APPENDIX A

Supreme Court of Wisconsin

STATE of Wisconsin, Plaintiff-Respondent,

v.

Daniel J.H. BARTELT, Defendant-Appellant-Petitioner

No. 2015AP2506-CR

Oral Argument: November 14, 2017
Opinion Filed: February 20, 2018

Appeal from Circuit Court, Washington County, Todd K. Martens, Judge (L.C. No. 2013CF276)

For the defendant-appellant-petitioner, there were briefs and an oral argument by Leon W. Todd, assistant state public defender.

For the plaintiff-respondent, there was a brief by Amy C. Miller, assistant solicitor general, Brad D. Schimel, attorney general, Misha Tseytlin, solicitor general, and Ryan J. Walsh, chief deputy solicitor general. There was an oral argument by Amy C. Miller.

PATIENCE DRAKE ROGGENSACK, C.J.

¶1 This review concerns the point in time at which a person is "in custody" for purposes of *Miranda*.[1] Daniel J.H. Bartelt asks us to overturn a decision of the court of appeals, affirming the circuit court's[2] judgment entered in favor of the State regarding Bartelt's motion to suppress incriminating

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[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966); *cf. Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L.Ed.2d 378 (1981).

[2] The Honorable Todd K. Martens of Washington County, presided.

statements, and concluding that Bartelt was not in custody at the time the statements were made.

¶2 Bartelt presents two issues: first, whether Bartelt's confession to a serious crime transformed his custody status from noncustodial to "in custody;" and second, whether Bartelt's request for counsel was unequivocal such that police officers violated his Fifth Amendment rights when they questioned him the following day without counsel present.

¶3 On the first issue we conclude that, under the totality of the circumstances attendant to his interview, Bartelt's confession did not transform his custody status. Rather, Bartelt was not in custody until Detectives Joel Clausing and Aaron Walsh of the Washington County Sheriff's Department took his cell phone, approximately ten minutes after his confession, and instructed him to remain in the interview room. Because we determine that Bartelt was not in custody until this point, which was after his alleged request for counsel, we need not and do not reach the issue of whether his alleged request for counsel was unequivocal.

¶4 Accordingly, we affirm the court of appeals.

I. BACKGROUND

¶5 This case arises from two crimes committed in July 2013. On July 12, 2013, M.R. was assaulted by a male suspect with a knife while walking her dog in Richfield Historical Park in the Village of Richfield. M.R. was tackled to the ground and suffered several knife wounds before disarming the suspect, who fled the scene in a blue Dodge Caravan. Three days later, on July 15, 2013, Jessie Blodgett, a friend and former girlfriend of Bartelt, was found dead in her home in the City of Hartford. According to prelimi-

nary autopsy findings, the cause of death was ligature strangulation.

¶6 As of July 16, 2013, Clausing and Detective Richard Thickens of the Hartford Police Department had identified Bartelt as a person of interest in the attack on M.R. Earlier that month, a deputy had noticed a blue Dodge Caravan at the same park and had run the license plate, which revealed that the vehicle was registered to Bartelt's parents. Police learned that the Bartelts had a son, and were then able to match Bartelt's photograph from the Wisconsin Department of Transportation with the composite sketch drawn at M.R.'s direction. Clausing contacted Bartelt around 5:00 p.m. on July 16, and told him that the police were investigating an incident, and that they needed to speak with him. Bartelt was "very compliant," and agreed to meet with detectives at the Slinger Police Department.

¶7 The Slinger Police Department is located inside a municipal building that it shares with various other offices and departments. There is one main entrance to the building. Once inside, a separate entrance leads to the police department. Neither the main door to the building nor the door to the police department is secured during normal business hours, and there are no metal detectors or other security screening devices. Inside the police department, another door leads to the "internal portion" of the department. This door is locked from the outside, but one can freely exit. The interview room is located about twenty-five feet inside this secured area. The room is thirteen and one-half feet by ten and one-half feet, and contains a table, three chairs and a

window. The room can be accessed by either of two doors, neither of which can be locked.

¶8 Bartelt was dropped off by two friends at the Slinger Police Department around 5:12 p.m. His friends waited outside. Clausing testified that Bartelt was escorted to the interview room but was not searched. Bartelt chose the seat on the far side of the table, while Clausing sat at the end, and Walsh sat opposite Bartelt. Clausing and Walsh were wearing civilian clothes; however, they both had their badges displayed on their belts, as well as their service weapons. Clausing testified that one of the doors to the room was left open. Unbeknownst to Bartelt, the interview was recorded by both audio and visual means.

¶9 Clausing began the interview by telling Bartelt that he was not in trouble, he was not under arrest, and he could leave at any time. Clausing did not read Bartelt his *Miranda* rights. Bartelt, who had just come from the Blodgett residence to pay his respects to the family, believed the police were meeting with him about Blodgett's murder. However, Clausing explained that law enforcement was investigating an attack that had occurred at Richfield Historic Park on the previous Friday. Bartelt was asked a number of preliminary questions and initially denied any involvement. Bartelt stated that he had been with his girlfriend on the day in question, although he could not "remember any specifics." Clausing then explained that cell phones "are kind of like GPS's," and told Bartelt, "I don't want any lies."

¶10 Clausing then observed some scrapes and a cut on Bartelt's hand and arm. Bartelt stated he did not remember how he scraped his arm, but that he

had stabbed his hand "with a screw at work." The following exchange then occurred:

> DET. CLAUSING: ... So what do you think evidence is?
> MR. BARTELT: Incriminating items, documents.
> DET. CLAUSING: First—but I'm more of a nuts-and-bolts type of guy. Like, what would you consider to be evidence?
> MR. BARTELT: Well—
> DET. CLAUSING: Fingerprints?
> MR. BARTELT: Yeah.
> DET. CLAUSING: Okay. Fibers? Hairs?
> MR. BARTELT: Yeah.
> DET. CLAUSING: Any DNA? You know, footwear impressions?
> MR. BARTELT: Yeah.
> DET. CLAUSING: Witness statements, right? Video surveillance, stuff like that, right?
> MR. BARTELT: Yeah.
> DET. CLAUSING: Is there any evidence that we just talked about which would show that you would be in this park at the time of this incident that had occurred? Is there any evidence out there that would show that?
> MR. BARTELT: I don't think so ... What is this about?

¶11 After reminding Bartelt that police were investigating an incident at Richfield Historical Park, Clausing said, "What if I were to tell you that there might be something that links you there." Clausing then proceeded to explain "Locard's exchange principle," which holds that the perpetrator of a crime will bring something into the crime scene—such as fin-

gerprints, sweat, DNA, or clothing fibers—and leave it behind. The detectives added that they had found evidence "from the person that was out there," which needed to be analyzed by the state crime laboratory.

¶12 Clausing next told Bartelt that they had an eyewitness, stating, "I would hate to put down your picture in front of the eyewitness and have them say, that's the guy that was out there." Further, Clausing stated, "I can prove that you were out there. It's not just a tip. I can prove it. And all I'm getting at is that if you were out there, just talk to us about what happened or what you saw or what you observed or whatever." Walsh told Bartelt they knew that his vehicle had been spotted at the park on several occasions when Bartelt was supposed to be at work. Bartelt admitted that he had been laid off for several months, and that the injury was actually the result of a cooking accident.

¶13 At this time Clausing moved his chair closer to Bartelt. When Clausing's face was about two feet from Bartelt's, Clausing told him, "No more lies. It just makes things worse. It is spiraling out of control right now.... Nobody in their right mind would lie about cutting themselves if it happened at home cooking.... What happened? Just be honest." Bartelt admitted that he had been to the park before and that he had seen the sketch on television, but that "it wasn't me."

¶14 Walsh then urged Bartelt to help bring closure to M.R. "Daniel, the truth is going to help us bring some resolution to this for everybody involved.... We have one scared person out there right now ... and the easiest way to put some resolution to this is [for] the [ ] person that did this to take re-

sponsibility." Walsh added that he could understand why someone would do this, "especially if the person that did it explains to us what they were thinking, where they were in their life." For example, Bartelt had lost his job and hid that from his parents, and he had dropped out of college after only one semester. Walsh stated that "when things are not going well for people, they do things that are very out of character." He added, "I think you are a good person ... [g]ood people can explain things away and we can understand why they do things. So tell us about the park."

¶15 Following a lengthy narrative from Clausing about the two types of people in this situation—those who take responsibility and those who say "prove it"—Bartelt admitted to being at the park and going "after that girl" because he "wanted to scare someone." Bartelt told the officers that he had been reading when he saw M.R., and in the "spur of the moment," he decided to "run at her and knock her down and scare her." Bartelt admitted there was no real explanation or motive for the attack; he was "just numb" and scared because "life scares me." Bartelt targeted M.R. because "[t]here was no one else there." Following this admission, Clausing asked Bartelt if he would be willing to provide a written statement of confession. Walsh explained that the written statement would be Bartelt's chance to apologize. When Bartelt asked what would happen after he gave his statement, Clausing responded, "I can't say what happens then. We'll probably have more questions for you, quite honestly." Clausing later testified that, once Bartelt had confessed, he "was going to be under arrest, and he probably wasn't free to get up and leave."

¶16 It was at this point that Bartelt asked, "Should I or can I speak to a lawyer or anything?" Clausing told him, "Sure, yes. That is your option." Bartelt responded, "I think I'd prefer that." At 5:45 p.m., roughly 33 minutes after Bartelt arrived at the station for questioning, Clausing and Walsh suspended the interview, took Bartelt's cell phone, and left the room. When the detectives returned seven or eight minutes later, Clausing told Bartelt he was under arrest, handcuffed him, and searched him. Bartelt was then transported to the Washington County Jail.

¶17 Clausing testified that, during the course of the interview, both he and Walsh spoke in a conversational tone, which did not change even after Bartelt's admission. Neither detective ever made reference to or unholstered their weapons. Bartelt never asked to use the restroom or take a break. At one point during the interview Clausing gave Bartelt permission to answer his cell phone, which Bartelt declined to do.

¶18 The following day, on July 17, 2013, Bartelt was brought to the interview room at the Washington County Sheriff's Department to be questioned by Thickens and Detective James Wolf regarding his relationship with Blodgett. Before commencing with questioning, Thickens read Bartelt his *Miranda* rights, which Bartelt knowingly and voluntarily waived.

¶19 Bartelt was questioned for approximately 90 minutes about his relationship with Blodgett and his whereabouts on the day of Blodgett's death. Bartelt denied being at the Blodgett residence on July 15, 2013, or having any knowledge of Blodgett's death.

Bartelt stated that on the morning of July 15 he had left his house at 6:30 a.m. and drove "all over" before spending a few hours at Woodlawn Union Park. Bartelt then asked for an attorney, at which point the questioning stopped.

¶20 Thickens later drove to Woodlawn Union Park to investigate, and in doing so he collected garbage from the park's receptacles. In one container he found a Frosted Mini-Wheats cereal box containing paper toweling, numerous types of rope and tape, and antiseptic wipes with red stains. One of the ropes later revealed DNA that belonged to both Bartelt and Blodgett, and which matched the ligature marks on Blodgett's neck. Another rope matched the ligature marks on her wrists and ankles. Based on this evidence and the confession Bartelt made during his first interview, Bartelt was charged with attempted first-degree intentional homicide, first-degree reckless endangerment, and attempted false imprisonment for the attack on M.R., as well as first-degree intentional homicide for the murder of Blodgett.

