STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 18AP258-CR
(Walworth County Case No. 2014CF215)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN S. FINLEY,

Defendant-Appellant.

Appeal From the Judgment of Conviction and Order Denying Postconviction Motion, Both Entered In The Circuit Court For Walworth County, the Honorable Kristine E. Drettwan Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED FOR REVIEW

In determining whether a confession is voluntary under the totality of the circumstances, courts weight the pressures police use to induce a defendant to confess against the personal characteristics of that defendant. Whitewater Police Officers used complex questions, the introduction of misinformation, minimization, and other psychological pressures of the Reid Technique in questioning John Finley, who was suggestible, had significant intellectual limitations, and was physically ill. Did the admission of Mr. Finley's statement as evidence at trial violate his state and federal due process rights not to be coerced into confessing?

Prior to trial and prior to the trial testimony of Dr. David Thompson concerning Mr. Finley's suggestibility, the circuit court, the Honorable David M. Reddy presiding, denied a motion to suppress Mr. Finley statement. The circuit court, the Honorable Kristine E. Drettwan presiding, denied a postconviction motion raising the same issue, after having the benefit of Dr. Thompson's testimony.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case under Wis. Stat. (Rule) 809.22. Appellant's arguments are clearly substantial and do not fall within that class of frivolous or near frivolous arguments concerning which oral

argument may be denied under Rule 809.22(2)(a).

Publication may be appropriate under Wis. Stat. (Rule) 809.23(1)(a) to clarify the application of the law of police coercion of statements to intellectually-limited defendants.

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BRIEF OF THE DEFENDANT-APPELLANT

STATEMENT OF THE CASE

This case involves police questioning of John Finley, whom police were told has the mental capacity of a 12-year-old although he is an adult (R99:27.) He attended Lakeland Special Education school and graduated from there. (R99:64.) According to his aunt, Linda Reed, who is a retired social worker, he is easily manipulated, tends to give into pressure situations, and tells people what they want to hear under stress. (R99:60-64.) When he was younger, he could be convinced of one thing, even if he originally said the opposite. (R9:77-78.) He was afraid and passive and had a weak short-term memory. (R99:63-64.) He needed more than one direction to follow a task and has been bullied all his life. (R99:64.)

Dr. Roland Manos, who preformed a psychological evaluation of Mr. Finley to see if he qualified for Social Security Disability Insurance (R100:3-5), found him to be functioning within the borderline range of intellectual ability with a full scale IQ score of 72, which placed him in the 3rd percentile for intelligence. (R100:5-6.) 97% of the population has a higher IQ score than Mr. Finley does. (R100:18-19.) Dr. Manos found he

had significant, although not disabling, intellectual limitations, including problems with verbal comprehension, working memory, and processing speed. (R100:6.)

Dr. David Thompson, a clinical and forensic psychologist, testified at trial[1] that Mr. Finley is much more compliant and suggestible than a normal person of his age. (R109:61.) Dr. Thompson preformed the Gudjonsson Compliance Test on Mr. Finley in forming his expert opinion. (R109:40.) That test is a commonly-used, reliable, field-accepted, self-report instrument that indicates how likely someone is to follow orders. (R109:44.) The questions in it relate to the willingness of someone to follow orders or to cave in to opposition, although it is designed to appear to be a memory test. (R109:55.) Mr. Finley's scores indicated that he was more compliant that 95% of the population, while the cores from his aunt indicated that he is more compliant than 99% of the populations. (R109:56.)

Dr. Thompson also tested Mr. Finley's listening comprehension and oral expression using the Wechsler Individual Achievement Tests and learned that he had difficulty expressing himself. (R109:46-47.) Although his listening comprehension was in the average range, his oral expression score was in the 2nd Percentile. (R109:57.) Finally, Dr. Thompson administered the Test of Memory Malingering, which suggested that Mr. Finley was not malingering. (R109:49.) Mr. Finley scored well, which meant that he was not trying to fake his memory problems. (R109:60.)

This case began when Mr. Finley's sister took her daughter, C.P., to her regular appointment with her mental health therapist in May of 2014. C.P. has mild autism and had been seeing Jennifer Chellivoid for her behavioral problems and sensory issues for approximately a year. (R108:17-18.) She was socially awkward, did not want to bathe, was defying instructions, and was getting angry. (R107:283.)

