STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP2220-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

ADAM W. VICE,

Defendant-Respondent.

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

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT-PETITIONER

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ISSUE PRESENTED

Did Defendant-Respondent Adam W. Vice voluntarily confess to sexually assaulting a four-year-old girl during a post-polygraph interview?

The circuit court answered, "no."

The court of appeals answered, "no."

This Court should answer, "yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests oral argument and publication.

INTRODUCTION

To clear his name, Vice agreed to take a polygraph examination after being confronted with an allegation of child sexual assault. He was advised of his *Miranda*[1] rights and took the exam. He failed. During a post-polygraph interview, Vice confessed, providing detailed responses to the officers' questions about the assault.

Vice moved to suppress his confession on the basis that it was involuntary. The circuit court agreed, largely because police repeatedly referenced Vice's polygraph result during the questioning. The court of appeals affirmed, condemning the officers' use of the polygraph result as an interrogation tactic.

This Court should reverse. It takes extreme circumstances—like a 36-hour interrogation or a threat to the suspect's safety—for a confession to be coerced. When the facts of this case are measured against ordinary principles of

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

voluntariness, the result is clear: Vice voluntarily confessed to child sexual assault.

STATEMENT OF THE CASE

Police investigate Vice

In December 2014, Officer William Fisher 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 of the alleged assault. (R. 1:3.) While the caretaker was tucking her 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 Fisher 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] name," and Officer Fisher suggested Vice take a polygraph test. (R. 109:45.)

Vice consents to a polygraph

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. 109:8–9.) On the way, Officer Fisher reminded Vice that he did not have to take the test. Vice said he wanted to clear his name. (R. 109:8–9.)

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* rights. (R. 109:27.) Vice was informed that he could exercise his rights at "any time [he] wish[ed] to during the entire time" he was there. (R. 10:2; 109:27.) Vice signed both a waiver-of-rights form and a polygraph examination consent form after Detective Lambeseder orally reviewed the forms with him. (R. 109:10, 27–28; 10.)

Detective Lambeseder then asked Vice questions pertinent to the "polygraph examination data sheet." (R. 109:29–32.) Based on Vice's answers, Detective Lambeseder concluded that Vice possessed a high school education and had never previously taken a polygraph. (R. 109:30–31.) 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 issues." (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.) Based on this information, Detective Lambeseder deemed Vice "fit to test." (R. 109:31.)

Detective Lambeseder then conducted a "pretest" with Vice. (R. 109:31–32.) He explained to Vice "the polygraph procedure" and the "psychology and physiology behind the polygraph." (R. 109:32.)

The polygraph exam lasted one hour and forty-five minutes. (R. 109:10.) Vice denied all wrongdoing during the exam. (R. 109:37.) 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 had ended. (R. 10:2.) By

signing the form, Vice acknowledged that he was continuing to waive his *Miranda* rights. (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.)

Vice confesses to sexually assaulting EJ

Vice was not handcuffed during the interview. (R. 109:58.) The interview room was small and had an "average temperature." (R. 109:14.) It did not have any windows, but it had a table and three chairs. (R. 109:14.) Officer Fisher sat across the table from Vice, and Detective Lambeseder sat on the side of the table to Fisher's left. (R. 109:19–20.) Vice was farthest from the door and would have had to walk past both officers to leave the room. (R. 109:39.) This arrangement was standard police protocol—both for officer safety and because of the angle of the camera in the interview room. (R. 109:39.)

At the start of the interview, Detective Lambeseder asked Vice, "Well, how do you think you did?" (R. 128:2.)[2] 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.) 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

[2] The State cites to the transcript (R. 128) 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.

> 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. . . . But now is the time let's talk like men. . . . [Officer Fisher] wants to talk to you about his case. And 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.)

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.) 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. (R. 128:4.) "[O]bviously," Vice said, "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.)

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.) Detective Lambeseder acknowledged that it was hard to tell the truth and admit to wrongdoing. (R. 128:5.) 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.)

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.) 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.) 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.) Vice shook his head no. (R. 128:6; 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.) Vice answered, "I'm not going to do that." (R. 128:6.) He added, "I don't know why I would do it -- first one, apparently." (R. 128:6.)

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 do 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.)

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.) 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.) 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.)

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.) Vice said he was scared, and Officer Fisher offered, "You're thinking of the consequences." (R. 128:9.) 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.)

The officers asked Vice to be truthful and 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's 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.)

Vice said, "Yes," and Detective Lambeseder questioned, "Be truthful?" (R. 128:10.) Vice again said, "Yes", and Detective Lambeseder told him to "[g]o ahead." (R. 128:10.) Vice confessed: "It's going to sound really shitty for me to say this right now, but I sexually assaulted [EJ]." (R. 128:10.) 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.) Detective Lambeseder asked Vice to "work [them] through it." (R. 128:10.) Vice stated, "I never fucking remember. I -- my whole body's reacting to it. Why can't I fucking remember?" (R. 128:11.) Detective Lambeseder offered, "It's okay, bud," and Vice responded that he felt like he would throw up. (R. 128:11.) Officer Fisher offered him tissues and a wastebasket. (R. 128:11.)

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 occasionally. (R. 128:11–12.) He repeatedly expressed that he could not remember. (R. 128:11.) 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 did it because obviously the test says that I did it, but I don't physically remember." (R. 128:13.) Vice expressed that his heart was racing and told himself to "think." (R. 128:13.)

