SUPREME COURT, STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, Colorado 80202	FILED IN THE SUPREME COURT SEP - 8 2011 OF THE STATE OF COLORADO Christopher T. Ryan, Clerk
Certiorari to the Colorado Court of Appeals Case No. 08CA974	
ANDREW MUMFORD Petitioner v. THE PEOPLE OF THE STATE OF COLORADO Respondent	σ COURT USE ONLY σ
Douglas K. Wilson, Colorado State Public Defender RYANN S. HARDMAN, #37922 1290 Broadway, Suite 900 Denver, CO 80203 Appellate.pubdef@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 10SC295

REPLY BRIEF

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CERTIFICATE OF COMPLIANCE	

I hereby certify that this reply brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The reply brief complies with C.A.R. 28(g).

Choose one:

☒ It contains 1,469 words.

☒ It does not exceed 18 pages.

Signature of attorney or party

In response to matters raised in the Attorney General's Answer Brief, and in addition to the arguments and authorities presented in the Opening Brief, Petitioner submits the following Reply Brief.

ARGUMENT

Mr. Mumford Was Deprived of His Freedom to the Degree Associated with Formal Arrest When He Was Removed at Gunpoint from His Home, Told He Was Not Free to Leave, and Told that "If He Cooperated Things Would Go Well for Him," Among Other Circumstances.

A large part of the State's argument focuses on the identity of the officer who promised Mr. Mumford that "if you cooperate, you're not going to get in trouble. Tell us what you have; nothing bad is going to happen to you." (AB, pp5 fn.2, 7 fn.3, 22-24) The record indicates that Detective Sarkisian and an unnamed officer made that promise. Detective Sarkisian testified that he did not recall whether he "told Mr. Mumford that, if he told the truth he wouldn't get in trouble." (3/18/08, p27) However, Mr. Mumford testified that multiple officers reassured him. He testified that, while he was sitting at the curb with Timmerman and his friends who were all handcuffed, an unnamed officer said "if you tell us the truth nothing bad will – you won't get in trouble." (3/18/08, pp52-53, 55) He testified that Detective Sarkisian repeated the reassurance, promising "if you just tell me the truth you're not going to get in trouble." (3/18/08, p68) The court credited Mr. Mumford's testimony and

found: "one or more officers had told him during this encounter that if he told the truth he would be okay, or nothing would happen to him ...." (3/18/08, pp95-96)

Even if it is unclear which officer made promise, the identity of the officer is unimportant to the custody determination in this case. A totality of circumstances test determines whether a person is in custody. *See, e.g., People v. Holt*, 233 P.3d 1194, 1197-99 (Colo. 2010). Indeed, if the officer made the promise to the entire group at the curb, Mr. Mumford's inclusion with the others who were in custody only strengthens the conclusion that a reasonable person in Mr. Mumford's position would consider himself to be deprived of his freedom of action to the degree associated with a formal arrest.

Moreover, whether the first officer or Detective Sarkisian, or both officers, made the promise, there was no break between the time police pointed guns at Mr. Mumford, removed him from his home, told him he was not free to leave, patted him down, took his identification, instructed him to sit at the curb with his friends who were in custody, and began to search the home and the time he was promised that, if he told the truth, he would not get in trouble. Officers may have been "in and out" while searching the house, but Mr. Mumford was continuously guarded by one or more officers. (3/18/08, pp11-12, 26-27, 40) Officer Huston confirmed that Mr. Mumford and his friends were "placed under guard" and, "when they weren't with

another detective, they were being guarded by one of the other officers." (3/18/08, p40) And Detective Sarkisian testified, "I was in charge of, basically staying outside with all four of the suspects." (3/18/08, pp11-12, 26-27)

The State contends that the officers' promises and their instruction that Mr. Mumford was not free to leave are irrelevant to this custody determination. (AB, pp20, 26) However, "the words spoken by the officer to the defendant" are one factor that this Court has found should be considered in determining custody. *People v. Matheny*, 46 P.3d 453, 465-66 (Colo. 2002). Indeed, in *People v. Elmarr*, 181 P.3d 1157, 1159, 1163 (Colo. 2008), this Court found it important that police never told Elmarr that he was free to leave or that he was not under arrest. And, as the dissent in the court of appeals explained, "unless the police 'had grounds to arrest,' the detective lacked any legitimate basis for offering defendant 'some form of reassurance ...." *People v. Mumford*, 2010WL961644, *8 (Colo. App. No. 08CA0974, Mar. 18, 2010)(Webb, J., dissenting)(comparing facts to *People v. Polander*, 41 P.3d 698, 705 (Colo. 2001)).

