STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2016AP1965-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SETH Z. LEHRKE,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDERS DENYING POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR CHIPPEWA COUNTY, THE HONORABLE STEVEN R. CRAY, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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3. Did the circuit court erroneously exercise its discretion when it excluded Dr. Richard Leo's false confession testimony and did the exclusion of Dr. Leo's testimony deny Lehrke the right to present a defense?

4. Did the circuit court erroneously exercise its discretion when it excluded the report of the sexual assault nurse examiner (SANE)?

5. Did the prosecutor commit plain error in his closing argument?

6. Did Lehrke receive ineffective assistance of counsel?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

INTRODUCTION

A jury convicted Lehrke after a two-day jury trial of having sexual contact with his niece, a person under the age of thirteen. He claims that his low IQ and learning disabilities rendered his waiver of *Miranda* rights and his confession involuntary, that the circuit court erred in excluding false confessions expert testimony from Dr. Leo, in excluding a

SANE report, that three of the prosecutor's remarks in closing argument constituted plain error, and that he received ineffective assistance of counsel in three respects.

Lehrke's claims must fail. The video recording of his confession shows that police read him the *Miranda* warnings prior to his questioning and he said he understood them. The officers did not use any coercive or improper tactics in eliciting Lehrke's confession.

The circuit court correctly excluded Dr. Leo's false confession testimony because (1) his principles did not provide the jury any assistance in determining whether Lehrke's confession was true or false; and (2) the factors Leo identified were likely to mislead or confuse the jury about voluntariness, an issue Wisconsin does not submit to the jury. The circuit court also correctly excluded the SANE report because most of the report does not qualify as statements made for the purpose of medical diagnosis or treatment.

Lastly, the prosecutor's remarks in closing did not constitute plain error and Lehrke fails to establish that his attorney either performed deficiently or that he was prejudiced.

STATEMENT OF THE CASE

The State alleged Lehrke had sexual contact with a person under the age of thirteen, his niece. (R.4:1.) A jury convicted Lehrke after a two-day jury trial. (R.255-258.)

1. The suppression hearing and the circuit court's decision.

Lehrke filed a motion to suppress his confession. (R.13.) The circuit court held a hearing at which Detective David Kleinhans identified a DVD of Lehrke's confession.[1] (R.238:4.)

At the beginning of the interview, Detective Kleinhans read the *Miranda* rights to Lehrke.

> Okay you have the right to remain silent. Anything you say can and will be used against you in the Court of Law. You have the right to consult a lawyer before questioning, to have a lawyer present with you during questioning. If you cannot afford to hire a lawyer, one will be appointed to represent you at public expense before or during any questioning if you wish. If you decide to answer questions now without a lawyer present, you have the right to stop the questioning and recess any time you wish. You have the right to ask for a lawyer at any time you wish including the questioning. Do you understand each of these rights?
>
> A. Yes.
>
> Q. You have these rights, and are now willing to answer questions or make a statement?
>
> A. Huh?
>
> Q. What's that?
>
> A. What was the last two things you said thought. I heard it, but I --
>
> Q. Yeah. You have these rights are you now willing to answer questions or make a statement. Basically, do

[1] Lehrke's brief cites the transcript of his confession as R.262. *See* order granting Lehrke's motion to supplement the record, Feb. 2, 2017. In the electronic record, Document 262 is a transcript of an order to show cause/restitution hearing. The transcript of Lehrke's confession is in the record but it does not have a document number. The State will cite to it as Ex.2, 5/12/16.

> you want to talk to me today and try to figure out what's going on?
>
> A. Yeah. I want to know what's going on. Because I should not be sitting here, but, okay.

(R.Ex.2, 5/12/16:6.)

The circuit court found that Lehrke validly waived his *Miranda* rights. The court found that Detective Kleinhans read Lehrke the warnings, asked him if he agreed to speak with the officers, and that Lehrke agreed. (R.240:5-6.) "Then he asked a question about the last two parts. . . . [T]he officer fairly responded to him. He noted that you have these rights." (R.240:5-6.) "The state has made a prima facie case of a valid waiver by demonstrating that Mr. Lehrke was told his rights, Mr. Lehrke indicating an understanding and willingness to make a statement."(R.240:6.)

The circuit court also concluded Lehrke's statement was voluntarily and freely made without undue pressure by law enforcement. (R.240:9.) The interrogation took approximately 99 minutes, a short period of time for an interrogation. (R.240:7-8.) Lehrke had been incarcerated less than 24 hours. (R.240:8.) Lehrke was not denied any outside communication, no threats were made, and no physical abuse used. (R.240:8.) The police did not use any coercion, the conditions of the interrogation did not imply coercion and there were no promises of leniency. (R.240:6-7.) The only promise that was made was that the officer said he would relate Lehrke's cooperation to the District Attorney's Office. (R.240:8.) Lehrke did not demonstrate any emotional distress or discomfort, he was not deprived of sleep, and he was not under the influence of alcohol or drugs. (R.240:8.) Lehrke was handcuffed and shackled, but he did not complain about that nor request to be uncuffed or unshackled. (R.240:8.)

Lehrke was 19 years old and a high school graduate, which he achieved with the assistance of special education. (R.240:8-9.) Lehrke's learning disabilities were not evident during the interrogation. He was not required to read anything. His oral skills appeared adequate. (R.240:6.)

2. The State's motion to exclude expert testimony, the *Daubert* hearing and the circuit court's decision.

The State moved to exclude Lehrke's false confessions expert, Dr. Richard Leo. (R.64; 74; 120:1.) Dr. Leo testified at a *Daubert*[2] hearing. He is currently a professor of law in social psychology at the University of San Francisco. (R.248:5.) His work is in the area of police investigations and interrogations, in false and unreliable confessions, and erroneous convictions. (R.248:5.)

Dr. Leo testified that certain interview techniques increased the risks of false confessions. (R.248:18.) The primary techniques he has identified are a lengthy interrogation, sleep deprivation, false evidence ploys, minimization, implied or explicit promises, and implied or explicit threats. (R.248:19, 34, 43.) The age of the suspect is important. (R.248:20.) Juveniles, because of their psychosocial immaturity and impulsivity, are more easily led and manipulated. (R.248:20.) Other researchers in his field have accepted generally these risk factors. (R.248:20.)

On cross-examination he admitted that the percentage of false confessions is unknown because the total number of interrogations and confessions is unknown. (R.248:29-30.) He also admitted that the error rate for false confessions is unknown for the same reason. (R.248:30.) He could not give a

[2] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

probability of whether a particular confession is true or false. (R.248:36.) Additionally, if one knew a general probability for false confessions, that does not tell the jury whether a particular confession is true or false. (R.248:37.)

The circuit court excluded Dr. Leo's testimony but found his research methods valid and that his research has identified risk factors for false confessions. (R.249:45-46.) Dr. Leo's research relied on cases where the confession was not accurate and identified interrogation techniques that may have contributed to the inaccuracy. (R.249:46-48). Dr. Leo's research has been subjected to some peer review. (R.249:49.) The circuit court found that coercive or improper police tactics may or may not cause a false confession. (R.249:50.) The court also found that if the jury was informed of Lehrke's intellectual limitations and his young age, the jury would consider that the confession might be false. (R.249:51.)

The court recognized the jury must consider the characteristics of the individual, Lehrke's age and mental status, and the circumstances of the interrogation in deciding if the confession was true. (R.249:46-47.) The court concluded that the jury, using its common wisdom, would believe that a younger person is more likely to be overwhelmed during interrogation than a more mature person. (R.249:46.) It also concluded that the jury would know someone "who has less intellectual firepower" is more susceptible to manipulation. (R.249:47.)

