COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP1406

Cir. Ct. Nos. 2005JV685
2005JV689

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

IN THE INTEREST OF JULIAN M.,
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-APPELLANT,

V.

JULIAN M.,

RESPONDENT-RESPONDENT.

IN THE INTEREST OF PHAHEEM S.B.,
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-APPELLANT,

v.

PHAHEEM S. B.,

RESPONDENT-RESPONDENT.

APPEAL from orders of the circuit court for Racine County: JOHN S. JUDE, Judge. *Affirmed in part; reversed in part and cause remanded.*

¶1 NETTESHEIM, J.[1] The State of Wisconsin brings this interlocutory appeal challenging several evidentiary rulings in a sexual assault case in which the alleged victim, Janel J., and the defendants-respondents, Julian M. and Phaheem S.B., are all juveniles. The trial court ruled that the report of an earlier sexual assault made by Janel could be admitted into evidence as a prior untruthful allegation under the rape shield law, WIS. STAT. § 972.11(2). The court also ruled that various pre- and post-***Miranda***[2] statements made by Julian and Phaheem should be suppressed.

¶2 We reverse the trial court's rape shield law ruling because, even if Janel's report of the prior alleged assault might not have supported a successful prosecution, Julian and Phaheem have failed to demonstrate that Janel's report was "untruthful." As to the challenged statements made by Julian and Phaheem, we

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 75231(2)(e) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

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

affirm the trial court's rulings in part and reverse them in part. Three discrete sets of statements are challenged: (1) statements made by Julian and Phaheem during their separate bookings at the police station; (2) later statements made by Phaheem after he was given incomplete ***Miranda*** warnings; and (3) still later statements made by Julian and Phaheem as they rode together in the police van and in the lobby of the sheriff's department. We affirm the trial court's suppression of the pre-***Miranda*** booking statements because the police interaction with Julian and Phaheem crossed the line into interrogation. We also affirm the suppression of Phaheem's immediate post-***Miranda*** statements because even if Phaheem understood his right to counsel, the abbreviated caution failed to inform him that his statements could be used against him. However, we reverse the ruling suppressing the information gleaned from the unprompted conversations between Julian and Phaheem while in the police van and in the sheriff's lobby before detention because there is no suggestion of any police overstepping that would render inadmissible the gratuitous statements made within earshot of the officers.

BACKGROUND

¶3 On October 14, 2005, the City of Racine Police Department was called to investigate the alleged sexual assault of sixteen-year-old Janel. The responding officer found Janel hysterical, sobbing and shaking violently. She reported that Julian and Phaheem had raped her, and provided the following details. She, Phaheem, whom she knew from school, and Phaheem's cousin, Julian, went to Phaheem's house and the trio walked around the neighborhood for some time, then returned to Phaheem's house. When Janel indicated her intent to leave, Phaheem grabbed her from behind with his arms around her head and neck. Both boys dragged her into a nearby garage and attempted to pull down her pants while she verbally and physically resisted. Julian forced her to engage in sexual

intercourse and Phaheem forced her to perform fellatio on him. The boys released her after about an hour, and threatened to beat her if she reported the incident.

¶4 In juvenile court, the State charged Phaheem, age sixteen, with second-degree sexual assault by use of force, and Julian, age fifteen, with second-degree sexual assault, as party to the crime. Both also were charged with kidnapping and intimidating a victim. The State petitioned to waive both juveniles into adult court. The trial court denied the petition regarding Phaheem, and the State withdrew its petition regarding Julian. Pretrial, both juveniles filed motions seeking to introduce at trial evidence that Janel had made a prior untruthful allegation of sexual assault. The motions also sought to suppress various custodial statements both juveniles had provided to the police or made to each other while in such custody.

¶5 On February 20, 2006 and again on May 8 and 9, the trial court took testimony on the pretrial motions, and later granted the motions in an oral decision. The court then stayed further proceedings while the State pursued this interlocutory appeal. We granted the State's petition for leave to appeal the court's non-final order. ***State v. Julian M.***, No. 2006AP1406, order (WI App June 28, 2006). We will recite additional facts as we discuss the issues.

