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STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT II

Case No 2020AP000056-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL J. REJHOLEC,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an Order Denying Postconviction Relief Entered in Sheboygan County Circuit Court, the Honorable Rebecca Persick, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Were self-incriminating statements Mr. Rejholec made during custodial interrogation coerced and involuntary and thus obtained in violation of his right to due process?

The circuit court answered: no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is requested.

STATEMENT OF THE CASE

Daniel J. Rejholec was charged by information with repeated sexual assault of the same child, exposing intimate parts, and exposing a child to harmful materials, all based upon alleged conduct involving N.R.H., the 14-year-old daughter of his girlfriend, T.T. (25:1-2). Mr. Rejholec filed a motion to suppress incriminatory statements made to police during custodial interrogation on the night of his arrest, arguing the statements were involuntary and thus obtained in violation of his right to due process. (30:1-8). After the court denied the motion (36:1-2; 103:3; App. 105), Mr. Rejholec on April 20, 2018, pled no contest to count one, repeated sexual assault of the same child, and the other two counts were

dismissed but read in. (52:1-2; 110:6). On June 22, 2018, the court imposed a 22-year term of imprisonment consisting of 12 years of initial confinement followed by 10 years of extended supervision. (66:1-2).

Mr. Rejholec on June 22, 2018, timely filed a notice of intent to pursue postconviction relief. (67:1). On October 3, 2019, Mr. Rejholec filed a post-conviction motion seeking sentencing relief arguing the lack of availability of treatment in prison, which the sentencing court mistakenly believed would be available, was a new factor warranting resentencing. (84:1-18). Following a hearing, the court on December 19, 2019, denied Mr. Rejholec's motion. (92:1).

Mr. Rejholec on January 8, 2020, timely filed a notice of appeal from the June 22, 2018, judgment of conviction and the December 19, 2019, order.

STATEMENT OF FACTS

According to information gleaned from the criminal complaint, on January 13, 2017, Sheboygan police officers spoke with Brian H. who informed them that his daughter N.R.H. told him that her mother's boyfriend, Daniel J. Rejholec, sexually assaulted her over the previous month. (6:2-3). N.R.H. also claimed Mr. Rejholec had taken naked pictures of her with his phone and had shown her nude pictures of children or women on his computer. *Id.* Brian H. told officers he shares joint custody of

N.R.H. with N.R.H.'s mother, T.T., and is allowed only chaperoned visitation with N.R.H. as Brian H. is a registered sex offender. (6:2). On January 16, 2017, officers executed a search warrant and arrested Mr. Rejholec. (6:3).

Sheboygan police detective Eric Edson interrogated Mr. Rejholec on the night of Rejholec's arrest. The interrogation took place in an 8' x 8' booking cell with only Mr. Rejholec and Edson present. (100:15). It began at 8:40 p.m. and lasted approximately one hour and 36 minutes. (100:20; 113). The interrogation was recorded on a DVD via an overhead camera. (113). Mr. Rejholec adamantly denied engaging in any sexual conduct with N.R.H., but near the end of the interrogation made self-incriminating statements.

On March 29, 2017, Mr. Rejholec filed a motion to suppress his statements from the January 16, 2017, interrogation. Mr. Rejholec argued the statements were involuntary and thus obtained in violation of his right to due process as guaranteed by the 5th and 14th Amendments, and Wis. Const. Art. I, § 8. (30:1-8).

The suppression motion was heard on June 5, 2017. (100:1-47). The hearing consisted of Detective Edson's testimony (100:5-43), and the court viewing the DVD recording of the interrogation. (103:2; 113). The video shows the interrogation began with Mr. Rejholec fidgeting while isolated in a cramped, windowless room containing a small metal table

bolted to the floor with two attached backless metal stools. (100:15; 113). At the 3:32 mark Edson wheeled in a backed chair, and sat in it several feet from Rejholec as he began the interrogation. (100:24; 113 at 3:41).[1]

Edson testified that he conducted thousands of interviews, had training in interview techniques and was familiar with the "Reid school or model of interview." (100:6-7). Edson testified that the "techniques" or "strategies" he utilized in interrogating Mr. Rejholec included projecting empathy (100:24, 34), positioning himself physically very close to Rejholec during the second part of the interview after Rejholec had taken a bathroom break (100:24, 41), repeatedly telling Rejholec he believed he was lying (100:32-33), minimizing the situation and assigning blame to N.R.H. for "being sexually active or overt" and coming on to him (100:29), and fabricating or lying about having collected semen, DNA and electronic evidence that proved Rejholec's guilt. (100:25, 27, 37, 39).

Edson testified he was aware Mr. Rejholec had no prior arrests or police contact. (100:22). The prosecutor asked Edson "how many times [he] made reference to DNA and law enforcement's collection of DNA during this interview," and Edson responded

[1] References to the content of the interrogation DVD will be designated (113: at x:xx), with the minute and second or hour, minute and second of the reference so noted.

"just one time in the very beginning of the interview." (100:37).

Regarding DNA evidence, during the first part of the interrogation, after Edson informed Rejholec he had spoken with N.R.H., the following occurred:

> Edson: So, is there any reason why your DNA would be on her abdomen or on her vagina?
>
> Rejholec: None whatsoever.
>
> Edson: Ok. Have you ever had a DNA test done before? You said you've never been arrested before, right?
>
> Rejholec: Right.
>
> Edson: Ok. Um…if I told you that we collected what appears to be, um, male semen from her abdomen and from her vagina, would, what would you say? Would you have any insight into where that would have come from?
>
> Rejholec: Not from me.
>
> Edson: Alright. What if it did come back to you, to your, to match your DNA, how would you explain that? Is there any explanation that you can think of, of how to explain how that might happen?
>
> Rejholec: Nope. I didn't touch her, so….
>
> Edson: Ok.

(113: at 32:45-33:51).

During the second part of the interrogation, Edson told Mr. Rejholec:

> You tell me that your DNA is not going to be on her and I don't have a magic lab here in the police department right now. But we took swabs of various different sources from her body that we use a special light to find things that, that light up and that, you know, certain bodily fluids, blood, semen, urine, those kind of things all have a different kind of glow under a special kind of light, they all fluoresce at a different color. And so we examined her and then we find bodily fluid stains that, you know, stay on the body. And even after you take a shower, certain remnants of that stay on there. We are able to use a cotton swab and swab that off of there. And we've collected a couple of samples from that, as well as from clothing, as well as from bedsheets, ok? Towels, some towels, we've got some stuff from towels. Um, you know. Obviously, I'm not going to lie to you. We don't have all of those results back yet. But those are being processed right now and then very shortly we'll have the results back, ok? Um. And that stuff doesn't lie. I mean DNA evidence has been proven to be very reliable in court and it doesn't lie.

(113: at 54:52-56:01)

Approximately three minutes later, Edson told Rejholec:

> Edson: I know that you had sexual contact with her. I know you did. And I'm, I'm going to prove it through forensic evidence. I'm asking you to be honest with me.

> Rejholec: How can you know? She's lying.

(113: at 59:01-:09).

A few minutes later Edson again referenced forensic evidence:

> Rejholec: She's lied to her teacher, she lies to her counselor. It's all…
>
> Edson: Well, whether she's lied in the past or lied about that kind of stuff, I'm telling you and, and, I firmly believe and, and I guess if you want to wait 'til that [unintelligible] you know. The forensic evidence is going to prove otherwise, Dan. I know that.

(113: at 1:03:26-:45).

Edson acknowledged during the suppression hearing that there had been no forensic examination to identify or locate DNA evidence, and no inspection of electronic devices for evidence. Edson testified that lying to Mr. Rejholec about the existence of forensic evidence was an interrogation "strategy." (100:11, 27, 39).

Edson's testimony that throughout the interrogation he utilized the "interview technique" of "placing blame on the victim along the lines of suggesting it's not the perpetrator's fault," is confirmed by the DVD. (100:29).

> Edson: You seem like a really decent guy, Dan, you really do…um…I, I have a feeling that things kind of got moving pretty fast with [N.R.H.], with her attitude, she's 14, she ah

> clearly has a little bit of an attitude and I can see how things would quickly with her kind of encouragement, and, and, you know things like that and things would get out of control pretty quickly before you had a chance to be able to stop it, ok? And if that's what happened, then that's what we should be talking about right now instead of telling me that, that nothing happened and accusing her of just being a liar and making stuff up.

(113: at 47:11-:48)

> Edson: As a matter of fact, I have a feeling that she was probably, ah, you know helped encourage it and was a willing participant in this. And if that's the case that mitigates things even more, ok?

(113: at 48:02-:12)

> Edson: It makes you look foolish, Dan, ok? You made a mistake, an error in judgment, not necessarily all your fault.

(113: at 48:27-:35)

> Edson: The more evidence we get like that the less people are going to wanna want to sympathize with you and say you know what? This guy, she was hittin' on him, she put the moves on him, she was relentless, she wouldn't stop. I can see how this would happen.

(113: at 57:03-:16).

> Edson: I don't think you're a bad person because of what happened. I think part of her personality

> got into your head and, and the circumstances and such, and the time the ability for you to be alone with her and her to be alone with you, and it created a perfect situation where she was able to kind of manipulate, manipulate that to her advantage and unfortunately you got sucked into that. And you made some bad decisions.

(113: 1:03:02-:23)

> Edson: They're going to paint you to be the villain, Dan. And I don't think that's fair. I don't think you're, you're the only one responsible for what happened.

(113: at 1:05:56-1:06:02).

> Edson: You seem like a good man to me and you seem like someone who got caught up in a situation that got way out of control, way out of control, and it, it's hard for people to fault you for that because, you know, it could happen to anyone. Especially with a teenage kid. They're manipulative. