COURT OF APPEALS
DECISION
DATED AND FILED

May 1, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0847-CR **Cir. Ct. No. 01-CF-417**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

LORENZO A. MARES,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dodge County: ANDREW P. BISSONNETTE, Judge. *Affirmed in part; reversed in part*.

Before Vergeront, P.J., Roggensack and Deininger, JJ.

¶1 ROGGENSACK, J. The State appeals a pretrial order granting a motion to suppress statements and evidence.[1] The State contends that the circuit

[1] This is an appeal from a non-final order. *See* WIS. STAT. § 974.05 (2001-02).

court erred by concluding that Lorenzo Mares's confession to fatally stabbing a man was obtained in violation of his Fifth Amendment rights because: (1) Mares knowingly and intelligently waived his ***Miranda***[2] rights; (2) Mares did not unequivocally invoke his right to remain silent during the interview; and (3) Mares's statements were voluntary and the product of a free and rational choice. Accordingly, the State argues that Mares's confession and any derivative evidence, including statements made after a second ***Miranda*** waiver, are admissible.

¶2 Addressing the issues in sequential order, we conclude first that the State proved that Mares knowingly and intelligently waived his ***Miranda*** rights at the outset of the interview. Second, we agree with the circuit court that Mares subsequently re-invoked his right to silence during the interview. Because the police failed to scrupulously honor that right by terminating the interrogation, Mares's confession was procured in violation of his Fifth Amendment right to remain silent as articulated by ***Michigan v. Mosley***, 423 U.S. 96 (1975). However, because statements made after invoking the right to remain silent are not presumed coerced and because there is no evidence in the record that officers employed improperly coercive tactics to procure Mares's confession, we conclude that Mares's statements were voluntarily made and reverse the circuit court on the issue of voluntariness.

[2] *See generally* ***Miranda v. Arizona***, 384 U.S. 436 (1966), prescribing warnings to be given to preserve the Fifth Amendment privilege against testifying against one's self. These warnings are commonly referred to as ***Miranda*** warnings and the right to have them given as ***Miranda*** rights.

¶3 Finally, we turn to the admissibility of both Mares's initial confession and statements made after he signed a second ***Miranda*** waiver. With regard to the initial confession, we conclude that because it was made after Mares invoked his right to silence, it is inadmissible in the prosecution's case-in-chief. However, because "tainted" statements that are not compelled or involuntary may be used for impeachment purposes, Mares's confession is admissible to impeach him if he chooses to testify in his own behalf and we amend the suppression order accordingly. Regarding Mares's subsequent statements given after he signed the second ***Miranda*** waiver, we conclude that pursuant to ***Oregon v. Elstad***, 470 U.S. 298 (1985), his statements are admissible. Because Mares's initial confession was voluntary, there is no Fifth Amendment violation and the "technical" illegality of the first confession does not taint admissions made after the second ***Miranda*** waiver. Accordingly, we reverse the part of the suppression order barring the admissibility of voluntary statements made after Mares signed the second ***Miranda*** waiver.

BACKGROUND

¶4 On December 11, 2001, at approximately 6:30 p.m., Watertown police officers responded to an emergency call regarding a van that had crashed into the side of a house. Inside the van, police officers discovered a man, Abraham Lira, slumped over the wheel of the vehicle with a stab wound to his left chest, from which he subsequently died. The police investigation quickly led to the arrest of Mares. According to Mares, at the time of his arrest, he was "very intoxicated." Officers Kleppin and Hogan, however, testified that Mares did not appear intoxicated or "high" on any type of substance. Accordingly, they did not administer a test for intoxication.

¶5 When Mares arrived at the police department, Kleppin and Hogan questioned him about Lira's death for approximately two hours. Both Kleppin and Hogan were unarmed and wearing street clothes. Mares sat approximately three to four feet from the officers.

¶6 At the outset of the interview, Kleppin asked Mares if he understood English and could read and write the English language. Mares answered yes. Hogan then asked Mares if he was injured or on medication and Mares answered no. Mares was also offered coffee, soda and use of the bathroom if needed. Kleppin then placed a ***Miranda*** waiver form in front of Mares and read him his rights verbatim from the form. Mares testified that he understood his rights and decided to speak with the officers. Kleppin removed the handcuffs and Mares signed and dated the waiver form. Kleppin remained without handcuffs for the duration of the interview.

¶7 During the first twenty minutes of the interview, Mares and Kleppin talked about sports and issues relating to school. Kleppin described Mares as "noticeably nervous" and "uncomfortable" but that he spoke in coherent sentences, did not slur his speech and seemed very intelligent. The officers began to question Mares directly about his altercation with Lira. In response, Mares told the officers "I don't want to do this anymore." According to Mares, the officers ignored his request and continued the interrogation. The officers explained to Mares the "seriousness" of the incident and suggested that he would feel better if he explained his side of the story. In response to their "prompting," Mares again stated, "I don't want to tell you right now," and that he "did not want to talk about this, period." Eventually, however, Mares responded to the officer's "prompting" and admitted to stabbing Lira. The interview ended at 4:45 a.m. Approximately five hours later, at 9:22 a.m., Mares signed a second ***Miranda*** waiver form and

agreed to accompany police to the swamp where he claimed to have buried the knife. The knife was never located.

¶8 Mares moved to suppress his confession and any evidence obtained subsequent to his 9:22 a.m. ***Miranda*** waiver. Mares testified that the officers did not honor his request to stop the interview and that he felt he had no choice but to answer their questions. The circuit court granted his motion on the following grounds: (1) Mares did not knowingly waive his ***Miranda*** rights; (2) Mares "re-invoked" his Fifth Amendment right to silence during the interview and the officers failed to scrupulously honor that right; and (3) Mares's statements were involuntarily made. Accordingly, the circuit court suppressed Mares's custodial statements and any evidence "tainted" by his confession, including statements or evidence obtained during the trip to the marsh. The State appeals the pretrial suppression order.

DISCUSSION

Standard of Review.

¶9 Our analysis involves various issues that we decide under different standards of review. The sufficiency of Mares's ***Miranda*** waiver and whether he invoked his Fifth Amendment right to silence mid-way through his custodial interrogation are questions of constitutional fact that we review under a two-part standard. ***State v. Jennings***, 2002 WI 44, ¶20, 252 Wis. 2d 228, 647 N.W.2d 142. We uphold the circuit court's findings of historical or evidentiary fact unless they are clearly erroneous. ***State v. Henderson***, 2001 WI 97, ¶16, 245 Wis. 2d 345, 629 N.W.2d 613. We review independently the application of those evidentiary facts to federal and state constitutional principles. ***Jennings***, 252 Wis. 2d 228, ¶20.

¶10 Whether Mares's confession was voluntarily made also presents a mixed question of fact and law. *See* ***State v. Clappes***, 136 Wis. 2d 222, 235, 401 N.W.2d 759, 765 (1987). The circuit court's findings of evidentiary or historical fact will not be disturbed unless clearly erroneous. ***Id.*** However, we review *de novo* the application of constitutional principles to the facts as found by the circuit court. ***Id.*** Finally, in reviewing the admissibility of Mares's statements, we will not set aside the circuit court's findings of fact unless they are clearly erroneous. ***State v. Armstrong***, 223 Wis. 2d 331, 352, 588 N.W.2d 606, 615 (1999). However, we must determine the applicable law, which is a legal question that we answer without deference to the circuit court. *See* ***State v. Yang***, 2000 WI App 63, ¶17, 233 Wis. 2d 545, 608 N.W.2d 703. Whether those facts meet the appropriate legal standard presents a question of law that we decide independent of the circuit court. ***Id.***

***Miranda* Waiver.**

¶11 The State argues that the circuit court erred by concluding that it failed to prove by a preponderance of the evidence that Mares knowingly and intelligently waived his ***Miranda*** rights. The State contends that the circuit court found "misconduct and sinister motives where none existed" and that it proved a *prima facie* valid ***Miranda*** waiver that was unrebutted by countervailing evidence. Accordingly, the State argues that evidence obtained as a result of the interrogation can be used against Mares. We agree that Mares initially waived his ***Miranda*** rights.

¶12 To admit into evidence statements made during custodial interrogation, the State must prove by a preponderance of the evidence that the defendant was informed of his ***Miranda*** rights, understood them and intelligently

waived them. ***State v. Lee***, 175 Wis. 2d 348, 359, 499 N.W.2d 250, 255 (Ct. App. 1993). The State establishes a *prima facie* case of valid waiver by showing "that [the] defendant has been told or has read all the rights and admonitions required in ***Miranda***, and the defendant indicates he understands them and is willing to make a statement." ***State v. Hernandez***, 61 Wis. 2d 253, 259, 212 N.W.2d 118, 121 (1973). In the absence of countervailing evidence that a defendant did not knowingly and intelligently waive ***Miranda*** rights, the statement should be admitted into evidence. *See* ***State v. Santiago***, 206 Wis. 2d 3, 28-29, 556 N.W.2d 687, 696-97 (1996).