DISCUSSION

1. The Prior Allegation/Rape Shield Law

¶6 The facts regarding Janel's report of a prior sexual assault were presented via the testimony of the officer who investigated the incident and David J., whom Janel accused. In 2004, while in gym class at her middle school, Janel alleged that David, a fellow student, had "swiped his hand across her breast"

and touched her legs, saying, "Ooh, baby." Janel also reported that David had slightly pulled down the waistband of his pants and said, "Suck it." The principal called David to the office and a police officer spoke to David about the incident. David denied touching Janel's legs, pulling down his waistband or saying, "Ooh, baby." However, he acknowledged to the police and also in his testimony at the motion hearing that a touching of Janel's breast area and a reference to oral sex—"What's up with the head?"—did occur. However, David characterized the touching as accidental, and the comment as a joking reference to an offer to perform fellatio he says Janel made to him on the telephone the night before. The police officer testified that when he interviewed Janel she was "smiling and kind of acting like it was somewhat funny."

¶7 Julian and Phaheem moved to introduce the report of this incident into evidence, and the trial court granted the motion. WIS. STAT. § 972.11(2), the rape shield law, precludes the admission of evidence regarding a complainant's prior sexual conduct or behavior unless a statutory or judicially created exception applies. The exception Phaheem and Julian relied on is § 972.11(2)(b)3., concerning "prior untruthful allegations of sexual assault made by the complaining witness." Before admitting evidence of prior untruthful allegations, the circuit court must determine whether the proffered evidence: (1) fits within § 972.11(2)(b)3.; (2) is material to a fact at issue in the case; and (3) is of sufficient probative value to outweigh its inflammatory and prejudicial nature. ***State v. DeSantis***, 155 Wis. 2d 774, 785, 456 N.W.2d 600 (1990). We consider the second and third prongs only if the first is met. *See* ***State v. Moats***, 156 Wis. 2d 74, 110, 457 N.W.2d 299 (1990).

¶8 The first consideration is whether the proffered evidence fits within WIS. STAT. § 972.11(2)(b)3. ***DeSantis***, 155 Wis. 2d at 785. The admission of

evidence is left to the discretion of the circuit court. ***State v. Dunlap***, 2002 WI 19, ¶ 31, 250 Wis. 2d 466, 640 N.W.2d 112. We will not find an erroneous exercise of that discretion unless the circuit court has improperly applied the facts of record to the accepted legal standards. *See* ***id.*** The burden is on the defense to produce evidence sufficient to support a reasonable person's finding that the complainant made prior untruthful allegations. ***Moats***, 156 Wis. 2d at110.

¶9 The trial court found that since Janel alleged that David touched both her breast and her leg, David's clear denial that he touched Janel's leg rendered the allegation untruthful, and so could be inquired into at trial. David denied touching or rubbing Janel's legs and saying, "Ooh, baby," but acknowledged that while "messing around" he "slapped across" her breast and made a comment to her about oral sex. Janel and David are at odds in their interpretation of the episode, but it remains that an incident between the two occurred, and that it included, at a minimum, David touching Janel's breast. We deem the term "untruthful" to connote a concocted event without any factual or historical support. That cannot be said as to Janel's accusation against David. Whether or not the touching was intentional does not alter the fact that it happened. Sexual contact is the intentional touching of an intimate body part, which includes the breast. WIS. STAT. §§ 940.225(5)(b), 939.22(19). School and police authorities investigated the matter. That they evidently considered the incident nonprosecutable is not the same as it being untruthful, however.

¶10 Nor does Janel's smiling demeanor when reporting the incident change our view. David testified that Janel was teased at school because she was "slow," and the investigating officer acknowledged that the "thousands" of alleged victims he had interviewed responded in a variety of ways. Because Julian and Phaheem did not meet their burden of demonstrating untruthfulness, we must

conclude that the evidence is inadmissible under the statute and our analysis ends. *See* ***Moats***, 156 Wis. 2d at 110.

