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COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT III

Case No. 2018AP2220-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ADAM W. VICE,

Defendant-Respondent.

APPEAL FROM AN ORDER GRANTING
A MOTION TO SUPPRESS, ENTERED IN THE
CIRCUIT COURT FOR WASHBURN COUNTY,
THE HONORABLE JOHN ANDERSON, PRESIDING

**BRIEF AND APPENDIX OF
THE PLAINTIFF-APPELLANT**

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ISSUE PRESENTED

Did the circuit court err when it suppressed Defendant-Respondent Adam W. Vice's post-polygraph confession on the grounds that it was involuntary?

The circuit court suppressed Vice's confession as involuntary.

This Court should answer, "Yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication, as the arguments are developed in the briefs, and the issue presented involves the application of well-established principles.

INTRODUCTION

Vice confessed to sexually assaulting a four-year-old-girl during a post-polygraph interview. He later moved to suppress his confession on due process voluntariness grounds, and the circuit court granted his motion.

Post-polygraph statements are governed by *Davis*. *State v. Davis*, 2008 WI 71, 310 Wis. 2d 583, 751 N.W.2d 332. *Davis* says a post-polygraph confession is admissible when it "is given at an interview that is totally discrete from the [polygraph] test and the statement is voluntarily given." *Id.* ¶ 21. Courts consider numerous factors to determine if the confession is totally discrete from the polygraph test and voluntary.

This is not the first time this Court has ruled on Vice's confession. In 2016, the State appealed the circuit court's suppression of the same confession. This Court reversed the circuit court's order and remanded so the circuit court could perform a totality of the circumstances analysis to determine

whether Vice confessed voluntarily. *State v. Vice*, No. 2015AP2258-CR, 2016 WL 4766034 (Wis. Ct. App. Sept. 13 (2016) (unpublished). On remand, the circuit court again suppressed Vice's confession.

The circuit court erred. Applying *Davis*, Vice's post-polygraph confession was admissible because he confessed at an interview separate from his polygraph test, and his confession was voluntary.

Below, Vice conceded that he confessed at an interview separate from his polygraph test. This Court held Vice to his concession during the first appeal. He should again be held to his concession.

Even so, Vice confessed at an interview that was totally discrete from the polygraph test. Two officers were involved, one who administered the test, and one who investigated the sexual assault allegations, though both participated in the post-polygraph interview. Vice knew when the polygraph test ended, and after the test, an officer moved Vice to a different room. Roughly ten to fifteen minutes elapsed between the test and the post-test interview, and the results of Vice's polygraph were referenced only a few times, often in response to a question or statement from Vice. Thus, on the whole, Vice confessed at an interview separate from his polygraph test.

Vice's confession was also voluntary. The record contained no evidence that would raise any concern over Vice's personal characteristics. And there was no evidence that the police used coercion or other improper conduct to overbear Vice's will and elicit the confession. Thus, a balancing of Vice's personal characteristics against any possible police pressure shows that his confession was voluntary (i.e., the product of a free and unconstrained will).

Because the circuit court erred when it suppressed Vice's admissible confession, this Court should reverse.

STATEMENT OF THE CASE

The following facts largely come from testimony offered at the suppression hearing and from Vice’s recorded polygraph test and his post-polygraph interview, which was transcribed.¹ (R. 109; 128, A-App. 117–38.) As this Court has already ruled on this issue once before, it could refer to its prior opinion for a factual overview. (R. 37); *Vice*, 2016 WL 4766034. A copy of that opinion is included in the appendix. (A-App. 156–168.)

A. The police open an investigation into Vice.

Officer William Fischer opened an investigation when a caretaker reported that a little girl, EJ, described being sexually assaulted by a family friend, Vice. (R. 1:3.) She was four years old at the time. (R. 1:3.) While being tucked into bed one night, EJ mentioned a “puppy game” she played with Vice. (R. 1:3.) As part of the game, Vice would lick EJ “all over her body,” including her vagina and buttocks. (R. 1:4.) EJ also reported that Vice would touch her, including inserting his finger into her vagina and anus. (R. 1:4.)

Officer Fischer interviewed Vice at his workplace, and Vice denied any wrongdoing. (R. 109:44.) Vice asked Officer Fisher if “there was anything [he] could do to clear [his]

¹ The State cites to the transcript from the post-polygraph interview when quoting from it. There are multiple DVDs in the record. Based on the State’s review, the DVDs marked 2019 22(3), 127(1-1), and 125(2) contain an audiovisual recording of Vice’s post-polygraph interview. All appear to be the same. The DVD marked 125(3) contains an audiovisual recording of Vice’s polygraph test. The DVD marked 2019 22(2) contains an audio recording of Vice answering background questions, like his address and phone number.

A DVD containing an audiovisual recording of the interview is also included in the record. (R. 127.)

name,” and Officer Fisher suggested Vice take a polygraph test. (R. 109:45.)

B. Vice consents to a polygraph test.

Vice agreed to take a polygraph exam, and Officer Fisher arranged for it to be conducted at the police department. (R. 109:8.) Because Vice did not have a ride to the department, Officer Fisher drove him there. (R. 109:8.) During the drive, Vice sat in the front seat and made small talk with Officer Fisher. (R. 109:8.) On the way, Officer Fisher reminded Vice that he did not have to take the test, and Vice said he wanted to clear his name. (R. 109:8.)

At the department, Officer Fisher and Vice waited in the lobby until Detective Lambeseder, the officer responsible for conducting the polygraph test, led Vice to the polygraph examination room. (R. 109:10.) Officer Fisher went to the observation room. (R. 109:10.) Detective Lambeseder advised Vice of his *Miranda*² rights, and Vice signed both a waiver-of-rights form and a polygraph examination consent form. (R. 109:10, 27–28; 10.)

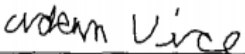
The polygraph exam lasted one hour and forty-five minutes. (R. 109:10.) At the end of the exam, Vice again signed the polygraph examination consent form. (R. 10:2.) The form notified Vice that his polygraph exam ended:

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

7. This examination was concluded at 11:40am on the above date. I completely reaffirm, in its entirety, my above agreement. In addition, I knowingly and intelligently continue to waive my rights, including those listed in paragraph two above, and I willingly made all statements that I did make. I also understand that any questions I may be asked after this point in time, and any answers that I may give to those questions, are not part of the polygraph examination.
8. I also certify that during the entire time, I was well treated, submitted myself freely to the examination knowing that I could stop at any time I so desired by merely saying I wished to stop or that I wished to consult an attorney or any other person. I remained of my own free will, knowing that I could leave this room at any time I so desired, and that there were no threats, promises, or any harm whatsoever done to me during the entire period I have been here either in connection with the examination or my again signing of this agreement and release form.



 Witness



 Subject **EXHIBIT # 2**
 DATE: 5-6-15
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(R. 10:2.)

Detective Lambeseder escorted Vice to a separate interview room and left him alone there for ten to fifteen minutes. (R. 109:10.) Detective Lambeseder scored the polygraph test and informed Officer Fisher that Vice failed it. (R. 109:11.) The two then went to interview Vice. (R. 109:11.)

