but in the hospital's "intake" room across the hall from the hospital's "family room." (R. 94:11–12, 14.) The interview lasted eight minutes. (R. 171:10, 11.) Hauschultz "was not handcuffed, he was not told he had to stay put, he was not restrained in any way." (R. 171:11–12.) *See Fields*, 565 U.S. at 509 (factors bearing on degree of restraint include whether a suspect is handcuffed, manner in which suspect is restrained, whether questioning took place in police vehicle, and number of officers involved).

While Hauschultz argues that he was interviewed "away from his parents" (Hauschultz's Br. 34), the court correctly found that Hauschultz's "mother was across the hall readily available to him, she knew where he was, she knew who he was speaking to." (R. 171:12.) Also, Hauschultz never told Remiker that he wanted a parent present. (R. 94:14.)

Hauschultz further argues that "his movement was restricted" (Hauschultz's Br. 34), but Remiker testified that he never locked the door (R. 94:23), and the circuit court found no "evidence that [Hauschultz's] movements were restricted, and that he wouldn't have felt free to leave under those circumstances." (R. 171:11.) *See Fields*, 565 U.S. at 509 (manner in which suspect is restrained is factor bearing on degree of restraint); *Lonkoski*, 346 Wis. 2d 523, ¶ 30 (facts that defendant never asked for interview to end and that door to interview room was unlocked bolster conclusion that interview was not custodial).

Hauschultz also points to his age at the time of the interview, 14 years old. (Hauschultz's Br. 34.) Since Hauschultz was a minor, his age is certainly a factor in a *Miranda* analysis. *J.D.B.,* 564 U.S. at 275–77.

Hauschultz also argues that his statements "were elicited by questions peppered with common, and coercive, interrogation ploys, including the false reassurance Remiker offered that a confession would not get anyone in trouble." (Hauschultz's Br. 35.) Remiker did not tell Hauschultz that "a confession would not get anyone in trouble." (Hauschultz's Br. 35.) Remiker told Hauschultz, "we're not getting anybody in trouble. Obviously, this was an accident, but I need to know specifically details about stuff that was – like, if he was, you know, if somebody swatted him." (Video 1 at 1:05–1:17.) This lone statement would not make a reasonable person feel that he was not at liberty to terminate the interview and leave. *See Fields*, 565 U.S. at 509. Further, the court found that Hauschultz would not have felt as though he was unable to

leave. (R. 171:11.) And Remiker—who the court found credible—testified that Hauschultz was "very cooperative." (R. 94:12.)

Beyond this, Hauschultz fails to point this Court to the numerous "ploys" that Remiker specifically used in the eight-minute interview--that's because, as the audio of the interview shows, none exist.

Hauschultz also points to the "ongoing, acute trauma [he] faced" (Hauschultz's Br. 35), but there was no evidence introduced at the hearings that Hauschultz suffered from ongoing, acute trauma during this interview.

The circuit court correctly concluded that "[g]iven the totality of the circumstances here including the brevity of the interview, the location of the interview and the proximity to parents, it's clear this is not a custodial statement, and *Miranda* warnings were not necessary." (R. 171:12.) This Court should affirm.

2. The second interview

Hauschultz argues that the second interview was "a paradigmatically custodial police interview." (Hauschultz's Br. 35.) A review of the video interview reveals otherwise, supporting the circuit court's conclusion that Hauschultz was not in custody.

Hauschultz again argues, and the State again concedes, that Hauschultz's age is a factor for this Court to consider.

Hauschultz notes that for this interview, he was transported from the hospital to the department. (Hauschultz's Br. 36.) He fails to observe, however, that Timothy gave permission for this, and that Hauschultz *himself* consented to the interview.[10] (R. 171:14.) Further,

[10] The video recording of the interview supports this finding. (Video 1 at 53 seconds.)

Detective Bessler—whom the court found credible (R. 171:16)—drove Hauschultz in her unmarked squad car with a normal back seat, where Hauschultz "was not handcuffed," and the drive was less than four minutes. (R. 171:14.)

