STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2016AP1965-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SETH Z. LEHRKE,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and Order Denying Postconviction Relief Entered in the Chippewa County Circuit Court, the Honorable Steven Cray, Presiding.

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANT-APPELLANT

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ARGUMENT

I. Seth's ***Miranda*** Waiver and Subsequent Confession Were Not Knowing, Intelligent and Voluntary.

A. The standard of review.

The State ignores, and thus concedes, the argument and cases indicating that this Court should review the video of Seth's ***Miranda*** waiver de novo. ***Raz v. Brown***, 2003 WI 29, ¶25, 269 Wis. 2d 614, 660 N.W.2d 647 (respondent's failure to refute appellant's argument is deemed a concession). The video is in the record. Seth did not testify at the suppression hearing. Thus, the trial court was in no better position to decide waiver than this Court. (Initial Br. 9)(citing ***Jimmie R.R.***, 2000 WI App 5, ¶39, 232 Wis. 2d 138, 606 N.W.2d 196; ***Brown v. State***, 290 Ga. 865, 868, 725 S.E.2d 320 (2012)).

B. Seth's ***Miranda*** waiver was invalid.

These facts are undisputed:

- Seth, born December 22, 1994, was barely 18 (not 19) when he was interrogated. (Supp.App.101:3, 104:9).[1]
- Seth's full scale IQ is 73; his 71 verbal IQ places him in the bottom 1% of the population, he cannot accurately recall information and pretends to understand when he doesn't. (R.256:36-39, 56-57, 65).

[1]The transcript of Seth's confession is in the record (5/12/16 Ex. 2) but has no record number. The Supplemental Appendix to this brief includes a redacted copy of it.

- Detective Kleinhans knew Seth had a learning disability before the interrogation. (R.255:113).

- At the outset, Seth made clear he wanted to know "everything that's going on." (Supp.App.101:3).

- Kleinhans read Seth a 121-word ***Miranda*** warning as one run-on sentence in 25 seconds. (R.130, Ex.1)[2]

- Seth said "yes" that he understood his rights but asked Kleinhans to clarify "you have these rights are you now willing to answer questions or make a statement?" Kleinhans explained: "Basically, do you want to talk to me today and try to figure out what is going on?" Seth replied: "Yeah I want to know what's going on because I shouldn't be sitting here, but, okay." (Supp.App.102:6).

The State asks the Court to take Seth's "yes" at face value, while ignoring multiple cases suppressing statements after police read ***Miranda*** at an unintelligible speed and made a misstatement to the defendant. (Initial Br.10-11). Kleinhans told Seth that to find out "what was going on," he had to answer questions or make a statement. Seth's response confirms that he was misled.

The Court can watch the one-sentence, warp speed ***Miranda*** warning given to Seth. A person of average intelligence would not consider it delivered in "clear and unequivocal terms," as required by ***Miranda v. Arizona***, 384 U.S. 436, 467-468 (1996). So it surely was not "clear and unequivocal" to Seth, who was barely 18, cognitively

[2] The Initial Brief at 10 incorrectly states the warning is 1,121 words. The video version (R.130, Ex. 1) is 121 words.

disabled and misled about its meaning. The State did not carry its burden of proving a valid waiver.

C. Seth's confession was not valid.

Seth's argument hinges upon two cases holding that "subtle pressures" by police are coercive where they exceed the defendant's ability to resist. ***State v. Jerrell C.J.***, 2005 WI 105, ¶17, 283 Wis. 2d 145, 699 N.W.2d 110; ***State v. Hoppe***, 2003 WI 43, ¶38, 261 Wis. 2d 294, 661 N.W.2d 407. The State does not refute or distinguish these cases. It does not discuss "subtle pressures" anywhere in its brief. The State thus concedes the applicable law. ***Raz***, ¶25.

Not one but two officers interrogated 18-year-old Seth, who reads at a 3rd-4th grade level, after isolating him in a tiny room and handcuffing and shackling him.[3] (Supp.App.119:39). Before Seth said one word about the night at issue, they asked him to admit that K.B. was "honest." (Supp.App.120:42). They informed him that she could not have made up her story. (Supp.App.120:42, 122:47). They fed him facts he did not volunteer: K.B. was sitting in his lap, watching "Pretty Pony," he tickled her, she was face down. When Seth conjured facts to appease them, they falsely stated that everything matched up with K.B.'s statement. (Supp.App.120-121:42-44; 126:53-54). They said Seth had two choices: admit he made a poor choice so the DA would work with him or deny the assault and face a substantially larger amount of time. Either way the case would go forward. (Supp.App.123-125). Each time Seth denied the accusation they falsely replied: "kids can't make this up." They falsely told Seth that admitting KB's version of

[3] The State says the conditions of the interrogation were not coercive; Seth never asked to be uncuffed or unshackled. (Resp. 15-16). The fact that he didn't ask suggests that he was cowed, not comfortable.

events wouldn't change anything or make things better or worse. (Supp.App.123-125). Seth caved. As in ***Jerrell C.J.***, the police here used isolation, a tiny room, shackles and "subtle pressures" to overcome a learning disabled person's ability to deny an accusation. The State failed to carry its burden of proof. Seth's confession should have been suppressed.

II. The Exclusion of Dr. Leo's Testimony and the Nurse's Report Violated Seth's Constitutional Right to Present a Complete Defense.

A. Dr. Leo's expert testimony.

1. The standard of review.

Justice Abrahamson's lead opinion in ***Seifert v. Balink***, 2017 WI 2,__Wis. 2d__,__N.W.2d __ did not change the standard of review for a ***Daubert*** decision. It is reviewed for an erroneous exercise of discretion. ***State v. Giese***, 2014 WI App 92, ¶16, 356 Wis. 2d 796, 854 N.W.2d 687. As with all discretionary decisions, an appellate court must determine whether the trial court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. An appellate court decides de novo whether the circuit court interpreted and applied the legal standard correctly. ***Id.*** ¶14. That was Justice Abrahamson's approach in ***Seifert*** at ¶¶89-90.

The State never disputes that in ***Seifert*** at least four justices agreed on the legal standard for the admissibility of expert testimony. It thus concedes the legal principles set out in Seth's Initial Brief at 21-22.

2. The trial court misinterpreted and misapplied ***Daubert***, and thus exercised its discretion erroneously.

Both the State and trial court fault Dr. Leo's opinion as "unreliable" because he would not predict whether Seth's confession was false or give an error rate for false confessions. (Resp. 22; R.249:49-50; App.127-128). ***Daubert*** applies to all manner of experts. It does not require that they "predict" results or provide error rates. ***Seifert*** admitted an expert's opinion about indications of shoulder dystocia during child birth without any discussion of error rates. ***Seifert***, ¶¶38-39, 44-45. *See also* ***Giese*** (expert admitted without requiring error rates for retrograde extrapolation). Indeed, had Dr. Leo opined that Seth's confession was false, he risked condemnation for violating ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984).

The State and trial court insist that false confessions are common knowledge so Dr. Leo's testimony could not have helped the jury. First, § 907.02(1) does not require the exclusion of evidence within a jury's common knowledge. Second, Seth proved that false confessions are not within a jury's common knowledge. *See* cases cited at Initial Br.20. The Wisconsin Supreme Court agrees that many people cannot understand what leads an innocent person to confess to a serious felony. ***Jerrell C.J.***, ¶103.

The State and trial court offered no contrary authorities. Indeed, they ensured Seth's jury did not understand his false confession defense by asking the venire panel to agree that an innocent person might confess where the police used torture, Gestapo tactics, or interrogated for 36 hours. (R.255:62-64). The jury never heard that interrogation tactics like evidence ploys, minimization, false promises (all

present in Seth's case) increase the risk of a false confession, especially where the subject is young and cognitively disabled. (R.249:7-18). That was Dr. Leo's proposed testimony.

The issue here is whether, under ***Daubert***, an expert may testify about the association between two phenomena. The answer is "yes." Under ***Daubert***'s "flexible" standard, a doctor may, based on personal observation (not even peer-reviewed studies), testify about "risk factors" associated with shoulder dystocia during birth. ***Seifert***, ¶¶44-45. A social worker may, based solely on personal experience, testify about behaviors associated with child sexual assault. ***State v. Smith***, 2016 WI App 8, ¶9, 366 Wis.2d 613, 874 N.W.2d 610. In fact, without any ***Daubert*** analysis, a social worker may testify about whether she saw "indications" that a child alleging sexual assault was "coached" or "lying" during her interview. ***State v. Maday***, 2017 WI 28, __Wis. 2d__, 892 N.W.2d 611. Dr. Leo's proposed testimony is similar, but more reliable because hundreds of published articles, books, and peer-reviewed studies support it. (R.248:5-10, 23-24).