C. Vice confesses to sexually assaulting EJ.

At the start of the interview, Detective Lambeseder asked Vice, “Well, how do you think you did?” (R. 128:2, A-App. 118.) Vice answered, “I don’t know. I know for a fact that I’m telling the truth when I was telling the truth.” (R. 128:2, A-App. 118.) Detective Lambeseder responded that the results indicated that Vice lied about his interactions with EJ:

[Detective Lambeseder]: Okay. Well, Adam, you didn’t pass the exam, okay? You’re right. You were telling the truth when you were telling the truth. You just said that, okay? The questions that I told you to tell the truth on, okay? But the questions regarding [EJ], it’s very clear, Adam, that you weren’t telling the truth, okay? And so that’s where, Adam, we want to talk about that, okay? We want you to -- this has been weighing on you, and I can tell. And I can tell on the exam, okay? In fact, I can tell on your face it’s been weighing on you. And I understand that, okay? It would -- something like that would weigh on me, but -- okay? But now is the time let’s talk like men. Let’s

get it out there. And let's figure out, you know, just where we need to go from here, okay? [Officer Fisher] wants to talk to you about his case. And uh let's go forward. I've -- I've worked with [Officer Fisher] before. And I'm sure he's treated you decent --

[Vice]: Yeah.

[Detective Lambeseder]: -- this entire process, okay? And I treated you decent here, okay? We're not going to treat you any differently, okay? What we want is the truth. We're not going to lie to you. We don't want you to lie to us. Let's just get it out there. Let's -- let's help you out from here on, okay?

(R. 128:2–3, A-App. 118–19.)

Officer Fisher asked Vice if he understood and added that he could tell Vice had not been honest when they first spoke about the allegations. (R. 128:3–4, A-App. 119–120.) Vice did not deny the allegations and instead responded that he did not remember what happened but would be honest and would take the test again:

[Vice]: I'll be honest.

[Officer Fisher]: Yeah.

[Vice]: 100 percent honest and I'll take that test again. I do not remember doing this. I honestly do --

[Officer Fisher]: Adam.

[Vice]: -- and I will take the test, but --

[Detective Lambeseder]: Okay.

[Vice]: -- but -- but obviously I failed the test. Something's wrong. Is there a way or is it any possibility that I -- somehow I blacked out and not remember this?

(R. 128:4, A-App. 120.)

Detective Lambeseder answered, "You do remember doing it, otherwise you wouldn't react the way you did on the exam, okay." (R. 128:4–5, A-App. 120–21.) Detective

Lambeseder acknowledged that it was hard to tell the truth and admit to wrongdoing. (R. 128:5, A-App. 121.) He asked if Vice was “trying to explore a sexual fantasy” or had “watched some pornography,” and Vice responded, “I never watched pornography with the kids.” (R. 128:5, A-App. 121.)

Detective Lambeseder explained that he was not suggesting Vice watched pornography with the children, only that Vice may have watched it, got his hormones going, and “did something one day that [he] normally wouldn’t do.” (R. 128:5–6, A-App. 121–122.) Detective Lambeseder told Vice he needed to tell the truth: “[W]hat you need to do, Adam, is tell us the truth, okay? [Officer Fisher] comes to me for a reason. We’ve worked together. We -- we know what we’re doing here, okay? It’s - - it’s apparent that you -- you know what you did.” (R. 128:6, A-App. 122.) He also told Vice, “You know what you did was wrong, but you got to convey that to us, okay? Because what’s left here . . . is for us to figure out what goes on from here, okay? Are you the guy who is going to do this to every little kid he comes in contact with?” (R. 128:6, A-App. 122.) Vice shook his head no. (R. 128:6, A-App. 122; R. 2019 22(3):12:02:24–12:02:27.)

Detective Lambeseder followed up, “No. Are you the guy who made a mistake, made a poor choice, and we need to deal with that appropriately as opposed to the guy who is going to do this to everybody.” (R. 128:6, A-App. 122.) Vice answered, “I’m not going to do that.” (R. 128:6, A-App. 122.) He added, “I don’t know why I would do it -- first one, apparently.” (R. 128:6, A-App. 122.)

Vice then asked several questions relating to potential consequences:

[Vice]: [A]m I going to go to jail?

[Officer Fisher]: No, you’re not going to jail.

[Vice]: Am I going to have to register as a sex offender?

[Officer Fisher]: That's -- that's a long ways down the road. And that has to deal with - -

. . . .

[Officer Fisher]: going through court and talking to the Judge and things like that.

[Vice]: So I take it I can't move to go see my mother now?

[Officer Fisher]: But first we need to, you know, get the truth out there and the facts so that way it shows you are willing to work and cooperate, get the help that you need.

[Detective Lambeseder]: That goes a long ways.

(R. 128:7, A-App. 123.)

Officer Fisher told Vice that if he cooperated, they could work with him and try to get him the help he needed. (R. 128:7, A-App. 123.) Detective Lambeseder said he could understand when people make mistakes, but he could not understand when a person made a mistake and refused to talk or lied about it. (R. 128:7-8, A-App. 123-24.) Vice did not deny the allegations and again stated that he did not remember what happened:

[Vice]: I -- I'm going to say flat out, I honestly don't remember doing this, but I'm going to do what you say.

[Detective Lambeseder]: You do, Adam. It's true. I see you wouldn't react like that, so let's get over that hurdle, okay? I know you've -- what -- probably what you want to do is you want to block it out because it was a bad mistake. Buddy, I understand that, Man, okay?

[Vice]: How do you get out of that? Because I honestly can't remember, and it's scaring me right now --

[Detective Lambeseder]: The heart -- the way you get out of a situation is you say I screwed up, Guys. Let's -- help me out here.

....

[Detective Lambeseder]: Then we can help you out, okay? But without you saying I screwed up or admitting, you know, what you did and understanding that, and getting us to understand that, we can't help you. Get over that hurdle and we can -- we can work with you on that, okay?

(R. 128:8, A-App. 124.)

Officer Fisher told Vice, "The reason you reacted that way is because you know you did it. And that's why the reactions were that way." (R. 128:8-9, A-App. 124-25.) Vice said he was scared, and Officer Fisher offered, "You're thinking of the consequences." (R. 128:9, A-App. 125.) Vice stated, "No. I'm not thinking of the consequences. I'm worried about what else I'm blocking out. If I can't -- I'm -- I'm trying hard to remember this." (R. 128:9, A-App. 125.)

The officers asked Vice to be truthful and to cooperate:

[Detective Lambeseder]: . . . the thing is, it's -- you're trying to block it out but it's not blocked out, okay? Because you've reacted. You -- you know what you did and you -- and you remember it, okay? It's a hard hurdle to overcome, okay? But, Adam, I want to help you out. I want to work with you. I want to talk to you about this. You just got to meet us there and show us -- show us that you understand you messed up, okay? Otherwise we're left to think the other thing. I don't want to think that about you, Adam.

[Vice]: No. I want to --

[Officer Fisher]: And that what the District Attorney, Judges, all that, they need to protect everyone.

[Vice]: Yes, I understand that.

[Officer Fisher]: And, you know, and that's what they're going to look at saying this guy, he's dangerous, he's -- all these other kids out there that he may have access to. We need to protect them.

[Detective Lambeseder]: Yes.

[Officer Fisher]: You know, but if it's an isolated mistake, you know, because just circumstances being what they were at that time, then they can deal with that. You know, and they can say okay, we can allow him to be in the community, you know. And that's for them to decide, but you have to give them that option.

[Detective Lambeseder]: Yeah. Can you do that for us right now?

(R. 128:9–10, A-App. 125–26.)

Vice said, “Yes,” and Detective Lambeseder questioned, “Be truthful?” (R. 128:10, A-App. 126.) Vice again said, “Yes”, and Detective Lambeseder told him to “[g]o ahead.” (R. 128:10, A-App. 126.) Vice confessed: “It’s going to sound really shitty for me to say this right now, but I sexually assaulted [EJ].” (R. 128:10, A-App. 126.) That confession occurred roughly eight minutes into the interview.