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.)

Officer Fisher asked Vice about the time he spent with EJ in October. (R. 128:15.) 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.) Officer Fisher asked Vice if EJ slept downstairs, and Vice said he did not remember. (R. 128:16.) 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.) Detective Lambeseder replied, "Adam, like I said, okay, it shows on the test that you remember, okay?" (R. 128:17.)

Officer Fisher told Vice that EJ had demonstrated what he did to her. (R. 128:17.) Officer Fisher continued, "[I]t happened. You remember it happening. I mean, I know it's tough to admit." (R. 128:17.) Vice responded, "But I don't know if I actually--," and Officer Fisher interjected to

encourage Vice to take responsibility for his actions "because it happened." (R. 128:17–18.)

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.) Detective Lambeseder asked Vice if direct questions about the assault might help him remember, and Vice agreed it would. (R. 128:18.) 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.)

Vice denied remembering when the sexual assault occurred, but then said, "It had to be in October." (R. 128:19.) He stated that he was "downstairs in the big living room when [EJ] was on the bed." (R. 128:19.) Vice specified that EJ "was

on the right-hand side." (R. 128:19.) He said that he did not know where EJ's sister was at the time. (R. 128:19.)

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.) 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.)

The officers acknowledged that this was "hard to talk about" but said they would "walk through this together." (R. 128:20.) Vice asked if he tried "having sex with her?" (R. 128:21.) The officers responded that Vice needed to tell them what happened. (R. 128:21.) 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.)

Officer Fisher thanked Vice for his honesty. (R. 128:22.) 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.) Vice also called himself a "Fucking monster." (R. 128:23.)

Detective Lambeseder asked if Vice touched her out of "sexual excitement" or a "[d]esperation-type thing," and Vice said, "Yes." (R. 128:24.) Officer Fisher said it was obvious that Vice remembered what happened and asked Vice to tell him everything that happened. (R. 128:24.) 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.) Vice said he already told them what he could remember. (R. 128:25.)

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.) He also thought this was the first time it happened because "otherwise [EJ] would have said something else earlier." (R. 128:25.) Detective Lambeseder asked Vice if he was attracted to girls EJ's age, and Vice said no. (R. 128:26–27.) Vice again offered that he might have been drunk and that is why he could not remember. (R. 128:27–28.) Detective Lambeseder told Vice he remembered the assault:

> [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.)

Later in the interview, Vice again described having "vague memories of doing the things" he said he did. (R. 128:32.) He described it as being "like a dream" or like "déjà vu." (R. 128:32.)

Vice then reaffirmed that he touched EJ's vagina underneath her underwear and her buttocks over her underwear. (R. 128:34.) He also reaffirmed that he tried to lick her vagina, and when he failed, he removed her pants. (R. 128:35.) 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.) The officers confirmed that Vice would be all right in the room alone and then left. (R. 128:37–38.)

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.)

The State charged Vice with first-degree sexual assault (contact) of a child under thirteen. (R. 1:2.)

Vice moves to suppress his confession

Vice moved to suppress his confession, arguing that it was involuntary because the officers referenced his failed polygraph examination in eliciting his incriminating statements. (R. 12:8.)

Officer Fisher, Detective Lambeseder, and Vice testified at a suppression hearing, providing many of the facts detailed above. (R. 109.) Questioning at the suppression hearing elicited the following additional facts.

Officer Fisher testified that Vice was not in custody before, during, or after the polygraph examination and interview. (R. 109:7.) 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.) Further, neither officer told Vice that the polygraph test would be inadmissible in court. (R. 109:20.)

Both officers 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.)

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.)

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 testified that no one told him he was free to leave the interview, 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 that mandated suppression. (R. 110:4–5.) It cited to *State v. Davis*, 2008 WI 71, 310 Wis. 2d 583, 751 N.W.2d 332, and *State v. Johnson*, 193 Wis. 2d 382, 535 N.W.2d 441 (Ct. App. 1995), for support. (R. 110:4–5.)

The first appeal and remand

The State appealed, and the court of appeals reversed the circuit court's order and remanded for further factfinding. (R. 37:1–2.) "[T]o the extent the circuit court concluded suppression of Vice's confession was required solely because the detectives referred to his failed polygraph examination when questioning him," the court opined, "that conclusion was erroneous." (R. 37:11.) The court instructed the circuit court to make factual findings to support a totality-of-the-circumstances analysis regarding the voluntariness of Vice's confession. (R. 37:13.)

On remand, the circuit court concluded that Vice's confession was involuntary under the totality of the circumstances. (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 circuit court noted that the post-polygraph interview lasted 45 minutes. (R. 124:11.) It concluded that the interview room "wasn't apparently uncomfortable" and that Vice was not "restrained or physical[ly] abused." (R. 124:11.) The court stated that "the defendant's [*Miranda*] rights were discussed before the polygraph but not before the post-polygraph interview." (R. 124:5.) It counted "at least 11 separate references to the polygraph test" during the interview. (R. 124:5.) The court further determined that Vice "voluntarily went to the test site" and that no "coercion . . . occurred during the ride to or from" the police station. (R. 124:11–12.)

Ultimately, in finding Vice's confession involuntary, the circuit court focused most heavily on Detective Lambeseder's participation in the interview and the repeated references to the polygraph result. (R. 124:12.) It found such actions

"somewhat coercive." (R. 124:12.) The court therefore granted Vice's motion to suppress. (R. 124:12.)

The instant appeal

Again, the State appealed. (A-App. 101–02.) In a "close case," the court of appeals determined that Vice's confession was involuntary. (A-App. 123, 135.)

The court of appeals first noted that in "many ways," the circumstances of Vice's confession were like those presented in *Davis*, where this Court held that the defendant's confession was voluntary. (A-App. 123.) However, a combination of several factors caused the court of appeals to suppress Vice's confession on voluntariness grounds.

First, the officers referenced Vice's polygraph result "at least eleven times during the forty-five-minute post-polygraph interview." (A-App. 126.) On this point, the court of appeals distinguished *Davis*, where Davis was briefly told that his polygraph result indicated that he was being deceptive. (A-App. 126.) The court then referenced *Davis*'s language that "[a]n important inquiry . . . [is] whether the test result was referred to in order to elicit an incriminating statement." (A-App. 126–27 (quoting *Davis*, 310 Wis. 2d 583, ¶ 42).) Reasoning that "[r]egardless of the authority cited by the *Davis* court, its statement was specific, and we are not free to disregard clear precedent," the court considered the references to the polygraph result a crucial factor in deciding voluntariness. (A-App. 127 n.6.)

The polygraph references were especially problematic, the court of appeals opined, because the officers told Vice numerous times that the results showed that he remembered the assault. (A-App. 127.) The court also found an omission significant in this context: the officers "did not respond to Vice's statement that because he failed the polygraph test, he must have sexually assaulted the victim." (A-App. 127.)

The court of appeals was also troubled that the officers did not inform Vice "that the polygraph results would be inadmissible in any criminal proceedings against him." (A-App. 128.) It reasoned that this omission constituted coercive behavior, especially because Vice received *Miranda* warnings before the post-polygraph interview. (A-App. 128.)

Ultimately, the court of appeals stressed that its finding of "unduly coercive" conduct was "in large part based on the nature of polygraph evidence, the reliability of which has long been questioned by Wisconsin courts." (A-App. 131–32.) It instructed law enforcement "that if they plan to rely on polygraph results in order to elicit a defendant's confession, they need to inform the defendant that those results are inadmissible in court." (A-App. 135.)

Judge Hruz dissented, finding that "no coercion or other improper conduct occurred." (A-App. 137.)

This Court granted the State's petition for review.

STANDARD OF REVIEW

"The question of voluntariness involves the application of constitutional principles to historical facts." *State v. Hoppe*, 2003 WI 43, ¶ 34, 261 Wis. 2d 294, 661 N.W.2d 407. 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

Under the totality of the circumstances, Vice voluntarily confessed to sexually assaulting a four-year-old girl.

A. Standards for assessing whether Vice's confession was voluntary.

1. Substantial police coercion must exist for any confession to be involuntary.

An involuntary confession admitted into evidence violates due process. *Hoppe*, 261 Wis. 2d 294, ¶ 36. Confessions "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." *Id.*

To determine "whether a defendant's will was overborne in a particular case," courts consider the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973).[3] "The totality of the circumstances analysis involves a balancing of the personal characteristics of the defendant against the pressures imposed upon the defendant by law enforcement officers." *Hoppe*, 261 Wis. 2d 294, ¶ 38. Relevant personal characteristics "include the defendant's age, education and intelligence, physical and emotional condition, and prior experience with law enforcement." *Id.* Relevant "police pressures and tactics" include "the length of the questioning . . . the general conditions under which the statements took place, any excessive physical or psychological

[3] This Court generally follows federal precedent in this area. *See State v. Edler*, 2013 WI 73, ¶ 29, 350 Wis. 2d 1, 833 N.W.2d 564.

pressure brought to bear on the defendant, [and] any inducements, threats, methods or strategies used by the police to compel a response." *Id.* ¶ 39. It also matters whether police advised the defendant of his *Miranda* rights. *See id.*; *accord Davis v. North Carolina*, 384 U.S. 737, 740–41 (1966) (indicating that the absence of *Miranda* warnings is a significant factor).

"Coercive or improper police conduct is a necessary prerequisite for a finding of involuntariness." *Hoppe*, 261 Wis. 2d 294, ¶ 37 (citing *Colorado v. Connelly*, 479 U.S. 157, 167 (1986)). As far as Supreme Court jurisprudence is concerned, all involuntary confession cases "have contained a *substantial* element of coercive police conduct." *Connelly*, 479 U.S. at 163–64 (emphasis added). Beyond complete "prohibitions on physical coercion," there is no "comprehensive set of hard rules" for assessing voluntariness." *Dassey v. Dittmann*, 877 F.3d 297, 303 (7th Cir. 2017).

The law is clear that "[i]nterrogation tactics short of physical force can amount to coercion." *Dassey*, 877 F.3d at 304. However, "[t]he Supreme Court has not found that police tactics not involving physical or mental exhaustion taken alone were sufficient to show involuntariness." *Id.* Instead, where "more subtle forms of psychological persuasion" are at issue, "courts have found the mental condition of the defendant a more significant factor in the 'voluntariness' calculus." *Connelly*, 479 U.S. at 164; *accord Hoppe*, 261 Wis. 2d 294, ¶ 40.