2. Suppression of Statements

¶11 The trial court suppressed all of Phaheem's and Julian's pre- and post-***Miranda*** statements. They consist of Phaheem's and Julian's statements to Investigator Jody Spiegelhoff at the police station during their separate bookings ("booking statements"); Phaheem's later statement to Investigator Steve Diener at the police station after an incomplete ***Miranda*** advisory ("Diener/Phaheem interview"); still later conversations between Julian and Phaheem overheard by the police van driver during a transport ("police van statements"); and statements between the two in the sheriff's department lobby which Investigator Spiegelhoff overheard and inadvertently recorded ("lobby statements"). We address each separately.

a. The Booking Statements

¶12 Spiegelhoff and another police officer went to Phaheem's home and took him into custody. A "pretty upset" man believed to be Phaheem's father called after Phaheem not to talk to the police and loudly said several times that he wanted an attorney. At the police station, Spiegelhoff put Phaheem in an interview room, obtained personal information from him, and asked him for personal information about Julian. Phaheem then said, "I know what it is; if it's like what [Janel's] telling you; if it's not true, I'm going to be kind of upset." Spiegelhoff responded that she "would be upset, too, if [she] was accused of something [she] didn't do." Phaheem insisted that he "never pressured [Janel] to do nothing…. I'm not going to force nobody to do nothing they don't want to do." Spiegelhoff also apologized to Phaheem for the "abrupt take away" from his

home, but that it was necessary because "[y]our dad was pretty upset and the sooner we [got] you out of there, the better the outcome." At no time did Spiegelhoff read Phaheem a ***Miranda*** advisory. She recorded the encounter, however, per the department policy to "record everything."

¶13 When Julian arrived at the station, besides obtaining his personal information, Spiegelhoff also asked him whether he knew why he was at the police department. Julian asked where Janel was, and Spiegelhoff told him Janel was in the hospital, and observed to Julian that he looked "kind of upset by that" information. Julian responded that he's a ball player and "I don't get into trouble like that, man. I mean, what happened between him and her, that's her. I was just there 'cuz I didn't have nothing to do with it period." Julian then said something like "I don't think I should be here," prompting Spiegelhoff to ask, "Why not?" As with Phaheem, Spiegelhoff never advised Julian of his ***Miranda*** rights or that the exchange was being recorded, despite at one point excusing herself to retrieve a recording device.

¶14 Both juveniles challenged their statements as being in violation of ***Miranda***. When the State seeks to admit an accused's custodial statement, it must show (1) that the accused was adequately informed of his or her ***Miranda*** rights, understood them, and knowingly and intelligently waived them, and (2) that the statement was given voluntarily. ***State v. Santiago***, 206 Wis. 2d 3, 18-19, 556 N.W.2d 687 (1996). Whether ***Miranda*** warnings should have been given is a constitutional question that we review independently of the trial court's determination. ***State v. Thomas J.W.***, 213 Wis. 2d 264, 268-69, 570 N.W.2d 586 (Ct. App. 1997). We first look at the Fifth Amendment command that no person "shall be compelled in any criminal case to be a witness against himself." ***Id.*** at 269. We then consider its interpretation in ***Miranda***, where the United States

Supreme Court established that the State may not use a suspect's statements stemming from custodial interrogation unless the State demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. ***Miranda v. Arizona***, 384 U.S. 436, 479 (1966); ***Thomas J.W.***, 213 Wis. 2d at 269-70. Included among those safeguards are the now-familiar ***Miranda*** warnings. ***State v. Cunningham***, 144 Wis. 2d 272, 276, 423 N.W.2d 862 (1988). The threshold question, then, is whether the exchange between Spiegelhoff and the juveniles was "custodial interrogation."

¶15 Custodial interrogation generally means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his or her freedom of action in any significant way. ***State v. Fischer***, 2003 WI App 5, ¶23, 259 Wis. 2d 799, 656 N.W.2d 503. The State concedes that Julian and Phaheem were in custody when they spoke with Spiegelhoff, leaving us to answer whether the interaction amounted to "interrogation."