Detective Lambeseder asked Vice if he could explain what he did, and Vice said, “No, I cannot. I honestly can’t.” (R. 128:10, A-App. 126.) Detective Lambeseder asked Vice to “work [them] through it.” (R. 128:10, A-App. 126.) Vice stated, “I never fucking remember. I -- my whole body’s reacting to it. Why can’t I fucking remember?” (R. 128:11, A-App. 127.) Detective Lambeseder offered, “It’s okay, bud,” and Vice responded that he felt like he would throw up. (R. 128:11, A-App. 127.) Officer Fisher offered him tissues and a wastebasket. (R. 128:11, A-App. 127.)

Vice questioned whether he could have been drunk at the time and suggested that he had a bottle of liquor in his room that he would drink from every now and then. (R. 128:11, A-App. 127.) He repeatedly expressed that he could not remember. (R. 128:11, A-App. 127–28.) Detective Lambeseder acknowledged that this was “a hard thing to talk about,” and Vice responded, “I would tell you if I knew, but I

-- I'll -- I'll admit that I must have done it because obviously that's what the test says that I did it, but I don't physically remember." (R. 128:13, A-App. 129.) Vice expressed that his heart was racing and told himself to "think." (R. 128:13, A-App. 129.)

Vice recounted spending thanksgiving with EJ and her family, but he claimed he did not remember assaulting EJ: "And I do not remember anything involving this situation whatsoever. I'm trying to remember. And obviously somehow in my subconscious I remember and I'm just trying to block it out and it won't come out." (R. 128:15, A-App. 131.)

Officer Fisher asked Vice about the time he spent with EJ in October. (R. 128:15, A-App. 131.) Vice described going to the pumpkin patch with EJ and later playing video games alone but said that was all he remembered. (R. 128:15-16, A-App. 131-32.) Officer Fisher asked Vice if EJ slept downstairs, and Vice said he did not remember. (R. 128:16, A-App. 132.) Officer Fisher told Vice that acting like he did not remember would not help him:

[Officer Fisher]: Okay. But they did sleep downstairs in October, also. And if you know -- if you don't remember or you're saying you don't remember, that's not going to help you out at all. I mean, because we can't have people running around doing things they can't remember and aren't responsible for, you know? That's not good.

[Vice]: I don't know --

[Officer Fisher]: So we need --

[Vice]: I honestly don't know if I tried to keep her quiet or why doesn't the older one remember? Why?

(R. 128:16-17, A-App. 132-33.) Detective Lambeseder replied, "Adam, like I said, okay, it shows on the test that you remember, okay?" (R. 128:17, A-App. 133.) Officer Fisher told

Vice that EJ had demonstrated what he did to her, and he encouraged Vice to take responsibility:

[Officer Fisher]: We have this girl, you know, in her -- her interview, I mean, physically demonstrating, describing, naming you. I mean, it happened. You remember it happening. I mean, I know it's tough to admit.

[Vice]: But I don't know if I actually --

[Officer Fisher]: And by saying you don't remember, you're -- you're trying to push that off and put that -- not take responsibility for it, but you need to take responsibility for it because it happened. And we need to protect this girl. We need her to be better. We need you to get help. And so that way the rest of society can function with you in it, you know?

(R. 128:17–18, A-App. 133–34.)

Vice responded, “I don't know what I did. I honestly don't. I don't know if I took her clothes off, if she was in her underwear, if I tried licking her over her pants or her underwear, if I actually touched her, or if I took my pants off --.” (R. 128:18, A-App. 134.) Detective Lambeseder asked Vice if direct questions about the assault might help him remember, and Vice agreed it would. (R. 128:18, A-App. 134.) Vice then confessed to placing his finger on her vagina:

[Officer Fisher]: Sure. Did you take your fingers and place them in -- or underneath her -- [EJ's] underwear on -- directly on her vagina?

[Vice]: Yes.

[Detective Lambeseder]: You're recalling that now?

[Vice]: Sort of.

[Detective Lambeseder]: Ok.

[Vice]: Like I see myself going, like, with just one finger going through her front and going like this (indicating).

[Detective Lambeseder]: Okay.

[Officer Fisher]: Sure. You remember that?

[Vice]: I think, yes.

[Officer Fisher]: I mean, you do. You just described it and -- and that's what happened, right?

[Vice]: Yes.

(R. 128:19, A-App. 135.)

When asked if he tried "to lick her vagina," Vice answered, "I don't know. I don't think so. I'm trying --." (R. 128:20, A-App. 136.) Officer Fisher asked if Vice tried to "pull down her pants to do that," and Vice responded, "I think I tried just pulling on her pants so I could get my hand down her pants a little easier. Oh, God. I'm sick." (R. 128:20, A-App. 136.)

The officers acknowledged that this was "hard to talk about" but said they would "walk through this together." (R. 128:20, A-App. 136.) Vice asked if he tried "having sex with her?" (R. 128:21, A-App. 137.) The officers responded that Vice needed to tell them what happened. (R. 128:21, A-App. 137.) Vice denied trying to have sex with EJ but admitted to trying to lick her vagina:

[Officer Fisher]: Well, I remember -- I know you remember what you told us, but you remember the events that happened?

[Vice]: Yes. Just -- just that -- to that point. I -- I don't know if I tried to lick her crotch first or after.

[Detective Lambeseder]: Did you pull down your pants and take out your penis at some point?

[Vice]: No.

[Detective Lambeseder]: Okay.

[Vice]: That I know for a fact.

[Officer Fisher]: Okay. Do you recall trying to lick her crotch? Because you -- you just stated you

were trying to remember whether it was before or after.

[Vice]: Yes. I tried to, but I couldn't through her pants. And then I just took off her pants. And I didn't try to lick it over her underwear. I just stuck my hand in her underwear and that's it.

[Detective Lambeseder]: Did you touch her butt? Did you put your finger by her butt?

[Vice]: That I don't think I did. Not that I remember. Maybe -- maybe when I was trying to get my hand down her front side and my other hand was touching her butt, but that's it.

(R. 128:21–22, A-App 137–38.)

Officer Fisher thanked Vice for his honesty. (R. 128:22, A-App. 138.) Vice said it “hurts,” and it felt like he was “getting like a massive headache trying to break through these barriers or something.” (R. 128:23, A-App. 139.) Vice also called himself a “Fucking monster.” (R. 128:23, A-App. 139.)

Detective Lambeseder asked if Vice touched her out of “sexual excitement” or a “[d]esperation-type thing,” and Vice said, “Yes.” (R. 128:24, A-App. 140.) Officer Fisher said it was obvious that Vice remembered what happened and asked Vice to tell him everything that happened. (R. 128:24, A-App. 140.) He also stated that Detective Lambeseder had been working with polygraphs and interviewing people for a long time, and that they both knew “the techniques” people use to try to mitigate their actions. (R. 128:24, A-App. 140.) Vice said he already told them what he could remember. (R. 128:25, A-App. 141.)

Detective Lambeseder asked if Vice had done this before, and Vice said, “No. This is the first time I've been accused -- was even accused.” (R. 128:25, A-App. 141.) He also thought this was the first time it happened because “otherwise [EJ] would have said something else earlier.” (R.

128:25, A-App. 141.) Detective Lambeseder asked Vice if he was attracted to girls EJ's age, and Vice said no. (R. 128:26–27, A-App. 142–43.) Vice again offered that he might have been drunk and that's why he could not remember. (R. 128:27–28, A-App. 143–44.) Detective Lambeseder told Vice he remembered:

[Vice]: Because I have a huge bottle of Sailor Jerry's in my room. I don't drink that often, but when I do, I do. And I play a lot of video games while drunk, and I don't remember at all the rest of the night.

[Officer Fisher]: But you do remember that.

[Vice]: Vaguely.

[Detective Lambeseder]: It's clear to you, because you --

[Officer Fisher]: Right.

[Detective Lambeseder]: -- showed you did on the test, okay?

[Vice]: Vaguely.

[Detective Lambeseder]: All right.

[Officer Fisher]: But you know what happened. You just described part, you know --

[Vice]: That is -- that is literally all I can remember.

(R. 128:28, A-App. 144.)

Later in the interview, Vice again described having “vague memories of doing the things” he said he did. (R. 128:32, A-App. 148.) He described it as being “like a dream” or like “déjà vu.” (R. 128:32, A-App. 150.) He reaffirmed that he touched EJ's vagina underneath her underwear and her butt over her underwear. (R. 128:34, A-App. 150.) He also reaffirmed that he tried to lick her vagina, and when he couldn't, he removed her pants. (R. 128:35, A-App. 151.) At the end of the interview, he acknowledged playing “the puppy

game” with EJ but said he did not “remember trying to introduce the puppy game to this sort of thing.” (R. 128:37, A-App. 153.) The officers confirmed that Vice would be alright in the room alone and then left. (R. 128:37–38, A-App. 153–54.)

After the interview, Officer Fisher did not arrest Vice; he drove him home. (R. 109:12–13; 1:7.) Vice again sat in the front seat of Officer Fisher’s car. (R. 109:13; 1:7.)

Officer Fisher referred Vice’s case to the District Attorney’s Office. (R. 1:7.) The State charged Vice with first-degree sexual assault (contact) of a child under thirteen. (R. 1:2.)

D. Vice moves to suppress his confession.

Vice moved to suppress his confession. (R. 12.) Vice conceded that he confessed at an interview separate from the polygraph test. (R. 12:5.) He argued only that his confession was not voluntary. (R. 12:7.)

Officer Fisher, Detective Lambeseder, and Vice testified at a suppression hearing. (R. 109.)

As to the test, Officer Fisher testified that he told Vice he did not have to take the exam, and Vice responded that he wanted to clear his name. (R. 109:8–9.) Detective Lambeseder testified that he orally reviewed the waiver of rights form and the polygraph examination consent form with Vice before he signed them. (R. 109:27.) Detective Lambeseder also explained the process to Vice before performing the test. (R. 109:32.)

Officer Fisher also stated that Vice was not in custody before, during, or after the polygraph examination and interview. (R. 109:7.)

As to the room, Officer Fisher testified that it was “average temperature.” (R. 109:14.) The room did not have

any windows, but it had a table and three chairs. (R. 109:14.) Officer Fisher explained that he sat in front of Vice, and Detective Lambeseder sat on his left. (R. 109:19–20.)

Neither officer told Vice that he was free to leave during the interview, though the form Vice signed after completing the polygraph test and before the interview so informed him. (R. 109:20, 39; 10:2.) Detective Lambeseder acknowledged that Vice would have needed to walk past him and Officer Fisher to leave, but he explained that a suspect is always seated in the back for safety and video-recording reasons. (R. 109:39.) Neither officer told Vice that the polygraph test would be inadmissible in court. (R. 109:20.)

As to Vice, both officers testified that Vice appeared to understand the questions asked, as Vice gave responsive answers to each question. (R. 109:14–15, 31.) Both knew that Vice completed high school, but they were unaware of his history of special education classes. (R. 109:21, 36.) They were also unaware that Vice suffered from Attention-Deficit/Hyperactivity Disorder (ADHD), anxiety, or depression. (R. 109:21, 36.)

Detective Lambeseder testified that he asked him several questions as part of the polygraph pre-test. (R. 109:30.) Based on Vice's answer, Detective Lambeseder concluded that Vice was in "average" physical condition, he had not had "any major injuries or surgeries in the last six months," and he had no "discomfort." (R. 109:30.) Vice had eaten in the last 24 hours, and he slept "fair" from 10:30 p.m. to 7:00 a.m. the night before the test. (R. 109:30–31.) Vice had never "been a patient in a mental hospital," nor had he "seen a psychologist or psychiatrist." (R. 109:31.) He had no "communicable diseases," no "heart disease," no "high or low blood pressure," no "seizures," no "hearing loss," and no "current back issue." (R. 109:31.) He also had no alcohol in the past 24 hours, and he had not taken any drugs in the past two days. (R. 109:31.)

Both officers also said they spoke to Vice in a nonconfrontational tone. (R. 109:24, 34.) Neither officer yelled at Vice, and neither made any threats, promises, or inducements. (R. 109:14, 24, 34.)

Vice testified that he had a high school education and a history of taking special education classes. (R. 109:47.) He said he had been previously diagnosed with a learning disability. (R. 109:47.) Vice also stated that he had been diagnosed with “ADHD, depression, [and] anxiety.” (R. 109:47.)

Vice explained that he “felt really nervous” during the polygraph test. (R. 109:48.) He also felt “nervous” after the test, when he was left in the interview room alone. (R. 109:49.) Vice said his “heart dropped” when he heard he failed the test. (R. 109:50.) He explained, “I honestly couldn’t believe I failed the polygraph test. I didn’t think I was going to fail ‘cause I honestly -- I didn’t do it” (R. 109:50.)

Vice testified that no one told him he was free to leave, and he did not believe he was free to go. (R. 109:49.) Vice said he confessed only after the officers implied that things “would go better” for him if he did so. (R. 109:51.) He felt “fairly treated” by the officers “[t]o a point.” (R. 109:53.) He agreed that the officers spoke to him in a “nice” and “average” tone of voice, but he felt “very uneasy” being positioned against the wall because if he wanted to leave, he “would have to literally jump over two armed people.” (R. 109:53.)

After the hearing, the circuit court granted Vice’s motion. (R. 15.) The court concluded that the officers’ references to Vice’s failed polygraph test created a coercive environment and mandated suppression. (R. 110:4–5.) In full, the court ruled:

All right. Well, the one area that I agree with the State is the video somewhat contradicts the defense’s description of the physical location and parameters of the interrogation. However, the record

is absolutely clear in this case that the State made a number of references to a failed polygraph at both times, and under certain circumstances, they created a coercive environment. The case law I think cited by [the defense] appears to be controlling here, and that that becomes the fatal flaw in the totality of the circumstances of this confession, therefore the motion to suppress the confession is granted.

(R. 110:4–5.)

E. Vice’s first appeal.

The State appealed, and this Court reversed the circuit court’s order and remanded for additional factfinding. (R. 37:1–2.)

This Court held Vice to his concession:

On appeal, Vice attempts to change course, arguing for the first time that the polygraph examination and his subsequent statements were not discrete events. However, because Vice conceded in the circuit court that the examination and statements were discrete events, he is judicially estopped from arguing to the contrary on appeal. We therefore decline to consider Vice’s appellate arguments regarding the discrete events test.

(R. 37:9 (citation omitted).)

As to voluntariness, this Court held that the circuit court erred when it concluded that a reference to a failed polygraph test, in and of itself, rendered a subsequent confession involuntary. (R. 37:10–11.) Such a conclusion, this Court said, was not supported by case law. (R. 37:10–11.)

Nevertheless, this Court remanded for additional factfinding. (R. 37:11–13.) It did so because the circuit court failed to make any factual findings relating to whether Vice’s confession was “involuntary under the totality of the circumstances.” (R. 37:11–13.) For example, the circuit court did not “make any findings regarding Vice’s personal

characteristics,” and it made only one finding as to possible police pressure. (R. 37:12.) This Court instructed the circuit court to “engage in additional fact-finding” to “determine, based on those facts, whether Vice’s confession was voluntary.” (R. 37:13.)

F. The circuit court again grants Vice’s motion to suppress.

On remand, no additional testimony was taken. The circuit court again granted Vice’s suppression motion. (R. 124.)

The circuit court began by discussing the conceded issue and expressing concern “that the defense may have prematurely conceded the point that the post-polygraph interview was wholly discrete and separate from the polygraph test.” (R. 124:4.) The court ultimately concluded it was “compelled to accept” the court of appeals’ decision to accept Vice’s concession. (R. 124:4.) It nonetheless discussed factors that weighed in Vice’s favor on that issue in case “the Court of Appeals in the future [was] willing or able to reconsider the issue.” (R. 124:4–5.)

On voluntariness, the circuit court concluded that Vice’s confession was involuntary. (R. 124:12.) As to Vice’s personal characteristics, the court found that Vice was in his mid-twenties, he had “little or marginal prior contacts with law enforcement,” and he had finished high school but had a “history of special education.” (R. 124:8.) The court stated that Vice was “competent” and could “reasonably understand the seriousness of the events,” but it commented that he was “by no means sophisticated or wily in the operation of the criminal justice system.” (R. 124:8.)

The circuit court described Vice’s demeanor as “distraught with the news that he failed” and pointed to Vice “nearly crying at times.” (R. 124:8.) The court highlighted Vice’s statement that he felt physically sick. (R. 124:8.) Based

on those facts, the court stated it was “satisfied” that Vice’s “physical state at times appeared to be compromised to a certain degree.” (R. 124:8.)

The court then discussed possible police pressures, focusing most heavily on Detective Lambeseder’s participation in and the repeated references to the polygraph test during the interview:

- “In this particular case, the test results were used over and over again to elicit a statement.” (R. 124:7.)
- “This case is such that the examiner was not only there, the examiner participated in the interview and the -- and the test was referenced 11 times in the span of a 45-minute interview, which you do the math, you know, comes out to it being a fairly continuous reference.” (R. 124:9.)
- “[B]ut an examiner in the room with this many references raises some concerns that the Court has.” (R. 124:9.)
- “The final reference, I think it was the 11th time that it was referenced in the interview, the polygraph test was referenced was actually directed by the examiner himself. And he indicated to the defendant that he clearly remembers the sexual contact.” (R. 124:10.)

The circuit court also discussed four other considerations: (1) Detective Lambeseder referenced the polygraph test almost immediately when the interview started and notified Vice right away that he had failed it; (2) Detective Lambeseder stated that because Vice failed the test, he must remember the assault; (3) the officers’ never corrected Vice’s conclusion that because he failed the test, he must have committed the assault; and (4) although an officer gave Vice *Miranda* warnings at the start of the polygraph test, no officer re-read the warnings to Vice before the interview. (R. 124:7–8.)

Given the above, the circuit court said the totality of the circumstances demonstrated that the confession was involuntary:

. . . the totality of the circumstances here . . . leads me to believe that in this particular case, the defendant's ability to reasonably overcome the efforts by the State to elicit a statement were simply overwhelmed by the somewhat coercive pressuring nature of the overt references to the failed test and the examiner's participation in that. And that, in the totality of the circumstances here, it does appear that the voluntariness of this statements is not only suspect, but I think Constitutionally difficult to maintain because of the coercive nature that was going on with the polygraph examiner under these facts, under the information that was given, and the extreme cross-referencing of the -- of the test. And, therefore I'm satisfied that the statement was not voluntary and I'm going to grant the motion to suppress again.

(R. 124:12.)

The State now appeals.

STANDARD OF REVIEW

This Court upholds “the trial court’s factual findings unless they are clearly erroneous.” *Davis*, 310 Wis. 2d 583, ¶ 18. The application of the facts to constitutional principles is, however, reviewed de novo. *Id.*

ARGUMENT

The circuit court erred when it suppressed Vice’s post-polygraph confession.

A. A post-polygraph confession is admissible when it is made during a totally discrete event and is voluntarily given.

The admissibility of polygraph statements turns on the timing of such statements. Statements made *during*

polygraph testing are inadmissible under Wis. Stat. § 905.065:

905.065 Honesty testing devices.

(1) DEFINITION. In this section, “honesty testing device” means a polygraph, voice stress analysis, psychological stress evaluator or any other similar test purporting to test honesty.

(2) GENERAL RULE OF THE PRIVILEGE. A person has a privilege to refuse to disclose and to prevent another from disclosing any oral or written communications during or any results of an examination using an honesty testing device in which the person was the test subject.

Wis. Stat. § 905.065(1)–(2); *see also Davis*, 310 Wis. 2d 583, ¶ 44. Statements made *after* polygraph testing are admissible if they satisfy *Davis*.

Davis established a two-part test for admissibility.³ First, the post-polygraph confession must be made during a “totally discrete event.” *Davis*, 310 Wis. 2d 583, ¶ 23. Stated differently, the confession cannot be “so closely associated” with the polygraph test that the test and subsequent interview are “one event” rather than two. *Id.* at ¶¶ 23, 2.

“Whether a statement is considered part of the test or a totally discrete event is largely dependent upon whether” the polygraph test “is over at the time the statement is given and the defendant knows the analysis is over.” *Davis*, 310 Wis. 2d 583, ¶ 23. To make that determination, courts rely on five factors: (1) “whether the defendant was told the test was over”; (2) “whether any time passed between the [test] and the defendant’s statement”; (3) “whether the officer conducting the [test] differed from the officer who took the statement”; (4)

³ Although *Davis* concerned a voice stress analysis, not a polygraph test, its principles “are equally applicable.” *State v. Davis*, 2008 WI 71, ¶ 20, 310 Wis. 2d 583, 751 N.W.2d 332.

whether the location where the [test] was conducted differed from where the statement was given”; and (5) “whether the [polygraph test] was referred to when obtaining a statement from the defendant.” *Id.* ¶ 24.

Second, the confession must “survive constitutional due process considerations of voluntariness.” *Davis*, 310 Wis. 2d 583, ¶ 2. Put simply, the confession must satisfy “ordinary principles of voluntariness.” *Id.* ¶ 21.

“A defendant’s statements are voluntary if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant’s ability to resist.” *Davis*, 310 Wis. 2d 583, ¶ 36 (quoting *State v. Hoppe*, 2003 WI 43, ¶ 36, 261 Wis. 2d 294, 661 N.W.2d 407).

Voluntariness is thus determined by applying a “totality of circumstances” analysis. *Davis*, 310 Wis. 2d 583, ¶ 37. The court balances “the personal characteristics of the defendant” against “the possible pressures that law enforcement could impose.” *Id.* Possible characteristics include the defendant’s “age, education, intelligence, physical or emotional condition, and [his] prior experience with law enforcement.” *Id.* Possible pressures “include the length of questioning, general conditions or circumstances in which the statement was taken, whether any excessive physical or psychological pressure was used, and whether any inducements, threats, methods, or strategies were utilized in order to elicit a statement from the defendant.” *Id.*

Importantly, “[c]oercive or improper police conduct is a necessary prerequisite for a finding of involuntariness.” *Hoppe*, 261 Wis. 2d 294, ¶ 37. When no “coercive police conduct” is “causally related to the confession,” there is no basis to conclude that a confession is involuntary and thus no

basis to conclude that due process is violated. *Colorado v. Connelly*, 479 U.S. 157, 164 (1986).

Applying the two-part test, the *Davis* court concluded that Davis's post-voice-stress-analysis statements were admissible. *Davis*, 310 Wis. 2d 583, ¶ 3. There, Davis and an officer discussed an allegation of sexual assault at Davis's home and later the police station. *Id.* ¶ 4. During their conversation, Davis offered to take a polygraph test. *Id.* The officer later followed-up with Davis, who agreed to return to the police station to take an honesty test. *Id.* ¶ 5. When Davis's car broke down, the officer found Davis walking to the station and offered him a ride. *Id.* ¶ 6. Davis got in the front seat of the officer's car, and the two proceeded to the station, where the officer led Davis into an interview room. *Id.* ¶¶ 6, 7.