That day, C.P.'s mother, in C.P.'s presence, mentioned "a concern"

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1 Dr. Thompson testified at the trial only (see R109:32-166), but the circuit court considered his testimony in deciding the postconviction motion (see R111:36-37).

that C.P. would become angry when her uncle wanted to play with her. (R108:20-21; see also R107:248). In response, Ms. Chellivoid read C.P. a children's book called "How to Keep Yourself Safe." (R108:21.) One of the pages spoke about how not being touched in areas under bathing suits and how adults should not ask children to keep secrets (R108:21.) The therapist then asked C.P. if anyone had ever touched her inappropriately and C.P. said yes. (R108:23). C.P. said her uncle touched her all the time and pointed to her breasts and her vagina (R108:23.) She claimed it occurred when her parents were not home. (R108:24.) Ms. Chellivoid then had a "facilitated discussion" with C.P., told C.P.'s mother, and reported the information to Child Protective Services. (R108:24-25.)

Subsequently, Ms. Chellivoid tried to use Eye Movement Desensitization and Reprocessing therapy ("EDMR") with C.P. (R108:46-49.) The therapy requires many sessions and involves thinking about an intrusive image" as part of the therapy. (R108:46-49.) It ended because C.P. could not come often enough and because of her autism, which made it hard to tell if she was processing properly. (R108:50-51.)

Paula Hocking, who works for the Walworth County Child Advocacy Center, interviewed C.P. after Ms. Chellivoid did. (R107:192-193, 207.) She used the StepWise Protocol, which starts out open-ended and then becomes more direct. (R107:196.) Under the protocol, the child provides information first and then the adult narrows in. (R107:243.)

Dr. Thompson, who testified about C.P.'s disclosures as well as Mr. Finley's suggestibility, was concerned about the repeated discussions with C.P. about the alleged abuse. (R109:69-70.) He noted that her regular therapist, her mother, Ms. Hocking, a doctor, and a school friend all spoke with C.P. about the incident before she testified to it at trial. R109:70. His concern was that repeatedly interviewing a child about something that did not happen can create a false memory of it. (R109:70.) He also was concerned about the number of leading questions used in interviewing C.P. because those types of questions provide false information and suggestion. (R109:71.) For example, he noted that in one interview, after C.P. mentioned having been touched, she was asked if anyone touched her at the new house, which could have suggested that the interviewer

wanted to hear specifically about genital touching at that new house. (R109:71.)

Dr. Thompson called some of these issues "source misattribution errors" in which a person begins to remember something the person has heard about repeatedly. (R109:73.) The problem is that the discussions contaminate memory. (R109:90.) He explained that the EDMR therapy, which required talking repeatedly about being touched, can create a memory of touching where none previously existed. (R109:83.) He also worried that C.P.'s mother, by discussing her concerns about C.P.'s behavior in front of C.P., and C.P.'s therapist, by immediately reading a book about sexual, touching afterwards, could have inadvertently suggested an incident to C.P. (R109:87-88.) In his expert opinion, there were considerable concerns about the reliability of C.P.'s memories and a high risk of source misattribution errors. (R109:95.)

In any event, as a result of C.P.'s claims, Officer Saul Valadez had a conversation with C.P.'s mother in which she told him that her brother, Mr. Finley, had the mental capacity of a twelve-year-old. (R99:27.) The officer and then-Detective Adam Vader Steeg then attempted to locate Mr. Finley to interview him. (R98:21; *see also* R97:5.)

The day after that unsuccessful attempt to locate Mr. Finley, Detective Vander Steeg and Officer Valadez went to his apartment at 8:45 a.m. (R98L21; *see also* R97:5), knowing he was a suspect (R98:26.) The detective was in street clothes, but the officer was in uniform. (R98:12.) After entering the front door of the building, Officer Valadez went down the hallway so he would know if Mr. Finley tried to flee. (R98:12; *see also* R99:30.) Detective Vander Steeg admitted that they would have stopped Mr. Finley if Mr. Finley had tried to leave. (R98:24.)

