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STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2018AP000319-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TIMOTHY E. DOBBS,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals,
District IV, Affirming a Judgement of Conviction
Entered in the Circuit Court for Dane County,
The Honorable Clayton Kawski, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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TABLE OF CONTENTS

CASES CITED

Federal Cases

Wisconsin Cases

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

<u>United States Constitution</u>

Wisconsin Statutes

OTHER AUTHORITIES

ISSUES PRESENTED

(1) Did the trial court err in precluding defense expert witness Dr. Lawrence T. White from testifying where, consistent with *State v. Smith*, 2016 WI App 8, 366 Wis. 2d 613, 874 N.W.2d 610, his opinions were relevant to a material issue, but he would not be offering an opinion on the specific facts of the case?

The trial court ruled that Dr. White's proposed testimony would not assist the trier of fact because he was not offering an opinion on the specific facts of the case, and therefore precluded him from testifying. The Court of Appeals held that the trial court properly exercised its discretion in excluding the testimony.

(2) Whether the Court of Appeals' decision is consistent with *State v. Morgan*, 2002 WI App 124, 254 Wis. 2d 602, 648 N.W.2d 23, and if not, whether *Morgan* should be overruled.

The Court of Appeals did not address *Morgan*. Nor is its opinion consistent with the holding in *Morgan* or other case law on when a person is in custody for purposes of *Miranda*. *Morgan* on the other hand is entirely consistent with said case law from both the United States Supreme Court and from this Court. Therefore it should not be overruled.

(3) Did the trial court err in allowing Mr. Dobbs' statements to law enforcement into evidence despite the delay in reading him his *Miranda* rights and because his statements were involuntary due to his mental and physical conditions?

The trial court denied the Defense motion to suppress and held that the statements were admissible. The Court of Appeals held that the trial court did not err in allowing the statements into evidence.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Pursuant to this Court's general practice and due to the issues in this case, it is appropriate for oral argument and publication.

STATEMENT OF THE CASE

This is an appeal from a judgment of conviction entered on June 2, 2017 in Dane County, The Honorable Clayton Kawski presiding, following a jury trial and guilty verdict by the jury on March 24, 2017. (R.241.) The Circuit Court convicted Mr. Dobbs of Homicide by Intoxicated Use of a Vehicle, in violation of Wis. Stat. § 940.09(1)(a). (*Id*.)

By a criminal complaint filed on September 10, 2015, the State charged Timothy Dobbs with one count of Homicide by Intoxicated Use of a Vehicle, in violation of Wis. Stat. § 940.09(1)(a); and one count of Hit and Run—Resulting in Death, in violation of Wis. Stat. §§ 346.67(1) and 346.74(5)(d). (R.2.) The case was tried to a jury from March 20, 2017 until March 24, 2017. (R.266-270.) The jury returned a verdict of guilty on the first count (homicide), but not guilty on the second count (hit and run). (R.225.)

Mr. Dobbs timely filed a Notice of Intent to Pursue Post-Conviction Relief on June 19, 2017 (R.244) and a Notice of Appeal on February 12, 2018 (R.246). On May 2, 2019, the Court of Appeals issued a decision affirming the Circuit Court. (P-App. 101-06.) This Court granted review on January 14, 2020.

STATEMENT OF FACTS

This case arises out of a vehicle-pedestrian accident on the morning of September 5, 2015 on the east side of Madison. (R.2:2.) Mr. Dobbs was driving on Nakoosa Trail near the Walmart, when according to a witness he crossed over to the wrong side of the street, went up over the curb and

hit ACM, and then drove away from the accident scene. (R.266:212-215, 224.) Officer Jimmy Milton of the City of Madison Police Department responded to a call at 7:23 a.m. about the accident. (R.267:64-66.) As he approached the intersection of Highway 51 and Commercial Avenue (a few blocks from the accident site), he noticed a vehicle stopped at the light that appeared to match the vehicle in the call. (R.267:67.) The vehicle was stopped in traffic with apparent damage, including a flat front driver's side tire. (R.267:73.) Based on the information from the call, he suspected that it was the hit and run vehicle from the accident to which he was responding. (R.253:6-7.)

On approaching the vehicle, Officer Milton noticed that Mr. Dobbs, the driver, was trying to remove a splint that he had on his right hand and arm. (R.267:77.) Officer Milton testified that Mr. Dobbs also had a white bandage on his hand and it was obviously injured. (R.267:79-80.) Officer Milton told him that he was being detained, handcuffed him, and put him in his squad car. (R.267:77, 81.) This then began more than a day of questioning, hospital visits, and testing of Mr. Dobbs, who initially remained in the back of the squad car about an hour before Officer Milton took him out to perform field sobriety tests. (R.267:115.) These events were the subject of pre-trial motions described below.

Officer Milton testified that he saw no signs of impairment, no slurred speech, and nothing unusual in how Mr. Dobbs walked. (R.267:208.) He did, however, notice a can of compressed air in the driver's console. (R.267:93-94.) Officer Milton decided to have Mr. Dobbs perform field sobriety tests to determine if he was impaired. (R.267:103.) Mr. Dobbs was cooperative and agreed to do the tests. (R.267:114-15.) Based on field sobriety tests and a preliminary breath test, Officer Milton concluded that he was not impaired, and despite detaining Mr. Dobbs he did not arrest him. (R.267:145-46.) However, Officer Milton still suspected that Mr. Dobbs was under the influence of an inhalant chemical and therefore arranged to have a drug

recognition expert ("DRE") examine Mr. Dobbs. (R.267:145-46.) He also still suspected —indeed knew—that Mr. Dobbs illegally fled the scene of an accident. (R.253:8, 10; R.267:77.) He asked Mr. Dobbs to submit to a blood test, put him back in the squad car, and transported him to Meriter Hospital. (R.267:146-47.) At the hospital Officer Milton read the "Informing the Accused" to Mr. Dobbs who agreed to the blood draw if he could also do a breathalyzer. (R.267:148-49.)

At the hospital, Nicholas Pine, the police DRE, put Mr. Dobbs through further testing. (R.269:37-39.) After the testing and examination, Officer Pine concluded that Mr. Dobbs was impaired from cannabis use. (R.269:71, 79-80.) Officer Pine specifically ruled out Mr. Dobbs being impaired from an inhalant as Officer Milton believed. (R.269:180-82.) Officer Pine continued to believe that Mr. Dobbs was impaired from cannabis even after the blood test results (from the blood draw prior to the exam) showed that Mr. Dobbs had no Delta-9 THC, the active THC metabolite, in his system. (R.269:101, 117-18.) The only THC metabolite in Mr. Dobbs system was Carboxy THC. (R.218; R.269:177-78.) The State's expert agreed that Carboxy THC is not an active substance and has no effect on a person—it simply means that sometime in the past the person had ingested THC.[1] (R.269:178-80.)

Contrary to Officer Pine's conclusion about impairment from cannabis, the State presented Amy Miles from the State Crime Lab to opine that Mr. Dobbs was under the influence of inhalants. (R.269:122.) However, there were issues with her testing. The first test only showed a peak

[1] This is consistent with Wisconsin statutory law. Wis. Stat. § 340.01(50m) defines "restricted controlled substance" as "[a] controlled substance included in schedule I under ch. 961 other than a tetrahydrocannabinol" and then specifically includes only Delta-9-tetrahydrocannabinol in the definition for a "restricted controlled substance."

reading where a volatile from an inhalant might be expected, but is not conclusive proof of its presence; because the lab did not do a confirmatory test until twenty-five days later, there was no evidence of a volatile on the confirmatory test. (R.269:218-21.) She did admit that the Carboxy THC metabolite was not impairing and could not say when Mr. Dobbs last used marijuana. (R.269:177-80, 226-27.)

In closing argument the State focused on the inhalant as causing Mr. Dobbs' impairment and the accident. (R.270:196, 208, 221-25.) The State led off its closing by quoting Mr. Dobbs: "I took a puff off a duster, and I killed a man." (R.270:196.) The jury returned a guilty verdict on the charge of homicide by intoxicated use of a vehicle, but not guilty on the charge of hit and run. (R.225.)

Pre-Trial Motions

Prior to trial, the court heard a number of motions, including a motion to suppress and *Daubert* motions regarding both State and Defense experts. Of relevance to this appeal are the facts from the evidentiary hearings and the court's rulings regarding the suppression motion and excluding Defense Expert Dr. Lawrence White.

Motion to Suppress

On February 22, 2016, the Defense filed a motion to suppress all statements that Mr. Dobbs made in response to custodial interrogation. (R.35.) The grounds were that law enforcement violated *Miranda v. Arizona*, 384 U.S. 436 (1966) and that any later statements made after law enforcement gave the required warning were involuntary. Therefore, all of the statements obtained by law enforcement were in violation of Mr. Dobbs' Constitutional Rights under the Fifth and Fourteenth Amendments. The court held evidentiary hearings on June 17 and June 21, 2016. (R.253 and 254.) The pertinent facts from the hearings are as follows.

Officer Milton testified he was the first police officer to have contact with Timothy Dobbs on September 5, 2015, the date of the accident. He was dispatched to the scene of a hit and run motor vehicle accident with a pedestrian casualty at approximately 7:30 a.m. Witnesses described the vehicle involved as a dark colored or black van. (R.253:5-6.) Officer Milton said he observed a dark colored pickup truck with a topper with damage and a flat front driver's side tire a few blocks from the reported accident. Based on that information he suspected that it was the hit and run vehicle. (R.253:6-7.) Thus, he positioned his squad car to prevent the driver from driving away. (R.253:8.)

Officer Milton was driving a fully marked squad vehicle with a light bar and was wearing a regular police uniform with a utility belt, including gun and Taser. (R.253:37.) After stopping and blocking the truck with his squad car, he approached the driver's side door and verbally instructed the driver, Mr. Dobbs, to show his hands and exit the vehicle. (R.253:8-9, 39.) He then immediately placed him in handcuffs and put him in the rear seat of his squad car. (R.253:9, 39.)

Officer Milton told Timothy Dobbs that he was being detained for an accident investigation, but did not tell him that he was under arrest. (R.253:11.) Officer Milton questioned Mr. Dobbs about some scratches and bruises on his face and also noted his arm was in a sling. (R.253:11-12.) Mr. Dobbs had a gauze bandage on his hand, but Officer Milton was able to successfully handcuff him. (R.253:40) Mr. Dobbs was wearing shorts, shoes, but no shirt. (R.253:13.) After detaining him, Officer Milton asked Dobbs questions about his identification as well as information about from where he was coming and to where he was going. (R.253:13.) Mr. Dobbs told Officer Milton he was adjusting the sling on his arm, lost control of the vehicle and hit the curb, causing damage to his vehicle. (R.253:14.) At some point during this initial questioning, Officer Milton informed Mr. Dobbs that

he was suspected of striking a person, but did not tell him that the person had been killed or even injured. (R.253:14, 41.) Mr. Dobbs asked Officer Milton about the person's condition, but Officer Milton withheld that information. (R.253:66.) During this initial stop, Officer Milton noted an air duster canister in the front console area of Dobbs' vehicle, two dents in the hood of the truck, and a tree branch stuck near the hood. (R.253:16.)

Officer Milton questioned Mr. Dobbs without a *Miranda* warning while he was handcuffed and locked in the rear of the squad vehicle. (R.253:43-44.) Mr. Dobbs answered questions, including that he suffered from anxiety and depression for which he takes medication, that he takes pain killers for his hand injury, but he had not had any of his medication that morning. (R.253:45-46.) The audio recording from Officer Milton's squad video indicated that Mr. Dobbs answered questions about prior damage to his vehicle, his depression and anxiety, his broken hand, and that he remembered hitting the curb but did not remember anything else. (R.51.) After Officer Milton informed him that a pedestrian was involved, Mr. Dobbs continually asked for more information about the situation and whether anyone had actually been injured. (*Id*.) Mr. Dobbs also said shortly before 8:25 a.m. that the pain in his hand was killing him and he did not take his pain medication that morning. (*Id*.)

After discussing with a traffic specialist that inhalant effects dissipate quickly, Officer Milton determined he should have Mr. Dobbs perform field sobriety tests. (R.253:19-20.) Mr. Dobbs was still in the backseat of the squad car and handcuffed at that time. (R.253:20.) At about 8:20 a.m., close to one hour after the initial call, Officer Milton removed the cuffs and started the field sobriety testing. (R.253:21, 43.) After the testing was completed, Officer Milton requested that Mr. Dobbs submit to a sample of his blood. (R.253:21-22.) Although Mr. Dobbs initially was reluctant to submit to the blood test, due to a fear of needles, he eventually agreed if he would be able to have a breath test afterward. (R.253:23.)

Officer Milton transported Mr. Dobbs to Meriter Hospital for the blood test. They arrived at about 9:08 a.m. Officer Milton then read the Informing the Accused Form to Dobbs at 9:24 a.m. (R.253:23-24, 49.) Afterwards, Mr. Dobbs again asked questions about an alternative test. Officer Milton agreed to do the alternative evidentiary breath test after Mr. Dobbs submitted to the blood test. (R.253:24-25.) The blood was drawn at about 9:33 a.m. (R.253:50.)

While still at Meriter Hospital, additional officers responded and had Mr. Dobbs perform further tests. (R.253:26.) One of the officers was Officer Pine. (R.253:78-79.) Officer Pine called another DRE trained officer to assist. (R.253:79-80.) Officer Pine began the evaluation at about 9:47 a.m. (R.253:82.) For the first time that morning, Officer Pine read Mr. Dobbs a *Miranda* warning at 10:19 a.m.—almost three hours after Officer Milton initially detained him. (R.253:84.) Mr. Dobbs was cooperative and followed directions, but was often emotional. (R.253:85-86.) Officer Pine testified Mr. Dobbs complained of a pain in his right hand, which he had recently broken and on which he had surgery. (R.253:86-87.) Mr. Dobbs said his hand was infected, removed the bandage, and showed Officer Pine two metal rods sticking out of his hand. (R.253:87.) Officer Pine testified that it was swollen, very red, and appeared infected. (R.253:87.) Mr. Dobbs was then given a preliminary breath test which showed .000 alcohol concentration in his system. (R.253:27.)

While sitting in the squad vehicle at Meriter Hospital following Officer Pine's examination, Officer Milton read Mr. Dobbs the *Miranda* warnings and asked him if he would be willing to answer questions. (R.253:28) That was the first time Officer Milton informed Mr. Dobbs of his rights. (R.253:54). Officer Milton testified that he told Mr. Dobbs that he was under arrest, that the pedestrian had died, and that he wanted to conduct an interview with him. (R.253:55-56.) Officer Milton informed Mr. Dobbs that the interview was

going to be recorded, and he was being arrested for homicide for negligent operation of a motor vehicle because the pedestrian died. (R.253:29, 56.) Mr. Dobbs was emotional and began to cry. He became so hysterical that several minutes passed before Officer Milton could continue with the questioning. (R.253:29-30.) Officer Milton testified that he specifically withheld the information that the pedestrian had died because he did not want to create additional hardship for Mr. Dobbs emotionally and wanted to conduct his investigation without Mr. Dobbs' emotions interfering. (R.253:66-67.) Officer Milton was afraid Mr. Dobbs' emotional state would detrimentally impact the investigation if he learned of the death of the pedestrian. (R.253:67.)

The entire interrogation of Mr. Dobbs in Officer Milton's squad car at Meriter Hospital was recorded. (R.253:37-38.) Mr. Dobbs answered Officer Milton's questions about the events leading up to the accident that morning. Officer Milton questioned Mr. Dobbs about the canister of air duster found in his vehicle, which eventually led to Mr. Dobbs making a statement that he had been huffing while driving, although he initially stated he had not huffed while driving. (R.253:30-31.) At times during the questioning, Mr. Dobbs was so distressed that Officer Milton had to pause because Mr. Dobbs was crying and could not answer. (R.253:56-57.) Mr. Dobbs also had loud, emotional outbursts during this time. (R.253:57.) He still was not wearing a shirt. (R.253:57.)

The audio recording from the interview was admitted into evidence at the hearing and later considered by the court. (R.253:64-65; R.52.) As soon as Officer Milton informed Mr. Dobbs that the person he hit died, Mr. Dobbs began to cry and express his distress. (R.52.) Officer Milton also informed him that the charges would include homicide by negligent use of a vehicle. (*Id*.) Officer Milton said that he did not the know details from the scene but affirmed Mr. Dobbs was under arrest, and his statement was going to be recorded. (*Id*.) Mr. Dobbs can be heard crying. (*Id*.) After

Officer Milton read the *Miranda* rights waiver to Mr. Dobbs, he had to ask Mr. Dobbs to respond verbally, as he continued to cry. (*Id*.) Officer Milton then proceeded to question Mr. Dobbs for over an hour. During the interrogation, Mr. Dobbs continued to cry and often was unable to answer questions. (*Id*.) He also told Officer Milton that he had not slept in about forty hours. (*Id*.)

Officer Milton testified that Mr. Dobbs was so distraught that a turning point came when he questioned Mr. Dobbs about being untruthful. It was then that Mr. Dobbs changed his answer to Officer Milton's question about huffing while driving. (R.253:58-59.) Mr. Dobbs was so upset that he killed someone that he said he did not care what happened to him. (R.253:61-62.)

After questioning Mr. Dobbs, Officer Milton transported him to the City County Building garage so Officer Fleischauer could continue the questioning and ask Mr. Dobbs to sign various consent forms. (R.253:33.) Officer Fleischauer talked with Mr. Dobbs in the basement of the City County Building at about 1:30 p.m.—six hours after the accident. (R.254:156-57.) Mr. Dobbs told Officer Fleischauer he was willing to answer a "couple more questions." (R.254:157.) Mr. Dobbs was not handcuffed but Officer Fleischauer testified that he was very sad and crying. (R.254:157-158.) Answering questions, Mr. Dobbs said he had been huffing Dust-Off spray as pain management in addition to using an antidepressant and prescribed pain medication. (R.254:158.) Mr. Dobbs again stated his hand was infected, and the officer observed it was visibly swollen and reddened. (R.254:161-62.) Officer Milton informed Officer Fleischauer that Mr. Dobbs admitted to huffing at the time of the crash. (R.254:161.) Mr. Dobbs told Officer Fleischauer he got a good deal on Dust-Off at Menards and opened one of the canisters while driving home, inhaled the substance and lost consciousness. (R.254:159) Mr. Dobbs also told Officer Fleischauer he wished he could trade places with the pedestrian who had been hit and wanted to cooperate

fully. (R.254:160-61.) Officer Fleischauer confirmed Mr. Dobbs was on antidepressants as well. (R.254:162.)

Following the questioning by Officer Fleischauer, Officer Milton transported Mr. Dobbs to the Public Safety Building to book him and process him into the jail. (R.253:36, 62.) The jail, however, refused to accept him due to concerns about his medical condition. (R.253:62-63.) The jail required that he return to the hospital for medical clearance. (R.253:63.)

Officer VanHove then transported Mr. Dobbs back to Meriter Hospital at about 2:14 p.m. (R.253:97.) During the transport, Officer VanHove asked Mr. Dobbs about the surgery on his hand. (R.253:98.) Mr. Dobbs responded "he couldn't talk right now, because he just killed a man." (R.253:98.) At the hospital, Mr. Dobbs said he was going to refuse treatment because he wanted his infection to go septic so that he would die. (R.253:98-99.) Mr. Dobbs was visibly upset, very distraught, and periodically crying. (R.253:100.) While at Meriter, Officer VanHove overheard Mr. Dobbs tell a nurse that he had taken a puff of Dust-Off and killed a man. (R.253:99.) He further told the nurse that he had run over the person with his vehicle. (*Id*.) At Meriter, the doctor was unable to medically clear him for jail entry and at about 5:00 p.m. he was transported to St. Mary's Hospital where his surgery previously had been done. (R.253:105.)

After being admitted to St. Mary's, Mr. Dobbs asked if he could call his father to take care of his pets. (R.253:101.) After dialing, Officer VanHove remained in the room while Mr. Dobbs spoke with his father. (R.253:102-103.) Officer VanHove heard Mr. Dobbs tell his father that he had just killed a 51 year old man near Walmart. (R.253:102.) Mr. Dobbs told his father he went to Menards to buy Dust-Off, was driving home, and that he thought he hit a tree. (R.253:102.) Mr. Dobbs also told his father that he took a puff of Dust-Off. (R.253:102.) Mr. Dobbs told Officer VanHove that he understood his rights, wanted to be honest,

and deserved any punishment that was given. (R.253:102-103.) Mr. Dobbs also told him he had a death wish, wanted to die, and was refusing medical treatment. (R.253:105.) He again said he would trade places with the deceased pedestrian if he could. (R.253:105.) Officer VanHove spoke with Mr. Dobbs' father on the phone, and his father was concerned that Mr. Dobbs was suicidal and needed his prescription medication. (R.253:107-108.) Eventually, Mr. Dobbs agreed to receive medical treatment for his injuries after Sgt. Quast told him that if he refused treatment he would likely be transported to the Winnebago facility to be given antibiotics before being brought back to the Dane County Jail. (R.253:109-110.)

Officer Dyer took over the duty of guarding Mr. Dobbs at about 8:00 p.m. at St. Mary's Hospital where he was cuffed to the bed. (R.253:111-112.) He did not ask any questions, but Mr. Dobbs told him that he "killed someone" and did not want to go on living. (R.253:112-113.) Mr. Dobbs was emotional, and they discussed the suicidal type statements he was making. (R.253:113.) Mr. Dobbs repeated the story that he had gone to Menards to purchase duster, which he huffed, and hit somebody with his car. (R.253:114.) Mr. Dobbs said he did not know he had hit a person and if he knew he would have stayed to help him. (R.253:116.) Mr. Dobbs said he started huffing about two weeks before that night. (R.253:114.) While making these statements Dobbs was crying, extremely upset and overwhelmed. (R.253:116.)

The next day, at about 7 a.m., Officer Baldukas went to St. Mary's Hospital to take a copy of the Informing the Accused Form to Mr. Dobbs. (R.253:118.) He identified himself as a police officer there to deliver paperwork. Mr. Dobbs responded by stating that he blew .00. (R.253:119-120.) He also said he took a puff of duster. (R.253:120.) Officer Baldukas reminded him he was under arrest and had rights associated with that. (R.253:120.) Mr. Dobbs did not remember the paperwork that he reviewed the prior day, so Officer Baldukas had to go over it again. (R.253:122.)

Officer Baehmann was assigned to guard Mr. Dobbs at St. Mary's Hospital. (R.253:124-25). Mr. Dobbs was handcuffed to the hospital bed and Officer Baehmann remembers cuffing and uncuffing him several times for various reasons. (R.253:126.) Mr. Dobbs started to cry and asked whether the pedestrian he hit had a family. (R.253:127.) He said he took one puff to relieve the pain in his hand and he did not remember anything; he did not remember hitting anyone. (R.253:127.) Mr. Dobbs told Officer Baehmann he must have passed out. (R.253:128.)