The Supreme Court "has condemned tactics designed to exhaust suspects physically and mentally." *Dassey*, 877 F.3d at 304. These improper tactics include lengthy interrogation sessions or detentions with limited food, medication, or sleep. *Greenwald v. Wisconsin*, 390 U.S. 519 (1968); *Davis*, 384 U.S. at 739, 746; *Ashcraft v. Tennessee*, 322 U.S. 143, 149–50

(1944). Another prohibited practice is exploiting a suspect's physical or mental infirmities, *Mincey v. Arizona*, 437 U.S. 385, 398–401 (1978) (suspect in great physical pain in hospital); *Blackburn v. Alabama*, 361 U.S. 199, 207–08 (1960) (suspect "insane and incompetent" during questioning). Other problematic forms of psychological pressure include threats, *Beecher v. Alabama*, 389 U.S. 35, 36 (1967) (holding a gun to the head of a wounded suspect to extract a confession); *Payne v. Arkansas*, 356 U.S. 560, 567 (1958) (threating the suspect with "mob violence"); *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963) (saying that a suspect's children would be taken away if she did not cooperate); and conditioning outside contact on police cooperation, *Haynes v. Washington*, 373 U.S. 503, 507–14 (1963).

"In several cases, the Court has held that officers may deceive suspects through appeals to a suspect's conscience, by posing as a false friend, and by other means of trickery and bluff." *Dassey*, 877 F.3d at 304. Police may, for example, lie about the strength of the evidence against the accused. *See Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (falsely telling a suspect that his accomplice confessed); *accord United States v. Rutledge*, 900 F.2d 1127, 1131 (7th Cir. 1990) ("[P]olice [may] pressure and cajole, conceal material facts, and actively mislead."); *State v. Albrecht*, 184 Wis. 2d 287, 300, 516 N.W.2d 776 (Ct. App. 1994) ("In the battle against crime, the police, within reasonable bounds, may use misrepresentations, tricks and other methods of deception to obtain evidence."). Indeed, this Court has underscored that "a 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).

"False promises to a suspect have similarly not been seen as *per se* coercion, at least if they are not quite specific."

Dassey, 877 F.3d at 304. So, "the Supreme Court allows police interrogators to tell a suspect that 'a cooperative attitude' would be to his benefit." *Id.* (citing *Fare v. Michael C.*, 442 U.S. 707, 727 (1979)); *accord State v. Deets*, 187 Wis. 2d 630, 636–37, 523 N.W.2d 180 (Ct. App. 1994).

A couple of final points are noteworthy. First, signs of voluntariness—that a suspect's will was *not* overborne—include a suspect's proven ability to resist further police questioning after he confesses, *see Minnesota v. Murphy*, 465 U.S. 420, 438 (1984); *Lyons v. Oklahoma*, 322 U.S. 596, 605 (1944); and a suspect's supplementation of "the questioner's information," *Lyons*, 322 U.S. at 605. Second, and significantly here, "[a]n officer may express dissatisfaction with a defendant's responses during an interrogation. The officer need not sit by and say nothing when the person provides answers of which the officer is skeptical." *Deets*, 187 Wis. 2d at 636.

While determining voluntariness "requires more than a mere color-matching of cases," the above principles inform the totality-of-the-circumstances analysis. *Dassey*, 877 F.3d at 315 (quoting *Reck v. Pate*, 367 U.S. 433, 442 (1961)).

2. Post-polygraph confessions are admissible if they satisfy ordinary principles of voluntariness.

The admissibility of polygraph statements in Wisconsin turns on the timing of such statements. Statements made *during* polygraph testing are inadmissible under 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-step test for admissibility of statements made following a polygraph examination.[4] First, the post-polygraph confession must be made during a "totally discrete event." *Davis*, 310 Wis. 2d 583, ¶ 23. Second, the defendant's statements must be voluntary. *Id.* ¶ 2. Courts resolve the latter issue by reference to "ordinary principles of voluntariness," detailed above. *Id.* ¶¶ 21, 35–42.

Discreteness is not at issue in this appeal.[5] But some discussion is warranted here to understand why lower courts need guidance on how to analyze the voluntariness of a post-polygraph confession.

Because statements made *during* a polygraph are inadmissible in court, the discreteness issue is designed to ensure that the test was over when the inculpatory statements were made. The *Davis* Court was "primarily" concerned with this issue. *Davis*, 310 Wis. 2d 583, ¶ 21. It identified five factors to consider in analyzing discreteness: (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)

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[4] 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.

[5] The court of appeals determined that Vice's polygraph examination and post-polygraph interview were totally discrete events. (A-App. 119–22.) The State did not raise the discreteness issue in its petition for review, and Vice did not file a cross-petition on the issue. This Court "did not order that any issues presented outside of the petition for review be granted and briefed." *State v. Sulla*, 2016 WI 46, ¶ 7 n.5, 369 Wis. 2d 225, 880 N.W.2d 659. Rather, it instructed the State *not* to raise or argue issues not set forth in the petition for review unless otherwise ordered by the Court. Therefore, the discreteness issue is not before this Court. *See id.*

whether the location where the [test] was conducted differed from where the statement was given"; and (5) "whether the [test] was referred to when obtaining a statement from the defendant." *Id.* ¶ 23.

