STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2018AP000319-CR

TIMOTHY E. DOBBS,

Defendant-Appellant.

On Notice of Appeal from the Judgment of Conviction
Entered in the Circuit Court for Dane County,
The Honorable Clayton Kawski, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

Community Justice, Inc.
Attorney Michael D. Rosenberg
State Bar #1001450
Attorney for Appellant

214 N. Hamilton St. #101
Madison, WI 53703
(608) 442-3009
(608) 204-9645 (fax)
michael@communityjusticeinc.org

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INTRODUCTION

The issues in this appeal revolve around statements made by Mr. Dobbs while in a depressed and mentally unstable condition. First, the State's arguments in support of the trial court's exclusion of Defense expert Dr. White fall flat. If the trial court was allowing the admission (as it did) of Mr. Dobbs' alleged confessions, then Dr. White's testimony was vital to the jury's understanding of the alleged confessions. Second, the State's arguments in favor of the admission of those statements minimize Mr. Dobbs' condition and law enforcement's use of his condition against him. All of his statements should have been suppressed. Together, these two errors support a new trial for Mr. Dobbs.

ARGUMENT

I. THE TRIAL COURT ERRED IN PRECLUDING DEFENSE EXPERT WITNESS DR. WHITE FROM TESTIFYING.

The State argues that the trial court properly excluded Dr. White's expert testimony under Wis. Stat. § 907.02 on the grounds that Dr. White did not link his testimony to the facts of the case. However, the State like the trial court misapplies the standard. In addition, it fails to adequately distinguish this Court's holding in *State v. Smith*, 2016 WI App 8, 366 Wis. 2d 613, 874 N.W.2d 610 which controls.

Interestingly, here the State takes the same position that the defendant in *Smith* asserted: that the State's expert there was not qualified under 907.02 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). As the Court in *Smith* noted, the standard is flexible.

> As for whether Hocking's testimony complies with WIS. STAT. § 907.02, we note that *Daubert* itself acknowledges that its test for the admissibility of expert evidence is

> "flexible." *Daubert*, 509 U.S. at 594, 113 S.Ct. 2786. In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999), the United States Supreme Court clarified that "the applicability of the factors mentioned in *Daubert* ... depends upon the particular circumstances of the particular case at issue." The *Kumho Tire* Court further provided that trial courts should have "considerable leeway" in determining the admissibility of expert testimony with the objective of ensuring the reliability and relevancy of such testimony in light of the facts of the particular case. *Kumho Tire*, 526 U.S. at 152, 119 S.Ct. 1167. Reliability may be based on the expert's own observations from his or her "extensive and specialized experience." *Id*. at 156, 119 S.Ct. 1167.

Smith, 2016 WI App 8, ¶7. As the Court further noted, the "court's function 'is to ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues.'" *Id.*, at ¶5, *quoting State v. Giese*, 2014 WI App 92, ¶18, 356 Wis. 2d 796, 854 N.W.2d 687. Dr. White's expert opinions were both reliable and relevant to the issues.

Like the Defense regarding Dr. White here, the State in *Smith* specifically stated that its expert "would not 'testify about specifics involving this case' but that she would testify 'about what, oftentimes, she sees victims of child sexual assault do.'" ¶6. This is exactly the same situation as here. Under the State's argument in this case, the State's expert should not have been able to testify in *Smith*. Nor should any State expert be able to testify on similar grounds in any other case. It also would exclude many other experts who can offer relevant opinions helpful to the jury but who might not specifically testify that based on their opinion the plaintiff or defendant did or did not act in conformity with those opinions. This position, as the Court in *Smith* found, goes too

far and is inconsistent with the flexibility the standard is meant to allow.

The amendment to Wis. Stat. §907.02, like the United States Supreme Court's decision in *Daubert* conferred on the trial court a gate-keeper role for expert testimony to ensure that the expert opinions were reliable. "This gatekeeper obligation 'assign[s] to the trial court the task of ensuring that a scientific expert is qualified' and that his or her 'testimony both rests on a reliable foundation and is relevant to the task at hand." *Seifert v. Balink*, 2017 WI 2, ¶57, 372 Wis. 2d 525, 888 N.W.2d 816, *quoting Daubert*, 509 U.S. at 597. "The goal is to prevent the jury from hearing conjecture dressed up in the guise of expert opinion." *Giese*, ¶19. Dr. White's testimony was both reliable and relevant to the issues in the case—it was not conjecture. The trial court erroneously exercised its discretion in excluding his testimony.

By excluding Dr. White, the trial court undercut a major portion of the Defense. Given Mr. Dobbs' statements that the court allowed in over the Defense objection, the Defense needed a way to explain Mr. Dobbs' statements about allegedly inhaling the aerosol. Dr. White's testimony would have laid the foundation for the argument to the jury about the problematic nature of Mr. Dobbs' statements. The jury could then fulfill its role by deciding the weight of those statements. The trial court usurped the jury's role by preventing it from hearing Dr. White's testimony. Therefore, this Court should remand the matter for a new trial.

II. THE TRIAL COURT ERRED IN ALLOWING MR. DOBBS' STATEMENTS TO LAW ENFORCEMENT INTO EVIDENCE.

First, both the trial court and the State are incorrect that Mr. Dobbs' was not in custody so as to require *Miranda*

warnings.[1] The standard for whether a person is in custody is a reasonable person standard. "Looking at the totality of the circumstances, courts will consider whether 'a reasonable person would not feel free to terminate the interview and leave the scene.'" *State v. Bartelt*, 2018 WI 16, ¶31, 379 Wis. 2d 588, 906 N.W.2d 684, *quoting State v. Martin*, 2012 WI 96, ¶33, 343 Wis. 2d 278, 816 N.W.2d 270. Looking at the totality of the circumstances here, there is no way that reasonable person in Mr. Dobbs' place would feel free to leave the scene. Officer Milton placed Mr. Dobbs in handcuffs, told him he was being detained, and then put him in the bag of the police car. (R.267:77, 81.) At no time was Mr. Dobbs free to leave the scene.

The State argues that this was simply a temporary investigative detention for which an officer does not need to read a person his or her *Miranda* rights. (St. Br. at 19.) It is incorrect. Officer Milton's initial detention occurred about 7:30 a.m. (R.253:5-9.) No one read Mr. Dobbs his *Miranda* rights until Officer Pine did so at the hospital at about 10:19 a.m.—almost three hours later. (R.253:84.) The State does not cite to any case that an almost three-hour detention is a temporary detention. Comparingly, in *State v. Colstad*, 2003 WI App 25, ¶17, 260 Wis.2d 406, 659 N.W.2d 394, this Court held that a thirty to forty-five minute wait was reasonable. Here, the delay was at least four times as long. The trial court erred factually and legally (and basically without citing any case law) in concluding that this was a temporary detention and that Mr. Dobbs was not in custody.

[1] The State also notes that Appellant is only contesting Judge Flanagan's decision denying his motion to suppress and not Judge Kawski's later denial of a motion for reconsideration. (St. Br. at 16.) Only Judge Flanagan's decision is at issue because only he made a decision on the merits of the issue. Judge Kawski denied the motion for reconsideration finding no basis for reconsideration. (R.256:3-8; A-App. 108-113.) Judge Kawski did not go back through the legal basis "for each and every legal conclusion in Judge Flanagan's decision." (R.256:6-7; A-App. 111-112.)

Therefore, all statements prior to Officer Pine reading Mr. Dobbs his *Miranda* rights should be excluded.

Secondly, and most importantly, the trial court erred in concluding that all of Mr. Dobbs' statements were voluntary. It did so without any discussion of the case law or application of the law to the facts. (R.67:6, A-App. 106.) The State in supporting the court's decision understates Mr. Dobbs' mental state. Mr. Dobbs was in distress, lacking his medication, had not eaten, was in pain, held for hours, and thus psychologically coerced into making statements that appear to implicate him.

The most telling piece of evidence perhaps is that Officer Milton recognized that Mr. Dobbs was distraught on learning that he hit someone. He testified that he was concerned about the "detrimental effect" of telling him the person was dead would have on Mr. Dobbs of the death. This was confirmed when as soon as he informed Mr. Dobbs and told him he was under arrest he became hysterical, crying, and unable to answer questions for several minutes. (R.253:29-30.) During the subsequent interview, Officer Milton had to pause because Mr. Dobbs was crying, could not answer, and had loud emotional outbursts. (R.253:56-57.)

In assessing whether Mr. Dobbs' statements were voluntary, the Court looks at the totality of the circumstances, balancing the personal characteristics of the defendant versus the pressures imposed by law enforcement officers. *State v. Clappes*, 136 Wis. 2d 222, 236, 401 N.W.2d 759 (1987); *State v. Hoppe*, 2003 WI 43, ¶38, 261 Wis. 2d 294, 661 N.W. 407 (2003). As here, when the police interviews involved subtle forms of persuasion, Mr. Dobbs' mental condition is a significant factor. *Id*.

As noted above, and in more detail in Appellant's initial brief, Mr. Dobbs was suffering from both physical and mental conditions. He had a serious hand infection that caused the jail to refuse to admit him until it was treated. He

informed the officers that he suffered from depression and anxiety and had not taken his medication. Nor had he taken his pain medication for his hand—an injury which was obvious and of which law enforcement was aware.

Mr. Dobbs was in a precarious and unstable condition even before the various officers began questioning him. Officer Milton recognized and withheld the coup de grâce—not telling him about the death until right before finally reading him his rights and questioning his account. This then caused Mr. Dobbs to spiral completely out of control, becoming hysterical, deeply depressed, and eventually talking of suicide. Mr. Dobbs simply went along with anything that Officer Milton said. There is ample evidence that Mr. Dobbs' statements were not reliable. They were involuntary under the circumstances and should have been suppressed. *See Hoppe*, ¶60. Therefore, Mr. Dobbs is entitled to a new trial.

CONCLUSION

For the above reasons and those set forth in his initial brief, Defendant respectfully requests that this Court reverse the trial court, vacate the judgment of conviction, and remand this matter to the Circuit Court for a new trial.

Dated this 17th day of August, 2018.

Respectfully submitted,

_____

Community Justice, Inc.
Attorney Michael D. Rosenberg
State Bar #1001450
Attorney for Appellant

214 N. Hamilton St. #101
Madison, WI 53703
(608) 442-3009
(608) 204-9645 (fax)
michael@communityjusticeinc.org

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 1773 words.

Dated this 17th day of August, 2018.

Signed:

_____

Community Justice, Inc.
Attorney Michael D. Rosenberg
State Bar #1001450
Attorney for Appellant

214 N. Hamilton St. #101
Madison, WI 53703
(608) 442-3009
(608) 204-9645 (fax)
michael@communityjusticeinc.org

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 17th day of August, 2018.

Signed:

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Community Justice, Inc.
Attorney Michael D. Rosenberg
State Bar #1001450
Attorney for Appellant

214 N. Hamilton St. #101
Madison, WI 53703
(608) 442-3009
(608) 204-9645 (fax)
michael@communityjusticeinc.org