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CASE NUMBER: 115609

No. 16-115609-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

v.

ANTHONY STEPHEN NICHOLS
Defendant-Appellant

BRIEF OF APPELLEE

Appeal from the District Court of Riley County, Kansas
Honorable Meryl D. Wilson, Judge
District Court Case No. 13 CR 556

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STATEMENT OF THE FACTS

On Sunday, September 8th, 2013, after John Burroughs uncharacteristically failed to show up for work for two consecutive days, his employer sent someone to his Manhattan, Kansas residence, located in the Red Bud Estate trailer park, to check on his welfare. (R. 12, 138 – 139, R. 12, 151). It was there that the Mr. Burroughs's lifeless body was discovered. (R. 12, 140). An autopsy revealed that Mr. Burroughs had suffered eight stab wounds, seven in the neck, one in the chest, and one gunshot wound to the right side of his face. (R. 14, 412). Based upon gun powder stippling on the face, it was determined that the gun was fired within three feet of Mr. Burroughs's face. (R. 14, 416). Both the gunshot and the stab wounds contributed to Mr. Burroughs's death. (R. 14, 422).

Mr. Burroughs' cellphone was collected from his trailer. (R. 13, 280- 281). The phone revealed the following:

- At 5:49 p.m. on Friday, September 6th, a call had been received from a phone associated with Christina Love. (R. 13, 288, 292, R. 9, 30).

- At 8:20 p.m. on that same date the last dialed number on the phone was made to a friend in Alabama. (R. 13, 283 - 284; R. 9, 26).
- At 9:55 p.m. on that same date the last answered call from the same friend in Alabama was received. (R. 13, 284; R. 9, 27).
- At 11:48 p.m. on that night Mr. Burroughs was no longer answering calls. (R. 13, 285, R. 9, 28).

Christina Love and John Burroughs were former co-workers and at one time had dated. (R. 14, 321 – 322). Mrs. Love suffered from an addiction to crack cocaine and on occasion would use crack with Mr. Burroughs, even after their dating relationship ended. (R. 14, 321 – 323). In September of 2013 a pattern had developed between Mrs. Love and Mr. Burroughs wherein he invite her to come over to use drugs and she would do so. (R. 14, 324 -325). Christina Love also knew the defendant, Anthony Nichols, and considered him her nephew. (R. 14, 326). She described their relationship as almost like a mother and son. (R. 14, 324).

The defendant was a self-admitted drug dealer in the Junction City and Manhattan area. (R. 14, 394, Ex. 55, R. 7, 10, 12, 54). In May of 2013, law enforcement concluded a large drug investigation in the Junction City/Manhattan, Kansas, area titled "Operation Add-A-Bag". The investigation extended into the Kansas City area. Over a hundred people were arrested as a result of Operation Add-A-Bag. In September of 2013 cases from the investigation were still going through the criminal justice system. (R. 14, 386). A search of the defendant's vehicle would later uncover a page from a law enforcement

document relating to Operation Add-A-Bag that listed names for each suspect in the operation. (R. 14, 386; R. 13, 325). Additionally, messages on the defendant's Facebook account sent to someone named "Mob Boss" on August 25th, 2013, expressed concern about "sells adabag". (R. 13, 262, R. 9, 38). The messages stated that "we got our own investigation" and spoke of two locations being "wired," one of which was "bro n hat". (R. 13, 262, R. 9, 40). The defendant believed that John Burroughs was a confidential informant and had been instrumental in sending a person to prison. (R. 14, 394, Ex. 55: R. 7, 65).

