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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.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Whether Seth Lehrke's waiver of his ***Miranda*** rights and his subsequent confession to 1st degree child sexual assault were knowing, intelligent and voluntary given that he was barely 18 and had a 71 verbal IQ, and detectives read him his rights while he was shackled, handcuffed, and isolated in a small room during the interrogation.

2. Whether the trial court erred in holding that Seth's false confessions expert failed ***Daubert*** and in excluding a Sexual Assault Nurse Examiner's report which challenged the credibility of K.B., the alleged victim, and her father. If so, was Seth denied his constitutional right to present a complete defense?

3. Whether the DA engaged in prosecutorial misconduct when, during closing arguments, he (a) asserted facts not in evidence, (b) vouched for K.B.'s credibility, and (c) appealed to the justness of K.B.'s cause.

4. Whether trial counsel was ineffective for failing to: (a) elicit professional opinions about Seth's psychological profile from his expert, Dr. Stress, (b) move to exclude or request a limiting instruction regarding parts of the video confession shown to the jury, and (c) object to prosecutorial misconduct during closing arguments.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Pursuant to Wis. Stat. §809.22 and 809.23, the court of appeals should hold oral argument and publish its opinion.

This case has a complicated procedural history, so oral argument would give the court of appeals an opportunity to ask questions about parts of the record that, despite the parties' best efforts, may not be clear from the briefs. Furthermore, this case raises issues of first impression, most notably whether expert testimony on false confessions satisfies ***Daubert*** and Wis. Stat. §907.02(1). Some Wisconsin circuit courts hold that it does. (App.190). The Chippewa County Circuit Court held that it does not. A published opinion will clarify Wisconsin law on this point and ensure its consistent application across the state.

STATEMENT OF CASE

Seth Lehrke turned 18 on December 22, 2012. In February 2013, he was living with his mother (Tracie Wittenberg), his stepfather, his stepbrother, Rod, and Rod's daughters K.B. and S.B., in a trailer in Chippewa Falls, Wisconsin.[1] (R.257:15-18).[2]

The State's Theory of the Case

According to the State, K.B., aged 6, told her father, Rod, that Seth had sexually assaulted her. More specifically, on February 8, 2013, during a videotaped interview, K.B. told a Child Advocacy Center representative that Seth was babysitting her and her sister. K.B. was watching TV in the living room, sitting on Seth's lap, and he tickled her. She went to her bedroom and lay down on the floor to watch a video. Seth was in the bathroom. He allegedly entered her room, pulled down her pants, got down on his knees, and

[1] K.B. and her father have the same initials. Per §809.19(1)(g) and (2)(a), Seth's brief and appendix refer to K.B.'s father by the pseudonym "Rod."

[2] This refers to Record Item No. 257 at page 15-18.

placed his privates on her bottom, and this hurt her. Later in the video she said that Seth pulled her into her bedroom and assaulted her. On February 11, 2013, two detectives interrogated Seth on videotape. He initially denied touching K.B. inappropriately, but by the end of the 99-minute interrogation he admitted that he had touched his penis to K.B.'s buttocks. (R.4; R.255:92-96).

The Defense's Theory of the Case

According to the defense, Rod has an explosive temper and a long criminal history, including 18 prior convictions. (R.256:18-19). Tracie was very protective of Seth, and Rod had become jealous of their close relationship. He trumped up the sexual assault allegation in order to get back at Seth. (R.257:24, 73-74; App.188).

In fact, just hours after K.B. spoke to the child advocate, Rod took her to Sacred Heart Hospital to be examined by a Sexual Assault Nurse Examiner. K.B. told the nurse that she felt fine, and she did not hurt anywhere. When asked why she was at the hospital K.B. answered "I don't know." Rod blew up at this exchange and ordered the nurse to just check "her ass and her vagina." The nurse wrote that when Rod learned there was no evidence of sexual assault, he became upset, threw K.B.'s discharge papers on the ground, and left. (R.165, Ex. 9 at 3, 7, 11, 13, 16-17).

Although Seth looks and speaks normally, it is undisputed that he has a substantial cognitive disability. Part of his defense strategy was to establish that his cognitive disability prevented him from giving a knowing and voluntary ***Miranda*** waiver and confession. Another part was to show that his confession was false. Seth thus planned to call (1) Amanda Turner, his special education teacher to testify about his struggles in school and in understanding

what is being said to him; (2) Dr. Brian Stress, a psychologist, to testify about his IQ testing and functional abilities, and (3) Dr. Richard Leo, a criminologist and sociologist, to testify about suspect characteristics and interrogation techniques associated with false confessions. (R.63; R.75). Seth's defense strategy also included eliciting testimony that just 10 weeks before the alleged assault he had had ACL surgery and was still using a leg brace. Thus, physically he could not have knelt down to commit the assault described by Rod and K.B. (R.257:141, 145).

Pre-Trial Proceedings

The extensive pre-trial proceedings for this case lasted two years. Three particular motions are pertinent to this appeal.

1. Seth moved to suppress his videotaped confession, arguing that neither his ***Miranda*** waiver nor his confession were knowing, intelligent and voluntary. (R.14, R.21). The trial court denied the motion. (R.240:5-7).

2. The State moved to exclude the testimony of Dr. Leo on the grounds that it did not satisfy Wis. Stat. §907.02, which codified ***Daubert v. Merrell Dow Pharm., Inc***., 509 U.S. 579 (1993). (R.48, R.64). The court held a ***Daubert*** hearing and granted the motion. (R.248, R.249:50-52). Seth moved to reconsider and lost. (R. 86, R. 91, R.250:20). He filed a petition for leave to appeal the issue, which the court of appeals denied. (R. 97).

3. The State moved to exclude the 20-page report of the nurse who examined K.B. The court granted the motion and further barred Seth from asking Rod about what happened at the hospital. (R.256:11-17). The court allowed into evidence only the two-sentence conclusion indicating

that K.B.'s genitals appeared normal. (R.165; R.130 Ex. 5). Due to this ruling, the parties agreed not to call the nurse to testify at trial. (R.255:17-18; R.256:11-14).

The Trial and Sentencing

The case was tried to a jury on March 12-13, 2015. Because there was no physical evidence of a sexual assault, the outcome hinged on the credibility of the witnesses—primarily, Seth, K.B. and Rod.

Seth and K.B. had lived together in Tracie's trailer for about 10 months. At the time of trial, K.B. was 8 years old. She could not identify Seth. (R.255:135). She did not know where they had lived together. When asked to list the people living with them, she forgot her little sister. (R.255:136-137). She didn't remember being interviewed at the Child Advocacy Center. She testified to wearing clothes that were different than those she described in the video. She testified that Seth put his private *in* her bottom, but "he wasn't putting his weight on her." (R.255:139, 141, 146, 153). In addition to K.B.'s testimony, the State played the child advocate video from two years before. K.B. said she didn't remember it. (R.130, Ex. 2).

The State called Detective Kleinhans, who testified that he and a partner interrogated Seth on video. The State played a redacted version of the confession for the jury. (R.255:102-103; R.130, Ex. 1).

Rod testified that K.B. told him what Seth had done on February 3, 2013, when the two of them returned from a trip to Wal-Mart. He admitted to grabbing Seth and threatening him. He was not asked, and did not testify about, Seth's ACL surgery and recovery. (R.256:75; R.257:1-7).

Seth testified that he was confused and scared during the interrogation. He knew that he was accused of sexual assault, but did not understand his ***Miranda*** rights because Detective Kleinhans read them too fast. It seemed to him that the detectives would not believe his denials, and they would pursue the case regardless, so he just agreed with what they wanted to hear. (R.257:61-62). Seth testified to his ACL surgery and that he still used a leg brace and was unable to kneel at the time of arrest. In fact, his mom would not even let him babysit alone. (R.257:66-70). Seth also testified that on February 3rd, Rod called Tracie and Seth and told them "to get their asses home." They went home. He grabbed Seth by the throat and said if you ever touch my kids again, I'm going to kill you. (R.257:2, 73-74). Tracie (mother of Seth and Rod) and Tom Spaeth (a family friend) testified in support of Seth's version of events, including his inability to babysit alone or get down on his knees due to his ACL surgery and the fact that he was still wearing a leg brace. (R.257:21-39; 42-45)

Dr. Stress testified that Seth's full scale IQ test results (73) were in the bottom 4% of the population, and his verbal IQ (71) was at the bottom 1% of the population. He said that these test results showed that Seth would have significant difficulties understanding things. (R.256:36-39). Dr. Stress was not asked for his professional opinion about how such a low IQ manifests itself in a person.

Amanda Turner, Seth's special education teacher and case manager testified about his "E" grades. (R.256:54). She read out loud to him and found that he often could not remember what she read. Nor could he answer questions about the material. Seth would respond to questions with "yeah, yeah, yeah, I understand," but then she would find that he did not understand. (R.256:54-57). According to Turner,

"Seth was very good pretending he understood and responding yes." (R.256:65).

The jury convicted Seth of 1st degree sexual assault of a child under the age of 13. The trial court sentenced him to 5.5 years of initial confinement and 4 years of extended supervision. (App.101).

Postconviction Proceedings

Seth filed a postconviction motion which more fully challenged the trial court's decisions to (1) deny suppression, (2) exclude Dr. Leo's false confession expert testimony, and (3) exclude the nurse's report. He further argued that (4) the DA engaged in prosecutorial misconduct during closing arguments, and (5) trial counsel provided ineffective assistance. (R. 165-R.168).

The trial court denied arguments (1) through (4) from the bench on March 3, 2016. (R. 260; App.115). On May 12, 2016, it held a ***Machner*** hearing and orally denied Seth's claims for ineffective assistance of counsel. (R.261; App.105). The trial court's reasons for these decisions will be set forth in the corresponding Argument sections below. The court entered an order denying postconviction relief on September 29, 2016. (R. 225; App.103). Seth appealed.

ARGUMENT

I. The Trial Court Erred in Denying Suppression Because Seth's ***Miranda*** Waiver and Subsequent Confession Were Not Knowing, Intelligent and Voluntary.

A. The trial court's decision.

The trial court agreed that Detective Kleinhans's reading of Seth's ***Miranda*** rights was rapid and observed: "I can't talk that fast myself. I don't ever want to, but they were intelligible." (App.119). It noted that Seth was listening to his ***Miranda*** rights and wasn't scared to ask a question. (App.116-117). Seth never said "I don't understand." "He was not cowed into passive acceptance of the questions that were being posed." (App.117). The court held that there is no case or "facts or scientific research to indicate some sort of cutoff point as to when somebody is considered not able to comprehend events." (App.118). It held that Kleinhans did not mislead Seth about his ***Miranda*** rights. Thus, his waiver was knowing and voluntary. (App.119-120).

As for the voluntariness of Seth's confession, the court held that its suppression decision continued to be "entirely valid and accurate." (App.120). The interrogation lasted "only" 99 minutes. The officers did not coerce or abuse Seth. Nor did they deprive him of food and water. He did not complain about being handcuffed and shackled. (R.240:6-8). He did not express "through body language, through the tone of his voice, or in his words that his free will was being overcome." (App.120).

B. The standard of review.

Typically, the court of appeals reviews the denial of suppression under a two-part standard of review. It upholds the trial court's findings of fact unless they are clearly erroneous, but it reviews *de novo* whether those facts warrant suppression. However, when the issue concerns the admissibility of a videotape that is in the appellate record, the court of appeals conducts a *de novo* review. *See e.g.* ***State v. Jimmie R.R.***, 2000 WI App 5, ¶39, 232 Wis. 2d 138, 606 N.W.2d 196 (re videotaped statement of victim) and ***Brown v. State***, 290 Ga. 865, 868, 725 S.E.2d 320 (2012)(re videotaped confession).

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

The State bears the burden of proving that a suspect's ***Miranda*** waiver was "the product of a free and deliberate choice rather than intimidation, coercion or deception" and with "***full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it***." ***Moran v. Burbine***, 475 U.S. 412, 421 (1986). (Emphasis supplied). ***Miranda*** itself requires police to inform the suspect in "clear and unequivocal terms" of his right to remain silent, to consult a lawyer and to have a lawyer present during the interrogation. ***Miranda v. Arizona***, 384 U.S. 436, 467-468 (1966). A court decides whether the State has carried its burden of proof by examining the totality of the circumstances. ***Moran*** at 421.

Substantial evidence shows Seth's ***Miranda*** waiver was neither knowing nor intelligent.[3] First, Kleinhans did not

[3] Seth's video confession is at R.130, Ex. 1. The transcript is in the Reply Brief's Supplemental Appendix. "Supp.App.101:4" refers to Supplemental Appendix page 101, confession transcript page 4.

read Seth's ***Miranda*** rights in a clear or effective manner. He read a version containing 1,121 words as one run-on sentence in just 25 seconds (or 290 words per minute). By comparison, the average American speaks at 110-150 words per minute.[4] Contrary, to the trial court's view, this high-speed ***Miranda*** warning would not be comprehensible to someone unfamiliar with it. *See* ***Clay v. State***, 290 Ga. 822, 825, 725 S.E.2d 260, 266 (2012)(***Miranda*** warnings read at super speed would sound like gibberish to anyone not having prior familiarity with ***Miranda***).

Second, Kleinhans read the ***Miranda*** warning at warp speed to a person who is cognitively disabled. It is undisputed that Seth has a 71 verbal IQ, which means his verbal comprehension is at the bottom 1% of the population. (R.256:36-39).[5] Seth's teacher testified that he was very good at pretending to understand what she said to him but when she asked follow up questions she could tell that he did not. (R.256:56-57, 65). Kleinhans knew Seth was learning disabled before the interrogation. He did not know the extent of the disability, but he also made no inquiries about it. (R.238:113). He just zipped through the warning.

Third, Kleinhans ended his unintelligible ***Miranda*** warning with the question "do you understand each of these rights?" Seth answered "yes." Then the following exchange occurred:

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[4]And auctioneers speak at 250-400 words per minute. *See* https://www.quora.com/Speeches/For-the-average-person-speaking-at-a-normal-pace-what-is-the-typical-number-of-words-they-can-say-in-one-minute (last visited Jan. 14, 2017).

[5] When reviewing a suppression decision, an appellate court may consider trial evidence. ***State v. Gaines***, 197 Wis. 2d 102, 106 n.1, 539 N.W.2d 723 (Ct. App. 1995).

> Detective Kleinhans: You understand that you have each of these rights are you now willing to answer questions or make a statement?
>
> Seth: All right.
>
> Detective Kleinhans: What's that?
>
> Seth: What's the last two things you said—not on the card but I didn't . . .
>
> Detective Kleinhans: As you have these rights are you now willing to answer questions or make a statement. ***Basically, do you want to talk to me today and try to figure out what is going on***?
>
> Seth: ***Yeah, I want to know what is going on***.

(Supp.App.102:6). (Emphasis supplied).

The above exchange shows Seth wanted to find out "what was going on," not that he wanted to waive his ***Miranda*** rights. Kleinhans's "clarification" was misleading. When a suspect is misled about his ***Miranda*** rights, his waiver is not knowing and intelligent, and it must be suppressed. ***State v. Rockette***, 2005 WI App 205, ¶24, 287 Wis. 2d 257, 704 N.W.2d 382.

In sum, due to Seth's undisputed cognitive disability, Kleinhans's rapid-fire reading of ***Miranda***, and Kleinhans's misstatement about what ***Miranda*** means, Seth's waiver was not knowing and intelligent. *See* ***State v. Floyd***, 306 Ga.App. 402, 405-406, 702 S.E.2d 467 (2010)(waiver invalid where policeman read ***Miranda*** rights in 30 seconds and misstated the substance of the waiver he asked the suspect to sign); ***Commonwealth v. Benjamin***, 28 Va.App. 548, 553, 507 S.E.2d 113 (1998)(no waiver where reading of ***Miranda*** rights was unintelligible, while other statements to the suspect

were clear, and where detective misstated the contents of the form he asked suspect to sign). The State did not carry its burden of proof. The court of appeals should reverse the trial court's denial of Seth's suppression motion and order a new trial.

D. Seth's confession was not knowing, intelligent and voluntary.

The State bore the burden of proving that Seth's confession was voluntary by a preponderance of the evidence. ***State v. Jerrell C.J.***, 2005 WI 105, ¶17, 283 Wis. 2d 145, 699 N.W.2d 110. 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 conspicuously unequal confrontation in which the pressures brought to bear on the defendant by the representative of the State exceeded the defendant's ability to resist." ***Id.***, ¶18 (quoting ***State v. Hoppe***, 2003 WI 43, ¶38, 261 Wis. 2d 294, 661 N.W.2d 407.) "A necessary prerequisite for a finding of involuntariness is coercive or improper police conduct." ***Id***. ¶19. But coerciveness can be subtle.

> Rather, ***subtle pressures*** are considered to be coercive if they exceed the defendant's ability to resist. Accordingly, 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.

Id. (quoting ***Hoppe***, ¶37). (Emphasis supplied).

When evaluating a confession, a court considers the totality of the circumstances and balances the defendant's personal characteristics against the pressures and tactics that law enforcement used to induce the confession. ***Id***. ¶20; ***Hoppe***, ¶38. The relevant personal characteristics are the

defendant's (1) age, (2) education and intelligence, (3) physical and emotional condition, and (4) prior experience with law enforcement. ***Hoppe***, ¶3. The police tactics and pressures to be considered are:

> The length of 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 the right against self-incrimination.

