NO. A-23-622

IN THE NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA,

Appellee,

vs.

CRYSTAL DEMERS,

Appellant.

APPEAL FROM THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA
HONORABLE KEVIN R. MCMANAMAN, DISTRICT JUDGE

BRIEF OF APPELLANT

Submitted by:

KRISTI EGGER, #18782
Public Defender

DAVID J. TARRELL, #22024
Deputy Public Defender

Lancaster County Public Defender
633 South 9th Street
Lincoln, NE 68508
(402) 441-7631
dtarrell@lancaster.ne.gov

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

BASIS FOR APPELLATE JURISDICTION

Ms. Crystal Demers (hereafter "Appellant") appeals the judgment and sentence of the District Court for Lancaster County, Nebraska (hereafter "District Court") following a guilty verdict in a stipulated bench trial. (T114). Appellant was charged in an Amended Information with First Degree Assault, a Class II felony under *Neb. Rev. Stat.* § 28-308 (Reissue 2016), and Child Abuse- Serious Bodily Injury, a Class II felony under *Neb. Rev. Stat.* §§ 28-701(1) and 28-701(7). (T107).

A. The judgment and order reviewed includes the criminal conviction and sentence imposed by the District Court. The conviction and sentence constitute a final, appealable order. Appellant was sentenced on August 10, 2023. (T116-117). For the purpose of an appeal in a criminal case, a judgment occurs when the court renders the verdict and sentence; there can be no appeal until a sentence is imposed. *State v. Hess*, 261 Neb. 368, 375 (2001).
B. No motions have been filed that toll the time within which to appeal.
C. On August 10, 2023, Appellant filed a notice of appeal and a motion to proceed in forma pauperis. (ST1,3) The District Court granted those motions on August 10, 2023. (ST17),
D. This is not an interlocutory appeal.

STATEMENT OF THE CASE

Nature of the case

On December 30, 2022, the State filed an Amended Information in the District Court of Lancaster County, Nebraska, alleging Appellant had committed two Class II felonies, First Degree Assault and Child Abuse - Serious Bodily Injury. (T107). Appellant entered pleas of not guilty to both charges. (127:10-17).

Issue in the District Court

Prior to trial, Appellant moved to suppress evidence concerning her statements to police. (T67).

How the Issue was Decided

The Court overruled the motion and allowed all the recorded interviews as well as the officers' testimony regarding the substance of those statements to be admitted, holding that Appellant was not in custody and had given her statements voluntarily. (T102). Appellant later waived her right to a jury trial to facilitate a stipulated bench trial (T112) On June 2, 2023, at a stipulated bench trial, the Court found her guilty of both first degree assault and child abuse. (T114). On August 10, 2023, the Court sentenced Appellant to sentences of not less than twenty-two (22) years, nor more than thirty (30) years on Count I, and not less than eight (8) years, nor more than twenty (20) years on Count II, to be served consecutively, both under the jurisdiction of the Nebraska Department of Correctional Services. (T116-117).

Scope of Review

The scope of review in a criminal appeal is limited to errors assigned and discussed in the appellant's brief and the appellate court's right to note plain error appearing on the record. *State v. Paul*, 256 Neb. 669, 677 (1999).

When an appellate court reviews a motion to suppress a custodial statement based on a claimed inadequacy of warnings under *Miranda v. Arizona*, 384 U.S. 436 (1966), findings of fact are reviewed for clear error and the legal question of whether the appellant was sufficiently warned to knowingly and intelligently waive their privilege against self incrimination is reviewed *de novo*. *State v. Fernando-Granados*, 268 Neb. 290, 301 (2004); *State v. Connelly*, 307 Neb. 495 (2020). A district court's determination of custody is a mixed question of law and fact warranting de novo review. *United States v. Reyes-Bosque*, 596 F.3d 1017 (2010).

In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Lierman*, 305 Neb. 289 (2020). Where the Nebraska Evidence Rules assign the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion. *Id*.

ASSIGNMENTS OF ERROR

I.

The District Court erred in overruling the Appellant's motion to suppress statements she made to law enforcement because these statements were procured in violation of her right against self incrimination under the Fifth and Fourteenth Amendments of the United States Constitution and Article 1, Section 12 of the Nebraska Constitution, and in violation of *Miranda v. Arizona*. 384 U.S. 436 (1966).

II.

The District Court erred in overruling the Appellant's motion to suppress statements she made to law enforcement as these statements were procured in violation of her right to Due Process of Law under the Fifth and Fourteenth Amendments of the United States Constitution, and Article 1, Section 12 of the Nebraska Constitution.

PROPOSITIONS OF LAW

I.

Miranda v. Arizona, 384 U.S. 436 (1966), prohibits the use of statements derived during custodial interrogation unless the prosecution demonstrates the use of procedural safeguards that are effective to secure the privilege against self incrimination.

State v. Juranek, 287 Neb. 846, 852 (2014).

II.

A suspect is in custody when there is a restraint on their freedom of movement such that a reasonable person would not feel they were at liberty to terminate the interrogation and leave.

State v. Rogers, 277 Neb. 37, 56-57 (2009).

III.

When determining custody, the Court looks at all relevant circumstances to understand the nature of the suspect's position at the time of the interrogation,

which includes many factors, such as the location of the interrogation, the initiation of contact, whether the suspect was informed of their right to leave, whether there were restrictions on the suspect's freedom of movement, whether neutral parties were present, the duration of the interrogation, whether the police used aggression or other interrogation tactics to pressure the suspect, whether the police manifested to the suspect a belief of their guilt, and whether the suspect was arrested at the end of the proceeding.

State v. Rogers, 277 Neb. 37, 57-58 (2009).

IV.

It is undisputed that a suspect who has been handcuffed and put into the back of a police car is in custody.

State v. Cavitte, 28 Neb.App. 601, 607 (2020) (citing *State v. Bormann*, 279 Neb. 320 (2010)).

V.

An individual being questioned as part of an investigatory traffic stop or for general on-the-scene information is not in custody, because that interaction does not involve coercion, the threat of force, or violating the suspect's consent.

State v. Landis, 281 Neb. 139, 148 (2011).

VI.

While a detention that goes past an investigatory traffic stop or general on-the-scene questioning may be exempt from *Miranda* requirements, that continued detention must be with the consent of the suspect and involve no coercion.

State v. Landis, 281 Neb. 139, 148 (2011) (quoting *State v. Dallmann*, 260 Neb. 937 (2000)).

VII.

If a suspect makes statements to police which are spontaneous and not in response to questioning, those statements are not the result of interrogation.

State v. Rodriguez, 272 Neb. 930, 944 (2007).

VIII.

Interrogation involves not only express questioning, but also to any words or actions on the part of police that the police should know are reasonably likely to elicit an incriminating response from the suspect.

State v. Juranek, 287 Neb. 846, 852 (2014).

IX.

Interrogation does not include a course of inquiry made by police which is related and responsive to a volunteered remark.

State v. Rodriguez, 272 Neb. 930, 943-44 (2007).

X.

If a *Miranda* warning is given in the midst of a continuing interrogation, testimony given after the warning may still be tainted.

Missouri v. Siebert, 542 U.S. 600 (2004).

XI.

A pre-*Miranda* confession will make a later *Miranda* warning ineffective when the pre-*Miranda* questioning is systematic, exhaustive, and managed with psychological skill to such an extent that after the unwarned interrogation, there was little, if anything, of incriminating potential left unsaid.

Missouri v. Siebert, 542 U.S. 600 (2004).

XII.

A sufficient warning under *Miranda* must include the following elements: a person must be warned that they have a "right to remain silent," that "any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."

Miranda v. Arizona, 384 U.S. 436, 444 (1966).

State v. Juranek, 287 Neb. 846, 852 (2014).

XIII.

The relevant factors for determining whether a post-*Miranda* confession is tainted by a pre-*Miranda* confession include the completeness and detail of the

questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.

State v. Clifton, 296 Neb. 135, 155 (2017) (citing Oregon v. Elstad, 470 U.S. 298 (1985)).

XIV.

After a *Miranda* warning has been given, the interrogation must cease if the suspect indicates in any manner that he wishes to remain silent.

State v. Rogers, 277 Neb. 37, 51 (2009).

XV.

To invoke the right to cut off questioning, a person must articulate his or her desire with sufficient clarity such that a reasonable officer under the circumstances would understand the statement as an invocation of the right to remain silent.

State v. Rogers, 277 Neb. 37, 52 (2009).

XVI.

To decide whether an invocation is sufficiently clear, Courts look towards the context of the invocation.

State v. Rogers, 277 Neb. 37, 64-65 (2009).

STATEMENT OF FACTS

In the late evening of March 3, 2021, the Appellant brought victim O.M. to Bryan West Hospital for medical treatment. (49:14-23). Appellant was then contacted by Officer Bussard at the hospital at approximately 2:00 a.m. the next morning, on March 4, 2021. (34:15-18). Officer Bussard spoke with Appellant in a side room while other officers arrived. (28:5-8). Bussard testified that Appellant was not free to leave at that time because of the ongoing investigation into the injuries sustained by O.M. (32:24-33:6). Bussard questioned Appellant for thirty

to forty minutes, during which time he observed that Appellant was both emotional and fatigued. (35:11-24).