Vera McCullers was also a friend of the defendant. He called her "Auntie" and she considered their relationship to be like that of aunt and nephew. (R. 12, 142 – 143). On Friday, September 6th, 2013, at approximately 9:00 p.m., the defendant went to Ms. McCullers's Manhattan residence. (R. 12, 149 -150). The defendant asked Ms. McCullers if she knew where "John" lived. Ms. McCullers clarified that he was inquiring about John Burroughs by asking the defendant if he meant John who lived in Red Bud Estates. (R. 12, 151). Ms. McCullers did not know John Burroughs's exact address, but told the defendant that Christina Love would know the address. (R. 12, 152). At 9:51 p.m., Ms. McCullers called Christina Love on behalf of the defendant but Ms. Love was unavailable. (R. 12, 153). At 9:54 p.m. on that same date a message was sent from the defendant's phone to a "Bg" that stated: "Jus need addresses g ill take care of what ever@." (R. 13, 270, R. 9, 254). At 10:07 p.m. a second text was sent from the defendant's phone to Bg asking "Any body nd 2 g delt wit?" At 10:19 p.m. Mrs. Love returned Ms. McCullers's call. (R. 12,

154). Ms. McCullers informed Love that the defendant was looking for John Burroughs's address and that the defendant had left Ms. McCullers's residence, and she thought he was heading to Mrs. Love's residence. (R. 12, 154).

The defendant did show up at Mrs. Love's residence. (R. 14, 331). He requested that Mrs. Love ride with him to John Burroughs's house. (R. 14, 331). Mrs. Love agreed to do so, thinking that the defendant was going to sell crack to Mr. Burroughs and that she may get some crack herself. (R. 14, 331). The defendant drove himself and Mrs. Love to John Burroughs's residence. (R. 14, 332). They then walked up to Mr. Burroughs door where Mrs. Love knocked and announced herself. (R. 14, 332). After announcing herself, the defendant told Mrs. Love to go back to the vehicle and she complied. (R. 14, 332). Two to four minutes later, Mrs. Love heard a gunshot coming from the residence. (R. 14, 333). The defendant then got back into the vehicle and asked Mrs. Love if she had heard the shot. Mrs. Love replied "yes, what did you do?" to which the defendant stated "don't worry about it." (R. 14, 333). The defendant then took Mrs. Love to her residence and told her "don't tell nobody nothing." (R. 14, 333).

Despite the defendant's warning, Mrs. Love told her husband, daughter, and son, Chris, what had happened. (R. 14, 333). When Chris heard that Mrs. Love had knocked on the door and said her name, he asked "Is the man dead?" When Mrs. Love said that she did not know, Chris told her "we need to go check and see." (R. 14, 335). Mrs. Love and Chris then went to Mr. Burroughs's residence. (R. 14, 335). They found Mr. Burroughs sitting on the toilet with his head laying on the wall. Blood was everywhere. Mr.

Burroughs was gasping for air. (R. 14, 335). He appeared close to death. (R. 14, 336). Mrs. Love suggested to Chris that they leave. Chris, however, produced a knife and began stabbing Mr. Burroughs. (R. 14, 336). Mrs. Love did not know this was going to occur. (R. 14, 336). Mrs. Love and Chris then left the residence, and Chris threw the knife off of a bridge. (R. 14, 337).

Early the next morning, September 7th, 2013, Facebook messages were sent from the defendant's phone to various people. (R. 13, 262). Including in these messages were the following:

- "I cnt lv im gn sorry speak no evil see no evil tel gp its begun I wnt stop til they kil me erase this when you read it my cleansin has begun ill fine going 2 iowa to take this job" (R. 9, 44).
- "Tel p its begun lv yal im gn lookn 4 kd n every body jus tel only him cus ill nva c yall" (R. 9, 50).
- "Its begun im gn g culdt wait lv u think goin bk hm bruh let them knw I cumn soon got mo 2 do my cusn nae nae n claduett are talkn g im cumn bk cleanin." (R. 9, 52).

During a search of the defendant's residence, the police recovered a revolver. (R. 13, 230). The bullet fragments collected from the body of John Burroughs was identified as having been fired from the firearm recovered from the defendant's residence. (R. 14, 432).

The defendant was charged with the first degree premeditated murder of John Burroughs. (R. 1, 40). After resting, but before deliberations started, the State amended

the charge to attempted first degree murder. (R. 3, 50; R. 14, 436). The defendant was found guilty of attempted first degree murder. (R. 3, 58). He timely appeals.

Additional facts pertinent to the issues are set forth below.

ARGUMENTS AND AUTHORITIES

Issue I Because the search warrant allowing for the seizure of the phone also allowed a search of the electronic data on the phone, the trial court did not err in allowing evidence contained in the data into evidence at the jury trial.

a. Preservation

In order for the court to have context, the State addresses the issue of preservation in subsection (d).

b. Standard of Review

When reviewing a motion to suppress evidence, this court reviews the factual underpinnings of a district court's decision by a substantial competent evidence standard and the ultimate legal conclusion drawn from those facts by a de novo standard. The ultimate determination of the suppression of evidence is a legal question requiring independent review. *State v. Horn*, 278 Kan. 24, 30, 91 P.3d 517 (2004).

c. Background

On September 11th, 2013, law enforcement officers searched the defendant's Kansas City, Kansas, apartment. (R. 21, 24). The search was authorized by a search warrant and a supporting affidavit. (R. 21, 24, R. 8, Ex. 3). A cellphone was seized from the apartment. (R. 13, 227). After seizing the cellphone, law enforcement conducted a search of the data

contained in the phone. (R. 13, 245–250). Two text messages from the cell phone were entered into evidence at trial. (R. 13, 270, R. 9, 54, 55). Prior to trial, the defendant filed two motions that, if successful, would have resulted in the suppression of cellphone and the text messages.

The first motion was titled "Motion To Suppress Search" and labeled as Accused Filing #11. This motion sought to suppress the entire search of the defendant's residence. (R. 1, 115). The motion asserted that the affidavit supporting the warrant lacked probable cause, and that the Riley County Police Department lacked jurisdiction to conduct a search in Wyandotte County. (R. 1, 117). A hearing on the motion was held on February 4, 2015. The trial court denied the motion. (R. 21, 60 – 63).

The second motion was titled "Motion To Suppress Search of Defendant's Phone" and labeled as Accused Filing #30. This motion was not directed at the seizure of the phone from the residence but rather the search of the contents of the phone. (R. 2, 61). This second motion took exception to the fact that the search warrant did not contain a search protocol. Stated another way, the objection was that the warrant should have set out a procedure in which the phone was to be searched. (R. 2, 63). The motion argued that, because the warrant did not provide a search protocol, the warrant was akin to a general warrant that allowed a broad sweep of the phone and should therefore be suppressed. (R. 2, 64). A hearing on this motion was held on March 5, 2015. The court denied the motion, finding that the warrant was not a general warrant and that probable cause existed to authorize the search. (R. 22, 12).

Argument and Authority

d. Defendant has failed to preserve this issue

At the trial court level the defendant did not assert that the search warrant failed to authorize a search of the contents of the phone. The "Motion To Suppress Search" labeled as Accused Filing #11 claimed that the warrant lacked probable cause and that the Riley County Police Department lacked jurisdiction to search the defendant's apartment. (R. 1, 115). During the February 4th, 2015, argument on this motion, the defense attorney argued these two issues and orally added a claim that the search was invalid because a physical copy of the warrant was not present when the search started. (R. 21, 57 – 59). Similarly, the "Motion To Suppress Search of Defendant's Phone" labeled as Accused Filing #30, claimed that in order to establish probable cause for the search of the phone the State needed to provide a "search protocol" that set forth the manner in which the contents of the phone would be searched. (R. 2, 63). This was the only issue raised in oral argument on March 5th, 2015. (R. 22, 5 – 11). In fact, during argument on March 5th, 2015, the defense attorney acknowledged that search warrant authorized the search of the contents of the phone when he stated:

> "With regard to the phone, Your Honor, it is our position that if the Court will recall the search of Mr. Nichols' apartment in Kansas city, the Court has found that to be appropriate. But what we mentioned in there, and part of the reason we've kind of held these over to get it all lined up was part of that warrant also not only said hey, you can seize any phones, but if you find a phone then you can just go through it and you can see what's on there." (R. 22, 5-6). (emphasis added).

