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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

REPLY BRIEF OF
DEFENDANT-APPELLANT-PETITIONER

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INTRODUCTION

In the State's response to the expert witness issue, it continues to miss the relevancy of the expert's opinions and the negative system-wide significance of the Court of Appeals' reasoning. As explained in the initial brief and below, Dr. White's opinions on false confessions were directly relevant to the issues at trial and the court erred in precluding him from testifying. In addition, the trial court and the Court of Appeals misapplied the law and, if allowed to stand, the Court of Appeals' decision potentially will create uncertainty across the legal system for expert witnesses in civil and criminal cases.

Regarding the various *Miranda* issues, the State's response somewhat narrows the areas of disagreement. First, the State agrees with Mr. Dobbs that *State v. Morgan* correctly stated the law and should not be overruled. (Rsp. Br. at 33, n.4.) Thus, Mr. Dobbs will not further address the issue in this reply brief. Second, the State concedes that Mr. Dobbs' detention became custodial prior to law enforcement informing him of his *Miranda* rights and that some of his responses should have been suppressed. (Rsp. Br. at 36.) The State argues that the pre-*Miranda* responses were not incriminating, but the State thereby overlooks how the pre- and post-*Miranda* warning statements fit together. Third, in its discussion of Mr. Dobbs' involuntary statements, the State, like the Court of Appeals, again downplays the significance of Mr. Dobbs' state of mind, his physical state, and the improper actions of law enforcement that played off of his condition.

ARGUMENT

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

Under amended Wis. Stat. § 907.02, the court's gatekeeper role in determining the admission of expert testimony is to ensure that the expert is qualified, that the testimony is based on a reliable foundation, and that it is relevant. *Seifert v. Balink*, 2017 WI 2, ¶ 57, 372 Wis. 2d 525, 888 N.W.2d 816. Dr. White's qualifications and the reliability of his opinions are not at issue—only relevancy is at issue. The State downplays the relevancy of Dr. White's testimony and the arguments of Mr. Dobbs in favor of the testimony. It claims that the false confession expert testimony could not be relevant since Mr. Dobbs was arguing that his statements were involuntary. This is both factually and logically incorrect.

First, Mr. Dobbs' trial counsel argued in favor of Dr. White's testimony because the court previously ruled Mr. Dobbs' statements to be voluntary and admissible; thus, Dr. White's testimony was necessary for the defense. (R.258:166-167.) Counsel specifically argued that they would be challenging the credibility of the statements and that Mr. Dobbs' confessions were false. (*Id.*) This is contrary to the State's claim that the defense was claiming only that the statements were involuntary. (Rsp. Brf. at 20.)

Moreover, there is nothing legally or logically inconsistent with claiming that Mr. Dobbs' statements were involuntary and also false. Indeed, Mr. Dobbs' position at trial and on appeal is that his "confessions" were both involuntary and not true due to his mental and physical condition. Furthermore, as argued by trial counsel, given that the court had already ruled Mr. Dobbs' statements to be admissible, Dr. White's testimony would support the defense argument that they were false. Mr. Dobbs' statements were central to the prosecution because the State's expert could not confirm the

presence of an inhalant in Mr. Dobbs' system or when he inhaled it (if at all). (R.269:200.) Thus, Dr. White's expert testimony was both necessary for the defense and highly relevant to whether Mr. Dobbs' statements were true confessions. In addition, the State's claim that it would have attacked Dr. White on cross-examination does not undermine this conclusion. (Rsp. Br. at 23.) The ultimate determination of accuracy and credibility of the expert is for the jury to decide—not the trial court. *State v. Giese*, 2014 WI App 92, ¶ 23, 356 Wis. 2d 796, 854 N.W.2d 687.

Second, Mr. Dobbs' counsel stated that they would stay very far away from Dr. White opining on the veracity of Mr. Dobbs because that would be a violation of the law. (R.258:168.) As Mr. Dobbs stated in his initial brief, if Dr. White had opined on Mr. Dobbs' veracity, it would be a violation of the rule in *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). The State did not respond to or question this argument, thus acquiescing in it. See *Charolais Breeding Ranches, Ltd v. FPC Securities, Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979); *Hoffman v. Economy Preferred Ins. Co.*, 2000 WI App 22, ¶ 9, 232 Wis. 2d 53, 606 N.W.2d 590. Nonetheless, the trial court focused both in its initial ruling and in denying the motion for reconsideration on the fact that Dr. White responded to the question of what facts in Mr. Dobbs' case he reviewed with "none." (R.258:180, P-App. 123; R.264:15.) Given that Dr. White was precluded from testifying whether Mr. Dobbs' statements were true or false themselves, whether he reviewed Mr. Dobbs' statements or other aspects of the case was not dispositive of the relevancy of his opinions.

