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**CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS**

No. A-23-622

IN THE NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA,

Appellee,

v.

CRYSTAL L. DEMERS,

Appellant.

**APPEAL FROM THE DISTRICT COURT OF
LANCASTER COUNTY, NEBRASKA**

The Honorable Kevin R. McManaman, District Judge

BRIEF OF APPELLEE

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Statement of the Case

A. Nature of the Case

Following a stipulated bench trial, Appellant Crystal Demers, also known and referred to as Crystal Woods at various times throughout the case, was found guilty in the District Court of Lancaster County of first degree assault and child abuse – serious bodily injury. She was sentenced to consecutive terms of 22 to 30 years’ imprisonment and 8 to 20 years’ imprisonment.

B. Issues Before the District Court

As relevant to this appeal, the issue before the district court was the admissibility of statements Demers made to law enforcement prior to her arrest.

Prior to trial, Demers filed a motion to suppress all statements made to law enforcement during the March 4, 2021, interview.

C. How the Issues Were Decided in the District Court

The district court overruled Demers’s motion to suppress following an evidentiary hearing and she preserved the objection as part of the stipulated trial. Following the stipulated bench trial, the district court confirmed the motion to suppress ruling and found Demers guilty of first degree assault and child abuse – serious bodily injury.

D. Scope of Review

In reviewing a trial court’s ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court’s findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of

the trial court's determination. *State v. Hammond*, 315 Neb. 362, 996 N.W.2d 270 (2023).

Propositions of Law

I.

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. Vaughn*, 314 Neb. 167, 989 N.W.2d 378 (2023).

II.

The safeguards provided by *Miranda* come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. *State v. Vaughn*, 314 Neb. 167, 989 N.W.2d 378 (2023).

III.

Under the *Miranda* rule a “custodial interrogation” takes place when questioning is initiated by law enforcement after a person has been taken into custody or is otherwise deprived of his or her freedom of action in any significant way. The ultimate inquiry for determining whether a person is “in custody” for purposes of *Miranda* is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. *State v. Vaughn*, 314 Neb. 167, 989 N.W.2d 378 (2023).

IV.

Factors relevant to the custody inquiry are: (1) the location of the interrogation and whether it was a place where the defendant would normally feel free to leave; (2) whether the contact with the police was initiated by them or by the person interrogated, and, if by the police, whether the defendant voluntarily agreed to the interview; (3) whether

the defendant was told he or she was free to terminate the interview and leave at any time; (4) whether there were restrictions on the defendant's freedom of movement during the interrogation; (5) whether neutral parties were present at any time during the interrogation; (6) the duration of the interrogation; (7) whether the police verbally dominated the questioning, were aggressive, were confrontational, were accusatory, threatened the defendant, or used other interrogation techniques to pressure the suspect; and (8) whether the police manifested to the defendant a belief that the defendant was culpable and that they had the evidence to prove it. *State v. Vaughn*, 314 Neb. 167, 989 N.W.2d 378 (2023) (citing *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009)).

V.

In considering whether a suspect has clearly invoked the right to remain silent, an appellate court reviews not only the words of the criminal defendant, but also the context of the invocation. Relevant circumstances include the words spoken by the defendant and the interrogating officer, the officer's response to the suspect's words, the speech patterns of the suspect, the context of the interrogation, the demeanor and tone of the interrogating officer, the suspect's behavior during questioning, the point at which the suspect allegedly invoked the right to remain silent, and who was present during the interrogation. *State v. DeJong*, 287 Neb. 864, 845 N.W.2d 858 (2014).

Statement of Facts

On June 16, 2021, Demers was charged by information with first degree assault and child abuse – serious bodily injury, both class II felonies. (T31-32) On December 30, 2022, the State filed an amended information with which it proceeded to trial. The charges in the amended information were identical to the original information. The State only changed the factual allegations in count II, clarifying the State's theory for trial. (118:4-12; T107)

Motion to Suppress Hearing

On May 12, 2022, Demers filed a motion to suppress any statements gathered by law enforcement as a result of their interview with Demers on March 4, 2021. (T67) Her motion alleged that during that interview she made incriminating statements to law enforcement but any statements she made were not knowingly, intelligently, or voluntarily given and were thus made in violation of her 5th, 6th, and 14th amendment rights. (T67)