At the trial court level, the defense never alleged that the warrant was insufficient because it did not authorize a search of the contents of the phone. A point not raised in the

trial court cannot be raised for the first time on appeal. *State v. Solomon*, 257 Kan. 212, 222, 891 P.2d 407 (1995). Because the defendant failed to raise this at the trial level, he should not be allowed to raise that issue on appeal.

e. The search warrant allowed for the search of the cellphone data

Even if the defendant is allowed to raise this issue it should be denied because the assertion is wrong. The search of the defendant's apartment was authorized under search warrant 13MR143. (R. 21, 24, R. 8, Ex. 3). Among the items authorized to be searched by warrant 13MR143 was the following:

- "Cellular telephones accessible to Nichols and McKenith" and
- Electronic devises capable of transmitting electronic data, media, or other information, ***and the information contained therein, including but not limited to: Call logs, to include incoming, outgoing and missed calls, Phonebook and contacts to include phone numbers, and e-mail addresses SMS (Text) / MMS (Multimedia) messages and attached multimedia files, to include incoming and outgoing,***
- The authorization to retrieve, review, view, store, and record the data seized, observed, discovered, or otherwise located. (Emphasis added R. 8, Ex. 3).

Clearly, and without ambiguity, the warrant allowed both the seizure of cellphone and the search of the information contained therein including text messages.

f. A search protocol is not required

If the defendant's brief can be construed as arguing that the search warrant for the cellphone was invalid because it did not contain a "search protocol," this argument should be deemed as abandoned. The defendant fails to cite any authority for this proposition. An issue is abandoned if a litigant fails to adequately brief it. *State v. Rojas-Marceleno*, 295

Kan. 525, 543, 285 P.3d 361 (2012). Likewise, pressing a point without pertinent authority, or without any showing why it is sound despite a lack of supporting authority, is akin to failing to brief an issue. *McCain Foods USA, Inc. v. Central Processors, Inc.*, 275 Kan. 1, 15, 61 P.3d 68 (2002).

g. The use of a warrant eliminated any implication of *Riley v. California*

The defendant's reliance upon *Riley v. California*, 134 S. Ct. 2473, 189 L.Ed 430 (2014), is unfounded. *Riley* held that a warrant must be obtained to search a cellphone seized incident to arrest. *Riley* 134 S. Ct. at 2495. The defendant asserts that the holding in *Riley* "must apply regardless of how the phone is seized, by warrant or by search incident to an arrest." (Appellant's brief pg. 21). But even assuming that the warrant requirement in *Riley* would apply to a search not incident to arrest, this does not further the defendant's case. As set forth above, the phone was searched pursuant to a warrant that not only authorized the seizure of the phone, but also the search of the contents of the same. The holding in *Riley* is simply not implicated.

h. The good faith exception would cure any defect

United States v. Leon, 468 U.S. 897, 908-09, 913, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), held the exclusionary rule should not be applied in cases where law enforcement officers relied in good faith on a signed warrant in conducting a search. The Kansas Supreme Court has approved application of the good-faith exception to the exclusionary rule in *State v. Hoeck*, 284 Kan. 441, 463, 163 P.3d 252 (2007), stating:

> "We therefore conclude that the holding in *Leon* applies in Kansas without modification: The Fourth Amendment exclusionary rule should not be applied to bar the use of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid, except where: (1) the magistrate issuing the warrant was deliberately misled by false information; (2) the magistrate wholly abandoned his or her detached or neutral role; (3) there was so little indicia of probable cause contained in the affidavit that it was entirely unreasonable for the officers to believe the warrant was valid, or (4) the warrant so lacked specificity that officers could not determine the place to be searched or the items to be seized." *Hoeck,* 284 Kan. at 463-64.

If, for some reason, the search warrant 13MR143 could be construed as not authorizing the search of the contents of the phone, then the good-faith exception of *Leon* should apply and the text messages collected from the phone should not be suppressed. Search warrant 13MR143 certainly appears to authorize a search of the contents of the phone, and law enforcement officers would be reasonable in acting upon reliance upon the same.