After additional briefing following the evidentiary hearing, the Circuit Court issued a written decision on July 31, 2016 denying the motion to suppress. (R.67, P-App. 107-112.) The decision was issued by The Honorable David T. Flanagan on the day that he retired. The Honorable Clayton Kawski presided over subsequent hearings and the trial. On September 9, 2016, the Defense filed before Judge Kawski a motion for reconsideration. The motion asserted, among other grounds, that the court did not address all issues, did not apply the law to its factual findings, and after initially indicating that the motions should be decided by the judge who would preside over the trial, issued a truncated briefing schedule and rushed the decision. (R.68.) The court orally denied this motion on October 31, 2016, not on the merits, but on the grounds that the Defense did not meet its burden on a motion for reconsideration. (R.256:3-8, P-App. 113-19.)

Dr. Lawrence White

The Defense named Dr. White to testify about false confessions and the situations in which they are likely to arise. (R.80:1.) The State filed a motion to exclude the testimony. (R.85.) The State, however, stipulated to Dr. White's qualifications, that he is an expert regarding false confessions, and could talk generally about false confessions. (R.258:12.)

At a hearing on February 7, 2017, Dr. White testified, summarizing his false confession research. (R.258:15.) His Curriculum Vitae was marked as an exhibit (R.93), as well as an article that he co-authored on false confessions: "An Empirical Basis for the Admission of Expert Testimony on False Confession." (R.94.) Specifically, he had conducted research regarding police interrogations and confessions, taught a seminar entitled "The Psychology of Interrogation and Confessions," published approximately twenty research reports and book chapters, and consulted on forty to forty-five criminal cases involving contested confessions, including about ten in Wisconsin. (R.258:16-17, 32.) This included previously testifying as an expert in Dane County. (R.258:33.) Prior to this case, according to Dr. White's knowledge, no court in Wisconsin had precluded him from testifying as an expert. (R.258:32.)

Among other areas, Dr. White would offer opinions on how false confessions occur more often with certain types of interrogations and the potential for false confessions. (R.258:19-21.) He opined that there can be false confessions without any real pressure from the police. (R.258:21.) A majority of false confessions can occur when law enforcement act in good faith believing the suspect is guilty and apply certain interrogation techniques. (R.258:21-22.) Importantly relevant to this case is that when the police use powerful psychological techniques, although they can induce the guilty to confess, they also can induce the innocent to give false confessions. (R.258:22.) Some of these techniques are isolating the suspect, cutting him or her off from family members, confronting the suspect with evidence of guilt, and lengthy and persistent questioning. (R.258:22.) He also referenced empirical studies regarding what potential jurors know about the frequency of false confessions. (R.258:25-26.) It is Dr. White's opinion that psychologically coercive interrogations can produce false confessions. (R.258:28.) In addition, he testified that persons with mental illness, for example anxiety, depression, or exhaustion, are more likely to make false confessions. (R.258:78-79.)

Dr. White, however, would not be offering an opinion on the truthfulness or falseness of any specific confession or statement in this case—he said that he never offers such testimony. (R.258:28-29.) Instead, Dr. White described himself as an educator telling the jury about problems with specific types of confessions and "what social scientists and legal scholars have learned about the problem of police induced false confessions, and also more generally about the psychology of interrogation in confections [sic]." (R.258:83-84.) The court granted the State's motion to preclude Dr. White from testifying holding that he would not assist the trier of fact because he had not applied principles and methods to the facts of the case. (R.258:178-183, P-App. 120-26.)

ARGUMENT

I. INTRODUCTION.

There was and is no dispute that Mr. Dobbs was driving the vehicle that hit and killed ACM. What is in dispute is whether Mr. Dobbs was operating while intoxicated. The State's physical evidence was contradictory, weak, and inconsistent. The drug recognition officer, Officer Pine, who administered tests to Mr. Dobbs following the accident, believed that he was operating under the influence of marijuana. Yet, the blood tests came back with no active THC in Mr. Dobbs' blood. Thus, he could not have been under the impairing influence of THC at the time of the accident. Instead, the State claimed at trial that he was under the influence of an inhalant in large part due to Mr. Dobbs' statements and the presence of a can in the driver's area of the vehicle. However, without Mr. Dobbs' statements, the State would have difficulty meeting its burden of proof, because the State Crime Lab testing was inconclusive for the presence of the active ingredient of the inhalant. Moreover, Officer Pine concluded from his expert examination of Mr. Dobbs that he was under the influence of marijuana and specifically

excluded the possibility that he was under the influence of inhalants.

Given the weak physical evidence, Mr. Dobbs' statements and circumstantial evidence were important and vital to both the prosecution and the defense. The State repeatedly emphasized the statements in its closing argument. Without these statements it is unlikely that the State had sufficient evidence to convict Mr. Dobbs of operating while intoxicated and/or with a prohibited substance in his blood. The trial court made multiple errors that affected Mr. Dobbs' right to a fair trial.

First, the court erred by allowing in Mr. Dobbs' statements to officers that seemed to implicate him as driving under the influence of an inhalant. Mr. Dobbs was held in custody for several hours without law enforcement informing him of his *Miranda* rights. Any statements made during this several hour time period should have been excluded. Then, after being informed of his rights, his subsequent statements were involuntary and should have been excluded. The statements were made by a person in pain, distraught, suicidal, held in custody for hours without his medication, and operating on a lack of sleep. Under established law the court should have excluded Mr. Dobbs' statements. The Court of Appeals downplayed these issues by stating that law enforcement did not use coercive methods. This, however, overlooked the psychological issues. Moreover, the Court of Appeals failed to apply the proper standard of looking at the total picture.

Second, the trial court compounded this error by precluding Dr. White from offering expert testimony from which the Defense might explain the statements as false confessions due to the circumstances. Without being able to explain Mr. Dobbs' statements, a jury would be extremely likely to convict him of the homicide by intoxicated use a vehicle charge even with contradictory State evidence—which indeed is what happened. By erroneously allowing the statements in and then precluding Dr. White from offering

testimony that would educate the jury about problems inherent with confessions, the Defense was hamstrung from the start. This testimony met both the standards for expert testimony under Wis. Stat. § 907.02 and Wisconsin case law interpreting the statute. The Court of Appeals shrugged off the trial court's problematic decision as discretionary. However, it was not a proper exercise of discretion. Instead it was an arbitrary decision without any basis in law or fact.

Finally, this Court directed the parties to address whether the Court of Appeals decision is consistent with *State v. Morgan* and, if not, whether the Court should overrule *Morgan*. The Court of Appeals did not follow *Morgan* or any other case law controlling of the issue of whether Mr. Dobbs was in custody for Fifth and Fourteenth Amendment purposes. Instead, it applied inapplicable Fourth Amendment analysis. More importantly, there is no reason for this Court to overrule *Morgan* because it is consistent and follows this Court's rulings and those of the United States Supreme Court in analyzing when a person is in custody for Fifth and Fourteenth Amendment purposes.

II. STANDARD OF REVIEW.

The first step in reviewing a circuit court's decision on the admission of expert testimony is whether the court applied the proper legal standard under Wis. Stat. § 907.02(1). *Seifert v. Balink*, 2017 WI 2, ¶ 89, 372 Wis. 2d 525, 888 N.W.2d 816. This Court reviews that decision *de novo*. *Id.* If the circuit court applied the correct legal standard, then this Court reviews whether it properly exercised its discretion. *Id.* at ¶ 90. *See also State v. Smith*, 2016 WI App 8, ¶ 4, 366 Wis. 2d 613, 874 N.W.2d 610.

