2012 IL App (2d) 100307
No. 2-10-0307
Order filed February 24, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MAURICE U. HALL, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 06-CF-506 Honorable Robert J. Anderson Judge Presiding.

ORDER

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

Held: Where police conducted a full-scale custodial interrogation of defendant (wherein he confessed to the crime), charged him, brought him to appear at a bond hearing, and placed him in jail *before* giving him his *Miranda* (*Miranda v. Arizona*, 384 U.S. 466 (1966)) warnings, defendant's subsequent, post-*Miranda* confession should have been suppressed. The evidence supported the inference that the police engaged in some form of the question first, warn later interrogation process, and a reasonable person in defendant's position would not have understood that, post-*Miranda*, he retained a genuine choice about continuing to talk to the police.

¶ 1 Defendant appeals the trial court's 2007 denial of his motion to suppress statements. We conclude that the motion to suppress should have been granted; accordingly, we reverse.

¶ 2 I. BACKGROUND

¶ 3 A. Underlying Offense

¶ 4 A jury convicted defendant of: (1) aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2004) (evidence showed that he, at age 28, entered into an ongoing sexual relationship with C.O., then age 15, which resulted in a baby, J.O.)); and (2) aggravated battery of a child (720 ILCS 5/12-4.3(a) (West 2004) (evidence showed that he shook, squeezed, and otherwise inflicted physical trauma to baby J.O. that resulted in a fractured skull, lacerated liver, cerebral hemorrhaging, and cracked ribs)). The court sentenced defendant to 5 years' imprisonment for the sex crime and 23 years' imprisonment for the aggravated battery of a child.

¶ 5 B. Procedural History

¶ 6 This case has a fairly complicated procedural history. For the purposes of this appeal, we will be reviewing Judge Robert Anderson's March 2007 ruling on a motion to suppress. Defendant moved to suppress statements made to police on February 13 and 14, 2006. At a hearing in March 2007, the State conceded that the February 13 statements were subject to suppression because the police did not give defendant any *Miranda* warnings. However, the State maintained that, after providing defendant with his *Miranda* warnings the next day, the February 14 statements were admissible. Judge Anderson agreed.

¶ 7 On December 14, 2007, during trial, defense counsel moved to admit a DVD recording of *both* the February 13 and February 14, 2006 statements. The trial court allowed the motion and summarized: "so the record is clear, you said [that,] despite the State's concession [that the February 13 statements are subject to suppression,] for trial strategy purposes[,] you want the jury to know about the length of time [defendant] was there and about the chronology of events and what occurred

[as the jury will see the February 14 statements anyway]."

¶ 8 On December 18, 2007, a jury convicted defendant. On January 22, 2008, defendant moved for a new trial. On April 4, 2008, the court denied the motion. On May 16, 2008, the court sentenced defendant, and it extended the deadline for filing the motion to reconsider sentence. Before that deadline, a newly released case (*Rothgery v. Gillespie County*, 554 U.S. 191 (2008)), came to the attention of defense counsel, causing him to file an amended motion for a new trial, raising a new basis by which the February 14, 2006, statements should have been suppressed (*i.e.*, defendant's adversarial proceedings began when he appeared in bond court on February 14, 2006, and that, therefore, police should have contacted the public defender's office before questioning defendant further).

¶ 9 On January 16, 2009, the trial court granted a new trial based on defendant's *Rothgery* argument. On April 1, 2009, defendant filed an amended motion to suppress the statements from evidence at the new trial. On April 16, 2009, the trial court, Judge Peter Dockery, granted the motion to suppress in part (barring statements made prior to 2:11 a.m. on February 13, but again allowing the February 14 statements).

¶ 10 On June 29, 2009, before the case proceeded to the new trial, the State filed a motion to reinstate the 2007 conviction, pursuant to *Montejo v. Louisiana*, ___ U.S. ___, 129 S. Ct. 2079 (May 26, 2009) (a post-bond confession given after waiver of *Miranda* rights retains its admissibility, and the waiver acts to obviate the sixth amendment counsel issue set forth in *Rothgery*). On February 16, 2010, the court reinstated the conviction and sentence based on the State's *Montejo* argument. On March 12, 2010, defendant again moved for a new trial (and to reconsider sentence). On March 16, 2010, the trial court denied the motion for a new trial.

¶ 11 Both parties agree that the reinstatement of the 2007 conviction rendered superfluous Judge Dockery's April 16, 2009, ruling on the amended motion to suppress (barring testimony after 2:11 a.m. on February 13 but allowing February 14 statements). Both parties agree that the reinstatement put defendant at the point where he stood prior to the rescission—when his posttrial motions were being heard (and ultimately denied). Therefore, the ruling on the motion to suppress for this court to review is the one made by Judge Anderson in March 2007, prior to the trial (based on the State's concession, barring all February 13 statements, but allowing all February 14 statements).

¶ 12 C. March 2007 Ruling on the Motion to Suppress

¶ 13 At the hearing on the motion to suppress, the State presented the following witnesses, each of whom were involved in taking defendant's statements: (1) Tom Wirsing (then a sergeant with the Lombard police department); (2) Jim Roberts (a detective with the Bloomingdale police department); and (3) Benny Ranallo (a detective with the Lombard police department). Defendant then testified on his own behalf. The testimony provided by each of these witnesses, as well as the DVD recording of the interrogation, established the following time-line.

¶ 14 On February 12, 2006, at approximately 9:25 p.m., Wirsing arrived at the hospital where baby J.O. was being treated for suspected abuse. Shortly after arriving, Wirsing learned that defendant and teenager C.O. were J.O.'s biological parents. Wirsing ordered that both defendant and C.O. be transported to the Lombard police station for questioning. Per investigatory practice, defendant and C.O. were transported in separate vehicles so they could not talk to each other. Prior to placing defendant in the vehicle, Wirsing performed a pat-down search of defendant. Wirsing stated that defendant "was certainly a potential suspect" at that time.

¶ 15 At around 10 p.m., defendant was placed in a seven-by-seven foot interview room. For the

next three hours, between 10 p.m. on February 12, and 12:55 a.m. on February 13, defendant sat alone in the interview room while police questioned C.O. Defendant testified that, when placed in the interview room, he felt "stressed out" because he "already knew [the police] were going to try to question [C.O. and him], kind of put the blame on [them]."

¶ 16 On February 13, between 12:55 a.m. and 1:30 a.m., Roberts and Ranallo interviewed defendant. Defendant signed a consent form for the police to search his apartment. Roberts did not believe defendant was in custody at this time, stating that, if defendant had asked to leave, Roberts would have allowed it. Ranallo similarly believed that defendant was not in custody at this time. Ranallo stated that, just prior to 12:55 a.m., he had finished questioning C.O., who told him that she was responsible for the injuries. This caused Ranallo to believe that he would be questioning defendant as a *witness* and not a suspect. Therefore, Ranallo did not give *Miranda* warnings to the "witness."

¶ 17 However, the DVD recording of the interview shows that, at 1:09 a.m., before defendant had been given *Miranda* warnings, Roberts asked defendant: "Let me ask you this. I'll ask you this straight up. Did you have anything to do with this baby getting hurt?" Following this question, defendant stated that he "could have" or "might have" hurt J.O.'s ribs. Roberts and Ranallo continued questioning defendant without providing *Miranda* warnings.

¶ 18 At approximately 1:30 a.m., Ranallo left the interview room and detective Frank Giammarese (who did not testify) stepped in; Roberts remained. Again without providing any *Miranda* warnings, Giammarese asked defendant if he hurt J.O.'s ribs (referencing the earlier admission). In response, defendant physically demonstrated how he may have hurt the baby's ribs. Roberts and Giammarese probed for more information, telling defendant they could tell he was holding back details.

Defendant replied that, on a recent evening, he picked up J.O., squeezed him, and then dropped him on the bed. Roberts and Giammarese then told defendant that the worst thing he could do was lie to them. In response, defendant showed them how he shook and squeezed J.O. Finally, defendant admitted that, at the hospital, he and C.O. had discussed the idea of C.O. taking the blame because, due to her age, she would be punished less. At 2:11 a.m., the DVD recording shows that Giammarese told defendant that, if the police did not discover the truth, "everything could come down on [him]." The early-morning questioning ended at 3:15 a.m. Defendant remained in the interview room, occasionally sleeping in the plastic chair provided. Defendant was allowed food, water, and access to the restroom.

¶ 19 Later that day (February 13, 2006), from 5:04 to 8:00 p.m., Ranallo again questioned defendant, this time with detective Terry Evoy (who did not testify). Ranallo testified that he thought that, by this point, another officer had read defendant his *Miranda* warnings, most likely during the 1:30 to 3:15 a.m. interview period conducted by Roberts and Giammarese. Before going into the room at 5:04 p.m., Ranallo asked an (unnamed) officer whether *Miranda* warnings needed to be repeated once given, and the answer was no. Ranallo began the 5:04 p.m. interview by questioning defendant about his relationship with C.O. Defendant told Ranallo that he knew C.O. was young when they began a sexual relationship and that he and C.O. were the only two people who had contact with baby J.O. Additionally, he stated that C.O. was great with the baby and that he (defendant) was too rough. He admitted that, in the past one or two weeks, he had "squeezed" the baby "hard enough to pop a balloon" 15 to 20 different times in order to make the baby stop crying. Defendant provided a written statement and was subsequently charged with aggravated criminal sexual abuse and five counts of aggravated battery of a child (four of which were ultimately

dismissed *nolle prosequi*). Later that evening, at approximately 9 p.m., defendant was taken to the Du Page County jail. He was placed in a jail cell.

¶ 20 On the morning of February 14, defendant appeared (remotely, via a screened image) at his bond hearing. Bail was set at $1,000,000. Defendant testified that he did not understand the import of his bond hearing, and he thought it meant he was convicted.

¶ 21 That same morning, the officers were putting together defendant's paperwork. It was then that Wirsing was unable to locate defendant's *Miranda* waiver form. Wirsing was "alarmed," and he questioned the other officers, ultimately realizing that no one had given defendant his *Miranda* warnings, orally or in writing. Wirsing testified that the failure of the four officers (Roberts, Ranallo, Giammarese, and Evoy) to provide *Miranda* warnings was a "big mistake," and that the other officers did not withhold the *Miranda* warnings to gain a tactical advantage. Contrary to his earlier testimony that defendant was "certainly" a suspect when, on February 12, he was patted down and brought to the Lombard police station, Wirsing explained that, perhaps the officers neglected to give defendant his *Miranda* warnings because "[they] were more focused on [C.O.] at that time because she had given [] a confession. We initially started interviewing [defendant] as a witness." Wirsing did not testify that his team took precautions to cure this "mistake" other than to read defendant his *Miranda* warnings and try to obtain a second confession.