The court observed that Dr. Leo had done no research in predicting whether a particular confession is true or false. (R.249:48.) Despite the validity of Dr. Leo's principles, their predictive value is unknown. (R.249:49.) All of his research is "backward looking," that is Dr. Leo starts from false confessions and observes the interrogation techniques. (R.249:48-49.) Therefore, Dr. Leo's research is "of limited

value in deciding whether a particular confession is accurate or inaccurate." (R.249:48.) Dr. Leo could not give the jury any objective method to accurately predict whether, in this specific case, Lehrke's confession is true or false. (R.249:49-50.) Without research that gives the jury objective predictive values, the court concluded, Dr. Leo's testimony would encourage the jury to speculate. (R.249:50.)

3. The trial.

Part of Lehrke's defense was that the victim's father was behind the accusation. He considered proving the father told police Lehrke attempted to take a shower with Tom Spaeth's niece. (R.255:10; 261:28.) The court ruled counsel must first confront before calling Spaeth as a witness to testify that he had not told that to victim's father. (R.255:10-11; 261:29.) The accusation was mentioned near the beginning of the interrogation and again later. (R.255:10-11.) The parties agreed to stop the video at one hour, 18 minutes. (R.255:11-13.) That eliminated the second reference. (R.255:11-12.)

During Lehrke's confession, he stated that his father and grandfather were sex offenders. (R.Ex.2, 5/12/16:60-62.) The comment in question here lasted approximately 30 seconds. (R.Ex.1, 57:00-57:30.) Lehrke had already admitted to having the victim grasp his penis. (R.Ex.2, 5/12/16:53-58.)

Lehrke and his mother testified Lehrke had ACL surgery on November 28, 2012. (R.257:26, 64.) He engaged in an exercise program in which he bent his knee more and more each week. (R.257:67; 258:8.) He denied he could kneel down at the time of the assault. (R.258:8.)

At the beginning of the second day of trial, the State moved the court to prohibit the defense from asking the

victim's father about his conduct when the SANE nurse examined the victim. (R.256:5-6.) That conduct was documented in a report. (R.256:6.) Defense counsel made an offer of proof that included statements by the victim's father that Lehrke's mother protected Lehrke, that he and the victim were there solely for an examination of her rectum and vagina, and he became angry when told the victim's external genitalia appeared normal. (R.256:9-10.)

The circuit court ruled that the father's conduct was not relevant to whether he had coached or persuaded the victim to accuse Lehrke. (R.256:11-12.) The court indicated it would allow the defense to use the report if the father denied saying that Lehrke's mother protects him. (R.256:12.) The court also indicated the defense could admit the result of the exam: "[the] external genitalia appears normal." (R.256:13.) The parties redacted the report limited to the result. (R.256:13-17.)

At trial Dr. Brian Stress, a psychologist who performed IQ testing and achievement testing on Lehrke, (R.256:27-33), testified Lerhke scored a verbal IQ of 71. (R.256:37.) His full scale IQ is 73. (R.256:38.) His reading ability is low but above impaired, about fourth-grade level. (R.256:41-42.) His comprehension is about sixth-grade level. (R.256:42.) These tests measure Lerhke's academic abilities. (R.256:43-44.) Amanda Grace Turner, a special education teacher and Lehrke's case manager in high school, (R.256:47-48, 53), testified that he had trouble remembering information. (R.256:56.) He would indicate he understood when he may or may not actually understand. (R.256:57.)

In his closing argument, the prosecutor referred to his own shoulder surgery; he stated "you're pretty limited, but two months out, the limitations aren't anywhere near what they used to be." (R.258:50.) The prosecutor argued Lehrke

never brought up his ACL surgery during his interrogation. (R.258:49-50.) The prosecutor also made a comment about professional athletes' rehabilitation. (R.258:50.) Immediately after the professional athlete comment, the prosecutor stated that Lehrke had two months to recover from the surgery. He could bend his knee more and more as time went on. (R.258:50-51.) The prosecutor also described an ACL. (R.258:51.)

In arguing that the victim had been truthful, the prosecutor told the jury,

> how do we know [the victim's] telling the truth about what occurred? The thing you have to remember is you have to judge her as a six-year-old, now eight-year-old. So okay, think is she telling me things a six-year-old would be able to tell if she was -- if she was making them up? I would say no.

(R.258:33.)

Near the end of defense counsel's closing argument he referred to the Bill of Rights and due process, claiming "that's what we have going on here today." (R.258:74.) He then told the jury "a very learned circuit court judge told me . . . where the constitution gets put to work on a daily basis is in the county courtrooms, and a lot of that work is done by people like you." (R.258:74.)

In the prosecutor's rebuttal argument, he stated that he agreed with defense counsel that the best justice is done in the courtroom. (R.258:86.) He also stated the victim deserved justice and that her offender be held accountable. (R.258:86.) He stated:

> I would say the evidence, taken as a whole . . . show[s] that the justice that should be given here is to that young six-year-old that gets up there and tells all the

> gory details that she can remember about how the defendant puts his penis on her buttocks and applies pressure that causes her pain.

(R.258:86.)

Lehrke failed to object to the prosecutor's comments or to move for a mistrial during the State's closing argument. (R.261:48.)

STANDARD OF REVIEW

In reviewing constitutional questions, appellate courts uphold a circuit court's factual findings unless clearly erroneous, but "independently determine whether those facts meet the constitutional standard." *State v. Samuel*, 2002 WI 34, ¶15, 252 Wis.2d 26, 643 N.W.2d 423 (citations omitted).

A circuit court's decision to admit or exclude evidence is reviewed for an erroneous exercise of discretion. *State v. Ford*, 2007 WI 138, ¶30, 306 Wis.2d 1, 742 N.W.2d 61. That standard also applies to expert testimony. *State v. Shomberg*, 2006 WI 9, ¶10, 288 Wis.2d 1, 709 N.W.2d 370.

Appellate courts independently review the record to determine whether a plain error affected the defendant's substantial rights. *Virgil v. State*, 84 Wis.2d 166, 189, 267 N.W.2d 852 (1978).

"[A]n ineffective assistance of counsel claim presents a mixed question of fact and law." *State v. Champlain*, 2008 WI App 5, ¶19, 307 Wis.2d 232, 744 N.W.2d 889. This Court reviews a postconviction court's findings of fact for clear error; it reviews whether counsel was constitutionally ineffective de novo. *Id.*

ARGUMENT

I. The circuit court correctly held that Lehrke waived his *Miranda* rights.

The State has the burden under *Miranda*[3] to show that the defendant was advised of his or her constitutional rights, that he or she understood them, and that he or she intelligently waived them. The State must prove a voluntary and an intelligent waiver of *Miranda* rights.

To satisfy its burden, the State must establish a prima facie case of voluntary waiver. The State meets that burden by establishing "that defendant has been told or has read all the rights and admonitions required in *Miranda*, and the defendant indicates he understands them and is willing to make a statement." *State v. Mitchell*, 167 Wis.2d 672, 687, 482 N.W.2d 364 (1992) (citing *State v. Hernandez*, 61 Wis.2d 253, 259, 212 N.W.2d 118 (1973)). In the absence of countervailing evidence that a defendant did not knowingly and intelligently waive *Miranda* rights, the statement should be admitted into evidence. *State v. Santiago*, 206 Wis.2d 3, 28-29, 556 N.W.2d 687 (1996).