¶21 Bartelt moved to suppress his statements, and any evidence derived from them, on the grounds that the officers had violated his *Miranda* rights when they questioned him. The circuit court denied Bartelt's motion, concluding that at the time of his July 16, 2013, interview, Bartelt had voluntarily agreed to speak with police. The circuit court concluded that Bartelt was not in custody until after he had requested an attorney, roughly ten minutes after his confession. Therefore, no *Miranda* warnings were necessary with respect to the July 16 interview, and police were free to initiate questioning on July

17 because "an assertion of *Miranda* ... which a person makes while they are not in custody, does not prospectively prohibit law enforcement from attempting to interview an individual later." Further, with respect to the July 17 interview, the circuit court found that Bartelt was properly given his *Miranda* warning, which he voluntarily waived.

¶22 Following the denial of Bartelt's suppression motion, the circuit court ordered that the Blodgett homicide charge be separated from the charges related to M.R. After a seven-day jury trial, Bartelt was found guilty of Blodgett's murder. Consequently, he was sentenced to life imprisonment without the possibility of release to extended supervision. Shortly thereafter, the parties reached a plea agreement regarding the attempted murder, reckless endangerment, and false imprisonment charges. In exchange for Bartelt's guilty plea to first-degree reckless endangerment, the State agreed to dismiss and read-in the remaining counts, and Bartelt was sentenced to five years' imprisonment and five years' extended supervision consecutive to his life sentence.

¶23 Bartelt appealed his murder conviction on the grounds that the circuit court improperly denied his suppression motion. Specifically, Bartelt argued that once he confessed to attacking M.R., a reasonable person in his circumstances would have believed he was not free to leave the station, thereby transforming the non-custodial interview into a custodial interrogation. Bartelt therefore argued that all statements made after his admissions about M.R. were inadmissible under the principles of *Miranda* and *Edwards*. As a consequence, Bartelt alleges that detectives violated his Fifth Amendment rights when

they approached him to question him about Blodgett's murder without counsel being present. Under the exclusionary rule,[3] Bartelt alleged that all derivative evidence discovered as a result of his statements should have been suppressed.[4]

¶24 The court of appeals rejected Bartelt's arguments and affirmed the circuit court's judgment. Bartelt sought review, which we granted. For the reasons explained below, we affirm the court of appeals.

II. DISCUSSION

A. Standard of Review

¶25 A determination of when custody begins presents a question 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. The circuit court's findings of historical fact will be upheld unless they are clearly erroneous. *State v. Henderson*, 2001 WI 97, ¶16, 245 Wis. 2d 345, 629 N.W.2d 613. Whether those findings support a determination of custody for purposes of *Miranda* is a question of law that we independently review. *Id.*

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[3] The exclusionary rule was first adopted by the United States Supreme Court in *Weeks v. United States*, 232 U.S. 383, 34 S. Ct. 341, 58 L.Ed. 652 (1914), which held that evidence obtained in violation of the Fourth Amendment is inadmissible. This holding was expanded to include state court proceedings in *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L.Ed.2d 1081 (1961). However, Wisconsin courts have aligned themselves with the federal rule since long before the *Mapp* holding. *See Hoyer v. State*, 180 Wis. 407, 417, 193 N.W. 89 (1923).

[4] *See State v. Knapp*, 2005 WI 127, ¶2, 285 Wis. 2d 86, 700 N.W.2d 899 ("Where physical evidence is obtained as the direct result of an intentional *Miranda* violation, we conclude that our constitution requires that the evidence must be suppressed.").

B. *Miranda* and Custody

¶26 The Fifth Amendment of the United States Constitution states that "[no person] shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...." We have interpreted Article I, Section 8(1)[5] of the Wisconsin Constitution consistent with the United States Supreme Court's interpretation of the Fifth Amendment. *State v. Ward*, 2009 WI 60, ¶18 n.3, 318 Wis. 2d 301, 767 N.W.2d 236.

¶27 In 1966, the Supreme Court held that the Fifth Amendment requires law enforcement to inform suspects of their rights to remain silent and to have an attorney present during custodial interrogations. *Miranda v. Arizona*, 384 U.S. 436, 458, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).[6] These warnings are required because "[t]he circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of [the suspect]." *Id.* at 469, 86 S. Ct. 1602; *see also State v. Quigley*, 2016 WI App 53, ¶31, 370 Wis. 2d 702, 883 N.W.2d 139 ("[W]hen a suspect is in police custody, there is a heightened risk of obtaining statements that 'are not the product

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[5] Article I, Section 8(1) reads: "[n]o person may be held to answer for a criminal offense without due process of law...."

[6] "[The suspect] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda*, 384 U.S. at 479, 86 S. Ct. 1602. If the accused indicates that he or she wishes to remain silent, questioning must stop. If he or she requests counsel, questioning must stop until an attorney is present. *Id.* at 474, 86 S. Ct. 1602.

of the suspect's free choice.'" (internal citation omitted)).

¶28 In *Edwards*, the Supreme Court added a second layer of protection to the *Miranda* right to counsel by fashioning a bright-line rule requiring law enforcement to immediately cease questioning once a suspect has asserted his or her right to counsel during a custodial interrogation. Further,

> [W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.

Edwards v. Arizona, 451 U.S. 477, 484, 101 S. Ct. 1880, 68 L.Ed.2d 378 (1981). Stated otherwise, once a suspect has invoked his Fifth Amendment right to counsel, the *Miranda-Edwards* rule prohibits police from engaging in subsequent, uncounseled interrogations regarding the same or separate investigations. *Arizona v. Roberson*, 486 U.S. 675, 677-78, 108 S. Ct. 2093, 100 L.Ed.2d 704 (1988).[7]

¶29 Over the years, particular emphasis has been placed on when a suspect may effectively invoke his or her Fifth Amendment rights. *Miranda* stated that "[a]n individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver." *Miranda*, 384

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[7] However, if it is the accused who initiates further communication with the police, courts typically will conclude that a valid waiver has been made. *State v. Kramar*, 149 Wis. 2d 767, 785-86, 440 N.W.2d 317 (1989).

U.S. at 470, 86 S. Ct. 1602. The Supreme Court later clarified this statement, noting that the Court has "never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation'...." *McNeil v. Wisconsin*, 501 U.S. 171, 182 n.3, 111 S. Ct. 2204, 115 L.Ed.2d 158 (1991). The Court continued:

> If the *Miranda* right to counsel can be invoked at a preliminary hearing, it could be argued, there is no logical reason why it could not be invoked by a letter prior to arrest, or indeed even prior to identification as a suspect. Most rights must be asserted when the government seeks to take the action they protect against. The fact that we have allowed the *Miranda* right to counsel, once asserted, to be effective with respect to future custodial interrogation does not necessarily mean that we will allow it to be asserted initially outside the context of custodial interrogation, with similar future effect.

Id.

¶30 These Supreme Court decisions explain that the right to counsel may not be invoked until a suspect is "in custody." Wisconsin courts interpret Article I, Section 8 of the Wisconsin Constitution consistent with the Supreme Court's interpretation of the Fifth Amendment. "*Miranda* and its progeny are aimed at dispelling the compulsion inherent in custodial surroundings. Thus, the *Miranda* safeguards apply only to custodial interrogations" under both constitutions. *State v. Pheil*, 152 Wis. 2d 523, 530-31,

449 N.W.2d 858 (Ct. App. 1989) (citation omitted).[8] "[U]nless a defendant is in custody, he or she may not invoke the right to counsel under *Miranda*." *State v. Kramer*, 2006 WI App 133, ¶9, 294 Wis. 2d 780, 720 N.W.2d 459. We therefore turn our attention to what "in custody" means such that an invocation of the right to counsel becomes immediately effective.

¶31 In *Miranda*, the Supreme Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444, 86 S. Ct. 1602. The test to determine whether a person is in custody under *Miranda* is an objective test. *State v. Lonkoski*, 2013 WI 30, ¶27, 346 Wis. 2d 523, 828 N.W.2d 552. The inquiry is "whether there is a formal arrest or restraint on freedom of movement of a degree associated with a formal arrest." *Id.* (quoting *State v. Leprich*, 160 Wis. 2d 472, 477, 465 N.W.2d 844 (Ct. App. 1991)); *see also California v. Beheler*, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L.Ed.2d 1275 (1983) (per curiam) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 50 L.Ed.2d 714 (1977)). Looking at the totality of the circumstances, courts will consider whether "a reasonable person would not feel free to terminate the interview and leave the scene." *State v. Martin*, 2012 WI 96, ¶33, 343 Wis. 2d 278, 816 N.W.2d 270 (citing

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[8] This exact language has been cited in numerous subsequent decisions. *See, e.g., State v. Kramer*, 2006 WI App 133, ¶9, 294 Wis. 2d 780, 720 N.W.2d 459 (quoting *State v. Hassel*, 2005 WI App 80, ¶9, 280 Wis. 2d 637, 696 N.W.2d 270).

Thompson v. Keohane, 516 U.S. 99, 112, 116 S. Ct. 457, 133 L.Ed.2d 383 (1995)).

¶32 We consider a variety of factors to determine whether under the totality of the circumstances a reasonable person would feel at liberty to terminate an interview and leave. Such factors include: the degree of restraint; the purpose, place, and length of the interrogation; and what has been communicated by police officers. *State v. Blatterman*, 2015 WI 46, ¶¶30, 31, 362 Wis. 2d 138, 864 N.W.2d 26. "When considering the degree of restraint, we consider: whether the suspect is handcuffed, whether a weapon is drawn, whether a frisk is performed, the manner in which the suspect is restrained, whether the suspect is moved to another location, whether questioning took place in a police vehicle, and the number of officers involved." *State v. Morgan*, 2002 WI App 124, ¶12, 254 Wis. 2d 602, 648 N.W.2d 23.

¶33 If we determine that a suspect's freedom of movement is curtailed such that a reasonable person would not feel free to leave, we must then consider whether "the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Howes v. Fields*, 565 U.S. 499, 509, 132 S. Ct. 1181, 182 L.Ed.2d 17 (2012). In other words, we must consider whether the specific circumstances presented a serious danger of coercion, because the "freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody." *Id*. (citation omitted). Importantly, a noncustodial situation is not converted to one in which *Miranda* applies simply because the environment in which the questioning took place was coercive. *Mathiason*, 429 U.S.

at 495, 97 S. Ct. 711. "Any interview of one suspected of a crime by a police officer will have coercive aspects to it ... [b]ut police officers are not required to administer *Miranda* warnings to everyone whom they question." *Id.* Therefore, "*Miranda* warnings are not required 'simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.'" *Beheler*, 463 U.S. at 1125, 103 S. Ct. 3517 (citing *Mathiason*, 429 U.S. at 495, 97 S. Ct. 711).[9] And finally, "the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v. California*, 511 U.S. 318, 323, 114 S. Ct. 1526, 128 L.Ed.2d 293 (1994).

C. Bartelt and Custody

¶34 We now turn to whether, under the totality of the circumstances of this case, Bartelt was in custody at any time prior to Clausing taking his cell phone and telling him to remain in the interrogation room. Although the parties agree that the interview was not initially custodial, Bartelt argues that his confession to the attack on M.R. transformed his custody status into one in which a reasonable person

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[9] The oft-used example of a situation in which one is physically detained but not in custody is that of a *Terry* stop or roadside traffic stop. *See Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968); *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L.Ed.2d 317 (1984). In *Berkemer*, the Supreme Court analogized traffic stops to *Terry* stops, concluding that the "noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of *Miranda*." *Berkemer*, 468 U.S. at 440, 104 S. Ct. 3138.

would not have felt free to leave. As a result, all further questioning should have ceased once Bartelt invoked his right to counsel.[10] Accordingly, Bartelt alleges his constitutional rights were violated when detectives from the City of Hartford approached him the following day about the murder of Blodgett without counsel present. Bartelt therefore argues that, under the exclusionary rule, all statements made during the July 17 interview and the evidence that was derived from those statements must be suppressed.

¶35 First, we consider the circumstances surrounding Clausing and Walsh's interrogation of Bartelt. Second, given those circumstances, we consider whether a reasonable person in Bartelt's position would have felt that he or she was at liberty to terminate the interview and leave. "Once the scene is set and the players' lines and actions are reconstructed, [we] must apply an objective test to resolve 'the ultimate inquiry': '[was] there a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest[?]'" *Keohane*, 516 U.S. at 112, 116 S. Ct. 457 (quoting *Beheler*, 463 U.S. at 1125, 103 S. Ct. 3517) (quoting *Mathiason*, 429 U.S. at 495, 97 S. Ct. 711); *see also Lonkoski*, 346 Wis. 2d 523, ¶27, 828 N.W.2d 552.

]¶36 As to Bartelt's custody status, the parties agree that Bartelt was not in custody at the beginning of the interview and up until the point that he confessed to attacking M.R. Bartelt came to the Slinger Police Department voluntarily. He was dropped off by two friends who waited for him in the

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[10] This argument assumes, although we do not decide, that Bartelt's request for counsel was unequivocal.

parking lot, indicating that a reasonable person in Bartelt's position would have believed he or she would be free to leave at the end of the interview.

¶37 Once inside the building, Bartelt was taken through a secured door, locked from the outside only, to the internal portion of the police department. He was then led to an interview room that had two doors, neither of which could be locked, and one of which was left ajar during the interview itself. *See Lonkoski*, 346 Wis. 2d 523, ¶¶30-32, 828 N.W.2d 552 (holding that where defendant voluntarily came to police department, interview room was locked for entry purposes only, and door was repeatedly opened, defendant was not in custody). The detectives did not search Bartelt, and he was not restrained in any way. All of these circumstances imply he was not in custody. *Id.*, ¶32 (holding that lack of handcuffs and failure to search indicates lack of custody).

¶38 At the outset of the interview, Clausing told Bartelt that he was "not in trouble" and that he was "not under arrest." *See Mathiason*, 429 U.S. at 495, 97 S. Ct. 711 (considering that defendant came to police department voluntarily and was immediately informed that he was not under arrest were indicative of lack of custody). Bartelt showed that he understood that when he nodded and responded, "that's good." Clausing further advised Bartelt that he could "get up and walk out of here any time [he] want[ed]." *See Quigley*, 370 Wis. 2d 702, ¶¶40-41, 883 N.W.2d 139 (holding that a police officer's advisements that an interviewee was not under arrest and was free to leave are "of substantial importance," and further concluding that a suspect's acknowledgement and lack of objection are "highly significant"). Additional-

ly, Clausing testified that neither he nor Detective Walsh ever raised their voice or made a show of authority, such as referencing or removing their weapons.[11] *Lonkoski*, 346 Wis. 2d 523, ¶32, 828 N.W.2d 552. When Bartelt's phone rang, he was given the opportunity to answer it. *See United States v. LeBrun*, 363 F.3d 715, 722 (8th Cir. 2004) ("While the mere possession of a cellular phone without more will not transform a custodial interrogation into a noncustodial one, it is relevant to the question of whether the interview was coercive and whether a reasonable person in the same circumstances would feel restrained."). And finally, the interview lasted only thirty-five minutes. *Lonkoski*, 346 Wis. 2d 523, ¶31, 828 N.W.2d 552 (holding that a "relatively short" interview of approximately thirty minutes indicated lack of custody). We agree that these factors support the conclusion that, prior to his confession, there was no restraint on Bartelt's freedom to the degree associated with an arrest.

¶39 Nonetheless, Bartelt argues that, as the interview progressed, he was increasingly treated as though he were the target of a serious felony investigation. At the outset of the interview, Clausing told Bartelt that he was investigating an "incident" that had occurred in Richfield Historical Park on the previous Friday. He did not specify the nature of the incident, nor did he accuse Bartelt of being involved. However, after Bartelt's initial denials and hesitations, the detectives began to insinuate that not only

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[11] At one point, having caught Bartelt in a lie about his employment and the nature of the cut on his hand, Clausing moved his chair closer to Bartelt, from approximately four or five feet away to within two feet. The ambiance of the interview remained otherwise unchanged.

had Bartelt been at the park, but that they suspected—and indeed had evidence—that Bartelt was involved in an attack in the park. The detectives said they knew what happened and just wanted to understand why. Clausing testified that he and Walsh were attempting to minimize Bartelt's moral liability by offering justifications for his behavior. Bartelt argues that the inherently coercive nature of the interview, coupled with the fact that the detectives essentially told Bartelt they believed he was guilty, created an environment such that from the moment Bartelt confessed, no reasonable person would have felt free to leave.

¶40 The court of appeals acknowledged that the detectives "applied some psychological pressures on Bartelt to persuade him to confess...." *State v. Bartelt*, 2017 WI App 23, ¶35, 375 Wis. 2d 148, 895 N.W.2d 86. We agree that this factor tends to favor custody. However, when combined with all of the other circumstances present here,[12] neither the use of certain interrogation techniques nor that the interview took place at a police station is enough to conclude that Bartelt could not have terminated the interview and left, even after his confession.

¶41 In support of this conclusion, the court of appeals cited to an Eighth Circuit decision, *United States v. LeBrun*, which itself relied heavily on both *Mathiason* and *Beheler*. In *LeBrun*, the suspect in a felony murder voluntarily agreed to accompany police to a nearby patrol office. As they arrived, LeBrun was told that he was not under arrest, that he was free to terminate the interview at any time, and that he was free to leave at any time. *LeBrun*,

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[12] *See supra* ¶¶35-36.

363 F.3d at 718. LeBrun was led to a windowless interview room, where the police used psychological ploys to facilitate a confession. For example, the agents told LeBrun that he was the prime suspect, and that they had significant evidence against him. However, at no point did the officers shout or use physical force, and LeBrun was not restrained in any way.

¶42 After thirty-three minutes of questioning, LeBrun confessed to the crime. Id. In concluding that LeBrun was not in custody before, during, or after his confession, the Eighth Circuit reiterated that "[n]ot every confession obtained absent the *Miranda* warnings is inadmissible." *Id.* at 720 (citing *Mathiason*, 429 U.S. at 495, 97 S. Ct. 711). The critical inquiry, the court concluded, "is not whether the interview took place in a coercive or police dominated environment, but rather whether the defendant's 'freedom to depart was restricted in any way.' " *Id.* (citing *Mathiason*, 429 U.S. at 495, 97 S. Ct. 711).[13]

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[13] In *Mathiason*, a police officer contacted Mathiason after he had been identified as a potential suspect by a burglary victim. The officer asked Mathiason where it would be convenient to meet, and they agreed to meet at the state patrol office. Once Mathiason arrived, the officer led Mathiason to an office, where he was told that he was not under arrest. During the course of the interview, the officer told Mathiason that he was a suspect and falsely indicated that police had discovered his fingerprints at the scene of the crime. The Supreme Court of Oregon overturned Mathiason's conviction, holding that the interrogation took place in a coercive environment such that Mathiason was in custody. The Supreme Court of the United States reversed:

> [T]here is no indication that the questioning took place in a context where respondent's freedom to depart was restricted in any way. He came voluntarily to the police station, where he was immediately informed that he was not under arrest. At the close of a ½-hour interview

"In answering this question, we look at the totality of the circumstances while keeping in mind that the determination is based 'on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.' " *Id.* (citing *Stansbury*, 511 U.S. at 322-23, 114 S. Ct. 1526). The Eighth Circuit concluded that "the purportedly coercive aspects of [the] interview are largely irrelevant to the custody determination and that the district court erred in giving such great weight to certain facts...." *Id.* at 720-21.

¶43 This issue was similarly discussed in *Beheler*, where the defendant, having been told he was not under arrest, accompanied police to the station for questioning. Beheler was not provided a *Miranda* warning, and he ultimately confessed during the course of the thirty-minute interview. The Supreme Court concluded that, given the totality of the circumstances, Beheler was neither taken into custody nor significantly deprived of his freedom of action. In so holding, the Court reiterated that a noncustodial situation is not converted to a custodial situation simply because the questioning took place in a coercive environment. *Beheler*, 463 U.S. at 1124, 103 S. Ct. 3517 (citing *Mathiason*, 429 U.S. at 495, 97 S. Ct. 711).

> respondent did in fact leave the police station without hindrance. It is clear from these facts that Mathiason was not in custody "or otherwise deprived of his freedom of action in any significant way."

Oregon v. Mathiason, 429 U.S. 492, 495, 97 S. Ct. 711, 50 L.Ed.2d 714 (1977).

¶44 As the court in *LeBrun* aptly noted, "*Mathiason* and *Beheler* teach us that some degree of coercion is part and parcel of the interrogation process and that the coercive aspects of a police interview are largely irrelevant to the custody determination except where a reasonable person would perceive the coercion as restricting his or her freedom to depart." *LeBrun*, 363 F.3d at 721. Furthermore, presenting a suspect with incriminating suggestions does not automatically convert an interview into a custodial interrogation. *United States v. Jones*, 523 F.3d 1235, 1241 (10th Cir. 2008).

¶45 Given the totality of the circumstances presented herein, we conclude that Bartelt was not in custody at the time of his confession.

¶46 We now turn to Bartelt's argument that from the moment of his confession no reasonable person in his position would have felt free to terminate the interview and leave. In answering this inquiry, the court of appeals focused on whether, given the totality of the circumstances, the environment of the interview after Bartelt's confession "present[ed] the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Howes*, 565 U.S. at 509, 132 S. Ct. 1181. The court of appeals concluded:

> [A] defendant making an incriminating statement does not necessarily transform a noncustodial setting to a custodial one. Indeed, "no Supreme Court case supports [the] contention that admission to a crime transforms an interview by the police into a custodial interrogation."

Bartelt, 375 Wis. 2d 148, ¶40, 895 N.W.2d 86 (citing *Locke v. Cattell*, 476 F.3d 46, 53 (1st Cir. 2007)).

¶47 As an issue of first impression in Wisconsin courts, the court of appeals relied on several out-of-state and federal court decisions, including *LeBrun, supra.* Ultimately, the court concluded that while a confession is undoubtedly one of the circumstances we must consider, *Miranda* is specifically "concerned 'with a type of interrogation environment *created* by the police' and it is this 'atmosphere *created* by the authorities for questioning' that necessitates *Miranda* warnings." *Bartelt*, 375 Wis. 2d 148, ¶46, 895 N.W.2d 86 (citing *State v. Clappes*, 117 Wis. 2d 277, 283, 344 N.W.2d 141 (1984)). As the court of appeals noted, *Miranda* itself stated that *Miranda* warnings are required "when an individual is taken into custody or otherwise deprived of his freedom *by the authorities* in any significant way and is subjected to questioning." *Bartelt*, 375 Wis. 2d, ¶47, 895 N.W.2d 86 (citing *Miranda*, 384 U.S. at 478, 86 S. Ct. 1602). Therefore, the court of appeals focused on whether the atmosphere of Bartelt's interview changed after his confession such that a reasonable person would not feel free to leave. Considering the totality of the circumstances, Bartelt's confession was not immediately associated with a restraint on freedom of movement of the degree associated with an arrest.