¶ 22 At 2:15 p.m. that day, Wirsing and Ranallo escorted defendant into an interview room at the jail and gave him his *Miranda* warnings. Ranallo read each line of the *Miranda* waiver form, asking defendant to initial if he understood. However, Ranallo did not expressly ask defendant if he was willing to waive these rights. When Ranallo read the line that informed defendant that he had the right to have an attorney present and that one would be appointed if he could not afford to hire

counsel, defendant asked, "Is that for right now, or [*sic*]?" Ranallo answered, "Yeah[.] [Y]ou answer yes or no [to indicate you understand your right to counsel]." Defendant asked no further questions regarding the waiver form, and he proceeded to initial each line. Defendant then repeated the information he previously told to the police, regarding his sexual relationship with C.O., how he squeezed and shook J.O., and how he initially convinced C.O. to take the blame for J.O.'s injuries. Ranallo frequently prompted defendant's recollection, repeating information he (Ranallo) had learned from defendant's February 13 confession and then following with, "Is this correct?" About six minutes into the interview, defendant stumbled inarticulately over his words, and Ranallo told him not to worry about it; they already had the same information on tape from the day before. After eliciting a full oral confession within 10 minutes (including the reading of the *Miranda* waiver form), defendant began working on his written confession.

¶ 23 In sum, evidence showed the time-line and context of the interview as this:

Date	Time	Police Officers	*Miranda* Warnings
	(*Prior to the interview, defendant was separated from other involved parties, subject to a pat-down search, transported to the Lombard police station, and placed in an interview room*).		
February 13	12:55 to 1:30 a.m.	Roberts and Ranallo	No
February 13	1:30 to 3:15 a.m.	Roberts and Giammarese	No
February 13	5:04 to 8:00 p.m.	Ranallo and Evoy	No
	(*In this interim, defendant was charged, transported to the Du Page County Jail, appeared at a bond hearing, and was placed in a jail cell*).		
February 14	2:15 to 3:00 p.m.	Ranallo and Wirsing	Yes

¶ 24 At the close of evidence, the parties submitted that the admissibility of the February 14, 2006, statements should be decided pursuant to *Missouri v. Seibert* (542 U.S. 600 (2004)). The court found

that, under *Seibert*, the officers' February 13 failure to give *Miranda* warnings was not part of a deliberate scheme to more easily secure the February 14 confession. The court considered the police testimony and stated that "Mr. Hall wasn't a suspect at first; that things changed at some point and I am going to find that it was a mistake that the police did not give him the *Miranda* warnings." Therefore, the court denied the motion to suppress as to the February 14 statements. This appeal followed.

¶ 25 II. ANALYSIS

¶ 26 A. No Procedural Default of February 13, 2006, Argument

¶ 27 The State first argues that defendant procedurally defaulted any argument pertaining to suppression of the February 13 statements. The State notes that, at the March 2007 hearing on defendant's motion to suppress *both* the February 13 and 14 statements, it conceded that all of the February 13 statements should be suppressed pursuant to *Miranda* (384 U.S. 436). However, when the court denied suppression of the February 14 statements, defendant (through his counsel) chose to present the jury with a recording of both the February 13 and February 14 statements so that the jury could "know about the length of time [defendant] was there and about the chronology of events and what occurred." The State argues that defendant cannot now on appeal disavow his earlier agreement during trial to admit into evidence all of the February 13 statements. See, *e.g.*, *People v. White*, 25 Ill. App. 3d 391, 395 (1974) (defendant cannot complain on appeal of matters that he himself caused to be placed before the jury).

¶ 28 Defendant responds, and the record supports, that he showed the jury the February 13 recording only for "damage control." Defense counsel did not request to show the February 13 recording until after the trial court ruled that the February 14 statements were admissible. If the

jurors were shown the February 14 recording in isolation, which depicted defendant readily confessing to the charged offense, they would be highly likely to convict defendant. As a matter of strategy, defense counsel chose to expose the jurors to the 20-hour interview process that began on February 13, perhaps hoping to raise doubts in the jurors' minds as to the voluntariness and reliability of the February 14 confession. Regardless of the precise motivation behind defense counsel's strategy, the record supports that defense counsel would not have asked to show the February 13 recording had the February 14 statement been, in defendant's view, properly suppressed.

¶ 29 Defendant concedes that *if* the February 13 statements were admissible, then the admission of the February 14 statements would be harmless error. Therefore, in order to qualify for relief on this appeal, defendant must show that *neither* the February 13 or February 14 confessions were admissible. We proceed to address the admissibility of each respective confession.

¶ 30 B. February 13, 2006, Confession

¶ 31 Defendant argues that he was the subject of a custodial interrogation as of at least 1:09 a.m., when police said to defendant: "Let me ask you this. I'll ask you this straight up. Did you have anything to do with this baby getting hurt?" Defendant, relying on *People v. Rivera*, 304 Ill. App. 3d 125, 126 (1999), contends that the question asked at 1:09 a.m. shows that he was the subject of an investigation, and the statement was aimed at eliciting an incriminating response, thereby entitling him to a *Miranda* warning. We agree.

¶ 32 When a defendant challenges the admissibility of his confession through a motion to suppress, the State bears the burden of proving by a preponderance of the evidence that the confession was voluntary. *People v. Slater*, 228 Ill. 2d 137, 149 (2008). A trial court's ruling on a motion to suppress presents mixed questions of law and fact. *People v. Alfaro*, 386 Ill. App. 3d 271,

290 (2008). A reviewing court should defer to the trial court's finding of fact, as long as it is not against the manifest weight of the evidence. *Id*. However, the ultimate question of whether suppression is warranted is reviewed *de novo*. *Id*. A higher court may consider the entire record when reviewing a ruling on a motion to suppress. *Id*.

¶ 33 When police question a suspect in custody without administering *Miranda* warnings, the answers received are presumed compelled and should be excluded from the State's case-in-chief. *Oregon v. Elstad*, 470 U.S. 298, 317 (1985). In *Miranda*, the Supreme Court held that, prior to the start of an interrogation, a person being questioned by law enforcement officers must first be warned that he or she has "the right to remain silent, that any statement he [or she] does make may be used against him [or her], and that he [or she] has the right to the presence of an attorney, either retained or appointed," as long as that person has been "taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444. To trigger the *Miranda exception*, a finding that a defendant was in custody is essential, because the preinterrogation warnings required by *Miranda* are intended to ensure that a defendant's inculpatory statement is not simply the "product of compulsion inherent in custodial surroundings." *Slater*, 228 Ill. 2d at 149-50, quoting *Yarborough v. Alvarado*, 541 U.S. 652, 661 (2004) (internal quotes omitted). Also, it is elementary that an interrogation include words or actions by the police that are reasonably likely to evoke an incriminating response. *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

¶ 34 In determining whether a statement was made in a custodial setting, the court should consider the following circumstances surrounding the interrogation: (1) the location, time, length, mood, and mode of the interrogation; (2) the number of police officers present; (3) the presence or absence of any of the suspect's friends and family; (4) any indicia of formal arrest; and (5) the age, intelligence,

and mental makeup of the accused. *Alfaro*, 386 Ill. App. 3d at 291. "The subjective thoughts of the police or the individual being questioned are generally irrelevant unless the officers' belief that the individual is a suspect is communicated in some manner to him or her, in which case it becomes relevant to the extent it would affect how a reasonable person in the position of the individual would have gauged his or her freedom to terminate the interview and leave." *Id*. (finding the defendant to be in custody when the tenor of police interrogation changed from inquisitive to accusatory).

¶ 35 Here, the circumstances surrounding defendant's interrogation support that defendant was in custody. Defendant was separated from other involved parties, subjected to a pat-down search, transported to a police station, placed alone in an interview room for three hours, and, 15 minutes into the interview, directly asked if he committed the battery crime. It is difficult to think of a question that a law enforcement officer could ask a person that would be more likely to elicit an incriminating response than the question asked at 1:09 a.m.: "Did you have anything to do with this baby getting hurt?" See, *e.g.*, *Alfaro*, 386 Ill. App. 3d at 291 (defendant in custody when tenor of interrogation became accusatory). Further, although defendant is not now seeking to suppress statements made *prior* to 1:09 a.m., evidence supports that defendant was interviewed as a suspect (rather than merely a witness) from the beginning. Defendant was one of only two people to have had contact with baby J.O. Indeed, Wirsing testified that defendant was "certainly" a suspect when transported to the Lombard police station and placed in the interview room. Additionally, given that the police knew the 30-year-old defendant had been in a sexual relationship with a 15-year-old girl, which is criminal conduct in and of itself, it would defy reason to posit that defendant was free to terminate the interview and leave the station.

¶ 36 The State does not respond substantively, claiming only procedural default. Indeed, we note

that the State, before Judge Anderson, initially conceded that the February 13 statements were subject to suppression. Because defendant was not given a *Miranda* warning, any statements he made after 1:09 a.m. on February 13 should have been suppressed. We need not address defendant's arguments concerning Judge Dockery's ruling that all statements made after 2:11 a.m. should be suppressed (when the police told defendant that if they did not discover the truth, "everything could come down on [him]."), because both parties ultimately agree that Judge Dockery's ruling is not at issue in this appeal.

¶ 37 C. February 14, 2006, Post-*Miranda* Confession

¶ 38 Defendant next argues that his February 14, 2006, confession should have been suppressed. His primary argument is that the *Miranda* warnings he received on February 14 did not suffice to remove the conditions that precluded admission of the February 13 confession because the police's February 13 *Miranda* failure was deliberate, and a reasonable person in defendant's situation, upon being given such "midstream" *Miranda* warnings, would not understand that he had a *genuine* choice about continuing to talk to the police. For the reasons that follow, we agree. Therefore, we do not reach defendant's alternative argument that the February 14 confession should be suppressed pursuant to *Berghuis v. Thompkins*, __ U.S. __, 130 S. Ct. 2250 (2010).

¶ 39 i. Case Law Concerning Mid-Stream *Miranda* Warnings

¶ 40 Defendant's primary argument can best be understood by examining four cases, in the order that they were decided: (1) *Elstad*, 470 U.S. 298; (2) *Seibert*, 542 U.S. 600; (3) *People v. Lopez*, 229 Ill. 2d 322 (2008); and (4) *Alfaro*, 386 Ill. App. 3d 271. Each of these cases addresses the admissibility of post-*Miranda* statements, where the *Miranda* warning was not given until *after* the defendant made an inculpatory, custodial statement. These cases deal with the concern that, by

initially withholding *Miranda* warnings, the police may more easily obtain a post-*Miranda* confession, which the defendant would not have given if he or she had been aware of his or her fifth amendment right from the beginning of the custodial interrogation.

¶ 41 1. U.S. Supreme Court in *Elstad*: *Miranda* Warning Generally Cures Previous Defect (Absent Improper Police Conduct)

¶ 42 In *Elstad*, the police questioned the 18-year-old defendant in his family home regarding the burglary of a neighboring home, wherein $150,000 in art objects and furnishings had been stolen. The officers conceded that they considered defendant to be in custody, but they did not inform him of his *Miranda* rights. During the questioning, the defendant made the inculpatory remark, "I was there." At that point, the officers took the defendant to the Sheriff's headquarters. There, the officers placed the defendant in an interview room and informed him of his *Miranda* rights. The defendant indicated that he understood his rights, and, having these rights in mind, wished to speak with the officers. The defendant proceeded to give a full statement concerning his involvement, which the officers typed and defendant signed. *Elstad*, 470 U.S. at 300-02.