The circuit court found that the State established a prima facie case that Lehrke was told his rights and indicated that he understood them. (R.240:5-6.) The record supports the circuit court's finding. Detective Kleinhans read Lehrke his *Miranda* rights. (R.Ex.2, 5/12/16:5-6.) Lehrke indicated he understood his rights. (R.Ex.2, 5/12/16:6.)

Lerhke argues that his waiver was invalid because Detective Kleinhans read the warnings fast, Lehrke has a low IQ, and that the exchange between him and detective

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966)

Kleinhans after he stated he understood his rights was not a waiver. Lehrke contends that, "Yeah, I want to know what's going on," (R.Ex.2, 5/12/16:6), was not an agreement to waive his rights and give a statement. And coupled with the fast reading and low IQ, Lehrke argues the result was an unknowing and unintelligent waiver. (Lehrke's Br. 9-11.)

The interchange to which Lehrke refers occurred after Lehrke clearly indicated he understood his rights. Detective Kleinhans' response to Lehrke's request to repeat the "last two things you said," (R.Ex.2, 5/12/16:6), was not misleading as Lehrke claims. Kleinhans' statement merely explained that he was going to question Lehrke in an attempt to uncover the truth.

Nor was it necessary for Lehrke to expressly state he agreed to answer questions. "It is not constitutionally required that a defendant either orally or in writing expressly waive his rights to counsel or to remain silent. Silence coupled with . . . conduct consistent with waiver may support the finding of a valid waiver." *State v. Woods*, 117 Wis.2d 701, 720, 345 N.W.2d 457 (1984). Our supreme court found that a defendant who demonstrated a willingness to talk once the interview began waived his *Miranda* rights. *State v. Ward*, 2009 WI 60, ¶54, 318 Wis.2d 301, 767 N.W.2d 236.

Here, Lehrke's statement, "I want to know what's going on," demonstrated his willingness to answer Kleinhans' questions. Moreover, during the entire interview, which lasted more than an hour and a half, Lehrke never told Detective Kleinhans he did not want to answer questions and never refused to respond to a single question. His conduct exhibited a willingness to participate in questioning.

To the extent that Lehrke claims his waiver was involuntary, the standard for a voluntary waiver of *Miranda*

rights is the same as for a voluntary statement. *See State v. Hambly*, 2008 WI 10, ¶¶93-95, 307 Wis.2d 98, 745 N.W.2d 48 (analyzing the voluntary nature of a *Miranda* waiver). The State will address the voluntary nature of Lehrke's statement in the next argument point.

II. The circuit court correctly held that Lehrke's confession was voluntary.

The Fifth and Fourteenth Amendments require "that a confession be voluntary to be admitted into evidence." *Dickerson v. United States*, 530 U.S. 428, 433 (2000). A defendant's statements are voluntary if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist. *State v. Clappes*, 136 Wis.2d 222, 236, 401 N.W.2d 759 (1987); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973) (A confession is voluntary if it is the product of a free and unconstrained choice.).

Courts consider the totality of the circumstances in determining whether a defendant's statements are voluntary. *Clappes*, 136 Wis.2d at 236; *Bustamonte*, 412 U.S. at 226. Courts balance the personal characteristics of the defendant against the pressures imposed by law enforcement officers. *Clappes*, 136 Wis.2d at 236. The relevant personal characteristics of the defendant include the defendant's age, education and intelligence, physical and emotional condition, and prior experience with law enforcement. *Id.* The personal characteristics are balanced against the police pressures and tactics which were used to induce the statements, such as: the length of the questioning, any delay in arraignment, the general conditions under which the statements took place,

any excessive physical or psychological pressure brought to bear on the defendant, any inducements, threats, methods or strategies used by the police to compel a response, and whether the defendant was informed of the right to counsel and right against self-incrimination. *Id.* at 236-37.

Coercive or improper police conduct is a necessary prerequisite for finding a confession involuntary. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986); *Clappes*, 136 Wis.2d at 239. There must be an "essential link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other." *Connelly*, 479 U.S. at 165. "[V]oluntariness . . . has always depended on the absence of police overreaching, not on 'free choice' in any broader sense of the word. *Connelly*, 479 U.S. at 170. "[V]ery few incriminating statements, custodial or otherwise, are held to be involuntary, though few are the product of a choice that the interrogators left completely free." *United States v. Rutledge*, 900 F.2d 1127, 1129 (7th Cir. 1990).

"[C]oercion can be mental as well as physical," *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960), but only techniques that "overcome the defendant's free will" are prohibited, such as "psychological intimidation," *United States v. Dillon*, 150 F.3d 754, 757 (7th Cir. 1998), or "outright fraud," *Hadley v. Williams*, 368 F.3d 747, 749 (7th Cir. 2004). Short of that, the police are allowed "to pressure and cajole, conceal material facts, and actively mislead." *Rutledge*, 900 F.2d at 1131. "[M]erely telling somebody to tell the truth is not coercive." *Etherly v. Davis*, 619 F.3d 654, 663 (7th Cir. 2010). Police officers are permitted to suggest that the suspect will reap a "net benefit" so long as they do not make specific promises of leniency that amount to outright "fraud." *Rutledge*, 900 F.2d at 1130-31; *Etherly*, 619 F.3d at 663-64 (police did not promise a "specific benefit . . . in exchange for [ ] cooperation"). Other factors that cut against a finding of

psychological coercion include the police giving *Miranda* warnings, *Missouri v. Seibert*, 542 U.S. 600, 608-09 (2004) (plurality opinion), and the suspect correcting police suggestions. *Lyons v. Oklahoma*, 322 U.S. 596, 605 (1944).

Courts also look to the content of a confession for evidence of voluntariness. Because the ultimate question is whether police conduct "overb[ore] petitioner's will to resist," *Rogers v. Richmond*, 365 U.S. 534, 544 (1961), a suspect's demonstrated ability to resist police questions even after confessing "strongly suggests" that a person's will was not overborne. *See Minnesota v. Murphy*, 465 U.S. 420, 438 (1984). Thus, a statement is more likely to be found voluntary when "answers to [police] questions . . . contain statements correcting and supplementing the questioner's information and do not appear to be mere supine attempts to give the desired response to leading questions." *Lyons*, 322 U.S. at 605.

The circuit court concluded Lehrke's statement was "voluntarily and freely made without coercion or undue pressure by law enforcement. (R.240:9.) A review of the recorded interrogation video strongly supports the circuit court's conclusion.

The interrogation took approximately 99 minutes. (R.240:7.) The court observed, "That's not a long period of time for a police interrogation." (R.240:8.) Lehrke had been incarcerated less than 24 hours. (R.240:8.) Lehrke was not denied any outside communication, no threats were made, and there was no physical abuse. (R.240:8.) The court did not detect any coercion on the part of law enforcement and the conditions of the interrogation did not imply coercion. (R.240:8.) The court found no promises of leniency. (R.240:8.) There was no showing Lehrke wanted or needed food or water, there was nothing unusual about his physical condition, he did not demonstrate any emotional distress or

discomfort, there was no indication that he was deprived of sleep and no indication he was under the influence of alcohol or drugs at the time of the interrogation. (R.240:8.) The circuit court stated, "[t]he only promise that was made that I heard was that the officer said he would relate to the district attorney's office Mr. Lehrke was cooperative." (R.240:6-7.)

Lehrke was handcuffed and shackled, but he did not complain about any discomfort, or request to be uncuffed or unshackled. (R.240:8.) The video fully supports all of the circuit court's findings.

Lehrke first asked about possible prison time approximately 45 minutes into questioning. (R.Ex.2, 5/12/16:49.) Shortly thereafter, Lehrke stated, "I didn't stick it inside her butthole or whatever." (R.Ex.2, 5/12/16:51.) The next 45 minutes or so consisted of Detective Kleinhans probing for additional details. Eventually, Lehrke admitted to rubbing his penis on the victim's leg. (R.Ex.2, 5/12/16:66.) And later he admitted to touching his penis to the victim's buttocks. (R.Ex.2, 5/12/16:77.) This latter admission is particularly noteworthy because Detective Kleinhans suggested that he touched the victim's vagina and rectum. (R.Ex.2, 5/12/16:77.) Lehrke consistently denied touching his penis to the victim's vagina, or to the victim's rectum. (R.Ex.2, 5/12/16:68, 75-77, 80, 83.) He did admit to touching her rectum with his finger. (R.Ex.2, 5/12/16:79.)

It is true, as Lehrke points out, that detectives urged Lehrke to be honest. Detective Kleinhans also told Lehrke several times that cooperation would benefit him. Such statements by law enforcement do not create compelling pressures which undermine an individual's will to resist. *State v. Cydzik*, 60 Wis.2d 683, 692, 211 N.W.2d 421 (1973); *see also See United States v. Nash*, 910 F.2d 749, 753 (11th Cir. 1990) ("[T]elling the defendant in a noncoercive manner

of the realistically expected penalties and encouraging him to tell the truth is no more than affording him the chance to make an informed decision with respect to his cooperation with the government.") (citation omitted).

It is also true that detective Kleinhans stated several times "kids can't make some of this stuff up," (R.Ex.2, 5/12/16:41-42), and that he believed the victim, (R.Ex.2, 5/12/16:42). "An officer may express dissatisfaction with a defendant's responses during an interrogation. The officer need not sit by and say nothing when the person provides answers of which the officer is skeptical." *State v. Deets*, 187 Wis.2d 630, 636, 523 N.W.2d 180 (Ct. App. 1994). Accusing a suspect of lying is not an improper police tactic. *State v. Owen*, 202 Wis.2d 620, 642, 551 N.W.2d 50 (Ct. App. 1996). The same is true for expressing a belief that a victim has been truthful in reporting to police.

Lehrke emphasizes his learning disability, arguing that "pressures that are not coercive in one set of circumstances may be coercive in another set of circumstances if the defendant's condition renders him or her uncommonly susceptible to police pressures." *In re Jerrell C.J.*, 2005 WI 105, ¶19, 283 Wis.2d 145, 699 N.W.2d 110 (citation omitted). At trial, Dr. Stress, testified Lerhke scored a verbal IQ of 71. (R.256:37.) His full scale IQ is 73. (R.256:38.) His reading ability is low but above impaired, about fourth-grade level. (R.256:41-42.) But his comprehension is about-sixth grade level. (R.256:42.) These tests measure Lerhke's academic abilities (R.256:43-44.) They say nothing about his will to resist questioning or what pressures will overbear his will. Amanda Grace Turner, a special education teacher and Lehrke's case manager in high school, (R.256:47-48, 53), testified that he had trouble remembering information. (R.256:56.) He would indicate he understood when he may or may not actually understand. (R.256:57.) But she also

testified he could remember things with follow up and probing. (R.256:60-61.) That is what detectives did here.

While Lehrke may have had difficulty remembering or communicating the incident, nothing demonstrates that his will to resist was overcome. To the contrary, Lehrke constantly resisted any suggestion of penetration. Absent coercion, Lehrke's low IQ and learning disability do not render his confession involuntary. *See Shawn B.N. v. State*, 173 Wis.2d 343, 365, 497 N.W.2d 141 (Ct. App. 1992) (absent coercion, fact that juvenile was thirteen years old and claimed to be emotionally disturbed does not make statements involuntary).

Since Detective Kleinhans did not use any improper police practices overbearing Lehrke's will to resist, the circuit court correctly found his confession voluntary.

III. The circuit court did not erroneously exercise its discretion or deny Lehrke his right to present a defense in barring Dr. Leo's testimony.

A. *Daubert* did not change the standard of review for the admission of expert testimony.

Wisconsin appellate courts review a circuit court's decision to admit or exclude evidence under an erroneous exercise of discretion standard. *State v. Ford*, 2007 WI 138, ¶30, 306 Wis.2d 1, 742 N.W.2d 61. That standard also applies to expert testimony. *State v. Shomberg*, 2006 WI 9, ¶10, 288 Wis.2d 1, 709 N.W.2d 370.

Lehrke contends that the 2011 amendment to Wis. Stat. § 907.02 changed the standard of review for expert opinions. He relies on the Wisconsin Supreme Court's recent case,

Seifert v. Balink, 2017 WI 2, ¶89, 372 Wis.2d 525, 888 N.W.2d 816. Lehrke's reliance on *Seifert* is misplaced. He cites to the lead opinion for the proposition that review is now de novo. (Lehrke's Br. 18-19.) But the lead opinion garnered only two votes. Justice Ziegler's concurrence did not use de novo review. "The circuit court did not "appl[y] an improper legal standard or make[ ] a decision not reasonably supported by the facts of record" in admitting [the evidence at issue.]" *Id.* ¶170 (Ziegler, J. concurring) (first and second alteration in original) (citing *118th St. Kenosha, LLC v. DOT*, 2014 WI 125, ¶18, 359 Wis.2d 30, 856 N.W.2d 486). Justice Gableman joined by Justice Roggensack explicitly stated, "[W]hile *Daubert* has imposed change in some areas of the law concerning expert testimony, it has not changed the standard of review in such cases." *Id.* ¶216 (Gableman, J. concurring). Justice Kelly's dissent joined by Justice Rebecca Bradley, did not address the standard of review at all.

Daubert did not change this standard. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 138-39 (1997); *see also Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 142 (1999). This Court has on four occasions used erroneous exercise of discretion in deciding expert opinion admissibility under the new version of the statute: first, in *State v. Giese*, 2014 WI App 92, ¶16, 356 Wis.2d 796, 854 N.W.2d 687 (citing *Shomberg* and *General Electric*); second, in this Court's *Seifert* decision relying on *Giese*; *Seifert v. Balink*, 2015 WI App 59, ¶15, 364 Wis.2d 692, 69 N.W.2d 493, *aff'd*, 2017 WI 2, 372 Wis.2d 525, 888 N.W.2d 816; third, in *State v. Chitwood*, 2016 WI App 36, ¶29, 369 Wis.2d 132, 879 N.W.2d 786 (citing *Giese* and *Kumho Tire*); and fourth in *State v. Smith*, 2016 WI App 8, ¶4, 366 Wis.2d 613, 874 N.W.2d 610 (citing *Giese).* This Court is bound to use the erroneous exercise of discretion standard.

B. The circuit court did not misuse its discretion in excluding Dr. Leo's testimony.

Wisconsin Stat. § 907.02 governs the admission of expert testimony. *Giese*, 356 Wis.2d 796, ¶17. Prior to 2011, that statute made expert testimony admissible "if the witness [was] qualified to testify and the testimony would help the trier of fact understand the evidence or determine a fact at issue." *State v. Kandutsch*, 2011 WI 78, ¶26, 336 Wis.2d 478, 799 N.W.2d 865. In January 2011, the legislature amended section 907.02 to make Wisconsin law on expert testimony consistent with "the *Daubert* reliability standard embodied in Federal Rule of Evidence 702." *Giese*, 356 Wis.2d 796, ¶17 (quoting *Kandutsch*, 336 Wis.2d 478, ¶26 n.7).