¶13 The circuit court appeared to rule that the State failed to meet its burden because there was no credible testimony that Mares actually communicated by word or deed that he was willing to talk. We disagree. At the suppression hearing, Detective Kleppin testified that he advised Mares of his rights using a written form and initialed each part of the form as he read it to Mares. He also testified that Mares "appeared to understand his rights" and Mares himself testified that he understood his rights. Finally, Mares signed the waiver form directly under the statement, "I am willing to answer questions at this time without the presence of an attorney" and then proceeded to speak with the officers. The State satisfied its *prima facie* burden of compliance with the ***Miranda*** dictates.

¶14 The circuit court, however, discounted the State's case because: (1) the waiver language was "shrunk down" to ten point type and the officers did not read the "fine print" statement to Mares; (2) Mares said "virtually nothing" for the first twenty minutes of the interview; and (3) it was possible that Mares signed the waiver form because it was the only way to get the handcuffs off. These reasons do not contradict the evidence offered by the State that Mares knowingly and intelligently waived his rights. First, there is no evidence in the record that the

type size of the waiver language adversely affected Mares's ability to understand and knowingly waive his rights. Second, Mares's "hesitancy" to speak does not amount to unwillingness to speak. However, more importantly, Mares never testified that he was unwilling to speak with the officers at the outset of the interview. To the contrary, Mares testified that he "decided to talk to [the officers] originally."

¶15 Finally, the record does not support a finding that the officers used the handcuffs as leverage to force Mares to sign the ***Miranda*** waiver. According to Detective Kleppin, whom the circuit court found most credible on this point, Mares was handcuffed from the time he was arrested until Kleppin finished reading the ***Miranda*** waiver form. According to Kleppin, he removed the handcuffs so that Mares could sign the waiver form because Mares indicated his willingness to do so. Before removing the handcuffs, Kleppin asked Mares if he was "going to give [him] a problem" and Mares answered "no." Mares remained unhandcuffed for the duration of the interview. There is nothing in Kleppin's testimony to suggest that the police "leveraged" the handcuffs to force Mares to sign the waiver. Additionally, Mares never testified that he asked the officers to remove the handcuffs. Accordingly, we conclude that any finding that removal of the handcuffs was used to coerce Mares to sign the ***Miranda*** waiver is clearly erroneous, and that the State met its burden of establishing, by the greater weight of credible evidence, that Mares knowingly and intelligently waived his ***Miranda*** rights.

Right to Remain Silent.

¶16 The State next argues that the circuit court erred by concluding that Mares re-invoked his right to remain silent after the interview had started and that the police failed to scrupulously honor that right. The State contends that because Mares did not unequivocally re-invoke his right to silence, the police were free to continue questioning him. We disagree.

¶17 The Fifth Amendment[3] right to remain silent provides to criminal suspects two distinct protections. ***State v. Ross***, 203 Wis. 2d 66, 73, 552 N.W.2d 428, 431 (Ct. App. 1996). The first occurs subsequent to the arrest but before police questioning. ***Miranda v. Arizona***, 384 U.S. 436, 460 (1966). A suspect may invoke his or her right to remain silent unless the suspect chooses to speak of his or her own free will. ***Id.*** The second occurs once police questioning has commenced. ***Mosley***, 423 U.S. at 103-04. The United States Supreme Court has held that a suspect has the unequivocal right to cut off questioning during the interview. ***Id.*** "Through the exercise of [the] option to terminate questioning [a suspect] can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation." ***Id.*** The State may again interrogate a suspect after he or she has invoked the right to silence provided that the right to silence was "scrupulously honored." ***State v. Hartwig***, 123 Wis. 2d 278, 284, 366 N.W.2d 866, 869 (1985), *citing* ***Mosley***, 423 U.S. at 104. The question we decide here is whether Mares, after waiving his ***Miranda*** rights, (1) later invoked his right

[3] The Fifth Amendment to the United States Constitution provides, "No person … shall be compelled in any criminal case to be a witness against himself." The Fifth Amendment is applied to the states by the Fourteenth Amendment. ***Malloy v. Hogan***, 378 U.S. 1, 3 (1964).

to remain silent during police questioning and (2) whether the police scrupulously honored that right.