¶ 43 On appeal, the *Elstad* court was faced with the question of whether an initial failure of law enforcement officers to administer the warnings required by *Miranda*, without more, "taints" subsequent admissions made after a suspect has been fully advised of and has waived his *Miranda* rights. *Id*. at 303-04. The defendant essentially argued that, because he had "let the cat out of the bag" in a voluntary yet unwarned statement, a sense of compulsion and, therefore, involuntariness would attach to any subsequent, warned statement. *Id*. at 304. The court rejected this argument, reasoning that endowing the psychological effects of voluntary unwarned admissions with constitutional implications, would, practically speaking, disable the police from obtaining a suspect's informed cooperation even when the official coercion prescribed by the fifth amendment played no

part in either the suspect's warned or unwarned confessions. *Id*. at 311. The court concluded that, *absent deliberate coercion or improper tactics* in obtaining an unwarned statement, *a careful and thorough administration* of *Miranda* warnings cures the condition that rendered the unwarned statement inadmissible. Where there has been a subsequent, careful administration of *Miranda* warnings, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights. *Id*. at 313. Hence, *Elstad* established the general rule that, absent improper tactics in obtaining the unwarned statement, subsequent careful administration of *Miranda* warnings will allow for the admission of the subsequent warned statement.

¶ 44 2. Justice Kennedy's *Seibert* Concurrence: Presumption of Exclusion Where Initial *Miranda* Violation Deliberate

¶ 45 In *Seibert*, the Supreme Court revisited the general rule set forth in *Elstad*, this time finding that the facts before it called for a different result. In *Seibert*, the police questioned the defendant for 30 to 40 minutes at the police station, where the defendant made an unwarned confession that she had been involved in an arson and a murder plot designed to cover up the (allegedly accidental) death of her disabled son. After the unwarned confession, the police took a 20-minute break. When they returned, they informed the defendant of her *Miranda* rights, which she did not invoke. In questioning the second time around, the police used information gained from the defendant's unwarned confession. The defendant then repeated her confession. The police testified that they deliberately and consciously withheld *Miranda* warnings to get the first confession, using a question first, warn later strategy. *Seibert*, 542 U.S. at 604-06.

¶ 46 The *Seibert* court split with a plurality opinion, two concurring opinions, and a dissent. Of these, the plurality and Justice Kennedy's concurrence, which has been adopted by most subsequent courts, are relevant to our discussion. The plurality held that the post-*Miranda* warnings should be

suppressed, reasoning that the circumstances surrounding the defendant's post-*Miranda* questioning did not allow for a *real choice* between talking and remaining silent. *Id*. at 609. The plurality found it particularly troubling that: (1) the unwarned interrogation was systematic, exhaustive, and performed with psychological skill (when the police were finished there was little, if anything, of incriminating potential left unsaid); (2) the warned interrogation took place less than 20 minutes later, in the same room, with the same officer; and (3) the officer did not inform the defendant that her unwarned statement could not be used against her (thereby leading her to believe that there was no point in remaining silent—she had already told them everything). *Id*. at 616.

¶ 47 Justice Kennedy agreed, but he found the plurality's holding to be too broad. He noted that the plurality focused only on " 'whether [the] *Miranda* warnings delivered midstream could have been effective enough to accomplish their object' given the specific facts of the case. [] This test envisions an objective inquiry from the perspective of the suspect, and applies in the case of both intentional and unintentional two-stage interrogations." *Id*. at 621. Justice Kennedy stated that this test, though leading to the right result here, could fall short of accomplishing the goals of the *Miranda* suppression remedy in other instances. *Id*. at 619. The goals of the *Miranda* suppression remedy include deterring improper police conduct and assuring trustworthy evidence. *Id*. Not every *Miranda* violation requires suppression of the evidence obtained; admission may be proper when it would further other important objectives (such as public safety) without compromising *Miranda's* central concerns. *Id*. Kennedy posited that *Elstad* reflected the desired balanced and pragmatic approach to enforcing compliance with *Miranda*. Kennedy cited *Elstad* for examples of situations where suppressing the post-*Miranda* statements would not serve the goal of deterring improper conduct: (1) an officer may not realize the suspect was in custody when the suspect made an

inculpatory remark; or (2) an officer may have been waiting for a more appropriate time to question the suspect. *Id*. at 620. Kennedy concluded that the post-warning statements should be suppressed on a narrower basis, formulating the following rule: "When an interrogator uses this deliberate, two-step strategy, predicated on violating *Miranda* during an extended interview, postwarning statements that are related to the substance of prewarning statements must be excluded absent specific curative steps." *Id*. at 621. Examples of such curative steps would be a break in time and circumstance such that the accused understands that the interrogation is taking a new turn, or an additional warning that explains the likely inadmissibility of the prewarning custodial statement. *Id*. at 622.

¶ 48 3. Illinois Supreme Court in *Lopez*: Application of *Seibert* Concurrence (Evidence "Supports Inference" of Deliberate Misconduct)

¶ 49 In *Lopez*, the police came to the 15-year-old defendant's family home and took him to the station for questioning regarding a murder. At 1 p.m., the police told the defendant that an accomplice had implicated him. The defendant provided the police with information (about what, it is not clear). The police left the defendant alone in the interview room for four to five hours while they continued their investigation. At 6 p.m., the police re-entered the interview room and again told the defendant that the accomplice had implicated him. The police then pointedly asked the defendant if he was involved. The defendant responded with an inculpatory statement. The police did not continue to question the defendant; they just let him keep talking. *After* the defendant confessed, the police give him his *Miranda* warnings and terminated the interview. *Lopez*, 229 Ill. 2d at 362. Three hours later, the police arranged a second interview, to be conducted by the assistant state's attorney with the defendant's father present (and a translator for the father, who did not speak English). The second interview began with a second reading of *Miranda* warnings. The defendant was never told that his prewarning statements could not be used against him. Defendant made a

written confession, which he signed. *Id*. at 365-66.