Amended Wis. Stat. § 907.02(1) provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

Wis. Stat. § 907.02(1) (2013-14).

Under the new section 907.02, the circuit court performs a "gate-keeper function . . . to ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues." *Giese*, 356 Wis.2d 796, ¶18. The court must focus on the principles and methodology the expert relies upon, not on the conclusion generated. *Id.*; *see also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993). The standard envisions a "flexible" inquiry "to prevent the jury from hearing conjecture dressed up in the guise of

expert opinion." *Giese*, 356 Wis.2d 796, ¶19. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded. Fed. R. Evid. 702 advisory committee notes (2000 amendments) (Rule 702 committee note).[4]

Federal Rule 702 envisions a "flexible" inquiry by the trial judge, who is charged with "the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert*, 509 U.S. at 594, 597. *Daubert* mentions a list of factors meant to be helpful, not definitive. *Kumho Tire*, 526 U.S. at 151. *See also* (Rule 702 committee note) ("No attempt has been made to 'codify' [the] factors. *Daubert* itself emphasized that the factors were neither exclusive nor dispositive.").

Expert testimony must also assist the trier of fact to understand the evidence or determine a fact at issue in the case. Wis. Stat. § 907.02(1). Expert testimony is not necessary to assist the trier of fact concerning matters of common knowledge or those within the realm of ordinary experience. *Racine Cty. v. Oracular Milwaukee, Inc.*, 2010 WI 25, ¶28, 323 Wis.2d 682, 781 N.W.2d 88. If "everything that the expert would testify to . . . is within the common knowledge and sense and perception of the jury," the trial court does not erroneously exercise its discretion by refusing to admit such expert evidence. *Shomberg*, 288 Wis.2d 1, ¶13 (citation omitted).

Even if expert testimony is admissible under Wis. Stat. § 907.02, it may still be excluded if its "probative value of the evidence is substantially outweighed by the danger of . . . ,

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[4] In 2000, Federal Rule 702 was amended to codify the trilogy of Supreme Court cases *Daubert*, *General Elecric*, and *Kumho Tire*.

confusion of the issues, or misleading the jury." Wis. Stat. § 904.03; *State v. Richardson*, 210 Wis.2d 694, 708, 563 N.W.2d 899 (1997).

The circuit court properly excluded Dr. Leo's testimony because it would not assist the jury and would mislead them. The circuit court recognized that Dr. Leo had extensive experience in false confessions, found his research methods valid and that his research has identified risk factors for false confessions. (R.249:45-46.) Dr. Leo's research had been subjected to some peer review. (R.249:48-49.) But Dr. Leo could not give the jury any objective method to accurately predict whether Lehrke's confession was true or false. (R.249:49-50.) Without research that gives the jury objective predictive values, the court concluded Dr. Leo's testimony would encourage the jury to speculate. (R.249:50.)

The court reasoned that the testimony would not assist the jury. The record supports the circuit court's conclusion. Dr. Leo admitted that the percentage of false confessions of all confessions is unknown. (R.248:29.) He did not testify to any probability that Lehrke's confession was false. He testified he could not give a probability of whether a particular confession is true or false. (R.248:36.) And, even if one knew the general probability for false confessions with any given police technique, that probability would still not tell the jury whether this particular confession is true or false. (R.248:37.) As the court concluded, this testimony encourages speculation.

The circuit court also found that Dr. Leo had done no research in predicting whether a particular confession is true or false. (R.249:48.) Despite the validity of Dr. Leo's principles, their predictive value is unknown. (R.249:49.) Therefore, Dr. Leo's research is "of limited value in deciding

whether a particular confession is accurate or inaccurate. (R.249:48.)

In addition, the circuit court found that if the jury was aware of Lehrke's limited intellectual abilities and his youth, it would consider that his confession might be false. (R.249:51.) The court concluded the jury's common experience with children would indicate young people can make false statements. (R.249:51-52.)

These conclusions find support in decisions from other states upholding the exclusion of Dr. Leo's testimony. In *People v. Kowalsk*, 821 N.W.2d 14 (Mich. 2012), the trial court criticized Dr. Leo's methodology because it failed to identify factors that contribute to false confessions but do not contribute to true confessions. *Id.* at 22. The Michigan Supreme Court agreed. "The unreliable methodology, as the circuit court described, resulted in conclusions consistent with Leo's own preconceived beliefs rather than testable results consistent with an objective, scientific process." *Id.* at 32.

The fact that police tactics may or may not cause false confessions formed one basis for the Washington Court of Appeals to affirm the trial court's rejection of Dr. Leo's false confession testimony. In *State v. Rafay*, 285 P.3d 83 (Wash. Ct. App. 2012), the court noted that the record in that case, as here, was silent as to any "specific correlation -- statistical or otherwise -- between coercive interrogation methods and the likelihood of an unreliable or false confession in any particular case." *Id.* at 111. The *Rafay* court also observed, "[Dr.] Leo's testimony about the risk factors of false confessions would have been highly speculative and provided the jury with scant assistance in evaluating [the case]." *Id.* at 110.

In *State v. Vent*, 67 P.3d 661 (Alaska Ct. App. 2003), the Alaska Court of Appeals observed that "[m]any of the tactics used by police that create false confessions typically result in true confessions as well." *Id.* at 670. The court affirmed the trial court's exclusion of Dr. Leo's testimony.

In *People v. Polk*, 942 N.E.2d 44 (Ill. Ct. App. 2010), the Illinois Court of Appeals rejected Dr. Leo's testimony in a case involving a defendant with an IQ of 70. *Id.* at 64. The court concluded that since the jury heard testimony about the defendant's low IQ, his education and intellectual performance, the conditions of the interrogation and viewed the defendant's videotape statement, the jury could decide the issue of the reliability of the defendant's statements without Dr. Leo's testimony. *Id.* And in *State v. Davis*, 32 S.W.3d 603 (Mo. Ct. App. 2000), the Missouri Court of Appeals affirmed the circuit court's exclusion of Dr. Leo's testimony because the "jury [was] capable of understanding the reasons why a statement may be unreliable; therefore, the introduction of expert testimony would be 'a superfluous attempt to put the gloss of expertise . . . upon inferences which lay persons were equally capable of drawing from the evidence.'" *Id.* at 609 (citation omitted).

Lehrke points to cases permitting false confession expert testimony in other states. (Lehrke's Br. 20, 23.) Given that these states use an erroneous exercise (or abuse) of discretion standard of review, it is not surprising there is a split in the states whether false confession testimony is admissible. The question before this Court, however, is whether the circuit court's exclusion of Dr. Leo's testimony considered the appropriate law, the facts of record, and reached a reasonable decision. The fact that other jurisdictions agree with the circuit court's conclusions demonstrates that the court's decision is a reasonable one.

Lehrke claims the circuit court misapplied *Daubert*. He cites *State v. St. George*, 2002 WI 50, ¶69, 252 Wis.2d 499, 643 N.W.2d 777. *St. George* does not control here for three reasons. First, it is a pre-*Daubert* case. Second, and more importantly, Lehrke ignores the fact that the testimony of the expert in *St. George* involved statistics, a subject not within the common knowledge of many jurors and which say nothing about whether most jurors realize a young person of low or limited intellect is more susceptible to giving a false statement. And third, *St. George* involved a recantation. It did not involve police techniques or whether police somehow coerced the speaker to falsely admit to something.

Finally, the circuit court properly found that Dr. Leo's testimony would confuse or mislead the jury. Dr. Leo testified the primary techniques identified by his research that raise the risk of a false confession are a lengthy interrogation or sleep deprivation, false evidence ploys, minimization, implied or explicit promises, and implied or explicit threats. (R.248:19, 34, 43.) These factors are virtually identical with the factors bearing on whether a confession is voluntary. In Wisconsin, the question of whether a confession is voluntary is solely for the judge; whether a confession is truthful is solely for the jury. *State ex rel. Goodchild v. Burke*, 27 Wis.2d 244, 258, 133 N.W.2d 753 (1965).

The almost identical nature of Dr. Leo's factors and the factors that bear on voluntariness might well lead a jury to conclude that they must determine whether Lehrke's confession was voluntary. Or, perhaps, they would disregard the confession because they believed it to be involuntary even if they thought it to be true. The circuit court's concern that the jury might embark on the wrong inquiry or speculate was a reasonable one.

For all these reasons, the circuit court did not misuse its discretion in excluding Dr. Leo's testimony.

C. The exclusion of Dr. Leo's testimony did not deny Lehrke the right to present a defense.

The Confrontation Clause and the Compulsory Process Clause together grant the defendant a constitutional right to present a defense. *See State v. Pulizzano*, 155 Wis.2d 633, 645, 456 N.W.2d 325 (1990) (citing *Chambers v. Mississippi*, 410 U.S. 284, 294-95 (1973)). The Supreme Court has observed, however, "[t]he accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996) (alteration in original) (citing *Taylor v. Illinois*, 484 U.S. 400, 410 (1988)). Rules excluding evidence do not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve. *United States v. Scheffer*, 523 U.S. 303, 308 (1998). The Court has "found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused." *Id.*

Whether exclusion of particular evidence denied a defendant the right to present a defense requires a reviewing court to determine whether the proffered evidence was "essential to" the defense, and whether without the proffered evidence, the defendant had "no reasonable means of defending his case." *State v. Williams*, 2002 WI 58, ¶70, 253 Wis.2d 99, 644 N.W.2d 919 (quoting *State v. Johnson*, 118 Wis.2d 472, 480, 348 N.W.2d 196 (Ct. App. 1984)).

Lehrke does not argue the rules of evidence that the circuit court relied on here are arbitrary or disproportionate. He relies instead on the two-part framework established in

State v. St. George. It is noteworthy that *Williams* was decided shortly after *St. George*. *Williams* does not go through *St. George*'s two-step analysis. Rather, it focuses only on whether the excluded evidence was essential to Williams' defense and left him with no reasonable means of defending his case. *Williams*, 253 Wis.2d 99, ¶¶71-73.

Here, Lehrkey cannot establish that Dr. Leo's testimony was essential to his defense nor that he had no reasonable means of defending his case. He had other reasonable means of presenting his theory that his confession was false. The circuit court allowed him to present the testimony of Dr. Stress and Amanda Turner to establish his limited intellectual ability. The victim, the interrogating police detective, and Lehrke testified. The jury viewed recordings of both the victim and Lehrke. The circuit court placed no restrictions on arguing his confession was false. Lehrke's counsel argued that the confession was false because of the police tactics. (R.258:57-65.)

Further, even if this court uses the *St. George* analysis, Lehrke cannot succeed. Lehrke cannot satisfy the first factor; as demonstrated above Dr. Leo's testimony does not meet the requirements of Wis. Stat. § 907.02. And he also cannot meet the fourth factor; the circuit court correctly held Dr. Leo's testimony would mislead the jury.

IV. The circuit court did not erroneously exercise its discretion when it excluded all of the SANE report except the result of the physical examination.

Hearsay is not admissible except as provided by the rules of evidence. Wis. Stat. § 908.02; *State v. Beauchamp*, 2011 WI 27, ¶13 n.15, 333 Wis.2d 1, 796 N.W.2d 780. "'Relevant evidence' means evidence having any tendency to

make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Wis. Stat. § 904.01; *In re Commitment of Talley*, 2017 WI 21, ¶52.

Lehrke claims the SANE report was admissible hearsay as a statement made for the purpose of medical diagnosis or treatment. Wis. Stat. § 908.03(4). He is wrong.

Wisconsin Stat. § 908.03(4) (2015-16) provides:

> Hearsay exceptions; availability of declarant immaterial. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

The plain language of the statute requires statements. In Lehrke's offer of proof, however, he sought to introduce mostly documentation of the victim's father's conduct. The description of the father's angry reaction or his destruction of paperwork does not fall within the plain language of the exception because the documented conduct is neither a statement intended as an assertion nor did the conduct describe a medical history, past or present symptoms, pain or sensations, or the cause or external source of the victim's injury. Wis. Stat. §§ 908.01(1), 908.03(4).

As to the father's verbal statements, a parent's statements to medical professionals fall within this exception

if they otherwise meet section 908.03(4)'s requirements. *State v. Huntington*, 216 Wis.2d 671, 694, 575 N.W.2d 268 (1998). But statements concerning Lehrke's mother or the purpose of the visit to the hospital do not fall within the enumerated purposes the rule identifies. The father's statements were not of past or present symptoms. They did not describe pain. Nor did they bear on the cause of the injury.

Moreover, if the circuit court correctly determined the statements were not relevant to Lehrke's theory of defense, they were relevant only to credibility. Specific instances of conduct are proper cross-examination to demonstrate lack of credibility, but extrinsic evidence, such as the report here, is barred by Wis. Stat. § 906.08(2). *State v. Selders*, 163 Wis.2d 607, 619, 472 N.W.2d 526 (Ct. App. 1991).

Finally, the victim's statement that she didn't know why she was at the hospital, which might qualify as a statement for medical diagnosis cannot save the entire report. Lehrke never mentioned the statement in his offer of proof. He did not make a limited offer regarding the victim's statement.

V. The prosecutor's closing argument was not plain error.

Lehrke failed to object to the prosecutor's comments or to move for a mistrial during the State's closing argument. (R.261:48.) He thus has forfeited a review of this challenge on the merits. *State v. Miller*, 2012 WI App 68, ¶17, 341 Wis.2d 737, 816 N.W.2d 331 (citing *State v. Saunders*, 2011 WI App 156, ¶29 n.5, 338 Wis.2d 160, 807 N.W.2d 679). He may directly raise this claim only as plain error. Wis. Stat. § 903.01(4); *State v. Cameron*, 2016 WI App 54, ¶11, 370 Wis.2d 661, 885 N.W.2d 611.

Plain error is error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time. *State v. Jorgensen*, 2008 WI 60, ¶21, 310 Wis.2d 138, 754 N.W.2d 77. The error, however, must be obvious and substantial. When a defendant claims that a prosecutor's statements in closing argument constituted plain error, the test is whether, in the context of the entire record of the trial, the statements "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Davidson*, 2000 WI 91, ¶88, 236 Wis.2d 537, 613 N.W.2d 606 (citation omitted). Courts should use the plain error doctrine sparingly. *Cameron*, 370 Wis.2d 661, ¶11 (citing *Jorgensen*, 310 Wis.2d 138, ¶¶21-22). This Court has said that a prosecutor "should be allowed considerable latitude in closing argument." *State v. Wolff*, 171 Wis.2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992).