As explained in the Opening Brief, when viewed under the totality of circumstances, this case is more similar to precedent from this Court than to the federal cases cited by the court of appeals and the State. *See People v. Holt*, 233 P.3d 1194, 1197-99 (Colo. 2010); *Polander*, 41 P.3d 698; *People v. Moore*, 900 P.2d 66, 71-73

(Colo. 1995). This Court's recent decision in *People v. Hughes*, 252 P.3d 1118 (Colo. 2011), is also instructive. This Court reviewed to two custody determinations by different trial courts and concluded that both courts had conflated the standard for Fourth Amendment seizures with the standard for custodial interrogations under *Miranda*. *Id.* at 1121-22. This Court stated, "investigatory stops and detentions often fall short of implicating *Miranda*, as they are usually brief encounters, involving no weapons, and 'an atmosphere which is less threatening than that surrounding the kinds of interrogation at issue in *Miranda*.'" *Id.* at 1121 (quoting *People v. Breidenbach*, 875 P.2d 879, 886 (Colo. 1994)).

In *Hughes*, three officers went to Hughes's home to investigate a call of domestic violence. *Id.* at 1120. Hughes voluntarily approached the driveway and waited with two of the officers. *Id.* The officers did not pat down or search Hughes or order him to stay. *Id.* "Nothing was done to compel him to remain." *Id.* Unlike *Hughes*, police patted down Mr. Mumford and ordered him to stay, among the other circumstances indicating custody. (3/18/08, p11, 34, 40-41) This was not a brief seizure, involving no weapons, and a non-threatening atmosphere, as contemplated by this Court in *Hughes*.

To the extent the State asserts, in a footnote, that this Court should affirm the trial court's denial of the motion to suppress on the grounds that there was no

"interrogation," that argument is not properly before this Court. *See People v. Simpson*, 93 P.3d 551, 555 (Colo. App. 2003)("We decline to consider a bald legal proposition presented without argument or development ...."). The trial court concluded, "There's no dispute here that the questioning was some form of interrogation." (3/18/08, p92) The State did not argue in the court of appeals that this conclusion was incorrect or that Detective Sarkisian's questions did not constitute interrogation. Moreover, the issue of interrogation is not within the narrow scope of the issue announced by this Court. There were ample opportunities to litigate that issue, and the State did not choose to do so. *See generally Moody v. People*, 159 P.3d 611, 614 (Colo. 2007)("arguments not advanced on appeal are generally deemed waived"; "courts generally decline to consider such points when parties—the government or otherwise—fail to address them in briefings or arguments"; *sua sponte* review should be limited to "exceptional circumstances," where there is "a complete and factually developed lower court record")(quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)); *People v. Aarness*, 150 P.3d 1271, (Colo. 2006)(parties had argued and briefed the alternate basis for this Court's ruling).

Police pointed guns at Mr. Mumford and removed him from his home. (3/18/08, pp21, 33, 37, 51-52, 60, 62) They told him he was not free to leave, patted him down, took his identification, and instructed him to sit at the curb with his

friends who were in custody. (3/18/08, pp11, 24, 26, 30, 39-42, 52, 64) Mr. Mumford observed "a lot of police officers in [his] house," as nine officers began to search his home. (3/18/08, pp9, 55) Officers continuously guarded Mr. Mumford and his friends at the curb. (3/18/08, pp11-12, 26-27, 40) Police had found drugs in Mr. Mumford's house and in his friends' pockets and purse by the time Detective Sarkisian questioned Mr. Mumford. (3/18/08, pp12-13, 39, 47) And officers promised him that, if he told the truth, he would be okay, or nothing would happen to him. (3/18/08, pp52, 55, 68) The totality of the circumstances in this case supports a conclusion that a reasonable person in Mr. Mumford's position would have considered himself to be deprived of his freedom of action to the degree associated with a formal arrest. Accordingly, the trial court misapplied the applicable facts to the controlling legal standard and erred by concluding that Mr. Mumford was not in custody when he made the unwarned statements to police and by determining that the statements were not obtained in violation of *Miranda*.

CONCLUSION

Because Mr. Mumford's statements were obtained in violation of *Miranda* and his state and federal constitutional rights, and because their admission cannot be deemed harmless beyond a reasonable doubt, this Court should reverse Mr.

Mumford's conviction and remand the case for a new trial with instructions that the prosecution be barred from using the challenged statements in its case in chief.

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CERTIFICATE OF SERVICE

I certify that, on September 8, 2011, a copy of this Reply Brief of Defendant-Appellant was served on Melissa D. Allen of the Attorney General's Office by emailing a copy to AGAppellate@state.co.us: