STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	FOR PUBLICATION May 8, 2014
v	Nos. 306449 and 308963 Ingham Circuit Court
RANDALL KEVIN HENRY, Defendant-Appellant.	LC Nos. 10-001266-FC; 10-001265-FC

AFTER REMAND

Before: BORRELLO, P.J., and M. J. KELLY and BOONSTRA, JJ.

BOONSTRA, J. (*concurring in part and dissenting in part*).

I concur fully with sections I, II, III and V-VIII of the majority opinion, and to the corresponding portions of its concluding section IX. I also concur with the result reached in section IV of the majority opinion and in the corresponding portion of its section IX. Where I respectfully part company with the majority is in its finding that the trial court erred, even harmlessly, in admitting into evidence defendant's statements to the police detectives. To that extent, I respectfully dissent. I write separately to detail why I would find that no *Miranda*[1] violation occurred here.

I. BACKGROUND OF *MIRANDA*

"No person . . . shall be compelled in any criminal case to be a witness against himself." US Const, Am V; Const 1963, art I, § 17. The genesis of that fundamental Constitutional protection lies in the "'iniquities of the ancient system'" of "inquisitorial and manifestly unjust methods of interrogating accused persons," including by "resort[ing] to physical brutality—beatings, hanging, whipping—and to sustained and protracted questioning incommunicado in order to extort confessions." *Miranda v Arizona*, 384 US 436, 442-443, 446; 86 S Ct 1602; 16 L Ed 2d 694 (1966) (internal citation omitted).

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

The *Miranda* procedures are a now-familiar judicially created mechanism for protecting this constitutional right "not to be compelled to incriminate" oneself against what a majority of the United States Supreme Court termed "overzealous police practices." *Id*. at 439, 444. The Court recognized that, by the time of the adoption of the *Miranda* procedures in 1966, the modern police practices with which they were concerned had become less those of physical brutality and more in the nature of psychological coercion. *Id*. at 448. The *Miranda* Court thus described its concern as being with the "interrogation atmosphere and the evils it can bring." *Id*. at 456. Stated differently, "the *Miranda* warning procedures protect against the coercion that can occur when a citizen is suddenly engulfed in a police-dominated environment." *People v Cortez*, 299 Mich App 679, 702; 823 NW 2d 1 (2013) (O'CONNELL, J., concurring). The Supreme Court recently has described the following as the typical scenario that triggers the *Miranda* procedures:

> a person is arrested in his home or on the street and whisked to a police station for questioning—detention represents a sharp and ominous change, and the shock may give rise to coercive pressures. A person who is cut off from his normal life and companions and abruptly transported from the street into a police-dominated atmosphere may feel coerced into answering questions. [*Howes v Fields*, ___ US ___; 132 S Ct 1181, 1190; 182 L Ed 2d 17 (2012)].

II. "CUSTODIAL INTERROGATION"

The *Miranda* Court thus created certain safeguards to protect individuals from excesses that might occur in the "police-dominated" "interrogation atmosphere."[2] As the Court explained, however, those safeguards apply only in the context of "custodial interrogation":

> Our holding . . . briefly stated . . . is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean 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 US at 444.]

"Custodial interrogation" obviously has two components: (1) "custody" and (2) "interrogation." "Custody" is not at issue in this case, as it is undisputed here that defendant was in "custody."[3]

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[2] The *Miranda* Court stressed, however, that it did not intend to create a "constitutional straightjacket" or to "hamper the traditional function of police officers in investigating crime." *Id*. at 467, 477. Nor, the Court clarified, did the Constitution require "any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation. Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it." *Id*. at 490.

The relevant question here, therefore, is whether the detectives engaged in improper "interrogation" of defendant in violation of *Miranda*. I would hold that they did not.

A. DEFENDANT RECEIVED THE REQUISITE *MIRANDA* WARNINGS

As the majority acknowledges, defendant was read his rights and acknowledged that he understood them. To give proper context to what occurred thereafter, it is worth reviewing the rights that the detectives read to defendant. The record reflects the following recitation of rights and related colloquy with defendant:

> [*Detective*]: What time you got? I don't — About 6:45. Okay. I'm gonna read these to you and I want you to answer me yes or no, okay. You have the right to remain silent. You do not have to talk to anyone and you do not have to answer any questions. Do you understand that one?
>
> [*Defendant*]: Yes.
>
> [*Detective*]: Anything you say can and will be used as evidence . . . excuse me. Anything you say can and will be used against you in a court of law.
>
> [*Defendant*]: Yeah.
>
> [*Detective*]: You have the right to speak to an attorney but you have the . . . attorney present while during questions . . . Jesus crimeney, the light here . . . You have the right to speak to an attorney and have an attorney present while you're being questioned. Do you understand that one?
>
> [*Defendant*]: Yes sir.
>
> [*Detective*]: If you want an attorney but cannot afford one, an attorney will be appointed to represent you at public expense before answering any questions. Understand that one?
>
> [*Defendant*]: Yeap. [Sic.]
>
> [*Detective*]: If you give up your right to remain silent you may at any time change your mind and stop talking and stop answering questions. Do you understand that one Randall?