Lehrke claims the prosecutor committed plain error during his closing argument. In closing, a prosecutor may "comment on the evidence, detail the evidence, argue from it to a conclusion, and state that the evidence convinces him or her and should convince the jurors." *Miller*, 341 Wis.2d 737, ¶20 (citing *State v. Adams*, 221 Wis.2d 1, 19, 584 N.W.2d 695 (Ct. App. 1998)). "[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements . . . must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." *Wolff*, 171 Wis.2d at 168 (alterations in original) (citing *United States v. Young*, 470 U.S. 1, 11 (1985)).

Lehrke relies on three statements: (1) the prosecutor's referral to his own shoulder surgery; (2) the prosecutor's vouching for the victim; (3) the prosecutor's urging the justice of the victim's cause. (Lehrke's Br. 32-40.)

A. The shoulder surgery comment.

Lehrke and his mother testified Lehrke had ACL surgery on November 28, 2012. (R.257:26, 64.) Lehrke testified he could not kneel. (R.257:66-67; 258:8.) He engaged in an exercise program in which he bent his knee more and more each week. (R.257:67; 258:8.) But he denied he could kneel down two months after his surgery. (R.258:8.)

Lehrke quotes the prosecutor's reference to his own shoulder surgery indicating the first couple of weeks "you're pretty limited, but two months out, the limitations aren't anywhere near what they used to be." (R.258:50.) The prosecutor made a comment about professional athlete's rehabilitation. (R.258:50.) Lehrke also refers to the prosecutor's description of ACL's. (R.258:51.)

Lehrke takes the prosecutor's comments out of context. The prosecutor anticipated Lehrke's argument that he could not commit the assault because he could not kneel down. (R.258:48-49.) The prosecutor was arguing that Lehrke's ACL surgery would not have prevented him from committing the assault. Immediately before the shoulder comment, the prosecutor argued Lehrke never brought up his ACL surgery during his interrogation. (R.258:49-50.) In his argument complaining about the professional athlete comment, Lehrke omits the prosecutor's statement that Lehrke has had two months to recover from the surgery and he could bend it more and more as time went on. (R.258:50-51.) The prosecutor here detailed the evidence and, using an analogy, argued to a conclusion that Lehrke's knee surgery did not prevent him from committing the crime as the victim described. Moreover, the facts to which the prosecutor referred were within the common knowledge of most jurors.

Lehrke relies on *State v. Smith*, 2003 WI App 234, 268 Wis.2d 138, 671 N.W.2d 854. The *Smith* court reversed a conviction finding ineffective assistance of counsel. Counsel failed to object to the State's closing argument when the prosecutor said he knew the police, they worked hard, performing long hours doing a tough job. *Id.* ¶12. There was no evidentiary basis for the officers' work habits or job demands or the prosecutor's knowledge of them. *Id.* ¶26. Here, Lerke testified on cross-examination he could bend his knee more and more as time passed. The prosecutor asked him about his physical therapy program. Unlike Smith, there was an evidentiary basis for the prosecutor's argument. Likewise, *Berger v. United States*, 295 U.S. 78 (1935), does not aid him. The cases provide quotable phrases but little guidance because of the pervasive and varied improprieties the prosecutor committed in that case.

B. Vouching for the victim.

A prosecutor "is permitted to comment on the credibility of witnesses as long as that comment is based on evidence presented." *Miller*, 341 Wis.2d 737, ¶20 (citation omitted).

Lehrke claims that the prosecutor "vouched" for the victim. He again takes the comments out of context. The prosecutor began the passage Lehrke quotes on page 37 of his brief by asking the jury,

> how do we know [the victim's] telling the truth about what occurred? . . . So okay, think is she telling me things a six-year-old would be able to tell if she was -- if she was making them up? I would say no.

(R.258:33.)

The jury had seen video of the victim's forensic interview. Almost all of the remarks Lehrke quotes from the

prosecutor referred directly to that forensic interview and the victim's testimony at trial. It is true that the prosecutor also referred to the victim remembering details provided by her father. But that was part of Lehrke's overall defense that her father got her to accuse Lehrke because he was jealous of him. Thus, the prosecutor's agument was appropriate.

C. The appeal to the justness of the victims cause.

Lehrke argues the prosecutor improperly appealed to the jury's sympathy for the victim when he argued in rebuttal argument that the victim "deserves justice." (R.258:86.) Lehrke equates the prosecutor's comments with the "golden rule" argument. "In a criminal case, a golden rule argument asks the jurors to place themselves in the victim's shoes." *State v. DeLain*, 2004 WI App 79, ¶23, 272 Wis.2d 356, 679 N.W.2d 562.

The prosecutor's remarks in this regard were an invited reply. In his closing, defense counsel referred to the Bill of Rights and due process. (R.258:74.) He then stated "a very learned circuit court judge told me . . . where the constitution gets put to work on a daily basis is in the county courtrooms, and a lot of that work is done by people like you." (R.258:74.)

The prosecutor's remark merely called the jury's attention to the fact that the Bill of Rights and the Constitution require that justice be done. And where the evidence establishes a defendant's guilt, justice requires he be convicted.

These comments all came at the end of the trial. The circuit court instructed the jury, "[r]emarks of the attorneys are not evidence. If the remarks suggested certain facts not in evidence, disregard that suggestion. (R.258:24.) "[O]nce the

jury has been properly instructed on the principles it must apply to find the defendant guilty beyond a reasonable doubt, a court must assume on appeal that the jury has abided by those instructions." *State v. Poellinger*, 153 Wis.2d 493, 507, 451 N.W.2d 752 (1990).

The prosecutor's remarks did not "so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process." *Davidson*, 236 Wis.2d 537, ¶88.

VI. Lehrke has not demonstrated ineffective assistance of counsel.

To prove a claim of ineffective assistance of counsel, a defendant must show that his lawyer performed deficiently and that this deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The standard for determining deficient performance is whether counsel's representation fell below objective standards of reasonableness. *State v. Carter*, 2010 WI 40, ¶22, 324 Wis.2d 640, 782 N.W.2d 695. To show prejudice, "the defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* ¶37 (citation omitted).

An attorney performs deficiently if he or she performs outside the range of professionally competent assistance, meaning the attorney's acts or omissions were not the result of reasonable professional judgment. *Strickland*, 466 U.S. at 690. However, "every effort is made to avoid determinations of ineffectiveness based on hindsight . . . and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." *State v. Johnson*, 153 Wis.2d 121, 127, 449 N.W.2d 845 (1990). Counsel's performance "need not be perfect, indeed not even

very good, to be constitutionally adequate." *State v. Thiel*, 2003 WI 111, ¶19, 264 Wis.2d 571, 665 N.W.2d 305.

A defendant satisfies his burden of proving the prejudice prong by showing that the attorney made errors of such magnitude that there is a reasonable probability that, absent the errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine the court's confidence in the outcome of the trial. *Id.* "The focus of this inquiry is not on the outcome of the trial, but on 'the reliability of the proceedings.'" *Thiel*, 264 Wis.2d 571, ¶20 (citation omitted).

A reviewing court may dispose of a claim of ineffective assistance of counsel on either deficient performance or prejudice. *Strickland*, 466 U.S. at 697.