Id. (Emphasis supplied).

Regarding Seth's personal characteristics, he had just turned 18. His verbal IQ is in the bottom 1% of the population. He had no prior convictions. He graduated from a special program earning "E for effort" grades.

Now consider the police interrogation tactics used against Seth. Kleinhans admitted that he had been trained in the Reid technique of police interrogation, but he denied using it on Seth. (R.238:12-13). The Reid technique includes isolating the suspect in a small room in order to increase his anxiety and desire to escape; confronting the suspect with accusations of guilt, bolstered by real or manufactured evidence; refusing to accept denials; using positive and negative incentives to induce confessions; and offering sympathy and moral justification for commission of the crime. Saul M. Kassin et al., ***Police Induced Confessions: Risk Factors and Recommendation***s, 34 Law and Hum. Behav. 3, 6 (Feb. 2010). *See also* ***Miranda***, 436 U.S. at 450-451 (1966)(criticizing these very aspects of the Reid technique).

Kleinhans and his partner isolated Seth in a tiny room and interrogated him for 99 minutes. Seth was handcuffed and shackled the entire time.

Going into the interrogation, Seth knew that Rod said K.B. had accused him of "trying to stick his penis into her butthole." (Supp.App.102: 6-7).

Kleinhans told Seth—at least 6 different times—that Seth just needed to confirm K.B.'s version of events. (Supp.App.135:71-72; 136:73; 139:79, 141:84). The detectives would not accept Seth's repeated denials that he did not touch K.B. (Supp.App.103:8, 122:46-47, 125:51, 127:56, 128:58, 129:59, 134:69, 137:76, 139:80). Instead, they kept telling him "to be honest." (Supp.App.118:38, 120:42, 123:47, 125:52, 127:56, 135:71-72, 139:79).

The detectives told Seth at least 12 times that "six year olds don't lie," "kids can't make this stuff up," "I'm confident she's telling the truth," or "I think it's unlikely this didn't happen." (Supp.App.120:41-42, 123:47-48, 129:59, 131:63, 132:65, 133:67, 135:71). For good measure, Kleinhans stressed that "we can agree" or "you can agree" that K.B.'s version of events was "the truth." (Supp.App.123:47, 133:67, 135:71).

The detectives presented Seth with a false choice. They repeatedly told him that if he confirmed K.B.'s version of events, they would tell the DA that "Seth was being honest and cooperative," but if he denied her version, they would tell the DA that "Seth was being a pain in the butt." Being honest and cooperative would go a long way with the DA. And it meant Seth had to admit that he "made a poor choice." (Supp.App.123:48). Seth asked how much time he would get. (Supp.124:49). Kleinhans initially said he didn't know Seth would even go to prison because he was a good kid and didn't

have a record, but then Kleinhans said if Seth was uncooperative (denied the crime) he would get a "substantially larger amount of time." (Supp.App.124:49). Either way, Kleinhans said, the case would go forward based on K.B.'s statement. (Supp.App.125:50).

Kleinhans's repeated statements that he was going to the DA caused Seth to relent. He started to fabricate acts of sexual contact with K.B. in order to cooperate with the detectives. He conjured up conduct that no one ever accused him of. (Supp.App.121:43, 126:53-54, 132:66). The detectives lied and told him that his story was matching K.B.'s story. (Supp.App.123:47, 127:56, 128:57, 131:63, 132:65, 137:76).[6] Then they started feeding him K.B.'s version of events. (Supp.App.120:42-43, 126:54, 127:56, 128:58, 131:64, 133:67, 134:70). They told him that he needed to confirm K.B.'s version of events. (Supp.App.125: 51, 128:57, 132:65, 136:73, 137:76, 141:84). Six times they assured him that admitting to the accusation "won't change anything" or "won't make things better or worse." (Supp.App.123:48, 124:50, 128:57, 132:65, 135:72, 137:76).

Weighing Seth's personal characteristics against the detectives' subtle interrogation tactics, the State failed to prove that Seth's confession was the product of a free and unconstrained will, reflecting a deliberate choice. The confession was the result of an unequal confrontation where the detectives' pressures exceeded Seth's ability to resist. *See* ***Jerrell C.J.***, ¶5. The trial court reached the opposite result because: (1) it did not recognize that under state and federal law "subtle" police pressures may be deemed coercive[7]; (2) it

[6] K.B.'s video statement is at R.130, Ex.2.

[7] Indeed, during voir dire, the court commented that an illegal interrogation tactic would be the "Gestapo or something like that." (R.255:63-64).

did not recognize that subtle police pressure tactics (the very tactics that ***Miranda*** condemned) were used in fact against Seth; and (3) consequently, it did not consider the totality of the circumstances when it found Seth's confession voluntary. The court of appeals should reverse the trial court's suppression decision on this basis too.

II. The Trial Court Erred in Excluding Expert Testimony on False Confessions and the S.A.N.E. report, and it denied Seth's Constitutional Right to Present a Complete Defense.

A. The trial court erred in excluding Dr. Leo's expert testimony on false confessions.

1. Dr. Leo's proposed testimony.

"A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him'" ***Arizona v. Fulminante***, 499 U.S. 279, 296 (1991)(citation omitted). Seth confessed. So the centerpiece of his defense was supposed to be Dr. Leo' testimony on the phenomenon of false confessions, the type of interrogation techniques that yield false confessions, and characteristics that make a person susceptible to giving false confessions. Dr. Leo has been qualified as a "false confession" expert over 275 times in trial court proceedings throughout 31 states. (R.248:7; R.249:24). Pre-***Daubert***, he was qualified to testify in Wisconsin courts four different times. (R.75:2). He has testified in at least 18 different federal court hearings, all of which applied ***Daubert***. (R.249:24-25). He has received 25 prestigious awards and honors for his work. (R.75:2-3). He has authored or co-authored over 80 articles, chapters and books on police interrogation and false confessions. (R.75:8). Even the United States Supreme Court and the Wisconsin Supreme Court have

cited his scholarship with approval. ***Jerrell C.J.***, ¶33 n.7; ***Corely v. U.S.***, 556 U.S. 303, 321 (2009).

At the ***Daubert*** hearing in this case, Dr. Leo explained that he testifies about false confessions in general terms. If permitted, attorneys will direct him to specific parts of a confession and ask him to identify and explain the technique the interrogator is using. (R.249:7). For example, he might testify that in his opinion the interrogator was, at a certain point, using a "minimization" technique, or an "implied promise technique," or an "evidence ploy." If asked, he explains the research showing how a particular technique can lead to false or unreliable confessions. (R.249:7-8). He might discuss the significance of statements by the defendant that do not match the victim's accusation. He also testifies about "individual" risk factors—such as cognitive disabilities, low IQ, and youth—and how they increase the risk of a false confession. (R.249:9-10, 15-18). Dr. Leo does not testify that a confession is true or false. (R.75:4; R.248:13).

2. The trial court's decision.

Pre-trial, the court held that Dr. Leo's principles and methods were "valid," his research was "accurate," and his work had received some peer review. (R.249:48-49). However, his methods were "backward-looking." (R.249:48-49). They were not reliable because they had no "predictive value." (R.249:50). Furthermore, a jury would know that a person with a learning disability can be overwhelmed during an interrogation, so Dr. Leo's testimony would not be helpful. (R.249:47).

Postconviction, the court reaffirmed these holdings. It noted that jurors understand the effect limited intelligence can have during an interrogation and that these jurors confirmed this point during voir dire. It held that if Seth had been

cognitively normal, it might have admitted Dr. Leo's testimony. But since Seth was disabled, the jurors would not benefit from it. (App.123-124).

The court found Dr. Leo's principles and methods unreliable because he could not watch the confession and "with any accuracy state that the confession is accurate or false, and that is the essence of expert testimony, is to be able to have an opinion that can be replicated, that is predictive." (App.128). The court declared: "This type of testimony, no matter how flexible an analysis done, cannot pass the ***Daubert*** test at this time." (App.128). The prejudice caused by the testimony would outweigh its probative value and cause the jury to speculate. (App.128). The court distinguished the long list of contrary cases and again held Dr. Leo's testimony inadmissible. (App.128-131).

3. ***Daubert*** and the standard of review.

Wisconsin adopted the ***Daubert*** test for the admissibility of expert testimony in 2011. The rule provides:

> If scientific, technical, or otherwise 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 methods reliably to the facts of the case.

Wis. Stat. §907.02(1)(2011-2012).

An appellate court reviews a trial court's application of this statute *de novo*, while benefiting from its analysis. ***Seifert v. Balink***, 2017 WI 2, ¶89, __Wis. 2d__, __N.W.2d __. If the

trial court applied the appropriate legal framework, then the appellate court determines whether the trial court properly exercised its discretion in choosing the factors for assessing the reliability of the expert's testimony. A trial court's decision on the admission or exclusion of expert evidence "is an erroneous exercise of discretion when it rests upon a clearly erroneous finding of fact, an erroneous conclusion of law, or an improper application of fact to law." ***Id***. at ¶¶90-93.

4. The trial court misapplied ***Daubert***.

a. Dr. Leo's testimony would have assisted the jury.

The trial court's first mistake was holding that the jury needed no help from an expert because it is common knowledge that a cognitively disabled person might falsely confess. Actually, the court did not know what knowledge or experience, if any, the jurors had with cognitive disabilities or special education students. Furthermore, under Wisconsin law, the fact that a layperson of ordinary intelligence may understand a subject does not mean that the opinion of an expert in the field would not assist the jury in determining a fact in issue. ***State v. St. George***, 2002 WI 50, ¶69, 252 Wis. 2d 499, 643 N.W.2d 777 (exclusion of expert on recantation and interview techniques violated defendant's constitutional right to present a defense).

Seth's jury clearly needed expert guidance on police interrogation techniques. Voir dire revealed that the jury considered confessions to be reliable absent torture or extreme pressure. (R.255:62-63). In response to the DA's questions, the venire panel agreed that a person might break down and confess if the police used illegal tactics or interrogated him for 36 hours. And the court interjected "you

may pick on either Gestapo or something like that" confirming that the pressure had to be extreme. (R.255:63-64). The panel was never told that under Wisconsin law subtle pressures can also coerce false confessions. ***Jerrell, C.J.***, ¶19.

Contrary to the trial court's decision, other courts have found that the phenomenon of false confessions is beyond a jury's ken.

- ***People v. Kowalski***, 492 Mich. 106, 126, 821 N.W.2d 14 (2012)(expert testimony on how a confession is obtained and how the suspect's psychological makeup may have affected his statements is beyond the understanding of the average juror).

- ***People v. Days***, 15 N.Y.S.3d 823, 830 (2015)("it cannot be said that psychological studies bearing on the reliability of confessions are as a general matter, 'within the ken of the typical juror;'" trial court erred in precluding Dr. Leo's testimony on this ground."

- ***U.S. v. Hall***, 93 F.3d 1337, 1345 (7th Cir. 1996)("It was precisely because juries are unlikely to know that social scientists and psychologists have identified a personality disorder that will cause individuals to make false confessions that the testimony would have assisted the jury in making its decision.")

- ***State v. Perea***, 322 P.3d 624, 640-41(Utah 2013)(the potential infirmities of confessions are largely unknown to juries; "[t]estimony regarding the factors that can lead to false confessions is exactly the type of evidence that would have helped the jury assess Perea's claim that he falsely confessed;" "false confession" science satisfies Utah's Rule 702).

In short, the trial court erred when it held that a false confession expert could not assist the jury.

b. Dr. Leo's work is reliable.

Seifert is the Wisconsin Supreme Court's first decision to interpret and apply ***Daubert***. The decision includes a lead opinion, two concurring opinions, and a dissenting opinion. The court held 5-2 that a medical doctor's opinion, based solely on personal experience, satisfied ***Daubert***. At least four justices (Abrahamson joined by A.W. Bradley and Gableman joined by Roggensack) agreed on the follow rules:

- ***Daubert***'s purpose is to keep junk science out of the courtroom. ***Seifert*** at ¶85 (Abrahamson); ¶188 (Ziegler); ¶230 (Gableman).

- ***Daubert*** makes the trial court a gatekeeper, not a fact finder. When credible experts disagree, the jury, not the court decides which expert to believe. ***Seifert*** at ¶59 (Abrahamson); ¶¶236-237, ¶241, ¶246 (Gableman)

- ***Daubert*** applies to all expert opinions, not just scientific evidence. ***Id***; ¶60 (Abrahamson); ¶¶225-236 (Gableman).

- To decide whether an expert's opinion is reliable, courts should consider a list of factors, but they are neither exhaustive nor definitive. ***Id.*** ¶¶62-64 (Abrahamson); ¶225, ¶226, ¶236 (Gableman).

- How courts apply these factors will vary case by case, expert by expert. ***Id.*** ¶64 (Abrahamson); ¶225, ¶236 (Gableman).

- The trial court may consider some, all, or none of these factors. ***Id.*** ¶65 (Abrahamson); ¶¶225-226 (Gableman) (quoting ***Kumho Tire Co., Ltd v. Carmichael***, 526 U.S. 137 (1997).

- An expert cannot establish that a fact is generally accepted merely by saying so. ***Id.*** ¶75 (Abrahamson); ¶227 (Gableman).

- The appropriate way to attack "shaky but admissible" experience-based testimony is by vigorous cross-examination, presentation of contrary evidence and careful instruction on the burden of proof. ***Id.*** ¶86 (Abrahamson); ¶244 (Gableman).

Seifert addressed whether a medical doctor's expert testimony was "reliable" under ***Daubert***. The doctor identified risk factors for a birth complication and opined that a family practitioner had breached the standard of care for handling the situation. The doctor's expert opinion did not satisfy any of ***Daubert***'s reliability factors. Nor was it peer-reviewed or supported by medical literature. Instead it was based on the doctor's substantial clinical experience delivering babies, supervising other doctors, and teaching medical school. Five justices held that this holistic, experienced-based opinion passed ***Daubert***. ***Id.*** ¶¶120-129, ¶170, ¶194.

Dr. Leo's opinion was based on substantial published literature, it was peer-reviewed, and by the trial court's own admission it used "valid" methods and principles. (R.249:46, 49). Dr. Leo and other researchers have conducted statistical analyses of cases involving confessions that have been objectively proven false. They found patterns in those confessions and demonstrated that certain interrogation and individual risk factors are strongly associated with false

confessions. They have also tested interrogation techniques in laboratory settings. *See e.g.* ***U.S. v. Hall***, 974 F. Supp. 1198, 1204-1205 (E.D. Wis. 1997)(where the district court explained why the "false confession" field of research is a reliable body of specialized knowledge under Rule 702 and admitted the expert testimony by Dr. Richard Ofshe, one of Dr. Leo's co-authors). *See also,* ***Caine v. Burge***, 2013WL1966381 at *3 (N.D. Ill. 2013)(unreported) (App.232)(admitting Dr. Leo's testimony and noting that the field of false confessions is a reliable body of specialized knowledge under F.R.E. 702).

The trial court faulted Dr. Leo's work because he could not watch a confession and predict whether it was false; he could only identify risk factors in known false confessions. But ***Daubert*** applies to all experts, not just those who predict. ***Seifert*** approved the methodology of identifying risk factors associated with certain outcomes. The methodology makes sense. For example, studies show that smoking increases the risk of lung cancer, but no expert can predict whether someone will develop lung cancer. Furthermore, some lung cancer patients smoked but some did not. This does not prove the association between smoking and lung cancer is unreliable, junk science.

Numerous federal courts have held that false confession expert testimony satisfies ***Daubert***. *See* ***Shelby v. State***, 986 N.E.2d 345, 368-369 (Ind. Ct. App. 2013)(Dr. Leo was permitted to testify at length regarding false confessions, the methods police use in interrogation, and problems with the Reid technique); ***Livers v. Schenck***, 2013WL5676881 at *2 (W.D. Neb. 2013)(unreported)(Dr. Leo's testimony passes ***Daubert***)(App.235); ***U.S. v. Whittles***, 2016WL4433685 (W.D. Ky. 2016)(unreported)(false confession expert satisfied

Daubert based in part on studies conducted by Dr. Leo)(App.259).

Moreover, post-***Daubert***, some Wisconsin circuit courts have permitted false confession experts to testify, and the State did not object. *See* ***State v. David Allen***, Milwaukee County Case No. 2012CF5148 and ***State v. Maria-Castillo-Dominguez***, Dane County Case. No. 2011CF1262 (R.166, App.190).

It is true that some non-Wisconsin courts have held that false confession experts do not satisfy ***Daubert***. *See e.g.* ***Kowalski***, 492 Mich. at 133-134. But ***Seifert*** holds that when there is disagreement or if the science is shaky, the jury, not the court, gets to decide whether to believe the expert. *See also* ***Bayer v. Dobbins***, 2016 WI App 65, ¶32, 371 Wis. 2d 428, 885 N.W.2d 173. The opponent of the expert should challenge his methodology through vigorous cross examination. *See* ***Caine*** at *3 (government's objections to Dr. Leo's testimony could be explored on cross-examination.)

The trial court misunderstood ***Daubert***'s reliability analysis. Dr. Leo's testimony met if not exceeded the test. The court of appeals should reverse the trial court on this issue.

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

1. The trial court's decision.

Seth's other defense strategy was to undermine the credibility of K.B. and Rod. Thus, he wanted to offer the report of the nurse who examined K.B. and talked to Rod. The report indicates:

> Father stated daughter was assaulted by her uncle . . . ***Father stated no one believes him***. When asked if blood in panties noted by himself he stated he wouldn't know. He works mostly. Stated if grandmother knew she would hide it. ***Asked [K.B.] if she knew why her dad brought her to the ER tonight. She said she didn't know. When asked what happened and did she hurt anywhere she said "I don't know." Dad very upset. Stated "that is the rudest question ever to ask his daughter in front of him." He doesn't want to know details.*** Tried to explain to dad trying to establish rapport prior to exam. Father's anger escalated. Stated ***"I'm here for one thing for her ass and vagina to be checked—she either got it in her ass or vagina." Pt's dad then wanted to leave . . . Pt's dad giving no eye contact and texting constantly. [K.B.] asked Dad to leave during exam by SANE and Dr. Mason. Dad remained in hall texting when brought back into room. No questions asked. Dad updated. Pt had normal exam.*** UA probe collected for GC Chlamydia. ***Patient's dad threw DC instructions on ground outside ER entrance. Stranger brought them into registration triage area.***
>
> Triage: Dad texting. Told triage nurse to hold, took a call—overheard him say "we're here she'll get checked out." Reluctant to state why he brought daughter to ER.
>
> Exam room: Child watching cartoons, dad texting, poor eye contact with Dr. Mason.

(R.165 at 3, 7, 11, 13, 16-17). (Emphasis supplied).

The court excluded this 20-page medical report on the grounds that it did not show that Rod tried to coach K.B.:

> What we have is a reaction to an examination that did not show the assault that apparently the father believed took place, and that is consistent with the father believing that the assault did take place, or it's at least ambiguous.

> It doesn't prove that [Rod] was trying to coax [K.B.] into providing false facts in this case. Therefore it is not relevant.

(R.256:11-12). The court allowed only the two-sentence conclusion into evidence: "A visual inspection exam was performed by the sexual assault nurse examiner Mike Nye and myself. At this time external genitalia appears normal." (R.130, Ex. 5). Because of this ruling, the parties stipulated to that conclusion and agreed not to call the nurse to testify. (R.256:13-15).

The court did not budge postconviction. K.B.'s statement that she did not know why she was at the hospital was ambiguous. Rod may have been upset by the exam but he did agree to it, and the report does not indicate that Rod tried to suggest answers to K.B. The court further held that the report did not show K.B. had a motive to lie, it did not impeach her credibility, it provided no probative evidence as to what happened, and it would only distract the jury. (App.136-137).

2. The standard of review.

Again, the court of appeals reviews a trial court decision to exclude evidence for an erroneous exercise of discretion. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. Because the trial court made a legal error on this issue, the court of appeals decides the matter *de novo*. ***Roger D.H. v. Virginia O.***, 2002 WI App 35, ¶9, 250 Wis. 2d 747, 641 N.W.2d 400.

3. The trial court misapplied the law.

The Sexual Assault Nurse Examiner's report documented K.B.'s statements that she didn't know why she was brought to the hospital and Rod's comments: "I'm here

for one thing for her ass and vagina to be checked—she either got it in her ass or vagina." The report falls squarely within exceptions to the rule against hearsay. These statements were made for purposes of medical diagnosis or treatment. Wis. Stat. §908.03(4); ***State v. Higgins***, 2011 WI App 44, ¶¶31-35, 332 Wis. 2d 317, 797 N.W.2d 935 (unpublished)(re statements made to S.A.N.E.)(App.252); ***State v. Nelson***, 138 Wis. 2d 418, 435, 406 N.W.2d 385 (1987). The report also had circumstantial guarantees of trustworthiness given that it was prepared by an objective person. Wis. Stat. §908.03(24).

The description of Rod's conduct was admissible also because it showed K.B. had a motive to confirm her dad's version of events. ***State v. Echols***, 2013 WI App 58, ¶18, 348 Wis. 2d 81, 8310 N.W.2d (admitting school's disciplinary records of child sexual assault victim to show her motive to accuse defendant). From K.B.'s perspective, denying that Seth assaulted her caused her dad to become very angry. Indeed, the nurse noted that after K.B. said she didn't know why she was at the hospital and she didn't hurt, Rod became "very upset." When the nurse tried to explain that she had to ask these questions, Rod's anger "escalated." He threw the report on the ground when it reported no evidence of sexual assault.

The report was probative of a material issue in the case—K.B.'s credibility and motive to lie. Was she telling the truth during her interview at the child advocacy center or was she telling the truth at the hospital? The jury could reasonably infer from the report that she was not assaulted and she knew that saying so would provoke her father's ire. (Keep in mind, she was home when Rod grabbed Seth by the neck, threatened to kill him and punched a hole in Tracie's wall.) (R.257:73-74). The report also speaks to Rod's character and credibility. He appeared at trial as the concerned father. The

report suggests just the opposite. The court of appeals should reverse the trial court's decision to exclude the nurse's report and order a new trial.

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

1. The trial court's decision.

The trial court held that its exclusion of Dr. Leo's expert testimony and the nurse's report did not deny Seth his constitutional right to present a defense. Specifically, Dr. Leo's testimony failed ***Daubert***, was not necessary to Seth's case, and would prejudice the jury. (App.125-129). The jury heard about Seth's cognitive vulnerabilities from Dr. Stress and Amanda Turner. "They could take a look at the video. They were all attentive and watched the video and would make up their own minds." (App.125-127). As for the nurse's report, the court held that Seth "was not prohibited from presenting a defense but only required to abide by the rules of evidence." (App.138). Seth failed to show that K.B. "had a motive to lie to the nurse about anything or to create further lies." (App.137). Furthermore, admission of the evidence would have confused the jury and invited speculation. (App.138).

2. The constitutional right to present a complete defense.

The Compulsory Process clause of the Sixth Amendment, the Due Process Clause of the Fourteenth Amendment, and Article 1, §7 of the Wisconsin Constitution guarantee a criminal defendant the constitutional right to present a complete defense. ***Crane v. Kentucky***, 476 U.S. 683, 690 (1986); ***State v. St. George***, 2002 WI 50, ¶14. These rights "are fundamental and essential to achieving the

constitutional objective of a fair trial." ***Id.*** They ensure that a defendant has the right to effective cross-examination of adverse witnesses and the right to admit favorable testimony. ***Id***. The right is not absolute. The defendant may present relevant evidence that is not substantially outweighed by its prejudicial effect.

To show a violation of the constitutional right to present a defense, a defendant must satisfy a two-part inquiry. The first inquiry requires proof that: (a) the evidence meets the statutory standards governing its admission; (b) the evidence was clearly relevant to a material issue in the case; (c) the evidence was necessary to the defendant's case; and (d) the probative value of the evidence outweighed its prejudicial effect. ***Id.***, ¶54. After the defendant establishes these factors, then the court undertakes the second inquiry: determining whether the right to present the proffered evidence is outweighed by the State's compelling interest in excluding it. ***Id***. ¶55.

In ***St. George*** the defendant was convicted of 1st degree sexual assault of a child. The child told several people that he had fondled her vagina. At trial, she denied the assault. The State offered the testimony of a social worker regarding recantations and of an investigator who had interviewed the child. The defendant wanted to call a recantation expert to challenge the process used to interview the child, but the trial court excluded it.

St. George held that the exclusion of the defendant's expert deprived him of his constitutional right to present a complete defense. Regarding the first inquiry, (a) the recantation expert's testimony was "relevant" to the material issue in the case—the defendant's and the child's credibility. (b) The testimony was essential to the defense—the defendant

had to explain why the child's statements favorable to him were more reliable than her accusations. (c) The State was permitted to offer experts; whereas the defendant had none. (d) The State would not have been prejudiced by the admission of the recantation expert's testimony because it could have challenged his expertise and credibility on cross-examination and argued "probative value" to the jury. ***Id***., ¶¶57-68.

As for the second inquiry, ***St. George*** held that the defendant's need to present the testimony outweighed the State's interest in the court's exercise of discretion and the unfounded fear that the testimony would mislead the jury. ***Id.*** ¶70.

3. The trial court misapplied the law.

Dr. Leo's testimony clearly satisfied ***St. George***'s initial inquiry. (a) It passed §907.02(1) and ***Daubert***. (b) It was certainly relevant to a material issue in the case—Seth's credibility. (c) It was necessary to Seth's defense. He had to prove that his trial testimony was more credible than what he said during the videotaped interrogation. His strategy was to challenge the detectives' interrogation techniques—showing that they exerted subtle, improper pressures on him and that those kinds of pressures contribute to false confessions. The jury had no other guidance on interrogation techniques. Dr. Leo's testimony was all the more crucial in this case because Seth looks normal but is not. The trial court failed to grasp this point. It held that false confession expert testimony might be admissible where a defendant was not cognitively disabled, but because Seth is cognitively disabled the jury could just watch the video and decide whether his confession was coerced. (d) Dr. Leo's testimony would not have

prejudiced the State because it could have cross-examined Dr. Leo and argued that his opinion had little probative value.

As with the expert testimony at issue in ***St. George***, Dr. Leo's opinion also satisfied the second inquiry. The State has no compelling interest in excluding Dr. Leo's testimony—especially since it has not opposed the admission of false confession experts in other cases. Indeed, Seth's need to present the testimony outweighed the unfounded fear that it would mislead the jury. *See also* ***Crane***, 476 U.S. at 690-691 (the constitutional right to present a defense is violated where the State is permitted to exclude competent relevant evidence bearing on the credibility of a confession where such evidence is central to the defendant's claim of innocence).

The nurse's report also satisfies ***St. George***'s initial four-part inquiry. (a) K.B.'s and Rod's statements to the nurse were admissible under §908.03(4) and (24) as well as ***Higgins***. (b) The report was relevant to a material issue in the case—K.B.'s credibility and motive to lie and Rod's character and credibility. (c) The report was essential to Seth's defense. It was the ***only*** evidence he had where K.B herself indicated that nothing had happened. It was the only direct evidence of her incentive to confirm her dad's version of evidence. The report was critical to undermining the State's two best witnesses. (d) The report's only "prejudicial effect" was that it might support the defense's theory of the case. Even if the jury could draw competing inferences from the report, that is not grounds to bar the defense from arguing one of them—especially when it was coming from an objective source (a Sexual Assault Nurse Examiner, not a family member or friend).

The report also satisfied the second ***St. George*** inquiry. The State had no compelling interest in excluding it. The

prosecutor's function is to search for the truth, not secure a guilty verdict. ***State v. Missouri***, 2006 WI App 74, ¶17, 291 Wis. 2d 466, 714 N.W.2d 595. Admitting evidence that challenges the credibility of the State's witnesses is essential to that goal.

The trial court's decision to exclude Dr. Leo's testimony and all but the conclusion of the nurse's report deprived Seth of his constitutional right to present a complete defense. The court of appeals should reverse the trial court and order a new trial.

III. The District Attorney Engaged in Prosecutorial Misconduct During Closing Arguments.

A. The trial court's decision.

The trial court denied Seth's postconviction claim that the DA engaged in misconduct during closing arguments. It held that the DA did not purport to be an expert on ACL surgeries, and the jury was instructed to use its common knowledge about recovering from an ACL surgery. (App.140-141). The DA did "some vouching for [K.B.'s] credibility, but a lot of it was two-step . . .[he] didn't say I believe [K.B.] which would have been a problem." (App.141-142). The DA's repeated statements that "six-year-olds don't lie" was okay because it is common knowledge that they do lie. (App.142). Furthermore, unlike the cases Seth cites, this case was not a credibility contest between Witness A and Witness B, because Seth confessed. The DA did not put the weight of the government behind any particular witness. (App.142). And the DA did not appeal to the justness of K.B.'s cause because he did not request a conviction in order to alleviate social problems." He did not appeal "to passion rather than reason." (App.144).

B. The standard of review.

Trial counsel did not object to the prosecutor's misconduct during closing arguments. Therefore, the court of appeals reviews this issue for "plain error"—error so fundamental that a new trial must be granted. Wis. Stat §901.03(4).

C. The law governing prosecutorial misconduct.

Prosecutorial misconduct violates the Due Process Clause of the Fourteenth Amendment and right to a fair trial under the Sixth Amendment to the U.S. Constitution and Article 1, §7 of the Wisconsin Constitution. When the prosecutor's closing argument refers to evidence not presented at trial or statements that are false, it further violates the defendant's constitutional right to confront his accuser. *See* Michael Cicchini, ***Prosecutorial Misconduct at Trial: A New Perspective Rooted in Confrontation Clause Jurisprudence***, 37 Seton Hall L. Rev. 335, 358-364 (2007)(citing ***Crawford v. Washington***, 451 U.S. 36)(2004)).

A prosecutor is allowed wide latitude during closing arguments. He may detail the evidence presented at trial, argue from it to a conclusion, and state that the evidence convinces him and should convince the jury. ***State v. Hurley***, 2015 WI 35, ¶95, 361 Wis. 2d 529, 861 N.W.2d 174. "While [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." ***Berger v. U.S.***, 295 U.S. 78, 88 (1935). The average juror trusts a prosecutor to faithfully observe these obligations. "***Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused***

when they should properly carry none." ***Id.*** (Emphasis supplied).

Thus, a prosecutor may not vouch for the credibility of a witness who testified at trial, reference matters not in the record, or ask the jury to draw inferences that he knows are not true. ***State v. Smith,*** 2003 WI App 234, ¶25, 268 Wis. 2d 138, 671 N.W.2d 854; ***State v. Weiss***, 2008 WI App 72, ¶15, 312 Wis. 2d 382, 752 N.W.2d 371. Such tactics amount to "unsworn, unchecked testimony, not comments on the evidence." ***State v. Pabst,*** 268 Kan. 501, 510, 996 P.2d 321 (2000). They place the government's prestige behind certain witnesses and evidence through personal assurances of their truthfulness. ***U.S. v. Weatherspoon,*** 410 F.3d 1142, 1146 (9th Cir. 2005).

Consistent with these principles, SCR 20:3.4(e) provides that at trial, a lawyer shall not "assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness . . . or guilt or innocence of an accused."

D. The DA asserted facts outside the record.

Three witnesses testified about Seth's ACL surgery. Tracie explained that Seth's surgery was on November 28, 2013, and afterwards he could not be left alone with K.B. and S.B. due to his leg brace and crutches. About 6-8 weeks later, he was allowed to take the brace off to sleep or drive. (R.257:27, 37-38). However, at the time of the arrest, Seth still used his brace when he wasn't driving, he did not have full mobility of his knee, and he could not do "squat thrusts or bends or kneeling." (R.257:35, 38-39). Tom Spaeth confirmed that Seth could not babysit alone after his ACL

surgery. (R.257:44). Seth himself testified that he could not kneel at the time of the alleged assault. (R.257:65-66, 70).

Rod did ***not*** testify on the subject of Seth's ACL surgery or mobility at all. (R.256:75; R.257:1-8). Furthermore, no expert testified about what ACL injuries are or how quickly people recover from ACL surgery. The point is, all evidence presented at trial supported Seth's version of events. Nevertheless, here is what the DA told the jury during closing arguments:

> ***I had shoulder surgery. I've known other people that have had hip injuries, knee replacements, other type of surgeries. Yeah, the first couple weeks right after it occurs you're pretty limited, but two months out, the limitations aren't anywhere near what they used to be.***
>
> In fact, if you're a professional athlete, you're probably almost majorly rehabbing more than what I do in an average day much sooner after it occurs. ***He says he's doing his rehab work at home with his mom, so yes, week one is he able to probably kneel down? No.*** . . .
>
> . . . I don't know how many of you are familiar with ACLs . . . ***the ACL is a stabilizing muscle in his leg. He's not having a knee replaced. It's not an injury to the knee. It's the fact his knee is less stabilized till it gets fixed. It gets fixed, and the swelling is huge, and over the course of time, it goes down and you're able to function more, and you need to strengthen up that muscle. There's nothing to indicate you haven't been able to kneel down two months later. You haven't heard any testimony saying I'm a doctor, two months later, he can't do this***. (App.166-167). (Emphasis supplied).

Then, for good measure during his rebuttal, the DA told the jury:

> ***But the testimony is*** they [Rod and Seth] lived together. He works his twelve-hour shifts and goes away, goes away and comes back. ***[Rod] knows his brother has a brace on***. I don't know how you could possibly live at a house, see a person who's there, even if you're in and out, in and out, and not realize that they're wearing a brace, not realize that they had surgery.
>
> ***[Rod] doesn't think*** about that because ***[Rod] sees his brother getting around fine after awhile 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. He's getting around fine at that time.***
>
> ***[Rod] doesn't see what he's doing on a daily basis or once a week? I just can't see that that's possible.*** (App.181-182). (Emphasis supplied).

Compare the above to ***Smith***, where the defendant allegedly sold cocaine to an undercover cop. Smith denied the transaction. No one observed it. So the jury had to decide whom to believe—Smith or the officer. The prosecutor tried to bolster the credibility of various police officers who testified by telling the jury simply: "I know these officers; and you know them now too. They work hard. They do a tough job. They come here to testify a lot of times. They work long, long hours. You weigh their testimony against the defendant's." ***Smith***, ¶25. The court of appeals declared these statements improper:

> It is undisputed that there is no evidentiary basis for the officer's work habits or job demands, or for the prosecutor's knowledge of them. This portion of the prosecutor's closing argument unfairly referenced matters not in the record and vouched for the credibility of the police witnesses.