In the interview room, the officer told Davis that he was not under arrest, he did not have to speak with the officer, and he could leave at any time. *Davis*, 310 Wis. 2d 583, ¶ 7. Davis said he understood. *Id.* The officer left, and a second officer moved Davis to a family room to conduct the test. *Id.* ¶ 8. The second, testing officer explained the procedure and obtained Davis's consent to test. *Id.* ¶ 9. After the test, Davis returned to the interview room. *Id.* The testing officer told the first officer that the results indicated that Davis had been deceptive, and both retrieved Davis from the interview room and brought him back to the family room. *Id.*

With both officers in the family room, the testing officer "told Davis that his answers were deemed deceptive and showed Davis the results from the computer charts." *Davis*, 310 Wis. 2d 583, ¶ 10. Davis continually responded that he "did not do anything." *Id.* The testing officer challenged Davis's denial, and then asked Davis if he wanted to talk about the allegations. *Id.* Davis confirmed that he did and indicated that he preferred to speak with the first officer. *Id.* The testing officer stated that he was "finished here," packed

up his computer, left the room with all the voice stress analysis equipment, and told Davis he was finished with the test. *Id.* The first officer took Davis back to the interview room, where Davis confessed. *Id.* ¶ 11.

On the first requirement, the court concluded that Davis’s confession was given at a totally discrete event. *Davis*, 310 Wis. 2d 583, ¶¶ 30–34.

First, the court said that Davis knew the test was over because the testing officer said he was finished, packed his laptop, and left the room with the all the equipment before Davis made any incriminating statement. *Id.* ¶ 30. Second, the court acknowledged that “very little time passed between the examination and interview” but it said that “time alone is not dispositive.” *Davis*, 310 Wis. 2d 583, ¶ 31.

Third, the court said that “[t]wo different officers were involved,” one who “conducted the examination” and one who “conducted the interview.” *Davis*, 310 Wis. 2d 583, ¶ 30. Even so, the court clarified that “precedent clearly holds that the same officer may conduct both the examination and the interview so long as the two events are separate.” *Id.* ¶ 33. Consequently, even though both officers were in the room when the testing officer told Davis he failed and when Davis said he wanted to talk, those facts did “not preclude the subsequently made statement from being admitted.” *Id.*

Fourth, the court concluded that two different rooms were used, the interview room and the family room. *Davis*, 310 Wis. 2d 583, ¶ 33.

Finally, the court acknowledged that the testing officer referenced the results of the voice stress analysis, but it concluded that the reference did not transform the test and interview into a single event: “[S]o long as the examination and interview are two totally discrete events, ‘letting the defendant know that he or she did not pass the examination, or letting the defendant so conclude, does not negate that the

examination and the post-examination interview are . . . ‘totally discrete’ events rather than ‘one event.’” *Davis*, 310 Wis. 2d 583, ¶ 33. The court also noted that the first officer did not “relate back to or rely on the voice stress evaluation or its results” during the interview. *Id.*

On the second requirement, the court ruled that Davis’s statements were voluntary. *Davis*, 310 Wis. 2d 583, ¶¶ 38–42. Examining Davis’s personal characteristics, the court said Davis was “43 years old” and possessed a “middle school level education.” *Id.* ¶ 38.

Looking at possible police pressures, the court concluded that it did “not find evidence that law enforcement used coercion or other forms of improper conduct in order to elicit Davis’s incriminating statement.” *Davis*, 310 Wis. 2d 583, ¶ 39. “The duration of questioning was not lengthy, no physical or emotional pressures were used, and no inducements, threats, methods, or strategies were employed to ascertain an incriminating statement from” Davis. *Id.*

The court further emphasized that “Davis’s participation was voluntary in every way.” *Davis*, 310 Wis. 2d 583, ¶ 40. Davis agreed to talk and take the voice stress analysis, he came to the station on his own terms, when his car broke down, he accepted a ride from the officer and rode in the front seat, he was told he could leave any time, and after the analysis, he chose which officer he wanted to speak with. *Id.*

The court also rejected Davis’s argument that the officer’s relaying to him that he failed the analysis undermined his will to resist. *Davis*, 310 Wis. 2d 583, ¶ 41. It reaffirmed that “[m]erely because one is administered a voice stress analysis or polygraph test does not render a subsequent statement per se coercive.” *Id.* ¶ 42.

The proper inquiry, the court said, is not “whether a test was taken, but rather, whether a subsequent statement was

given at a distinct event and whether law enforcement used coercive means to obtain the statement.” *Davis*, 310 Wis. 2d 583, ¶ 42. The court added, “An important inquiry continues to be whether the test result was referred to in order to elicit an incriminating statement.” *Id.* The court reexamined the five factors used to assess whether Davis confessed at a separate interview. *Id.* It then reasoned that because “no coercive measures were used to elicit the statement,” Davis’s confession was voluntary. *Id.*

In re-examining the five totally-discrete-event factors in its final paragraph where it also addressed voluntariness, the court muddled when a trial court should consider an officer’s reference to the polygraph test (i.e., the first or second prong of *Davis* or both). Most likely, the court suggested that a trial court should consider any reference when analyzing the first prong, the totally discrete event requirement.

The court cited to *Johnson* as support, and voluntariness was not at issue in *Johnson*. *State v. Johnson*, 193 Wis. 2d 382, 386, 535 N.W.2d 411 (Ct. App. 1995) (“On appeal, the voluntariness of Johnson’s statements is not disputed.”). Moreover, the court, in the preceding sentence, had just reaffirmed the two-part inquiry: “[t]he proper inquiry is not only whether a test was taken, but rather, whether a subsequent statement was given at a distinct event and whether law enforcement used coercive means to obtain the statement.” *Davis*, 310 Wis. 2d 583, ¶ 42. Finally, it would be odd (and redundant) if the supreme court suggested that lower courts should apply the same factors to determine if a statement is both a totally discrete event and voluntary.

To the extent a court would consider a reference to the polygraph test as part of its voluntary analysis, it would be to determine whether the reference was so coercive it overbore the defendant’s will. As the court explained in *Davis*, a court should use “ordinary principles of voluntariness” to analyze

the admissibility of a confession, even a post-polygraph confession. *Davis*, 310 Wis. 2d 583, ¶¶ 21, 35.

B. Vice’s confession was admissible because it satisfied *Davis*.

Here, the circuit court erred when it suppressed Vice’s post-polygraph confession. As in *Davis*, Vice confessed at a totally discrete event (Vice conceded this point), and his confession was voluntary.

1. Vice conceded the first *Davis* requirement; he conceded that he confessed at an interview separate from the polygraph test.

Vice conceded *Davis*’s first requirement. He conceded that he confessed at an interview totally separate from his polygraph test. As in his first appeal, Vice should again be held to that concession.

Below, Vice repeatedly admitted that the State satisfied the first *Davis* requirement. In his motion, he wrote, “In the case at bar the detectives got the right part of the process right, they separated the polygraph test from the interrogation . . .” (R. 12:5.) At oral argument, he reaffirmed, “And I think the defense cited quite accurately that, according to Deputy Fisher’s testimony, the police got it half right. You’re supposed to take the polygraph test and interrogation separate. They did that right.” (R. 110:3.)