As explained in greater detail below, the fifth discreteness factor concerning references to the polygraph test re-emerged in the *Davis* Court's voluntariness analysis in a way that has created some confusion.

Returning to voluntariness, it should be noted at the outset of this discussion that confronting a suspect about the result of a polygraph examination is *not* inherently coercive and does not, without other factors, make a confession involuntary. *Wyrick v. Fields*, 459 U.S. 42, 48–49 (1982) (indicating that to hold otherwise would be "an unjustifiable restriction on reasonable police questioning"). Indeed, the Supreme Court has said that it would be "unreasonable" for a suspect who consents to a polygraph examination "to assume that [he] would not be informed of the polygraph readings and asked to explain any unfavorable result." *Id.* at 47.

Consistent with *Fields*, this Court in *Davis* rejected Davis's contention that his confession was involuntary because the officer who conducted his voice stress analysis informed him that he failed the test. *Davis*, 310 Wis. 2d 583, ¶ 41. There, Davis and an officer discussed an allegation of sexual assault at Davis's home and again at 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" and left the room. *Id.* The first officer took Davis back to the interview room, where Davis confessed. *Id.* ¶ 11.

This Court determined that Davis's confession was voluntary under the totality of the circumstances. *Davis*, 310 Wis. 2d 583, ¶¶ 38–42. It found "no evidence that would give rise to any concerns regarding [Davis's] personal characteristics," noting that Davis was "43 years old" and possessed a "middle school level education." *Id.* ¶ 38.

Looking at possible police pressures, this 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.*

This 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 at any time; and after the analysis, he chose which officer he wanted to speak with. *Id.*

The *Davis* Court was not concerned that an officer briefly referenced Davis's honesty test result before Davis confessed. *Davis*, 310 Wis. 2d 583, ¶ 41. Nevertheless, as it relates to voluntariness, the Court said that "[a]n *important* inquiry continues to be whether the test result was referred to in order to elicit an incriminating statement." *Id.* ¶ 42 (emphasis added). This Court cited to *Johnson* to support that proposition. *Id.* But *Johnson* addresses the discreteness aspect of a post-polygraph confession, not voluntariness. *Johnson*, 193 Wis. 2d at 389–90. Further complicating matters, in rejecting Davis's claim that the honesty test result reference rendered his confession involuntary, this Court drew a comparison to the circumstances of *State v. Schlise*, 86 Wis. 2d 26, 40–41, 271 N.W.2d 619 (1978). *See Davis*, 310 Wis. 2d 583, ¶ 41. But like *Johnson*, *Schlise* deals exclusively with discreteness—not the voluntariness of a post-polygraph confession—so the import of the comparison is unclear. *See Schlise*, 86 Wis. 2d at 40–50.

Given the absence of supporting authority for the proposition that an *important* inquiry in assessing the *voluntariness* of a post-polygraph confession is whether police referenced the honesty test result during questioning, it is unclear whether the *Davis* Court intended for lower courts to even consider this factor during the second step of its test. But

if the answer is yes, it is still questionable whether lower courts should be elevating this factor in their totality-of-the-circumstances analysis of the voluntariness inquiry (as the court of appeals did here). This is especially true considering the Supreme Court's recognition that confronting a suspect about the result of a polygraph is *not* inherently coercive. *Fields*, 459 U.S. at 48. Further, as the above discussion in Argument Section A.1. demonstrates, aside from physical coercion, the Supreme Court has predominantly condemned police tactics designed to exhaust suspects physically and mentally. *Dassey*, 877 F.3d at 304.

Statements from this Court that pre-date *Davis* also cast doubt on what the *Davis* Court meant about the significance of references to honesty test results during police questioning. For example, this Court had said that "the confrontation of the defendant with the information against him, whatever that may be, does not amount to the utilization of overwhelming force or psychology." *Turner v. State*, 76 Wis. 2d 1, 22, 250 N.W.2d 706 (1977); *see also Phillips v. State*, 29 Wis. 2d 521, 530, 139 N.W.2d 41 (1966) ("On[e] must distinguish between motivation and a compelling overpowering mental force."). This Court had also noted that a "polygraph can hardly be considered 'a strategy of the police officers,' [when] it [is] administered to the defendant upon his request." *McAdoo v. State*, 65 Wis. 2d 596, 608, 223 N.W.2d 521 (1974).

Further, it is noteworthy that even a blatant misrepresentation of evidence against the accused is not, as a general matter, more heavily weighted than other factors in the totality-of-the-circumstances analysis. *See Triggs*, 264 Wis. 2d 861, ¶¶ 17, 20 ("[T]he trickery in this case bears little upon our analysis of whether under the totality of the circumstances the confession was involuntary.").

Perhaps this Court in *Davis* merely meant to say that a reference to an honesty test result is an *ordinary* (rather than an "important") factor to consider in assessing voluntariness, as it is in assessing discreteness. *See Davis*, 310 Wis. 2d 583, ¶ 23. That would be more consistent with how other courts around the country treat the issue. *See, e.g.*, *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); *United States v. McDevitt*, 328 F.2d 282, 284 (6th Cir. 1964) ("[I]t seems to be well established that the use of a lie detector in the process of interrogation does not render a subsequent confession involuntary or inadmissible."); *State v. Cloutier*, 110 A.3d 10, 17 (N.H. 2015) ("The use of polygraph results in questioning . . . is not inherently coercive, but merely a factor to be considered in examining the circumstances surrounding a confession."); *State v. Damron*, 151 S.W.3d 510, 518 (Tenn. 2004) ("Confronting a suspect with polygraph results ordinarily is not coercive or unreasonable."); *State v. Marini*, 638 A.2d 507, 512–13 (R.I. 1994) (collecting cases) ("[C]onfessions prompted by polygraph results are not automatically rendered involuntary. . . . Rather, the totality of the circumstances must be examined . . . .").

Notably, even where police misrepresent the honesty test result or its accuracy, courts have not elevated this factor in their totality-of-the-circumstances analysis. *See, e.g.*, *State v. Farley*, 192 W.Va. 247, 257, 452 S.E.2d 50 (1984) ("Even if we assumed that the results of the polygraph were misrepresented to the defendant, this misrepresentation standing alone would be insufficient to render the confession involuntary."); *Cloutier*, 110 A.3d at 17 (treating the officers' repeated statements that the polygraph was infallible as an ordinary factor in assessing voluntariness). And the United States Court of Appeals for the Ninth Circuit does not seem

at all bothered by references to honesty test results during police questioning. *See United States v. Haswood*, 350 F.3d 1024, 1029 (9th Cir. 2003) (citing *Fields*, 459 U.S. at 47) ("Whether Agent Kirk confronted Haswood with the polygraph results makes no difference. The use of polygraph results is a reasonable means of police questioning.").

Considering that officers in Wisconsin are permitted to use polygraphs to investigate crime, persuasive reasoning exists for why references to the test result should not be paramount in assessing voluntariness: practically speaking, it would "foreclose the effective use" of the tool. *See State v. Clifton*, 271 Or. 177, 181, 531 P.2d 256 (1975).

B. Vice's will was not overborne during his post-polygraph interview.

Again, in determining whether Vice's confession was voluntary, the ultimate question is whether his will was overborne by police tactics. *See Bustamonte*, 412 U.S. at 225–26. In answering this question, the court of appeals properly weighed many of the relevant voluntariness factors (though it failed to consider a couple). But the court erred by placing undue weight on the officers' use of Vice's polygraph result during the post-polygraph interview. It also discounted two well-established signs of voluntariness.

1. The court of appeals correctly concluded that neither Vice's personal characteristics nor most of the circumstances surrounding his post-polygraph interview are signs of involuntariness.

In assessing voluntariness, the court of appeals rightfully deemed benign Vice's personal characteristics and most of the circumstances surrounding his post-polygraph interview. (A-App. 125.)

Vice was in his mid-twenties at the time of the polygraph test, and although he had a history of taking special education classes, he possessed a high school education. (R. 124:8); *Compare State v. Jerrell C.J.*, 2005 WI 105, ¶¶ 26–27, 283 Wis. 2d 145, 699 N.W.2d 110 (indicating that the defendant's young age and low IQ were important signs of involuntariness); *Dassey*, 877 F.3d at 306, 312 (same). Although Vice said that he was nervous at the police station, the recordings for both the polygraph test and the post-polygraph interview demonstrate that he was competent and able to understand the seriousness of the events. (R. 109:48–49; 124:8.) The recordings also demonstrate that Vice gave responsive answers to the officers' questions. *Compare Lemoine*, 345 Wis. 2d 171, ¶¶ 21, 23 (indicating that Lemoine's ability to track the interview demonstrated voluntariness).

Vice claimed at the suppression hearing that he has a history of ADHD, depression, and anxiety; however, the court of appeals rightfully discounted such testimony because Vice never disclosed those facts to the officers and represented that he was in good mental and physical condition. (R. 10:2; 109:47; A-App. 125 n.5.)

While Vice had little experience with law enforcement (R. 10:3; 124:8), nothing in the record suggests that that made him more vulnerable to involuntarily confessing, *compare Jerrell C.J.*, 283 Wis. 2d 145, ¶ 29 (stating that the defendant's limited experience with law enforcement may have led him to believe that an admission to improper conduct would go unpunished); *Dassey*, 877 F.3d at 312 (noting that the inexperienced Dassey may have believed that he was free to go back to class after confessing to rape and murder). Quite the contrary, Vice demonstrated familiarity with the criminal justice system when, early in the interview, he asked whether he was going to jail or would be required to register as a sex

offender. (R. 128:7); *Compare Lemoine*, 345 Wis. 2d 171, ¶¶ 22–23 (indicating that Lemoine's familiarity with the criminal justice system made him less vulnerable to police pressures).

Regarding the circumstances of the interview, as in *Davis*, 310 Wis. 2d 583, ¶ 40, Vice's "participation was voluntary in every way": he volunteered to take the polygraph test, and he willingly rode to and from the polygraph test and interview with Officer Fisher. (R. 109:7–8; 124:11–12.) 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.)