A hearing on Demers's motion to suppress was held on May 25, 2022. The court received exhibits 1 through 11 and the State called 5 witnesses. (23:2-16) Former Lincoln Police Officer Curtis Bussard testified that on March 4, 2021, when he was still a Lincoln police officer, he was already at the hospital on another call when he observed a baby being brought into the emergency room, so he followed medical personnel back into the emergency room to find out what was occurring. (26:23-27:18) He came into contact with Demers as one of the parties who brought the baby in to the emergency room in a side room at approximately 2 a.m. (28:1-8; 34:9-18) He testified that he was wearing an operable body camera that day and exhibits 1 and 2 depicted his contact with Demers in the side room he mentioned. (28:9-30:3) Bussard testified that at the time he had contact with Demers she was not under arrest, but she was not necessarily free to go due to the investigation and his contact with her was simply to gather background information and gather some preliminary knowledge as to what took place leading up to them coming to the hospital. (31:11-32:5) He stated that he did not threaten or make promises to Demers to get her to talk to him, her contact with him appeared to be voluntary, she was cooperative, and she never asked him to let her go home or to quit talking to her. (32:15-23; 36:20-37:1)

Lincoln Police Officer Payton Egger, previously Payton Virts at the time of her contact with Demers, testified that she was tasked with transporting Demers to the police department. (38:6-40:11) She stated she made contact with Demers at approximately 3:43 a.m. and exhibit

3 depicted her body cam footage of the contact. (40:8-41:24; 44:8-13) She testified that she had been told Demers was not under arrest. (41:15-22) Egger testified that she advised Demers she was not under arrest and was simply transporting her to give a formal statement at the police station and she stated Demers was cooperative during her contact with her. (43:5-44:7) She stated she was not questioning Demers at any time to elicit incriminating information and Demers did not make any statements to her that she would characterize as incriminating. (45:17-22)

Sergeant Trent Peterson testified that he reported to the hospital at approximately 2:54 a.m. and was advised that the child brought in was in grave danger that was possibly fatal. (49:7-50:12) He stated he was briefed by the doctor and nurses as to the baby, O.M.'s situation and the doctor expressed concern that Demers was under the influence of methamphetamine. He stated he first came into contact with Demers at the hospital to inform her that O.M., was stabilized and was being transported for surgery. (50:13-52:11) He asked Demers if she would be willing to come down to the police station and give a formal statement, which she agreed, and he assured her she was not under arrest. (53:10-55:3) Sergeant Peterson testified that his contact with Demers at the hospital was depicted in exhibit 4. (52:12-55:3)

He stated he transported Demers's roommate, Kayleigh, down to the station to get a formal statement from her also and both Demers and Kayleigh were placed in interview rooms. (55:4-22) Sgt. Peterson testified that the door to Demers's interview room was unlocked, he told her she was going home that night, and the decision was made that she was not going to be arrested regardless of what she told them. (56:2-57:8) Sgt. Peterson stated that he did not Mirandize Demers because as she was told, they wanted her to come down and provide information that led up to her being at the hospital, she was not under arrest, she was free to go at that time, and at that time they did not know whether she was a witness or a suspect in O.M.'s injuries. (58:22-59:8) He stated that at no point during his questioning of Demers did

she ask him to stop asking her questions, ask to leave, or ask for an attorney, and she answered his questions appropriately, voluntarily, and intelligently. (59:9-60:21) Sgt. Peterson stated that at one point toward the end of his contact with her, Demers said she wanted to go home and he told her to hold on because they had an investigator coming to talk to her more who specialized in child cases. (60:25-61:7) He stated he did not gather any incriminating evidence against Demers but more background-type information and she was cooperative with him. (61:12-62:4)