B. The trial court erred in excluding the nurse's report.

Seth argued that the trial court should have admitted the entire nurse's report because: (1) it contained statements made for the purpose of medical diagnosis or treatment per §908.03(4); (2) it had the necessary circumstantial guarantees of trustworthiness per §908.03(24); and (3) it showed K.B. had a motive to confirm Rod's version of events per §906.08(2) and ***State v. Echols***, 2013 WI App 58, 348 Wis. 2d 81, 831 N.W.2d 768.

The State agrees that K.B.'s "statement" that she didn't know why she was at the ER was admissible under

§908.03(4). (Resp. 29). Her statement that she didn't hurt anywhere and Rod's statements to the nurse should have been admitted for the same reason. Furthermore, the State ignores, and thus concedes, points (2) and (3), which permit admission of the entire report. (R.165).

C. The trial court violated Seth's constitutional right to present a complete defense.

The State failed to refute Seth's argument that the exclusion of the nurse's report violated his constitutional right to present complete defense. (Initial Br.31-32). It further ignores: (1) ***Crane v. Kentucky***, 476 U.S. 683, 690 (1986), which holds that a defendant's right to present a defense is violated where he is barred from presenting competent evidence on the credibility of his confession; and (2) the holding of ***State v. St. George***, 2002 WI 50, ¶¶57-68, 252 Wis. 2d 499, 643 N.W.2d 777—excluding a defendant's expert regarding a child's recantation of her sexual assault accusation violate his right to present a complete defense. The State further ignores Seth's explanation for why both Dr. Leo's opinion ***and*** the nurse's report were essential to his defense. (Initial Br.30-31). If the Court agrees that this evidence was admissible under Wisconsin law, then based on the State's failure to address Seth's arguments (Initial Br. 28-32), it should hold that he was denied his right to present a complete defense.

III. The DA Engaged in Prosecutorial Misconduct.

A DA may not assert personal knowledge of facts in issue or reference matters outside the record. SCR 20:3.4(e); ***State v. Smith***, 2003 WI App 234, ¶25, 268 Wis. 2d 138, 671 N.W.2d 854. Seth and Tracie testified that due to an ACL surgery, Seth could not kneel at the time of his arrest, and thus could not have committed the crime K.B. described.

(R.257:35, 38-39; 65-66, 70). Rod never testified about Seth's ACL surgery. Yet the DA told the jury:

> ***[Rod] knows his brother has a brace on***. (App.181). (Emphasis supplied).
>
> ***[Rod] doesn't think about that because [Rod] sees his brother getting around fine after a while and around the time that this occurred. His limitations for his leg aren't there anymore, so he doesn't think oh, geez, I got to come up with an explanation for that because he doesn't need an explanation for it. [Seth's] getting around fine at that time.***
>
> ***[Rod] doesn't see what [Seth's] doing on a daily basis or once a week? I just can't see that that's possible.*** (App.181-182). (Emphasis supplied).

The DA asserted facts Rod never testified to and insinuated that he knew what Rod saw. The DA violated SCR 20:3.4(e) and ***Smith.*** Seth presented this argument to the trial court, but it ignored the point. (R.168:30-32; App.140-141). On appeal, the State ignores the argument too. Seth asks this Court to address the issue, and, for the reasons stated at Initial Br.34-37, hold that the DA's conduct was plain error.

Next, the State may not vouch for a witness's credibility. ***Smith***, ¶25; SCR 20:3.4(e). Seth cited three cases holding that a DA's comments like "kids can't make this up" amount to vouching and plain error. (Initial Br.38-39). The State ignores all of them. Instead, it contends that the DA's seven comments along these lines were appropriate because mostly he was referring directly to K.B.'s forensic interview and trial testimony. (Resp.32-33). The fact that the DA was referring to K.B.'s interview and testimony is precisely why his "six-year-olds can't make this up" comments constitute vouching.

SCR 20:3.4(e) also provides that in trial, a lawyer shall not "state a personal opinion as to the justness of a cause . . . or the guilt or innocence of an accused." Now turn to the DA's closing remarks about K.B. and Seth:

> ***She's a young girl that deserves justice. She's a young girl that deserves that her offender be held accountable, and for him to just say disregard what she's saying and say that it doesn't -- say that it doesn't matter, give me justice but don't give justice to her***. (App.182).

> ***[T]he 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. She is the one that deserves justice. ***What the defendant deserves is to be found guilty of first degree sexual assault of a child***. (App.182-183).

This is a textbook example of "stating a personal opinion on the justness of cause and on the guilt of the accused." Defense counsel's comment that county courts put the constitution to work on a daily basis does not "invite" a brazen violation of SCR 20:3.4(e).

The State does not respond to ***Jordan v. Hepp***, 831 F.3d 837, 849 (7th Cir. 2016), which holds that where a case turns on credibility, the generic jury instruction "arguments are not evidence" does not rectify damage caused by flagrant vouching. That's what happened here. The DA's misconduct "struck foul blows" that so infected Seth's case that a new trial is required under ***State v. Weiss***, 2008 WI App 72, 312 Wis. 2d 382, 752 N.W.2d 371 and ***Berger v. U.S.***, 295 U.S. 78, 88 (1935).

IV. Seth Received Ineffective Assistance of Counsel.

First, defense counsel had Dr. Stress testify to Seth's IQ scores but not to what they indicate about his suggestibility and functional abilities. The State contends that such testimony would have been inadmissible false confession testimony. (Resp.36). That is incorrect. False confession experts testify about interrogation techniques and risk factors associated with false confessions. They do not testify about whether the person being interrogated is suggestible, defers to authorities and so forth. That was the purpose of Dr. Stress's testimony, except that trial counsel neglected to ask the key questions. According to ***U.S. v. West***, 813 F.3d 619, 625 (2015), excluding expert testimony that a person with a 73 IQ is suggestible and might give an unreliable confession is so harmful that a new trial is necessary.

Second, defense counsel admitted error in failing to object to, move to strike, or request a limiting instruction regarding, a 4-minute segment of the video where the police questioned Seth about Rod's false accusation that Seth tried to assault another girl. Counsel admitted that he didn't think about Seth's statement that his father and grandfather were "sexual offenders" when the court and parties were deciding which parts of the video to redact. (R.261:30-33, 35). This amounts to deficient performance. ***State v. Silva***, 2003 WI 191, ¶11, 266 Wis. 2d 906, 670 N.W.2d 385.

So does counsel's failure to address Kleinhans's relentless refrain: "I'm an expert in sensitive crimes," "6-year-olds can't make this us," "I'm confident K.B. is telling the truth." A detective swore to tell the truth and then by video declared for the jury what he could not say on the stand. Without a limiting instruction a la ***State v. Miller***, 2012 WI

App 68, 341 Wis. 2d 737, 816 N.W.2d 331, this is pure, inadmissible ***Haseltine*** evidence.

Third, if the Court agrees that the DA committed prosecutorial misconduct, then defense counsel's failure to object or otherwise address it is further deficient performance. The State offers no case to suggest that standing silent while the DA violates the Supreme Court Rules is a reasonable strategy. ***Jordan*** suggests that it is not.

There is no physical evidence of K. B's alleged sexual assault, so this case boiled down to a credibility contest. Due to counsel's deficient performance, the jury heard that (1) Rod accused Seth of another sexual assault (but it was not instructed that the accusation was false), (2) Seth's father and grandfather are sex offenders, (3) KB was telling the truth or could not possibly make this story up (at least 12 times from the police, 7 times from the DA), (4) Rod observed Seth moving around fine at the time of the alleged assault, and (5) the State of Wisconsin believed that K.B. deserved to have Seth found guilty; and (6) Seth deserved to be found guilty. The jury didn't hear significant evidence challenging the reliability of Seth's confession because defense counsel did not elicit it from Dr. Stress. That was especially prejudicial given the trial court's erroneous exclusion of Dr. Leo's opinion and the nurse's report. Counsel's deficient performance loaded the scales of justice for the prosecution and warrants a new trial.

CONCLUSION

Seth Z. Lehrke respectfully requests that the court of appeals reverse the trial court's denial of his motion to suppress his confession and his postconviction motions and order a new trial.

Dated this 15th day of May, 2017.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,979 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 15th day of May, 2017.

Signed:

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CERTIFICATION AS TO APPENDIX

I hereby certify that the Supplemental Appendix filed with this brief complies with § 809.19(2)(a). The transcript included in the Supplemental Appendix is required by law to be confidential and has been reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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