Although Vice was not in custody, Detective Lambeseder read him his *Miranda* rights before the polygraph examination, and Vice knowingly, intelligently, and voluntarily waived those rights. (R. 10:1; 109:7, 27); *Compare (Elmer) Davis*, 384 U.S. at 741 ("[T]he fact that Davis was never effectively advised of his rights gives added weight to the other circumstances . . . which made his confessions involuntary."); *Lemoine*, 345 Wis. 2d 171, ¶ 25 (indicting that the voluntariness question would have been "much easier" if police had provided *Miranda* warnings). Vice also 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.)[6]

[6] Notably, like in *State v. Lemoine*, the officers here did not tell Vice during the interview that he was free to leave. (R. 109:20, 39); *State v. Lemoine*, 2013 WI 5, ¶ 24, 345 Wis. 2d 171, 827 N.W.2d 589. This Court in *Lemoine* concluded that that fact did not "demonstrate inappropriate police pressure" although Lemoine was *not* advised of his *Miranda* rights, as Vice was here. *Lemoine*, 345 Wis. 2d 171, ¶¶ 24, 33.

Vice was not restrained during the post-polygraph interview, nor was he told that he was under arrest. (R. 109:7; 124:11); *Compare Davis*, 310 Wis. 2d 583, ¶ 40. The interview lasted roughly 45 minutes, just like the interview in *Davis*. (R. 124:11); *Davis*, 310 Wis. 2d 583, ¶¶ 11, 39 ("The duration of questioning was not lengthy."). The officers spoke to Vice in nonconfrontational tones. (R. 109:24, 34); *Compare Lemoine*, 345 Wis. 2d 171, ¶ 24 (indicating that normal tones of voice are signs of voluntariness); *Dassey*, 877 F.3d at 313 (same). Neither officer threatened Vice. (R. 109:14, 24, 34); *Compare Dassey*, 877 F.3d at 313 (stating that the lack of police threats was an important factor in assessing voluntariness).

The officers did not make any promises to Vice, either. (R. 109:14, 34); *Compare Davis*, 310 Wis. 2d 583, ¶ 39. At most, the officers told Vice that if he cooperated, they could work with him and try to get him help. (R. 128:5, 7–9.) But encouraging cooperation in the way the officers did here does not render a confession involuntary. *See Deets*, 187 Wis. 2d at 636. The officers' suggestion that the prosecutor and the judge would look upon the case differently with Vice's cooperation does not change the analysis. (R. 128:9–10); *See Deets*, 187 Wis. 2d at 636.

Finally, while the officers repeatedly pleaded for Vice to tell the truth (R. 128:6–7, 10, 18), encouraging honesty is not a coercive police tactic, *Hintz v. State*, 125 Wis. 405, 410, 104 N.W. 110 (1905) ("[A]dvice that it would be better to tell the truth, or words of similar import, are not sufficient to vitiate a confession.").

For the above reasons, the court of appeals rightfully concluded that neither Vice's personal characteristics nor most of the circumstances surrounding his post-polygraph interview demonstrate involuntariness.

2. The court of appeals erred by giving undue weight to the officers' use of Vice's polygraph result during police questioning, and discounting two well-established signs of voluntariness.

The court of appeals gave too much weight to the officers' use of Vice's polygraph result during questioning, and it improperly discounted two well-established signs of voluntariness. This led to the incorrect conclusion that Vice's confession was involuntary.

a. Polygraph results.

The court of appeals understandably treated the officers' references to Vice's polygraph result as an "important" factor under *Davis*. (A-App. 127 n.6.) But even setting aside *Davis*'s language for the moment, the court's voluntariness analysis here is still flawed.

The court of appeals found egregious or outrageous police conduct—not subtle pressures amounting to coercion—from the following four facts: (1) police repeatedly referenced Vice's polygraph result during the interview, (2) police repeatedly told Vice that the result showed that he remembered assaulting the victim, (3) police did not respond to Vice's statement that he must have assaulted the victim because the test showed he did, and (4) police did not inform Vice that the result would be inadmissible in court. (A-App. 131.) These circumstances are nowhere near the level of misconduct that the Supreme Court has relied upon to invalidate confessions, discussed in Argument Section A.1., above. Further, these four factors are simply not as problematic as the court makes them out to be when consulting ordinary principles of voluntariness.

Regarding the first two factors—the references to the polygraph result and statements regarding its import—the

court of appeals overlooked the principle that officers are not required to "sit by and say nothing" when they are skeptical of a suspect's answers. *Deets*, 187 Wis. 2d at 636. That is why the context in which the polygraph references were made matters: most were made by Vice or by an officer in response to Vice saying he could not remember the assault. The officers were not obligated to accept Vice's claimed memory loss—they could "express dissatisfaction" with his responses. *Id.* Given that they repeatedly asked Vice to tell the truth (a non-coercive practice itself), that is obviously the route they chose. (R. 128:6–7, 10, 13, 18.) In concluding that the officers continually referenced the polygraph result and its import to "exploit [Vice's] lack of memory," the court of appeals appeared to incorrectly assume otherwise. (A-App. 129.)

Further, the court of appeals gave no credence to the principle that "merely telling somebody to tell the truth is not coercive." *Etherly v. Davis*, 619 F.3d 654, 663 (7th Cir. 2010). As the dissent in this case observed, "[t]here is no genuine dispute that Lambeseder determined Vice had failed the examination or that the officers understood the test result to indicate that Vice remembered the assault." (A-App. 142.) That matters. *See Sotelo v. Ind. State Prison*, 850 F.2d 1244, 1249 (7th Cir. 1988) (finding that no misstatements were used to obtain a confession where it was undisputed that the polygraph examiner believed the results to show deception). And even if police made a definitively false statement or misrepresentation to Vice, that is not an elevated consideration in the totality-of-the-circumstances analysis. *See Lemoine*, 345 Wis. 2d 171, ¶ 32; *Triggs*, 264 Wis. 2d 861, ¶¶ 17, 20. Notably absent from the court of appeals' opinion is any acknowledgement that police may utilize trickery in the "battle against crime." *Albrecht*, 184 Wis. 2d at 300.