Investigator Robert Norton, Special Victims Unit investigator, testified that he was called in to interview Demers after he was advised that a 10-month-old child, O.M., was receiving emergency brain surgery as a result of an injury to her head and Demers, one of O.M.'s caregivers, was transported to headquarters for an interview. (70:2-10; 71:3-72:1) Norton was told Demers was not under arrest and the plan was to release her at the end of the interview even if she confessed. (72:2-12) Inv. Norton testified that he entered Demers's interview room at approximately 6:23 a.m. (72:16-21) He stated that during his contact with Demers she was never handcuffed, the door to the interview room was never locked, and Demers's movements were never restricted as she stood up at times during the interview and actually walked out of the room on her own to request a smoke break and go to the bathroom. (76:7-19) He stated he accompanied her on one smoke break and Inv. Foster accompanied her on another one because headquarters is a locked facility and he wanted to facilitate her entrance back into the building. He confirmed Demers went back in and continued her interview after the smoke breaks. (85:8-86:18) Inv. Norton stated that Demers was very cooperative during his contact with her and, while she mentioned being tired on more than one occasion, she did not nod off while he was talking to her and she gave appropriate answers to his questions. (76:23-77:15) He testified that Demers never specifically asked him to stop asking her questions, never told him she wanted an attorney present, and despite her mentioning she was tired and wanted to go home, she never demanded

to go home, and she continued talking to him intelligently and voluntarily. (77:16-78:8)

Inv. Norton testified that he told Demers she was not under arrest numerous times, told her she was going to be allowed to leave at the end of the interview, and followed through with that by making arrangements to get her back to her car after the interview concluded. (78:9-22) He stated that when Demers began to incriminate herself by giving a different version than she had been as to how O.M. was hurt, at approximately 9:12 a.m., he did advise her of her rights under *Miranda v. Arizona*, 384 US 436 (1966), and she waived *Miranda* and continued talking to him without him making any threats, promises, or using any force. (79:7-8; 80:7-81:20; 82:13-14; E7) Inv. Norton reiterated that Demers was not under arrest when he Mirandized her, he repeatedly told her that, and she continued to speak with him and got more detailed into what occurred leading up to O.M.'s injuries. (82:5-24) He stated a common technique used in child abuse situations is to explain the importance of knowing the truth so the child can get the best possible care, he employed that technique in this situation, and Demers admitted to lying to him and apologized repeatedly for lying. (83:20-85:7)

Finally, Investigator Frank Foster, another Special Victims Unit investigator, testified that he was called in to help with the investigation and he initially interviewed Demers's roommate, Kayleigh and Demers's other roommate and brother, Danny. (101:15-19; 102:2-103:5) He stated he had contact with Demers at approximately 9:52 a.m. when he went outside the building with her to give her a smoke break. (103:6-104:3) Inv. Foster testified that at no point during his contact with Demers did she say she did not want to answer any more questions or tell him she wanted an attorney, and, while his goal was not to interrogate her, he did ask her follow up questions to make small talk and to keep her talking about the case. (105:13-106:5) He stated that it was his understanding from the beginning that Demers was advised she was not going to be placed

under arrest and when they were done they were going home. (106:8-10) He testified that Demers was not handcuffed or restrained in any way when he was with her, and she was cooperative with him. (106:11-16)

Sgt. Peterson and Investigators Norton and Foster all confirmed that their interviews of Demers at police headquarters were memorialized in exhibit 5 and transcribed in exhibit 6. (56:7-11; 57:14-58:21; 61:24-62:4; 73:2-74:16; 106:24-107:11) Invs. Norton and Foster also indicated that Foster's digital recorder was utilized during interactions with Demers outside the interview room and those recordings were memorialized in exhibits 8 and 10 and transcribed in exhibits 9 and 11. (75:2-76:6; 104:4-105:12)

Exhibits 1-6 and 8-11 corroborate the testimony offered at the hearing. Exhibit 1 reflects Demers's initial statement to Officer Bussard where she provided the first explanation for O.M.'s injuries – that her son threw a little metal car and it hit O.M. in the head. Exhibit 2 shows Demers providing a different story to the doctor regarding the source of O.M.'s injuries – that O.M. fell off her bed onto a concrete floor 2 days prior. The doctor confronted Demers about not providing that story earlier and Demers reiterated this story to Officer Bussard in private, providing further detail. (E2) The remaining exhibits and their corresponding transcripts reflect that Demers willingly came to the police station to give her statement, was told multiple times she was not under arrest and she would be free to leave the police station at the conclusion of the interview, was allowed to move freely within the interview room, was advised the interview room was unlocked, was able to leave the interview room, even on her own, for smoke and bathroom breaks, was offered and provided beverages, and was allowed to wait in the lobby after she stated she was done and did not want to be in the interview room anymore. (E4 @ 3:18-5:45; E4 @ 6:05-6:15; E5 @ 2:50-3:15; E5 @ 47:57-48:15; E5 @ 1:06:44; E5 @ 1:46:55-1:47:40; E5 @ 1:50:05-1:54:45; E5 @ 2:54:58-2:55:25; E5 @ 4:15:30-4:15:55; E5 @ 4:25:37-4:25:42; E5 @ 4:36:35-4:37:52; E5 @