This Court will find an erroneous exercise of discretion by a trial court if it "failed to exercise its discretion, the facts fail to support the trial court's decision, or this court finds that the trial court applied the wrong legal standard." *State v. Black*, 2001WI 31, ¶ 9, 242 Wis. 2d 126, 624 N.W.2d 363 (citation omitted). This Court will not reverse a circuit

court's decision under the erroneous exercise of discretion standard "if it has a rational basis and was made in accordance with accepted legal standards in view of the facts in the record." *Smith*, 2016 WI App 8, ¶ 4.

The sufficiency of *Miranda* warnings and the waiver of *Miranda* rights are issues of constitutional fact which the appellate courts review *de novo*. *State v. Santiago*, 206 Wis. 2d 3, 18, 556 N.W.2d 687, 692 (1996). "The standard of review on the question of whether the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment Miranda right to counsel is as follows: This court will uphold a circuit court's findings of historical or evidentiary fact unless they are clearly erroneous. This Court determines the application of legal and constitutional principles to those evidentiary facts independently of the circuit court, but benefits from the circuit court's analyses." *State v. Hambly*, 2008 WI 10, ¶ 71, 307 Wis. 2d 98, 745 N.W.2d 48.

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

At the time of the evidentiary hearing regarding Dr. White's testimony, the court had already ruled twice denying the motion to suppress Mr. Dobbs' statements to law enforcement about use of an inhalant. Therefore, the parties and the court knew that at trial all of those statements were going to come into evidence. Thus, the Defense needed some way to address the statements and named Dr. White to testify about false confessions.

The admissibility of expert testimony in Wisconsin is governed by Wis. Stat. § 907.02. *See Seifert*, 2017 WI 2, ¶ 50; *State v. Giese*, 2014 WI App 92, ¶ 17, 356 Wis. 2d 796, 854 N.W.2d 687. The legislature amended § 907.02 in 2011 to codify the standard from *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993) and subsequent

cases. *Seifert*, 2017 WI 2, ¶ 51. Under amended § 907.02 and *Daubert*, the trial court serves as a gatekeeper. "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." *Id.* at ¶ 57, *quoting Daubert*, 509 U.S. at 597. This gatekeeper role is a change from the prior standard examining only whether "the witness is qualified to testify and the testimony would help the trier of fact understand the evidence or determine a fact at issue." *Giese*, 2014 WI App 92, ¶ 17, quoting *State v. Kandutsch*, 2011 WI 78, ¶ 26, 336 Wis. 2d 478, 799 N.W.2d 865.

In determining whether expert testimony meets the new standards, the trial court should focus on the expert's principles and methodology, not the conclusion. *Giese*, 2014 WI App 92, at ¶ 18. There is not an exhaustive list of factors, but the courts have stated: "Relevant factors include whether the scientific approach can be objectively tested, whether it has been subject to peer review and publication, and whether it is generally accepted in the scientific community." *Id.*, *quoting Daubert*, 509 U.S. at 593-94. Dr. White's proposed testimony met this standard.

In excluding Dr. White, the court relied upon *Bayer v. Dobbins*, 2016 WI App 65, 371 Wis. 2d 428, 885 N.W.2d 173 for a three factors it must consider: (1) whether the expert is qualified; (2) whether the expert's methodology is scientifically reliable; and (3) whether the testimony will assist the jury. 2016 WI App 65, ¶ 20. (R.258:180, P-App. 123.) The court found Dr. White qualified and had no issue with his research; instead it took issue with factor three, finding that he would not assist the jury. (R.258:180, P-App. 123.) The court's primary complaint was that Dr. White had not applied his research to the specific facts of this case. In reaching its decision, the trial court erroneously exercised its discretion by improperly applying the legal standard.

The standard is whether Dr. White would assist the jury, not whether Dr. White had specific opinions based on the specific facts of this case. "Under this [*Daubert*] test, 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.'" *Smith*, 2016 WI App 8, ¶ 5, *quoting Giese*, at ¶ 18. There was no issue about Dr. White's opinions being based on a reliable foundation. Contrary to the court's ruling, Dr. White's opinions and research were highly relevant to a material issue. Mr. Dobbs' alleged confessions were a primary, if not the primary, issue of fact in the case. Dr. White's research and elucidation of issues and circumstances surrounding false confessions would have given the jury important information on which to determine for itself whether Mr. Dobbs' confessions were truthful or false. By excluding this evidence, the Defense was deprived of a major scientific basis for arguing to the jury that it could find that Mr. Dobbs' statements were not truthful. Dr. White's testimony was directly relevant to a major factual issue—Mr. Dobbs' supposed confessions—and among other things would have addressed juror misperceptions about the frequency of false confessions. (R.258:25-26.) *Compare State v. Pittman*, 174 Wis. 2d 255, 273, 496 N.W.2d 74 (1993) (expert's testimony "would not have assisted the jury by disabusing them of a commonly held but inaccurate belief").

Smith is directly on point. There, the State sought to introduce testimony from the director of a children's advocacy center regarding reactive behavior of child abuse victims. 2016 WI App 8, at ¶ 3. Like here, the State's expert would not testify about case specifics and the specific alleged victim, but instead would testify in general about what the expert often saw from child sexual assault victims. *Id.* at ¶ 6. The trial court allowed the testimony and the Court of Appeals affirmed. *Id.* at ¶ 10. As the Court of Appeals noted, the *Daubert* test for admissibility is flexible and courts should have "considerable leeway" in determining admissibility

consistent with the goal of ensuring reliability and relevancy. *Id.* at ¶ 7.

The Court of Appeals here distinguished *Smith* on the grounds that Mr. Dobbs' argument overlooked the trial court's discretion. (P-App. 103.) The Court of Appeals stated that the trial court could within its discretion exclude the testimony, but also could have allowed the testimony. (*Id.*) Yet, this is neither what the court in *Smith* held, nor is it consistent with the Legislature's intent in amending Wis. Stat. § 907.02. Under the newer standard, the trial court is to serve as a gatekeeper. *See Seifert*, at ¶ 57. Yet, under the Court of Appeals' reasoning here, the gate freely swings to and fro without any real set standards; sometimes letting in opinions, sometimes excluding them. The Court of Appeals in *Smith* held that an expert need not offer opinions directly on the facts of the case as long as they were relevant to the material issue of the case. 2016 WI App 8, ¶¶ 9-10. In *Daubert*, upon which Wis. Stat. § 907.02 is based, the experts also were not testifying as to case specifics but rather whether Bendectin can cause birth defects. *See, e.g.*, 509 U.S. 579, at 583. Yet here, the Court of Appeals held that it is within a trial judge's discretion to exclude such testimony.

The Court of Appeals' reasoning cannot be explained as merely trial court discretion. Instead, its reasoning would allow arbitrary decision-making by trial courts. On the Court of Appeals' reasoning, the Walworth County Circuit Court in *Smith* could allow the prosecution's expert to testify, but a court in Dane or Rock County could decide to exclude the exact same expert offering similar opinions without any reasoning other than finding it would not be helpful to the jury. Indeed, one court in Dane County could allow the expert and another could exclude the expert (as happened with Dr. White). This is contrary to the intent of the legislature in adopting the amended Wis. Stat. § 907.02 that reversed the prior Wisconsin standard of whether the expert would help the jury understand the evidence or determine an issue of fact. *See Giese*, 2014 WI App 92, at ¶ 17.