Id. at ¶26.

Likewise in ***Berger***, the United States Supreme Court found misconduct because the prosecutor put "into the mouths of witnesses things which they had not said" and pretended "to understand that a witness had said something which he had not said." ***Berger***, 295 U.S. at 632. *See also*, ***U.S. v. Cheska***, 202 F.3d 947, 951-52 (7th Cir. 2000)(prosecutor's comment during closing that witness's testimony had helped 23 other people was not supported by the record and deprived defendant of a fair trial.)

In Seth's case the vouching was more egregious. The State presented ***no*** evidence on what an ACL injury is or how quickly people recover from it. The DA spoke like an expert and fabricated what Rod would have observed about Seth's recovery. Under ***Smith***, ***Berger***, and SCR 20:3.4(e), the DA engaged in prosecutorial misconduct by asserting facts outside the record.

E. The DA vouched for K.B.'s credibility.

During closing arguments, the DA bluntly told the jury that 6-year-olds don't lie and that K.B. was telling the truth. He said:

> . . . is [K.B.] 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. She provided way too much detail, way too much graphic nature about what had occurred for it to be something that she just made up***. (App.149). (Emphasis supplied).
>
> ***I can't conceive*** of a way that a six-year-old would be able to give that much detail about a false memory. ***The only way that she provides that much detail is if it's true, it's true what occurred to her.*** (App.150). (Emphasis supplied).

> ***I can't imagine a six-year-old that would be able to lie, apparently, as well as she did on that video. It has to be the truth.*** (App.150-151). (Emphasis supplied).
>
> ***There's no way*** [K.B.] could remember all those details and keep it all straight, ***just inconceivable that a six-year-old would have the sort of mental capacity to be able to memorize all those facts.*** (App.151). (Emphasis supplied).
>
> ***[S]ix-year-olds cannot lie as well as they're going to say she lied on that video***. (App.152). (Emphasis supplied).
>
> All [K.B.] did is describe it in the most basic way she can come up with ***'cause it's the truth,*** felt smooth, felt soft, and felt cold. (App.156). (Emphasis supplied).
>
> ***I didn't hear anything that he said that tells you that [K.B.] is lying there, that it was all set up by [Rod]. That's just not possible.*** (App.179). (Emphasis supplied).

In a child sexual assault trial, a prosecutor's statements that "children don't lie" or "kids can't make this up" constitutes vouching so prejudicial that it requires a new trial. *See* ***People v. Mendiola***, 2010WL1266837 *3-6 (Guam Terr. Mar. 5 2010)(unreported)(prosecutor's comments that children don't lie during opening and closing arguments amounted to plain error and required a new trial(App.243); ***State v. Magallanez***, 290 Kan. 906, 914, 235 P.3d 460 (2010)(prosecutor's statements that "You trust children until you have a reason not to. We assume that. We assume we have taught them correctly" constituted misconduct and together with other errors, warranted a new trial); ***State v. Alexander***, 254 Conn. 290, 755 A.2d 868, 875-77 (Conn. 2000)(prosecutor's argument that victim "knew she had to tell the truth and that's what she did," "little kids can't make this

up," "that's how little kids think," "she told the truth," were improper vouching).

The DA's personal assurances of K.B.'s credibility were even more pronounced and pervasive. The DA engaged in misconduct by vouching in violation of SCR 20:3.4(e).

F. The DA improperly appealed to the justness of K.B.'s cause.

SCR 20:3.4(e), provides—in no uncertain terms—that, in trial, a lawyer shall not "state a personal opinion as to the justness of a cause" or "the guilt of the accused." Like a "Golden Rule" argument, this strategy appeals to the jury's sympathy for the victim of a crime. ***State v. DeLain***, 2004 WI App 79, ¶23, 272 Wis. 2d 356, 679 N.W.2d 562. The "evil lurking" in arguments like this is that they urge the jury to convict a defendant for reasons that have nothing to do with the evidence or his guilt or innocence. ***Weatherspoon***, 410 F.3d at 1149 (citation omitted).

Here are the DA's parting words to the jury in Seth's case:

> ***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***.
>
> I would say the evidence, taken as a whole, her video, the defendant's confession, and even the way he tries to get out of it here today, show 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. She is the one that deserves justice. ***What the defendant***

> ***deserves is to be found guilty of first degree sexual assault of a child***. Thank you. (App.182-183).

The DA literally appealed to the justness of K.B.'s cause in violation of SCR 20:3.4(e).

G. The DA's misconduct requires a new trial.

The DA's closing arguments gutted Seth's defense. He personally vouched for K.B.'s honesty, offered his own "expert" views on how quickly Seth recovered from ACL surgery, conjured evidence about Rod to support the State's theory of the case, and told the jury to convict Seth based on the justness of K.B.'s cause. His misconduct was so blatant and pervasive that a general instruction reminding the jury that arguments are not evidence could not undo the damage. See ***Jordan v. Hepp,*** 831 F.3d 837, 848, 849 (7th Cir. 2016)(when a case turns on credibility, defense counsel cannot stand silent in reliance on a generic instruction while the State vouches). The DA's misconduct so infected the proceeding that a new trial is required under the "plain error" doctrine.

IV. The Trial Court Erred in Denying Seth's Claim for Ineffective Assistance of Counsel.

A. The standard of review.

The Sixth Amendment and Article I § 7 of the Wisconsin Constitution guarantee a criminal defendant the right to counsel. This means vigorous advocacy of the client's cause so that he receives a fair trial. ***Strickland v. Washington***, 466 U.S. 668, 689. (1984). To prevail on a claim for ineffective assistance of counsel, a defendant must prove that his lawyer performed deficiently—meaning his errors were so serious that he was not functioning as the

'counsel' guaranteed by the Sixth Amendment. ***Id***. at 687. A defendant must also prove prejudice—meaning that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

An appellate court reviews the trial court's findings of fact regarding counsel's conduct under a clearly erroneous standard. It reviews whether the facts amount to deficient performance and prejudice *de novo*. ***State v. Honig***, 2016 WI App 10, ¶25, 366 Wis. 2d 681, 874 N.W.2d 589. When a defendant alleges multiple performance deficiencies, a court assesses prejudice based on their cumulative effect. ***State v. Coleman***, 2015 WI App 38, ¶21, 362 Wis. 2d 447, 865 N.W.2d 190.

B. Trial counsel performed deficiently.

1. Trial counsel failed to elicit opinions from Dr. Stress that were critical to Seth's defense.

At trial, Dr. Stress testified that he could have projected how Seth would function in certain settings based on his IQ scores. (R.256:45-46). Counsel never asked Dr. Stress for this—or ***any***—substantive professional opinion. Dr. Stress's postconviction proffer shows that he could have testified that it is not possible to watch an interview of a cognitively-disabled, normal-acting person and know what he was understanding. (App.184). He would have testified that a person of Seth's IQ was unlikely to understand his ***Miranda*** rights or the consequences of an interrogation. (App.184). A person with Seth's scores would be suggestible, try to please authority figures, and tend to confabulate. (App.184; R.261:21-22).

Trial counsel acknowledged that he should have asked Dr. Stress about the ability of person with a low IQ to understand ***Miranda*** and to function in an interrogation. (R.261:23, 27, 53, 70-72). He admitted that the trial court signed a pre-trial order barring Dr. Stress from testifying "regarding the validity of the defendant's confession," but imposed no other limitations. (R.261:25-26).

The trial court held that it would have barred Dr. Stress from testifying to "some" of his opinions, without specifying which opinions it meant. It thus held that trial counsel did not perform deficiently in failing to ask for the unspecified opinions. It also held that Seth was not prejudiced because the jury heard about his learning disability. (App.108-109).

The trial court was wrong on both counts. First, at the ***Machner*** hearing, Seth's lawyer agreed that Dr. Stress's testimony was critical to his defense—especially after the court barred Dr. Leo's testimony. Dr. Stress was the only expert witness called at trial and the only expert who could give a professional opinion about Seth's psychological profile. Amanda Turner, Seth's teacher, could not give those opinions. Trial counsel testified that he did not ask these questions because he thought they were barred by the trial court's exclusion of false confession expert testimony. (R.261:18, 20-23). But there is a difference between an expert testifying on a suspect's mental disabilities and how they might affect the reliability of his confession and a false confession expert. ***U.S. v. West***, 813 F.3d 619, 624 (7th Cir. 2015)(trial court erred in excluding expert testimony that defendant was suggestible, mentally ill person with a 73 verbal IQ and how this might have influenced his responses to police questions).