¶48 First, we note that both before and after Bartelt's confession, Clausing and Walsh spoke in a conversational tone. *United States v. Chee*, 514 F.3d 1106 (10th Cir. 2008) (concluding, in part, that tone of interview, unchanged even after confession to a serious crime, indicates lack of custody). Although Clausing moved his chair closer to Bartelt after

catching Bartelt in a series of lies, the discussion otherwise was not aggressive or confrontational. *Thomas v. State*, 429 Md. 246, 55 A.3d 680, 696 (2012) (holding that a confession does not per se render a suspect in custody, especially where the atmosphere of the room never changed); *Commonwealth v. Hilton*, 443 Mass. 597, 823 N.E.2d 383, 396 (2005) ("[A]n interview does not automatically become custodial at the instant a defendant starts to confess."). Rather, following Bartelt's admission, the detectives simply continued to ask for details about the attack, which Bartelt continued to supply. *United States v. Caiello*, 420 F.2d 471, 473 (2d Cir. 1969) (stating that it is the presence or absence of compelling pressures that renders an interview custodial); *State v. Lapointe*, 237 Conn. 694, 678 A.2d 942, 958 (1966) ("While we agree that admissions of culpability may lead the police either to arrest a suspect or to place restraints on his freedom approximating an arrest, the police in this case never altered the circumstances of their interviews of the defendant in such a way that his initial noncustodial status became custodial.").

¶49 Second, that Bartelt was arrested at the end of his interview does not necessarily mean that he was in custody at any point prior to his arrest. *Thomas*, 55 A.3d at 692 (noting that when a suspect is arrested at the end of an interview that does not demonstrate that he was in custody prior to the arrest); *Chee*, 514 F.3d at 1114 (concluding that until a suspect who has confessed to a crime is arrested, he is merely subject to arrest). Stated otherwise, although Clausing and Walsh clearly suspected Bartelt and had enough evidence to arrest him when he confessed, that in itself did not restrain Bartelt's free-

dom of movement. Indeed, the defendants in *Chee*, *Beheler*, and *Mathiason* were permitted to go home following their incriminating statements. *See Stansbury*, 511 U.S. at 325, 114 S. Ct. 1526 ("Even a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest.").

¶50 On review, Bartelt argues that the court of appeals ignored the "many more cases" from other jurisdictions that have gone the other way. Specifically, Bartelt points to several cases indicating that, after confession to a serious crime, a person should generally be considered to be in custody for *Miranda* purposes, regardless of whether the confession altered the atmosphere of the interrogation. *See State v. Pitts*, 936 So.2d 1111 (Fla. Dist. Ct. App. 2006); *Jackson v. State*, 272 Ga. 191, 528 S.E.2d 232 (2000); *People v. Ripic*, 182 A.D.2d 226, 587 N.Y.S.2d 776 (1992); *People v. Carroll*, 318 Ill.App.3d 135, 252 Ill.Dec. 383, 742 N.E.2d 1247 (2001); *Commonwealth v. Smith*, 426 Mass. 76, 686 N.E.2d 983 (1997); *Kolb v. State*, 930 P.2d 1238 (Wyo. 1996); *Ackerman v. State*, 774 N.E.2d 970 (Ind. Ct. App. 2002).

¶51 Bartelt contends that the court of appeals erred in relegating its discussion of these cases to a footnote, in which it asserted that at least two of the cases are not persuasive because they treat a defendant's confession as dispositive. We disagree with Bartelt because the aforementioned cases are readily distinguishable. Furthermore, it is law enforcement's conduct that determines whether a suspect has been taken into custody. As we have explained above,

whether a suspect is in custody is a fact-specific inquiry where the totality of the circumstances must be evaluated in full. The totality of the circumstances herein differ from those in the cases Bartelt cites.

¶52 Although the specific question we address today—whether confession to a serious crime transforms a noncustodial interview into a custodial interrogation in these circumstances—is an issue of first impression in Wisconsin, Bartelt contends that our decision in *State v. Koput*, 142 Wis. 2d 370, 418 N.W.2d 804 (1988), supports the conclusion that no reasonable person would have felt free to leave following his confession to a serious, violent crime. In *Koput*, we considered whether a defendant, who had arrived for questioning at 9:30 a.m., was in custody by the time he gave an inculpatory statement at 4:15 p.m. Based on the totality of the circumstances, we concluded that Koput was not in custody "until after his confession, sometime after 4:15 PM." Id. at 380, 418 N.W.2d 804.[14] As the court of appeals correctly noted, *Koput* does not stand for the proposition that it was the confession itself which transformed Koput's custody status. Rather, it was the combination of circumstances after the confession that amounted to custody.

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[14] *Koput* goes on to state, "It was only then that a reasonable person viewing the situation objectively would conclude that he was not free to leave but was in custody." *State v. Koput*, 142 Wis. 2d 370, 380, 418 N.W.2d 804 (1988). Bartelt argues that in omitting this language from its opinion, the court of appeals omitted *Koput*'s indication that the defendant's custody status changed after (and because) of his confession. We disagree. Even with this language, *Koput* does not stand for the proposition that the confession, in and of itself, transformed his custody status.

¶53 We therefore conclude that although an admission of guilt to a serious crime is a factor to consider in a custody analysis, Bartelt's admission to attacking M.R. was not enough to transform his status to that of "in custody" given the totality of the circumstances. Because Bartelt was not in custody when he asked about counsel, his Fifth Amendment right to counsel did not attach.

III. CONCLUSION

¶54 There were two issues on this appeal. First, we considered whether Bartelt was in custody for the purposes of *Miranda* once he confessed to attacking M.R. We concluded that, in light of the totality of the circumstances, Bartelt's confession did not transform his status to that of "in custody." Rather, Bartelt was not in custody until Detectives Clausing and Walsh took his cell phone, approximately ten minutes after his confession, and instructed him to remain in the interview room. Second, because we determine that Bartelt was not in custody until this point, which was after his alleged request for counsel, we need not and do not reach the issue of whether his alleged request for counsel was unequivocal.

By the Court.—The decision of the court of appeals is affirmed.

ANN WALSH BRADLEY, J. (dissenting).

¶55 "I committed a serious, violent felony." If suspects uttered these words, would law enforcement let them walk out of the station? Would a reasonable person feel free to simply get up and leave? Engaging in a work of fantasy, the majority says yes. Mired to the grips of reality, I say no.

¶56 Legal decisions regarding what the "reasonable person" would do in a given situation do not always reflect the real world. In reality, any reasonable person would not feel free to leave a police interrogation room after confessing to a serious, violent felony. Yet, the majority again finds "a perceived freedom to depart in circumstances when only the most thick-skinned of suspects would think such a choice was open to them." *See* Wayne R. LaFave, *Pinguitudinous Police, Pachydermatous Prey: Whence Fourth Amendment "Seizures"?*, 1991 U. Ill. L. Rev. 729, 739-40.[1]

¶57 To further the fantasy, the majority omits relevant facts from its analysis that would lead to the conclusion that Bartelt was in custody after confessing to the attack on M.R. As a result it does not reach a critical issue in this case—whether the defendant clearly and unequivocally invoked his right to counsel. Unlike the majority, I would reach that issue.

¶58 I conclude that a reasonable person in Bartelt's position would not have felt free to leave the station house interrogation room, and that Bartelt clearly and unequivocally invoked his right to counsel. When considering the totality of the circumstances (namely *all* of the facts of record), I determine that Bartelt's Fifth Amendment rights were violated. Accordingly, I respectfully dissent.

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[1] *See also* Michelle R. Ghetti, *Seizure Through the Looking Glass: Constitutional Analysis in Alice's Wonderland*, 22 S.U. L. Rev. 231, 253 (1995); *Thomas v. State*, 429 Md. 246, 55 A.3d 680, 702-03 (2012) (Bell, C.J., dissenting).

I

¶59 The majority engages in fantasy by determining that a reasonable person would feel free to leave the police interrogation room under the circumstances presented here. Academic studies, the facts of this case, and common sense support a conclusion contrary to that of the majority.

A

¶60 A suspect is in custody for *Miranda* purposes if, under the totality of the circumstances, a reasonable person would not feel free to terminate the interview and leave the scene. *State v. Lonkoski*, 2013 WI 30, ¶6, 346 Wis. 2d 523, 828 N.W.2d 552 (citing *State v. Martin*, 2012 WI 96, ¶33, 343 Wis. 2d 278, 816 N.W.2d 270).

¶61 Studies demonstrate that the "free to leave" standard that courts apply does not generally reflect what reasonable people actually think and how they act when interacting with law enforcement. *Cty. of Grant v. Vogt*, 2014 WI 76, ¶71, 356 Wis. 2d 343, 850 N.W.2d 253 (Abrahamson, C.J., dissenting) (citing David K. Kessler, *Free To Leave: An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. Crim. L. & Criminology 51 (2009); Edwin J. Butterfoss, *Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins*, 79 J. Crim. L. & Criminology 437, 439-42 (1988); Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 Sup. Ct. Rev. 153 (2002)).[2]

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[2] Although these studies address the "free to leave" standard with regard to a Fourth Amendment seizure, they are equally applicable to the same standard in relation to the Fifth

¶62 Indeed, one study concluded that the average person does not feel free to leave even a simple interaction with law enforcement on a bus or sidewalk. *See Kessler, supra*, at 74-75. This result held true even among people who knew they had the right to leave such an encounter. *Id*. at 78.

¶63 Our jurisprudence should reflect reality. It should be based on true inclinations and thought processes rather than pushing the mythical "reasonable person" even further from the bounds of the real world. The majority in this case accomplishes the latter.

B

¶64 Although the majority correctly invokes analysis of the totality of the circumstances, it errs by ignoring relevant facts that, in the aggregate, support a determination that Bartelt was in custody immediately after confessing to the attack on M.R.

¶65 First, the majority correctly sets the scene by observing that "Bartelt chose the seat on the far side of the table, while Clausing sat at the end, and Walsh sat opposite Bartelt." Majority op., ¶8. The majority fails to mention, however, that in order to leave the room (unless he went under the table), Bartelt would have had to walk around either detective. Thus, from the outset of the interview, he would have had to squeeze by a detective in his path if he tried to leave the room.

Amendment. In both situations, a court must determine whether a reasonable person would feel free to leave. It defies logic to argue that a person being questioned in a police station under threat of custody would feel more free to leave than a person stopped pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968).

¶66 Second, the majority observes that at one point during the interrogation, Detective Clausing "moved his chair closer to Bartelt, from approximately four or five feet away to within two feet." *Id.*, ¶38 n.11. Yet, according to the majority, "[t]he ambiance of the interview remained otherwise unchanged." *Id.*[3] I disagree. Under the totality of the circumstances, cutting the distance by half and bringing the detective within arms reach of the suspect changed the atmosphere of the room considerably.

¶67 Detective Clausing's movement in effect shrunk the size of the room and further blocked Bartelt's exit.[4] Subsequently, in order to leave the room, Bartelt would have had not only to walk past either detective, but also if he chose to leave in Detective Clausing's direction, carefully maneuver around Detective Clausing, who now sat a mere two feet away from him.

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[3] The majority focuses its analysis on law enforcement's conduct, not the suspect's. *See* majority op., ¶48 (observing that "both before and after Bartelt's confession, Clausing and Walsh spoke in a conversational tone"); *see also id.* ("Although Clausing moved his chair closer to Bartelt after catching Bartelt in a series of lies, the discussion otherwise was not aggressive or confrontational").

To the extent that this line of analysis evinces a departure from the totality of the circumstances test in favor of a narrow focus on law enforcement conduct, this suggestion can be quickly dispatched. In the next sentence after stating that "it is law enforcement's conduct that determines whether a suspect has been taken into custody," the majority reaffirms that a custody determination is made with reference to the totality of the circumstances. *See id.*, ¶51.

[4] A suspect's purported belief at the beginning of the interview that he would be free to leave at the end of the interview is irrelevant. *See* majority op., ¶36. During the course of the interview, circumstances can change. Indeed they did here.