Mr. Finley's mother, Holly, opened the door and consented to their entry. (R98:13; see also R99:30.) As they came in, Mr. Finley was in the bathroom and the door was closed. (R98:12-13; R99:32.) Mr. Finley crawled out of the bathroom on his hands and knees within a minute or two. (R98:12-13; R99:32.) He crawled four or five feet, got up, and walked into the kitchen with the officers. (R98:14.)

Mr. Finley said he was not feeling good, but Detective Vander Steeg did not remember what his ailment was. (R98:14.) Mr. Finley never vomited or said he was going to do so. (Id.) According to Officer Valadez, Mr. Finley might have mentioned that he had a temperature of 102 degrees in the days before the interview. (R99:33.)

Although she was not directed to leave, Holly went into a back bedroom and the police began interviewing Mr. Finley at the table. (R98:17.) Officer Valadez would later claim that Mr. Finley had adequate communication skills to discuss the allegations and also had some familiarity with being accused of a crime. (R99:16.) Despite having been told of limitations, the officer thought Mr. Finley did not seem to be hallucinating and seemed to understand the questions. (R99:14.) Detective Vander Steeg, who insisted he was not informed of Mr. Finley's cognitive limitations, averred that he would have been able to tell if Mr. Finley were truly cognitively disabled, although the detective also admitted that he did not know how I.Q. numbers work. (R98:26, 44.)

During the interrogation, neither Detective Vander Steeg or Officer Valadez threatened him nor did either of them draw a weapon on him. (R99:17.) They said he was not under arrest and that he could ask them to leave. (R98:46-47; R99:16-17.) All of the questioning was captured on video and the police gave Mr. Finley a glass of water during the interview. (R99:14-15.)

Detective Vander Steeg used a psychological interviewing method called the Reid Technique, which begins with an interview about who, what, where, when, why, and how, and that potentially places the person at the scene of the crime. (R98:27-28.) An interrogation follows which calls people out on errors and focuses on subject areas that the suspect glosses over. (R98:27-28.) A police officer using the technique is looking for deceptive behavior, body language, how people refer to the victims or themselves, and non-verbal cues. (R98:30-33.) He commonly uses "I need your help" as a conversation starter to make sure people talk. (R98:34.)

If suspects respond, as Mr. Finley did, that they "did not do nothing," the police see it as a red flag because the person did not say why

they were there. (R98:35.) The technique involves not taking the suspect's word and a no without an explanation and is considered a flag. (*Id.*:36.) It also involves cutting off denials as was done in this interview. (R98:35.)

Here, for example, there was a discussion of roughhousing and the police said, "I'm assuming your hand or finger went in," but Mr. Finley denied it. (R98:35.) The detective tried to use the word "accident" as a way to get Mr. Finley to admit to the touching and place him at the scene. (R98:35-36.) The police used the word "accident" or "accidentally" 38 times in the interview as part of the technique. (R63:6-9, 11-15, 17-20, 22.) After Mr. Finley confessed he was a little rough with C.P and that he was not supposed to be rough with girls, Detective Vander Steeg talked to him about being a protector of C.P. in order to give Mr. Finley a moral justification for what the detective believed Mr. Finley's illegal actions to be. (R98:37-40.)

According to Detective Vander Steeg, Mr. Finley eventually said that he inserted his finger for 5-10 seconds for the purpose of showing C.P. that she needed to tell him if any boy ever did something like that to her. (R98:47-48.) He made this confession even though C.P. herself had never said that he had inserted his finger. (R98:47-48.) Mr. Finley denied it several times until the police falsely suggested C.P. had said he inserted his finger and that it was disrespectful to her to say otherwise. (R98:47-48.)

In addition, the police played on Mr. Finley's love for his niece, telling him that he would be disrespecting her if he denied sexually assaulting her. (*See* R63:13.)

Mr. Finley asked about a lawyer. (R98:47-48.) According to Detective Vander Steeg, Mr. Finley said either "Am I gonna need a lawyer?" or "Do I need a lawyer?" and Detective Vander Steeg responded, "Well, you're not under arrest. We're just talking, man." (R98:47-48.)