While Hauschultz notes that he was alone in the interview at the department (Hauschultz's Br. 36), again, both Timothy and Hauschultz consented to this interview. Further, during the interview Hauschultz never asked for his parents or for an attorney. (R. 94:55–56.)

Hauschultz next argues that the duration of the second interview "underscores his custodial status" (Hauschultz's Br. 37), but the State disagrees. First, a two-and-a-half-hour interview in a police department's interview room does not automatically translate to custody, especially this one. The interview occurred in the department's "soft room," where the door was open until people arrived and it started getting noisy in the hallway. (R. 171:15.) Bessler provided Hauschultz coffee and told him to let her know if he didn't want to talk any longer. (R. 171:15.) Hauschultz did not ask for any breaks. (R. 171:15.) He did not ask for his parents. (R. 171:15.) He did not ask for a lawyer. (R. 171:15.) He was never handcuffed and he was never denied a request to leave. (R. 171:15.)

Second, contrary to Hauschultz's argument (Hauschultz's Br. 37), *State v. Dionicia*, 2010 WI App 134, 329 Wis. 2d 524, 791 N.W.2d 236, does not support a conclusion that Hauschultz was in custody. In *Dionicia*, an officer received a request to locate 15-year-old Dionicia and return her to school. *Id.* ¶ 2. The officer found Dionicia about a half block from school, asked her to get into the back seat of his squad car, and Dionicia complied. *Id.*

The officer had previously heard from another officer that Dionicia was a possible suspect in a battery case. *Id.* ¶ 3. During the drive, the officer asked Dionicia whether she had been involved in the battery. *Id.* Dionicia said that she had.

Id. The officer then asked Dionicia whether she would be willing to give a statement about her involvement in the battery, and Dionicia agreed to do so. *Id*.

This Court agreed with the circuit court that Dionica was in custody while in the back seat of the locked squad car:

> He told her he intended to take her back to school, and he directed her to the locked back seat of his patrol car. Once she was in the locked car, he questioned her about her involvement in a crime. A reasonable person, particularly a fifteen-year-old, would not feel free to leave the back of a patrol car under these circumstances. From the time Dionicia entered [the officer's] patrol car, she was in custody.

Id. ¶ 10. Hauschultz argues that he "likewise [was] in custody" (Hauschultz's Br. 38) during his interview at the police department. But the circumstances of Dionica's ride in the backseat of a locked squad car are unlike the circumstances of Hauschultz's consenting interview in the department's soft room where he told police he did not even care if the door was open or shut during the interview. Further, unlike the officer in *Dionica,* Bessler told Hauschultz to let her know if he didn't want to talk any longer. (R. 171:15.)

But Hauschultz believes that the cases are similar because he and Dionicia were both children who were transported in a squad car. His premise is wrong, because the questioning did not, as he implies, take place in a squad car. Dionicia *was* questioned in the car, which in her case constituted a custodial environment. Hauschultz was not questioned in the squad car, but in the soft room, so there is no comparison. *Dionica* is inapposite and provides no support to Hauschultz.

Here, the circuit court correctly found that the second interview "was initiated with the explicit consent of [Timothy] and [Hauschultz] himself, it was recorded, and there were no indicators of custody." (R. 171:16.) And, not only was Hauschultz free to leave, he *did* leave. (R. 171:16.) This Court

should affirm the circuit court's conclusion: "the totality of the circumstances show [sic] this was not a custodial interrogation." (R. 171:16.)

3. The third interview

Hauschultz argues that during the third interview, which lasted an hour, Hauschultz "was isolated, guilted, and pushed to confess." (Hauschultz's Br. 39.) The State disagrees, the video supports this. A reasonable person would have felt he was at liberty to terminate the interrogation and leave. *Fields*, 565 U.S. at 509.

The State again starts by recognizing that Hauschultz was 14 years old during this interview, which is a factor this Court considers.

Next, Hauschultz points out that he "did not have a trusted adult with him" (Hauschultz's Br. 38), but he fails to acknowledge that Timothy and Tina drove him to the police department and then chose not to accompany him into the interview. (R. 171:21.) As the circuit court found, this "further bolsters the view that Timothy, Tina and [Hauschultz] all believed this was a noncustodial fact finding interview." (R. 171:21.)

Hauschultz next argues that there are three characteristics of this interview that are "particularly significant": the timing of the interview, Ethan's death, and his contention that Bessler's and Zimbler's "tactics were more coercive." (Hauschultz's Br. 39–40.)

1. The timing of the interview

Hauschultz notes that the interview occurred after 2:45 a.m., so "as a practical matter, [he] was not free to leave, and everyone knew it." (Hauschultz's Br. 39.) The circuit court disagreed. The court recognized that "[a]lthough it was late at night [Hauschultz's] parents knew where he was, they knew that he was speaking to law enforcement and a social worker,

they knew what he was speaking to them about, they knew that he had previously spoken with the same detective." (R. 171:21.) The court further found that "[n]obody had any reason to believe that this interview wouldn't end the exact same way the earlier interview at the [department] ended, with [Hauschultz] walking out the door, *and he did*." (R. 171:21 (emphasis added).) The circuit court further recognized that while Hauschultz was at the department "until the early morning hours," "he was not interrogated that entire time." (R. 171:22.) Rather, Hauschultz was in a room with the other children until arrangements were made for them to have somewhere safe to go; it was not "a tactic to deprive Mr. Hauschultz of sleep to convince him to confess." (R. 171:22.)

Timing is not a significant factor that weighs in favor of a custody finding.

2. Ethan had died

Hauschultz next argues that because Ethan had died between the second and third interviews, a "reasonable 14-year-old" would not understand the consequences he faced, a reasonable 14-year-old "would also be grieving," and an ordinary person "would be in an acute state of anxiety and distress." (Hauschultz's Br. 39–40.) First, there was no evidence at the hearings or on the videotape that Hauschultz did not understand the consequences of his actions, that he was grieving Ethan's death, or that he was suffering from anxiety or distress. Second, whether a reasonable person would be grieving or distressed is not the test for *custody*. Nor is ignorance of legal consequences the test. The test for this Court to employ is whether a reasonable person would "have felt he or she was not at liberty to terminate the interrogation and leave.'" *Fields*, 565 U.S. at 509 (citations omitted). Moreover, as the court found, during this interview Hauschultz "was not threatened, restrained, handcuffed, or

deprived of any of his creature comforts," *and* he "agreed to talk to Ms. Zimbler and Detective Bessler." (R. 171:21–22.)

Ethan's death is a not a significant factor that weighs in favor of a custody finding.

3. The interviewers' tactics

Finally, Hauschultz argues that Zimbler's and Bessler's "tactics were more coercive this time around." (Hauschultz's Br. 40–41.) The State disagrees; there was no coercion at all.

First, while Hauschultz argues on appeal that he was "reluctant to participate" in the interview because Timothy did not want him to (Hauschultz's Br. 40), a review of the videotape interview shows otherwise: Hauschultz agreed—without any coercion—to talk to Bessler and Zimbler. The circuit court also specifically so found. (R. 171:21.)

Second, Hauschultz argues that Bessler and Zimbler engaged in the "Reid interrogation technique," citing *Rejholec*, 398 Wis. 2d 729, ¶ 20 n.9. (Hauschultz's Br. 40.) But in *Rejholec,* decided less than two years ago, this Court expressly refused to hold that the "Reid interrogation technique" itself "creates a coercive environment, and given the state of our law, we cannot so find." *Id*. ¶ 25. Thus, any argument that the Reid interrogation technique cannot be used by law enforcement in Wisconsin has been decided. *Id*.