¶68 Finally, the majority also fails to note an important shift in the tone of the conversation: Detective Clausing's language becomes coarser.[5] In fact, Detective Clausing does not utter a curse word over the course of the entire interview until after he pulls his chair closer to Bartelt. The change in language coupled with the close proximity of the detective to the suspect enhances coercive pressure.[6] In other words, it puts more pressure on the suspect and weighs in favor of a custody determination, even if the officer's comments otherwise remain conversational.

¶69 To summarize: two detectives, one of them two feet away and now swearing at him, block Bartelt's exit path. Yet under the majority's analysis, Bartelt should have felt free to stand up in the interrogation room, squeeze by a hovering detective, and walk out of the police station.

¶70 Add to this atmosphere the fact that the suspect confessed to a serious, violent felony—the assault of M.R. Essentially, the majority determines

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[5] Detective Clausing lectured Bartelt:

> There is [sic] two different types of people that are in your chair at this time. Okay? There is a person that says, no, f—— this. F—— you. Prove it. And, okay, we will. But there is a person, you know, I f——ed up, I made a mistake, I screwed up, but here is the reason why. Okay? Maybe I have a problem with A, maybe I have a problem with B. I was out of character. I'm making bad decisions, and I regret it, and I will do everything in my power to reverse what I did and make things right.

[6] Although neither the detective's word choice nor his positioning is by itself determinative of custody, each provides further weight in favor of a custody determination when analyzing the totality of the circumstances.

that a suspect in Bartelt's situation could state to the police, "I committed a serious, violent felony. I'm leaving, see you later," and then march past detectives on the way out of the interrogation room and the police station. This stretches the bounds of credulity.

¶71 Additionally, Detective Clausing testified that he subjectively believed that after Bartelt confessed, Bartelt would not have been free to leave.[7] Is Detective Clausing not a reasonable person?

¶72 I acknowledge that Detective Clausing's subjective view of when Bartelt was in custody is not dispositive. *See Lonkoski*, 346 Wis. 2d 523, ¶35, 828 N.W.2d 552. However, his view certainly provides a window into the perspective of one reasonable person with a front seat view of the situation. It further demonstrates law enforcement's expected response if Bartelt had simply walked out as the majority contends he could have done.

¶73 If even the interrogating detective testified that a suspect was not free to leave, would a reasonable suspect in such a position really think he could

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[7] During an evidentiary hearing, Detective Clausing testified as follows:

> COUNSEL FOR BARTELT: Okay. And when, from your perspective, did [Bartelt being able to walk out of the room] change during the course of this interview?
> DET. CLAUSING: When he admitted to attacking [M.R.].
> COUNSEL FOR BARTELT: So at that point in time, he was in trouble, he was going to be under arrest, and he probably wasn't free to get up and leave, true?
> DET. CLAUSING: In my mind?
> COUNSEL FOR BARTELT: Yes.
> DET. CLAUSING: Yes.

just get up and walk out? Only in a fantasy world would a suspect act in this manner. Common sense tells us that a real world suspect would do no such thing.

¶74 In sum, I determine that the totality of the circumstances clearly indicates that Bartelt was not free to leave. Rather, he was in custody for *Miranda* purposes immediately after confessing to the attack on M.R.

II

¶75 Finally, because the majority concludes that Bartelt was not in custody until the detectives took his cell phone and instructed him to remain in the interview room, approximately ten minutes after his confession, it does not reach the issue of whether Bartelt unequivocally invoked his right to counsel. *See* majority op., ¶¶3, 54. As explained above, because I determine that Bartelt was in custody for *Miranda* purposes immediately after confessing to the attack on M.R., I would reach the issue, and determine that Bartelt's invocation of the right to counsel was clear and unequivocal.

¶76 To successfully invoke the right to counsel, a suspect must make a clear and unequivocal request. *State v. Edler*, 2013 WI 73, ¶34, 350 Wis. 2d 1, 833 N.W.2d 564. "Although a suspect need not 'speak with the discrimination of an Oxford don,' he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.* (quoting *Davis v. United States*, 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L.Ed.2d 362 (1994)). Under this objective test, the court must examine the circumstances surround-

ing the request. *Edler*, 350 Wis. 2d 1, ¶34, 833 N.W.2d 564.

¶77 The relevant circumstances here are as follows: Bartelt stated, "Should I or can I speak to a lawyer or anything?" Detective Clausing responded, "Sure, yes. That is your option." Bartelt then told him, "I think I'd prefer that." *See* majority op., ¶16.

¶78 "That" clearly refers to the option to speak to a lawyer. The circumstances surrounding the statement present a question, an answer, and a subsequent follow-up. Given this exchange, a reasonable officer would have understood that Bartelt was accepting the "option" the officer had just presented to him.

¶79 Bartelt's invocation of the right to counsel was informal, but that does not make it ineffective. *See Edler*, 350 Wis. 2d 1, ¶36, 833 N.W.2d 564; *State v. Dumas*, 750 A.2d 420, 425 (R.I. 2000) ("A suspect asserting his or her right to counsel need not speak with perfect formality, but may use any manner of colloquial speech, so long as his or her statement would be reasonably understood as a request for an attorney"). The most reasonable interpretation is that Bartelt used the word "think" as colloquial filler, not as an indication of ambiguity.

¶80 Conversely, ambiguous or equivocal statements not invoking the protection, are those from which a reasonable officer "would have understood only that the suspect *might* be invoking the right to counsel." *State v. Jennings*, 2002 WI 44, ¶36, 252 Wis. 2d 228, 647 N.W.2d 142 (quoting *Davis*, 512 U.S. at 459, 114 S. Ct. 2350).

¶81 In *Jennings*, the defendant stated, "I think maybe I need to talk to a lawyer." *Jennings*, 252 Wis.

2d 228, ¶36, 647 N.W.2d 142. The word "maybe" coupled with "think" in Jennings' statement adds ambiguity not present here. Instead, Bartelt's response was made in reply to the detective's statement that having counsel was his "option." Bartelt clearly chose that option.

¶82 An analogy presented in Bartelt's brief further illustrates that Bartelt's statement was an unambiguous invocation of the right to counsel: "if a customer went to a restaurant and asked the waiter, 'What kind of light beers do you have on tap?,' and the waiter responded, 'Miller Lite and Bud Light.' If the customer then said, "Okay. I think I'd prefer a Miller Lite,' no reasonable person would think this was anything other than a clear request for a Miller Lite." Indeed, this analogy clarifies that neither the word "think" nor the word "prefer" necessarily demonstrates equivocation.

¶83 In sum, Bartelt was in custody for *Miranda* purposes immediately after confessing to the attack on M.R., and he invoked his right to counsel. Because a reasonable person in Bartelt's position would not have felt free to leave the station house interrogation room, and because Bartelt clearly and unequivocally invoked his right to counsel, I determine that Bartelt's Fifth Amendment rights were violated.

¶84 Accordingly, I respectfully dissent.

¶85 I am authorized to state that Justice SHIRLEY S. ABRAHAMSON joins this dissent.

APPENDIX B

Court of Appeals of Wisconsin

STATE of Wisconsin, Plaintiff-Respondent,

v.

Daniel J.H. BARTELT, Defendant-Appellant.

Appeal No. 2015AP2506-CR

Submitted on Briefs: January 25, 2017
Opinion Filed: March 1, 2017

APPEAL from judgments of the circuit court for Washington County, Cir. Ct. No. 2013CF276: TODD K. MARTENS, Judge. Affirmed.

On behalf of the defendant-appellant, the cause was submitted on the briefs of Leon W. Todd, assistant state public defender of Milwaukee.

On behalf of the plaintiff-respondent, the cause was submitted on the brief of Thomas J. Balistreri, assistant attorney general, and Brad D. Schimel, attorney general.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

NEUBAUER, C.J.

¶1 Daniel J.H. Bartelt was convicted of the first-degree intentional homicide of Jessie Blodgett upon a jury verdict and first-degree recklessly endangering safety of M.R. upon Bartelt's plea of guilty. During the course of the investigations, detectives from the Washington County Sheriff's Office interviewed Bartelt and he implicated himself in the attack of M.R. Following these oral admissions, the detectives asked if Bartelt would make a written statement, at which point he asked if he should or can talk to a

lawyer, and, when told that was an option, he indicated that he preferred that. The detectives left the interview room and a few minutes later placed Bartelt under arrest. The following day, detectives from the City of Hartford met with Bartelt to question him about Blodgett's death. After Bartelt was advised of his *Miranda*[1] rights, he waived them and stated that he was at Woodlawn Union Park on the morning of Blodgett's murder. The detectives then went to Woodlawn Union Park and uncovered evidence connecting Bartelt to Blodgett's murder. The circuit court denied Bartelt's motion to suppress the statements he made and the evidence that resulted from those statements, concluding that Bartelt was not in custody at the time he asked about counsel. Because Bartelt asked about counsel before he was in custody, the detectives from the City of Hartford were not prohibited from interviewing Bartelt. Bartelt now challenges the circuit court's determination of his motion to suppress. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Charges

¶2 Under an amended criminal complaint, Bartelt was charged in the attack on M.R. with attempted first-degree intentional homicide, first-degree recklessly endangering safety, attempted false imprisonment and, in the death of Blodgett, with first-degree intentional homicide.

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[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

The Suppression Hearing

¶3 At a suppression hearing, Detective Joel Clausing of the Washington County Sheriff's Office testified that as of July 16, 2013, he had identified Bartelt as a person of interest. M.R. had said that her attacker had been in a blue Dodge Caravan and another deputy had run the license plate to a blue Dodge Caravan earlier that month, which was registered to Bartelt's parents. Clausing discovered that the Bartelts had a son, and a photo of him from the Wisconsin Department of Transportation was similar to a composite sketch that was drawn at M.R.'s direction. The police had also collected evidence from the crime scene including beer cans, a knife and its sheath, tape, and blood, but none of it had been analyzed at that point.

¶4 Clausing spoke with the Bartelts at their home, and they gave him Bartelt's cell phone number. Clausing called Bartelt around 5:00 p.m., told him that the police were investigating an incident, and that they needed to speak with him. Bartelt was not given any other details, and he did not ask for any additional ones. Bartelt was "very compliant" and asked where and when he should meet the police. Clausing told him to come to the Slinger Police Department because Clausing preferred to do all of his interviews at a station house, and it was about the midway point between Clausing and Bartelt. Bartelt agreed. Two friends dropped Bartelt off at the police department, and they waited for him.

¶5 The Slinger Police Department is inside a municipal building that it shares with other offices such as parks and planning. There is one main entrance door used to enter the building, and, once inside the

building, there is a specific door for the police department, neither of which is secured during regular business hours. After one enters the lobby of the police department, there is another door that leads to the "internal portion of the police department." This door provides a secured entry but one may freely exit.

¶6 At 5:12 p.m., Bartelt was escorted into an interview room with Clausing and Detective Aaron Walsh.[2] Clausing described the interview room as about twenty-five feet from the secured entry door. The front doors to the interview room cannot be locked, and Clausing left them ajar. The room itself is about thirteen-and-one-half feet by ten-and-one-half feet and has windows. Inside were one table and three chairs. Bartelt was asked where he wanted to sit, and then Clausing and Walsh sat on either side of Bartelt. Both Clausing and Walsh were wearing casual clothes, with their badges on their belts and their guns holstered at their sides.

¶7 At the outset of the interview, Clausing advised Bartelt that he was "not in trouble" and that he was "not under arrest." Bartelt responded, "[T]hat's good." Clausing repeated that Bartelt was not under arrest and also advised him that he could "get up and walk out of here any time [he] want[ed]." The detectives did not search or frisk Bartelt. During the course of the interview, Clausing learned that Bartelt was nineteen years old, that he had completed a semester of college, and claimed to be working as a "gopher" for a manufacturing company. Bartelt appeared intelligent according to Clausing. When asked, Bartelt said he thought the police were meet-

[2] The interview was videotaped, and we have reviewed it.

ing with him about Blodgett. Clausing told him that he and Walsh were investigating an incident at a park that occurred the prior Friday.