Regarding the third factor that the court of appeals found troubling—that police did not respond to Vice's

comment that he must have assaulted the victim because the test said he did—the court cited no authority for the proposition that an omission by law enforcement constitutes a coercive practice. (A-App. 127 n.7.) Considering that police may "actively mislead" a suspect during an interview, *Rutledge*, 900 F.2d at 1131, an omission that misleads a suspect is even less concerning, *see United States v. Montgomery*, 555 F.3d 623, 628, 632 (7th Cir. 2009) (stating that the officers' failure to fully apprise Montgomery of the "legal landscape" was not coercive). And it bears repeating a point that the court of appeals overlooked in this case: the officers did not have to assume the truthfulness of Vice's responses in employing their interrogation tactics.

Finally, the fourth factor that the court of appeals noted—police's failure to tell Vice that his polygraph result would be inadmissible in court—is equally unpersuasive. This *omission* is particularly benign when considering that police may falsely tell a suspect that his accomplice confessed and still not coerce a confession. *See Frazier*, 394 U.S. at 739. If outright deception does not constitute coercion, surely an omission about the admissibility of evidence does not either.

But there are bigger weaknesses in the court of appeals' analysis regarding the fourth factor. It concluded that police's failure to advise Vice of a rule of trial admissibility was aggravated by the fact that he was read his *Miranda* rights. (A-App. 128.) Although "there is no direct evidence that Vice interpreted these warnings to mean that the polygraph results could be used against him at trial," the court thought that that might have occurred. (A-App. 128.) So, the court invalidated a confession to child sexual assault based in part on its speculation about inferences Vice may have silently drawn from the *Miranda* warnings. This speculation unfortunately compounded the primary speculation that Vice truly had a lack of memory about the assault. (A-App. 129.)

More noteworthy, though, is that the court used the *Miranda* factor—an important sign of *voluntariness*—against the State. That appears unprecedented.

All of this is to say that the court of appeals erred in invalidating Vice's confession even if a reference to an honesty test result *is* an important factor in assessing voluntariness.

But this Court should clarify that it is not. As discussed, the Supreme Court has said that informing a suspect that he failed a polygraph is not an inherently coercive practice—it is perfectly reasonable after the suspect consents to the test to try to clear his name. *See Fields*, 459 U.S. at 48. Even without *Fields*'s guidance, this practice is mild compared to those the Supreme Court has permitted. *See Dassey*, 877 F.3d at 304. Elevating this factor in the totality-of-the-circumstances analysis—where even blatant misrepresentations of evidence are not so elevated, *see Triggs*, 264 Wis. 2d 861, ¶¶ 17, 20—impedes a permissible investigative practice. This Court should therefore make clear that, like many other courts around the country, Wisconsin treats references to honesty test results as an ordinary factor in assessing voluntariness.

b. Discounted signs of voluntariness.

Even if this Court were to find that any of the above factors are signs of involuntariness, it is important to remember the ultimate question: did police overcome Vice's free will? In answering yes, the court of appeals discounted two signs of voluntariness that relate to the content of Vice's confession.

First, after confessing to sexually assaulting EJ, Vice resisted repeated police questioning about how he assaulted her (R. 128:22, 23, 34), how many times (R. 128:25, 32, 35), whether he assaulted other little girls (R. 128:25–26), and whether he was attracted to children (R. 128:27). This

"strongly suggests" that his will was not overborne. *Murphy*, 465 U.S. at 438. The court of appeals did not credit this principle. (A-App. 130.)

Second, Vice supplemented the officers' information on numerous occasions. *See Lyons*, 322 U.S. at 605. Unprompted, he showed how he touched EJ's vagina, explained why he was unsuccessful in licking the four-year-old's crotch, detailed how he touched her buttocks, described what EJ was wearing and her positioning on the bed, and said what he was drinking that night. (R. 128:19, 22, 27–28, 34–35.) It matters that Vice did not simply provide "yes-or-no answers" to "leading or suggestive" questions. *Fikes v. Alabama*, 352 U.S. 191, 195 (1957). The court of appeals erred in brushing aside this ordinary principle of voluntariness. (A-App. 130.)

* * * * *

In the end, this case is about a suspect with no notable vulnerabilities who willingly took a polygraph examination to try to clear his name, knowing full well that he had a right to remain silent and a right to counsel. There was no physical coercion, and the hallmark signs of improper psychological pressure are absent. Vice's confession was voluntary.

CONCLUSION

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

Dated this 5th day of October 2020.

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 10,846 words.

Dated this 5th day of October 2020.

_____
KARA L. JANSON
Assistant Attorney General

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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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KARA L. JANSON
Assistant Attorney General

Appendix
State of Wisconsin v. Adam W. Vice
No. 2018AP2220-CR

Description of Document	Pages
State of Wisconsin v. Adam W. Vice, No. 2018AP2220-CR, Court of Appeals Decision, dated May 19, 2020	101–144

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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KARA L. JANSON
Assistant Attorney General

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