5:04:48-5:04:55; E5 @ 5:08:15-5:08:45; E5 @ 5:19:32-5:32:19; E5 @ 6:00:43-6:18:19; E6p39; E6p50; E6p51-54; E6p117; E6p158; E6p183-188; E8 @ :29; E8 @ 8:35) Exhibit 5 reveals that approximately 4 hours into the interview, Demers provides another explanation for O.M.'s injuries that incriminates her and, at that point, Investigator Norton Mirandizes her, she waives *Miranda*, and voluntarily continues to talk to Investigator Norton and provides him with further details of her actions that led to O.M.'s injuries. (E5 @ 3:38:23-3:43:59; E5 @ 4:38:35-4:40:00; E6p142-146; E6p159)

While Demers stated she was tired or wanted to sleep several times throughout exhibit 5 and asked or said she wanted to go home, she never unequivocally told investigators she wished or intended to stop speaking with them and, despite her comments, she willingly continued to speak with them and cooperate. (E5 @ 11:44-12:10; E5 @ 26:10-26:30; E5 @ 29:20; E5 @ 1:13:13; E5 @ 1:14:15; E5 @ 1:44:00-1:44:50; E5 @ 2:10:10-2:10:20; E5 @ 2:54:50-2:55:25; E6p46-47; E6p49-50; E6p74; E6p145) Demers told Sgt. Peterson and Inv. Norton about all the stress she had been under lately with her parents' health, having to move due to her lease being terminated, and having to provide for O.M. for three weeks to a month at a time because O.M.'s mom would not return to come get her. (E5 @ 13:50-21:25; E5 @ 25:12-26:30; E5 @ 2:01:33-2:06:07; E5 @ 2:11:03-2:11:32; E5 @ 3:13:04-3:19:55; E6p63-68; E6p75; E6p135-136) She finally told Investigator Norton that she got mad when O.M. would not stop playing with her jewelry and screaming and she smacked O.M.'s head with her hands on both sides and then threw her onto the couch and it was possible her head hit the window frame behind the couch. Demers did not seek medical care for O.M. until hours later when O.M. would not wake up and Demers's roommate noticed O.M.'s pupils were different sizes. (E5 @ 42:00-46:04; E5 @ 3:38:20-3:51:20; E6p104-107; E6p142-146; E6p168-170)

When Demers said unequivocally that she was done and didn't want to be there anymore at approximately 5 hours into the interview,

questioning into the incident ceased and she was assured she was free to leave, she was taken outside for another smoke break, she was allowed to wait in the lobby as she expressed she did not want to be in the interview room anymore, and Inv. Norton worked to contact Demers's mom for temporary custody of Demers's children and made arrangements to get Demers back to her car. (E5 @ 5:07:37-5:08:49; E5 @ 5:19:32-5:42:57; E5 @ 6:00:43-6:18:19; E6p182-188)

District Court Order on Motion to Suppress

After the parties submitted briefs on the issue, the district court filed an order on November 2, 2022, overruling Demers's motion to suppress. (T73-91; T94-102) The court laid out factually that officers told Demers she was not under arrest and asked if she would be willing to come to the police department for a statement, Demers nodded her head yes, officers told Demers she would be given a ride home after the interview was complete, Demers was not placed in handcuffs, and she was allowed to smoke a cigarette before voluntarily getting into the police car where she was told again she was not under arrest and was transported to the police department. (T95-96) The district court noted that while in the interview room at the police station, "defendant was told no less than five times that she was not under arrest and was free to leave, including when Investigator Norton first entered the room." (T96, citing Ex. 6)