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[3] Since *Miranda*, the Supreme Court has clarified that "not all restraints on freedom of movement amount to custody for purposes of *Miranda*." *Fields*, 132 S Ct at 1189. The question of "custody" instead further turns on "the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Id*. The courts thus have recently grappled, for example, with whether the questioning of prisoners necessarily is "custodial" for purposes of *Miranda*. See e.g., *Fields*, 132 S Ct at 1190; *Cortez*, 299 Mich App at 699-702.

[*Defendant*]: Yeah.

[*Detective*]: If you give up your right to an attorney you may at any time change your mind and ask to speak to an attorney. Understand all of those ones, six things I read to ya?

[*Defendant*]: Yes.

B. THE CONTEXT OF DEFENDANT'S SUBSEQUENT EXCHANGE WITH THE DETECTIVES REVEALS CONFUSION, NOT AN UNEQUIVOCAL INVOCATION OF DEFENDANT'S RIGHT TO REMAIN SILENT

The police then had the following initial exchange with defendant:

[*Detective*]: Okay. So you understand everything that I read to you?

[*Defendant*]: Yes.

[*Detective*]: Are you willing to give up those rights and make a statement to us at this time? Talk to us about what we're, talk to us about what we're doing?

[*Defendant*]: No sir.

Indisputably, defendant answered "No sir" when, after he was read his rights and acknowledged his understanding of them, he was presented by the above-quoted follow-up query from the detectives. On its face, it would thus appear, as the majority in fact concludes, that defendant had unambiguously asserted his right to remain silent. Were that in fact the case, I would agree that the detectives could not then have interrogated defendant at that time.[4]

However, for the reasons that follow, I conclude, on closer inspection, that defendant's "No sir" response did not constitute an unequivocal invocation of his right to remain silent.[5] As

[4] The majority cites *Michigan v Mosley*, 423 US 96, 100-101; 96 S Ct 321, 46 L Ed 2d 313 (1975), for the proposition that "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." This is a quotation from *Miranda* itself. See *Miranda*, 384 US at 473-474. However, while this general statement remains true, *Mosley* dealt with the issue of when police may resume questioning after an *unequivocal* invocation of the right to remain silent. *Mosley*, 423 US at 101. *Mosley* does not address the situation here, where, as explained further below, defendant did not unequivocally invoke his right to remain silent; nor does it provide any aid in determining whether "interrogation" took place.

[5] The majority posits that I have "fail[ed] to articulate what part of the word 'no' is equivocal," and goes on to incorrectly suggest that I state or imply that the word "no" is ambiguous and may mean "'yes,' 'maybe,' 'possibly,' or 'perhaps.'" Of course, that is not my position. The majority misstates my position, attacks a position that I have not taken, and fails entirely to

the majority acknowledges, to invoke the right to remain silent, a suspect must "unequivocally" indicate that he or she wishes to remain silent. *People v Catey*, 135 Mich App 714, 722; 356 NW2d 241 (1984); *People v Adams*, 245 Mich App 226, 234-235; 627 NW2d 623 (2001). When the suspect does not unequivocally invoke his right to remain silent, police officers are permitted to continue the interview. *Adams*, 245 Mich App at 234-235. Here, viewed in context, defendant's response reflects not an unequivocal invocation of his right to remain silent, but instead reflects understandable confusion about what he was being asked. See *id*. at 239.

To properly understand defendant's initial "No sir" response, we must consider the question(s) to which he was responding. As noted, after reading defendant his rights (i.e., "those . . . six things I read to ya"), the detectives posed the following query to defendant:

> [*Detective*]: Are you willing to give up those rights and make a statement to us at this time? Talk to us about what we're, talk to us about what we're doing?

The detectives thus clumsily asked defendant three confusing questions, all combined and compounded into one simultaneous[6] query: (1) "Are you willing to give up those rights [?]"; (2) "Are you willing to . . . make a statement to us at this time?"; and (3) "Are you willing to . . . talk to us about what we're doing?" Arguably, the second and third questions are essentially the same, inquiring of defendant whether he wished to talk with the detectives notwithstanding the rights that had been read to him.

But the first question ("Are you willing to give up those rights"?) was entirely inconsistent with the other questions to which it was joined. Specifically, and notably, among the "six things" that comprised the *Miranda* rights that the detectives read to defendant were both the right to remain silent and the right, if he chose not to remain silent, to "at any time change [his] mind and stop talking and stop answering questions." So, by posing their query to defendant in the clumsy, confusing, and compound manner in which they did, the detectives simultaneously and inconsistently asked defendant if he wanted to "give up" both his right to remain silent and his right, if he gave up that right, to "change [his] mind and stop talking and stop answering questions." It is hardly surprising in this context that defendant was confused.

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address the merits of this dissent. Simply put, I need not, and do not, contend that the bare word "no," in and of itself, is ambiguous. Rather, read in context and with a proper understanding of *Miranda* and its progeny, defendant's response to the detective's multi-part and confusing question, to use the majority's chosen terminology, "allow[ed] for the possibility of more than one meaning or interpretation," as explained further *infra*. See *Adams*, 245 Mich App 226, 239 (declining to view transcript words cited by the defendant in isolation and examining the "context" and "circumstances" surrounding the defendant's statement alleged to be an unequivocal assertion of the right to counsel). Moreover, the subsequent dialogue did not constitute "interrogation" for purposes of *Miranda*. See *infra*. The majority, in failing to address the substantive merits of this dissent, and in choosing instead to distort my position, fails to articulate why I am wrong.