Issue II It was unnecessary to re-*Mirandize* the defendant a second time before continuing an interview with him later in the same day, and the defendant did not unequivocally invoke his right to remain silent.

a. Background

The defendant was arrested by the Kansas City, Kansas, police department at approximately 5:30 a.m. on September 11th, 2013. (R. 21, 33). Detective Patricia Giordano and Detective Brek Jager contacted the defendant in an interview room at the Kansas City Kansas Police Department at approximately 11:20 a.m. on that day. (R. 21, 33, 37). No one had interviewed the defendant between his arrest and the detectives contacting him. (R. 21, 36 – 37). Detective Giordano informed the defendant that before they could

interview him she must first inform him of his *Miranda* rights. (R. 21, 40). The defendant insisted that he knew his rights and began to correctly recite those rights back to the detective. (R. 21, 40). The defendant finally agreed to stop and allow Detective Giordano to read him his *Miranda* rights. (R. 21, 40). Detective Giordano read the defendant each right by using a written *Miranda* waiver, and the defendant initialed his understanding of each right by placing his initials after each right. (R. 21, 41, Ex. 8). At 11:25 a.m. the defendant signed the *Miranda* form and agreed to be interviewed. (R. 21, 42, Ex. 8).

During the interview, Detective Jager questioned the defendant about the last time he saw the victim, John Burroughs. (R. 21, 65). The following exchange took place:

Q: [by Detective Jager]: When was the last time you saw John?

A: [by defendant]: I ain't seen John in almost two years.

Q: Where does John live at?

A: I don't know. The last place I (sic) John to live was on fucking Third and Webster, you know what I mean? Last place I know –

Q: You said when was the last time you saw John?

A: A couple years ago.

Q: And where was he at?

A: Shit, at fucking whose house was he at? It has been two fucking years.

Q: So you –

A: If I could remember every fucking detail of my fucking life for two fucking years, I could tell you every fucking thing about Friday, I can't.

Q: Can I just – I have one question.

A: I have a fucking memory problem since I got shot in the fucking…

Q: Anthony, Anthony, let me ask you a couple of questions. So you've never been to John's current residence?

A: So there is no reason for your DNA to be in there?

Q: No. (R. 8, Ex. 8, 65 – 66).

The Kansas City interview with the defendant lasted approximately an hour and a half. (R. 21, 42). While the interview was being conducted, a search was taking place at the defendant's home. (R. 21, 42). Prior to leaving, Detective Giordano informed the defendant of the search and asked if they could re-contact him when after the search was completed. The defendant agreed that the detectives could re-contact him. (R. 21, 41).

After the detectives left, the defendant was transported to Junction City, Kansas, police department. (R. 21, 43). At 7:45 p.m. that same evening, Detective Giordano

returned and again made contact with the defendant. (R. 21, 43 - 44). It had been six hours and fifty minutes since the interview in Kansas City. (R. 21, 45). This time, Detective Giordano was accompanied by Detective Josh Brown. (R. 21, 44). Upon entering the interview room, Detective Giordano reminded the defendant that she said she would be back after the search and now she was back. (R. 21, 45). The defendant appeared to be alert, conscious, and capable of making rational decisions. (R. 21, 45). The defendant was not re-advised of his *Miranda* warnings. (R. 21, 45).

Detective Giordano advised the defendant that a gun had been found during the search of his home. (R. 8, Ex. 8, 3). The defendant admitted that the gun was the murder weapon, but denied that he was the shooter. (R. 8, Ex. 8, 4). He claimed that he had the murder weapon because he had went to Kansas City and picked it up. (R. 8, Ex. 8, 6). The defendant refused to say who he got the murder weapon from. (R. 8, Ex. 8, 6). During the exchange about the gun the following occurred:

Q: [by Detective Giordano]: I just want to hear your side of the story, don't you –

A: [by defendant]: I did not shoot this man. Believe what you want.

Q: [by Detective Brown]: What did you do?

A: I got the murder weapon –

Q: What did you do?

A: I went and got the fucking murder weapon.

Q: Tell me – tell me how it played out.

A: I don't want to talk about it now. (R. 8, Ex. 8, 7).

The defendant filed three pre-trial motions relating to his statements to the police. The first was a Motion to Suppress the Kansas City interview claiming that his waiver of *Miranda* was invalid because he was tired and that his memory was impaired from a lack of sleep and a previous gunshot injury (R. 2, 7-9). The other two motions related to the Junction City interview. Accused Filing #12 claimed that the Junction City interview was invalid because a second *Miranda* warning was not given prior to commencing the interview. (R. 1, 120 - 122). The second, Accused Filing #12a, claimed that the defendant invoked his *Miranda* rights when he stated to law enforcement "I don't want to talk about it now." (R. 2, 20)[1].

A hearing on these motions was held on February 4th, 2015. In denying the motion to suppress the Kansas City interview, the court found that the defendant knew and understood his rights, agreed to waive those rights and made a free and voluntary statement. (R. 21, 75 - 76). The court specifically rejected the claim of a memory problem citing the example of the defendant reciting his *Miranda* rights to the detectives by memory before

[1] The appellant brief incorrectly states that the defendant filed a motion for a *Jackson v. Denno* hearing. (Appellant's brief pg. 23). In fact, it was the State that filed a *Jackson v. Denno* motion requesting that the court find the defendant's statements were freely and voluntarily made. (R. 1, 103)

the rights were even given to him. (R. 21, 75). In rejecting the motion to suppress the Junction City interview, the court found that that interview to be a continuation of the first interview, specifically citing the detective's statements that they would return after the search was concluded. (R. 21, 76). In regards to the defendant's statement "I don't want to talk about it now" the court found that the defendant was not invoking his right to remain silent and that a reasonable reading of the interview leads to a conclusion that the defendant was merely stating that he did not want to talk about the gun at that point. (R. 21, 76).

b. Preservation

Although the defendant's brief mentions the Kansas City interview, it does not claim that the waiver of *Miranda* at the beginning of the Kansas City interview was invalid or that the Kansas City interview was involuntary. This issue, therefore, should be deemed waived and abandoned. *State v. Boleyn*, 297 Kan. 610, 633, 303 P.3d 680 (2013) (an issue not briefed by an appellant is deemed waived and abandoned).

c. Standard of Review

A determination that a statement was freely, voluntarily, and intelligently given will be upheld if there is substantial competent evidence to support such a conclusion. In making the factual review, the appellate courts will not reweigh the evidence and will give deference to the factual findings of the trial court. The legal conclusions drawn from those facts is subject to de novo review. *State v. Cline*, 295 Kan. 104, 283 P.3d 194 (2012).

Argument and Authority

d. It was not necessary to re-*Mirandize* the defendant

before interviewing him in Junction City

"Once the mandate of *Miranda* is complied with at the threshold of the interrogation by law enforcement officers, the warnings need not be repeated at the beginning of each successive interview. To adopt an automatic second warning system would be to add a perfunctory ritual to police procedures rather than provide the meaningful set of procedural safeguards envisioned by *Miranda.*" *State v. Boyle,* 207 Kan. 833, 841, 486 P.2d 849 (1971).

Whether a suspect should be re-*Mirandized* after waiver of those communicated is based upon the totality of the circumstances. *State v. Bridges*, 297 Kan. 989, 1003-1004, 306 P.3d 244, 255 (2013). Factors the court should consider include the time that elapsed between the interviews, whether anything happened after the waiver that affected the defendant's understanding of his rights, and whether it was the same officer conducting the subsequent interview. *State v. Bridges*, 297 Kan. at 1003-1004.

In *State v. Nguyen*, 281 Kan. 702, 133 P.3d 1259 (2006), it was determined that a waiver did not expire through the mere passage of 5 to 8 hours when a suspect has been in continuous custody. In *State v. Mattox,* 280 Kan. 473, 124 P.3d 6 (2005), an interval of 8 hours and 25 minutes between being read *Miranda* rights and a subsequent un-*Miranda* interview was determined to be reasonable (citing *People v. Gonzalez*, 5 App. Div. 3d 696, 697, 774 N.Y.S.2d 739 (2004) (11 ½ hours after first questioning defendant was reasonable). Similarly, in *United States v. Andaverde*, 64 F.3d 1305, 1313 (9th Cir. 1995), a 1 day interval between waiver of *Miranda* rights and defendant's statement to law enforcement was held not to be unreasonable under the circumstances.