The district court acknowledged that Demers stated she was tired during her questioning several times and made statements about wanting to go home when she was in the room alone. (T96-97) The court stated that Demers provided three versions of events and once she told Investigator Norton she "slammed O.M. onto the couch" he read Demers a *Miranda* warning then continued to question her about O.M.'s injuries. (T97) The court noted that Demers was allowed multiple breaks during the interview to smoke cigarettes and use the bathroom, was provided with beverages to drink, was never told she was under arrest or not free to leave, was told the door to the interview room was unlocked multiple times, and at the conclusion of the

interviews she was given a ride back to her car at the hospital as promised rather than taken into custody. (T97-98)

In analyzing these facts within Demers's motion to suppress, the court concluded that her right to self-incrimination was not violated because she was not in custody, she did not make an unequivocal invocation of her right to terminate questioning, and her statements were voluntary. (T98-101) Regarding the court's conclusion that Demers was not in custody for purposes of *Miranda*, the court reiterated that Demers was asked to give a voluntary statement to police, she agreed, she was told she was not under arrest at least two times before giving her statement, she was told she would be given a ride back home at the end of the interview, she was put in an interview room with an unlocked door and she could have left at any time, and there were no restrictions on her freedom of movement before, during, or after the interview. (T98-99) Further, the court noted that the police did not use strong-arm tactics, their questioning was not aggressive, threatening, or accusatory, and the questioning atmosphere was not "police-dominated." (T99)

Regarding the court's conclusion that Demers did not make an unequivocal invocation of her right to terminate questioning, the court noted that she made statements that she was tired or fatigued but that is different than being done talking to the police. (T99-100) The court stated that "a bare statement of fatigue requires police to guess that what Defendant really means is that she wants to terminate questioning" and "when ambiguity exists, a statement cannot be an unequivocal invocation of a right to cease questioning." (T99-100) Further, the court noted that after these statements, Demers willingly continued with the questioning and did not manifest other signs that she did not want to continue with questioning. (T100) The court concluded that there was no coercive police conduct that would have rendered her statements involuntary and, since the court concluded that her unwarned statements were not coerced, there was no need to

evaluate whether the warned statements were tainted and thus also inadmissible. (T101-102)

Stipulated Bench Trial Evidence

A stipulated bench trial was held on April 24, 2023. The court granted the State leave to file the amended information and the State re-arraigned Demers on the charges in the amended information, explaining that the charges were the same but some language was simply removed from the original information, and the possible penalties, which she indicated she understood. (124:15-127:9) Demers pled not guilty to the charges and the parties proceeded to a stipulated bench trial. (127:10-128:9)

The parties jointly offered exhibits 1 through 23, which included body cam and interview videos of Demers the night of the incident, transcripts of those interviews, Demers's *Miranda* waiver form, CVs and reports of the experts, witness statements, police reports, and Demers's motion to suppress and *Jackson v. Denno* motion. Exhibit 23 outlined the evidence to be submitted and reiterated that the law enforcement officers who interviewed Demers throughout the night would testify consistent to their respective testimony at the motion to suppress hearing and other witnesses would testify consistent with their written statements offered as exhibits. Defense counsel renewed orally and in exhibit 23 Demers's objections in her motion to suppress and *Jackson v. Denno* motion but waived any other objections. (128:10-25; E21-E23) The State clarified for the court why it charged two separate counts, the parties briefly discussed the evidence, then the court scheduled a hearing for when it would announce its decision after reviewing the evidence. (129:5-132:3)

On June 2, 2023, the court pronounced its decision. The court affirmed its ruling on Demers's motion to suppress and found Demers guilty of first degree assault and child abuse – serious bodily injury. (133:9-134:6) The court further filed an order memorializing its oral pronouncements. (T114) The court ordered a presentence investigation

(PSI), set the matter for sentencing, and revoked Demers's bond. (134:7-135:17; T114)

Sentencing

Sentencing was held on August 10, 2023. The parties only had minor changes to be made to the PSI and the court added a letter received by defense counsel. (136:20-137:23) The parties offered argument as to the appropriate sentence and Demers submitted her allocution through a letter she wrote to the court. (138:3-139:7)

The district court sentenced Demers to consecutive terms of 22 to 30 years' imprisonment on count I and 8 to 20 years' imprisonment on count II. (141:2-142:1; T116-117) The court granted Demers credit for 205 days served. (142:4; T117) This appeal followed.