Officer Payton Eggers (who was named Payton Virts at the time) first contacted Appellant around 3:43 a.m. on March 4, 2021. (40:13-14). Officer Eggers was instructed by Sgt. Peterson to transport Appellant to the police station in Officer Eggers' police cruiser. (62:16-22). Eggers and Appellant arrived at the police station around 4:00 a.m. on March 4, 2021. (46:8-14). Eggers placed Appellant in an interview room because that was a "more formal setting." (55:10-14). After reaching the interview room, Appellant asked Officer Eggers if she could call her brother and Eggers responded, "Not right now," before she left. (46:20-25).

At around 4:45 a.m. on March 4, 2021, Sergeant Peterson began questioning Appellant in the interview room Eggers placed her in at the police station. (58:15-16). Appellant stated several times during this questioning that she was tired and wanted to go home. (60:16-61:4; 64:16-19). Appellant also asked Sgt. Peterson to call her brother but she was not allowed to and Peterson did not do so. (63:22-64:15). Appellant asked Peterson, "[s]o am I going home, or no?" and he told her that a different investigator would then speak with her, ignoring her question. (E6, 49). When Peterson asked Appellant if she wanted water, she replied, "No I wanna [sic] go home." (E6, 50). Peterson replied, "Okay, well hold on" and left the room. (E6, 50). After he left, leaving Appellant alone, she said, "I gave you, my phone. I've been cooperative. I have answered all your questions that I'm answering, and I want to go home." (E6, 50).

Shortly after that statement, at 6:23 a.m. on March 4, 2021, Officer Norton began questioning Appellant. (72:17-24). At the beginning, Appellant told him she "wants a nap." (E6, 51). She then stated that she was "really starting to feel different. They took my phone…" (E6, 52). A few minutes later, Appellant told Norton she had been awake for 48 hours. (E6, 54) Later, Appellant even told Norton she was experiencing double vision. (E6, 74). Norton then suggested to Appellant she was responsible for the victim's injuries from shaking her, which Appellant initially denied. (E6, 133-34). Appellant then offered an explanation for the injury she had not been previously mentioned before eventually offering a third explanation that involved a couch. (E6, 137; E6, 148).

At 9:12 a.m. on March 4, 2021- which was almost three hours after Officer Norton began questioning her and over seven hours after officers began investigating the situation at the hospital, Appellant's rights under *Miranda* were finally read to her. (E6, 159) Questioning about details of explanations Appellant previously gave, prior to receiving the *Miranda* warnings, then continued. (E6, 160-74). During this questioning, which occurred after the *Miranda* warnings were provided, at about 9:52 a.m. Appellant was allowed a cigarette break. However, during this break Officer Foster supervised her and thus she was not allowed to move freely or leave the police station. (103:6-13).

During this questioning, Appellant referred to her possible culpability for the injuries as Officer Foster asked more questions about her conduct. (E11, 4; 105:23-106:5). Appellant then asked, "Do you know when they're gonna give me my keys and my phone? (Crying)… He said I could leave." (E11, 1). Finally, Appellant said, "I want my keys and my phone…So I can leave (crying)." (E11, 1).

SUMMARY OF ARGUMENT

First, the District Court erred in overruling Appellant's Motion to Suppress statements she made to police because the record demonstrates that her rights under *Miranda v. Arizona* were violated. Appellant was in custody throughout much if not all of her encounter with police and was interrogated by them, without having received *Miranda* warnings, and provided numerous incriminating responses, which all should have been suppressed by the trial court.

Additionally, any incriminating statements the Appellant made after receiving these warnings were all tainted by the prior violations of her rights against self incrimination. Police brought Appellant to a location where they exercised total control over the environment, Appellant's freedom of movement within it, in which her ability to communicate with outside parties was curtailed significantly by the confiscation of her smart phone, in which her ability to leave the police station and return to her car was hindered significantly by the distance she had been transported away from it in a police cruiser, and in which her ability to even operate her vehicle was taken away due to the police confiscation of her car keys, among other things.

These deprivations all occurred in an environment where Appellant was separated from neutral parties, where her attempts to contact others were repeatedly denied, and where multiple, highly trained investigators questioned Appellant incessantly, dominatingly and with specialized interview techniques the officers received training on, for multiple hours. Additionally, Appellant's repeated requests to leave, to sleep, to speak with her family, to get her keys and smartphone returned by the police who confiscated them were either repeatedly delayed or completely ignored.

A *Miranda* warning was finally administered hours after the interrogations began and also after all of the incriminating details police were seeking had been divulged by Appellant. Officer's questions after the *Miranda* warnings were administered only re-confirmed what Appellant already told them before she received these warnings and thus merely continued the previous interrogation Appellant was subjected to without her receiving any break in the place, personnel or time, to demonstrate that the post-*Miranda* interview was a mere continuation of the interrogation that occurred before the warnings were administered.

Because of this, the District Court should have held that Appellant was both subjected to interrogation and was in custody, and that her *Miranda* rights were thus violated. Further, the District Court should also have held that Appellant's post-*Miranda* statements were tainted fruit of the poisonous tree of the prior violations and held that they be suppressed from evidence against her.

Second, the District Court erred in overruling Appellant's motion to suppress statements she made to police because the record shows that her rights under the Due Process Clause and Article I of the Nebraska Constitution were also violated. The investigators kept Appellant against her will for an excessive time period and applied intense interrogation tactics against her to elicit a confession. Officers also exploited her highly emotional, vulnerable, sleep-deprived mental state. Appellant stated that she was sleep deprived several times, but officers continued their interrogation for a prolonged period despite having knowledge of these impairments.

Officers also displayed an aggressive demeanor in questioning Appellant and intentionally placed her in a vulnerable, isolating position in the stationhouse after she was transported there in a police cruiser. Police then confiscated her

phone (while promising to give it back to her before ultimately refusing to do so), as well as confiscating her car keys and then refusing or delaying her requests for them to be returned, thus delaying the interrogation and denying Appellant's requests to be allowed to leave.

Thus, when considering the totality of the circumstances Appellant was placed in by police, their interrogation overbore her will and exploited her vulnerable, isolated, agitated, sleep deprived state. This is shown in the record as a whole and is especially visible in portions of it in which Appellant is barely able to form coherent sentences, repeatedly sobs, and begs for her keys and phone to be returned, without success. Thus, Appellant was prevented from contacting anyone on the outside to arrange ride to her vehicle or her home, and clearly prevented from going about her in violation of her right against self incrimination and to Due Process of law.

ARGUMENT

I.

First Assigned Error: *Miranda v. Arizona* was violated

The District Court erred in overruling the Appellant's motion to suppress statements she made to law enforcement because these statements were procured in violation of her right against self incrimination under the Fifth and Fourteenth Amendments of the United States Constitution and Article 1, Section 12 of the Nebraska Constitution, and in violation of *Miranda v. Arizona*. 384 U.S. 436 (1966).

A. Appellant was in custody early in her interviews with police and therefore should have received *Miranda* warnings prior to interrogation.

"Miranda prohibits the use of statements derived during custodial interrogation unless the prosecution demonstrates the use of procedural safeguards that are effective to secure the privilege against self incrimination." *State v. Juranek*, 287 Neb. 846, 852-53 (2014) (citing *Miranda v. Arizona*, 384

U.S. 436 (1966)). "The relevant inquiry in determining "custody" for purposes of *Miranda* rights is whether, given the objective circumstances of the interrogation, a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave." *State v. Rogers*, 277 Neb. 37, 38 (2009).

The Court looks at all relevant circumstances to understand the nature of the suspect's position at the time of the interrogation, which includes many factors, such as the location of the interrogation, the initiation of contact, whether the suspect was informed of their right to leave, whether there were restrictions on the suspect's freedom of movement, whether neutral parties were present, the duration of the interrogation, whether the police used aggression or other interrogation tactics to pressure the suspect, whether the police manifested to the suspect a belief of their guilt, and whether the suspect was arrested at the end of the proceeding. *Id*. at 57-58.

While all the factors are potentially relevant, the Court has found that some factors can be sufficiently intense to constitute a custodial interrogation without analyzing other factors. For example, it is virtually undisputed that a suspect who has been handcuffed and placed into the back of a police cruiser is in custody. *State v. Cavitte*, 28 Neb.App. 601, 607 (2020) (citing *State v. Bormann*, 279 Neb. 320 (2010)). In contrast, an individual being questioned without such restraints, as part of an investigatory traffic stop, for example, or for general on-the-scene information, is not in custody because that interaction does not involve coercion, the threat of force, or overriding the suspect's consent to speak. *State v. Landis*, 281 Neb. 139, 148 (2011).

In *Landis*, the Court considered whether a suspect who was seated in a police cruiser in between two officers was in custody and concluded that he was not because no threats or force were used to get him there, the suspect stayed voluntarily, and no other evidence suggested a situation analogous to arrest. *Id*. at 149. The facts of this case are substantially different from *Landis*, however, because the interaction between Appellant and the police was not one involving short-term questioning in a car near to the scene of a routine traffic stop, but instead represented a long-term interrogation that took place in a police station, which Appellant had been transported to in a police cruiser, which left her miles away from her vehicle, and after her freedom of movement was significantly restricted for multiple hours.