¶18 Our determination of whether Mares invoked his right to silence is controlled by the "clear articulation rule" of ***Davis v. United States***, 512 U.S. 452 (1994). *See* ***Ross***, 203 Wis. 2d at 75, 552 N.W.2d at 432. In ***Ross***, we adopted the clear articulation rule as applied to a suspect's invocation of the right to remain silent. ***Id.*** We noted that a "bright line rule" would protect a suspect's Fifth Amendment privilege against compelled self-incrimination, without unduly hampering the need for effective law enforcement. ***Id.*** at 76, 552 N.W.2d at 432. Thus, to invoke the right to silence, a criminal suspect must "articulate his or her desire to remain silent or to cut off questioning sufficiently clearly" that a reasonable officer would understand the statement to be an invocation of the right to silence. ***Id.*** at 78, 552 N.W.2d at 432-33. There are no particular or magic words that a suspect must speak; rather, the oral assertion or non-verbal conduct must be clear and unambiguous. For example, in ***Ross*** we held that a suspect's silence, standing alone, was insufficient to unambiguously invoke the right to remain silent. ***Id.*** at 79, 552 N.W.2d at 433. In contrast, we held in ***State v. Goetsch***, 186 Wis. 2d 1, 519 N.W.2d 634 (Ct. App. 1994) that the statement "I don't want to talk about this anymore" amounted to an invocation of the suspect's right to silence. ***Goetsch***, 186 Wis. 2d at 7-8, 519 N.W.2d at 637.

¶19 Applying the ***Ross*** standard to the facts here, we conclude that Mares unequivocally invoked his right to remain silent after the interview had started. At the motion to suppress, Mares testified that when asked about what occurred in the van with the victim, he told the officers, "I don't want to do this anymore." In response to their continued questions, Mares again stated, "I [am] tired. I don't want to do this anymore." In addition, Detective Kleppin testified

that when confronted about the "incident," Mares said "I don't want to tell you right now" and Sergeant Hogan likewise testified that Mares explained that he "did not want to talk about it at that time." The State argues that the qualifier "right now" renders Mares's statement ambiguous. We disagree. The qualifier "right now" does not alter the fact that Mares did not want to speak to the officers about his interactions with Lira. Moreover, Mares repeatedly asserted this right in response to the officers continued efforts to learn more information about the homicide. We think a reasonable officer would understand Mares's statements to be an invocation of the right to silence. *See* ***Ross***, 203 Wis. 2d at 78, 552 N.W.2d at 432-33. Accordingly, Kleppin and Hogan should have terminated the interview. *See* ***Mosley***, 423 U.S. at 103.

¶20 The State attempts to carve out an exception to Mares's Fifth Amendment protections by arguing that Mares only selectively invocated the right to remain silent. The State argues that under ***State v. Wright***, 196 Wis. 2d 149, 537 N.W.2d 134 (Ct. App. 1995), a suspect's refusal to answer one specific question does not assert an overall right to remain silent and the police are therefore free to continue questioning. ***Wright***, 196 Wis. 2d at 157, 537 N.W.2d at 137. While true in the context of ***Wright***, we disagree with the State's characterization of Mares's statements as "selective invocation" of the right to silence. In ***Wright***, police officers asked Wright a specific question about when he last saw the victim and Wright answered, "I'm going to do what [the public defender] told me and plead the Fifth *on that one*." ***Id.*** at 156, 537 N.W.2d at 137 (emphasis added). We concluded that "any reasonable thinking person" would construe Wright's statement to mean that he was not going to answer that specific question. ***Id.*** at 158, 537 N.W.2d at 138. In contrast, here, the police asked Mares broad, open-ended questions regarding the "main event" under investigation or

"what happened in the van." A reasonable person would not understand Mares's answers to mean that he was "pleading the Fifth" to one specific question, thereby consenting to continued questioning. Accordingly, we affirm the circuit court's conclusion that Mares, in "constitutionally sufficient language," unequivocally invoked his right to remain silent, and the officers should have refrained from further questioning.