While Bessler recognized that midway through the interview, "[i]t did get a little excited," she also testified that the majority of the interview "was a very calm factual type conversation." (R. 94:64.) A review of the videotape confirms this. Further, Bessler made no threats or promises, and she was not "accusatory" towards Hauschultz. (R. 94:65, 79.) She was just trying to figure out what happened to Ethan. (R. 94:80.) The circuit court correctly found "no coercive tactics [were] employed to illicit [sic] a statement." (R. 171:22.)

The interviewers' tactics were not a significant factor weighing in favor of a custody finding, and the conditions of Hauschultz's third interview were far from "extreme." (Hauschultz's Br. 42.) This Court should affirm the circuit court's conclusion that "[t]he totality of the circumstances in light of the entire day all lead to the conclusion that this [third interview] was not a custodial interrogation, [and so] *Miranda* warnings were not required." (R. 171:22.)

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In sum, the circuit court properly determined that under the totality of the circumstances, Hauschultz was not in custody during any interview.

II. Hauschultz's Statements Were Voluntarily Made.

The circuit court also rejected Hauschultz's claim that his statements should be suppressed because they were involuntarily made. (R. 171:13, 16, 22.) This Court should affirm.

A. A statement is involuntary only if it is obtained through coercive police activity or improper conduct.

Involuntary confessions admitted into evidence violate the due process rights guaranteed by the federal and state constitutions. *State v. Hoppe*, 2003 WI 43, ¶ 36, 261 Wis. 2d 294, 661 N.W.2d 407. It is the government's burden to prove, by a preponderance of the evidence, that a confession was voluntary. *State v. Vice*, 2021 WI 63, ¶ 29, 397 Wis. 2d 682, 961 N.W.2d 1. Confessions "are voluntary if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist." *Hoppe*, 261 Wis. 2d 294, ¶ 36.

Courts consider the totality of the circumstances in determining whether a confession was voluntary. *Vice*, 397 Wis. 2d 682, ¶ 30. "That analysis involves balancing the suspect's personal characteristics, such as age, intelligence, physical and emotional condition, and prior experience with law enforcement, against any pressures imposed upon him by police." *Id.*

Before this Court may perform that balancing test and consider personal characteristics, however, it "must first examine the threshold matter of coercion." *Vice*, 397 Wis. 2d 682, ¶ 31. That is because "[c]oercive or improper police conduct is a necessary prerequisite for a finding of involuntariness." *Hoppe*, 261 Wis. 2d 294, ¶ 37 (citing *Colorado v. Connelly*, 479 U.S. 157, 167 (1986)). "If [this Court's] analysis of the facts does not reveal coercion or improper police pressures, there is no need . . . to engage in the balancing test between the suspect's personal characteristics and those nonexistent pressures." *Vice*, 397 Wis. 2d 682, ¶ 31. Notably, "the protections of the Due Process Clause are intended to safeguard against conduct or circumstances that 'destroyed [the suspect's] volition and compelled him to confess.'" *Vice*, 397 Wis. 2d 682, ¶ 32 (citing *Connelly*, 479 U.S. at 162). Thus, "establishing coercion is a high bar for a defendant to surmount." *Id.*

Five factors are relevant to a determination of police coercion. *Hoppe*, 261 Wis. 2d 294, ¶ 39. Those factors are whether any excessive physical or psychological pressures were used, whether any inducements, threats, methods, or strategies were used to compel a response, the general circumstances surrounding the interview, the length of the interview, and whether the suspect was given *Miranda* warnings. *Hoppe*, 261 Wis. 2d 294, ¶ 39.

Statements have been held involuntary where a suspect was not provided with *Miranda* warnings and where the suspect was a juvenile subjected to extreme treatment. *See In*

re Jerrell C.J., 2005 WI 105, 283 Wis. 2d 145, 699 N.W.2d 110 (holding involuntary a juvenile's confession made during a five-and-a-half–hour interrogation, during which he was handcuffed to a wall, left alone for two hours, and denied a request to speak to his mother).

"[E]stablishing coercion is a high bar for a defendant to surmount" because the Due Process Clause protects only against police conduct that completely wore down a suspect's will to resist and compelled the confession. *Vice*, 397 Wis. 2d 682, ¶ 32. Even when coercion is found, a confession can still be voluntary under the totality of the circumstances. *Id.* ¶ 35. A confession is voluntary, even when coercion is present, if the tactics employed were insufficient to "exceed[ ] [the individual's] ability to resist." *Hoppe*, 261 Wis. 2d 294, ¶ 36.

"Police may, and often do, engage in multiple tactics and strategies in the same interview without" being coercive. *Vice*, 397 Wis. 2d 682, ¶ 48. "[A]bsent police coercion, it is not necessary to balance [police] tactics against [the defendant's] personal characteristics; there is simply nothing against which to balance them." *Id.*

B. The circuit court correctly determined there was no coercion.

The ultimate question is whether Hauschultz was compelled to confess by improper police conduct. *See Vice*, 397 Wis. 2d 682, ¶ 32. The first step in the analysis is to review the practices that Hauschultz claims were coercive, since "coercive or improper police conduct is a necessary prerequisite for a finding of involuntariness." *Id.* ¶ 38 (citing *Hoppe*, 261 Wis. 2d 294, ¶ 37).

In this case the circuit court determined that there was no police coercion during any interview, despite Hauschultz's youth. (R. 171:13–14, 16, 22–23.) Hauschultz disagrees and argues that during his first interview, "he was separated from his mother, questioned in a small room by an armed law

enforcement officer, and subjected to psychological pressure in the form of demands that he be honest and false reassurance that no one would get in trouble based on his statements." (Hauschultz's Br. 52.) During the second interview, Hauschultz argues, he again was separated, this time for two and a half hours, in a "police-dominated atmosphere," leaving him "susceptibl[e] to pressures from police." (Hauschultz's Br. 52–53.) Finally, Hauschultz argues that the timing of the third interview made him "more vulnerable to making admissions," that he had no adult present, and that "Bessler's conduct was more than enough to degrade [Hauschultz's] capacity to resist the pressure she put on him to confess." (Hauschultz's Br. 53.) Hauschultz relies on *Jerrell C.J.*, 283 Wis. 2d 145, to support his proposition that the "aspects of the [first] interrogation were coercive" and that his statements during all three interviews were involuntary. (Hauschultz's Br. 52, 53.)

Jerrell C.J. is indeed a seminal case in evaluating the voluntariness of a juvenile confession. (Hauschultz's Br. 45–48.) But *Jerrell* does not support Hauschultz's contention that his statements (in all interviews) were involuntary and the product of police coercion. (Hauschultz's Br. 52–53.) A contrast of the facts in *Jerrell* to the facts in the instant case reveals that while Jerrell's statements were coerced, Hauschultz's statements were voluntary.

First, Jerrell was in custody during his challenged interrogation while Hauschultz, as shown above, was not.

Second, the *Jerrell C.J.* court addressed Jerrell's claim that his confession was involuntary because police had denied his request to call his parents. 283 Wis. 2d 145, ¶ 30. The court emphasized the importance of police calling a juvenile's parents to tell them about the interview. *Id.* ¶¶ 30–31. Although the court did not say that this action was per se coercive, it warned that the denial of "Jerrell's requests to talk

to his parents [w]as strong evidence of coercive police conduct." *Id.* ¶ 31.

In contrast, Hauschultz's parents consistently *consented* to Hauschultz's interviews, and his mother was even across the hall in the hospital during the first interview. Timothy consented to the second interview, and he even drove Hauschultz to the third interview. Not once during these interviews did Hauschultz ask police if he could talk to his parents. Thus, unlike in *Jerrell C.J.*, the police conduct with regard to parental presence bore no sign of impropriety.

Third, the *Jerrell C.J.* court addressed the length of Jerrell's custody, calling it "an important factor in evaluating police behavior." *Jerrell C.J.*, 283 Wis. 2d 145, ¶ 32. The length of Jerrell's custody was extreme. Jerrell had been handcuffed to a wall for two hours and left alone. *Id.* ¶ 33. He was then interrogated for over five hours "before finally signing a written confession." *Id.*

In contrast, here Hauschultz was involved in an eight minute interview, a two and a half hour interview, and finally a one hour interview. He was always seated in a room without handcuffs, offered food and drink, no threats were ever made, and he was never handcuffed or restrained in any way.

Fourth, Jerrell was an eighth grader with an IQ of eighty-four, indicating a low average range of intelligence. *See Jerrell C.J.,* 283 Wis. 2d 145, ¶ 27. In the instant case, Hauschultz was also an eighth grader, but he gave no indication of low intelligence. On the contrary, during both of her interviews, Detective Bessler testified that she had no concerns about Hauschultz's intelligence level. (R. 94:85–86.) Rather, Hauschultz was "a smart kid." (R. 94:86.) Bessler also testified that Hauschultz told her that he found taking tests "easy," that he was taking a foreign language class, and that he was "going to be taking a class up" at the high school even

though he was in middle school.[11] (R. 94:57.) In sum, Hauschultz had no characteristics other than being a minor that would make him particularly vulnerable to a police contact.

And finally, the *Jerrell C.J.* court addressed the psychological techniques that the police employed in questioning Jerrell. *Jerrell C.J.,* 283 Wis. 2d 145, ¶ 34. The detectives refused "to believe Jerrell's repeated denials of guilt, but they also joined in urging him to tell a different 'truth,' sometimes using a 'strong voice' that 'frightened' him." *Id.* ¶ 35. Although the court noted that Jerrell did not appear to have any significant mental or emotional problems that would have made him particularly vulnerable to coercion, it remained concerned that these types of interview techniques applied to a juvenile "over a prolonged period of time could result in an involuntary confession." *Id.*

But here, unlike the officers in *Jerrell C.J.*, the evidence and videos show that Remiker, Bessler, and Zimbler were consistently calm and solicitous.

Jerrell C.J. and this case both involve the interrogation of a minor. But that is the limit to their connection. There is a sharp contrast between the pertinent factual circumstances. Hauschultz was treated in a non-coercive manner, unlike Jerrell. Hauschultz was never handcuffed or otherwise restrained. He was never denied any requests, he was never threatened, and he was allowed to leave the interview rooms when he wanted to. As the circuit court determined, "[Hauschultz] was not deprived of any of his creature comfort measures, his prior experience earlier that day showed him that the interview could be terminated at any time, and this all indicates that [Hauschultz], despite his youth, was able to and did, in fact, freely consent to the voluntary interview." (R.

[11] *See also supra* note 8.

171:22–23.) It is totally compatible with *Jerrell C.J.* for this Court to hold that Hauschultz's statements during all interviews were not coerced and thus voluntary.

In this case, Hauschultz's decision to make statements against his personal interest was the result of "a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on [him] by representatives of the State exceeded [his] ability to resist." *Hoppe*, 261 Wis. 2d 294, ¶ 36. This Court should affirm the circuit court: there was no coercion.

C. If this Court considers Hauschultz's personal characteristics, his statements were still voluntary.

Hauschultz's appellate brief focuses on his personal traits, such as his age and education, in support of his argument that his statements were involuntary. He relies heavily on *Jerrell J.C.*, which also involved the interrogation of juvenile. (Hauschultz's Br. 46–50.) But as noted above, a suspect's personal traits alone cannot form the basis for finding that the suspect's statements are involuntary. *State v. Moore*, 2015 WI 54, ¶ 56, 363 Wis. 2d 376, 864 N.W.2d 827. Instead, there has to be "some affirmative evidence of improper police practices deliberately used to procure a confession." *Id.* (citation omitted). And here, a determination that the tactics utilized by the interviewers were not coercive is fatal to Hauschultz's voluntariness claim. Therefore, this Court's consideration of Hauschultz's personal characteristics is unnecessary. *See Vice*, 397 Wis. 2d 682, ¶ 48.