¶16 In ***Rhode Island v. Innis***, 446 U.S. 291, 300-01 (1980), the United States Supreme Court clarified that "interrogation" under ***Miranda*** refers not only to express questioning, but also to its "functional equivalent." An accused may be interrogated without being asked a single question by police. ***State v. Price***, 111 Wis. 2d 366, 372, 330 N.W.2d 779 (Ct. App. 1983). The suspect's perceptions outweigh the police officer's intent. ***Innis***, 446 U.S. at 301.

¶17 The test for whether police conduct is the "functional equivalent" of express questioning is if the police officer should know that his or her words or actions, aside from those normally attendant to arrest and custody, "are reasonably likely to elicit an incriminating response from the suspect." ***Fischer***, 259 Wis. 2d 799, ¶25 (citing ***Innis***, 446 U.S. at 301). The ***Innis*** test implies an objective

foreseeability standard: whether an objective observer could foresee that the officer's conduct or words would elicit an incriminating response, such that the subject reasonably could have interpreted the officer's words or actions as a question. ***Fischer***, 259 Wis. 2d 799, ¶25. In addition, any specific knowledge the officer may have had concerning a defendant's unusual susceptibility to a particular form of persuasion could impact the objective foreseeability test. ***Id.***, ¶26 (citing ***Innis***, 446 U.S. at 302 n. 8).

¶18 The ***Innis*** test can be summarized as follows: if an objective observer with the same knowledge of the suspect as the police officer on the sole basis of hearing the officer's remarks or observing the officer's conduct could conclude that the officer's words or conduct likely would elicit an incriminating response, that is, reasonably could have had the force of a question on the suspect, then the conduct or words constitutes interrogation. ***Fischer***, 259 Wis. 2d 799, ¶27. We will not disturb the trial court's findings of evidentiary or historical fact unless they are clearly erroneous. ***Id.***, ¶28. Whether the facts satisfy the legal standard articulated in ***Innis***, however, is a question of law we review independently of the trial court. ***Fischer***, 259 Wis. 2d 799, ¶28. The facts surrounding the "booking statements" are not in dispute, so the issue narrows to the legal component of ***Innis—***whether an objective observer would foresee that the officer's conduct or words would elicit an incriminating response, such that the subject reasonably could have interpreted the officer's words or actions as a question. ***Fischer***, 259 Wis. 2d 799, ¶25.

¶19 The trial court rightly observed that ***Miranda*** does not apply to Spiegelhoff's questions seeking biographical data. Such queries are considered nonincriminating, routine booking questions and so are exempted from the coverage of ***Miranda***. ***State v. Stevens***, 181 Wis. 2d 410, 433-34, 511 N.W.2d

591 (1994), *overruled on other grounds,* ***Richards v. Wisconsin***, 520 U.S. 385 (1997). The court then further found that although Spiegelhoff may have intended to use a friendly manner with Phaheem to put him at ease, her approach and words were "so open-ended that an objective person would know they are reasonably likely to elicit incriminating responses." The court took similar issue with Spiegelhoff's response to Julian when he said he did not think he should be at the police station and she asked, "Why not?" Spiegelhoff explained that she thought it only fair that he should know why he was there, an explanation the court found "laudable" but still impermissibly open-ended.

¶20 We agree with the trial court that here Spiegelhoff's open-ended questions and comments to both youths crossed the line from legitimate booking questions to the functional equivalent of interrogation. An investigator with abundant ***Miranda*** training, Spiegelhoff should have known that by agreeing with Phaheem that she, too, would be upset if wrongly accused or by directly asking Julian why he did not think he belonged in custody, likely would be interpreted as prompts for their further responses—responses she took care to record. While Spiegelhoff may not have known about Phaheem's learning difficulties, she certainly knew that he and Julian were juveniles. She told neither one their conversations were being recorded. We agree that under the objective-person test Spiegelhoff's questioning constituted interrogation.