¶21 Because we conclude that Mares invoked his right to silence, we next determine whether Kleppin and Hogan "scrupulously honored" that right. The supreme court in ***Hartwig*** set forth a five-factor framework to analyze whether the defendant's right to silence was scrupulously honored: (1) whether the original interrogation was promptly terminated; (2) whether interrogation was resumed after a significant period of time; (3) whether the suspect received ***Miranda*** warnings at the beginning of the subsequent interrogation; (4) whether a different officer resumed the questioning; and (5) whether the subsequent interrogation was limited to a different crime than the previous interrogation. ***Hartwig***, 123 Wis. 2d at 284, 366 N.W.2d at 869 (adopting the five factors from ***Mosley***, 423 U.S. at 105-06). Although the presence or absence of the ***Mosley/Hartwig*** factors is not controlling and the factors do not establish a test that can be "woodenly" applied, it is readily apparent that the police failed to scrupulously honor Mares's right to silence. *See* ***Hartwig***, 123 Wis. 2d at 284-85, 366 N.W.2d at 870.

¶22 With regard to the first factor, the police did not "promptly terminate" the interrogation following Mares's invocation of his right to silence. Kleppin testified that he resumed questioning Mares about "what happened in the van" an average of twenty to forty seconds after Mares stated that he did not want to talk. Sergeant Hogan testified that at first, Mares did not want to speak, but

after some "prompting" he offered information about the altercation. The officers' "promptings" entailed explaining to Mares that they were investigating a serious incident, that it "was in his best interest" to speak to them about it and that he would "feel better and get a weight off his chest if he explained his side of the incident." We agree with the circuit court that the officers' "promptings" were the functional equivalent of an interrogation because they were reasonably likely to elicit an incriminating response from Mares. *See* ***Armstrong***, 223 Wis. 2d at 356-57, 588 N.W.2d at 617 (citing ***Rhode Island v. Innis***, 446 U.S. 291 (1980)). Additionally, the circuit court made a credibility determination that Mares did not just start talking, but rather, his "confession" resulted from the officers' continued interrogation. Because the officers failed to promptly terminate the interrogation, we need not consider the remaining ***Mosley/Hartwig*** factors. We conclude that after the interview began, Mares re-invoked his right to silence and his subsequent inculpatory statements were procured in violation of his Fifth Amendment right to silence. *See* ***Mosley***, 423 U.S. at 103.

Voluntariness.

¶23 The State next argues the circuit court erroneously concluded that Mares's confession was involuntary. The State argues that there is no evidence to support the circuit court's conclusion that the police employed improperly coercive tactics to procure Mares's confession and that it proved by a preponderance of the evidence that his statements were the product of a free and rational choice. We agree.

¶24 To determine whether Mares's confession was voluntarily made, "the essential inquiry is whether the confession was procured via coercive means or whether it was the product of improper pressures exercised by the police."

Clappes, 136 Wis. 2d at 235-36, 401 N.W.2d at 765. We focus on the presence of actual coercion or improper police practices because they are determinative of whether the inculpatory statement was the product of a "free and unconstrained will, reflecting deliberateness of choice." ***Id.*** at 236, 401 N.W.2d at 765 (quoting ***Norwood v. State***, 74 Wis. 2d 343, 364, 246 N.W.2d 801, 812 (1976)). Improper police tactics include questioning a defendant for excessively long periods of time without breaks for food or rest, ***State v. Hoyt***, 21 Wis. 2d 284, 309, 128 N.W.2d 645, 657-58 (1964), threatening a defendant with physical violence or making promises in exchange for cooperation, ***Norwood***, 74 Wis. 2d at 365, 246 N.W.2d at 813, employing relays of interrogators to question a defendant "relentlessly" or conducting questioning so as to "control and coerce the mind of the defendant," ***Phillips v. State***, 29 Wis. 2d 521, 530, 139 N.W.2d 41, 44-45 (1966). If there is no affirmative evidence of improperly coercive tactics, our inquiry ends and the confession is deemed voluntary. ***Clappes***, 136 Wis. 2d at 239-40, 401 N.W.2d at 767. However, if the police employed coercive tactics, we balance the personal characteristics of the defendant against the pressures imposed by the police to induce him or her to respond to the interrogation. ***Id.*** at 236, 401 N.W.2d at 766. The relevant personal characteristics include the suspect's age, education and intelligence, physical and emotional condition and prior experience with the police. ***Id.***