Argument

I. Assignments of Error #1 and #2: The district court did not err in overruling Demers's motion to suppress or considering that evidence as part of the stipulated trial

Demers assigns that the district court erred in overruling her motion to suppress because the statements she made to law enforcement were procured in violation of her right against self incrimination and due process rights under the 5th and 14th amendments. She argues *Miranda* was violated because she was subjected to custodial interrogation when police controlled her ability to move, contact outside parties, return to her vehicle, and employed interrogation techniques against her. (Brief of Appellant, pp. 14-27) She asserts she did not receive her *Miranda* warnings until more than 4 hours after interrogation began and her statements after she received *Miranda* warnings should also have been suppressed because her attempt to terminate questioning was not honored and it was fruit of the poisonous tree of the *Miranda* violation. (Brief of Appellant, pp. 27-40) She argues that the actions of law enforcement officers in

interrogating her also violated her due process rights so her statements should have been suppressed. (Brief of Appellant, pp. 40-44) The State submits this argument is without merit and the district court did not err in denying Demers's motion to suppress.

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. Vaughn*, 314 Neb. 167, 989 N.W.2d 378 (2023). The safeguards provided by *Miranda* come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. *Id.* Under the *Miranda* rule a "custodial interrogation" takes place when questioning is initiated by law enforcement after a person has been taken into custody or is otherwise deprived of his or her freedom of action in any significant way. *Id.* The ultimate inquiry for determining whether a person is "in custody" for purposes of *Miranda* is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. *Id.*

The Nebraska Supreme Court has further set out factors relevant to the custody inquiry: (1) the location of the interrogation and whether it was a place where the defendant would normally feel free to leave; (2) whether the contact with the police was initiated by them or by the person interrogated, and, if by the police, whether the defendant voluntarily agreed to the interview; (3) whether the defendant was told he or she was free to terminate the interview and leave at any time; (4) whether there were restrictions on the defendant's freedom of movement during the interrogation; (5) whether neutral parties were present at any time during the interrogation; (6) the duration of the interrogation; (7) whether the police verbally dominated the questioning, were aggressive, were confrontational, were accusatory, threatened the defendant, or used other interrogation techniques to pressure the suspect; and (8) whether the police manifested to the defendant a belief that the defendant was culpable

and that they had the evidence to prove it. *Id.* (citing *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009)).

The State submits that Demers was not in custody for purposes of *Miranda* and her statements to law enforcement were voluntary and therefore admissible. The videos of Demers's contact with law enforcement throughout the early morning hours of March 4, 2021, show that Demers stated she was willing to go to the police station and give a formal statement and, after she was allowed to smoke a cigarette, she voluntarily got in Officer Eggers's cruiser to be transported to the police station. She voluntarily gave consent for law enforcement to search her residence and her phone to help facilitate their investigation. Multiple law enforcement officers throughout their contacts with Demers advised her that she was not under arrest, she was free to leave at any time, the door to the interview room was unlocked, and that no matter what happened she would be going home at the conclusion of the interview.

Law enforcement did not verbally dominate the interview with Demers and were not accusatory, threatening, aggressive, or confrontational. Their questioning was in the context of needing to know the truth in order to help O.M. receive the best medical care and did not accuse anyone, especially Demers, of intentionally hurting O.M. Sgt. Peterson testified that, at the time Demers was asked to come give a formal statement, law enforcement was not even sure whether Demers was a witness or a suspect. Investigator Norton only confronted Demers regarding her telling the truth because he explained to her that, according to medical personnel, O.M.'s injuries could not have been caused by the stories she was telling him and emphasized the importance of telling the truth so they could help O.M., a questioning technique he testified was a common practice with child cases, not to pressure Demers into confessing but to get the truth of what happened so O.M. could be treated properly.