¶8 Initially, Bartelt denied that he was at the park. He was asked about his whereabouts on that Friday, but other than stating that he was "[p]robably" with his girlfriend and that he "assume[d]" they watched television and ate dinner together, he could not "remember any specifics." The detectives explained to him about evidence and asked if there was any evidence, such as blood or "something [he] left there," that might show he was at this park last Friday. Bartelt said there was nothing there and asked, "What is this about?" Clausing replied, "I already told you what this is about. We are investigating an incident that happened at a park," with Walsh adding, "[l]ast Friday." Clausing asked, "What if I were to tell you that there might be something that links you there."

¶9 Clausing then explained "Locard's exchange principle" to Bartelt, that a person leaves some of himself, such as fingerprints, sweat, DNA, or clothing fibers, behind. The detectives added that they had evidence "from the person that was out there," which needed to be analyzed by the state crime laboratory, as well as an eyewitness, although this eyewitness had not seen a photograph of Bartelt. Thus, Clausing said, "I can prove that you were out there." So, if Bartelt was "out there," he should "just talk to [the detectives] about what happened or what [he] saw or ... observed or whatever."

¶10 Walsh added that the police knew that the blue Dodge Caravan he drove was there that Friday and that it had been there other days when Bartelt

was supposed to be working. Walsh then confronted Bartelt about his claim that he was working, and he admitted he did not have a job. Bartelt also acknowledged that his claim earlier in the interview that he had injured his thumb when he "[g]ot stabbed with a screw at work" was untrue. Bartelt then said he cut his finger on a knife. When asked to explain, he said he was cooking at home and cut his finger on a knife. Clausing did not believe Bartelt's second explanation, saying "Nobody in their right mind would lie about cutting themselves if it happened at home cooking." Clausing said, "No more lies," and asked that Bartelt "[j]ust be honest." Bartelt admitted he had been to the park and that he had seen "the sketch on TV," but "it wasn't me."

¶11 Walsh then went into a lengthy monologue about how the victim was scared, that she was "looking over [her] shoulder every single second," and that the police wanted to give her "some closure" so that she would not have to look over her shoulder any longer. The easiest way to give the victim closure, Walsh said, was for the person who did this to take responsibility. Walsh added that what happened could "be explained by the person that did it." For example, things were not going well for Bartelt—he had lost his job and had hid that from his parents—and the police could understand that situation. When things are not going well for a person, Walsh said, he might do something that is out of his character. "[T]hey are in a bad place in their life," but "they are usually good people ... and they can continue being a good person by taking responsibility for it."

¶12 Clausing told Bartelt that he understood that his first instinct was "self-preservation." There were "two different types of people" sitting in Bartelt's chair at this time, Clausing explained. The person who dared the police to prove it—and they would—and the person who admits he made a mistake, explains why, and expresses regret and the intention to "make things right." Clausing said that he believed in "a second chance" for the person who took responsibility and, when asked, Bartelt said he agreed. Clausing was just "trying to impress upon" Bartelt that it was in his "best interest to come out now and get ahead of it." Later on Bartelt would be able to say that he told them the truth, that he regretted what had happened, but that he "wasn't stalking anyone" and this was "just a spur-of-the-moment thing." "[W]ith that in mind," Clausing asked to hear Bartelt's "side of the story."

¶13 Bartelt responded that he made a mistake not telling his parents that he was fired from his job and that it was a mistake for him to leave college. Clausing replied, "It's okay ... we know what happened." When Bartelt asked "[w]hat happened," Clausing repeated that he knew what happened and he just wanted to understand why. Bartelt said he had no intentions and that he was "just numb." Clausing countered, "[Y]ou had to know that this would be coming.... [Y]ou cut yourself. There is blood on the sheet that you tried to throw away," and, Walsh added, on "the beer cans" and "on the knife she took away."

¶14 A few moments later Bartelt admitted, among other things, that he was at the park where M.R. was attacked, that he had had a knife, and that he

"went after that girl" or ran at her and knocked her down with a knife because he "wanted to scare someone," since "life scares" him. After that, Bartelt said, M.R. screamed, he dropped the knife, and they both ran away. At that point, Clausing testified, in his mind, Bartelt was not free to leave and was going to be placed under arrest.

¶15 After Bartelt made these admissions, Clausing asked him to give a written statement. Clausing told Bartelt it would be his "chance to apologize," and Bartelt said, "Can I[,] to her?" Bartelt asked what would happen after he gave a written statement, and Clausing answered that he was unsure, but probably he would have more questions for Bartelt. Bartelt replied, "Should I or can I speak to a lawyer or anything." Clausing answered, "Sure, yes. That is your option." Clausing testified that Bartelt answered that "he would prefer having one present." Clausing asked Bartelt if he could see his cell phone for a minute, and then said he was "going to take it." Bartelt gave Clausing permission to see who had just called him, and Bartelt said it was his mother. At that point, 5:45 p.m., Clausing suspended the interview and left the room with Walsh for about seven or eight minutes. When Clausing returned, he told Bartelt he was under arrest, cuffed his hands, and searched him.

¶16 Clausing noted that during the course of the interview neither he nor Walsh ever yelled; instead, it was a "conversational tone." They never lied to Bartelt. Neither detective ever unholstered or said anything about their weapons. When Bartelt admitted to lying about an injury to his hand, Clausing moved away from the table and shifted his chair

closer to Bartelt, leaving them about two feet away from each other. At one point during the interview, Bartelt's phone rang and he was permitted to answer it.[3] Bartelt never asked to use the bathroom or to take a break, and he never requested food or drink. The only time when Bartelt's demeanor changed during the interview was when Blodgett was mentioned, at which point he became emotional; otherwise he was "very stoic." Clausing never read any *Miranda* warnings to Bartelt.

¶17 During cross-examination, Clausing agreed with counsel that he acted no differently once Bartelt started making admissions.

¶18 The day after Bartelt was arrested, July 17, 2013, at about 2:30 p.m., Detective Richard Thickens of the City of Hartford Police Department, the lead investigator into Blodgett's death, met Bartelt, along with another detective, at the Washington County Sheriff's Department. After informing Bartelt about the nature of the interview, Thickens read Bartelt *Miranda* warnings. Bartelt waived his *Miranda* rights and agreed to speak with Thickens without an attorney present. At the time of this interview, Thickens knew that Bartelt had previously asked about an attorney. Bartelt spoke with Thickens for about ninety minutes during which he said that on the morning of Blodgett's murder he was at Woodlawn Union Park. After Bartelt made those statements, Thickens went to Woodlawn Union Park to investigate, and he discovered physical evidence that

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[3] The video shows that Bartelt's phone was ringing, he asked, "Can I," and Clausing said, "Sure." Bartelt then looked at his phone and placed it back in his pocket.

was connected to the murder of Blodgett and that contained both her and Bartelt's DNA.

The Circuit Court Denies Bartelt's Motion to Suppress

¶19 The circuit court denied Bartelt's motion to suppress. The court found that Bartelt had voluntarily come to the Slinger Police Department. Two friends had dropped him off and they waited for him, indicating that Bartelt expected to leave at the conclusion of the interview. Bartelt was not searched, and he was not restrained in any way. The doors to the interview room were not locked, and they remained partially open. Although the detectives were armed, they never removed their weapons. Bartelt was told that he was not in trouble, that he was not under arrest, and that he could leave at any time. Once Bartelt asked for an attorney, the detectives stopped questioning him.

¶20 Based on those findings, the court concluded that prior to and at the time Bartelt asked for counsel, he was not in custody for purposes of *Miranda*. After Bartelt had asked for counsel, he was arrested. Nevertheless, *Miranda* warnings are not required even "when custody is imminent."

¶21 As for the second interview, the fact that Bartelt had asked about counsel while not in custody did not prohibit Thickens from speaking with him without an attorney present. In other words, asking about counsel was of no legal effect. When Thickens interviewed Bartelt, he was clearly in custody, but Bartelt was given *Miranda* warnings, and he waived his rights freely, knowingly, and voluntarily. It was not until ninety minutes later that Bartelt invoked

his right to counsel, at which point the questioning ceased.

Convictions and Sentence

¶22 Because the count charging Bartelt with first-degree intentional homicide was severed from the counts related to the attack on M.R., the former proceeded to trial first. A jury found Bartelt guilty of first-degree intentional homicide, and the court sentenced him to life imprisonment without the possibility of release to extended supervision. As for the counts relating to the attack on M.R., Bartelt later pleaded guilty to first-degree recklessly endangering safety and the remaining counts were dismissed and read in. The court sentenced Bartelt to five years of initial confinement and five years of extended supervision, to run consecutive to his sentence of life imprisonment.

ANALYSIS

Bartelt's Contentions

¶23 Bartelt contends that once he admitted to attacking M.R., combined with other circumstances present at the time, a reasonable person in that situation would not have felt free to terminate the interview and leave. In other words, "his confession ... transformed his custody status." Consequently, Bartelt was in custody, and all further interrogation had to cease. When, the following day, the detectives from the City of Hartford approached Bartelt to question him about the murder of Blodgett without counsel present, Bartelt's right to counsel was violated. Bartelt did not validly waive his asserted right to counsel. Therefore, Bartelt contends, the statements he made during that second interview and the

evidence that was derived from those statements should have been suppressed.

The Law of Custody

¶24 The Fifth Amendment to the United States Constitution and article I, section 8(1) of the Wisconsin Constitution protect a criminal defendant's right against self-incrimination.[4] Specifically, "No person ... shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. One of the rights guaranteed under the Fifth Amendment, as interpreted by the United States Supreme Court in *Miranda*, is the right to have counsel present when a suspect is subjected to a custodial interrogation. *Miranda*, 384 U.S. at 444, 86 S. Ct. 1602; *State v. Hambly*, 2008 WI 10, ¶41, 307 Wis.2d 98, 745 N.W.2d 48; *State v. Kramer*, 2006 WI App 133, ¶9, 294 Wis.2d 780, 720 N.W.2d 459.[5] "This is because, when a suspect is in police custody, there is a heightened risk of obtaining statements that 'are not the product of the suspect's free choice.'" *State v. Quigley*, 2016 WI App 53, ¶31, 370 Wis.2d 702, 883 N.W.2d 139 (quoting *J.D.B. v. North Carolina*, 564

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[4] Our supreme court's interpretation of article I, section 8(1) of the Wisconsin Constitution has generally been consistent with the United States Supreme Court's interpretation of the Fifth Amendment to the United States Constitution. *State v. Ward*, 2009 WI 60, ¶18 n.3, 318 Wis.2d 301, 767 N.W.2d 236.

[5] In order to protect a suspect's Fifth Amendment privilege against self-incrimination, a suspect who is interrogated while "in custody" is entitled to *Miranda* warnings. A suspect must be warned prior to questioning that he or she has the right to remain silent, that anything he or she says can be used against him or her in a court of law, that he or she has a right to an attorney, and that if he or she cannot afford an attorney, one will be provided free of charge. *Miranda*, 384 U.S. at 479, 86 S. Ct. 1602.

U.S. 261, 268-69, 131 S. Ct. 2394, 180 L.Ed.2d 310 (2011)).