Lehrke claims three instances where his attorney performed deficiently: (1) he failed to ask Dr. Stress his opinion on how Lehrke would function in certain settings given his low IQ; (2) he failed to request redaction or otherwise keep three portions of his video confession from the jury; and (3) he failed to object or move for a mistrial after three comments in the prosecutor's closing argument. (Lehrke's Br. 41-48.)

A. Lehrke has not demonstrated ineffective assistance on his claim concerning opinions from Dr. Stress.

At trial Dr. Stress, testified Lerhke scored a verbal IQ of 71. Lerhke's performance ability is in the lower eight percent and his full scale IQ is 73. (R.256:36-38.) Lehrke argues his trial counsel should have asked Dr. Stress's

opinion on how he would function in certain settings based on these IQ scores. (Lerhke's Br. 41.)

Trial counsel acknowledged that he had not asked Dr. Stress for an opinion on how Lerhke would comprehend his situation. (R.261:21.) Nor did he ask for an opinion of whether an observer can tell if a cognitively disabled person understands. (R.261:22.) Counsel testified that he was concerned the court would be vigilant about presenting false confession testimony after the court's exclusion of Dr. Leo. (R.261:23.) Since he did not want Dr. Stress's testimony excluded entirely, he stayed away from Lehrke's function and understanding because he thought the court would view it as backdooring false confession testimony. (R.261:25-27.)

In its ruling on Lerhke's postconviction motion, the court indicated it did indeed view these questions as backdooring false confession testimony. (R.261:98.) It further indicated it viewed the balance of the opinions as appropriate only after a *Daubert* analysis. (R.261:98.)

Dr. Stress testified he did not do a diagnostic interview. (R.256:45.) He could only testify in generalities. (R.256:46.) It is reasonable to infer that the circuit court would find his testimony, like Dr. Leo's, did not assist the jury. Wis. Stat. § 907.02(1). Lerhke's claim fails because an attorney could reasonably refrain from offering the opinions Lehrke suggests because counsel knew the particular court would sustain any objections. The idiosyncrasies of a court may play a part in a trial attorney's selection of strategies and thus affect the performance inquiry. *Strickland*, 466 U.S. at 695. This Court may not "second-guess a trial attorney's 'considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel.'" *State v. DeLain*, 2004 WI App 79, ¶20, 272 Wis.2d 356, 679 N.W.2d 562 (citation omitted). The circuit court correctly

found that trial counsel considered the matter under the law and made a reasonable tactical decision. (R.261:98.)

B. Lehrke has not demonstrated ineffective assistance on his claim concerning redacting his confession.

Lehrke argues his trial counsel was ineffective for failing to redact three things in his video confession: (1) the "false shower" accusation by the victim's father; (2) statements about Lehrke's grandfather and father; and (3) the detective's declarations that six-year-olds do not lie.

1. The shower accusation.

Lehrke's counsel was considering introducing evidence that the victim's father told police that Lehrke attempted to take a shower with Tom Spaeth's niece. (R.255:10; 261:28.) The court ruled counsel must first confront the victim's father before calling Spaeth as a witness to testify that he had not told that to the victim's father. (R.255:10-11; 261:29.) Detective Kleinhans asked Lehrke about the accusation twice during the interrogation. The accusation was mentioned near the beginning of the interrogation and again later. (R.255:10-11.) The parties agreed to stop the video at one hour, 18 minutes. (R.255:11-13.) That eliminated the second reference. (R.255:11-12.)

Counsel testified that he did not ask to redact the video because he was still considering whether he wanted to use the accusation to bolster his theory that the victim's father had it out for Lehrke and convinced his daughter to falsely accuse him. (R.261:32.)

The court held Lehrke was not prejudiced by the brief reference in the video. (R.261:101.) The State never made any

reference to the statement nor developed any argument regarding it. (R.261:101.) Additionally, Lehrke continuously denied he ever made such an statement. (R.255:11.) Detective Kleinhans accepted Lehrke's denial during the interrogation. The court did not send the video to the jury. (R. 255:12.)

Under these circumstances it is unlikely the reference to the accusation played any role in the jury's decision. Even if failing to move to redact the reference from the video amounted to deficient performance, it should not shake this courts confidence in the jury's decision.

2. The statements about Lehrke's grandfather and father.

During Lehrke's confession, he stated that his father and grandfather were sex offenders. (R.Ex.2, 5/12/16:61-62.) Lehrke correctly notes that his trial counsel did not think to request redaction of the statement. (R.262:35.) The circuit court correctly found that the reference to Lehrke's father and grandfather were trivial, insignificant, and not prejudicial. (R.261:102.)

The comment in question here lasted approximately 30 seconds. (R.Ex.1, 57:00-57:30.) Moreover, Lehrke had already admitted to having the victim grasp his penis. (Ex.2, 5/12/16:53-58.) This admission was more damaging than Lehrke's statements about his father and grandfather.

3. The detective's declarations that six-year-olds don't lie.

In *Miller*, this court held that the rule of *State v. Hazeltine*, 120 Wis.2d 92, 352 N.W.2d 673 (Ct. App. 1984) does not apply to recordings of police interrogations. *Miller*, 341 Wis.2d 737, ¶¶11-13. Lehrke acknowledges *Miller*, but

argues that his trial counsel performed deficiently by not requesting redaction of the detective's declarations that six-year-olds don't lie. (Lehrke's Br. 45-46.)

Lehrke's argument fails. Even if *Miller* did not control here, a reasonable counsel could determine a redaction request would fail because the court would rule based on *Miller*.

C. Lehrke has not proven ineffective assistance on his claim concerning the prosecutor's closing argument.

Lehrke argues his trial counsel performed deficiently when he did not object to the prosecutor's closing argument. Counsel testified he did not object because he saw no reason to. (R.261:48.) The circuit court agreed. (R.261:103.)

The question before this Court is not whether trial counsel correctly determined whether the prosecutor committed misconduct. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *State v. Coogan*, 154 Wis.2d 387, 405, 453 N.W.2d 186 (Ct. App. 1990) (citation omitted). Prosecutorial misconduct in closing argument is highly fact driven and involves close questions. Successful ineffective assistance claims should be limited to situations where the law or duty is clear. *State v. Maloney*, 2005 WI 74, ¶29, 281 Wis.2d 595, 698 N.W.2d 583; *see also In re Commitment of Thayer*, 2001 WI App 51, ¶14, 241 Wis. 2d 417, 626 N.W.2d 811 (counsel not required to argue a point of law that is unclear). Counsel reasonably chose not to object to the prosecutor's arguments.

D. Lehrke has not established prejudice.

A defendant has the burden of proving prejudice. *State v. Prineas*, 2012 WI App 2, ¶22, 338 Wis.2d 362, 809 N.W.2d 68. After reciting his alleged errors, Lehrke advances a single paragraph regarding prejudice. His sole claim for prejudice is that "[t]he errors gave the State so much of an advantage that the court of appeals cannot be confident that the outcome of the trial would have been the same either way." (Lehrke's Br. 48.)

Lehrke's allegation of prejudice is conclusory. Conclusions will not establish prejudice. A defendant must prove facts that demonstrate prejudice. *State v. Jackson*, 229 Wis.2d 328, 343, 600 N.W.2d 39 (Ct. App. 1999).

CONCLUSION

For the reasons given above, this Court should affirm Lehrke's judgment of conviction and the order denying postconviction relief.

Dated at Madison, Wisconsin, this 28th day of April, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 10,656 words.

Dated this 28th day of April, 2017.

_____
WARREN D. WEINSTEIN
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 28th day of April, 2017.

_____
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