Finally, Demers's freedom of movement at the police station was never restricted. She was never handcuffed, even when transported in

the back of Officer Eggers's cruiser, she was allowed to stand up and walk around during her interview, she was allowed multiple bathroom and smoke breaks, and the door to the interview room was never locked, as shown by the fact that Demers opened the door herself and went out into the hallway to find someone to request a bathroom break. Investigator Norton testified at the motion to suppress hearing, and Investigator Foster indicated to Demers in exhibit 5, that the only reason Demers was accompanied whenever she left the interview room was because they were in a secure facility so she could not simply be walking around other people's offices by herself and they had to facilitate her re-entry into the building when she went outside to smoke.

Contrary to Demers's assertion that her attempt to terminate questioning was not honored, it was honored after her invocation was unequivocal. In considering whether a suspect has clearly invoked the right to remain silent, an appellate court reviews not only the words of the criminal defendant, but also the context of the invocation. *State v. DeJong*, 287 Neb. 864, 845 N.W.2d 858 (2014). Relevant circumstances include the words spoken by the defendant and the interrogating officer, the officer's response to the suspect's words, the speech patterns of the suspect, the context of the interrogation, the demeanor and tone of the interrogating officer, the suspect's behavior during questioning, the point at which the suspect allegedly invoked the right to remain silent, and who was present during the interrogation. *Id.* In *State v. Dejong*, the Nebraska Supreme Court determined that the defendant's statement "I'm tired. I wanna go to bed, please. I'm done, I wanna go to sleep. I'm tired" to be an invocation of the defendant's right to remain silent, but the bare statements of needing sleep and being exhausted prior to that were not.

Similar to *DeJong*, Demers made many statements throughout the interview about being tired, exhausted, and wanting to go to bed, but continued cooperating with questions from Sgt. Peterson and Inv. Norton. This is not an unequivocal invocation to terminate

questioning. As the district court reasoned in its order denying Demers's motion to suppress, "a bare statement of fatigue requires police to guess that what Defendant really means is that she wants to terminate questioning" and "when ambiguity exists, a statement cannot be an unequivocal invocation of a right to cease questioning." (T100) Therefore, the State submits that Demers's simple statements of being tired did not invoke her right to remain silent and, as argued above, since she was not in custody for purposes of *Miranda*, the officers were allowed to continue questioning her and the court did not err in concluding those statements admissible.

However, the State submits that Demers did invoke her right to remain silent, as Demers asserts, but, contrary to Demers's argument, that invocation was indeed honored. After Demers was Mirandized and waived *Miranda*, she continued cooperating with Investigator Norton before invoking her right to terminate questioning. Then once she unequivocally expressed she was "done," Investigator Norton ceased questioning regarding the investigation and switched gears to asking Demers where she wanted to go, made efforts to get in touch with Demers's mom regarding temporary custody of Demers's children, and made arrangements to get transportation for Demers back to her car. While Investigator Norton was doing this and asking Demers questions to facilitate these things and informing her what was happening, Investigator Foster took Demers outside for another smoke break, then temporarily took her to the lobby at Demers's request because she did not want to be in the interview room anymore. Investigator Foster did not ask Demers anymore questions regarding the case, but simply made small talk with Demers, and Investigator Norton assured Demers that she was free to leave and they were just trying to accommodate her and facilitate her transportation back to her car at the hospital. Therefore, despite Demers's assertion that her attempt to terminate questioning was not honored, Demers continued to cooperate and voluntarily participate in conversation after the invocation and the invocation was indeed honored by law enforcement

because all the discussion after her invocation was to discuss her mother taking her kids and facilitate her return back to her vehicle.

Demers further asserts that her statements after she was Mirandized and waived *Miranda* should be suppressed because those statements were tainted by the *Miranda* violation and the *Miranda* warning did not cure the previous violation. Since the State argues above that there was no violation of *Miranda* because Demers was never in custody for purposes of *Miranda* and all her statements were admissible, the State further submits that any statements Demers made after she waived her *Miranda* rights were also admissible.

Conclusion

For the reasons noted above, the Appellee respectfully requests that this Court affirm the judgment of the district court.

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Certificate of Compliance

I hereby certify that this brief complies with the word count and typeface requirements of Neb. Ct. R. App. P. § 2-103. This brief contains 6,038 words, excluding this certificate. This brief was created using Word Microsoft 365.

s/Teryn Blessin

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Certificate of Service

I hereby certify that on Wednesday, March 13, 2024 I provided a true and correct copy of this *Brief of Appellee State of NE* to the following:

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