IN THE COURT OF APPEALS OF IOWA

No. 1-959 / 10-1532
Filed May 9, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MATTHEW JAMES GRADY, Jr.,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge.

Matthew Grady appeals from his conviction for murder in the first degree.

REVERSED AND REMANDED.

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson, Assistant Appellate Defender, for appellant.

Matthew Grady, Fort Madison, appellant pro se.

Thomas J. Miller, Attorney General, Kyle P. Hanson, Assistant Attorney General, John P. Sarcone, County Attorney, and George Karnas and Susan Cox, Assistant County Attorneys, for appellee.

Considered by Vogel, P.J., and Potterfield and Mullins, JJ.

POTTERFIELD, J.

Matthew Grady appeals from his conviction for murder in the first degree under Iowa Code sections 707.1 and 707.2 (2009), and specifically from the district court's denial of his motion in limine, finding he failed to invoke his right to silence during his custodial interrogation. We disagree and find Grady's statement to police "That's all I can tell you, I ain't got nothing to say, like just take me to Polk County"[1] was sufficient to invoke his Fifth Amendment right against self-incrimination. Grady's statement was an unambiguous and unequivocal invocation of his right to remain silent.

We further find that testimony presented to the jury describing Grady's statements made during the interrogation and after invocation of his right to remain silent contributed to his conviction and was not harmless error. We reverse and remand for a new trial.

We do not reach Grady's ineffective-assistance-of-counsel claims which we do not expect to be repeated after his new trial. *See State v. Heemstra*, 721 N.W.2d 549, 563 (Iowa 2006).

I. Background Facts and Proceedings

On August 17, 2009, at around 4:15 a.m., neighbors in the 1000 block of 23rd Street, Des Moines, heard gun shots. Jorge Archila, who lived on 22nd Street, heard two to four gunshots. Archila looked out his window and saw a car and a "black person next to the driver." Archila observed the black male run away and remembered he was wearing a white shirt with something hanging on top of his shoulders.

[1] "Polk County" in this context is a reference to the Polk County Jail.

Jeffrey Young and his wife had just finished feeding their infant daughter when they heard the shots, and Young's wife saw someone in a car hit a tree in front of their house on 23rd Street; Young called 911. Young went outside and found Stephen Scott in the driver's seat, "flailing in the car and gasping for air."

Christopher Riggs, who lived on 26th Street and had just arrived home from work, also heard the gunshots, the air bag deploying, and the car hitting the tree; he ran to the scene while his brother called the police. Riggs observed Scott was "leaning more toward the center of the console and . . . breathing erratically." When the police arrived, Scott was dead; a bullet wound was discovered in Scott's upper-left back.

Demarkis Simon was visiting his friend "Faye" at her house on 22nd Street. Simon told police that Grady had been at Faye's house after midnight, was gone when Simon heard the gunshots, but that Grady returned to Faye's house minutes after the shots were fired. Simon recalled Grady wearing a striped shirt when he returned—"which is what stood out about [Grady] to [Simon]." Simon also observed that Grady seemed "a little nervous."

In addition to the information obtained from neighbors, the police found in Scott's pocket a receipt from a convenience store located approximately two blocks north of the crime scene, which Scott had visited at 4:01 a.m. on August 17, 2009. Camera footage from outside the convenience store showed Scott was not alone in his car. In the passenger seat was a man wearing a shirt with black and yellow stripes.

Based on this information, detectives obtained a search warrant for the apartment of Grady's sister, where Grady had been staying. During the search,

detectives found a magazine clip from a pistol and a black-and-yellow striped shirt consistent with the shirt Grady was seen wearing earlier that evening.

On August 22, 2009, Officer Chad Steffen observed Grady walking along Forest Avenue in Des Moines. Denying his name was Matthew Grady, Grady attempted to flee, and after a foot chase, Officer Steffen took Grady into custody.

Grady was taken to the police station and read his *Miranda* rights.[2] Police Detective Michael McTaggart, along with another detective, interviewed Grady at the police station for roughly four hours. Approximately fifty-two minutes into the interview, after McTaggart asked Grady whether he thought the police had retrieved Grady's fingerprints from Scott's car, Grady again said he did not do "whatever happened to [Scott]." Grady then told the officer, "That's all I can tell you, I ain't got nothing to say, like just take me to Polk County." The interrogation continued for about three more hours.

On October 22, 2009, Grady was charged by trial information with murder in the first degree while participating in a forcible felony, in violation of Iowa Code sections 707.1 and 707.2, later amended to first-degree murder while "participating in the crime of robbery or intimidation with a dangerous weapon." Grady waived a speedy trial.

During a pre-trial conference on June 17, 2010, Grady filed a motion in limine, arguing among other things that the Des Moines police "violated [his] Fifth Amendment right against self-incrimination after he invoked his right to cut off

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[2] *See Miranda v. Arizona*, 384 U.S. 436, 497 (1966).

questioning."[3] The State resisted. The district court denied Grady's motion in limine with respect to the invocation of his Fifth Amendment right against self-incrimination.

At trial, the State did not offer into evidence the tape or the transcript of Grady's interrogation. Rather, statements made by Grady to McTaggart were presented to the jury through McTaggart's testimony.

On June 25, 2010, after a two-day trial, the jury returned a guilty verdict for murder in the first degree as charged. On August 30, 2010, the district court denied Grady's motion for a new trial and motion in arrest of judgment. On August 31, 2010, Grady was sentenced to life in prison. Grady appeals.

II. Standard of Review

Our review of constitutional claims is de novo. *State v. Effler*, 769 N.W.2d 880, 886 (Iowa 2009). "Under this standard of review, we make an independent evaluation of the totality of the circumstances as shown by the entire record." *State v. Palmer*, 791 N.W.2d 840, 844 (Iowa 2010).

III. Invocation of Right to Remain Silent

Grady alleges the district court erred in denying the suppression of his statements to police during a custodial interrogation after he claims to have invoked his right to remain silent. The State contends Grady never unambiguously invoked this right.[4]

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[3] Alternatively, Grady argues on appeal that his counsel was ineffective for failing to assert this argument in a timely motion to suppress. *See* Iowa R. Crim. P. 2.11(2)(c). Because the State did not object to the timeliness of the motion and the district court considered the matter and ruled on the merits, we need not review this as an ineffective-assistance-of-counsel claim.

[4] Grady and the State agree this claim is only raised under the federal constitution and not the Iowa constitution. We therefore do not undertake a separate analysis based on

In *Miranda*, 384 U.S. at 478–79, the Supreme Court established that an individual must receive certain warnings prior to custodial interrogation in order to protect the privilege against self-incrimination. One of the requisite warnings pertains to an individual's right to remain silent. *Id.* at 479.

In *Palmer* the Iowa Supreme Court discussed the invocation of the right to silence as a "second level of procedural safeguards"[5] guaranteed in *Miranda*, saying: "The [U.S.] Supreme Court has employed different procedural safeguards depending on whether the suspect has invoked the right to remain silent or the right to the presence of counsel." 791 N.W.2d at 845. The Supreme Court discussed the procedural safeguards to be followed when the suspect invokes the right to remain silent in *Michigan v. Mosley*:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.

423 U.S. 96, 100–01 (1975) (quoting *Miranda*, 384 U.S. at 473–74).

In *Davis v. U.S.*, 512 U.S. 452, 459 (1994), the Supreme Court enunciated an objective test for determining when an accused has invoked the right to

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the Iowa constitution. *See Effler*, 769 N.W.2d at 895 (Appel, J., specially concurring) (explaining the circumstances under which a separate analysis of the state and federal constitutions may apply).

[5] *Palmer* cited to Christopher S. Thrutchley, Minnick v. Mississippi: *Rationale of Right to Counsel Ruling Necessitates Reversal of* Michigan v. Mosley's *Right to Silence Ruling,* 27 Tulsa L.J. 181, 183 (1991) in support of the assertion that *Miranda* provides two levels of procedural protection, the first requiring an officer to inform the suspect of *Miranda* rights.

counsel. Similarly, the test for whether a suspect has invoked the right to silence is an objective one, turning on how a reasonable officer would perceive the suspect's words, not on how the officer at the scene actually perceived the words. *See Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260 (2010) (adopting the objective standard established in *Davis* to determine when an accused has invoked the *Miranda* right to remain silent). The *Davis* court required the suspect to "unambiguously request counsel." *Davis*, 512 U.S. at 459. Paralleling *Davis*, *Berghuis* requires that an accused who wants to invoke the right to remain silent must "do so unambiguously." *See Berghuis*, 130 S. Ct. at 2260.

Grady claims the questioning should have been cut off approximately fifty-two minutes into the interrogation. The questioning leading up to the fifty-two minute point and the disputed statement proceeded as follows:

> SPO McTAGGART: You didn't fire a gun that night? Or were you around anybody who fired a gun that night?
>
> GRADY: Um um. You could just hear it throughout the hood.
>
> SPO McTAGGART: OK. So your clothing is not going to have gunshot residue on it, huh?
>
> GRADY: Um um.
>
> SPO McTAGGART: Really?
>
> GRADY: It don't matter to me man, what are you talking about?
>
> SPO McTAGGART: It should matter to you.
>
> GRADY: It don't because I . . .
>
> SPO McTAGGART: It should matter to you.
>
> GRADY: It don't, it don't matter to me.
>
> SPO McTAGGART: It should.
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> GRADY: It don't man, I'm being honest with you, it don't matter to me. If you want to take me to Polk County, take me to Polk County. I might as well have to go to trial. We'll just have to take it to trial man because . . . .
>
> . . . .
>
> SPO McTAGGART: OK, do you think we might have got your fingerprints from that guy's car?

> GRADY: Hell yeah, you could have got my fingerprints, yeah. My fingerprints would be on it.
> SPO McTAGGART: Um hum.
> GRADY: It'd be on it but I didn't, I didn't do whatever happened to him.
> SPO McTAGGART: OK.
> GRADY: *That's all I can tell you, I ain't got nothing to say, like just take me to Polk County*.

(Emphasis added.)

This court addressed a similar situation in *State v. Astello*, 602 N.W.2d 190 (Iowa Ct. App. 1999). In that case, the defendant asserted the district court erred in failing to suppress statements made by the defendant after he had invoked his Fifth Amendment right to remain silent. *Astello*, 602 N.W.2d at 194. In *Astello*, the defendant told officers, "I'm done. You're just repeating the same questions." *Id.* at 196. One of the officers replied, "Well, I'd like to continue talking, but that's up to you," to which the defendant responded, "Well I don't. Cuz I'm done." *Id.* In spite of these statements, the officers continued to question the defendant. *Id.* The court found that under the circumstances, Astello's right to cut off questioning had not been "scrupulously honored" and any statements subsequently made should have been suppressed. *Id.*

Similarly, after a de novo review of the record, we find Grady's declaration, "That's all I can tell you, I ain't got nothing to say, like just take me to Polk County" was unequivocal, clear, and unambiguous from an objective standpoint. In reaching this conclusion, we consider his statement in context. Grady's statement was made in response to pressure by the interrogating officers, who were using profanity, accusing Grady of playing games, and presenting untruths about evidence to Grady as facts as part of their interrogation tactics. *See*

Alvarez v. State, 15 So.3d 738, 745 (Fla. Dist. Ct. App. 2009) (considering that the question immediately preceding the defendant's statement "I really don't have nothing to say" was "simply whether he could wait a minute and talk some more before using the bathroom," and stating "That is not the type of question a reasonable officer would conclude would trigger a spontaneous, global invocation of the right to remain silent"). Further, a review of the remainder of the transcript reveals that on many different occasions, Grady expressed a desire to cease questioning. Because we find Grady invoked his right to remain silent, the interrogating officers should have "scrupulously honored" the invocation. *See Miranda*, 384 U.S. at 479 (stating procedural safeguards must be adopted to notify a person of the right to silence and to assure that the exercise of the right will be scrupulously honored). Under the objective standard enunciated in *Berghuis*, the officer failed to honor the invocation and simply asked another question. *See Berghuis*, 130 S. Ct. at 2260. (citing *Davis*, 512 U.S. at 458–59). All references to the responses Grady gave to the officers following Grady's invocation should have been suppressed.

We find this case to be distinguishable from cases in which other courts have found a defendant's statement was ambiguous and could be interpreted to express a desire to stop discussing a topic the defendant believed was exhausted or to express the defendant had nothing to say due to lack of knowledge about the crime. *See, e.g.*, *Alvarez*, 15 So.3d at 745 (finding defendant's statement "I really don't have nothing to say" did not invoke his right to remain silent but was an expression that defendant knew nothing about the crimes); *State v. Ortega*, 798 N.W.2d 59, 68–69 (Minn. 2011) (finding

defendant's statement "I ain't got nothing else to say man. That's it, I'm through. I told you," when considered in context, indicated defendant was through discussing a topic the agents had exhausted). We believe Grady's statement, read in context, demonstrates a clear desire to end all questioning.

In *Berghuis*, the defendant, Thompkins, was read his *Miranda* rights prior to custodial interrogation. 130 S. Ct. at 2256–57. Thompkins was mostly silent during the interrogation, which lasted three hours. *Id.* at 2256. The Court noted, "[a]t no point during the interrogation did [the defendant] say he wanted to remain silent, that he did not want to talk with the police, or that he wanted an attorney." *Id.* The Supreme Court held that in order to invoke the right to remain silent and cut off questioning, remaining silent would not be sufficient. *Id.* at 2259–60. The Court further articulated that invocation of the right to remain silent must be unambiguous or unequivocal. *Id.* The invocation must be unambiguous because "[i]f an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression 'if they guess wrong.'" *Id.* at 2260 (citation omitted).

If silence is ambiguous, the statement, "That's all I can tell you, I ain't got nothing to say, like just take me to Polk County," is loud and clear. Grady was not required to announce a legalistic "I assert my right to silence as to all questions" to put an interrogating officer on notice that he had asserted his Fifth Amendment right. The officers should not have asked another question after Grady's invocation of his right to silence, and every question and answer after his invocation should have been suppressed at trial.

We disagree with the district court's conclusion that Grady did not invoke his Fifth Amendment right against self-incrimination in an unambiguous or unequivocal manner and therefore reverse the ruling denying suppression of statements Grady made after his invocation of the right to silence.

IV. Harmless Error

The State asserts Grady's conviction should be affirmed because any error it committed was harmless. "To establish harmless error when a defendant's constitutional rights have been violated, the State must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *State v. Cox*, 781 N.W.2d 757, 771 (Iowa 2010). A two-step analysis is employed to determine whether the State has met its burden under the harmless-error standard. *State v. Walls*, 761 N.W.2d 683, 686 (Iowa 2009).

> First, the court asks what evidence the jury actually considered in reaching its verdict. Second, the court weighs the probative force of that evidence against the probative force of the erroneously admitted evidence standing alone. This step requires the court to ask whether the force of the evidence is so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same without the erroneously admitted evidence.

Id. at 686–87 (internal citation and quotation marks omitted).

With respect to the evidence the jury actually considered in reaching the verdict, "we do not conduct a subjective inquiry into the jurors' minds." *State v. Peterson*, 663 N.W.2d 417, 431 (Iowa 2003). The inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Id*.

In this case, we determined a violation of Grady's Fifth Amendment right against self-incrimination occurred approximately fifty-two minutes into the August 22, 2009 interview. Grady's interview was not played for the jury; instead, McTaggart testified regarding statements made by Grady during the course of the police interview. However, any testimony by McTaggart regarding the discussion that occurred subsequent to Grady's invocation was erroneously admitted.

McTaggart's testimony to the jury regarding statements made by Grady during his custodial interrogation was presented by the prosecution as a series of inconsistent inculpatory responses to the questions posed during four hours between about one and five a.m. The prosecutor asked questions of McTaggart regarding "claims" Grady made during his interrogation that McTaggart presented as inconsistencies. McTaggart testified Grady gave conflicting stories regarding: the whereabouts of his phone; phone calls he placed on the night Scott was murdered; when and where Grady saw the victim masturbating;[6] Grady's description of the victim's attempt to perform oral sex on Grady and his reaction to that; the places he went and the times he arrived following his exit from the victim's car; times and occasions when he fired a gun; how he obtained a gun; where the gun was located; and whether a clip he owned fit the murder weapon. Though Grady touched on some of these topics before he invoked his right to remain silent, he made inconsistent statements on each of these topics after he had invoked his right to remain silent. These later inconsistent statements, which

[6] McTaggart had questioned Grady about sexual solicitation by the victim as a potential motive for the murder.

should have been suppressed, were made the focal point of the State's case during its questioning of McTaggart. The inconsistencies were damning evidence that likely contributed to the jury's guilty verdict.

Grady testified in his own defense and on direct examination attempted to clear up or admit the inconsistencies raised by McTaggart at trial that occurred during Grady's custodial interrogation. Whether Grady's decision to testify would have been different absent his post-invocation statements is speculation, but his testimony was a direct response to McTaggart's recounting Grady's statements as inconsistencies.

While we acknowledge the circumstantial evidence against Grady was strong and that he might have been convicted without reference to his inadmissible statements, we cannot say the inconsistencies presented to the jury as a result of his inadmissible statements did not contribute to the guilty verdict. *See State v. Damme*, 433 N.W.2d 714, 715 (Iowa 1988) (stating we can find error harmless only where the prosecution proves beyond a reasonable doubt the error complained of did not contribute to the guilty verdict). Because the State failed to prove the admission into evidence of Grady's post-invocation statements was harmless beyond a reasonable doubt, we reverse and remand for a new trial.

REVERSED AND REMANDED.

Mullins, J., concurs; Vogel, P.J., concurs in part and dissents in part.

VOGEL, P.J. (concurring in part and dissenting in part)

While I agree that Grady invoked his right to remain silent during the police interview, I would find his invocation occurred one hour and twenty-three minutes into the interview. Even if I agreed with the majority that Grady invoked his rights at the fifty-two minute time mark, I would still affirm the conviction as I find the admission of the statements made after the fifty-two minute mark was harmless error.

I. Invocation of Right

The majority determined a violation of Grady's Fifth Amendment right against self-incrimination occurred approximately fifty-two minutes into the August 22, 2009 interview conducted by Detectives Michael McTaggart and Kurt Bender. I, however, would find his invocation did not occur until one hour, twenty-three minutes[7] into the interview, because when read in context, that is the point when Grady said, "just take me to Polk County," and subsequently refused detective Bender's request to "just tell us what happened" by stating, "I'm good." Grady's interview was not played for the jury; instead, McTaggart testified regarding statements made by Grady during the course of the police interview. I would find any testimony by McTaggart regarding the discussion that occurred subsequent to Grady's invocation at one hour and twenty-three minutes was

[7] Our supreme court recently reiterated, "we will uphold a district court ruling on a ground other than the one upon which the district court relied provided the ground was urged in that court." *King v. State*, ___ N.W.2d ___, ___, 2012 WL 1366597, at *5 (Iowa Apr. 20, 2012). Grady filed a motion in limine, urging his Fifth Amendment right against self-incrimination was violated during the police interview at page twenty-two in the interview transcript—the fifty-two minute point, and again at page thirty-one in the interview transcript—the one hour, twenty-three minute point. For this reason, grounds exist to affirm at the one hour, twenty-three minute point.

erroneously admitted. However, I find such admission in this case was harmless error.

II. Harmless Error

As the majority pointed out, "To establish harmless error when a defendant's constitutional rights have been violated, the State must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Cox*, 781 N.W.2d at 771. A two-step analysis is employed to determine whether the State has met its burden under the harmless-error standard. *Walls*, 761 N.W.2d at 686. We first ask what evidence the jury actually considered in reaching its verdict. *Id.* We then weigh the probative force of the evidence the jury actually considered against the probative force of the erroneously admitted evidence standing alone. *Id.*

A. Evidence Jury Actually Considered

Our inquiry with respect to the evidence the jury actually considered "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Peterson*, 663 N.W.2d at 431.

In this case, the State was required to prove that Grady killed Scott "willfully, deliberately, and with premeditation" or "while participating in a forcible felony." Iowa Code § 707.2(1), (2). The State's witness, Detective McTaggart, testified regarding statements made by Grady following Grady's invocation of his Fifth Amendment right against self-incrimination. Among McTaggart's testimony that was not erroneously admitted—because it referenced statements made by Grady that occurred prior to the majority's demarcation of Grady's invocation of

his Fifth Amendment right against self-incrimination—included Grady's statements that: (1) Grady saw Scott near the time of the shooting; (2) Grady was wearing a yellow-and-black striped button-up shirt with a black collar; (3) Grady related that Scott drove a white or silver four-door vehicle; (4) Grady never talked to Scott or got into his vehicle; (5) Grady then admitting his prior statement was a lie; (6) Grady was with Scott and got into Scott's vehicle; (7) Grady claimed nothing happened in the vehicle, but that his fingerprints would be on the inside of Scott's vehicle; (8) Grady had not fired a gun in approximately one month; and (9) Grady's admission that the magazine clip discovered by the police at his sister's apartment belonged to him.

After the fifty-two minute time mark but before the one hour and twenty-three minute time mark, additional statements made by Grady included: (10) Scott was making homosexual statements—saying he could give men sexual favors;[8] (11) after the two men stopped at the convenience store, Scott began masturbating while driving; (12) Grady never returned to "Faye's" house on 22nd Street; (13) Grady's explanations of what happened to his cell phone(s) that evening; (14) Grady's inconsistent statement that he shot four rounds with his gun the night before at Good's Park; and (15) Grady's description of the gun as a 9-millimeter.

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[8] Grady stated,

> [Scott] was just asking about fucking some queer ass shit. I was like, man, you know he was being cool, he took me to the store, he bought me a Black and Mild [(cigar)]. . . . Gay ass shit . . . . He was trying to, he was trying to fuck with dudes for twenty, he was trying to give people, dudes blow jobs for twenty dollars.

The statements I would find erroneously admitted—those that occurred after the one hour and twenty-three minute point and referenced by McTaggart—mainly concerned: (16) Grady's statements that he did not want to be seen with Scott; (17) Grady's assertion that Scott was masturbating *prior to* Grady getting into Scott's vehicle; (18) Grady's statement regarding sexual contact between himself and Scott—which Grady claimed was initiated by Scott; and (19) Grady's statement that he heard four to six shots while walking to his mom's house after he exited Scott's vehicle.

McTaggart also testified regarding evidence that was gathered independent of the interview with Grady, which was properly admitted into evidence and included: shell casings that appeared to be recent that were found near the New Life Church following the homicide; statements made by Demarkis Simon to McTaggart indicating that Grady was at Faye's house on 22nd Street during the early morning hours of August 17, 2009, left, and then returned after gun shots were heard; a time-stamped receipt from the convenience store where Scott and Grady stopped at 4:01 a.m. on August 17, found in Scott's pocket when officers arrived at the scene; video of the convenience store's interior and parking lot around 4:01 a.m., where Scott is observed going into the convenience store and the passenger, who is wearing a dark-colored shirt with horizontal stripes, remains in the vehicle; and the yellow-and-black striped shirt, as well as a magazine clip, which were recovered from Grady's sister's apartment, where Grady had been staying.

In addition to testimony from McTaggart, the State also presented testimony from Jorge Archila, Jeffrey Young, Christopher Riggs, and Demarkis

Simon. This testimony, as outlined by the majority, mainly concerned the timing of the events that occurred during the early morning hours of August 17, 2009.

Officer Jacob Hedlund testified that he was dispatched to the Drake Park neighborhood around 4:00 a.m. on August 17, 2009, on what was believed to be a property damage accident. Hedlund discovered Scott in his vehicle, applied a sternum rub to his chest to try and wake Scott up, but ultimately determined Scott was dead.

Detective Daniel Blom worked with Detective McTaggart on the morning of August 17, 2009, to assess the scene of the accident. Blom and McTaggart traced glass shards from the crash scene to the parking lot of the New Life Church. Blom found a collection of glass shards in the parking lot and eventually found two shell casings. Blom testified two additional casings were also recovered, but not by him. Blom and McTaggart determined the church parking lot was probably the location of the crime scene; a crew was called in to process the scene.

Megan Wilcutt, a crime scene analyst for the Des Moines Police Department, testified she was dispatched to the Drake Park neighborhood around 4:30 a.m. on August 17, 2009. When the medical examiner removed Scott from the vehicle, Wilcutt observed a bullet impact to Scott's left upper back. Willcutt also took photographs of the crime scene and gathered additional evidence, including the convenience store receipt from 4:01 a.m., which was in Scott's left, front pocket.

Gregory Gourd, a crime scene technician with the Des Moines Police Department, testified that he videotaped the general vicinity of the crime scene.

He testified there was a bullet hole in Scott's car door and identified two spent shell casings that were recovered from the church parking lot and two spent shell casings that were recovered from the church's driveway area.

April Sharpnack, general manager of the convenience store located one and one-half blocks north of the crime scene, testified that the receipt found in Scott's pocket came from the convenience store she manages. She verified the receipt was dated August 17, 2009, and time stamped 4:01:13. Sharpnack reviewed the disk from the store's video system. The jury was shown video footage of Scott walking into the convenience store, engaging in a transaction with an employee, and exiting the store. A camera located outside the convenience store showed Scott exiting his vehicle and entering the store. Sharpnack explained video from the outdoor camera showed somebody sitting in the passenger seat of Scott's car, wearing a yellow-and-black striped shirt.

Anthony Wood, who was working at the convenience store on the early morning of August 17, 2009, confirmed that he created the receipt that was found in Scott's pocket. He further verified that the time on the video and the receipts were synchronized and that the time stamp of 4:01:13 was accurate.

Rex Sparks, an identification technician with the Des Moines Police Department, was responsible for crime scene reconstruction. Sparks worked to recover the bullet slug from Scott's vehicle and when the vehicle was taken to the police garage, to determine the ballistics and trajectories of the gun shot. Sparks opined that three shots impacted Scott's vehicle and that a fourth shot may have went into a parked car. Sparks determined gunshot number one "traveled through an open window . . . impacted at the back edge of the inner side of the

armrest of the right front door . . . immediately exited on the backside of the armrest and impacted into the door." A copper-jacketed bullet slug from gunshot number one was located on the floor underneath the right side of the front passenger seat. Sparks opined that gunshot number two did not enter the car, but bounced out of the car at the door casing. Sparks stated that because the State could only account for three of the four bullet casings, this bullet would be the one that could not be accounted for. As to gunshot number three, Sparks explained that the glass shards in the top of the window casing indicated the window was closed at the time the shot was fired and that based on the forty-six degree angle of the driver's seat cushion and the eleven inch space between the edge of the headrest and door casing, the bullet would have traveled in the front half of the closed window in order to impact Scott. Sparks explained that based on his knowledge of the case, gunshot three was the only gunshot that could have killed Scott.[9] Based on a trajectory analysis, Sparks determined shots one and two were three feet, eight inches above the ground, and indicated a stationary shooter. The angle of the gun was determined to be twenty degrees downward and that the shooter was probably two to four feet away from the vehicle.

Victor Murillo, a criminalist with the Iowa Division of Criminal Investigation State Crime Laboratory in Ankeny, Iowa, with approximately thirty years of experience, testified that he performed tests on various pieces of evidence from the investigation in this case. Murillo examined the magazine clip recovered from

[9] During his testimony, Sparks explained that the gunshots were numbered one, two, and three, but this numbering was not intended to represent the sequence in which the shots were fired.

Grady's sister's apartment. Grady had admitted in his interview with McTaggart—prior to the majority's demarcation of the invocation—that he had the "clip," and it would be found on a shelf in his sister's apartment. Murillo also examined three copper-jacketed bullets and four shell casings recovered from the crime scene. Murillo testified that although there was no firearm in evidence in this case,

> [W]ith all of these items in evidence, I can look at them in detail and get quite a bit of information from both the fired cartridge case and from the fired bullet. Even though I can't match it to a particular firearm, if there wasn't one submitted, I can look at each of the fired bullets and casings and try to match them to one another in order. In other words, try to figure out if all of them have the same fingerprint information or the same pattern of unique characteristics on them that's being reproduced on every bullet, on every cartridge case.

Murillo identified the magazine as compatible with a 9-millimeter Makarov pistol. He explained that this particular magazine was so unique that he could not find a match with any of the 4000 or so different makes and models of firearms in the lab's reference collection. After explaining his examination procedure for the bullets, Murillo opined that the three bullets were consistent with having originated from 9-millimeter Makarov cartridges and that they were fired from "a 9-millimeter Makarov pistol or a pistol that was chambered from the 9-millimeter Makarov cartridge." Murillo further explained the four shell casings were all 9-millimeter Makarov cartridge cases and were identified as being fired from the same firearm. Murillo also determined that all three bullets were fired by the same firearm. When asked whether the four shell casings and three bullets, if intact prior to being fired, would fit in the magazine clip owned by Grady, Murillo answered, "Yes."

In addition to the above witnesses, the State called: (1) Des Moines Police Officer Chad Steffen, who testified about locating and eventually detaining Grady on the night of August 22, 2009; (2) Jennifer McCarroll, a sales manager for a Qwest Communications kiosk, where Scott was employed prior to his death; and (3) Thomas Koch, a records custodian for Sprint out of Overland Park, Kansas, who testified regarding phone calls to and from the cell phone number that matched the number provided by Grady at the beginning of the August 22, 2009 police interview. Koch testified that at 4:03 a.m. on August 17, 2009, an outbound call was placed and lasted for zero seconds, an inbound call at 6:00 a.m. lasted zero seconds, and an inbound call at 6:05 a.m. lasted eight seconds. Finally, the State read into evidence a stipulation regarding the testimony of the Polk County Medical Examiner, who stated the cause of Scott's death was a gunshot wound.

B. Probative Force of Evidence

In weighing the probative force of the untainted evidence the jury actually considered against the probative force of the erroneously admitted portions of McTaggart's testimony regarding statements made by Grady following Grady's invocation, "the key question for this court is whether we can conclude the erroneously admitted statements are so unimportant in relation to everything else the jury considered that there is no reasonable possibility they contributed to [the defendant's] conviction." *Walls*, 761 N.W.2d at 688. "It is only when the effect of the incorrectly admitted evidence is comparatively minimal to this degree that it can be said . . . there is no reasonable possibility that such evidence might have

contributed to the conviction." *State v. Hensley*, 534 N.W.2d 379, 383 (Iowa 1995).

As the State indicated, Grady's interview was not played for the jury; instead, McTaggart testified regarding statements Grady made during the course of the police interview. Even if the majority's fifty-two minute mark was used as the point of invocation,[10] I would still find harmless error because statements one through nine and all of the properly admitted evidence presented by the State render statements ten through nineteen "so unimportant in relation to everything else the jury considered that there is no reasonable possibility they contributed to [Grady's] conviction." *Walls*, 761 N.W.2d at 688.

The State placed Grady at the scene at the time of the shooting by several pieces of unrefuted evidence and witnesses. Grady admitted to owning what was proven to be a unique magazine clip. In addition, through detailed ballistic evidence, the State proved Grady's connection to the bullets and shell casings found at the scene, as the bullets and shell casings would have fit Grady's unique magazine clip. Moreover, although Grady provided inconsistent statements as he was recounting the events of the night, he never confessed to the crime. Therefore, any possible inculpatory statements are simply his varying recollections of the events of the incident. Standing alone, this erroneously admitted evidence was comparatively minimal to the probative force of the evidence supporting the jury's determination. *See id.* at 686 (noting the court's second task in the harmless error analysis is to weigh the probative force of the

[10] As stated earlier, I find invocation at the one hour and twenty-three minute time point, so I would find statements one through fifteen were properly admitted.

properly admitted evidence against the probative force of the erroneously admitted evidence standing alone); *Henlsey*, 534 N.W.2d at 383 ("It is only when the effect of the incorrectly admitted evidence is comparatively minimal to this degree that it can be said . . . that there is no reasonable possibility that such evidence might have contributed to the conviction."). Accordingly, I would find the admission of Detective McTaggart's testimony regarding Grady's statements that were made after his invocation of his Fifth Amendment right against self-incrimination, whether it occurred at the fifty-two minute mark or the one hour and twenty-three minute mark, was harmless error.

As such, I concur in part and dissent in part.