¶ 50 The *Lopez* court adopted Justice Kennedy's approach in determining the admissibility of the postwarning statements. *Id*. at 359 (when a fragmented court decides a case and no single rationale has the assent of five judges, the Court's holding may be viewed as that position taken by the members that concurred on the narrowest grounds). The *Lopez* court stated:

> "In applying Justice Kennedy's concurrence, we must first determine whether the detectives deliberately used a question first, warn later technique when interrogating defendant. If there is no evidence to support a finding of deliberateness on the part of detectives, our *Seibert* analysis ends. If there is evidence to support deliberateness, then we must consider whether curative measures were taken." *Id*. at 361.

¶ 51 To determine whether the interrogator deliberately withheld *Miranda* warnings, courts should consider whether objective evidence and any available subjective evidence "support an inference" that the two-step interrogation procedure was used to undermine *Miranda*. *Id*. Examples of objective evidence include: timing, setting, and completeness of the prewarning interrogation; the continuity of police personal; and the overlapping content of the pre-and postwarning statements. *Id*. An example of subjective evidence is officer testimony. *Id*.

¶ 52 In considering whether curative measures were (adequately) taken, the relevant question is whether, after receiving midstream *Miranda* warnings, a reasonable person in the defendant's situation would have understood that he retained a real choice about continuing to talk to the police. *Id*. at 364, citing *Seibert*, 542 U.S. at 616-17 (plurality op.), and *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring). Factors to consider are: passage of time between the warned and unwarned statements, the location(s) where the statements were taken, whether the same person questioned the

defendant during warned and unwarned phases, whether details obtained during the unwarned phase were used during the warned phase, and whether the suspect was told the unwarned statement could not be used against him. *Id*. at 364-65.

¶ 53 The *Lopez* court found that the interrogators deliberately withheld *Miranda* warnings. *Id*. at 363. To determine whether the police conduct was deliberate, the court reviewed the objective evidence as follows. After being left alone in an interview room for four to five hours, the police told defendant for the second time that he had been implicated in a murder and asked him whether he was involved. The defendant made an inculpatory statement and the police let him continue to confess. They did not provide the *Miranda* warning until the defendant was finished confessing. The court noted that subjective evidence, *i.e.*, police testimony, weighed against finding that police actions were deliberate. The police testified that they did *not* deliberately use the two-step process. However, even though the trial court went on record stating that it found the police officers to be credible, the supreme court found that the record contradicted the officers' statements that they did not give the defendant his *Miranda* warning because they did not consider him to be a suspect. *Id*. at 363-64. The court noted that an accomplice implicated the defendant (and the police asked the defendant if he was involved). *Id*. The court concluded: "The objective and subjective evidence available to this court, when viewed in its totality, supports an inference that the detectives engaged in some form of the 'question first, warn later' interrogation technique." *Id*. at 363.

¶ 54 The *Lopez* court found that insufficient curative measures were taken. *Id*. at 366. The court recognized that the defendant was allowed to speak to his father, that the defendant ultimately received at least two *Miranda* warnings, and that the assistant state's attorney did the questioning rather than a detective. *Id*. at 365-66. However, the statements were taken close in time (two to

three hours), in the same room, with the same detective present, and the defendant was not told that his prior statement could not be used against him. *Id*. at 366. The court concluded that a reasonable juvenile in the defendant's position would not have understood that he had a genuine choice about continuing to talk to the police, and, therefore, the postwarning statements should have been suppressed. *Id*.

¶ 55 4. Second District in *Alfaro*: Application of *Seibert* Concurrence and *Lopez* (Evidence "Supports Inference" of Deliberate Misconduct)

¶ 56 In *Alfaro*, the defendant accompanied the police to the station to discuss a gang shooting. The tone of the questioning soon changed from inquisitive to accusatory, effectively placing the defendant in custody. *Alfaro*, 386 Ill. App. 3d at 300. Three hours into the interview, *after* the defendant confessed his involvement with the crime at least twice, the police presented the defendant with his *Miranda* warnings. The police told the defendant that it was "just a formality." *Id*. at 275. The defendant read the *Miranda* form and signed it. The defendant then repeated his story. After repeating his story, he was placed under arrest. *Id*. at 276.

¶ 57 The *Alfaro* court mirrored the analysis set forth in *Lopez*. *Id*. at 302. The *Alfaro* court found that the objective and subjective evidence, in its totality, supported the inference that the police deliberately engaged in a question first, warn later interrogation strategy. *Id*. at 304. As to the subjective evidence, the court acknowledged that the officers testified that they were only seeking leads from the defendant and that he was free to leave at any time. However, the court noted that, though the officers *knew* the defendant had not received his *Miranda* warnings, they did not provide the defendant with his *Miranda* warnings when he began to make inculpatory statements. *Id*.

¶ 58 The *Alfaro* court found that insufficient curative measures were taken. *Id*. at 306. Of particular note to the court was that the officers told the defendant that the *Miranda* warning was just

a formality and that the officers failed to inform the defendant that his prewarning statements could not be used against him. *Id.* Due to this undermining of *Miranda*, the *Alfaro* court held that all of the defendant's warned statements should have been suppressed. *Id.* at 307.

¶ 59 ii. Application of the Case Law

¶ 60 1. Evidence "Supports Inference" of Deliberate Misconduct

¶ 61 Moving to the facts of the instant case, we must determine whether the objective evidence and any available subjective evidence "support an inference" that the two-step interrogation procedure was used to undermine *Miranda*. *Lopez*, 229 Ill. 2d at 361. Again, examples of objective evidence include: (1) timing, setting, and completeness of the prewarning interrogation; (2) the continuity of police personal; and (3) the overlapping content of the pre-and postwarning statements. *Id.* An example of subjective evidence is officer testimony. *Id.*

¶ 62 The first objective factor (timing, setting, and completeness of the prewarning interrogation), weighs heavily in favor of defendant. As discussed above in the custody analysis, the officers conducted a formal, full scale interrogation against defendant. Defendant was separated from involved parties, placed alone for three hours in an interview room at the station, and asked accusatory questions. The unwarned interrogation could not have been more complete: as in *Seibert*, *Lopez*, and *Alfaro*, when the police were finished, there was little, if anything of incriminating potential left unsaid. Unlike in *Elstad*, the police did not stop defendant when he began to incriminate himself.

¶ 63 As to the second and third objective factors, officer Ranallo was present during both the pre- and post-warning statements. When defendant stumbled over his words in the postwarning interrogation, Ranallo told him not to worry about it; they already had the same information from

the day before. Due largely to prompts regarding information gained from the prewarning interrogation, defendant gave a full oral confession 10 minutes into the warned interrogation, with an additional 35 minutes used to draw up a written confession—this is in contrast to the unwarned interrogation, which took place in three sessions over a 19-hour span.

¶ 64 As to the subjective evidence, *i.e.*, officer testimony, we acknowledge that the officers here testified that they did *not* intentionally withhold defendant's *Miranda* warnings so as to obtain a confession that the defendant may not have given had he been aware of his rights from the beginning. However, we, like the courts in *Lopez* and *Alfaro*, find that the record contradicts this testimony. See *Lopez*, 229 Ill. 2d at 363-64 (despite the trial court's statement that it found the police to be credible, the supreme court found that the record contradicted police testimony that the defendant was not a suspect and, therefore, was not in custody), and *Alfaro*, 386 Ill. App. 3d at 304 (though the officers denied that they were trying to elicit an incriminating statement from the defendant, they failed to explain why they did not warn the defendant until after the defendant made several inculpatory statements).

¶ 65 Again, the time-line of defendant's prewarning interrogation was as follows:

Date	Time	Police Officers	*Miranda* Warnings
February 13	12:55 to 1:30 a.m.	Roberts and Ranallo	No
February 13	1:30 to 3:15 a.m.	Roberts and Giammarese	No
February 13	5:04 to 8:00 p.m.	Ranallo and Evoy	No

¶ 66 Here, both Roberts and Ranallo testified that, going into the first interview, which took place between 12:55 and 1:30 a.m., they intended to interview defendant as a witness and not as a suspect. Therefore, they did not give defendant any *Miranda* warnings. The record contradicts that Roberts

and Ranallo treated defendant purely as a witness throughout this interview session. The record shows that, less than 15 minutes into the first interview, at 1:09 a.m., Roberts and Ranallo asked defendant if he committed the battery: "Let me ask you this. I'll ask you this straight up. Did you have anything to do with this baby getting hurt?" As in *Lopez* and *Alfaro*, Roberts and Ranallo should not have asked an incriminating question to a suspect in custody without providing a *Miranda* warning. Defendant answered that he might have hurt J.O.'s ribs. Again as in *Lopez* and *Alfaro*, Roberts and Ranallo failed to stop the interrogation right there and provide a *Miranda* warning. Roberts then continued to interview defendant from 1:30 to 3:15 a.m., wherein defendant actually demonstrated with a doll how he may have hurt the baby's ribs. Defendant repeated the demonstration more than once. Defendant informed the police that he and C.O. had discussed the idea of C.O. taking the blame because, due to her age, she would be punished less. In other words, Roberts and Ranallo, knowing they were the first to interview defendant, asked defendant incriminating questions and allowed him to give incriminating responses, for a period of 35 minutes (Ranallo) and 2 hours and 20 minutes (Roberts), respectively, without advising defendant of his *Miranda* rights.

¶ 67 The State's arguments concerning the officer testimony are red herrings. Ranallo's testimony that he thought defendant received *Miranda* warnings during the 1:30 to 3:15 a.m. interview is not helpful. As discussed above, Ranallo was present when, at 1:09 a.m., Roberts asked defendant if he committed the crime. Ranallo saw that no *Miranda* warnings had been given prior to that question. Ranallo saw the error being made, and he did nothing to correct it. Also irrelevant is Wirsing's testimony that he was "alarmed" to find that defendant had not received his *Miranda* warning. That one officer may have legitimately been unaware that no *Miranda* warning was given does not

absolve the improper conduct of the other officers, nor does it provide a basis upon which to infer other officers' motive (or lack thereof) in failing to give *Miranda* warnings. The State's arguments characterize the February 13 interrogation as involving so many officers (just four), with such poor coordination amongst them, that the failure to provide any *Miranda* warnings was purely inadvertent—an oversight. The record contradicts this position; Roberts and Ranallo did not need to receive word from another officer as to whether defendant received any *Miranda* warnings, because they themselves began the interrogation, elicited incriminating statements, and failed to provide a *Miranda* warning.

¶ 68 The officers in this case did not, like the officers in *Seibert*, testify that they deliberately withheld *Miranda* warnings as part of a two-step plan. However, after the Court's ruling in *Seibert*, it is unlikely that any officer will ever again directly admit to that. See *Seibert*, 542 U.S. at 616; *Lopez*, 229 Ill. 2d at 361. Still, we fail to see how the officers' actions in this case differ in any real way from the officers' actions in *Lopez* and *Alfaro*. As in *Lopez* and *Alfaro*, the officers claimed to be interviewing the defendant only as a witness, yet they asked him incriminating questions and allowed him to make a full confession without interrupting to provide *Miranda* warnings. We find that the objective and subjective evidence available to this court, when viewed in its totality, supports the inference that the officers engaged in some form of the question first, warn later technique. Therefore, a presumption of exclusion applies unless the State can show that adequate curative measures were taken.[1]

[1] As set forth above, we have used the framework provided by our supreme court in *Lopez*, which adopted Justice Kennedy's *Seibert* concurrence. Our decision is based on our determination that the facts in the instant case are analogous to those in *Lopez* and *Alfaro*, each of which found that

¶ 69 2. Inadequate Curative Measures

¶ 70 Having found police conduct in failing to give *Miranda* warnings sufficiently deliberate, we next consider whether adequate curative measures were taken. We are mindful that the trial court did not reach this stage of the analysis. However, both sides presented evidence and argued the issue. Essentially, there was no testimony regarding February 14 conduct that fell outside the scope of what was covered in the DVD recording. At the suppression hearing, the vast majority of testimony concerned the question of whether the failure to give *Miranda* warnings was deliberate.

