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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REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

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ARGUMENT

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

The role of mild intellectual disabilities in an adult's function can be difficult to perceive. *See* Morgan Cloud et. al, *Words Without Meaning: The Constitution, Confessions and Mentally Retarded Suspects*, 69 U. Chi. L. Rev. 495, 510-511 (2002). Difficulty in listening, processing language, thinking, and speaking as a result of disabilities can make a person appear evasive or manipulative. Those problems also can cause someone like Mr. Finley to perceive threat in circumstances where those without such issues would not, *see* Saul M. Kassen, *The Psychology of Confession Evidence*, 52 Am. Psychologist 221, 224 (1997), or to see a promise of leniency where others might not, *see* Saul Kassen, Sara

C. Appleby, and Jennifer Torkidlson Perrillo, *Interviewing Suspects: Practice, Science, and Future Directions*, Legal & Crim Psychology 5-6 (2009). With that reality in mind, review of the video of Mr. Finley's statement shows his confusion as well as an attempt to fend off threat and end the situation (*see* R62), rather than manipulation as the state suggests, *see* Brief of Plaintiff-Respondent at 2.

There is no question that, as the trial court found, Mr. Finley has "significant" intellectual limitations, (*See* R100:51 (App. 13)), just as his sister told police (R99:27). Nor is there any question that he was in a special needs school as a child (*id*.:64), that his I.Q. score is lower than 97% of the population (R100:18-19), and that he has problems with verbal comprehension, working memory, and processing speed (*Id*.:6). Slow thinking makes people more vulnerable to the pressures of interrogation. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post DNA World*, 82 N.C.L. Rev. 891, 918, 920 (2004). Unlike standing up to interrogation, holding a job does not necessarily require independent thinking, good verbal comprehension, or the ability to process information quickly. For many jobs, unthinking obedience to authority and rote action are a plus, not a minus. Nor does obtaining a driver's license or having a live-in girlfriend is rely on the abilities required to handle interrogation.

Contact with the criminal justice system would help remedy the problem only if Mr. Finley had experience with interrogation–and, as the state concedes, *see* Brief of Plaintiff-Respondent at 13, the state never established that he did. One of the key characteristics of the mildly intellectually impaired is a failure to generalize well. *See* M.S. Rosenberg, D.L. Westling, J. McLeskey, *Primary Characteristics of Students with Intellectual Disabilities* (2013), http://www.education.com/reference/article/

characteristics-intellectual-disabilities/ (last accessed 8-16-18). Unless the police previously interrogated him, mere exposure to pleas and accusations would do little to help him resist coercion.

Moreover, weak evidence of an initial occasional protest against the officers' attempts to get Mr. Finley to confess is not tantamount to evidence of resistance to coercion, although the state suggests otherwise, *see* Brief of Plaintiff-Respondent at 12. Coercion is a matter of "exceed[ing] the defendant's ability to resist," ***State v. Hoppe*****,** 2003 WI 43, ¶36, 261 Wis.2d 294, 661 N.W.2d 704, and not a matter of the defendant having no ability to resist at all. An officer need not get a confession immediately for a defendant to establish that he has been coerced. The United States Supreme Court held that a defendant had been coerced when his confession did not occur until eight hours into the questioning. ***Spano v. New York*****,** 360 U.S. 315 (1959). Similarly, the Court held that a defendant had been coerced when his confession did not occur until eight or nine hours into the questioning. ***Blackburn v. Alabama***, 361 U.S. 199 (1960). That length of questioning is one of the factors considered in determining the propriety of police tactics, *see* ***State v. Davis*****,** 2008 WI 70, ¶37, 319 Wis.2d 583, 751 N.w.2d 332, emphasizes that some initial resistance does not prevent a finding of coercion.

As for the law of the coerced confessions, the state implicitly agrees, as it must, *see* ***In re Jerell C.J.*****,** 2005 WI 105, ¶17, 283 Wis.2d 145, 699 N.W.2d 100, that the admission of Mr. Finley's statements at trial violated his state and federal constitutional rights if those statements were "the result of a conspicuously unequal confrontation in which the pressures brought to bear on" Mr. Finley exceeded his ability to resist, *see* ***Hoppe***, 2003 WI. Although Mr. Finley asserted his federal constitutional right to be free from coercion of his statements, the state fails to cite any United States Supreme Court cases, *see* Brief

of Plaintiff-Respondent at 7-16, while analyzing the core question whether intellectually-limited John Finley's statements to the Whitewater Police were "the result of a conspicuously unequal confrontation in which the pressures brought to bear" which exceeded Mr. Finley's ability to resist. *See* ***Hoppe***, 2003 WI 43, ¶36.