Based on the totality of the circumstances, it would be unreasonable to conclude that the defendant had to be re-administered his *Miranda* warnings prior to continuing the interview in Junction City. The length of time between the interview at Kansas City, Kansas, and Junction City was only 6 hours and fifty minutes. (R. 21, 45). This is much shorter than the 1-day interval in *Andaverede* and well within the 5 to 8 hour period recognized as reasonable in *Nguyen*. Further, the defendant was continuously in custody and was told by the detectives when they left him in Kansas City that they would return to talk to him. (R. 21, 41, 43). Detective Giordano was the primary person who interviewed the defendant in Kansas City, Kansas, and it was Detective Giordano who led the interview in Junction City. When she entered the Junction City interview room, Detective Giordano reminded the defendant that she had said she would be back. (R. 21, 45). There is nothing to indicate that the defendant had forgotten the *Miranda* rights previously given. The Junction City interview was simply a continuation of the Kansas City, Kansas interview. To require law enforcement to re-Mirandize the defendant under the circumstances presented here would be to require the "perfunctory ritual" that *Boyle* cautioned against.

e. The defendant's statement that "I don't want to talk about it now" was not a unequivocal statement invoking his right to remain silent.

Police are free to question a suspect who is in custody when the suspect has waived his or her *Miranda* rights. See *Davis v. United States*, 512 U.S. 452, 458, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994). If the suspect invokes *Miranda* during questioning, the interrogation must end. See *Berghuis v. Thompkins*, 560 U.S. 370, 381-82, 130 S. Ct. 2250,

176 L. Ed. 1098 (2010). Under *Miranda*, a suspect must unambiguously request counsel so that a reasonable police officer in those circumstances would understand the statement to be a request for an attorney. The same rule applies to the right to remain silent. See *State v. Cline*, 295 Kan. 104, 113, 283 P.3d 194 (2012). When a suspect makes a statement which is ambiguous as to whether the suspect is asserting a right to remain silent or to confer with counsel, the interrogator may, but is not required to, ask clarifying questions and may continue the questioning. *State v. Holmes*, 278 Kan. 603, 102 P.3d 406 (2004).

In determining whether an alleged invocation is clear and unambiguous, the court may examine the invocation itself and the defendant's statements prior to the invocation. *Cline*, 295 Kan. at 114. The timing, content, and context may aid in determining whether the alleged invocation was unambiguous. *State v. Appleby*, 289 Kan. 1017, 1051, 221 P.3d 525 (2009). In his dissent in *State v. Aguirre,* 301 Kan. 950, 349 P.3d 1245 (2015), Justice Biles discussed cases where that the Kansas Supreme Court examined whether a suspect's statements were unambiguous assertions of the right to remain silent:

> "This court has examined on several occasions whether a suspect's statements were unambiguous assertions of the right to remain silent.
>
> For instance, the statement "'I think I'll just quit talking, I don't know'" was held to be ambiguous because it could be construed to mean the suspect simply did not want to talk about details of a shooting at that precise moment in the interview but did not know if he should. *State v. Holmes*, 278 Kan.

603, 619, 102 P.3d 406 (2004). Similarly, the phrase "'I think that might be all for you'" was ambiguous as to whether the defendant desired to end the interview. *State v. Kleypas*, 272 Kan. 894, 924, 40 P.3d 139 (2001). And the declaration "'[s]o that's all I [got] to say'" was ambiguous because it could be interpreted to mean the defendant had simply finished his answer to the previous question. *State v. McCorkendale*, 267 Kan. 263, 273, 979 P.2d 1239 (1999). Similarly, the phrase "'I don't want to talk about it anymore, it hurts too much'" uttered while the suspect was being questioned about his involvement in two murders "d[id] not even reach the level of a potentially ambiguous request to remain silent; [the suspect] was saying he was upset and having difficulty talking." *State v. Fritschen*, 247 Kan. 592, 606-07, 802 P.2d 558 (1990)." *State v. Aguirre*, 301 Kan. at 966.