¶21 Our next inquiry is whether the statements made in response to custodial interrogation were voluntary. *See* ***Santiago***, 206 Wis. 2d at 19. A statement is voluntary if it is the product of a free and unconstrained will, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by the State exceeded the individual's ability to resist. ***State v. Jerrell C.J.***, 2005 WI 105, ¶18, 283 Wis. 2d 145, 699

N.W.2d 110. Reviewing the voluntariness of a statement involves the application of constitutional principles to historical facts. ***Id.***, ¶16. We defer to the trial court's findings of fact surrounding the statement; applying constitutional principles to those facts presents a question of law subject to our independent review. ***Id.***

¶22 We determine the voluntariness of a statement by examining the record and applying the totality of the circumstances test, which requires a balancing of a defendant's personal characteristics against police pressure and tactics. ***Id.***, ¶20. We must consider the party's age, intelligence, education, experience and knowledge of the right to withhold consent, and evidence of inherently coercive tactics, either in the nature of the police questioning or in the environment in which it took place. *See* ***id.*** Coercive or improper police tactics are a prerequisite to a finding of involuntariness. ***Id.***, ¶19. "Special caution" is needed when assessing the voluntariness of a juvenile's statements, particularly when the statement is obtained "in the absence of a parent, lawyer or other friendly adult." ***Id.***, ¶21 (citations omitted). The State bears the burden of proving the voluntariness of a statement by a preponderance of the evidence. ***Id.***, ¶17.

¶23 The trial court found that under the totality of the circumstances, an element of police coercion existed sufficient to render the statements of both Julian and Phaheem to Spiegelhoff involuntary. The court allowed that the custodial period was not prolonged, and there was no yelling, threats, physical abuse or promises. However, the court also noted that Phaheem was a sixteen-year-old tenth-grade special education student working at a below-third-grade level in reading, math and spelling, and his only prior contact with the justice system was a "counsel and release" for a fight at school. The court found that Julian was a fifteen-year-old ninth grader with youthful brushes with the law

resulting in a delinquency petition. However, the court also noted as to both Julian and Phaheem that the police had not offered an opportunity for a parent to be present—a consideration the court deemed appropriate given the "special caution" imperative of ***Jerrell C.J.***[3]

¶24 Bearing in mind the special caution we must use in assessing the voluntariness of the unwarned statements, we agree that these circumstances went too far in the other direction for the State to say they were freely given. Phaheem was taken from his home and his agitated father, which Spiegelhoff told Phaheem was for the best. Both suspects were taken separately into an interview room and engaged in conversation that strayed beyond the biographical. Given their immaturity, educational level, and only youthful exposure to the justice system, they likely would not know at what point they might refuse to answer a question or respond to a comment a police officer puts to them. Julian expressed worry for his cousin, who he thought was "scared because … he don't talk good." No familiar face was present to advise or support them. There is no evidence of any efforts made to ascertain the whereabouts of the youths' parents.

¶25 Coerciveness may be subtle and depends on the circumstances. ***Jerrell C.J.***, 283 Wis. 2d 145, ¶19. Under these circumstances, because ***Miranda*** advisories were not given, we agree with the trial court that the statements to

[3] "The Supreme Court in the past has spoken of the need to exercise 'special caution' when assessing the voluntariness of a juvenile confession … particularly when the interrogation occurs in the absence of a parent, lawyer or other friendly adult." ***State v. Jerrell C.J.***, 2005 WI 105, ¶21, 283 Wis. 2d 145, 699 N.W.2d 110 (citations omitted). We read the "special caution" directive as falling on the shoulders of the courts, not the police. Nonetheless, we still essentially agree with the trial court.

Spiegelhoff were not made voluntarily. We affirm the trial court's suppression ruling as to these "booking statements."

b. The Diener/Phaheem Interview

¶26 After speaking with Spiegelhoff, both Phaheem and Julian were interviewed by Investigator Steve Diener. Only Phaheem's statements are at issue.[4] Diener recorded the interview with a recorder placed on the table between him and Phaheem. Diener began to read Phaheem the ***Miranda*** warnings when there was an interruption. As a result, Diener did not complete the warnings, failing to inform Phaheem that his statements could and would be used against him.