According to the United States Supreme Court, answering this question requires an examination of the "particular circumstances of the case," ***Miller v. Fenton***, **474** U.S. 104, 110 (1985), and a determination whether the police technique were unduly coercive "as applied to *this* subject," ***id.*** at 116 (emphasis in original). The particular circumstances of the case necessarily include Mr. Finley's intellectual limitations and analysis of whether what occurred was coercive as applied *to him* requires some consideration of his perceptions and abilities. Contrary to the state's suggestion, police tactics are not either coercive or not-coercive in a vacuum.

Moreover, the Wisconsin Supreme Court has clarified that personal characteristics are relevant in evaluating police tactics. *See* ***State v. Moore***, 2015 WI 54, ¶57, 363 Wis.2d 376, 864 N.W.2d 827. They are the lens through which courts view police tactics so, for example, "[t]he age of the suspect may affect how we view police tactics," even though the personal characteristics alone may not be dispositive. ***Id***. Thus, the inquiry into voluntariness properly may begin with the personal characteristics of the declarant rather than police tactics. *See* ***id***, ¶58.

Using this framework tactics that are non-coercive when no one is asserting special vulnerabilities, *see, e.g.,* ***State v. Triggs***, 2003 WI App 91, 264 Wis.2d 861, 663 N.W.2d 396; ***State v. Owens***, 202 Wis.2d 620, 551 N.W.2d 50 (Ct. App. 1996); ***State v. Deets***, 187 Wis.2d 630, 523 N.W.2d 180 (Ct. App. 1994), are not necessary non-coercive when special vulnerabilities known to police are

involved.

Nor does strategy that "has been validated by this Court" exist. *See* Brief of Plaintiff-Respondent at 9. As this Court explained in response to a similar state argument in ***Triggs***, 2003 WI App 91, ¶17, cases that uphold statements obtained by deception do not hold that misrepresentation is not coercive or improper. Instead, they clarify that they "'do not necessarily make a confession involuntary,'" and that they are "'simply one factor to consider out of the totality of the circumstances.'" ***Id.*** (quoting ***United States v. Velasquez***, 885 F.2d 1076, 1088 (3d Cir. 1989)). Using similar reasoning, upholding the introduction of statements obtained by telling a defendant of ordinary intelligence that "he should think about the consequences of obstructing the investigation" *see* ***Deets***, 187 Wis.2d at 636, or that he was lying, *see* ***Owens***, 202 Wis.2d at 642, is not a holding that the tactic of displaying confidence in a defendant's guilt is always proper, regardless of the limitation of the defendant or the number of times and ways the defendant is told that "it happened" (*see* R22:7) or "that happened (*see id.*:9).

Coercion via lying is a special problem here because the police chose to simply make up a fact while also playing on familial love. *See* ***Spano***, 360 U.S. 315 (finding coercion by trickery exacerbated by a claim of injury to a long-standing friend). C.P. never said to anyone that she had been penetrated in any way (R107:213-240, 251-266), yet the police not only claimed she had, but also equated any denial by Mr. Finley with disrespect for C.P. (R63:13).

This interrogation was full of complex questions and the lack of expressed confusion over them does not change their difficulty. Nor would it be surprising to anyone who works with those who have intellectual limitations that Mr. Finley never asked

for clarification despite confusion and simply tried to get along. People with such limitations tend to try to mask or disguise their cognitive deficits. *See* Jon B. Gould & Richard A. Leo, *One Hundred Years Later*, 100 J. Crim. L & Criminology 825, 847 n.119 (2010). To say "I don't understand" is to expose those deficits. Moreover, noting that Mr. Finley handled a particular question reasonably well is not the same as establishing that he was able to handle all of the questions. The state simply ignores his non-responsive answers. (*See*, e.g., R63:7.)

When police know of specific personal characteristics of a defendant, requiring them to be sensitive to them is not a great burden–and the police here had been told of Mr. Finley's limitations. (*See* R99:27). Police conducting interrogations regularly look to determine a suspect's weaknesses and to exploit them. A leading text on interrogation encourages them to do so. *See* Cloud, *Words Without Meaning*, 69 U. Chi. L. Rev. at 515. If an officer can be expected to determine weaknesses to exploit them, an officer can be expected to determine weaknesses to accommodate them. Second, good communicators adjust their language to the circumstance. They do not question seven-year-olds the same way that they question thirty-year-olds. They do not question those who speak English the same way they question those who speak very little English. They do not question old women with dementia the same way they question clear-headed middle-aged women.

This Court therefore should hold that Mr. Finley's statement was coerced.

Finally, the error here was not harmless. The state has not met 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 question is not simply one of whether C.P.'s statement was sufficient to establish guilt for a jury. Instead, the question is whether a reasonable jury could say, "Yes, we have some reasonable doubts about the accuracy of C.P.'s statement, but it does not really matter because, after all, Mr. Finley admitted it." In a case such as this one where no physical evidence existed, the danger of such reasoning is particularly great.

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, August 23, 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 reply brief is 1,834 words.

Electronically signed by Ellen Henak
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