To put the statement -- "I don't want to talk about it now" – into perspective, the context of the interview must be examined. The defendant had just been advised that a gun had been found in his home. (R. 8, Ex. 8, 3). While he acknowledged the gun was the murder weapon, he denied being the shooter. Instead, he stated that he had driven to Kansas City to pick up the murder weapon. When pressed by the detectives on who the shooter was, the defendant insisted that he would not tell on anyone and refused to say who he picked the gun up from. (R. 8, Ex. 8, 4 – 7). It was in this context that Detective Josh Brown requested that the defendant tell him "how it played out". (R. 8, Ex. 8, 7). The defendant then responded by stating "I don't want to talk about it now." (R. 8, Ex. 8, 7).

In context, the statement "I don't want to talk about it now" was not an invocation of his right to remain silent, but simply the defendant declining to give details about a particular aspect of the case – how he got the gun. The Oxford Dictionary defines "it" as a pronoun used to refer to a thing previously mentioned or easily identified. When the defendant said "I don't want to talk about "it" now he was simply referring to the thing previously mentioned by Detective Brown, i.e. how it played out, in other words, how he came to be in possession of the murder weapon. If the defendant was asserting a right to remain silent there would have been no need for him to refer to "it". He would have simply said "I don't want to talk." Like the statement of "I don't want to talk about it anymore, it hurts to much" uttered in *Fritschen*, the statement of "I don't want to talk about it now" uttered by this defendant does not even reach the level of a potentially ambiguous request to remain silent. This was the conclusion reached by the trial court in finding that the defendant was merely saying he didn't want to discuss the the gun at that particular point. (R. 21, 76). Based on the context of the statement, this factual finding is supported by substantial competent evidence and deference should be given to that finding. The legal conclusion based upon that factual finding – that the statement was voluntary because the defendant had been advised of his *Miranda* rights and did not invoke -- the same should not be reversed. See *State v. Scott,* 286 Kan. 54, 71, 183 P.3d 801 (2008) (suspects request to finish the interview the next morning was not an invocation of his rights because he indicated a willingness to talk later).

But even if the statement could be construed as somehow being a request to remain silent, it is at best ambiguous. Because the defendant said he did not want to talk about it now, it could reasonably be construed as meaning that the defendant was not asserting a right to remain silent but simply indicating a desire to finish his statement at another time. It could also reasonably be inferred, as argued above, that he was simply declining to talk about who provided him the gun. See *Berghuis v. Thompkins*, 560 U.S. 370, 381-82, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010) (suppression only required for denial of unambiguous invocation of Miranda rights; objective inquiry).

f. Harmless Error in Admitting the Statement

If the State can carry the burden of proving beyond a reasonable doubt that the error complained of did not affect the outcome of the trial in light of the entire record then the harmless error rule applies to the erroneous admission of an involuntary confession and no reversal is required. *State v. Aguirre*, 301 Kan. 950, 349 P.3d 1245 (2016).

The harmless error rule should apply to the facts of this case. First, prior to making the statement of "I don't want to talk about it now" the defendant had already given his statement in Kansas City and had started making a statement in Junction City. (R. 7). Granting the motion to suppress based upon the finding that "I don't want to talk about it now" would not have suppressed these earlier statements. In these earlier statements the defendant admitted to being in possession of the firearm but denied being the shooter. (R. 7, 4). He also admitted that he belief that John Burroughs was a confidential informant. He essentially says nothing more in the remaining portion of the interview. He never

admits to shooting John Burroughs and only admits to picking up the weapon from the person he claims did the shooting. (R. 7). Thus, admitting the remainder of his statement was not particular helpful to the State's case. Even without the statement the case against the defendant was overwhelming and included the fact that the murder weapon was found in his possession, Vera McCullers testified the defendant was looking for John Burroughs, and Christina Love identified him as the shooter.

CONCLUSION

For the above and foregoing reasons, the State respectfully requests that this court affirm the defendant's convictions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of Appellee's Brief was sent via U.S. Mail to Gerald Wells and Jerry Wells, Attorneys at Law on this the 16th day of December, 2016.

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