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the evidence "supported the inference" that the officers "deliberately" engaged in "some form" of the question first, warn later two-step plan. The courts in *Lopez* and *Alfaro*, rather than label the egregious error as "gross negligence," gave credit to the officers' knowledge and intelligence, stating that the evidence "supported the inference" that the behavior was deliberate. We decline the State's request that we apply the word "deliberate" more literally than applied in either *Lopez* or *Alfaro*.

Therefore, we do not resolve the parties' question as to whether an officer's gross negligence in failing to provide *Miranda* warnings during a custodial interrogation would be enough to create a presumption of exclusion (to be rebutted only if adequate curative measures were taken), or would at least allow for the court to proceed to the question of whether the mid-stream *Miranda* warnings cured the defect. This question appears to reveal a gap in the case law. We note that Justice Kennedy departed from the *Seibert* plurality because he wanted to ensure a test narrowly tailored to the sort of police misconduct the suppression rule is meant to deter (as opposed to an honest and quickly corrected mistake of the sort in *Elstad*). It seems that gross negligence would fit into the category of deterrable misconduct. However, we leave the question for another court to answer.

Under these circumstances, and in the interest of judicial economy, we reach the issue of curative measures.

¶ 71 In evaluating curative measures, the relevant question is whether, after receiving midstream *Miranda* warnings, a reasonable person in defendant's situation would have understood that he retained a real choice about continuing to talk to the police. *Lopez*, at 364, citing *Seibert*, 542 U.S. at 616-17 (plurality op.), and Seibert, 542 U.S. at 622 (Kennedy, J., concurring). Factors to consider are: (1) passage of time between the warned and unwarned statements; (2) the location(s) where the statements were taken; (3) whether the same person questioned the defendant during warned and unwarned phases; (4) whether details obtained during the unwarned phase were used during the warned phase; (5) and whether the suspect was told the unwarned statement could not be used against him. *Id*. at 364-65.

¶ 72 We acknowledge that: (1) several hours passed between defendant's February 13, pre-*Miranda* statements and his February 14, post-*Miranda* statements; and (2) the post-*Miranda* statements were made in a different location (the Du Page County Jail rather than the Lombard police station). A lengthy break and a change in location would typically work to cure the prior *Miranda* violation, making it more likely that a defendant would be able to recognize that he or she had a fresh opportunity to assert his or her rights. However, here, the reason for the relatively lengthy break and change in location between the unwarned and warned statements was that defendant went through a full-blown interrogation, was placed under arrest, transported from a station to a jail, subjected to the booking process, given a bond hearing, and put in a jail cell. A change in location from an investigatory facility to a jail would not make a reasonable person feel as though he or she had a fresh opportunity to assert his or her rights; rather it would make a

reasonable person feel as though his or her rights had already been taken.

¶ 73 The remaining factors weigh even more heavily in favor of defendant. If ever a *careful* correction of a *Miranda* failure was necessary, this was the case. Instead, the police did not inform defendant that his prior confession would most likely be inadmissible. To the contrary, and most compelling to this court, the police affirmatively implied that defendant's prior confession *would* be admissible. When defendant stumbled over his words, Ranallo told him not to worry about it; they had the same information on tape from the day before. *Lopez*, 229 Ill. 2d at 364-65 (factor five); see also, *Alfaro*, 386 Ill. App. 3d at 275 (police told the defendant the *Miranda* warnings were "just a formality"). Additionally, the DVD recording shows Ranallo, the *same* detective present when defendant made his first confession, read the *Miranda* waiver form in a relatively cursory manner. *Id*. (factor three). For example, when Ranallo read the line that informed defendant that he had the right to have an attorney present and that one would be appointed if he could not afford to hire counsel, defendant asked, "Is that for right now, or [*sic*]?" Ranallo answered, "Yeah[.] [Y]ou answer yes or no [to indicate you understand your right to counsel]." Although Ranallo answered defendant's direct question with a "yeah," Ranallo did not provide defendant with time to let the answer settle, in the same breath prompting defendant to initial the form. Defendant was asked to initial the written waiver form but was not expressly asked, with time to give a thoughtful answer, whether he indeed waived his rights. When securing defendant's second confession, Ranallo repeatedly referred to information acquired during the first confession. For example, Ranallo would make a statement based on information learned from the February 13 confession (regarding defendant's relationship with C.O., or how defendant shook the baby), and ask, "Is that correct?" *Id*. (factor four). These circumstances, taken as a whole, show that the police did not carefully correct

the initial *Miranda* failing.

¶ 74 In conclusion, particularly given Ranallo's comment that defendant need not give a perfect statement because they already had his first statement on tape, a reasonable person in defendant's position would not have understood that he retained a *genuine* choice about whether to continue talking to the police. The trial court erred in denying the motion to suppress the February 14 statements. We need not reach defendant's alternative argument that the statements should have been suppressed pursuant to *Berghuis*.

¶ 75 III. CONCLUSION

¶ 76 For the aforementioned reasons, we reverse the trial court's judgment.

¶ 77 Reversed.