As this Court pointed out during Vice’s first appeal, “judicial estoppel bars litigant from argument directly contradictory to circuit court argument.” *Rusk Cty. Dep’t of Health & Human Servs. v. Thorson*, 2005 WI App 37, ¶ 5 n.4, 278 Wis. 2d 638, 693 N.W.2d 318; (R. 37:9). Because Vice conceded below that the polygraph test and the interview were separate events, he is judicially estopped from arguing to the contrary on appeal. (See R. 37:9.)

Allowing Vice to resurrect any argument on the first *Davis* factor at this late stage would be especially inappropriate for two reasons. First, this Court accepted and held Vice to his concession on his first appeal. (R. 37:9.) Second, this Court clearly directed the circuit court to consider only the voluntariness of Vice's confession on remand: "Under these circumstances, a remand is necessary for the circuit court to engage in additional fact-finding and to determine, based on those fact, whether Vice's confession was voluntary." (R. 37:13.) Thus, any new argument on the first *Davis* factor would fall outside the scope of this Court's remand instructions.

Because Vice conceded that he confessed at an interview separate from his polygraph test, the first *Davis* requirement is met.

2. Notwithstanding Vice's concession, the record shows that Vice confessed at an interview separate from the polygraph test.

Even so, an application of *Davis*'s five factors shows that Vice confessed at an interview that was totally discrete from his polygraph test.

First, Vice knew the polygraph test was over. The polygraph examination consent form told Vice the polygraph test "concluded at 11:40am." (R. 10:2.) It also confirmed that Vice "underst[ood] that any question [he] may be asked at this point in time, and any answers that [he] gave to those questions, [were] not part of the polygraph examination." (R. 10:2.) Vice signed the form. (R. 10:2.)

Second, sufficient time passed between the polygraph test and the interview. The officers testified that ten to fifteen minutes passed between the end of the polygraph test and the start of the post-polygraph interview. (R. 109:10, 32.) That amount of time is sufficient to attenuate the test from the

interview. *See Davis*, 310 Wis. 2d 583, ¶ 31 (concluding that the polygraph test and interview were separate even though “very little time passed”).

Third, two officers were involved, one who administered the test, and one who investigated the sexual assault allegations, though both participated in the post-polygraph interview. That Detective Lambeseder participated in the interview does not automatically render the events connected. *Davis*, 310 Wis. 2d 583, ¶ 33 (“[P]recedent clearly holds that the same officer may conduct both the examination and the interview so long as the two events are separate.”).

Fourth, Vice took the polygraph test in one room and was interviewed by the officers in a different room.⁴ The change from one room to another signaled that the polygraph test and the post-polygraph interview were two separate events.

Finally, the officers referenced the results of Vice’s polygraph only a few times and often in response to a question or statement from Vice. That the officers referenced the results is not dispositive. As this Court has explained, so long as “there is both a sufficient temporal separation and a sufficient spatial demarcation” between the test and the interview, “and the defendant is told that the test is over, letting the defendant know that he or she did not pass the examination, or letting the defendant so conclude, does not negate that the examination and the post-examination interview” are totally discrete events. *State v. Greer*, 2003 WI

⁴ In examining this factor, the circuit court found that the interview “was [in] the same building as the polygraph but in a different room.” (R. 124:5.) To the State’s knowledge, no decision has suggested that the post-polygraph interview must occur in a different building. *See, e.g., Davis*, 310 Wis. 2d 583, ¶¶ 7–10 (noting that the interview and test were separate even though both occurred in the same building, the police station).

App 112, ¶ 16, 265 Wis. 2d 463, 666 N.W.2d 518. Thus, “a truthful comment to a suspect, either volunteered by the officer or in response to the suspect’s question, does not override the other factors” used “consistently to determine whether a suspect’s post-examination statements should be suppressed.” *Id.* ¶ 17. Accordingly, here, even though the officers referenced the polygraph results, the remaining factors demonstrate that Vice’s polygraph test and his post-polygraph interview were totally discrete events.

Because an analysis of *Davis*’s five factors establish that Vice confessed at an interview separate from his polygraph test, the first *Davis* requirement is met.

3. Vice’s post-polygraph statements were voluntarily given.

Davis’s second requirement is also met because Vice voluntarily confessed. A balancing of Vice’s personal characteristics against any possible law enforcement pressure demonstrates that Vice’s confession was the “product of a free and unconstrained will.” *Davis*, 310 Wis. 2d 583, ¶ 36.

The record contains little to no evidence that would give rise to any concern over Vice’s personal characteristics. At the time of the polygraph test, Vice was in his mid-twenties and had completed high school. (R. 124:8; 10:3.)

Vice described his physical condition as “average,” and he told Detective Lambeseder he had never been a patient in a mental hospital and had never seen a psychologist or psychiatrist. (R. 10:3.) At the suppression hearing, Vice claimed a history of ADHD, depression, and anxiety, but he did not disclose those conditions to Detective Lambeseder. (R. 10:3.) He had a history of taking special education classes and had little or marginal experiences with law enforcement. (R. 124:8; 10:3 (indicating that Vice had one prior arrest).)

Finally, the recordings for both the polygraph test and the post-polygraph interview demonstrated that Vice was competent and able to understand the seriousness of the events. (R. 124:8.) The recordings also demonstrate that Vice gave responsive answers to the officers' questions.

Certainly, Vice was nervous. (R. 109:48–49.) Anyone in his shoes would have been nervous—Vice faced serious allegations, he had just taken a polygraph test, and he was being interviewed by the police. But nothing in the record suggests that Vice was inordinately nervous. Indeed, the recordings of both the polygraph test and the post-polygraph interview show that Vice was relatively calm. He did not appear to be shaking. He did not cry. And he did not throw up, though he expressed feeling sick the moment he admitted to molesting the little girl. Who wouldn't feel sick after he admitted he stuck his hand down a four-year-old's pants so he could touch her vagina.

There is also no evidence that Vice's confession was "the result of coercion or otherwise improper conduct by law enforcement." *Davis*, 310 Wis. 2d 583, ¶ 36. The duration of questioning here was not lengthy, lasting only 45 minutes. See *State v. Moore*, 2015 WI 54, ¶ 62, 363 Wis. 2d 376, 864 N.W.2d 827 (finding no issue with questioning that lasted "about five and a half hours").⁵

The officers did not place "any excessive physical or psychological pressure" on Vice. *Davis*, 310 Wis. 2d 583, ¶ 37. As for physical pressure, Vice was not restrained, and neither officer touched Vice during the interview.

⁵ Given that five and a half hours of questioning is permissible under the law, the circuit court's view that Vice's interview "became somewhat convoluted and lengthy" is unsupportable. (R. 124:11.)

As for psychological pressure, Detective Lambeseder started the interview by truthfully relaying that Vice failed the polygraph test. An officer may so inform a suspect without rendering any subsequent confession involuntary. *See Johnson v. Pollard*, 559 F.3d 746, 753–55 (7th Cir. 2009) (informing the suspect that he failed the polygraph test did not make the confession coercive or involuntary); *see also Turner v. State*, 76 Wis. 2d 1, 22, 250 N.W.2d 706 (1977) (“[T]he confrontation of the defendant with information against him, whatever that may be, does not amount to the utilization of overwhelming force or psychology.”).

In response to Vice’s question if he could have blacked out and not remembered the assault, Detective Lambeseder told Vice he remembered doing it, “otherwise [he] wouldn’t [have] react[ed] the way [he] did on the exam.” (A-App. 120–21.) At other points when Vice claimed he did not remember the assault, the officers reaffirmed that his reactions showed he remembered. Truthfully answering a suspect’s question does not amount to coercion or improper conduct.