Nor is this unique to criminal trials. The Court of Appeals' reasoning would allow a court to preclude, for example, a defense expert in a toxic tort case from testifying about studies finding that the chemical at issue does not cause the plaintiff's disease on the grounds that the expert only was testifying about general research and not the plaintiff specifically. In essence, on this reasoning, all of the expert testimony about Bendectin in *Daubert* could be excluded by a trial court. *See also* David L. Faigman, John Monahan & Christopher Slobogin, *Group to Individual (G2i) Inference in Scientific Expert Testimony*, 81 U. Chi. L. Rev. 417 (2014) (discussing the divide between the scientific inquiry into phenomena at the group level and the court inquiry at the individual level). Experts help the jury understand the larger empirical framework for the issue in the trial, but it is the jurors who determine the specific issue in the case. Faigman, et al., 424.

In addition, the trial court's ruling seems to require that an expert such as Dr. White could only be relevant and admissible if he was to testify directly whether Mr. Dobbs' confessions were true or false. This, however, would presumably be contrary to the rule in *State v. Haseltine* that a witness cannot testify whether another witness is telling the truth. "No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). "The jury is the sole judge of credibility of the witnesses, and a witness who comments on the veracity of another witness usurps this role instead of assisting the jury in fulfilling it." *State v. Maday*, 2017 WI 28, ¶ 34, 374 Wis. 2d 164, 892 N.W.2d 611. Dr. White's proper role was educating the jury on false confessions to assist it in its fact-finding role and allowing the jury to draw its conclusions. Indeed, the advisory committee to Federal Rule 702 recognized this role: "The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the

case, leaving the trier of fact to apply them to the facts." FRE 702, Advisory Committee's Note to the 2012 Proposed Rules. Chief Justice Roggensack appears to have contemplated the same in her dissent in *Dubose* when addressing procedures to improve the use of eyewitness identifications: "Other proposed enhancements include allowing expert testimony on the reliability of eyewitness identifications or jury instructions on eyewitness identification." *State v. Dubose*. 2005 WI 126, ¶ 95, 285 Wis. 2d 143, 699 N.W.2d 582 (Roggensack, J., dissenting).

"'[O]ne of the major tenets in the administration of justice' is 'the presentation of reliable, relevant evidence at trial.'" *State v. Roberson*, 2019 WI 102, ¶ 40, 389 Wis. 2d 190, 935 N.W.2d 813, *quoting Dubose*, ¶ 86. Here the trial court erroneously exercised its discretion and excluded reliable and relevant evidence. The trial court erroneously exercised its discretion because its decision is not in accordance with accepted legal standards. *See Smith*, 2016 WI App 8, at ¶ 4. As noted above, Dr. White's opinions were relevant to the material issue of the truthfulness of Mr. Dobbs' statements. "The accuracy of the facts upon which the expert relies and the ultimate determinations of credibility and accuracy are for the jury, not the court." *Giese*, 2014 WI App 92, ¶ 23 (citation omitted). The trial court here usurped the jury's role by preventing it from hearing Dr. White's testimony. In turn, the Court of Appeals applied the wrong standard to its consideration of the trial court's ruling in affirming it. Therefore, this Court should remand the matter for a new trial.

IV. *MORGAN* SHOULD NOT BE OVERTURNED AS IT CORRECTLY STATES THE LAW REGARDING WHEN A PERSON IS IN "CUSTODY" FOR *MIRANDA* PURPOSES.

In its Order granting Mr. Dobbs' Petition for Review, this Court asked the parties to address whether the Court of Appeals' decision is consistent with *State v. Morgan*, 2002 WI App 124, 254 Wis. 2d 602, 648 N.W.2d 23, and if not, whether *Morgan* should be overruled.

The Court of Appeals did not address *Morgan* and its opinion is not consistent with the holding in *Morgan* (or other case law analyzing if someone is in custody for purposes of *Miranda*). *Morgan* on the other hand is entirely consistent with case law from both the United States Supreme Court and from this Court on the issue of when a person is in custody for purposes of *Miranda*. *Morgan* should, therefore, not be overruled.

The Court of Appeals relied on *State v. Blatterman*, 2015 WI 46, 362 Wis. 2d 138, 864 N.W.2d 26, as a standard for judging Mr. Dobbs' Fifth Amendment claim. (P-App. 104.) *Blatterman*, however, is a Fourth Amendment case. It deals with whether the stop and detention of Mr. Blatterman was reasonable under the circumstances. There was no Fifth Amendment issue in that case.[2] Instead, like *Morgan* and

[2] The Court of Appeals asserts that Mr. Dobbs' argument was that he was "in custody *upon being placed in the squad car*." (P-App. 105) (emphasis in original). Although Mr. Dobbs' brief to the Court of Appeals argued both the detention of Mr. Dobbs and his interrogation were illegal, the focus there was on the violation of his *Miranda* rights, not that he was illegally detained. Mr. Dobbs also did not limit the circumstances of his Fifth Amendment claim to his being placed in the squad car. Mr. Dobbs' brief set forth facts to support his Fifth Amendment claim, including the three hours he had been held, the fact he was handcuffed, removed from the police vehicle to perform sobriety tests then returned to the police vehicle, and the fact that he was

other this Court's other case law, Mr. Dobbs' claim focused on whether he was in custody for purposes of *Miranda*. Mr. Dobbs asserted that his Fifth and Fourteenth Amendment rights were violated for failure to read him his *Miranda* rights. (See, e.g., Ct. App. Br., p. 4; Reply Br., pp. 3-4.)

Morgan employed the correct legal test for *Miranda* purposes when an individual has been detained in a *Terry* stop. *Morgan*, 2002 WI App. 124, ¶ 13. The State argued in *Morgan* that the test for *Miranda* purposes is essentially the same as the test for whether a person has been arrested for Fourth Amendment purposes. *Id.* The *Morgan* court disagreed. It noted that a Fourth Amendment issue involves balancing the government interests in crime prevention against an individual's right to be free from government intrusion. *Id.* ¶ 14, citing *Terry v. Ohio*, 392 U.S. 1, 19-21, 22-27 (1968). The Fifth Amendment, according to the Court of Appeals in *Morgan*, protects a different interest, the right not to be compelled to incriminate oneself, which is based on the need to protect the fairness of a criminal defendant's trial. *Morgan*, 2002 WI App. 124, ¶ 16.

Morgan pointed out that the Fifth Amendment does not exclusively focus on the reasonableness of the police officer's conduct, but whether the acts of the police "give rise to a custodian situation." *Id*. The *Morgan* court stated that to determine if there is a custodial situation a court must look at the totality of the circumstances, including "defendant's freedom to leave; the purpose, place and length of the interrogation; and the degree of restraint." *Id.* ¶¶ 12, 16. This Court recently reiterated that it is a totality of circumstances and quoted *Morgan* for the factors the courts should consider. *State v. Bartelt*, 2018 WI 16, ¶¶ 31-32, 379 Wis. 2d 588, 906 N.W.2d 684.

The *Morgan* court's approach is consistent with the precedent of this Court and that of the United States Supreme

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transported by the police to the hospital for a blood test; all of which affect the custody analysis. (Dobbs' Ct. App. Br., at 20-21).

Court. "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. Martin*, 2012 WI 96, ¶ 33, 343 Wis. 2d 278, 816 N.W.2d 270, *citing Thompson v. Koehane*, 516 U.S. 99, 112 (1995). "If we determine that a suspect's freedom of movement is curtailed such that a reasonable person would not feel free to leave, we must then consider whether 'the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda.*'" *State v. Bartelt*, 2018 WI 16, ¶ 33, *citing Howes v. Fields*, 565 U.S. 499, 509 (2012).

Morgan should not be overturned. It correctly recognizes the distinction between the Fourth and Fifth Amendment interests, and correctly references the factors that must be considered by courts when dealing with each of these issues. The interests should not be conflated; to do so ignores the interests of defendants in not incriminating themselves and in fair trials. It would elevate police procedure over the interest of fairness.