Throughout the interview, detective Vander Steeg and Officer Valadez asked Mr. Finley if he wanted an ambulance, but he did not want one until after he confessed when he seemed more ill. (R98:15.) According to Officer Valadez, Mr. Finley leaned to the side, was embracing his chest

and looked like he was shaking. (R99:16.) Officer Valadez thought that behavior typically related to anxiety. (R99:17.) Detective Vander Steeg believed that Mr. Finley had panicked about what he had just said and it seemed to the detective as though Mr. Finley were acting. (R99:16.)

When the ambulance arrived, Mr. Finley was placed inside. (R99:18.) He and Officer Valadez then conferred and Officer Valadez then told Mr. Finley that he was under arrest and read him his *Miranda* rights. (R98:17-18.) Mr. Finley was at the hospital for an hour or two before being transported to the Walworth County Jail. (R98:18.)

ARGUMENT

Mr. Finley is Entitled to a New Trial and to Suppression of His Statement Because His Statement was Not Voluntary.

According to his sister and his aunt, John S. Finley, who attended Lakeland Special Education School while growing up (R99:64), has the mental capacity of a twelve-year-old-child (R99:27, 60-61.) The police knew of his intellectual limitations (R99:27) and used techniques that exploited his deficits to extract a "confession" from him. Coercing someone into confessing violates both the United States and the Wisconsin Constitutions, *see* ***In re Jerrell C.J.***, 2005 WI 105 , ¶17, 283 Wis.2d 145, 699 N.W.2d 100, and the United States Supreme Court has emphasized that "mental condition is surely relevant to an individual's susceptibility to police coercion," and is a "significant factor in the 'voluntariness' calculus." ***Colorado v. Connelly***, 479 U.S. 157, 164-165 (1986). Given the police use of techniques which were unduly coercive "as applied to *this* suspect," *see* ***Miller v. Fenton***, 474 U.S. 104, 116 (1985) (emphasis in original), this Court should hold that Mr. Finley's confession was coerced. This Court therefore should vacate the judgment of conviction and the order denying postconviction motion and should remand the matter to the circuit court with directions to suppress the statements Mr. Finley made to police and grant him a new trial.

The burden of proving that a confession is voluntary is on the state, which must establish it by a preponderance of the evidence. ***State v. Moore***, 2014 WI 54, ¶55, 363 Wis.2d 374, 864 N.W.2d 827. Whether

a confession is voluntary is a question of constitutional fact. ***State v. Clappes***, 136 Wis.2d 222, 234-35, 401 N.W.2d 759 (1987). This Court therefore independently determines whether the facts meet the constitutional standard, while upholding a circuit court's factual findings unless they are clearly erroneous. ***State v. Samuel***, 2002 WI 34, ¶15, 252 Wis.2d 26, 643 N.W.2d 423.

To be voluntary, a confession must be "the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist." ***State v. Hoppe***, 2003 WI 43, ¶36, 261 Wis.2d 294, 661 N.W.2d 407. Courts, in determining whether a confession is voluntary under the totality of the circumstances, must weight "the personal characteristics of the confessor" very carefully against "any pressures to which he was subjected to induce the confession." ***State v. Verhasselt***, 83 Wis.2d 647, 653-654, 266 N.W.2d 342 (1978).

State action is required before courts may find that a statement is involuntary. ***Connelly***, 479 U.S. at 165. Although courts must be able to identify "a substantial element of coercive police conduct" that is "causally related to the confession, " ***id.*** at 164, "as interrogators have turned to more subtle forms of psychological persuasion, ...mental condition" becomes "a more significant factor in the 'voluntariness' calculus." ***Id***. (citing ***Spano v. New York***, 360 U.S. 315 (1959)).

Moreover, due process does not merely bar admissions resulting from police tactics that are themselves inherently coercive. "It applies equally when the interrogation techniques were improper only because, in the particular circumstances of the case, the confession is unlikely to have been the product of a free and rational will." ***Miller v. Fenton***, 474 U.S. at 110.

In determining whether police tactics were coercive, the totality of the circumstances, including all of the general conditions or circumstances controls. *See* ***State v. Davis***, 2008 WI 71, ¶37, 319 Wis.2d 583, 751 N.W.2d 332. Courts consider whether police practices were improper,

courts review "the length of questioning, general conditions or circumstances in which the statement was taken, whether any excessive physical or psychological pressure was used, and whether any inducements, threats, methods, or strategies were utilized in order to elicit a statement from the defendant." ***Id***.

In addition, tactics that might be allowed when interrogating an average adult can render a statement involuntary when used on someone with substantial intellectual or mental difficulties. In ***Blackburn v. Alabama***, 361 U.S. 199, 204 (1960), for example, sustained interrogation in a small room with multiple officers, the exclusion of the defendant's friends, the absence of counsel, and the composition of the confession by the sheriff resulted in a coerced confession. In holding the confession involuntary, the Court noted that not only was there "the strongest probability that Blackburn was insane and incompetent," but also that the sheriff's tactics were inappropriate *under the circumstances*. ***Id.*** at 207-08 (emphasis added).

This sliding scale makes sense, especially as research demonstrates that the cognitively disabled are more predisposed to confess falsely than other adults. "People with intellectual disabilities are disproportionately represented in the reported false confession cases." Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post DNA World*, 82 N. C. L. Rev. 891, 920 (2004). They are more vulnerable than other adults to the pressures of interrogation because they think slowly, think concretely rather than abstractly, have short attention spans, often have poor impulse control, and can be highly submissive and compliant. *Id.* at 918, 920. They also are highly suggestible, easy to manipulate and tend to try to mask their cognitive deficits. Jon B. Gould & Richard A. Leo, *One Hundred Years Later*, 100 J. Crim. L. & Criminology 825 n. 119 (Summer 2010). Their tendency to look to others for cues on how to act make it easy to get them to agree, especially as many are eager to please. *Id.* They often are conflict-avoidant and small amounts of stress can overwhelm them. *Id.*

The evidence demonstrated clearly that Mr. Finley was intellectually disabled and that the police knew he had limitations because

Mr. Finley's sister had told them he had the mental capacity of a 12-year-old. (*See* R99:27). Regardless whether he is actually labeled disabled, he has "significant" intellectual limitations (*see* R100:51) (App. 13) and 97% of the population is smarter than he is. (R100:5-6.) He has difficulty with verbal comprehension, working memory, and processing speed. *(Id.*:6.) As Dr. Thompson's testing established, he is more compliant than somewhere between 95% and 97% of the population, (R109:55-56), and therefore is more likely to cave in to opposition (*id.*:40). Mr. Finley was at a serious intellectual disadvantage, easily suggestible, and recuperating from physical illness at the time of the interview.

Although the court below recognized Mr. Finley's "significant" intellectual limitations,[2] *see* R100:51 (App. 13), it failed to analyze police techniques in light of them. The court ignored the sliding scale. Instead, the court held that the techniques used here, which are part of the Reid Technique, including "the persistent questions and leading questions" were not improper police practice by looking to only such factors as the length of the interrogation and the lack of direct threats. (*Id.*:50) (App. 12). The court dismissed the possibility of psychological coercion because the court believed "some degree of psychological coercion" is inherent in any custodial interrogation." (*See id.*) (App. 12).

But, in light of the sliding scale, the use of an officer's expressed certainty in a defendant's guilt is improperly coercive as against a defendant as intellectually-limited as Mr. Finley. Indeed, the United States Supreme Court in ***Miranda v. Arizona***, 384 U.S. 436, 450 (1966) found it problematic that police would "display an air of confidence in the suspect's guilt." Research shows that this technique "communicates an implicit threat of punishment." Saul M. Kassin, *The Psychology of Confession Evidence*, 52 Am. Psychologist 221, 224 (1997).

In this case, the police used this type of certainty coercion against Mr. Finley frequently during the interrogation. For example, the police

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[2] The postconviction court, the Honorable Krstine E. Drettwan presiding, adopted the findings and reasoning of the court, the Honorable David M. Reddy presiding, that denied the motion to suppress. (See R111:38) (App.6).

expressed this certainty while supposedly seeking information saying, "tell me about you accidently touching her ah, on her private, I know, I mean you, *you and I both know that that* [sic] *it happened*." (R22:7 (emphasis added).) A little later, Officer Valadez said, "I mean throughout those times while you guys were playing I mean, you know few times, inadvertently you know your hand accidently touched her vagina, right. I mean that that happened a couple times, am I right John." (*Id.*:9.) Soon thereafter, he again suggesting that same certainty, asking, "[H]ow many times once it got accidently um, was it underneath her clothing that you touched her?" (*Id.*:11.)

Another technique inappropriate for use against intellectually limited people is the introduction of false information. Introducing misinformation "can substantially alter people's . . . memories for experienced and observed events." Saul M. Kassen, Sara C. Appleby, and Jennifer Torkidlson Perrillo, *Interviewing Suspects: Practice, Science, and Future Directions*, Legal & Crim Psychology 5-6 (2009). In fact, confronting average, non-intellectually-limited adults with a false accusation that they had made a computer crash by striking a forbidden key doubled the likelihood that they would sign a written confession. Saul M. Kassin et al, *Police-Induced Confession: Risk Factors and Recommendations*, 34 L. & Hum. Behav. 3, 17 (2010). Similar studies produced similar results, even when the participants were told that they would lose $10 if they confessed. *See, e.g.*, Robert Horselenberg et al, *Individual Differences and False Confessions: A Conceptual Replication of Kassin and Kiechel (1996)*, 9 Psychol. Crime & L. 1, 5 (2003).

In fact, Wisconsin courts have noted that, even in cases involving adults without intellectual limitations, deception is one factor to consider in assessing the totality of the circumstances. ***State v. Triggs***, 2003 WI App 91, ¶17, 264 Wis.2d 861, 663 N.W.2d 396. Assessing the deception can involve determining whether the lie simply relates to a suspect's connection to the crime or whether it involves something more. ***Id.***, ¶19.

In this case, the police introduced the lie that C.P. said that Mr. Finley's finger penetrated her vagina. (*See* R63:13.) They then built on the lie by suggesting that any denial by Mr. Finley was tantamount to

disrespect for his niece. (*Id.*) But, in all of her statements, C.P. claimed that he rubbed his hand on her breasts and vagina under her clothes. *(See, e.g.,* R107:222-223.) She *never* said that she had been penetrated – not to her therapist, not to the woman at the Child Advocacy Center, and not to the court. (R107:213-240, 251-266.)

For Mr. Finley, as for the defendant in ***Spano v. New York***, 360 U.S. 315 (1959), the trickery was worse because it involved something more than his connection to the crime. As in ***Spano***, ***id***. at 318-319, the trickery involved someone whom the defendant cared about. Police coerced Spano into confessing in part by appealing to his love for a long-standing friend of his, a new police officer, who told Spano that his failure to confess would jeopardize the friend's career and thereby hurt the friend's wife and children. ***Id***. Similarly Police coerced Mr. Finley into confessing in part by appealing to his love for his niece, C.P., whom they told him he would be disrespecting if he denied their lie. (*See* R63:13.)

Third, using minimization is inappropriate in taking statements from intellectually limited people. Minimization occurs when police provide a suspect with excuses or justifications for committing a particular crime in an attempt to get them to say they did it. Kassin, *Police-Induced Confessions*, at 12. According to research, people infer that the understanding the police pretend to have suggests they will receive a lesser punishment by saying what the police want them to say. *Interviewing Suspects*, at 7. Psychologically, it therefore can substitute for explicit promises of leniency in exchange for a confession, *id.*, and "promises of leniency may be coercive if they are broken or illusory." *See* ***United States v. Johnson***, 351 F.3d 254, 262 (6th Cir. 2003).

Here, the police admitted to the use of minimization. *(See* R99:41.) It consisted of trying to make sexual touching appear relatively normal, either by a suggestion that it was roughhousing or that it was accidental. (*Id.*) The police used the words "accident" or accidentally" a total of 38 times with Mr. Finley during the interrogation. (R63:6-9, 11-15, 17-20, 22.) To the extent that police minimization created an expectation of leniency for Mr. Finley, that expectation was illusory, especially after police trickery had him confessing to penetration rather than the touching that C.P.

reported. Penetration generally is treated more seriously at sentencing.

Finally, despite Mr. Finley's intellectual deficits, the police insisted upon using complex questions designed to confuse him. Using complex questions for someone who is intellectually limited amounts to exploiting the disability. *See* ***Bottenfield v. Commonwealth***, 487 S.E.2d 883, 888 (Ct. App. Va. 1997) (holding that confession of intellectually limited individual was not coerced in part because the police "did not use complex questions or other tactics aimed at exploiting [the defendant's] disability").

This interrogation was rife with complex questions, For example, Officer Valadez asked:

> What about recently, have you watched her recently? I guess you don't babysit cause she's not a baby but recently have you watched her while your sister has been either working or gone somewhere or doing something[?]

(R63:4.)

> Um, there was also some you know tickling and wrestling once in a while between you too, right, which is normal, that's normally between an uncle and a niece that's that's [sic] stuff that happened ever[y] once in a while, am I correct? Just some, you know some tickling and some wrestling and some...

(*Id.*:5.)

> Well, you tell me, I mean you tell me. I mean there's I've, my opinion that's perfectly fine. Alright. You know I'm just ah, I just want to clarify it. I mean throughout those times while you guys were playing I mean, you know few times, inadvertently you know your hand accident[ally] touched her vagina, right. I mean that that happened a couple times, am I right John, Once again it's an accident man and we just want to, we just want to clarify these things.

(*Id.*:9.)

They also ignored signs that Mr. Finley failed to comprehend some of the questions. Some complex questions elicited answers that made no

sense at all. The question

> Q. So John ah, tell me about um, tell me about you accident[ally] touching her ah, on her private, I know, I mean you, you and I both know that that it happened and I know it was a complete accident, that stuff like that happens man, alright so tell tell [sic] me about a time recently when that when that happened.

(*Id.*:7) solicited an answer that was not really responsive:

> A. She wanted me to pick her up and there was no way that could get a hold of her you know so I put one arm up like this, you know and then I

(Id.)

Once, as here, the use of coercive police tactics"casually related to the confession" itself, *see* ***Connelly,*** 479 U.S. at 164, has been established, the court must weigh "the personal characteristics of the confessor" against the tactics used, ***Verhasselt,*** 83 Wis.2d at 653-654. In considering the personal characteristics of the defendant, courts consider "the age of the accused, his education and intelligence, his physical and emotional condition, whether he has had prior experience with the police, whether the defendant was apprised of his rights, whether he requested counsel and the response to any such request. ***Id.***

Most of these considerations suggest in this case that it would not take much to outweigh the pressures used, even though Mr. Finley was not deprived of water and not subjected to hours of interrogation out of familiar surroundings. Although Mr. Finley was an adult, he was one with significant intellectual limitations who lived with his mother. (*See* R98:13). His schooling, although completed, all occurred at a special education facility: Lakeland Special Education School. (R99:64.) In addition, there is no question that, at best, he was not in tip-top physical shape. He recuperating from some physical illness. He came crawling out of the bathroom when the officers arrived. (R98:12-13.) He said he was not feeling well (R98:14), and Officer Valadez thought he might have mentioned having had a temperature of 102 degrees in the days before the interview. (R99:33.)

Nor does his prior experience with police appear to provide much protection against overreaching police tactics. There was no evidence that police had questioned him before. As the circuit court found in its decision on the suppression motion, "there is no record with respect to whether he was subject to interrogation in the past," even though he had "some police contacts." (*See* R100:52). This finding is not clearly erroneous and this Court therefore must uphold it. ***Samuel***, 2002 WI 34, ¶15.