[6] The transcript reflects two question marks, but three inquiries, all posed to defendant simultaneously.

He may well have been willing to speak with the detectives, yet unwilling, for example, to "give up" his right to stop talking whenever he chose.[7]

For all of the above reasons, I would hold that defendant did not unequivocally invoke his right to remain silent, and the detectives did not fail to "scrupulously honor" any exercise of defendant's "right to cut off questioning." *Catey*, 135 Mich App at 725 (internal quotation marks and citations omitted).

C. THE CONFUSION WAS REMEDIABLE, AND WAS REMEDIED

The next question, for *Miranda* purposes, is whether the confusion that resulted from the detectives' inartful attempt to comply with *Miranda*, was remediable. I conclude that it was, and that it must be. Otherwise, we will have mechanically transformed *Miranda* from the intended safeguard against coercive and overzealous police practices into the very "constitutional straightjacket" that *Miranda* itself decried.

The detectives immediately followed up defendant's initial "No sir" response with the following question: "So you don't wanna talk to us?" That question can hardly be described as the kind of coercive or overzealous police practice to which *Miranda* was directed. To the contrary, it simply served to further a preliminary dialogue to clarify the confusion that was inherent in the detectives' earlier query, to advance and confirm defendant's understanding of his rights, and to facilitate defendant's knowledgeable decision-making, with regard to the exercise of his rights, in an understandable context. Defendant's immediate response reflects his initial confusion:

> [*Detective*]: So you don't wanna talk to us?
>
> [*Defendant*]: I mean you say give up the rights.

The exchange that continued thereafter reflected a clarification of the confusion, greater clarity of defendant's understanding of his rights, and a knowledgeable decision by defendant to talk with the detectives but not to otherwise "give up" his rights:

> [*Detective*]: Well no, do you wanna give us, give us a statement at this time? You understand what I read to you.
>
> [*Defendant*]: Yeah.
>
> [*Detective*]: Those are all your rights.
>
> [*Defendant*]: Yeah.

[7] For this reason, I disagree with the majority's conclusion that defendant "unequivocally" made an "assertion of his Fifth Amendment right to remain silent" by responding "No sir" to the detectives' initial inartful query.

[*Detective*]: Now I'm asking do you wanna make a statement at this time, what we wanna talk to you about?

[*Detective 2*]: In order for us . . .

[*Defendant*]: Yeap, [sic] yes. I understand what you're saying. Yeah, yeah.

[*Detective*]: Okay, okay. You wanna make a statement then and talk to us.

[*Defendant*]: Yes, I'll make a statement yeah.

[*Detective*]: Okay.

[*Defendant*]: But I'm not give [sic] up my rights am I?

[*Detective 2*]: You can stop talking –

[*Detective*]: You can -------- you know at any time you want.

[*Detective 2*]: If you're uncomfortable about something or if you just simply don't like us, you can say I'm done, okay. You can interrupt us for that matter, it's no big deal. We just wanna set the matter straight. This has been coming on for some time.

[*Defendant*]: Okay.[8]

Beyond a doubt, the handling of the *Miranda* rights process that the detectives exhibited here was not one that I would encourage others to emulate. They initially stumbled over the reading of some of the rights. They then posed a confusing, compound, inconsistent and unnecessary query to defendant about "giving up" his rights. Rather than following these detectives' example, others should learn from it, and should endeavor to employ a practice whereby they clearly read each of the rights in question, secure the suspect's understanding of them, and then clearly inquire of the suspect whether, understanding his rights, he wishes to speak to them.

However, I conclude that, when the totality of the circumstances is examined, the detectives were able to clear up the confusion and secure a valid *Miranda* waiver, as I will discuss further *infra*. Thus any confusion that initially resulted did not result in a statement procured by coercion or given by a defendant ignorant of the consequences of his actions. See *People v Ryan*, 295 Mich App 388, 397; 819 NW2d 55 (2012); see also *People v McBride*, 273 Mich App 238, 254-255; 729 NW2d 551 (2006), rev'd in part on other grounds 480 Mich 1047 (2008).

D. THERE WAS NO "INTERROGATION" FOR PURPOSES OF *MIRANDA*

[8] Defendant thereupon signed a written form waiving his *Miranda* rights.

Equally importantly for *Miranda* purposes, neither the detective's follow-up question ("So you don't wanna talk to us?") nor the succeeding dialogue constituted "interrogation" to which *Miranda* applies. The *Miranda* Court was careful to limit its holding to the "interrogation" process, thereby restricting police officers, upon a defendant's exercise of his right to remain silent, from further "interrogation." *Miranda*, 384 US at 444, and passim. This, of course, raises the question of what constitutes "interrogation" for *Miranda* purposes.

The Court in *Miranda* did not provide a definition of "interrogation" per se, but simply stated that "[b]y custodial interrogation, we mean 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." *Id*. at 444.

1. *INNIS*'S DEFINITION OF "INTERROGATION"

The question of what constitutes "interrogation" for purposes of *Miranda* was answered by the Supreme Court in *Rhode Island v Innis*, 446 US 291; 100 S Ct 1682; 64 L Ed 2d 297 (1980). In *Innis*, two police officers, after repeatedly advising the defendant of his *Miranda* rights, and after the defendant had stated that he understood his rights and wanted to speak to a lawyer, engaged in a dialogue ostensibly directed to each other (and not directed to the defendant). During that dialogue, one of the officers stated that there were "a lot of handicapped children running around in this area" because a school for handicapped children was located nearby, and that "God forbid one of them might find a weapon with shells and they might hurt themselves." *Id*. at 294-295. Having overheard the conversation, the defendant interrupted it, stating that the officers should turn the car around so that he could show them where the gun was located. The officers again advised the defendant of his *Miranda* rights, and he replied that he understood them but that he "wanted to get the gun out of the way because of the kids in the area in the school." *Id*. at 295. The defendant then led the officers to the gun in question.

The defendant in *Innis* unsuccessfully moved to suppress the gun and his statements regarding it. The evidence was introduced at defendant's trial, and he was convicted on a number of counts. The Rhode Island Supreme Court reversed, finding that the defendant "had been subjected to 'subtle coercion' that was the equivalent of 'interrogation' within the meaning of the *Miranda* opinion." The United States Supreme Court granted certiorari "to address for the first time the meaning of 'interrogation' under [*Miranda*]." *Id*. at 296-297.

As a starting point, the Court in *Innis* looked to *Miranda* itself, and to its reference to "*questioning* initiated by law enforcement officers . . . ." *Innis*, 446 US at 298, quoting *Miranda*, 384 US at 444 (emphasis in *Innis*). But notwithstanding *Miranda*'s use of the term "questioning," the Court in *Innis* rejected the suggestion that the *Miranda* principles should apply "only to those police interrogation practices that involve express questioning of a defendant." *Innis*, 446 US at 298-299 ("We do not, however, construe the *Miranda* opinion so narrowly.").

In vacating the reversal of the defendant's conviction, the Court in *Innis* thus supplied the following definition of "interrogation" for purposes of *Miranda*:

> We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. [*Id*. at 300-301 (footnote omitted).]

The definition of "interrogation" supplied in *Innis* thus did two important things: (1) it broadly construed "interrogation" to include not only "express questioning" but also its "functional equivalent," i.e., in certain circumstances, to also include "words or actions on the part of the police (other than those normally attendant to arrest and custody)"; and (2) it added the qualifier that "the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id*. As to the latter, the Court noted that it "focuses primarily upon the perceptions of the suspect, rather than the intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response thus amounts to interrogation." *Id*. at 301 (footnote omitted).

In providing that definition, the Court further clarified that "'"[i]nterrogation," as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself.'" *Id*. at 300 (citation omitted). See also *People v Anderson*, 209 Mich App 527, 532-533; 531 NW 2d 780 (1995).

2. *WHITE*

Our Supreme Court also recently had occasion to apply *Innis*'s definition of "interrogation" in *People v White*, 493 Mich 187; 828 NW 2d 239 (2013). In *White*, as in *Innis*, a police officer engaged in commentary after the defendant had invoked his *Miranda* rights. That commentary was prefaced by the officer's admonition to the defendant that he was "not asking you questions, I'm just telling you," followed by the officer's statement that "I hope that the gun is in a place where nobody can get a hold of it and nobody else can get hurt by it, okay. All right." *Id*. at 191. The defendant interrupted the officer's comments and blurted out, among other incriminating statements, that "I didn't even mean for it to happen like that. It was a complete accident." *Id*. at 192.

Our Supreme Court held in *White* that the defendant was not subjected to "interrogation" within the meaning of *Miranda*. *Id*. at 209. Pursuant to *Innis*, the Court analyzed both whether the defendant had been subjected to "express questioning" and whether he had been subjected to its "functional equivalent." *Id*. at 197-198, 208-209. The Court held that he had been subjected to neither. *Id*. at 209.

The Court concluded that there had been no "express questioning" for several reasons. First, the officer's comment "was not a question because it did not ask for an answer or invite a response. It was a mere expression of hope and concern." *White*, 493 Mich at 198. Second, particularly when the conversation is considered in its entirety, "the officer's addition of the words "okay" and "all right" at the end of his comment did not transform a non-question into a question." *Id*. Third, the officer prefaced his comment with "I'm not asking you questions, I'm

just telling you." *Id*. at 199. While not dispositive, the Court found that factor "relevant with regard to whether the officer reasonably should have expected an answer." *Id*. Fourth, the fact that the defendant's response (that it was an "accident" and that he "didn't mean for it to happen like that") had nothing to do with the subject of the officer's preceding comment (regarding the location of the gun) "reinforces the conclusion that the officer's comment here was not a question." *Id*. at 200. Fifth, the fact that the officer responded to the defendant's incriminating statement by attempting to "veer the conversation away from any further incriminating statements" serves to "underscore[] that the officer's comment was not 'designed to elicit an incriminating response. . . ." *Id*. at 200-201, citing *Innis*, 446 US at 302 n 7.[9] Finally, "to the extent that the officer's statement can even be reasonably viewed as a question, this particular question does not seem intended to generate an incriminating response. Instead, if anything, the officer was simply trying to ensure that defendant heard and understood him." *Id*. at 201-202.

The Court in *White* additionally held that the defendant "was not subjected to the 'functional equivalent' of express questioning after he invoked his right to remain silent." *Id*. at 202. Noting that "direct statements to the defendant do not necessarily constitute 'interrogation,'" the Court stressed that "the dispositive question is whether the 'suspect's incriminating response was the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response,'" *Id*. at 208, citing *Innis*, 446 US at 303. The Court found that it was not, rejecting the argument that *Innis* was distinguishable because the officers there "were talking to themselves and not directly to the defendant." *Id*. at 205-206 ("we do not believe that this difference alone requires a different outcome"). And the Court further found that none of the criteria referenced in *Innis* were present to support a conclusion that defendant's incriminating response "was the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response," *Id*. at 208, citing *Innis*, 446 US at 303.[10]

3. *WOODS*

Recently, the Sixth Circuit applied the *Innis* definition of "interrogation" in *United States v Woods*, 711 F3d 737 (CA 6, 2013). In *Woods*, an officer in the process of arresting and patting

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[9] This is relevant because "the intent of the police … may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response." *Innis*, 446 US at 302, n 7.

[10] As the Court noted in *White*, there was "nothing in the record to suggest that the officer was aware that [the] defendant was 'peculiarly susceptible to an appeal to his conscience' concerning the safety of others." *White*, 493 Mich at 197, quoting *Innis*, 446 US at 302. Also, there was "nothing in the record to suggest that the officer . . . was aware that [the] defendant was 'unusually disoriented or upset at the time of his arrest.'" *Id*, quoting *Innis*, 446 US at 303. "Furthermore, the officer only made a single remark about the gun. 'This is not a case where the police carried on a lengthy harangue in the presence of the suspect.'" *Id*., quoting *Innis*, 446 US at 303. "Indeed, the officer's comment in [*White*] was far less 'evocative' than the officer's comment in *Innis*." *Id*. at 204.

down a suspect asked the suspect, "What is in your pocket?" *Id*. at 739. The suspect responded with an incriminating statement; specifically that he had a gun in his car. *Id*. The suspect had not been advised of his *Miranda* rights. The court concluded that the officer's question did not meet the *Innis* definition of "interrogation" because it "was not an investigatory question or otherwise calculated to elicit an incriminating response, but rather a natural and automatic response to the unfolding events during the normal course of an arrest." *Id*. at 741. The court referred to the officer's question as "essentially an automatic, reflexive question" that had "nothing to do with an interrogation as that term is commonly understood." *Id*. Additionally, the court stated that the officer's "question was not reasonably likely to elicit an incriminating response beyond what he was already entitled to know . . . ." *Id*. at 742.

The court also invoked "common sense":

> We believe that our analysis is also consistent with common sense. If we were to hold that the question "What is in your pocket?" amounted to an interrogation such as to require *Miranda* warnings, we would be saying, in effect, that the police were acting lawfully when they drew a gun on Woods, dragged him out of his car by the wrists, ordered him to the ground, cuffed his hands behind his back, and patted him down; but the moment that they asked "What is in your pocket?", they went beyond the bounds of constitutionally permissible action. The Fifth Amendment does not require such an impractical regime of stilted logic. [*Id*. at 742.]

Finally, the court cautioned against elevation of "form over substance" by fixating on whether or not "the alleged interrogation is phrased in the form of a question or a declarative sentence," because the test is "whether the conduct implicates the concerns with police 'compulsion' and 'coercion' that animated the *Miranda* decision." *Id*. at 744, quoting *Innis*, 466 US at 299-301.

> The proper interpretation of *Innis* . . . thus requires us to determine whether the words or actions on the part of the police are those normally attendant to arrest and custody, and whether they give rise to the concerns about police coercion that animated the *Miranda* decision. It does not require us to attach talismanic importance to whether the words are punctuated by a question mark. [*Id*. at 744.]

4. APPLICATION OF *INNIS*, *WHITE*, AND *WOODS*

In applying *Innis*, *White*, and *Woods* to the facts of this case,[11] it is worth noting at the outset that the defendants' invocations of their *Miranda* rights in *Innis* (invoking the right to counsel) and in *White* ("I don't even want to speak") were more unequivocal than defendant's

[11] I am mindful of the fact that "none of the cited decisions fully addresses the specific circumstances at issue here—few criminal cases are factually identical—these decisions are nonetheless helpful in resolving the present question . . . ." *White*, 493 Mich at 208, n 10.

initial expression ("No sir") arguably was here.[12] Those invocations did not end the inquiry in *Innis* and *White*, however, as to whether subsequent dialogue or events constituted "interrogation" within the meaning of *Miranda*. Even more clearly, defendant's more equivocal expression cannot end the inquiry here.

We must therefore determine whether, in following up defendant's "No sir" response with "So you don't wanna talk with us?" and the succeeding dialogue quoted above, the detectives here engaged in either "express questioning" or its "functional equivalent," as defined in *Innis* and interpreted in *White*. I would hold that they did neither.

a. THERE WAS NO "FUNCTIONAL EQUIVALENT" OF EXPRESS QUESTIONING

To begin, I note that the detective here indisputably asked the defendant a follow-up *question*. We therefore arguably are not faced, as were the Courts in *Innis* and *White*, with the question of whether a comment or statement—not punctuated by a question mark—constitutes "interrogation." Therefore, it may be unnecessary for us in this context to even address the "functional equivalent" component of the *Innis* definition of "interrogation." I do so nonetheless, because aspects of the above-quoted succeeding dialogue between the detectives and defendant were in the form of statements by the detectives, rather than questions, and because the "functional equivalent" analysis informs my analysis of the "express questioning" component of the *Innis* test. In so doing I am mindful that *Miranda* does not require this Court to attach "talismanic importance to whether the words are punctuated by a question mark." *Woods*, 711 F3d at 744.

As our Supreme Court noted in *White*, the "dispositive question," even under a "functional equivalent" analysis, is "whether the 'suspect's incriminating response was the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response," *White*, 493 Mich at 208, citing *Innis*, 446 US at 303. In my view, that question almost has no place here, because defendant in fact gave no "incriminating response" in response to any of the dialogue in question. All of defendant's responses dealt solely with his understanding of his rights, the meaning of "give up the rights," and an affirmation, after receiving clarification of the detective's initial query, that defendant indeed wanted to speak with the detectives. Plainly and simply, defendant at that juncture said nothing "incriminating."

Lest it be contended, notwithstanding this, that defendant's *subsequent* incriminating statements, made *after* defendant had knowledgeably waived his right to remain silent, was somehow tainted, as the majority concludes by stating that "police subsequently led defendant to believe that he was not relinquishing his rights by agreeing to make a statement," I will further

[12] For the reasons noted, for example, defendant's "No sir" response here was far less indicative of an invocation of *Miranda* rights than was the defendant's "I don't even want to speak" response in *White*. In context, defendant's "No sir" response exhibited confusion about what he was being asked. Consequently, unlike in *White*, there was here no unequivocal invocation by defendant of his *Miranda* rights. See *Id*. at 191.

address the remaining components of *Innis'* "functional equivalent" test. Specifically, and as in *White* and *Innis*, there is nothing in the record here to suggest that the detectives were aware that defendant was "peculiarly susceptible" in any respect.[13] Unlike the defendant in *White* (who was only 17 years old) defendant here was at least 43 years old at the time of these events.[14] But even in the circumstances presented in *White*, our Supreme Court stated that "the mere fact that defendant was 17 years old and inexperienced in the criminal justice system[15] does not mean that he was 'peculiarly susceptible to an appeal to his conscience' or 'unusual[ly] susceptib[le] . . . to a particular form of persuasion. . . .'" *White*, 493 Mich at 197, citing *Innis*, 446 US at 302. Moreover, there is nothing to suggest that the detectives here were "aware" of any "peculiar susceptibility" nor, for the reasons noted, was any "appeal to [defendant's] conscience" or any other "particular form of persuasion" even employed here. *Id.*

Nor is there anything in the record to suggest that the detectives were aware that defendant was "'unusually disoriented or upset at the time of his arrest.'" *Id*., citing *Innis*, 446 US at 303. To the contrary, the record, including the video of the police interview of defendant, reflects otherwise. Nor did the detectives here engage in any "lengthy harangue" or say anything even remotely "evocative." *Id*. Defendant was not subjected even to "subtle compulsion," which in any event has been held not to constitute "interrogation." *Id*.

For all of these reasons, I conclude that there was no "functional equivalent" of "express questioning, within the meaning of *Innis* and *White*.

b. THERE WAS NO "EXPRESS QUESTIONING"

That brings me to the next question that we must address: whether defendant was subjected to "express questioning" in violation of *Miranda*. Again, I would hold that he was not.

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[13] In both *Innis* and *White*, where the officers made reference to the location of a gun, the Courts considered whether there was any evidence that the defendants were "peculiarly susceptible to an appeal to his conscience." Here, by contrast, there was no similar reference, and not even arguably such an appeal.

[14] Defendant was interviewed on December 5, 2010, following his arrest. He gave his birth date as March 17, 1967, making him 43 at the time of the interview. See also defendant's entry on the Michigan Offender Tracking Information System (OTIS), http://mdocweb.state.mi.us/OTIS2/otis2profile.aspx?mdocNumber=238185 (last visited April 10, 2014).

[15] Here, defendant was not inexperienced in the criminal justice system; the complaint against defendant states that he was previously convicted of three separate offenses involving the manufacture and delivery of controlled substances and a previous breaking and entering, for which he served substantial prison time. Defendant's Sentencing Information Report indicates that he was scored 170 points for Prior Record Variable Score (PRV), and placed category F, the highest PRV category. The sentencing transcript also reflects defendant's numerous past convictions.

As noted, defendant indisputably was asked a follow-up *question*: "So you don't wanna talk to us?" But keeping in mind the perceived evils that *Miranda* was intended to address, every "question" does not equate to "questioning" or, therefore, to "interrogation," for purposes of *Miranda*. See *Woods*, 711 F3d at 744. As the Supreme Court recently noted, "Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated." *Fields*, 132 S Ct at 1192, quoting *Berkemer v McCarty*, 468 US 420, 437; 104 S Ct 3138; 82 L Ed 2d 317 (1984) (emphasis added).

The question at issue here ("So you don't wanna talk to us?") had nothing whatsoever to do with the substantive matter about which the detectives sought to question defendant. Certainly, the question invited a response, and the detective reasonably could have expected one. But the response that was invited, and that reasonably could have been expected, was only as to *whether* defendant would talk to the detectives, not about *what* he and the detectives would discuss if he chose to do so. Further, in the totality of the circumstances, this question resembles the "automatic, reflexive question" asked by the officer in *Woods*, 711 F3d at 741; it is natural, after all, in a confusing situation, to seek clarity through follow-up questioning.

Relatedly, this particular question clearly was not intended to generate an incriminating response. This factor indeed is critical. Much more than the statement made by the officer in *White* (which related to the substantive issue of the location of a gun), the question here ("So you don't want talk to us?") indisputably could not have reasonably been expected, or intended, to elicit a *substantive* response of any kind, much less an "incriminating" one. To the contrary, the only response that reasonably could have been expected, or intended, related to defendant's understanding of his rights and his willingness to speak with the detectives. See *White*, 493 Mich at 201-202 ("to the extent that the officer's statement can even be reasonably viewed as a question, this particular question does not seem intended to generate an incriminating response. Instead, if anything, the officer was simply trying to ensure that defendant heard and understood him.").

To close this loop of my analysis, I will again quote the definition of "interrogation" that the Supreme Court supplied in *Innis*, as I believe that definition further supports my conclusion that no "express questioning" occurred here:

> We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. [*Innis*, 446 US at 300-301 (footnote omitted).]

To the extent that it might be argued, under the last antecedent rule or otherwise, that the Court's use of the language "that the police should know are reasonably likely to elicit an incriminating response from the suspect" does not apply to "express questioning," but only to "words or actions on the part of the police," I categorically reject that notion, for several reasons. First, our Supreme Court in *White* already has specifically interpreted that language as having

application to "express questioning." See *White*, 493 Mich at 200-202.[16] Moreover, the very point of *Innis* was to juxtapose "express questioning" with other "words or actions on the part of the police" as "functional equivalent[s]." It would make no sense to apply a qualifier ("that the police should know are reasonably likely to elicit an incriminating response from the suspect") to one but not the other; indeed, they then would not be "functional equivalent[s]." Clearly, therefore, to constitute "express questioning" for purposes of *Miranda*, questions must be ones "that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.*

The same reasoning necessarily also holds true for the parenthetical language found in the *Innis* definition of "interrogation." Therefore, in order to constitute "express questioning" for purposes of *Miranda*, questions must be "other than those normally attendant to arrest and custody." *Id.*; see also *Woods*, 713 F3d at 741. This conclusion, of course, dovetails with my earlier observation that the question here ("So you don't wanna talk to us?") was merely a non-substantive inquiry that "simply served to further a preliminary dialogue to clarify the confusion that was inherent in the officers' earlier query, to advance and confirm defendant's understanding of his rights, and to facilitate defendant's knowledgeable decision-making, with regard to the exercise of his rights, in an understandable context." Simply put, the question was one that was "normally attendant to arrest and custody," since it related to the *Miranda* warning process itself, and not to the substantive, underlying merits of the subject matter that caused those warnings to have to be given to defendant. As such, it did not constitute "express questioning" within the meaning of *Miranda*. See, e.g., *Pennsylvania v Muniz*, 496 US 582, 601-602; 110 S Ct 2638; 110 L Ed 2d 528 (1990) (questions asked for biographical and administrative purposes are not covered by *Miranda* unless they are designed to elicit incriminating statements).

Finally, it can hardly be disputed that neither the detective's follow-up question ("So you don't wanna talk to us?") nor their succeeding dialogue with defendant exhibited even the least amount of coercion or compulsion, subtle or otherwise. I disagree with the majority's characterization of the subsequent statements by the detectives as "conceal[ing] from defendant the fact that agreeing to talk constituted a waiver of his constitutional rights," resulting in defendant being led "to believe he was not relinquishing his rights by agreeing to make a statement." The majority takes issue with the detectives' statement, in the following portion of the colloquy, that defendant could stop talking at any time:

> [*Detective*]: Well no, do you wanna give us, give us a statement at this time? You understand what I read to you.
>
> [*Defendant*]: Yeah.

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[16] This Court has concluded similarly. See *People v Elliott*, 295 Mich App 623, 634-635; 815 NW 2d 575 (2012), rev'd on other grounds 494 Mich 292 (2013) (the "express questioning of defendant about the robbery in an attempt to obtain defendant's statement constituted an interrogation *because her questions were reasonably likely to elicit an incriminating response from defendant*") (emphasis added).

[*Detective*]: Those are all your rights.

[*Defendant*]: Yeah.

[*Detective*]: Now I'm asking do you wanna make a statement at this time, what we wanna talk to you about?

[*Detective 2*]: In order for us . . .

[*Defendant*]: Yeap, [sic] yes. I understand what you're saying. Yeah, yeah.

[*Detective*]: Okay, okay. You wanna make a statement then and talk to us.

[*Defendant*]: Yes, I'll make a statement yeah.

[*Detective*]: Okay.

[*Defendant*]: But I'm not give [sic] up my rights am I?

[*Detective 2*]: You can stop talking –

[*Detective*]: You can -------- you know at any time you want.

[*Detective 2*]: If you're uncomfortable about something or if you just simply don't like us, you can say I'm done, okay. You can interrupt us for that matter, it's no big deal. We just wanna set the matter straight. This has been coming on for some time.

[*Defendant*]: Okay.

The transcript thus reveals that defendant, mere moments *before* his query to the detectives, had indicated that he understood all of his *Miranda* rights that had been read to him. The majority's reasoning, that the police somehow convinced defendant (by later accurately informing him that he could stop talking at any point) that he could give a statement without waiving his right to self-incrimination is, at best, strained, and in any event is not supported by the record or the case law regarding waiver of *Miranda* rights, as discussed in Section IV, *infra*. The only measure of conceivable compulsion that was even arguably reflected in the circumstances presented was merely that which is "inherent in custody itself." Accordingly, there was no "interrogation." *Innis*, 446 US at 300. Holding otherwise would violate both common sense and the language of *Innis*. *Woods*, 713 F3d at 744, citing *Innis*, 466 US at 299-301.

IV. DEFENDANT KNOWINGLY AND VOLUNTARILY WAIVED HIS *MIRANDA* RIGHTS

In addition, I would hold that defendant "knowingly and voluntarily waived" his *Miranda* rights. *North Carolina v Butler*, 441 US 369, 373; 99 S Ct 1755; 60 L Ed 2d 286 (1979). The "question of waiver must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Id*. at 375

(citations omitted). "The waiver inquiry "has two distinct dimensions: waiver must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Berghuis v Thompkins*, 560 US 370, 383; 130 S Ct 2250; 176 L Ed 2d 1098 (2010) (citation omitted). This Court has further stated that the analysis of whether a defendant's waiver of his rights is valid is essentially the same as that for determining if a confession is admissible, and requires review of the totality of the circumstances. See *Ryan*, 295 Mich App at 397; see also *McBride*, 273 Mich App at 254-255. Here, the totality of the circumstances indicates that the waiver was "the product of free and deliberate choice" made in the absence of "intimidation, coercion, or deception." *Ryan*, 295 Mich App at 398. Additionally, although the process of reaching that point was somewhat labored, I conclude that defendant understood "basically what those [*Miranda*] rights encompass and minimally what their waiver will entail." *McBride*, 273 Mich App at 254.

Since *Miranda*, the Supreme Court has clarified that the "prosecution . . . does not need to show that a waiver of *Miranda* rights was express"; rather, "[a]n 'implicit waiver' of the "right to remain silent" is sufficient." *Id*. at 2262, citing *Butler*, 441 US at 376. Here, however, I would find that defendant's waiver of his right to remain silent indeed was made expressly. After receiving clarification of his rights, defendant said, "Yes, I'll make a statement yeah." After being further told that he could stop talking at any time, defendant responded, "Okay." He then signed a waiver of rights form. Without a doubt, defendant's waiver was the "product of a free and deliberate choice," and did not result from "intimidation, coercion, or deception." It was therefore "voluntary." It also was "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id*. at 2260.

The question then becomes whether that waiver was effective, given that it was made after defendant's initial "No sir" response. I would hold that it was. For all of the reasons stated above, I would find that defendant received proper *Miranda* warnings, there was no unequivocal invocation of defendant's *Miranda* rights, and there was no "interrogation" for purposes of *Miranda*. "The *Miranda* rule and its requirements are met if a suspect receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions." *Id*. at 2263. Those requirements are met here. It would defeat the very purpose of the *Miranda* procedures if, when presented with a degree of confusion about a defendant's rights, such as occurred here, the police and the defendant were forbidden from engaging in any dialogue by which to clarify those rights and to enable the defendant to make an informed decision.

Further, although I would find that no "interrogation" occurred here prior to defendant's waiver of rights, the Supreme Court has "rejected the rule … which would have "requir[ed] the police to obtain an express waiver of [*Miranda* rights] before proceeding with interrogation." *Id*. (quotation marks and citation omitted). Absent an unambiguous invocation of rights, even a substantive "interrogation" could have proceeded. *Id*. at 2264.

V. CONCLUSION

For these reasons, I would hold that no *Miranda* violation occurred here, and that the trial court did not err, even harmlessly, in admitting into evidence defendant's statements to the police detectives. Accordingly, I respectfully dissent from the majority's conclusion otherwise, and concur only in the result reached in section IV of the majority opinion (and in its concluding section IX with respect to that issue). As stated above, I concur fully with all other portions of the majority opinion.

/s/ Mark T. Boonstra