¶25 Once a suspect who is subject to a custodial interrogation invokes his or her right to counsel, all further interrogation must cease until an attorney is present.[6] *State v. Kramar*, 149 Wis.2d 767, 785, 440 N.W.2d 317 (1989). "[A] valid waiver of that right to counsel cannot be established by showing only that the accused responded to further police-initiated custodial interrogation even if the accused has been advised of his rights," but, rather, the accused must initiate further communication with the police. *Id*. at 785-86, 440 N.W.2d 317.[7]

¶26 However, if a defendant is not in custody, "he or she may not invoke the right to counsel under *Miranda*." *Kramer*, 294 Wis.2d 780, ¶9, 720 N.W.2d 459. If a suspect requests counsel but is not in custody, the police may continue to question the suspect. *State v. Lonkoski*, 2013 WI 30, ¶¶41-42, 346 Wis.2d 523, 828 N.W.2d 552.

¶27 A suspect is in custody when that suspect is "deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444, 86 S. Ct. 1602. In

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[6] We assume without deciding that Bartelt made an unequivocal request for counsel. Since we hold that Bartelt was not in custody at the time he asked about counsel, we need not address the State's alternative argument for affirmance, that Bartelt's request for counsel was equivocal.

[7] "If someone is subjected to custodial interrogation [after requesting counsel] and makes statements, whether exculpatory or inculpatory, then those statements constitute a *Miranda* violation and, absent exceptions, cannot be used by the prosecution." *See State v. Quigley*, 2016 WI App 53, ¶31 n.8, 370 Wis.2d 702, 883 N.W.2d 139 (citing *Miranda*, 384 U.S. at 444, 86 S. Ct. 1602).

other words, custody is the equivalent of "a formal arrest or restraint on freedom of movement of the degree associated with formal arrest." *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S. Ct. 457, 133 L.Ed.2d 383 (1995) (citation omitted); *Lonkoski*, 346 Wis.2d 523, ¶6, 828 N.W.2d 552. This is the ultimate inquiry. *Thompson*, 516 U.S. at 112, 116 S. Ct. 457. If, under the totality of the circumstances, "a reasonable person would not feel free to terminate the interview and leave the scene," then the suspect is in custody. *Lonkoski*, 346 Wis.2d 523, ¶6, 828 N.W.2d 552 (citation omitted). In making that determination, courts will consider "the defendant's freedom to leave; the purpose, place, and length of the interrogation; and the degree of restraint." *Id.* (citation omitted). On the latter, courts have considered whether the defendant was handcuffed, whether a gun was drawn on the defendant, whether a *Terry*[8] frisk was performed, the manner in which the defendant was restrained, whether the defendant was moved to another location, and the number of police officers involved. *State v. Gruen*, 218 Wis.2d 581, 594-96, 582 N.W.2d 728 (Ct. App. 1998).

The Standard of Review

¶28 An alleged *Miranda* violation is a question of constitutional fact, which presents a mixed question of law and fact. *State v. Hassel*, 2005 WI App 80, ¶7, 280 Wis.2d 637, 696 N.W.2d 270. The circuit court's findings of facts will be upheld unless clearly erroneous, but its determinations of law will be reviewed independently.[9] *Id.*

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[8] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968).

[9] Bartelt concedes that "the historical facts are uncontested."

Bartelt Was Not in Custody

¶29 Looking at the circumstances of the interrogation, Bartelt voluntarily agreed to come to the Slinger Police Department. *See Lonkoski*, 346 Wis.2d 523, ¶31, 828 N.W.2d 552 (holding that place of interview was not custodial because, while it was at the sheriff's department, the defendant came there voluntarily). He did not know the reason why the police wanted to speak with him, and he did not initially ask. He thought the matter concerned Blodgett. Two friends dropped off Bartelt at the station and waited for him, which, as the circuit court concluded, suggests that he thought that he would be free to leave after the interview. Bartelt was led through a secured entry into the "internal portion of the police department" to the interview room. Although that entry was secured, once inside, one could exit freely. The doors to the interview room were not locked and were left somewhat ajar, which suggested that Bartelt was free to leave at any time. *See id.*, ¶¶30-32 (holding that unlocked doors to interview room, which officers repeatedly used throughout interview, and fact that defendant was asked if he preferred the doors open or closed, all indicated a lack of custody).

¶30 At the outset of the interview, Clausing told Bartelt that he was "not in trouble" and that he was "not under arrest." Bartelt indicated that he understood by responding "that's good." Clausing also advised Bartelt that he could "get up and walk out of here any time [he] want[ed]." *See Quigley*, 370 Wis.2d 702, ¶¶40-41, 883 N.W.2d 139 (collecting cases for proposition that advising a suspect that he or she is free to leave is one of the "most important fac-

tors" to consider, which is strengthened by the suspect's acknowledgment of that advice).

¶31 The detectives did not search or frisk Bartelt, and they did not restrain him in any way. *See Lonkoski*, 346 Wis.2d 523, ¶32, 828 N.W.2d 552 (holding that because the suspect was not handcuffed or frisked, and the interrogating officers never drew their weapons, these factors pointed to a lack of custody). The detectives never made any show of authority, such as removing their firearms, other than at one point when Bartelt was caught in a lie and Clausing moved his chair closer to Bartelt and away from the table. When Bartelt's phone rang during the interview, he was permitted to answer it, which suggested a normal state of affairs, the detectives were not controlling his actions, and he was not being kept in isolation. *See United States v. LeBrun*, 363 F.3d 715, 722 (8th Cir. 2004) (stating that a cellular phone provides a line of communication between the suspect and the outside world and to some extent mitigates the incommunicado nature of interrogations with which *Miranda* was concerned and the psychological pressure associated with being isolated in an interview room). Bartelt never asked to use the bathroom or for food or drink during the "relatively short" thirty-five minute interview. *Lonkoski*, 346 Wis.2d 523, ¶31, 828 N.W.2d 552. These factors nearly all lead to the conclusion that Bartelt was not in custody.

¶32 As the interview progressed, Bartelt was increasingly "treated ... like the target of a serious felony investigation," which, he argues, is indicative of custody. Initially, the detectives attempted to get Bartelt to admit that he had been at the park at the

time of the "incident" without telling him about the nature of the incident or accusing him of being involved. But, each time Bartelt hesitated, the detectives increasingly insinuated, first, that he had been there at the time and, then, that they suspected he had been involved in this incident.

¶33 The detectives told him that they had recovered evidence from the scene, such as beer cans, a sheet, and a knife, all of which contained blood—although this evidence had yet to be tested by the state crime laboratory and, thus, was not yet connected to Bartelt—and that they had an eyewitness, although this eyewitness had not yet seen a photograph of Bartelt and, thus, had not identified him. The detectives said they knew "[w]hat happened" and they just wanted to understand why. The detectives suggested that Bartelt was not a bad person, that sometimes a good person will do bad things because of problems in his life, that it might have been "just a spur-of-the-moment thing," and that it would be better to take responsibility now.

¶34 Yet, contrary to Bartelt's contention, the fact the detectives essentially communicated to him that he was the focus of their investigation did not transform the interview into a custodial interrogation. *See Stansbury v. California*, 511 U.S. 318, 325, 114 S. Ct. 1526, 128 L.Ed.2d 293 (1994) (stating that even when an officer clearly tells a person under interrogation that he is a prime suspect such is not, in itself, dispositive of the custody issue, because some suspects are free to come and go until the police decide to make an arrest; rather, the weight and pertinence of any such communications regarding the officer's degree of suspicion will depend upon the facts

and circumstances of the particular case); *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 50 L.Ed.2d 714 (1977) (stating that *Miranda* warnings are not required "because the questioned person is one whom the police suspect," and any police interview of a criminal suspect will have coercive aspects to it).

¶35 Certainly the detectives applied some psychological pressures on Bartelt to persuade him to confess, but, unlike custodial interrogations, the other circumstances present here—coming voluntarily to the police department, being told he could leave anytime he wanted, keeping his cell phone and being permitted to answer it, and the door to the interview room being kept open, among other circumstances—did not suggest that Bartelt could not have terminated the interview and left. *See LeBrun*, 363 F.3d at 718, 720-21 (where the police used psychological ploys to facilitate a confession, told the defendant he was a prime suspect and there was significant evidence establishing that he was the killer, and that a trial would ruin him and his family, these "purportedly coercive aspects" were largely irrelevant to the custody determination, and "[w]hatever coercion existed ... was not of the sort that a reasonable person would perceive as restricting his freedom to depart"; rather, the fact that the defendant was never physically restrained, never placed in handcuffs, told he was free to leave, and called his wife during the interview using his own cell phone all suggested that he was free to leave).

¶36 Further, the circumstance of Bartelt ultimately making incriminating admissions, when consid-

ered among all the other circumstances, did not render him in custody.

¶37 In *Mathiason*, 429 U.S. at 493, 97 S. Ct. 711, the police were investigating a burglary of a residential home, and the owner told police that the defendant, a "close associate" of her son and a parolee, was the only person she thought could have burglarized her home. About twenty-five days after the burglary, an investigating officer left his card at the defendant's residence, writing on it, "I'd like to discuss something with you." *Id*. The next day the defendant called the officer and, after the defendant indicated that he had no preference as to where to meet, agreed to meet the officer at the state patrol office in an hour and a half. *Id*. The state patrol office housed several state agencies and was about two blocks from the defendant's home. *Id*.

¶38 Once the officer and the defendant met, the officer escorted him into an office. *Id*. The two men sat at a desk and the door to the office was closed. *Id*. The officer advised the defendant that he was not under arrest. *Id*. The officer then told the defendant that he believed the defendant was involved in a burglary and falsely told him that his fingerprints were found at the scene. *Id*. Within five minutes, the defendant admitted that he had taken the property. *Id*. At the end of the interview, the officer released the defendant and told him he would refer the matter to the district attorney. *Id*. at 494, 97 S. Ct. 711.

¶39 The United States Supreme Court held that the defendant was not in custody at the time he gave those incriminating statements. *Id*. at 495, 97 S. Ct. 711. The Court pointed out that the defendant came voluntarily to the police station, he was informed he

was not under arrest, and, after the thirty-minute interview, he was allowed to leave. *Id.* The court reasoned:

> Such a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a "coercive environment." Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." It was that sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited.

Mathiason, 429 U.S. at 495, 97 S. Ct. 711. Further, the Court did not think it even relevant for purposes of custody that the officer falsely told the defendant that his fingerprints were at the scene. *Id.* Thus, *Mathiason* teaches that confronting a suspect with incriminating evidence does not automatically convert the interview into a custodial interrogation. *See United States v. Jones*, 523 F.3d 1235, 1241 (10th

Cir. 2008) (holding that defendant was not in custody even though agents told her that they had sufficient evidence to arrest her).

¶40 Just as the police telling a suspect that they have sufficient evidence to arrest that suspect, and even identifying potentially incriminating evidence that they possess to the suspect, does not necessarily convert a noncustodial setting to a custodial one, a defendant making an incriminating statement does not necessarily transform a noncustodial setting to a custodial one. Indeed, "no Supreme Court case supports [the] contention that admission to a crime transforms an interview by the police into a custodial interrogation." *Locke v. Cattell*, 476 F.3d 46, 53 (1st Cir. 2007).

¶41 In *United States v. Chee*, 514 F.3d 1106, 1110 (10th Cir. 2008), the defendant sexually assaulted a twenty-eight-year-old woman "with both mental and physical disabilities." The woman, who knew the defendant, told her grandparents who reported the incident to the police. *Id*. A federal agent left his business card at the defendant's home with his daughter, telling her that he wanted to speak with him about a firearm the defendant had found in a car he had purchased at a government auction months earlier. *Id*. The defendant eventually called the agent, and they agreed to meet at a police department. *Id*.