The reading of *Miranda* warnings did not occur until the completion of the interview, R98:17-18, which means that they did not serve their prophylactic purpose here. He was not told about his right to have a lawyer present, and the police actively discouraged him from getting a lawyer when he asked about it. (*See* R63:14.) The police response to his inquiry from Officer Valadez was "Well, you're not under arrest. We're just talking man." (*Id.*)

These personal characteristics then must be balanced against the tactics used to induce a confession. ***State v. Clappes*****,** 136 Wis.2d 222, 236-237, 401 N.W.2d 259 (1987). The factors to consider include such things as the "length of the interrogation,...the general conditions under which the confessions took place, any excessive physical or psychological pressure brought to bear on the declarant, any inducements, threats, methods or strategies utilized by the police to compel a response, and whether the individual was informed of his right to counsel and right against self-incrimination." ***Id.***

The totality of the circumstances here demonstrate that Mr. Finley's confession was "the result of a conspicuously unequal confrontation, see ***Hoppe***, 2003 WI 43, ¶36, that exceeded Mr. Finley's ability to resist. Although the interrogation was not particularly long, what weighs against Mr. Finley's characteristic here are the inducements and psychological pressures that are especially potent against someone with Mr. Finley's characteristics: certainty coercion, introduction of false information, minimization, the use of complex questions, and the brushing off of his question about whether he needed a lawyer. His statements therefore were not voluntary, and the use of them violated his

due process rights.

Finally, the error here was not harmless. The admission of a coerced confession is subject to harmless error analysis, but before admission of a coerced confession can be considered harmless, the state must meet its burden of establishing that the admission of the confession "did not contribute to" the conviction. ***Arizona v. Fulminante***, 499 U.S. 279, 295-96 (1991); ***State v. Mayo***, 2007 WI 78, ¶ 47, 301 Wis.2d 642, 734 N.W.2d 115. The analysis should start with the notion that "[a] confession is like no other evidence" because it is peculiarly persuasive to a jury. ***Id.*** at 296.

Without Mr. Finley's confession, this case rested entirely on statements from C.P. The physical examination of C.P. established nothing. (R109:5-30.) There was no physical evidence of assault at all. Moreover, the revelation of her accusations occurred under suggestion, and expert testimony indicated that the repetition of the information could case false memories. A defense expert, Dr. Thompson, had considerable concerns about the reliability of C.P.'s memories. (R109:95.)

First, C.P.'s allegations are more suspect because she did not spontaneously report abuse. A child can be wrong without intentionally lying. Here, C.P. first heard her mother mention to her therapist "a concern" that C.P. was angry with her uncle. (R108:20-21.) Her therapist immediately responded with behavior – the reading of a book on sexual contact with children (R108:21) – that suggested to C.P. that the source of the problem might be the way her uncle was touching her. She furthered her suggestion by asking C.P., immediately after reading her the book, whether anyone had ever touched her inappropriately. (*Id.*:23.) The therapist's actions could have suggested to C.P. that the therapist expected to be told that someone had sexually assaulted C.P. In fact, unlike here, as Paula Hocking from the Walworth County Child Advocacy Center testified, protocols for interviewing children who may have been abused are very careful to start with general questions and then funnel down out of concern for accidentally directing answers with vulnerable children. (R107:244.)

In addition, there were repeated discussions with C.P. about this initial allegation, including with her regular therapist (R108:21-24), her mother (R107:285), Ms. Hocking (Id.:213-240), and a school friend (R107:285), Ms. Hocking (*Id.*:213:240), and a school friend (R107:52). As the defense expert, Dr. Thompson, testified, multiple discussions can contaminate memory. (R109:90.) Repeatedly interviewing a child about something that did not happen can create a false memory of it. (R109:70.) This type of mistake is known as a "source misattribution error." (*Id.*:73.)

The error therefore was not harmless and this Court should hold that Mr. Finley's statements to police were coerced.

CONCLUSION

For these reasons, John S. Finley respectfully asks that this Court vacate the order denying his postconviction motion, vacate the judgement of conviction, and remand the matter to the circuit court with directions to issue an order suppressing his statements to the police and granting him a new trial.

Dated at Milwaukee, Wisconsin, April 30, 2018.

Respectfully submitted,

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WIS. STAT. (RULE) 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. (Rule) 809.19(8)(b) and (c) for the brief produced with a proportional serif font. The length of this brief is 5,542 words.

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Ellen Henak

WIS. STAT. (RULE) 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief.

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Ellen Henak

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 30th day of April, 2018, I caused 10 copies of the Brief and Appendix of the Defendant-Appellant John S. Finley to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.

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