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

Mr. Dobbs challenged the admission of the statements that he made to police or that were overheard by police while Mr. Dobbs was detained by police following the fatal accident. He moved to suppress these statements on the grounds that his *Miranda* rights were violated and that the statements were not voluntary. The trial court held a suppression hearing, and then denied Mr. Dobbs' motion for suppression. (R.55; R.253; R.254)

A. Mr. Dobbs Statements To The Police Prior To Being Given *Miranda* Warnings Must Be Suppressed As He Was "In Custody" For *Miranda* Purposes.

The legality of questioning a detained suspect before *Miranda* warnings are given is a Fifth Amendment issue: the right not to be compelled to incriminate oneself. *Miranda v. Arizona*, 348 U.S. 436, 467 (1966). *Miranda* does not permit the prosecution to use "in custody" statements by a defendant unless the defendant had previously been given *Miranda* warnings.

The determination of whether a person is in custody for *Miranda* purposes is based on whether a reasonable person in that position would have considered himself to be in custody. *State v. Gruen*, 218 Wis. 2d 581, 594-96, 582 N.W.2d 728 (Ct. App. 1998); *Bartelt*, 2018 WI 16, ¶ 31; *State v. Martin*, 2012 WI 96, ¶¶ 33-35, 343 Wis. 2d 278, 816 N.W.2d 278 (distinguishing custody for *Miranda* purposes from a "temporary roadside detention"). It is a totality of the circumstances test that takes into account factors that bear on the person's state of mind. *Gruen*, 218 Wis. 2d at 594-96. A court should consider what a neutral, reasonable person would have felt—neither someone overly apprehensive nor someone insensitive to the circumstances of the situation. *Morgan*, 2002 WI App 124, ¶ 23.

The court should consider whether under the totality of the circumstances, a reasonable person would feel at liberty to terminate an interview and leave. Factors to consider include the degree of restraint; the purpose, place, and length of interrogation; and what was communicated by police officers. *State v. Lonkoski*, 2013 WI 30, ¶6, 346 Wis. 2d 523, 828 N.W.2d 552; *Bartelt*, 2018 WI 16, ¶ 32. "When considering the degree of restraint, we consider: whether the suspect is handcuffed, whether a weapon is drawn, whether a frisk is performed, the manner in which the suspect is restrained, whether the suspect is moved to another location, whether

questioning took place in a police vehicle, and the number of officers involved." *Bartelt*, 2018 WI 16, ¶ 32, *citing Morgan*, 2002 WI App 124, ¶12.

At issue is whether Mr. Dobbs was in custody for purposes of requiring a *Miranda* warning. If Mr. Dobbs was in custody for *Miranda* purposes, the statements and evidence obtained as a result of his custody must be suppressed. The evidence demonstrates that Mr. Dobbs was in custody for *Miranda* purposes.

Mr. Dobbs was contacted by police at approximately 7:30 a.m. (R.253:6.) His car was blocked by Officer Milton's squad car, and he was ordered out of his vehicle, handcuffed, and placed in a locked squad car. (R.253:8-9, 39-40.) He was told he was being detained for an accident investigation and that he was suspected of striking a person with his truck. (R.253:11, 14, 41.) He was not told that he was free to leave. At the time Mr. Dobbs was detained, he was in pain from an injury to his hand, as he told Officer Milton. (R.253:45-46, 59-60, 86, 88; R.267:182.) He was removing a splint on his arm when his vehicle was blocked by Officer Milton. (R.267:77.) The injury to his hand was visibly infected. (R.253:60, 87, 97.) After Officer Milton removed Mr. Dobbs from his vehicle, Officer Milton noticed a can of air duster in the vehicle; Officer Milton knew that air duster can be used to get high. (R.253:8-9, 15-16, 18; R.267:93-94.)

Mr. Dobbs remained handcuffed in the squad vehicle for almost an hour with Officer Milton periodically questioning him. (R.253:11, 21.) Officer Milton asked questions about the damage to Mr. Dobbs' vehicle, which drew responses about Mr. Dobbs' truck hitting the curb, his consumption of beers the night before, and his use of medication for anxiety and depression and a pain killer for his arm. (R.267:83-85.) After close to an hour, Mr. Dobbs was removed from the squad car and told to perform field sobriety tests. (R.253:21.) At the close of field sobriety testing, Officer Milton again put Mr. Dobbs in the back of squad

vehicle and transported him to the hospital for a blood draw. (R.253:23-24.) Before being transported to the hospital, but after the sobriety test, Mr. Dobbs said that the pain in his hand was killing him and he had not taken his pain medication that morning.[3] (R.51.)

During the time that Officer Milton kept Mr. Dobbs handcuffed in the back of his squad car, interrogated Mr. Dobbs, and performed a sobriety test, Officer Milton knew that Mr. Dobbs had killed someone with his car earlier that morning and left the scene of the accident. He had probable cause to arrest Mr. Dobbs at the very least for the hit and run. Yet Officer Milton did not tell Mr. Dobbs that he was under arrest for any of these acts and did not tell him that the pedestrian was dead. (R.253:14, 41; R.267:209.)

At the hospital, a legal blood draw was performed and additional tests were performed on Mr. Dobbs by a different police officer. (R.253:26, 79-80.) Twenty minutes after starting this second set of tests, a law enforcement officer finally informed Mr. Dobbs of his *Miranda* rights. Almost three hours had passed since his initial detention at 7:30. (R.253:84.) Mr. Dobbs had been talking freely with the officers and had provided significant information about his activities and accident by the time he was read his *Miranda* rights.

A reasonable person in Mr. Dobbs' circumstances would have felt his freedom was restrained to the degree normally associated with formal custody prior to any law enforcement officer giving the *Miranda* warning. He was certainly not free to leave at any time during the three hours he was "detained." Mr. Dobbs' car had been blocked by Officer Milton's squad car. Officer Milton, who was armed and in uniform, ordered Mr. Dobbs out of his car, handcuffed

[3] Officer Milton testified that he does not remember this statement, even though it is clear on the recording of the interview. (R.253:45.)

him, and then put Mr. Dobbs in the back seat of his squad. (R.253:8-9, 39-41.) Officer Milton told Mr. Dobbs that he was "detained." (R.253:8-11, 37, 40-41.) Mr. Dobbs was either in a locked squad car or in the presence of a uniformed and armed officer at all times before he received any *Miranda* warnings. (R.253:43-49.) He was transported from the stop site to the hospital after more than an hour; at the hospital he was in contact with multiple officers. (R.253:51-53, 75.)

The trial court made a number of conclusions of law, but cited to no case law other than to *State v. Armstrong*, 223 Wis. 2d 331, 588 N.W.2d 606 (1999) for the proposition that the State bears the burden of proving by a preponderance that the challenged evidence should be admitted. (R.67:4, P-App. 110.) Instead it made conclusory determinations with no discussion or application of the relevant law to the facts. As noted above, this Court reviews the application of law to facts *de novo. Santiago*, 206 Wis. 2d. at 18.

Based on the above, this Court should find that Officer Milton should have given Mr. Dobbs *Miranda* warnings as his detention certainly exceeded a "temporary roadside detention." In addition, it was clear to Officer Milton that Mr. Dobbs would be arrested. (See R.67:4 (trial court finding that at the time of the stop there was "a sufficient factual basis to conclude that there was probable cause to believe that the defendant had been involved in a felony traffic crime")). He knew that Mr. Dobbs had struck the pedestrian with his truck, that the pedestrian was dead, and that Mr. Dobbs had left the scene of the accident. (R.253:7, 10, 42-44.) Yet Officer Milton did not arrest Mr. Dobbs, did not give him *Miranda* warnings, and continued to detain him, often handcuffed, in the back of his squad car. Absent such warnings, Mr. Dobbs' statements should have been suppressed.