For these reasons, explored in more detail below, the Court should begin its analysis by examining the totality of the circumstances of Appellant's questioning to determine whether a reasonable person in her circumstances would have felt free to leave.

1. **<u>Space</u>: Police controlled the space in which the interrogation occurred, rendering it custodial.**

The surveillance and police presence in this environment indicate that the police had complete control over the space in which Appellant's questioning occurred. Once inside the stationhouse, Appellant was always accompanied by officers and prevented from moving around freely by them, with the officer who transported Appellant to the police station in a police cruiser escorted her into the interview room she remained in for hours. (47:7-12). When Appellant used the bathroom, she was supervised. (E6, 50) When she wanted to go outside to smoke, she was supervised and required to wait for Officer Norton to return to escort her back to the interrogation room rather than being allowed to move freely on her own. (E6, 157). Officer Foster even told Appellant the station is "a secured building" adding that if she wanted to go somewhere in it, he would have to "walk" her there and that he "can't walk" her "around peoples' offices." (E6, 183).

When Appellant's cigarette break was over and officers wanted to take her back to the interview room, they commanded her to do so with, "Hey, come on, you gotta come with us." (E9, 6). These examples are not exhaustive as more examples of the officers exerting control over the space of the stationhouse and Appellant's inability to move within it, is shown in the record. This evidence shows that police exerted control over the space exclusively and that a reasonable person in Appellant's position would not have felt free to terminate the interrogation, exit the space, or go on about their business. Instead, such a person would have been keenly aware they were subject to police officers' authority over the space as well as aware of their inability to move within or depart from this location.

2. **<u>Distance</u>: Police controlled the distance from where the interrogation occurred in relation to Appellant's vehicle, rendering it custodial.**

Another relevant feature of the location of the custody was the distance between Appellant and her car. Appellant was transported from the hospital, where her car had been left, and was driven to the police station in a police cruiser. (39:15-22). The ride took between 10 and 20 minutes by car. (46:12-14). Such a lengthy ride obviously covered a substantial distance and was not one that a person, especially one who had been awake for 48 hours, could reasonably walk away from. Yet, Appellant considered doing this, despite the distance, likely in desperation. However, when she raised this possibility, suggesting that she be allowed to walk back to her car, Officer Norton framed his response as if he were helping rather than restricting her, while also refusing her request to leave, saying, "No, we're not gonna do that to you." (E11, 13).

By transporting Appellant to the stationhouse for questioning, the police separated her from her vehicle, rendering her entirely reliant on them to determine when, or even if, she could leave the station to return to the vehicle that she had left behind at the hospital when she was transported to the stationhouse. That subservient position is further illustrated when, towards the end of Appellant's interrogation at the police station, she resorts to begging officers to return her to her car. After Appellant made numerous requests for her keys so she could terminate the interrogation and walk to her car, she pleaded to Officer Foster, "[p]lease, I'm begging you," followed by "I just wanna [sic] go anywhere but here. I don't want to be here" and "[y]ou guys gotta [sic] take me to the hospital, it's where my car is at." (E11, 5-6).

By the time the officers coordinated someone to drive Appellant back to the hospital, Appellant was obviously desperate, saying, "[p]lease let me go home (crying) (inaudible). I need my (inaudible) (crying). Please I wanna go home (crying). Please let me go (crying). (inaudible) (crying)." (E11, 15). Thus, if it were within Appellant's power to simply leave the station, she would simply have done so rather than begging, crying, and pleading with officers to allow her to exit the police station and terminate the interrogation. This demonstrates that Appellant was placed in a subordinate position by the officers, entirely dominated by them, begging for their assistance to return her to where the police had escorted her from, the hospital, where her vehicle, had been left behind when she was placed in a police cruiser, hours earlier. Under such circumstances, a reasonable person in Appellant's circumstances would not have felt free to leave

this environment given that the police demonstrated complete control over it and her within it.

Further, Sgt. Petersen, who was in charge of the officers at the hospital, told Officer Egger to transport Appellant to the police station. (39:14-16). Police wanted to obtain a statement from Appellant because they believed people who bring injured children to the hospital are of interest to them as a matter of course. (51:1-8). Police thus interrogated Appellant based on their desire to obtain additional incriminating information that was later used in court to convict her.

3. <u>Lack of Consent to Continue</u>: Police conducted this lengthy interrogation without ever verifying whether Appellant consented for it to continue, rendering it custodial.

During the additional and prolonged questioning Appellant was subjected to, police never verified whether Appellant wanted to continue answering questions. When Sgt. Petersen's interrogation concluded, Appellant asked "if she is going home or no?" Peterson responded that another officer would be coming to speak with her, asked if that was "okay" and Appellant made a non-verbal, vocalized response of uncertain meaning which Petersen took as assent despite the fact that Appellant immediately followed this by reiterating that she was "so tired." (E6, 49).

This interaction shows that Appellant felt she was not able to leave the police station. Appellant's submissive situation is further illustrated in her statements to Petersen such as "I've been doing everything that you guys have asked of me." (E6, 50). This shows Appellant was bargaining with authority and that she did not understand why the police had not allowed her to leave when she had already cooperated, and, finally, that she thought they controlled whether she the interrogation would terminate and, most importantly, that she did not have this ability given their control over her.

After Petersen left the room, Appellant said "I've answered all the questions that I'm answering and I want to go home." (E6, 50). While this statement was uttered while Appellant was alone, it reveals Appellant's strong desire to end the questioning and to go on about her business. Additionally, given that Appellant likely understood that her statement, even when made when she

was alone in an interrogation room, was being monitored by other officers who could hear this clear statement, honor this invocation and terminate the interview.

Upon Norton's return, Appellant announced that her initial desire to cooperate had changed to significantly, as she told him she was "really starting to feel different" before complaining, again, that police "took [her] phone." (E6, 52). Appellant made this statement as a response to Norton telling her the door was unlocked and it shows that while she was aware that the door was unlocked, if she were to walk out of it she would have to leave her smartphone behind, which was her only way of contacting family, a lawyer, to find a new place to live to avoid eviction, or to summon a ride back to where her car had been left. In short, Appellant's response should be interpreted as her saying she can't truly leave after Norton casually mentions that she was technically could, albeit at a very high cost and before a very long walk.

4. <u>Keys</u>: Police controlled Appellant's ability to leave the police station by confiscating her keys to her car and house, rendering the interrogation custodial.

Yet another physical restraint placed upon Appellant was the police's confiscation of her car keys. Even if Appellant had been able to reach her vehicle, walking miles perhaps, she was obviously aware that she would not be able to drive her car she left there until the keys the police confiscated from her were returned. Additionally, given that house keys are frequently kept alongside car keys, Appellant likely would not even have been able to get into her home, even if she elected to make the long walk there, since her keys were confiscated. Getting her keys back from the police proved to be both difficult and time consuming as Appellant made numerous requests to several officers for her keys to be returned, all of which were essentially ignored. Initially, Appellant asked Sgt. Petersen for her keys, but he responded that he would see which officer had them. (E6, 29). Later, Appellant again asked Petersen for her keys and he replied that he had them, but still did not return them to her! Instead, he simply said, "Okay" to her request, and left the room without honoring it. (E6, 47). Later, towards the end of the lengthy interrogation, Appellant made seven more requests for her keys to be returned before officers finally located them. (E11, 1, 6, 10, 13, 14, 16).

These delays police officers subjected Appellant to in refusing to return her car/house keys, after transporting her miles away from her car, demonstrate that Appellant lacked the ability to terminate the interrogation as she was completely reliant on the police returning her keys to her and thus not able to leave the police station without leaving behind the ability to operate her vehicle or gain entrance to her home.

5. <u>Smart Phone</u>: Police also controlled Appellant's ability to contact family, friends or counsel, or to summon a ride, by confiscating and refusing to return her smart phone, rendering the interrogation custodial.

Additionally, the seizure of Appellant's smartphone by police made other routes of exiting the police station incredibly difficult for her. While Appellant perhaps would have been allowed to exit the station and walk back to the hospital, without her phone Appellant was unable to call a friend or family member, or even an attorney, for a ride or other assistance or advice.

In fact, Investigator Petersen even told Appellant that because her phone had been confiscated as part of an investigation, the fastest way for it to be returned was to waive her Constitutional right against warrantless searches by consenting to allow police to search it without a warrant, telling her that if they had to wait to procure a warrant, the return, already delayed, would take even longer. (E6, 42).

Appellant protested strongly against this, saying that she needed her smartphone to search for new apartments due to an impending eviction. (E6, 42). Previously, Sgt. Petersen told Appellant that police might be able to download the phone's contents and return it to her that morning, perhaps around 8 a.m. or maybe 6:30 a.m. (E6, 44). However, later, Inv. Norton- perhaps revealing that this was simply a tactic to prolong the interrogation- told Appellant the opposite, breaking Sgt. Petersen's previous promise to her, and telling her she would not be get her smartphone back that day and refusing to provide her with an estimate of how long the confiscation of the phone would last. (E11, 10). Throughout this interrogation, Appellant repeatedly asked for her smartphone's return, to be returned to her, without any success. (E11, 1, 6, 10, 11).