¶27 Following the interruption and per Diener's instruction, Phaheem then read aloud the waiver portion of the ***Miranda*** form, mispronouncing some words. Diener did not specifically ask Phaheem if he wanted to waive his rights, but before asking him to sign the waiver form, Diener did advise that "you're not agreeing to anything," and that if Phaheem understood, he should "sign right there." Phaheem then asked, "[I]f I agree to speak, does that mean that at any time I can ask for a lawyer?" Diener responded: "Right…. [W]e can stop talking at any time you want, you're calling the shots …." Diener testified that Phaheem then "grabbed the pen" and signed before Diener could complete his warning. Despite being under the impression that Phaheem's father was at the police department, Diener did not tell Phaheem that his father was available.

[4] Diener read complete ***Miranda*** warnings to Julian, who said he wanted an attorney and invoked his right to remain silent.

¶28 Phaheem contends that his statements made during the interview were properly suppressed because Diener did not sufficiently comply with ***Miranda***. At a suppression hearing, the State is required to show that the defendant received and understood his or her ***Miranda*** warnings and knowingly and intelligently waived the rights protected by those warnings. ***State v. Jiles***, 2003 WI 66, ¶26, 262 Wis. 2d 457, 663 N.W.2d 798. The State bears the burden of showing by a preponderance of the evidence both that the warnings were sufficient in substance and that the defendant's statements were voluntary. ***Id.***

¶29 The State argues that ***Miranda*** warnings need not be recited verbatim every time. Diener's advisory was sufficient, the State contends, because it substantially conveyed what ***Miranda*** intends and, further, that Phaheem obviously understood because he asked whether he could request a lawyer at any point.

¶30 True, ***Miranda*** warnings need not be conveyed by "talismanic incantation," but they must convey in substance that the suspect has the right to remain silent; that anything the suspect says can be used against him or her in a court of law; that the suspect has the right to have a lawyer and to have the lawyer present if he or she gives a statement; and that if the suspect cannot afford an attorney, one will be appointed for him or her both prior to and during questioning. ***Santiago***, 206 Wis. 2d at 19 (citation omitted). Diener's partial advisory critically omitted the warning that Phaheem's statements could be used against him. His query about whether he might ask for an attorney demonstrates nothing about whether he grasped that—as is playing out now—the State would seek to use whatever he said to help establish his guilt.

¶31 The failure to provide ***Miranda*** warnings creates a "bright-line, legal presumption of coercion, requiring suppression of all unwarned statements" unless the suspect freely decides to forego those rights. ***State v. Kiekhefer***, 212 Wis. 2d 460, 469, 569 N.W.2d 316 (Ct. App. 1997) (citation omitted). We fail to see how a suspect, especially a juvenile, can intelligently and voluntarily waive a right without being informed of it. "Youth is more than a chronological fact"; the mere condition of youth renders a child "uncommonly susceptible to police pressures." ***Jerrell C.J.***, 283 Wis. 2d 145, ¶26 (citations omitted).

¶32 We agree that the State has not carried its burden of showing that the incomplete ***Miranda*** advisory adequately informed this juvenile suspect such that he comprehended his rights, knowingly and intelligently waived them, and voluntarily made incriminating statements. We affirm the trial court's suppression of Phaheem's statements to Diener.

c. The Police Van and Lobby Statements

¶33 After meeting with Diener, Phaheem and Julian were transported in a police van to the Racine County Sheriff's Department to be photographed and fingerprinted. The handcuffed pair sat in the rear of the three-compartment full-size police van accompanied only by the driver, Racine Police Officer Gary Neubauer. Neubauer could hear the juveniles conversing during transport, but did not ask them any questions. Their conversation during transport was not recorded.

¶34 Spiegelhoff rejoined the juveniles at the sheriff's department, and she and Neubauer waited approximately a half hour with them, making "small talk" with one while the other was photographed and fingerprinted. When Phaheem and Julian were there together, they talked between themselves in voices loud enough for Spiegelhoff to hear. They spoke mostly about why they thought

they had been arrested. Finding that her digital recorder had been accidentally activated, Spiegelhoff let it run. She neither advised Phaheem or Julian that their conversation was being recorded nor sought their consent to do so.

¶35 Phaheem and Julian contended that their conversational statements overheard during the transport and at the sheriff's lobby were involuntary and were tainted by the earlier improperly ***Mirandized*** statements. The trial court agreed, concluded that reuniting and transporting the "fairly unsophisticated" cousins together after a relatively brief separation, and putting them back in the presence of Spiegelhoff was an improper police tactic. The court therefore suppressed the police van and the lobby statements because they "were not sufficiently attenuated from the original taint."