¶25 The circuit court found affirmative evidence of coercive tactics in the following: (1) the seating arrangement during the interrogation deprived Mares of "personal space" because his back was to a wall, the officers were seated approximately four feet away from him and their heads were approximately three feet away from each other; and (2) Mares's handcuffs were not removed until he agreed to sign the ***Miranda*** waiver form. In our view, these are not coercive

tactics or improper police procedures used to induce an involuntary confession. The seating arrangement may have deprived Mares of significant "personal space" but an invasion of "space" does not establish actual coercion. *See* ***State v. Owen***, 202 Wis. 2d 620, 642, 551 N.W.2d 50, 59 (Ct. App. 1996) (holding that the investigators use of "good cop/bad cop" roles, their "confrontational manner," and the invasion of a suspect's space by "getting close to him" were not improper police procedures). Moreover, the approximately four feet of space between Mares and the officers is sufficient to rebut Mares's claim that the absence of a desk between the parties rendered the interrogation coercive or improper. An interrogation is an adversarial process, and although the police must adhere to constitutional mandates, the use of a shared office to conduct an interrogation, where the suspect is seated with his back to the wall, alongside a table, does not add up to police coercion.

¶26 With regard to the circuit court's second finding, as noted earlier, there is no evidence in the record that the officers used the handcuffs as a coercive tactic to force Mares's confession. Detective Kleppin removed the handcuffs shortly after he read Mares his ***Miranda*** rights because Mares indicated that he would sign the waiver form and not cause a disturbance. Mares remained without handcuffs for the duration of the interview. We fail to see the "coercive" role the handcuffs played in Mares's subsequent confession.

¶27 Furthermore, based on our independent review of the circumstances surrounding Mares's confession, we find no additional evidence of coercive tactics or improper pressures exercised by the police to procure a confession. The interrogation lasted approximately two hours and Mares testified that the officers were businesslike but polite during the interview. Mares was offered and declined various amenities, including coffee and soda. The police did not make any

promises of leniency, threats or threaten physical violence. And although Mares had consumed alcohol earlier that night, the circuit court found credible the officer's testimony that Mares did not slur his speech, was coherent and not incapacitated by the alcohol. Finally, although the officers questioned Mares in violation of ***Mosley***, Mares's subsequent statements are not presumed coerced absent evidence of unjust police coercion used to procure such statements. *Cf.* ***State v. Franklin***, 228 Wis. 2d 408, 415, 596 N.W.2d 855, 858 (Ct. App. 1999). Accordingly, we conclude that Mares's statements were voluntarily made and we reverse the circuit court on the issue of voluntariness.

Admissibility.

¶28 The State next argues that the circuit court erred by ordering Mares's custodial statements and "any other evidence tainted by such statements" suppressed for all purposes. With regard to Mares's custodial statements, the State argues that a "tainted" confession that is not compelled or involuntary may be used to impeach a defendant who chooses to testify in his or her own behalf. Additionally, the State argues that because Mares's confession was voluntary, subsequent statements and derivative evidence obtained after Mares was "re-***Mirandized***" are admissible for any purpose. We consider each argument in turn.

1. Mares's Custodial Statements.

¶29 It is well settled that statements obtained in violation of ***Miranda*** may not be used during direct examination. ***Elstad***, 470 U.S. at 306-07. There is a presumption that custodial interrogations are inherently coercive and ***Miranda*** warnings are a prophylactic to insure that the right against compulsory self-incrimination is protected. ***Id.*** at 305. Therefore, failure to administer ***Miranda*** warnings creates a presumption of compulsion that is irrebuttable for purposes of

the prosecution's case-in-chief. However, because the Fifth Amendment prohibits use only of *compelled* testimony, *voluntary* statements taken in violation of ***Miranda*** may be used for impeachment purposes on cross-examination. ***Id.*** at 307.

¶30 In ***Franklin***, we considered whether the ***Miranda*** rule of inadmissibility applied to statements made after a suspect invoked his or her Fifth Amendment right to counsel as construed in ***Edwards v. Arizona***, 451 U.S. 477 (1981). Following the Supreme Court's lead, we held that *voluntary* statements obtained in violation of a suspect's right to counsel may be used to impeach the defendant's conflicting testimony, although inadmissible in the prosecution's case-in-chief. ***Franklin***, 228 Wis. 2d at 412, 596 N.W.2d at 857. We reasoned that because the Fifth Amendment right to counsel was established as "a second layer of prophylactics for the ***Miranda*** right to counsel," ***id.*** at 415 n.3 (citing ***McNeil v. Wisconsin***, 501 U.S. 171, 176 (1991)), an ***Edwards*** violation raises a presumption of compulsion only for the prosecution's case-in-chief. Therefore, absent an affirmative showing of police coercion, voluntary statements obtained after a suspect invoked his or her right to counsel may be used for impeachment purposes. ***Id.*** at 415, 596 N.W.2d at 858. Applying ***Franklin*** to the facts here, we conclude that Mares's statements are admissible for impeachment purposes.[4] Because the officers questioned Mares in violation of his right to remain silent, his subsequent statements are inadmissible in the prosecution's case-in-chief.