Under these circumstances, a reasonable person, deprived of the ability to call friends, family or a lawyer, or to use the phone to summon a ride (through, for example, ride sharing apps such as Lyft or Uber, or to call a taxi) would not have felt free to leave and would have, instead, felt the pervasive extent of the police's domination of them, after being deprived of such an essential communication tool. Appellant demonstrated the effect this deprivation placed on her, telling Sgt. Petersen she urgently needed her smart phone to arrange a rent a new apartment to avoid the potential homelessness that would result if a pending eviction she was then facing, took effect. (E6, 42). Thus, from Appellant' perspective, the wellbeing of her family and whether she could find a new home for them to live in, depended on whether she could convince the police to return her smart phone, that increasingly essential piece of property in today's world. Thus, Appellant could not reasonably be comfortable leaving such an essential item behind while setting off on a long walk, miles from her vehicle, lacking the ability to summon a ride or reach outside parties for assistance, to get help or simply to go home.

An example of the effect of Appellant being deprived of the use of her smart phone is shown when, despite a strong, stated desire to do so, Appellant was prevented from contacting her brother. Appellant asked Officer Egger to call her brother but he replied, "not right now." (E6, 1). Later, Appellant asked Sgt. Peterson if she could call her brother and rather than answering her question instead changed the subject, replying, "Uh, I have a sergeant out there with him" as a reason why she could not call him. (E6, 49). Appellant then made other desperate attempts to get her phone back, at one point begging Officer Norton, "[p]lease can I call (inaudible), please, please, please can I call my babies. Please." (E6, 157). However, Norton did take any action in response to Appellant's desperate request and her smart phone, which she initially was told would be returned that morning, never was.

6. <u>Duration</u>: Police controlled the duration of the interrogation, rendering it custodial.

Appellant was interrogated for what was clearly a prolonged time period. Officer Bussard began questioning Appellant at the hospital at 2 a.m. (34:6-18). Next, Sgt. Petersen questioned Appellant starting around 4:45 a.m. and lasting approximately 90 minutes. (58:14-18). After that, Officer Norton questioned

Appellant from approximately 6:23 a.m. to 12:00 p.m. (89:15-20). In fact, the recording of the questioning of Appellant, solely within the interview room, and not including other various conversations, is more than six hours in length. (76:12-14).

Prior Nebraska cases have held that temporary detainments with relatively short durations are not custodial, such as *Landis* which concerned investigatory traffic stops and general on-the-scene questioning. *State v. Landis*, 281 Neb. 139, 148 (2011). While a detention past that initial step may be exempt from *Miranda* requirements, continued detention must be "at the consent of the suspect" and with "no coercion." *Id*. (quoting *State v. Dallmann*, 260 Neb. 937 (2000)). As the duration of a detention increases, the likelihood that it is at the consent of the suspect and occurring without coercion decreases, in other words.

However, the circumstances of this interrogation demonstrate that Appellant never consented to a detention that was this prolonged. Even if Appellant's statements are somehow deemed as not constituting a clear, unequivocal desire to end questioning, her comments about being tired, wanting to go home, being distressed about the condition of her children and the victim, about wanting to contact her family, or return to the location where police had driven her away from her vehicle, show that she was not effectively free to leave. These factors show that a reasonable person in Appellant's circumstances would not have felt free to terminate the investigation, leave the police station, or go on about his or her business.

For example, Appellant expressed to Officer Norton early in his questioning, "I hope I'm not here in a little bit, cause its 48 hours I've now been up." (E6, 54). She later said, "Oh my God, my kids are probably scared to death." (E6, 83). Later, Appellant even shouted the question, "Can I please go home?" but this was, once again, ignored. (E6, 47). After this, Appellant repeated, "I said I wanted to go home. Okay really need to get some sleep. Okay, damn it, I gotta go to bed." (E6, 117).

These examples are not exhaustive and the record furnishes many more examples of Appellant expressing a desire to be allowed to leave the police station. (See: E6, 15, 29, 46, 47, 48, 50, 51, 54, 74, 83, 85, 117, 159; E11, 2, 3, 4, 5, 6, 15). Thus, even if the duration of an interrogation is not, standing alone, a factor sufficient to show that whatever initial consent Appellant may have

provided to participate in questioning later elapsed, the incredibly lengthy time period in which she was deprived of a vehicle, a phone, her keys, or a ride back to hospital where her vehicle was left, exacerbates the other factors significantly and shows that Appellant was in custody, was subject to interrogated and should have been provide her Miranda rights at the outset, or early on in the interviews the police subjected her to.

7. **<u>Increasing Subordination</u>: Police conducted the interrogation of Appellant in a manner that increased her subordination to them over time, rendering it custodial.**

A reasonable person in Appellant's situation would experience an increasing sense of subordination to the police as time elapsed, given that people grow increasingly tired over time and are thus are more deeply affected by the psychological pressure inherent in prolonged questioning by highly trained investigators. The psychological effects Appellant experienced due to lengthy and psychologically exhausting interrogation are clear when observing Appellant's emotional state that the police exploited.

The record demonstrates that at the beginning of the interrogations, Appellant was fairly cogent, conversing with the officers in a fairly communicative way, as if her will were not overborne. However, hours later, when Appellant is finally allowed to leave the station, she is barely able to complete a sentence without crying or lapsing into incoherent speech. For example, Appellant pleads with Norton to let her go home, is extremely emotional and crying constantly. (E11, 15). In fact, Officers were so concerned about Appellant's emotional state that Norton expressed fear that if she were allowed to leave, she might hurt herself or others, when he told her, "I just think it's best, Crystal, that we release you to someone, I - - I'd feel a lot better about that." (E11, 13).

Significantly, the investigator's use of the word "release" suggests that Appellant was under their control, given that this word choice not only signaled to Appellant she was in custody it also tellingly reveals that police believed they possessed the ability to "release" her, and that she was thus not free to leave. In other words, if Appellant was not in custody at that point, why would Officer Norton feel, at that point, that he had the ability to release her in this way? This word choice shows the effect prolonged questioning and control ultimately has on

both the police and suspects as the word "release" both conveyed to the Appellant the true nature of her detainment while also revealing that the police subjectively believed they had taken custody of the Appellant well before any *Miranda* warnings were ever administered to her.

8. <u>Interrogation Tactics</u>: Police subjected Appellant to a variety of interrogation tactics designed to manipulate her into providing incriminating information, rendering the interrogation custodial.

These highly trained officers' extensive training in interrogation tactics also allowed them to exploit Appellant's emotional state and overbear her will. The police's constant supervision, the restrictions on Appellant' freedom of movement, the exclusion of neutral parties, the lengthy duration, the police's statements repeated and coercive statements about her guilt, as well as other factors previously discussed, all combined to exert psychological pressure on Appellant in violation of her rights.

Officer Norton even testified that taking periodic breaks during the questioning was not performed to allow Appellant to get a break but instead was done to allow Officer Norton an opportunty to confer with Officer Foster to refine the precision of his questioning. (95:24-96:3).

Taken together, the totality of the circumstances Appellant was subject to demonstrate that her later sharing of information was not a product of her own will but instead was elicited by intense pressure placed on her by highly trained investigators using a variety of interrogation tactics. This conclusion is further illustrated when, upon completing his questioning, Officer Norton attempts to thank Appellant and she responds "I didn't wanna [sic] talk." (E6, 143).

Additionally, Officer Norton's questions repeatedly implied and asserted Appellant's guilt. He stated that Appellant's stress may have caused her to hurt the victim on purpose and she responded by saying that he was wrong to "accuse" her and that it didn't make sense. (E6, 133). Norton did not accept Appellant's explanation because he said, "it was definitely not the result of an accident." (E6, 133). Appellant then replied to Norton's continued insistence that she was guilty of a crime, and hinted at her eventual submission to his coercive authority, when she said, "I didn't do nothing, and I don't know what you want me to tell you?" (E6, 134).

Appellant then attempted to deny Officer Norton's statement that the victim's head was struck, replying, "I'm telling you, it couldn't have happened." (E6, 134). Norton continued to state his belief that Appellant's stress caused her to hurt the victim and said, "I can't [tell] you how many times I've talked to parents, good parents like you, who are in a horrible situation when they're sleep deprived. … You've been through so much lately." (E6, 135). Appellant said she didn't believe the victim had been hurt by her actions but Norton objected, "That's not what happened Crystal." (E6, 136). Appellant then insisted there had only been one instance of her falling asleep and not watching the victim, but Norton objected again, saying "[t]hat's not the only time." (E6, 136).

This line of questioning led Appellant to insist, "I have not done [sic] nothing. I'm telling you everything that has happened." (E6, 136). When Norton continued insisting she hurt the victim due to stress, Appellant submitted to his authority again, altering her earlier statement to reflect what she understood him to want her to say, responding, "I don't remember doing anything though. I would tell you. I'm telling you everything I can remember. I swear I'm telling you everything I remember." (E6, 136). But Norton responded "You're not[,] Crystal." (E6, 136).

During a period in which Appellant is crying and speaking inaudibly, Norton continued pushing for information saying, "[p]lease Crystal, just help her… This is a one time deal. That got out of hand and if we want any chance at her to being able to help those – those doctor we need to know exactly what happened… Crystal, I can see – I can see it in your face Crystal. Just tell me what happened… Okay, then tell me what happened… Crystal tell me what happened… Tell me what happened." (E6, 137).

Norton again implied again that Appellant had a stress-induced violent episode, even putting words in her mouth with, "[y]ou were at your point were [sic] you just couldn't take it anymore." (E6, 143). When Appellant suggested it was possible her daughter had shaken the victim, Norton said, "[y]ou're diverting. Your daughter did not cause this injury, okay." (E6, 144). When Appellant said, "I didn't shake her," Norton replied, "[y]ou smacked her very forcefully to cause an injury like that." (E6, 144). Then, when Appellant attempted to demonstrate how hard she had once hit the victim, Norton said, "[i]t was harder than that Crystal." (E6, 145).

Norton then referred to Appellant's prior explanation about the victim falling off the bed with, "[a]nd obviously falling was not the truth." (E6, 153). At one point, Norton said Appellant was responsible for the victim's injury on, telling her the victim "has the injury from you hitting her and from you throwing her," to which Appellant replied "No." (E6, 155).

In fact, this cycle of accusations and discounting Appellant's denials of involvement should, by itself, be dispositive on the issue of whether and at what point Appellant was in custody. The Nebraska Supreme Court considered a situation where "[d]espite the defendant's repeated denials of any involvement, … the officers continued to accuse the defendant of stating untruths" such that "a reasonable person would have believed that 'as often as he made denials, [the officers] would renew their accusations" and therefore a reasonable person "would believe he or she was not free to leave." *State v. Rogers*, 277 Neb. 37, 55-56 (2009) (considering facts from *State v. Dedrick*, 132 N.H. 218, 564 A.2d 423 (1989)).

The same pattern is present in this case. Appellant makes repeated claims of innocence to the crime which are unequivocally denied by Officer Norton, who clearly expresses his belief that Appellant is guilty and insists that whatever story she provides is incomplete. Norton then directly accuses Appellant of committing the crime and he even supplied the factual basis for her guilt, which was the supposed testimony of the medical doctors treating the victim, as well as the state of mind which produced the crime, which was the stress-induced aggression of Appellant.

9. <u>Summary:</u> Police controlled Appellant's ability to move, contact outside parties, return to her vehicle, operate her vehicle and employed interrogation techniques against her, demonstrating to a reasonable person they were not free to leave, and the interrogation was thus custodial.

A reasonable person in the circumstances Appellant was subjected to by police in this case would not have felt free to terminate the investigation and leave, at any point, because the police exerted complete control over the space the questioning occurred in, over Appellant's ability to move in that space, over her ability to return to her vehicle, over her ability to operate her vehicle or unlock her home due to the confiscation of her car keys, and, finally, over her ability to

contact family members, friends, ride sharing services, or counsel to assist her, due to the confiscation of her smart phone throughout the duration of the lengthy, intense interrogation at issue in this case.

Thus, Appellant was not free to go on about her business, free from police domination, given that every avenue of outside contact, travel, ability to move within the space of the interrogation or to leave it, was either completely controlled by police or had been confiscated by them, despite her numerous pleas to have these articles or avenues returned to or provided to her.

In summary, because Appellant was isolated from all outside contact for the entire duration of her custody with police, from the moment she left the hospital until the interrogation was ended, approximately eight (8) hours after it began. (40:8-14; 89:15-20). Appellant made three distinct and clear requests to make a phone call and all were denied. Further, because Appellant was not allowed to speak with anyone other than police during this interrogation, she reasonably believed that any discretion to terminate the interrogation lay entirely with the police, and not with her. For this reason, and those previously discussed, the interrogation of Appellant was conducted in violation of her rights under the Fifth and Fourteenth Amendments, as well as Article I of the Nebraska Constitution, and the trial court erred in not suppressing her statements.

In fact, despite the fact that the record is clear that Appellant was not Mirandized for approximately eight hours after she was transported to the police station, Investigator Norton testified that the reason he Mirandized her was because, in his view, the Appellant was placed into custody when she was placed in the cruiser at the hospital. When asked "Why did you Mirandize her?" Norton responded, "*because she was transported from Bryan East in a police cruiser*, which any police cruiser is equipped with doors that a person sitting in the back cannot open themselves. *And I felt it was necessary for her to be apprised of her rights because she was transported*." (81:25-82:4) (emphasis supplied)

B. Appellant's 5th and 14th Amendment rights were violated because she was interrogated by law enforcement for hours prior to receiving the *Miranda* warnings.

A violation of a citizen's *Miranda* rights occurs when the person is subject to interrogation while also in custody. Thus, obviously not all questioning by police constitutes interrogation. For example, if a person makes statements to police which are spontaneous and not in response to questioning, an interrogation did not occur. *State v. Rodriguez*, 272 Neb. 930, 944 (2007). The Nebraska Supreme Court clarified the rule under *Miranda*, which is that interrogation means "not only express questioning, 'but also to any words or actions on the part of police … that the police should know are reasonably likely to elicit an incriminating response from the suspect." *State v. Juranek*, 287 Neb. 846, 852 (2014) (citations omitted). Interrogation does not include a course of inquiry made by police which is related and responsive to a volunteered remark. *Rodriguez*, 272 Neb. at 943-44.

All the incriminating information given to police during the interview was the result of interrogation. First, the officers who interviewed Appellant directly inquired about potential criminal conduct. Sgt. Peterson questioned Appellant about when she contacted the victim's biological mother about the victim's condition, and when Appellant realized that the victim needed to go to the hospital. (E6, 13). Those questions are directly relevant to the second crime charged against the defendant, which alleged that Appellant deprived the victim of necessary care, resulting in serious bodily injury.

Sgt. Peterson later repeated a similar question asking, "[w]hen did you start noticing that [the victim] wasn't acting herself?" (E6, 25). That question deviated from the prior line of questioning about whether the housemate, Kayleigh, had unsupervised contact with the victim prior to the injuries being received and thus was not related or respondive to a volunteered comment. *Id*.

Sgt. Peterson then questioned Appellant about the nature of the victim's injuries asking, "[w]hat can you tell me about her injuries?" (E6, 15). The Nebraska Supreme Court has held that an officer's inquiries into a suspect's apparent injuries is not a form of interrogation. *State v. Cavitte*, 28 Neb. App. 601, 608 (2020). However, Sgt. Peterson's question was not about the welfare of the suspect but rather about the circumstances of the victim's injury, which is substantially different because an inquiry about the victim is likely to reveal incriminating facts about how those injuries occurred. Thus, Sgt. Peterson's question is similar to the question asked by the officer in *Juranek*, where a general

request for information is deemed likely to reveal incriminating information. *Id*. at 608-09.

A reasonable officer, in each of these circumstances, would have understood that an inquiry into a child victim's injury is likely to reveal incriminating information about the parental figure because, as a general rule, the parental figure is the primary suspect for causing the injury, as Officer Norton testified. (72:13-15).

Similarly, Sgt. Peterson asked, "[d]id you ever report essential child abuse to the state or anything like that?" (E6, 20). This question is also reasonably likely to elicit incriminating evidence because it either goes towards the theory that Appellant deprived the victim of medical services or that because there is a reasonable chance Appellant would be subject to mandatory reporting laws and her failure to report potential abuse would be another independent criminal violation.

During Norton's interview, he also asked Appellant if there were "any accidents or anything" on the day the victim was brought to the hospital. (E6, 101). This question followed a discussion of the child victim's sleep schedule in the days prior to her hospitalization and was not a continuation or response to what Appellant had just revealed. This question was also reasonably likely to elicit incriminating information because it is a general request for facts about all events which might have produced the victim's injury or even accidents Appellant might have caused that revealed reveal criminal negligence. A reasonable officer who was aware of the information that Officer Norton knew at the time- that the injury to the victim was the result of an impact to the head- and that Appellant, as the victim's parental figure, was the primary suspect- should have reasonably expected that incriminating information could be elicited as a response to this question.

When Appellant did not reveal anything substantial, Norton then interrupted her description of a tripping incident involving her daughter with "[s]o let's kinda [sic] fast forward through that evening into the night… kinda walk me through that… [w]alk me through last -yesterday evening into the night. What are you all doing?" (E6, 102). This question was not a response to the statements that Appellant had previously made but instead interrupted her answer, representing a new question addressing a different time period. This question is, once again,

reasonably likely to elicit incriminating information because it was a request for a description of the actions of all people in the house at the time the injury to the victim occurred. Any action directed at the victim, committed either by the Appellant or any of the children under her supervision, would likely be incriminating for Appellant if it addressed intent or negligence that caused the injury.

When Appellant mentioned that when she discovered something wrong with the victim she called her brother, Norton asked her, "[s]o what time did you call him?" (E6, 107). This question was not a response to what Appellant said but was a request for additional information. The question was also likely to elicit incriminating information since the timeline of when Appellant called her brother revealed how long it took Appellant to take the victim to the hospital after discovering cause for alarm, an element necessary to prove for the charge alleging a denial of necessary medical care against her. Appellant's response to Norton's question about the timing of events could have shown an excessive delay and a reasonable officer should have expected that possibility and administered *Miranda* warnings to her before asking it.

Officer Norton's questioning about when Appellant tried to wake the victim are also likely to elicit an incriminating response for similar reasons. (E6, 108). Norton asked several more questions of this type, attempting to construct a timeline of when various actions occurred and culminating in the question, "how long are you guys watching her and trying to wake her up?" (E6, 114). This question was also reasonably likely to elicit an incriminating response because if Appellant said anything that struck the officers listening as taking too long, she would have been incriminating herself regarding a criminal charge of not timely obtaining medical care for the victim.

After Officer Norton left the room to make a call, he returned and began a line of questioning about the sources of injury to the victim, asking her, "so tell me about this fall." (E6, 118). This was not a response to something Appellant just said but instead was a request for her to elicit incriminating information on the subject which was not initially offered. This question was also likely to elicit incriminating information because the circumstances of that fall off the bed could reveal intent or criminal negligence by Appellant.

Officer Norton said that he had been told by people at the hospital that Appellant' explanation about the victim falling off a bed did not explain the injury. (E6, 132). When Appellant responded that "nobody would purposely hurt that baby," Norton directly implied that Appellant had done so. He did this by attempting to create a narrative to explain why Appellant hurt the victim, telling her, "it's become so clear to me, right now, Crystal, that you are so stressed out, and you are so sleep deprived, and it sounds like you have been at your … you've been at your wit's end for the last few days." (E6, 133). Norton built on this leading narrative, next saying, "Crystal, this is an acute injury. This - - this happened while, uh, you (inaudible) (talk over) …" *Id*.

Appellant clearly understood this comment as an accusation because she responded, "I would never hurt that baby." (E6, 133-34). Norton then continued to insist on his theory by telling her, "[s]omething happened, Crystal. Just tell me what happened." *Id*. This statement was also clearly understood as an accusation of Appellant's culpability, as shown by her reply, "I didn't do nothing." *Id*. These questions and statements by Officer Norton are, like so many others, reasonably likely to elicit incriminating information as they directly allege the suspect's involvement in the crime and inquire into the facts which produced the injury.

Next, Officer Norton began to command that Appellant explain the full circumstances of "what happened," which he previously explained must be a "sharp blow, or a shaking motion that would've caused that type of injury to her brain." (E6, 135-37). This line of questioning was also reasonably likely to elicit incriminating information because Norton had just told Appellant he was searching for a description of a physical act responsible for creating the victim's injuries, using language that clearly showed blunt force trauma. A reasonable officer would have, at this point, reasonably believed that the suspect that Appellant might have performed this act given that she was the victim's primary caregiver. Norton's commands that Appellant divulge this information were not merely a response to volunteered statements she had given but rather represented strong pressure designed to neutralize and overcome Appellant' objections, hesitations and previous statements asserting innocence. Appellant replied that nothing could have happened because "I would've remembered [but] I can't remember." (E6, 135).

After that, Appellant told Norton that she had only fallen asleep once and lost track of the victim, but he replied, "[t]hat's not the only time." (E6, 136). Appellant replied that "I swear I'm telling you everything I remember" and Norton replied, "[y]ou're not Crystal." *Id*. Officer Norton continued to apply psychological pressure, even using Appellant's love for the victim as a reason she should provide the information to "help" with the investigation, which was clearly aimed directly at her as the primary suspect. (E6, 137).

At this point in the interview, Appellant is consistently sobbing and speaking at a low volume onscreen, so much so that Norton completely controls both the pace and subject matter of the conversation, taking advantage of her emotional state to gather more incriminating information to use against her. (E6, 133-38). Norton's statements consistently contradicted Appellant's, pushing for additional information she previously resisted divulging and thus his questions and follow up statements cannot reasonably be characterized merely as responses to the suspect's voluntary comments.

For the remainder of the interrogation Officer Norton continued to stress the importance of Appellant providing more incriminating information and continued to refute the explanations Appellant previously provided for the injuries. For example, when Norton left and then returned to the interview room with a child-sized doll, Appellant pleaded, "No, please don't." (E6, 138-39). However, Norton insisted that she use the doll to demonstrate how the accident on the staircase occurred. (Id.) When Appellant replied that she tripped and the victim hit the couch, Norton contradicted her, asserting that he talked to the doctors who treated the victim and "they said that there is absolutely not [sic] way that it happened like that." (E6, 142).

When Appellant continued to assert her innocence, Norton manipulated her to divulge more, telling her, "you're passed [sic] the hard part here. This was, you were embarrassed to talk to me. … Slowly you have been being true to yourself." *Id*. Officer Norton, then asked Appellant "how you slapped her" and "what did you hit her with," demonstrating that he did not accept Appellant' explanation of hitting the victim one time. (E6, 143) Norton then followed this by introducing a new theory, saying, "I know there's more to it then [sic] one hit. And that's why we need to talk about it. … She was shaken as well." (E6, 144).

Officer Norton then asserted that Appellant's hit caused the victim's injury, telling her "you smacked her very forcefully to cause an injury like that." (E6, 144). When Appellant began describing roughhousing that her other children engaged in with the victim, Norton accused her of "diverting" and asserted that her daughter "did not cause this injury, okay." *Id*. Norton continued, telling Appellant, "[j]ust show me exactly what you did" and, after Appellant attempted to do so, he told her "it was harder than that Crystal." (E6, 145).

After Appellant described a time when she tossed the victim onto a couch, Norton asked, "have you been to a point where this has almost happened before?" (E6, 150). Then, after Appellant said she had not noticed any indications of an injury from the victim's fall out of her bed or being hit by a toy, Norton said "That's not what cause [sic] the injury what [sic] she has right now… She has the injury from you hitting her and from you throwing her." (E6, 155). When Appellant replied "No," Norton asked, "Did you ever try to seek medical advice or anything prior to that?" which is yet another question that is likely to elicit incriminating information regarding the charge about depriving the victim of necessary medical services. (*Id*.)

Each one of these questions by Norton constitutes an interrogation and, especially when considered together, all of these questions were likely to elicit incriminating information because they directly asked the primary suspect to provide precise details about the location, time, and intensity of actions she took that might have caused the victim's injury. None of these questions or statements should be deemed mere responses to Appellant's volunteered comments because the questions all countered or overrode her assertions of innocence, all involved strong application of persuasion and emotional manipulation, and all frequently involved the addition of new information that was known only to the Investigator and divulged to the Appellant strategically, to elicit more incriminating information from her.

Additionally, all these statements and questions described above were asked of the Appellant before she was read her *Miranda* rights. (E6, 159). Because of this, all the incriminating information provided by Appellant, the primary suspect, should have been suppressed from evidence as violations of her right against self incrimination and her right to Due Process under the Fifth and Fourteenth Amendments, as outlined in the second assigned error.

C. Appellant did not receive any *Miranda* warnings prior to when they were read to her at approximately 9:12 a.m.

Significantly, all the statements, questions and other pressures described above were directed at Appellant before she was read her *Miranda* rights. (E6, 159). Because of this, all the incriminating information provided by Appellant, the primary suspect, should have been suppressed from evidence as violations of her right against self incrimination and her right to Due Process under the Fifth and Fourteenth Amendments, as outlined in the second assigned error.

The United States Supreme Court's holding in *Miranda v. Arizona* requires that a sufficient warning include the following elements: a person must be warned that they have a "right to remain silent," that "any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). The Nebraska Supreme Court has applied that statement of the rule as authoritative. *See e.g. State v. Juranek*, 287 Neb. 846, 852 (2014).

There is nothing in the record that demonstrates any officer ever informed Appellant of these rights prior to when the warning was given by Officer Norton well after his interrogation commenced. Officers Bussard, Egger, and Sgt. Peterson each testified that they had not given any *Miranda* warnings to Appellant during their contact with her. (35:8-10; 43:25-44:7; 58:22-25).

As previously discussed, Sgt. Peterson's initial questioning of Appellant began about 4:45 a.m., Officer Norton's questioning began at the police station around 6:23 a.m. Thus, the interrogation prior to the *Miranda* warnings being administered lasted more than four (4) hours. (58:14-18; 72:19-21).

D. Appellant's testimony after the *Miranda* warnings were read should be suppressed because the prior, constitutionally infirm questioning tainted the post *Miranda* interview, rendering it fruit of the poisonous tree.

Nebraska courts have addressed the circumstance where a *Miranda* warning is required to be given in the midst of an ongoing interrogation, holding

that testimony given after the warning may still be tainted. *See e.g. State v. Cavitte*, 28 Neb.App. 601, 609-10 (2020) (summarizing the application in Nebraska courts of *Missouri v. Siebert*, 542 U.S. 600 (2004)). A pre-*Miranda* confession will make a later *Miranda* warning ineffective when the pre-*Miranda* questioning is "systematic, exhaustive, and managed with psychological skill to such an extent that after the unwarned interrogation, there was little, if anything, of incriminating potential left unsaid." *Id*.

Relevant factors for determining whether the post-*Miranda* confession was tainted by initial unwarned portion of an interrogation include "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." *State v. Clifton*, 296 Neb. 135, 155 (2017) (citing *Oregon v. Elstad*, 470 U.S. 298 (1985)).

Nebraska cases addressing whether police questioning before *Miranda* warnings were provided are admittedly limited. In *State v. Juranek*, 287 Neb. 846, 860 (2014), the pre-*Miranda* interrogation at issue consisted only of a single question and the suspect was given a warning "approximately 2 minutes into the interrogation." *State v. Juranek*, 287 Neb. 846, 860 (2014). Thus, this case, while illustrative, addressed a different situation than the one at issue in this case.

In *State v. Clifton*, 296 Neb. 135, 157, 892 N.W.2d 112 (2017), the pre-*Miranda* questioning at issue lasted only five (5) minutes and concerned "the correct spelling of Clifton's name and other information such as his address, job status, and educational background." Thus, like *Juranek,* it addressed concerns a similar topic but a much different factual situation than the one at issue in this case.

Similarly, *State v. Williams*, 26 Neb.App. 459, 495 (2018), addressed a situation in which the pre-*Miranda* interrogation lasted "approximately a minute" and "did not go to many of the key points of the investigation," meaning that, like the previously mentioned cases, the facts at issue in this case have not been before the appellate courts previously.

However, all of the relevant factors for properly determining whether pre-*Miranda* questioning tainted post-*Miranda* statements, as outlined in the above-mentioned cases demonstrates that Appellant's statements provided after she finally received the *Miranda* warnings were tainted and should have been suppressed. This is so for several reasons.

First, the pre-*Miranda* interrogation at issue in this case was prolonged, exhaustive and touched on multiple key points of the investigation. Officer Norton questioned Appellant about the time, location, and severity of several multiple events that he believed caused the injury to the victim. These included her falling off the bed, being hit by a toy, tripping on the stairs, being hit on the head, and being tossed onto the couch. Appellant was interrogated regarding all of these topics, all before the *Miranda* warning were given. And, as previously discussed, this portion of the interrogation lasted several hours while Norton applied constant pressure on Appellant to divulge incriminating information about how she caused the victim's injuries. Officer Norton's questioning of Appellant, even standing alone, cannot reasonably be equated to the questioning at issue in a case such as *Clifton*, in which only basic personal information was elicited before the warnings were administered. *Clifton*, 296 Neb. at 157.

Secondly, Appellant's post-*Miranda* statements in this case completely overlapped with her pre-*Miranda* statements. Officer Norton's interrogation, that continued after he read Appellant the warnings, merely reiterated his prior questions she had already provided and confirmed other minor details. For example, Norton asked "she was on your lap, it was around eleven o'clock and you were just frustrated. Uhm, and you demonstrated to me that while holding her, she just wouldn't stop crying, you were tired, and kinda forcefully went… like that. Is that about how hard it was? Okay." (E6, 162).

The location of the victim, the timing, Appellant' state of mind, and the demonstration discussed above all occurred before the warning was administered and the officer merely went down a "laundry list" of admissions Appellant previously made. Officer Norton is thus able to refer to these details solely because Appellant previously stated them. (E6, 150). Additionally, the Officer's language in these questions, referring to and rehashing information Appellant already disclosed before the warnings, demonstrates that the post-*Miranda* interrogation merely continued the pre-*Miranda* interrogation, as if the warnings

were the icing on the cake rather than the first essential ingredient to a Constitutionally valid interrogation.

Additionally, the post-*Miranda* questioning of Appellant did not lead to any new incidents or facts being elicited. After all the incriminating details Appellant stated before receiving the warnings was confirmed after they were given, the remainder of the post-*Miranda* interrogation consisted of topics similar to those discussed above in the Nebraska cases on this subject. However, unlike those cases, in which background, general questions were discussed prior to a suspect receiving *Miranda* warnings, in this case it was the post-*Miranda* interview that addressed these 'housekeeping related' topics. For example, when the investigator asked Appellant about the details of a camera surveillance system in the house, contact information for the victim's mother, and the temporary removal of Appellant's children. (E6, 175-181).

Third, the timing and setting of the pre and post *Miranda* portions of the interrogation show that the eventual reading of the warnings to Appellant did not cure the prior Constitutional violations she suffered. To truly understand at what point *Miranda* warnings were read to Appellant, relative to the entire interrogation, it is significant that the warnings were administered on page 159 of a transcript that is 188 pages long. This shows that *Miranda* warnings were more afterthought than necessary prerequisite to a custodial interrogation, in this case and that Appellant's admissions should have been suppressed. In fact, in the final portion of Appellant's interrogation the police do not even ask her about the victim's injuries. (E6, 159).

Fourth, the setting of when the *Miranda* warnings were administered shows that the warnings did not cure the prior failure to provide them because there was no temporal or substantial break between the warnings being provided and the interview that preceded this. In *Clifton*, in contrast, the two phases of the interrogation took place "an hour apart" and happened "in different locations." *Clifton*, 26 Neb.App. at 496. However, in this case, the resumption of the interrogation occurred in the same room as the prior questioning and began almost immediately after warnings were finally read.

Fifth, the continuity of police personnel shows that the warnings did not cure the previous failure to provide them. Officer Norton, the same person who previously interrogated Appellant, also interrogated her after reading her these

rights. When the same personnel continue the interrogation, a reasonable person would have believed that the post-*Miranda* interrogation was merely a continuation of the previous one, especially in this scenario in which Appellant was not given any opportunity, beyond hearing the warnings, to interrupt the inertia of the interrogation and assert the rights she had finally been reminded of, pursuant to *Miranda v. Arizona*.

E. Appellant's conversations with Officer Foster should be suppressed because she invoked her right to terminate questioning after the *Miranda* warning was given, but that invocation of this right was not honored.

Appellant's post-*Miranda* interrogation with Officer Foster does not cure the previous violations Appellant endured simply due to him being a different interrogator. In fact, while speaking to Officer Foster, Appellant invoked her right to cut off questioning and that invocation was not honored. After a *Miranda* warning is administered, the interrogation must cease if the suspect "indicates in any manner … that he wishes to remain silent." *State v. Rogers*, 277 Neb. 37, 51 (2009). To invoke the "right to cut off questioning," the person must "articulate his or her desire with sufficient clarity such that a reasonable police officer under the circumstances would understand the statement as an invocation of the right to remain silent." *Id*. at 52.

To decide whether an invocation is clear, courts can look towards the "context" of the invocation, and the many factors involved in that context. *Id*. at 64-65. Certain statements are sufficiently clear invocations of the right to cut off questioning that a detailed analysis of circumstances is not required. Examples include "I don't want to talk no more," "Uh! I'm through with this," and "I have nothing further to say." *Id*. at 68.

Appellant made several comments to Officer Foster that clearly satisfy this test. Appellant initially asked Foster, "[d]o you know when they're gonna give me my keys and my phone? (Crying). He said I could leave (inaudible)." (E11, 1). This statement shows Appellant wanted to leave badly and, as previously discussed, she was prevented from doing so because the police retained control of her personal effects, the space, and the distance she was from her vehicle. Officer Foster makes no attempt to locate or return her keys and phone, frustrating

Appellant' desire to end the interrogation and further signaling to her that leaving is not an option, given his indifference to her request.

Appellant follows this by saying, "I want my keys and my phone. So I can leave (crying)." (E11, 1). However, Foster responds by telling her he does not have her keys but he also does not terminate the interview or respect her invocation of her privilege against self incrimination. Instead, Foster starts to question Appellant about her personal life such as her living situation. (E11, 2). Appellant continues to plead to be allowed to leave the station, saying, "I just wanna [sic] go home and cry (inaudible) (crying). (inaudible) I just wanna [sic] go to sleep (crying.)" *Id*.

However, Foster simply resumed his previous questions, ignoring Appellant and asking, "you guys were in the process of moving too, huh?" *Id*. Appellant then said, "I know my twin brother will be at the house. I just need to go there and just (inaudible) (crying)." (E11, 3).

All of these statements, which represent an invocation of Appellant's right to cut off questioning, were made after the *Miranda* warning was provided and before any incriminating information was revealed to Officer Foster. *Miranda* imposes a duty on police officers to "scrupulously honor" a suspect's invocation of the right to cut off questioning, and a reasonable officer should have honored this invocation. *Rogers*, 277 Neb. at 62. *Rogers* also explained that the Court should not allow interrogators to persist in "repeated efforts to wear down the suspect's resistance and change his or her mind about the invocation." *Id*. Appellant told Foster "I wanna [sic] go home," and yet he ignored her request, responding, "Just exhausted, huh?" (E11, 4).

That response by police is to a clear invocation is exactly the type of persistent, psychologically manipulative technique both the *Miranda* decision and the Due Process Clause should disallow, because a reasonable officer should have understood that Appellant's strongly expressed desire to leave and end the interrogation constituted an invocation of her rights in these circumstances.