Third, despite the State's claims to the contrary, Mr. Dobbs' counsel gave numerous reasons in the trial court supporting the basis for the relevancy of Dr. White's opinions on false confessions. (R.258:169-71.) For example, counsel raised the length of time Mr. Dobbs was in custody, the accusatory language used in the interrogation, Mr. Dobbs' mental state, Officer Milton's determination to elicit an

emotional response, and Mr. Dobbs' exhaustion and time without sleep. (*Id.*)

At the evidentiary *Daubert* hearing, Dr. White testified that he 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.) Most importantly he testified that when the police use powerful psychological techniques, they 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.) 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.) Mr. Dobbs' condition following the accident fit all of these areas. Therefore, the trial court's ruling that his testimony would not be relevant was an erroneous exercise of discretion because the facts do not support the ruling. *See State v. Black*, 2001WI 31, ¶ 9, 242 Wis. 2d 126, 624 N.W.2d 363 (citation omitted).

The Court of Appeals held that it was reasonable for the trial court to exclude Dr. White's testimony, but also stated that it would have been reasonable for it to admit the testimony. (P-App. 103.) This, however, is not a proper application of a trial court's exercise of discretion nor any way to guide the admission of expert testimony. There was no basis in law or fact for the trial court's decision. Furthermore, if a trial court can decide both that the testimony is relevant and that it is not relevant, then there is no consistency regarding which experts should be allowed to testify. In addition, equally problematic is that such decisions can vary from county to county and even judge to judge. This is not discretion. It is arbitrariness and chaos.

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*, 2017 WI 2, ¶ 89. It is Mr. Dobbs' position that both the trial court and the Court of Appeals applied the wrong legal standard to the extent that they focused on whether Dr. White had case specific opinions and had reviewed case specific materials. This Court reviews that decision *de novo* and thus should reverse the Court of Appeals and remand for a new trial, because it is not the correct legal standard. Furthermore, as argued in the initial brief, this potentially would exclude numerous expert witnesses, including in civil cases. (Br. at 21-23.)

However, even if this Court finds that the lower courts applied the correct legal standard, the trial court erroneously exercised its discretion and this Court should also reverse on that basis. This Court will find an erroneous exercise of discretion by a trial court if "the facts fail to support the trial court's decision." *Black*, 2001WI 31, ¶ 9 (citation omitted). For the reasons stated above and in the initial brief, the facts support the relevance of Dr. White's opinion and do not support the trial court's finding. Dr. White's opinions about conditions in which suspects falsely confess when under mental and/or physical strain or impairment were directly relevant to whether the confessions were true or false. It then should have been up to the jury to make the ultimate determination. Instead, the trial court took the issue from the jury and left the defense with the inability to counter the statements. Therefore, this Court should reverse the Court of Appeals.

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

The State conceded that Mr. Dobbs was "in custody" for purposes of *Miranda* warnings. (State Br. at 35-36.) Thus, Mr. Dobbs will not further address that argument. Mr. Dobbs does

acknowledge that these pre-*Miranda* statements are minimal, but they are not meaningless. Rather, they should be examined in the totality of his statements and the court's exclusion of Dr. White.

The main issue regarding Mr. Dobbs' statements to law enforcement after being informed of his *Miranda* rights where he confessed to using an inhalant prior to the accident is whether the statements were voluntary. The State has the burden of proving whether the confessions were voluntary. *State v. Moore*, 2015 WI 54, ¶ 55, 363 Wis. 2d 376, 864 N.W.2d 827. The State failed to meet this burden.

The State mistakenly claimed that there is no evidence of improper police conduct and that therefore under Wisconsin case law the statements cannot be excluded as involuntary. (Rsp. Br. at 28-29, 31.) Mr. Dobbs did not argue that an admission can be involuntary absent improper or coercive police activity. Instead, Mr. Dobbs agreed that there needs to be improper police conduct for confession to be involuntary (Dobbs' brief at 31-34). The difference, however, is that the State appears to have a very narrow definition of coercion and improper police conduct. Although law enforcement did not torture or physically assault Mr. Dobbs, the intentional actions of law enforcement to exacerbate his mental instability in full knowledge of his fragile state amounted to the same thing.

The courts must judge police coercion in light of personal characteristics of the defendant. When coercion is subtler, the mental condition of the defendant is a more significant factor as the defendant is more susceptible to such coercion. *State v. Hoppe*, 2003 WI 43, ¶ 38, 261 Wis. 2d 294, 661 N.W. 407 (2003); *see also Colorado v. Connelly*, 479 U.S. 157, 164 (1986).

In this case, in the hours before giving the *Miranda* warnings, Officer Milton intentionally withheld the information that a person had been killed in the accident because he knew this would cause Dobbs to become very

emotional. (R.253:66-67.) Officer Milton knew that Mr. Dobbs had been in significant pain and was crying about the situation before he informed Mr. Dobbs of his *Miranda* rights. Then Officer Milton chose to give the *Miranda* warnings and question Mr. Dobbs immediately after telling him that someone had been killed in the accident. (R.253:55-56.) He got the reaction he intended by playing on Mr. Dobbs' fragile emotional state—Mr. Dobbs became more emotional, crying, and generally distraught. (R. 253:58-61.) Officer Milton also knew that Mr. Dobbs was on pain medication for his hand, but had not taken the medication or his medication for depression that day. (R.253:59-60.) Officer Milton then used Mr. Dobbs being distraught as a “turning point” where he pushed Mr. Dobbs for a confession. (R.253:58-59.)

Officer Milton intentionally put a suspect into a very emotional state immediately before questioning him. Especially when this state is related to the suspect's known physical and mental disabilities and impairments, it is not proper. This is not much different than twisting an arm of a suspect to get him to confess. Officer Milton used the mental state to tell Mr. Dobbs that he was not being truthful when he said he did not remember what had happened. Mr. Dobbs did not remember what happened, so he simply went along with the police officer with whom he had developed a relationship, when the police officer told him he had been huffing.

This Court reviews the voluntariness of the confession under a totality of the circumstances test. *Moore*, 2015 WI 54, ¶ 56; *State v. Clappes*, 136 Wis. 2d 222, 236, 401 N.W.2d 759 (1987). The Court of Appeals, however, never looked at all the circumstances. In *Moore*, this Court began with a review of Moore's personal characteristics. 2015 WI 54, ¶ 58. Here, the Court of Appeals never fully examined Mr. Dobbs' state. Instead, it looked basically only at the police conduct. “While it may be true that Dobbs was in an emotionally and physically uncomfortable state, from the perspective of police conduct this appears to have been an ordinary interrogation.” (P-App. 106.) Not only did the Court of Appeals thereby err in

downplaying the police conduct, but it failed to follow this Court's precedent and factor in Mr. Dobbs' condition under a totality of the circumstances test.

The State also argues that this Court rejected a defense argument that pain and mental state can render a confession involuntary without improper police conduct. (Rsp. Br. at 29.) First, as noted above, Mr. Dobbs established how there was improper police conduct. Second, to the extent that the State is claiming that asking questions of someone in pain and in a hospital setting does not make it involuntary, the facts in *Clappes* are far more minimal than here. As this Court recognized in *Clappes*, "[t]he questioning was brief and in both cases was terminated as soon as the police were able to identify the accident victims and the drivers of the cars involved in the respective accidents." 136 Wis. 2d at 238. In contrast, here the questioning went on for hours and well beyond just identifying victims and drivers. If Officer Milton had ceased questioning after obtaining the basic information about the accident, then perhaps it would be analogous. Instead, making use of Mr. Dobbs' mental and physically impaired condition, he pushed him on his truthfulness "[a]nd he was distraught enough about what had happened, that I [Officer Milton] think that was the turning point." (R.253:59.)

The "confessions" to other law enforcement officers, doctors, and others in the hours following Officer Milton's initial interrogation were the product of the initial improper police coercion. Mr. Dobbs was in pain, exhausted and emotionally traumatized by the knowledge that he had killed someone; he just kept saying what Officer Milton had told him he had done. While some of these "confessions" were to non-law enforcement, they point all the more to the necessity of Dr. White's testimony.

Therefore, for the above reasons, this Court should find that the trial court and Court of Appeals erred in their analysis. Mr. Dobbs' "confessions" were involuntary and should have been excluded.

CONCLUSION

For the above reasons and those in his initial brief, Mr. Dobbs 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 16th day of March, 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 2624 words.

Dated this 16th day of March, 2020.

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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 16th day of March, 2020.

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