¶42 The next morning, the defendant arrived at the police station with his wife. *Id*. The agent and another investigator escorted the defendant without his wife into the police chief's office. *Id*. at 1111. The agent told the defendant that he was not under arrest or in any trouble, that he could leave if he wanted and did not have to talk with them. *Id*. After talk-

ing with the defendant about the firearm, the agent asked him about the sexual assault. *Id.* The agent told the defendant that the woman's grandmother was very upset, and the defendant replied that he knew she was upset and had tried to apologize. *Id.* The agent asked the defendant what happened, and the defendant denied having sex with the woman. *Id.*

¶43 The agent then falsely told the defendant that the FBI had DNA evidence from the scene, and the defendant admitted that he had had sex with the woman against her will. *Id.* At the agent's suggestion, the defendant agreed to write a letter of apology to the woman and her grandmother. *Id.* After the defendant finished the letter and the agent asked a few more questions, the defendant asked what would happen next, and the agent replied that someone else would decide. *Id.* The interview lasted less than one hour, and the agent then let the defendant leave. *Id.*

¶44 The defendant argued that he was in custody under *Miranda* once the topic moved from the firearm to the sexual assault and that, at a minimum, he should have received *Miranda* warnings once he orally confessed. *Id.* at 1113. The Tenth Circuit Court of Appeals rejected the defendant's contentions. *Id.* It cited with approval the First Circuit's statement, "[N]o Supreme Court case supports [the] contention that admission to a crime transforms an interview by the police into a custodial interrogation." *Id.* at 1114 (alteration in original; citation omitted). The Tenth Circuit also pointed out that "the environment did not change once the topic shifted to the sexual assault." *Id.* Viewing all of the

circumstances, such as the brevity of the interview, the fact that the defendant was told that he was free to leave and did, in fact, leave at the end of the interview, a reasonable person in his situation would not have believed he was effectively under arrest, held the court. *Id.*; *see also Locke*, 476 F.3d at 49-55 (holding that it was not an unreasonable application of the law for the state court to conclude that the defendant was not in custody even after initially implicating himself in robbery and where, among other circumstances, defendant was interviewed at police headquarters, defendant was confronted with his codefendant's statements implicating him in robbery and murder, codefendant and defendant had two conversations that the police monitored, and at the end of the interview the defendant was arrested); *Thomas v. State*, 429 Md. 246, 55 A.3d 680, 692 (2012) (pointing out that the fact a suspect was arrested at the end of police interview does not necessarily mean the suspect was in custody before the arrest).

¶45 If it were as Bartelt argues, then at the moment of the first incriminating statement, the police would have to stop questioning the subject and administer *Miranda* warnings, which is without basis in *Miranda* jurisprudence. *See Miranda*, 384 U.S. at 478, 86 S. Ct. 1602 ("There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime."); *Commonwealth v. Hilton*, 443 Mass. 597, 823 N.E.2d 383, 396 (2005) ("[A]n interview does not automatically become custodial at the instant a defendant starts to confess.").

¶46 Instead, "[a] confession is just one of the circumstances to consider in evaluating whether a reasonable person would believe he or she was free to leave." *State v. Oney*, 187 Vt. 56, 989 A.2d 995, 1000 (2009). What matters in that evaluation is the police's response to a suspect's incriminating statement, for *Miranda* is concerned "with a type of interrogation environment *created* by the police" and it is this "atmosphere *created* by the authorities for questioning" that necessitates *Miranda* warnings. *State v. Clappes*, 117 Wis.2d 277, 283, 344 N.W.2d 141 (1984) (emphasis added).[10]

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[10] We recognize that that there are cases from other jurisdictions that have held that a suspect's incriminating admission is dispositive on the custody issue. *See Jackson v. State,* 272 Ga. 191, 528 S.E.2d 232, 235 (2000); *State v. Ripic*, 182 A.D.2d 226, 587 N.Y.S.2d 776, 782 (1992). In reply, Bartelt argues that "none" of the cases he cited in his main brief stands for the proposition that a confession is a dispositive factor. Our reading of *Jackson* and *Ripic* is to the contrary and, thus, we conclude that they are not persuasive. *See State v. Thomas*, 202 Md.App. 545, 33 A.3d 494, 512 (Md. Ct. Spec. App. 2011) (citing *Jackson* and *Ripic* in the context that "when a suspect incriminates himself" or herself, "[s]ome courts ... appear to view this factor as dispositive"), *aff'd*, 429 Md. 246, 55 A.3d 680 (2012). In any case, Bartelt argues, other cases he has cited simply view a suspect's incriminating statement "to a serious crime [as] a significant factor in this analysis." *See Ackerman v. State*, 774 N.E.2d 970, 978-79 (Ind. Ct. App. 2002) ("[W]e certainly do not consider [defendant's admissions] to be dispositive as to custody ... [h]owever we do consider the admissions relevant to the question of custody."). As we emphasize and other cases have explained, a defendant's incriminating statement is a relevant circumstance but, again, it is the impact of that statement on the conditions in the interrogation room created by the police that bear on custody, that is, "whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121,

¶47 The *Miranda* Court itself said that *Miranda* warnings are required "when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning." *Miranda*, 384 U.S. at 478, 86 S. Ct. 1602 (emphasis added). After making an incriminating statement, a suspect might believe an arrest is imminent, but that is not the test. "[T]here is a decisive difference between being arrested and merely being subject to arrest." *United States v. Thyberg*, 411 Fed. Appx. 181, 185 (10th Cir. 2011); *see United States v. Caiello*, 420 F.2d 471, 473 (2d Cir. 1969) ("It was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning was conducted, which led the court to impose the *Miranda* requirements with regard to custodial questioning."); *see also Lonkoski*, 346 Wis.2d 523, ¶38, 828 N.W.2d 552 (holding that *Miranda* does not apply to "imminent custody").[11]

¶48 As we have noted, the "ultimate inquiry is ... whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L.Ed.2d 1275 (1983) (citation omitted). Here, the police did not change the circumstances of the interview after Bartelt

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1125, 103 S. Ct. 3517, 77 L.Ed.2d 1275 (1983) (citation omitted).

[11] While *United States v. Thyberg*, 411 Fed.Appx. 181 (10th Cir. 2011), is an unpublished opinion of the Tenth Circuit Court of Appeals, FED. R. APP. P. 32.1, which the Tenth Circuit has adopted, permits the citation of an unpublished federal judicial opinion issued on or after January 1, 2007. *See State v. Duchow*, 2008 WI 57, ¶25 n.20, 310 Wis.2d 1, 749 N.W.2d 913.

made incriminating admissions.[12] The tone of the discussion throughout was not aggressive or confrontational. The officers were low-key and respectful. There was no difference in how Bartelt was treated. There was no increased compulsion inherent in the surroundings. *See Chee*, 514 F.3d at 1114 (noting that "environment did not change once the topic shifted to the sexual assault" and tone of the interview did not change even after defendant confessed); *Thomas*, 55 A.3d at 696 (holding that a confession does not per se render a suspect in custody, and once defendant confessed, the atmosphere of the room never changed; thus, admission did not render defendant in custody); *State v. Lapointe*, 237 Conn. 694, 678 A.2d 942, 958 (1996) ("While ... admissions of culpability may lead the police either to arrest a suspect or to place restraints on his freedom approximating an arrest, the police in this case never altered the circumstances of their interviews of the defendant in such a way that his initial noncustodial status became custodial.").

¶49 In support of his argument that no reasonable person would have believed that he was free to leave after confessing to an attempted homicide or other serious crime in the presence of police, Bartelt cites to *State v. Koput*, 142 Wis.2d 370, 418 N.W.2d 804 (1988). He hinges his argument on a statement from

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[12] Bartelt points out that Clausing testified that after Bartelt made incriminating statements, he was not free to leave. It is well established that "the subjective views harbored by either the interrogating officers or the person being questioned" are irrelevant. *Stansbury v. California*, 511 U.S. 318, 323, 114 S. Ct. 1526, 128 L.Ed.2d 293 (1994). There was no objective manifestation of Clausing's thoughts—he never communicated this to Bartelt.

that case that "the defendant was not in custody until after his confession, sometime after 4:15 P.M." *Id.* at 380, 418 N.W.2d 804. But, *Koput* does not control the question here, because the claim there was that the defendant was in custody when he confessed at 4:15 P.M.—a claim the supreme court rejected—and not, as here, whether a defendant was in custody after making incriminating statements. Whatever amounted to custody "sometime after 4:15 P.M." in *Koput*, whether it was being told he was under arrest, or being placed in handcuffs, or some other combination of circumstances, is not evident from the supreme court's decision. In fact, even after the defendant confessed in *Koput*, the officers questioned whether he really was the killer or just "a crackpot." *Id.* at 382, 418 N.W.2d 804. Thus, again, *Koput* does not stand for the proposition that Bartelt claims.

¶50 Bartelt also places significance on the fact that Clausing took his cell phone after he made incriminating statements. But, in doing so, he neglects the sequence of events. After Bartelt made incriminating statements, Clausing did not immediately take custody of Bartelt's cell phone. Rather, Clausing asked Bartelt to give a written statement, then Bartelt asked about counsel (before he was arrested or placed in the functional equivalent of custody), Bartelt and Clausing then briefly discussed the option of having counsel present, and then Clausing took Bartelt's cell phone. Up until that point of Clausing taking Bartelt's cell phone, the dynamics in that room bearing on the question of custody had not changed. So, at the moment Bartelt asked about counsel, he was not in custody and any request for counsel was of no significance for purposes of *Miranda*.

¶51 In this relatively brief interview of just over thirty-five minutes, Bartelt was not physically restrained in any way, was not frisked, was told he was free to leave and not under arrest, had access to an unlocked and slightly open door, and was permitted to keep and check his cell phone. We conclude, therefore, that under the totality of the circumstances, Bartelt was not in custody at the time he asked about counsel. The circumstances surrounding the station house interrogation do not show that at the time Bartelt confessed he had "no choice but to submit to the [detectives'] will and to confess," *Minnesota v. Murphy*, 465 U.S. 420, 433, 104 S. Ct. 1136, 79 L.Ed.2d 409 (1984), but, rather, he made a "free and informed choice" to implicate himself in the attack on M.R., *Roberts v. United States*, 445 U.S. 552, 561, 100 S. Ct. 1358, 63 L.Ed.2d 622 (1980).

¶52 Since Bartelt was not in custody when he asked about counsel, his Fifth Amendment right to counsel did not attach. *See State v. McNeil*, 155 Wis.2d 24, 36, 454 N.W.2d 742 (1990), *aff'd*, 501 U.S. 171, 182 n.3, 111 S. Ct. 2204, 115 L.Ed.2d 158 (1991) (noting that *Miranda* rights cannot be invoked anticipatorily, that is, in a context other than custodial interrogation); *Lonkoski*, 346 Wis.2d 523, ¶36, 828 N.W.2d 552 (rejecting argument that *Miranda* should apply because even if he was not in custody when he asked for an attorney, he undisputedly was in custody a few seconds later). Since Bartelt's right to counsel did not attach, detectives from the City of Hartford Police Department were not prohibited from interrogating Bartelt the next day in the absence of counsel. *See Lonkoski*, 346 Wis.2d 523, ¶41, 828 N.W.2d 552; *see also Kramer*, 294 Wis.2d 780, ¶14, 720 N.W.2d 459; *cf. Edwards v. Arizona*, 451

U.S. 477, 484-85, 101 S. Ct. 1880, 68 L.Ed.2d 378 (1981).

CONCLUSION

¶53 The circuit court properly denied Bartelt's motion to suppress because he was not in custody at the time he asked about counsel. Since Bartelt was not in custody at that time, detectives from the City of Hartford Police Department were not prohibited from interrogating Bartelt the next day in the absence of counsel. Accordingly, the judgments of conviction are affirmed.

By the Court.—Judgments affirmed.