As noted above in Section IV, the Court of Appeals incorrectly relied on *Blatterman* and ignored this Court's and the United States Supreme Court's well-established case law on looking at the totality of the circumstances. Under that

precedent, Officer Milton violated Mr. Dobbs' Fifth and Fourteenth Amendment rights. Therefore, this Court should reverse and remand the case to have all Mr. Dobbs' statements prior to being read his *Miranda* rights suppressed.

B. Mr. Dobbs' Statements To Police Both Before And After Being Given The Miranda Warnings Must Be Suppressed As The Statements Were Not Voluntary.

Even if this Court finds Mr. Dobbs was not in custody for purposes of *Miranda* warnings, his statements before and after the *Miranda* warnings were not voluntary and should be suppressed. Without any discussion of the case law or application of the law to the facts, the trial court simply concluded without any real analysis that the statements were all voluntary and not the subject of coercion. (R.67:4-6, P-App. 110-12.) The trial court erred.

If a defendant's statements are involuntary, it is a violation of the right against self-incrimination and due process to use such statements against him and suppression is required. *State v. McManus*, 152 Wis. 2d 113, 130, 447 N.W.2d 654 (1989); *Dickerson v. United States*, 530 U.S. 428, 433 (2000). In determining whether statements are voluntary, a court looks at the totality of the circumstances. *State v. Clappes*, 136 Wis. 2d 222, 236, 401 N.W.2d 759 (1987). The test is a balancing of the personal characteristics of the defendant versus the pressures imposed by law enforcement officers. *Id*.; *see also State v. Hoppe*, 2003 WI 43, ¶ 38, 261 Wis. 2d 294, 661 N.W. 407 (2003). When the police conduct includes more subtle forms of persuasion, the mental condition of the subject becomes a more significant factor. *Hoppe*, 2003 WI 43, ¶ 38; *see also Colorado v. Connelly*, 479 U.S. 157, 164 (1986). Whether statements are voluntary involves the application of historical facts to constitutional principles. *Hoppe*, 2003 WI 43, ¶ 34, *citing Arizona v. Fulminante*, 499 U.S. 279, 287 (1991). The

appellate court reviews *de novo* the application of the historical facts to the constitutional principles. *Id.*

On the defendant's personal characteristics side of the scale, relevant characteristics include age, education, physical and emotional condition, and prior experience with law enforcement. On the law enforcement pressure side, factors include the length of questioning, the general conditions under which statements took place, physical or psychological pressure, methods or strategies used by police to compel a response, and whether the defendant was informed of his right to counsel and right against self-incrimination. *Hoppe*, 2003 WI 43, ¶ 39.

Mr. Dobbs was suffering from significant pain from physical injuries. He had an infected hand on which he recently had surgery. (R.253:45, 59-60, 86-87, 100, 128.) He told the officers that before he was arrested he had not taken the painkillers and antibiotics prescribed for his hand. (R.253:45.) He complained about his hand and showed it to the officers involved in his questioning. (R.253:45, 60, 86-87, 93.) Those officers acknowledged that the hand looked swollen and infected. (R.253:60, 87, 97, 105, 128.) The jail would not admit Mr. Dobbs because of the hand, insisting that he be medically cleared by the hospital. (R253:62-63, 104-05.) Mr. Dobbs was admitted to the hospital, placed on intravenous antibiotics, and underwent surgery the next day for the infection. (R.253:128-29.) In addition, Mr. Dobbs was partially unclothed throughout the investigation and interrogation. He did not receive a shirt until he asked for one after he was being transported to the jail in the afternoon. (R.253:13, 57.)

Most importantly, Mr. Dobbs suffered from impairing mental conditions of which the officers were aware. He informed officers that he suffered from depression and anxiety and that he had not taken his medication. (R.253:14, 33, 45, 59.) He told them that he had not slept for 40 hours. (R.267:189.) In fact, Mr. Dobbs' father contacted the police

after Mr. Dobbs had been arrested to express his concern that Mr. Dobbs was suicidal and had not taken this medication. (R.253:107-09.)

Mr. Dobbs was in obvious distress when questioned by officers throughout the day. (R.253:86-87, 100, 127.) Officer Milton was unquestionably aware of Mr. Dobbs' mental condition. According to Officer Milton, Mr. Dobbs was emotional and crying about the situation. (R.253:9,29-30, 56-58.) He kept asking about the condition of the injured person. (R.253:61, 66.) Officer Milton testified that he withheld the fact that the pedestrian had died because he wanted to conduct his investigation without Mr. Dobbs' emotions interfering. (R253:66-67.) He was concerned about the "detrimental effect" of Mr. Dobbs' emotions on interviewing him. (R.253:66-67.)

Mr. Dobbs became extremely upset when he learned that someone had been killed in the accident. He broke down, crying, and in obvious distress. (R.253:56-58.) After provoking this emotional breakdown that he seemed to anticipate, Officer Milton read Mr. Dobbs his *Miranda* rights and questioned him. (R.253:55-56.) Mr. Dobbs was crying, suicidal, and said that he did not care what happened to him. (R.253:29-30, 56-57.) When Officer Milton questioned his truthfulness about huffing the air duster, Mr. Dobbs went along with what the officer wanted him to say, admitting that he had "huffed." (R.253:58-59.)

Later, in the police garage and while a patient in the hospital, Mr. Dobbs repeated his confession about huffing and killing the pedestrian. During the times he made these confessions, he was crying, extremely upset, and wanted to know about the victim and the victim's family. He also said that he did not remember anything. (R.253:102-06, 113, 116, 127.) Officer Dyer, who guarded Mr. Dobbs at the hospital the evening following the accident, testified that Mr. Dobbs "was crying, and I would say that he was overwhelmed by everything that was going on." (R.253:116).

Prior to the day of the accident, Mr. Dobbs had had minimal contact with law enforcement. The presentence investigation report prepared by the Department of Corrections found no prior adult or juvenile record. (R.227:11.) It also noted that he had never been on probation, supervision, or in prison. (R.227:12.) He had no experience with police procedures or protecting his rights.

Despite being read his *Miranda* rights after his transport to the hospital, Mr. Dobbs' statements were not voluntary. Although he was cooperative with all law enforcement directions and requests throughout his contact, being cooperative does not mean the statements he made were voluntary. He was informed of the death of the pedestrian and questioned in such a way to break him down emotionally.

The *Miranda* warnings did not effectively advise Mr. Dobbs that he had a real choice about giving statements to the police. He had been talking to them before the warnings. Such warnings could not effectively convey to a person in Mr. Dobbs' emotional and physical condition that he could choose to stop talking.

The Court of Appeals rejected the involuntariness argument by finding that there was no evidence of police coercion or improper conduct. (P-App. 105-106.) However, the Court of Appeals misstated the standard used in determining the voluntariness of a confession. Determining voluntariness is a totality of the circumstances review that requires balancing the defendant's characteristics with the police actions. *See Clappes*, 136 Wis. 2d at 236; *Hoppe*, 2003 WI 43, at ¶38. The Court of Appeals erred in narrowly looking at only the police conduct. The court completely overlooked the significance of Mr. Dobbs' mental and physical conditions discussed in detail above.

Under the circumstances of this case, there are no indicia that Mr. Dobbs' statements are reliable. They were

driven by emotion, a desire to cooperate, and suicidal ideation. As case law makes clear, such statements must be considered involuntary and should be suppressed. *See Hoppe*, 2003 WI 43, ¶60. Therefore, this Court should reverse the judgment and remand the matter for a new trial.

CONCLUSION

For the above reasons, 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 12th day of February, 2020.

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 10,752 words.

Dated this 12th day of February, 2020.

Signed:

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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 12th day of February, 2020.

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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; and (3) 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.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 12th day of February, 2020.

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APPENDIX

INDEX TO APPENDIX

Page