Should this Court nonetheless consider Hauschultz's personal traits, it should still find that his statements to the interviewers were voluntary.

Hauschultz first emphasizes his age, education, and intelligence at the time of the interviews. (Hauschultz's Br.

47.) The State acknowledges that Hauschultz's age is a "strong factor" that weighs against voluntariness, but as this Court noted, age is not "dispositive." *Jerrell J.C.*, 283 Wis. 2d 145, ¶ 26. And, as the court found, "caselaw does not establish a bright line rule that no 14 year old is competent to give a voluntary statement," and that "every other factor points to the voluntariness" of his statement. (R. 171:13.)

Regarding his education and intelligence, the only similarity to the suspect in Jerrell is that both were fourteen-year-olds in eighth grade. *Jerrell C.J.,* 283 Wis. 2d 145, ¶ 27. But Jerrell was of "low average range of intelligence," and had "average to failing grades," which made him "susceptible to police pressure." *Id*. Conversely, the evidence introduced at the evidentiary hearings indicate that there were no concerns about Hauschultz's intelligence level, that he was "a smart kid," that he found taking tests "easy," that he was taking a foreign language class, and that he was "going to be taking a class up" at the high school even though he was in eighth grade. (R. 94:57, 85–86.) The circuit also found that Hauschultz was "intelligent" and that he "displayed no confusion, no difficulty understanding what was going on." (R. 171:9, 10.) While Hauschultz notes that the circuit court found that he was not "an especially savvy youth" (Hauschultz's Br. 47), Hauschultz fails to acknowledge that in that *same* sentence the court found that there was "no evidence that he is especially susceptible to coercion." (R. 171:9.)

Turning to prior experience with police, the court found that Hauschultz had no "prior experience with the juvenile justice system, or the criminal justice system" before the interviews. (R. 171:9.)

The court also found that Hauschultz suffers from no "emotional impairments." (R. 171:9.) This is supported by Bessler's testimony that during the second interview Hauschultz was not emotional. (R. 94:57.) While during the

third interview Bessler testified that Hauschultz "did get a little emotional," she also testified there was no "hysteria." (R. 94:81–82.) A review of the video recordings supports Bessler's testimony.

Next, while Hauschultz stresses what he went through (Hauschultz's Br. 49) after he tortured Ethan to death, the evidence, testimony, and video recordings all support the court's finding that Hauschultz suffered from no emotional impairment. While Hauschultz argues that Dr. Collins's report[12] included diagnoses of "a trauma and stress-related disorder, an anxiety disorder, and trouble managing anger" (Hauschultz's Br. 48), that report was never offered as evidence at the hearings. Dr. Collins made her diagnoses more than a year after the interviews, and they were based upon her "*current* observations." (R. 32:8 (emphasis added).) As the circuit court found when it denied reverse waiver, Dr. Collins diagnosed Hauschultz with "an unspecified anxiety disorder*, as a result of his trouble emotionally adjusting to his arrest and incarceration*, and the uncertainty of his future." (R. 58:3 (emphasis added).) In other words, there was no evidence that his anxiety existed at the time of the interviews.

Finally, in regard to Hauschultz's physical condition, the court found no physical impairment. (R. 171:9.) But Hauschultz argues that he was tired during the interviews,

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[12] Hauschultz relies on Dr. Collins's report in discussing his personal traits. (Hauschultz's Br. 47.) Hauschultz offered Collins's report to assess his "psychological functioning relative to the 'reverse waiver' criteria." (R. 32:1; 58.) But in his motion to suppress statements, Hauschultz never discussed Collins's report. (R. 61; 107.) Nor was her report introduced as evidence during the *Miranda-Goodchild* hearings or ever discussed by either party or the court. (R. 94; 95; 100.) The State believes that it is inappropriate for Hauschultz to cite to the report—which was offered as evidence to whether Hauschultz met the legal standard for the reverse waiver criteria—as evidence supporting his claim that his statements were involuntary.