Second, the jury did not hear the professional opinions proffered by Dr. Stress from any other witness. The evidence went directly to the reliability of Seth's confession. Had the trial court excluded the opinion, the error would have been harmful. ***Id.*** at 62.

2. Trial counsel failed to object, move to strike or request a limiting instructions regarding three parts of Seth's video confession.

Before trial, the court and the parties discussed how much of the video interrogation should be shown to the jury. (R.255:10-13). Seth contends that his trial counsel provided ineffective assistance of counsel in failing to object, move to strike or request a limiting instruction regarding the parts of the video where: (1) the detectives talked about the fact that Rod had also accused Seth of trying to take a shower with Tom Spaeth's niece; (2) Seth said that his father and grandfather were sex offenders; and (3) the detectives said over and over that "six-year-olds don't lie."

a. Rod's false "shower accusation."

When Rod reported Seth to the police, he also told them that Tom Spaeth (a family friend) had told him that Seth had tried to take a shower with Spaeth's little niece. That was false. Spaeth never said that. (R.166: Ex. 8). Trial counsel wanted to redact references to this false "shower accusation" from the video interrogation so that the jury did not see or hear about it. The DA and the trial court agreed that references to the false "shower accusation" should not be shown to the jury. (R.255:10-13; App.188). Nevertheless, a four-minute discussion of it was in fact shown to the jury. (Supp.App.107:15-109:20).

At the ***Machner*** hearing, trial counsel admitted that the accusation was played, that he did not use the accusation to challenge Rod's credibility, and that the accusation could prejudice the jury against Seth. (R.261:30, 73). Counsel did not object to the evidence, move to strike it, or request a limiting instruction. He admitted he made a mistake. (R.261:30-33).

The trial court held that trial counsel was not deficient and Seth was not prejudiced because: (1) on the video the interrogating officer seemed confused about the shower accusation, (2) Seth never said that he intended to take a shower with Spaeth's niece, and (3) "the state had an interest, actually, in having this part of the testimony come forward because it showed Mr. Lehrke could stand up to questioning . . ." (App.109-110).

Of course ***the State*** had an interest in getting the "shower accusation" into evidence. It is "other acts" evidence suggesting that Seth had a propensity to sexually assault little girls. Wis. Stat. §904.04(2). The question is whether the jury should have heard it. Because the accusation was false and the trial court barred it, the answer is "no." Nevertheless, trial counsel did not seek to exclude the 4-minute discussion of the false accusation from the video shown to the jury. He did not move to strike it, request a limiting instruction, or use it to attack Rod's credibility. Counsel's failure to prevent the jury from hearing false "other acts" evidence is deficient performance. ***State v. Silva***, 2003 WI 191, ¶11, 266 Wis. 2d 906, 670 N.W.2d 385.

b. Seth's statements about his father and grandfather.

Similarly, trial counsel was deficient in failing to object to, move to strike, or request a limitation instruction

regarding the part of the video where Seth told the detectives that his father and grandfather were sex offenders. Specifically, Seth said:

> I know my side of the family, the Lehrke side, they're kind of all--not all of them, but my dad, my grandpa were all sexual offenders and I didn't want to turn out to be like them, that's another reason. (Supp.App.129:60-130:61).

Trial counsel testified that he was aware of those statements but was not thinking about them at the pre-trial conference concerning which parts of the video the jury would see. (R.261:35).

The trial court ruled that counsel "thought about it and decided not to ask for a deletion. I think that's a strategic decision on his part." (App.111). The trial court erred. Trial counsel testified that he did ***not*** think about it. The court further held: "I believe the passing reference to his family and their brushes with sexual assault was trivial and insignificant and not prejudicial." (App.112). The information was irrelevant to whether Seth assaulted K.B. Wis. Stat. §904.01. And it was prejudicial because it allowed the jury to infer that Seth was predisposed, based on family history, to commit a sex offense. Wis. Stat. §904.03. The trial court misunderstood the record and trivialized the prejudicial effect of the evidence. Counsel's mishandling of the evidence was deficient performance.

c. The detectives' declarations that six-year olds don't lie.

Finally, trial counsel did not seek to redact or request a limiting instruction regarding the parts of the video where the detectives invoked their expertise in sensitive crimes and repeatedly said "six-year olds don't lie," "kids can't make this

stuff up," "I'm confident she's telling the truth," "I think that it's unlikely this didn't happen," "we can agree" that K.B.'s version of events is "the truth." (Supp.App.120:41-42, 123:47-48, R.129:59, 131:63, 132:65, 133:67, 135:71). Trial counsel testified that if the jury believed these statements, they would prejudice Seth's defense. (R.261:39). However, he thought the jury would know from their own experiences that six-year-olds do lie and would conclude the detectives were not searching for the truth. (R.261:40).

The trial court held that under ***State v. Miller***, 2012 WI App 68, ¶¶11-13, 341 Wis. 2d 737, 816 N.W.2d 331, what an officer says to a defendant during an interrogation is not sworn testimony in court. Thus, a jury may see and hear an interrogator repeatedly telling a suspect that he is lying without violating ***State v. Haseltine***, 120 Wis. 92, 352 N.W.2d 673 (1984). (App.112-113).

The trial court made a legal error. The interrogators' declarations were indeed unsworn, but the jury did not know this. The State called Detective Kleinhans as a witness. He swore to tell the truth. Then the State played the video confession. (R.255:100-102). Trial counsel did not ask Kleinhans whether the drumbeat of "six-year-olds don't lie" was a false statement or an interrogation technique. Nor did counsel request a limiting instruction like the lawyer in ***Miller***. So, from the jury's perspective it heard one witness (the detective) testifying that another witness (K.B.) was telling the truth. That is ***Haseltine*** evidence. The failure to object or request a limiting instruction regarding ***Haseltine*** evidence is deficient performance. ***State v. Krueger***, 2008 WI App 162, ¶¶ 16-17, 314 Wis. 2d 605, 762 N.W.2d 114.

3. Trial counsel failed to object to prosecutorial misconduct and move for a mistrial.

Argument III above established that the DA committed prosecutorial misconduct during closing arguments. Trial counsel neither objected nor moved for a mistrial. He stood silent when the DA vouched for Rod's alleged observations of Seth's post-surgery mobility and K.B.'s credibility because: "My experience is that the State sometimes embellishes in making argument, exaggerates certain things, but I usually feel a jury sorts that out. And it's argument is what it was." (R.261:48). Counsel had no strategy.

Moreover, counsel "bit his tongue" when the DA made an "over the top" appeal to the justness of K.B.'s cause because it would have drawn the jury's attention to it. (R.261:48-49). Counsel agreed that he made a mistake when he did not ask the court for a limiting instruction. (R.261:49).

The trial court found no deficient performance: "The prosecutorial comments, again, I've previously made a ruling on that, and I'm not persuaded that my decision should be changed." (App.113-114). If the court of appeals holds that the DA ***did*** engage in vouching, it should reverse on this point. It should do so even though the court instructed the jury that "remarks of the attorneys are not evidence. If the remarks suggested certain facts not in evidence, disregard that suggestion." (R.258:24). That instruction does not cure prosecutorial misconduct because it did not identify the DA's improper statements, and it was not given contemporaneously with or immediately after the improper statements. ***Jordan***, 831 F.3d at 849. A prompt objection would have cut off the vouching. "When the whole case turns on witness credibility, standing silent when the state vouches for its witnesses cannot

be justified by reliance on a generic, non-contemporaneous instruction." ***Id.***

C. Trial counsel's errors prejudiced Seth.

The jury heard Seth's confession, his teacher's testimony that he struggled in school, and Dr. Stress's verification of his low IQ scores. Due to counsel's errors, the jury did not hear Dr. Stress's professional opinions about the psychological profile of a person with a low IQ score—that such a person is easily led, deferential to authority and tends to confabulate. Due to counsel's errors, it did hear Seth say that Rod had accused him of another child sexual assault and that his father and grandfather were sex offenders. It heard law enforcement officers repeatedly, categorically declare that six-year-olds don't lie. It heard the DA (the State's spokesperson) say that Rod saw Seth moving fine at the time of the alleged assault, that 6-year-olds cannot make up sexual assault charges, that K.B. "is a young girl that deserves justice," and that Seth "deserves to be found guilty." (App.182-183).

There is a stark difference between what the jury heard due to the cumulative effect of counsel's errors and what it otherwise would have heard. The 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. It should therefore order a new trial based on ineffective assistance of counsel.

CONCLUSION

For the reasons stated above, Seth Z. Lehrke respectfully requests that the court of appeals reverse the trial court's denial of his suppression and postconviction motions and order a new trial.

Dated this 7th day of February, 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 12,629 words, per the court of appeals January 10, 2017 order permitting 13,000 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 7th day of February, 2017.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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