¶36 The primary concern in attenuation cases is whether the evidence objected to was obtained by exploitation of a prior police illegality or instead by means sufficiently attenuated so as to be purged of the taint. ***State v. Anderson***, 165 Wis. 2d 441, 447-48, 477 N.W.2d 277 (1991). In other words, if the defendant's statement was obtained by exploitation of prior police misconduct, then the subsequent statement also should be excluded. ***Id.*** at 448.

¶37 The admissibility of any statement subsequent to an unwarned admission turns solely on whether it was knowingly and voluntarily made. ***Kiekhefer***, 212 Wis. 2d at 469-70. The subsequent statement must be an act of free will sufficient to purge the primary taint. ***Id.*** at 480. Put another way, the connection between the earlier illegal police activity and the later statement must be "so attenuated as to dissipate the taint." ***Id.*** at 480-81 (citation omitted). Factors we must consider in an attenuation analysis are: (1) the temporal proximity of the police misconduct to the defendant's later statement; (2) any intervening

circumstances; and (3) the purpose and flagrancy of the police misconduct. ***Anderson***, 165 Wis. 2d at 447-48.

¶38 Here, the time from the arrival at the police station to the point of transport in the van was about an hour and a half. The temporal proximity prong includes the conditions existing during the time between the initial police illegality and the defendant's later statement. *See* ***id.*** at 449. Even with close temporal proximity, nonthreatening conditions surrounding the later statement lean toward a finding that any taint created by the officer's unlawful action dissipated when the defendant made a later statement. *See* ***State v. Richter***, 2000 WI 58, ¶46, 235 Wis. 2d 524, 612 N.W.2d 29. Phaheem and Julian were seated together during transport, but Neubauer asked no questions. Upon arrival at the sheriff's department, they again were allowed to sit together and talk, within view of Spiegelhoff and Neubauer. They all engaged in small talk with no further questions. Julian, but not Phaheem, had previously been given full ***Miranda*** warnings. This factor weighs in favor of attenuation as to Julian.

¶39 The trial court found that as to the second factor, there were no intervening circumstances. In this case, however, we think the focus more properly should be on "intervening circumstances between what?" The juveniles' subsequent statements were not of the same ilk as the search fruits yielded in many of the attenuation cases. *See, e.g.*, ***Richter***, 235 Wis. 2d 524, ¶45; ***Anderson***, 165 Wis. 2d at 451. Rather, they were spontaneous conversations between the two juveniles. The officers neither prompted nor contributed to the talk. The second factor, if it applies, leans more toward attenuation.

¶40 Finally, we address the purpose and flagrancy of the police conduct. Inherent in this evaluation is an inquiry into whether there is evidence of some

degree of bad faith exploitation of the situation on the part of the officer. ***Richter***, 235 Wis. 2d 524, ¶53. Neubauer and Spiegelhoff of course had legitimate purposes to their actions: transporting Julian and Phaheem and supervising them as they awaited pictures and prints. There is no evidence that the officers exploited the situation or their duties to gain additional information. Instead, each simply overheard a gratuitous conversation. This factor also demonstrates attenuation. Taken together, we see no taint spilling over onto these latter statements. Accordingly, we reverse the trial court's ruling suppressing the statements as to this phase of the events.

CONCLUSION

¶41 In summary, we reverse the rape shield law ruling because Julian and Phaheem failed to carry their burden demonstrating that Janel's prior report of sexual assault was "untruthful." We affirm the exclusion of the booking statements because they were prompted by questions and comments which, despite Spiegelhoff's intent, impermissibly crossed the line into interrogation. We also affirm the exclusion of the statements Phaheem made to Diener because the ***Miranda*** advisory lacked a critical warning. Finally, we reverse the exclusion of the conversational statements Julian and Phaheem made in their unprompted personal conversations during transport and while in the sheriff's department.

By the Court.—Orders affirmed in part; reversed in part, and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.