[4] We see no difference for purposes of our analysis between a Fifth Amendment violation of a suspect's right to remain silent and his or her right to counsel. The Supreme Court in ***Miranda*** promulgated a set of safeguards to protect a suspect's constitutional privilege against compulsory self-incrimination. Both the right to remain silent and the right to counsel during the interrogation are supported by ***Miranda's*** prophylactic purpose. *See generally* ***Michigan v. Mosley***, 423 U.S. 96 (1975) and ***Edwards v. Arizona***, 451 U.S. 477 (1981).

However, because we have concluded that his confession was voluntary, the statements may be used to impeach Mares if he chooses to testify.

2. Derivative Evidence.

¶31 The final issue is whether the State may use statements in its case-in-chief, made after Mares signed a second ***Miranda*** waiver. During the first interrogation, *after* Mares invoked his right to remain silent, the police learned that Mares buried the knife that he used to stab Lira in a swamp. Approximately five hours after the interrogation ended, Mares signed a second ***Miranda*** waiver form and agreed to show the police where he claimed to have buried the knife. Although the knife was never recovered, the State argues that Mares's statements made subsequent to the second ***Miranda*** waiver are admissible. In contrast, Mares argues that the circuit court properly suppressed evidence obtained during the trip to the marsh because his statements were "tainted" by the initial illegal interrogation and as "fruit of the poisonous tree," are inadmissible. We agree with the State.

¶32 The so-called "fruit of the poisonous tree" doctrine was first articulated in ***Wong Sun v. United States***, 371 U.S. 471 (1963) and operates to exclude evidence and witnesses discovered in violation of the Fourth Amendment of the United States Constitution. The doctrine applies to evidence obtained as a result of an illegal search and seizure and when the "fruit" of a Fourth Amendment violation is a confession. ***Elstad***, 470 U.S. at 306. The doctrine also applies to exclude evidence discovered as a result of a Fifth Amendment violation. ***Id.*** at 308-09. The relevant inquiry here, then, is whether the officer's failure to honor Mares's right to silence "poisons" subsequent admissions made after Mares signed the second ***Miranda*** waiver. We conclude that the two-part inquiry of ***Elstad***,

adopted by the Wisconsin Supreme Court in ***Armstrong***, 223 Wis. 2d at 364-65, 588 N.W.2d at 620, applies to determine the admissibility of Mares's admissions.

¶33 In ***Elstad***, police officers obtained a warrant to arrest Elstad for burglary. ***Elstad***, 470 U.S. at 300. The officers interrogated Elstad at his home and in response to their questions, Elstad admitted his involvement in the burglary. ***Id.*** at 301. The officers then drove Elstad to the police station, where they administered ***Miranda*** warnings for the first time, and Elstad waived his rights. ***Id.*** He made an oral confession that was typed into a written statement which he reviewed, initialed and signed. ***Id.*** At trial, Elstad argued that the officers' failure to administer the ***Miranda*** warning "tainted" the admissibility of his written statement under the ***Wong Sun*** doctrine. ***Id.*** at 302. The Supreme Court rejected application of the "tainted fruit" doctrine holding that it applied only to constitutional violations and "a simple failure to administer ***Miranda*** warnings is not in itself a violation of the Fifth Amendment." ***Id.*** at 307 n.1.[5] The Court explained:

> The Fifth Amendment prohibits use by the prosecution in its case in chief only of *compelled* testimony. … If errors are made by law enforcement officers in administering the prophylactic ***Miranda*** procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself. It is an unwarranted extension of ***Miranda*** to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the

[5] At present, this continues to be a settled principal in Fifth Amendment jurisprudence, despite the Supreme Court's decision in ***Dickerson v. State***, 530 U.S. 428 (2000). However, the Wisconsin Supreme Court's decision on our certification of ***State v. Knapp***, No. 00-2590, 2002 WL 1875068 (Wis. Ct. App. Aug. 15, 2002), *review granted*, 2002 WI 121, 257 Wis. 2d 123, 653 N.W.2d 893 (Wis. Sep. 26, 2002) (No. 00-2590-CR), that raises the question of its continued validity, could affect this part of our analysis.

> investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.

Id. at 306, 309. Therefore, voluntary statements made in violation of ***Miranda*** do not "taint" subsequent statements obtained pursuant to a voluntary and knowing waiver. ***Id.*** at 318.

¶34 Thus, ***Elstad*** creates a two-step inquiry to determine the admissibility of subsequent ***Mirandized*** statements. *See also* ***Yang***, 233 Wis. 2d 545, ¶2. We look first to the statement obtained in violation of ***Miranda*** to determine whether the statement was voluntary. If voluntary, it is only ***Miranda's*** prophylactic rule that is violated and because there is no constitutional violation, the "tainted fruits" doctrine does not apply. "In these circumstances, a careful and thorough administration of ***Miranda*** warnings serves to cure the condition that rendered the unwarned statement inadmissible." ***Elstad***, 470 U.S. at 310-11. The second inquiry, therefore, is whether the subsequent statements were *voluntarily* made after a valid administration and waiver of ***Miranda***. Assuming a valid waiver and no police coercion, the statements are admissible.

¶35 In this case, we are faced with a different factual background than in ***Elstad*** and ***Armstrong*** because Mares re-invoked his right to remain silent subsequent to a valid ***Miranda*** waiver. In our view, however, this factual difference does not require a different outcome. The unequivocal right to terminate questioning during an interrogation is an extension of the prophylactic ***Miranda*** rules established to safeguard the constitutional right against compulsory self-incrimination. *See* ***Mosley***, 423 U.S. at 103-04. The failure to scrupulously honor a suspect's right to remain silent, without more, does not amount to a *per se* constitutional violation. Stated differently, the self-incrimination clause of the

Fifth Amendment prohibits only the use of *compelled* testimony and a ***Mosley*** violation, like a ***Miranda*** violation, does not constitute coercion. Therefore, the admissibility of evidence derived from a statement made after a ***Mosley*** violation is governed by the ***Elstad*** rationale. Accordingly, the failure to honor the right to silence, "unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will," is insufficient to result in an imputation of taint to subsequent statements or evidence gathered. *See* ***Elstad***, 470 U.S. at 309.

¶36 Applying ***Elstad*** to the facts here, we conclude that statements obtained after Mares signed the second ***Miranda*** waiver are admissible for all purposes. We have already concluded that Mares's initial inculpatory statements were voluntarily made; the officers engaged in no improperly coercive tactics to procure his confession. Because the officers' failure to honor Mares's invocation of the right to silence was not a Fifth Amendment constitutional infringement, there is no poisonous tree and, consequently, no tainted fruit. Accordingly, we next examine whether Mares's subsequent statements were voluntarily given after a valid administration of ***Miranda*** warnings and a knowing and voluntary waiver of the constitutional privilege that ***Miranda*** protects. *See* ***Yang***, 233 Wis. 2d 545, ¶28.

¶37 On appeal, Mares does not dispute the State's claim that he "intelligently and knowingly" waived his ***Miranda*** rights in preparation to go with the officers to search for the knife or that statements made subsequent to the waiver were voluntary. In fact, he does not raise or argue the issue at all. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285, 292 (Ct. App. 1998) ("[I]n order for a party to have an issue considered by this court, it must be raised and argued within its brief."). Because we conclude that

Mares's statements were given voluntarily after a valid ***Miranda*** waiver, we reverse the part of the order suppressing Mares's statements made subsequent to the second ***Miranda*** waiver.

CONCLUSION

¶38 Because we conclude that: (1) the State proved by a preponderance of the evidence that Mares knowingly and intelligently waived his ***Miranda*** rights; (2) Mares unequivocally re-invoked his right to silence during the interview and the officers failed to honor that right; and (3) Mares's initial confession was voluntarily made, we reverse the circuit court and amend the suppression order to reflect these decisions. Therefore, statements made after Mares invoked his right to silence are admissible for impeachment purposes only and the "technical" illegality of the first confession does not taint subsequent admissions. Accordingly, any voluntary admissions made after Mares waived his ***Miranda*** rights a second time are admissible.

By the Court.—Order affirmed in part; reversed in part.

Not recommended for publication in the official reports.