Officer Foster testified that the reason he continued to question Appellant was because she "kept talking about the case" when he had only initiated "small talk". (105:23-106:5). However, Foster's participation in that conversation was not merely reacting to the content of Appellant' statements because he also

referred to details he was aware of due solely to his participation in the interrogation. For example, after Appellant stated she didn't mean to hit the victim that hard, Foster asked, "Did you [sic] just panic sit [sic] in, when you knew that she wasn't waking up?" (E11, 4). Appellant had not previously said anything about the victim not waking up and Foster only knew this information because of his participation in the investigation. By asking this question, Foster was clearly seeking additional incriminating information about Appellant' actions after she discovered the victim's injury.

A knowledgeable investigator's question that is reasonably likely to elicit incriminating information (and is not, as he tried to characterize it, a response to a suspect's voluntary statement) is a violation of Appellant's *Miranda* rights. Because Appellant invoked her rights and Foster continued asking her questions that were reasonably likely to elicit incriminating responses, Appellant's statements to him should have been suppressed.

To summarize, each officer violated Appellant's right against self incrimination by subjecting her to interrogation while she was in custody. Further, taken together, and considered against the backdrop of the length of the interrogation, the location inside the police station, the distance from her vehicle, the confiscation of her keys and smartphone, and the fact that officers knew about, and exploited, her sleep deprived, emotionally charged state, the District Court clearly erred in not suppressing Appellant's statements. Additionally, since the information Appellant provided after her right against self incrimination was violated should have been suppressed, the evidence presented at the stipulated trial was insufficient to sustain a conviction. Thus, this Court should find that Appellant's rights under *Miranda* were violated, remand this matter for a new trial, and take whatever further actions justice requires.

II.

Second Assigned Error: Appellant's Right to Due Process of Law was violated

The District Court erred in overruling the Appellant's motion to suppress statements she made to law enforcement because these statements were procured in violation of her right to Due Process of Law under the Fifth

and Fourteenth Amendments of the United States Constitution, and Article 1, Section 12 of the Nebraska Constitution.

The Nebraska Supreme Court discussed and summarized Nebraska law regarding the issue of whether and at what point a suspect's right to Due Process of law is violated in the context of an interrogation in *State v. Hernandez*, 299 Neb. 896, 912-17 (2018). The same previously discussed facts that demonstrate Appellant was in custody throughout most, if not all, of the questioning directed at her also demonstrate that Appellant was subjected to coercion and to having her will overborne by law enforcement during this investigation. These actions by police violated Appellant's rights of her Due Process under the Fifth and Fourteenth Amendments as well as under Article I of the Nebraska Constitution.

Law enforcement personnel restrained Appellant against her will for a prolonged time period, deprived her of her car keys and smart phone, refused to transport her back to her vehicle, and then subjected her to intense, prolonged and manipulative interrogation tactics that eventually elicited a confession from her, as previously discussed.

In *Hernandez*, the Nebraska Supreme Court's reasoning demonstrates that Appellant's rights were violated in this case. The Court states that evidence of mental impairment is "relevant" to whether police exercised coercion, even though it is not sufficient by itself. *Hernandez*, 299 Neb. at 913. To demonstrate coercion, a showing that officers "exploited" that weakened mental state, needs to be made.

In this case, evidence of exploitation of a mental impairment is clearly present. Appellant told officers she was sleep deprived several times and yet, despite, or perhaps because of, this, officers continued their interrogation for hours, gradually increasing its coerciveness over time, taking advantage of Appellant's sleep deprived state, emotionally charged condition and essentially powerless circumstances, all of which eventually overbore Appellant's will. Further, the scope and increasing intensity of the questioning Appellant faced was clearly not "appropriate for someone in [Appellant's] state." *Id*. at 916.

Police asked Appellant questions that took advantage of her emotionally vulnerable state, her potential intoxication, her desire to provide information to help the victim, and subjected her to a variety of interrogation techniques,

administered by several officers (who could speak with other, observing officers to intensify and perfect these tactics), all for the purpose of obtaining evidence of Appellant's guilt. Given that officers were aware of Appellant's unstable and vulnerable mental state and not only continued but even intensified their efforts to obtain incriminating information, what other purpose could they have been pursuing if not to exploit Appellant's fragile state and gather incriminating information?

The Court in *Hernandez* described the police officers as "calm and relaxed" and observed that their interrogation "focused on building rapport with *Hernandez* and appealing to his better instincts." *Id*. at 915. Appellant's case can easily be distinguished from this factor as Officer Norton repeatedly accused Appellant of committing crimes, putting words in her mouth in the process, all despite her tears, tiredness and repeatedly expressed desire to end the interview and be allowed to leave.

In *Hernandez* the Court also found it significant that officers did not take "an aggressive demeanor." *Id*. However, in Appellant's case, the officers obviously did so. For example, Officer Norton interrupts Appellant several times, commenting "you know that's not true," as previously discussed. Additionally, the Court in *Hernandez* also found important the fact that Hernandez had been "allowed to speak at length without interruption." *Id*. In Appellant's case, however, she was frequently interrupted by Officer Norton, accused of both the crime and of lying about or minimizing her role in it during her interrogation.

The *Hernandez* court observed that his interview was "only about 2 hours long" and there was "nothing unusual or oppressive about the environment" where it occurred. *Hernandez*, 299 Neb. at 916. In this case, however, the record demonstrates Appellant was placed in a vulnerable position, subordinate to the police, as they confiscated both her car keys and smart phone after other officers transported her, in a squad car, miles from where her vehicle had been left behind. Additionally, the prolonged interviews lasted much longer than two hours, perhaps four times that long, in fact.

Because the test for a Due Process violation is whether the confession overbore the will of the person being interrogated, the Court looks at evidence regarding the clarity of the mind of the suspect being interrogated. In *Hernandez,* the Court pointed out that the suspect in that case made some "strategic"

statements that suggested "an effort to undermine the credibility of his incriminating statements," but also observed that, otherwise, he possessed the "ability to think clearly." *Id*.

While perhaps the early phases of Appellant's interview demonstrate that her mind was somewhat lucid at that point, given that she was providing responsive and descriptive answers to the questions posed, as the interrogation progressed, the quality, and thus the voluntariness, of her responses significantly deteriorated. There are several moments in the interrogation transcript where Appellant is barely able to form coherent sentences, in fact, and during these times she frequently sobs uncontrollably. For example, Appellant begs not to use the doll to demonstrate a strike she has just described after the officer returns to the room with a doll. This reluctance, immediately followed by submission to the officer's authority, shows that Appellant's will was overborne and her Due Process rights violated.

Additionally, Officer Norton's leading questions, that put words in Appellant's mouth, and intensified Appellant's admissions until they fit the investigator's perceived level of violence necessary to explain the injuries, demonstrates that the officer was coercing the Appellant to say what he wanted her to and overbearing her will in the process.

In summary, considering the myriad ways officers took advantage of Appellant's vulnerable and sleep deprived emotional state, and eventually overbore her will to elicit a confession, her Due Process rights were violated in this case. For that reason, the trial court erred in not suppressing Appellant's statements and this Court should correct that error and find that Nebraska law and the Due Process Clauses of the Fifth and Fourteenth Amendments and Article I of the Nebraska Constitution, were violated in this case. Additionally, given the fact that the record demonstrates officers essentially put words in Appellant's mouth, that were later admitted into evidence to convict her, the Court should find these coerced statements inherently unreliable, the product of a will overborne rather than of a truth seeking process that complied with the Due Process clause.

Thus, because each officer violated Appellant's Due Process rights in overbearing her will, as previously discussed, and this Court should find accordingly. Additionally, since the information Appellant provided after her Due Process rights were violated right should have been suppressed, the evidence

presented at the stipulated trial, after excluding that information, was insufficient to sustain a conviction. Thus, this Court should find that Appellant's rights to Due Process of law were violated, remand this matter for a new trial, and take whatever further actions justice requires.

CONCLUSION

The District Court erred by failing to suppress the evidence of Appellant's interrogation by law enforcement. The incriminating statements Appellant made were elicited during a custodial interrogation before the *Miranda* warning was read to Appellant. The warning was only given after essentially all the incriminating facts necessary for a conviction had been elicited from Appellant and its untimely administration did not cure the previous Constitutional violations Appellant was previously subjected to. Consequently, Appellant's subsequent statements should have been suppressed by the District Court.

Additionally, the District Court erred by failing to suppress the evidence of Appellant's interrogation by law enforcement because the incriminating statements Appellant made in response to their coercive, dominating interrogation represented violations of Appellant's right to Due Process of law. Consequently, Appellant's statements should also have been suppressed from use against her by the District Court.

Respectfully Submitted,

CRYSTAL DEMERS, Appellant

David Tarrell,
ATTORNEY FOR APPELLANT

Certificate of Compliance

The undersigned certified that the foregoing brief complies with Neb. Ct. R. App. P. § 2-103: it was generated on Microsoft Word Version 2102 and totals 14,789 words in Times New Roman 12 pt. type.

/s/ David Tarrell
DAVID TARRELL, #22024
ATTORNEY FOR APPELLANT

Certificate of Service

I hereby certify that on Thursday, January 11, 2024 I provided a true and correct copy of this *Brief of Appellant Demers* to the following:

State of Nebraska represented by Michael Thomas Hilgers (24483) service method: Electronic Service to **katie.beiermann@nebraska.gov**

Signature: /s/ David Tarrell (22024)