and the State would agree, as he indicated to the interviewers that he was tired. But Hauschultz also suggests that the officers intentionally engaged in sleep deprivation tactics. (Hauschultz's Br. 50.) The record clearly shows that this is false:

> Although [Hauschultz] was at the Sheriff's Department until the early morning hours of April 21st, 2018, he was not interrogated that entire time. He was in a room with the other children until safe arrangements could be made for all of the minors to have somewhere safe to go, it wasn't a tactic to deprive Mr. Hauschultz of sleep to convince him to confess to something, this was the human services portion of the investigation.

(R. 171:22.) Additionally, Bessler testified that Hauschultz napped at the station while she interviewed the other children before Hauschultz. (R. 94:86.)

In sum, should this Court consider Hauschultz's personal traits, they weigh in favor of a finding that his statements were voluntary, especially since the interviewers did not pressure Hauschultz to confess.

* * * *

This is not a case of police coercion. As shown above, the circumstances of the interviews were not coercive, and Hauschultz's personal traits did not make him susceptible to any pressure allegedly imposed by the police. Here, the police investigated the brutal homicide of a seven-year-old child, questioned the person who was last with the child, used permissible interrogation tactics, and audio or videotaped everything.

This Court should affirm the circuit court's conclusion that the police employed no coercion or improper behavior that would render Hauschultz's statements involuntary.

III. The Only Remedy Available to Hauschultz Would Be for a Remand to the Circuit Court to Enter an Order Granting Suppression.

Hauschultz requests that, should this Court agree with him that the circuit court erroneously denied his motion to suppress, this Court should grant plea withdrawal. (Hauschultz's Br. 54.) This Court should refuse to do so.

As this Court recently recognized in *Rejholec*, "Wis. Stat. § 971.31(10) appeals are subject to the harmless error test. *State v. Semrau*, 2000 WI App 54, ¶ 22, 233 Wis. 2d 508, 608 N.W.2d 376; *see also State v. Armstrong*, 223 Wis. 2d 331, 368–71, 588 N.W.2d 606 (1999)." *Rejholec*, 398 Wis. 2d 729, ¶ 35 n.14. And, "[i]n a guilty plea situation following the denial of a motion to suppress, the test for harmless error on appeal is whether there is a reasonable possibility that the erroneous admission of the disputed evidence contributed to the conviction." *Id.* (quoting *Semrau*, 233 Wis. 2d 508, ¶ 22; *Armstrong*, 223 Wis. 2d at 370).

Here, there is not a reasonable probability that Hauschultz would not have pleaded guilty because he received the benefit of a plea deal that resulted in the dismissal of *six* counts. (R. 172:6.) Finally, Hauschultz has not developed an argument on appeal that he is entitled to withdraw his guilty plea; he has only argued that his statements should be suppressed.

Therefore, if this Court concludes that the circuit court erred when it denied Hauschultz's motion to suppress, the remedy is to remand the case to the circuit court to enter an order granting the motion to suppress. On remand, the circuit court may then entertain a motion from Hauschultz to withdraw his guilty plea. The circuit court should grant plea withdrawal only if the State cannot meet its burden of demonstrating that the circuit court's error in refusing to suppress was harmless, guided by the factors this Court

identified in *Semrau*, 233 Wis. 2d 508, ¶ 22. Like *Rejholec*, this Court should decide the suppression question only and leave the matter of plea withdrawal to the circuit court on remand, if necessary.

CONCLUSION

This Court should affirm the circuit court's order denying suppression and Hauschultz's judgment of conviction.

Dated this 24th day of March 2023.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,963 words.

Dated this 24th day of March 2023.

Electronically signed by:

Sara Lynn Shaeffer
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CERTIFICATE OF EFILE/SERVICE

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

Dated this 24th day of March 2023.

Electronically signed by:

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