To be sure, nothing in the record suggests that Detective Lambeseder’s answer to Vice’s question was false. Vice did not claim that Detective Lambeseder lied or misrepresented when he answered Vice. (R. 47.) If Vice thought Detective Lambeseder had lied, he had the opportunity to question the detective about it at the motion hearing. He did not. The record does not, therefore, support the circuit court’s skepticism of Detective Lambeseder’s veracity with Vice. (*See* R. 124:10–11.)

Even if Detective Lambeseder had made a definitively false statement, “misrepresentation or trickery does not make an otherwise voluntary statement involuntary.” *State v. Jackson*, 2011 WI App 63, ¶ 22, 333 Wis. 2d 665, 799 N.W.2d 461. And a misrepresentation or “lie that relates to a suspect’s connection to the crime is the least likely to render a confession involuntary.” *State v. Lemoine*, 2013 WI 5, ¶ 32,

345 Wis. 2d 171, 827 N.W.2d 589 (quoting *State v. Triggs*, 2003 WI App 91, ¶ 19, 264 Wis. 2d 861, 663 N.W.2d 396). This is because “inflating evidence” of a suspect’s guilt interferes “little, if at all,” with his free will and deliberate choice of whether to confess, as it does not “lead him to consider anything beyond his own beliefs regarding his actual guilt or innocence.” *Id.* (quoting *Triggs*, 264 Wis. 2d 861, ¶ 19).

In addition, the officers instructed Vice to tell the truth. But “advice that it would be better to tell the truth, or words of similar import, are not sufficient to vitiate a confession.” *Hintz v. State*, 125 Wis. 405, 410, 104 N.W.2d 110 (1905).

The officers also made no threats or promises. *Davis*, 310 Wis. 2d 583, ¶ 37. At most, the officers told Vice that if he cooperated, they could work with him and could try to get him help. (*See, e.g.*, R. 128:5.) Encouraging cooperation in the way the officers did here does not render a confession involuntary: “An officer telling a defendant that his cooperation would be to his benefit is not coercive conduct, at least so long as leniency is not promised.” *State v. Deets*, 187 Wis. 2d 630, 636, 523 N.W.2d 180 (Ct. App. 1994). “Similarly, coercive conduct does not occur when, as here, an officer, without promising leniency, tells a defendant that if he or she does not cooperate the prosecutor will look upon the case differently.” *Id.* Under either scenario, the officer “does nothing more than predict” what might happen, “without making a promise one way or the other.” *Id.*

Finally, it must be remembered that Vice volunteered to take the polygraph test, and he willingly rode to and from the polygraph test and interview with Officer Fisher. *McAdoo v. State*, 65 Wis. 2d 596, 608, 223 N.W.2d 521 (1974) (“[A] polygraph can hardly be considered ‘a strategy of the police officers,’ [when] it [is] administered to the defendant upon his request.”). At multiple points, Officer Fisher and Detective Lambeseder reminded Vice that he did not have to take the

test, and each time, Vice agreed to participate. (R. 10:1–2; 109:8.)

Detective Lambeseder also read Vice his rights, even though Vice was not in custody, and Vice knowingly, intelligently, and voluntarily waived those rights. (R. 10:1.) Furthermore, Vice signed the polygraph examination consent form twice (once before the test and once after), each time confirming that he willingly participated in the test and the interview. (R. 10:1–2.)

The totality of the circumstances demonstrate that Vice voluntarily confessed.

4. The circuit court erred in at least three key respects.

In addition to incorrectly concluding that Vice’s confession was involuntary, the circuit court erred in at least three other key ways.

First, the circuit court glossed over the traditional voluntariness considerations and instead focused most heavily on the five factors used to determine whether the polygraph test and the confession were separate events. (R. 124:7–12.) For example, the court repeatedly highlighted that Detective Lambeseder participated in the post-polygraph interview. (R. 124:7–8.) And the court stressed that Detective Lambeseder immediately informed Vice that he failed the polygraph test. (R. 124:7–8.) But the court never connected those factors to voluntariness. It never explained why Detective Lambeseder’s general participation and his truthful comment that Vice failed the test was so coercive and improper that it overbore Vice’s will. In focusing on the wrong *Davis* prong, the circuit court failed to apply “ordinary principles of voluntariness” and erroneously suppressed Vice’s confession. *Davis*, 310 Wis. 2d 583, ¶ 21.

Second, at least two of the circuit court's considerations rested on improper legal propositions. For example, the circuit court criticized the officers for not correcting Vice's assumption that failing the polygraph test qualified as proof he committed the assault. (R. 124:7.) But an officer has no obligation to correct a suspect's faulty assumption. *See United State v. Rutledge*, 900 F.2d 1127, 1130 (7th Cir. 1990) ("The policeman is not a fiduciary of the suspect. The police are allowed to play on a suspect's ignorance, his anxieties, his fears, and his uncertainties; they just are not allowed to magnify those fears, uncertainties, and so forth to the point where rational decision becomes impossible.").

Here's another example. The circuit court criticized the officers' failure to re-read Vice the *Miranda* warnings at the start of the interview. But Vice was not in custody; he had not been arrested or charged, and he volunteered to take the polygraph test. Because Vice was not in custody, the officers were not required to give Vice the *Miranda* warnings. *State v. Bartelt*, 2018 WI 16, ¶ 30, 379 Wis. 2d 588, 906 N.W.2d 684 ("[T]he Miranda safeguards apply only to custodial interrogations under both constitutions." (citation omitted)).

Nevertheless, Detective Lambeseder twice informed Vice of his *Miranda* rights, once at the start of the polygraph test and once at the end. (R. 10:1–2.) That the officers did not inform Vice of the *Miranda* rights for a third time at the start of the interview (roughly 15 minutes later), does not weigh against the voluntariness of his confession.

Finally, the circuit court repeatedly hammered the fact that the polygraph test was referenced "at least 11 times during the interview," without placing those references in context. (R. 124:7.)

For example, the circuit court specifically discussed only the eleventh reference and found it particularly egregious. During that reference, Detective Lambeseder

indicated that Vice “clearly remembered the sexual contact because it showed up on the test that you remember.” (R. 124:10.) According to the court, that statement, “on top of the ten prior,” “was deliberately coercive and extremely effective.” (R. 124:11.)

It is unclear how that final reference could have overborn Vice’s will and compelled him to confess when he had already confessed at that point. Moreover, Vice’s hedging statements that he “[v]aguely” remembered or that what he disclosed previously was “literally all [he] [could] remember,” are not the statements of someone whose will had just been broken to the point he felt compelled to confess. (R. 128:28.)

When the references to the test are viewed in context, most are made by Vice or by an officer in response to Vice saying he could not remember the assault. It must be remembered that Vice initiated the reference to the results. He asked if it was possible that he blacked out and did not remember the assault. Detective Lambeseder answered Vice’s question, telling him that he remembered the assault, or he would not have reacted the way he did on the test. (R. 128:4–5.) It was thus Vice’s question and subsequent statements that set the tone of the interview. The officers simply responded to the environment Vice created by relaying that he remembered the assault.

The circuit court erred when it granted Vice’s suppression motion. As demonstrated above, Vice’s confession met both *Davis* requirements. He confessed at a totally discrete event (as he conceded), and his confession was voluntary. Because Vice’s confession is admissible under *Davis*, this Court should reverse the circuit court and hold that the State may use this voluntary confession to seek justice and prosecute Vice for sexually assaulting four-year-old EJ.

CONCLUSION

This Court should reverse the circuit court's order granting Vice's suppression motion.

Date this 16th day of July, 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 11,000 words.

Dated this 16th day of July, 2019.

JENNIFER R. REMINGTON
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 809.19(12).

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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Dated this 16th day of July, 2019.

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APPENDIX CERTIFICATION

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 Wis. Stat. § 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.

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JENNIFER R. REMINGTON
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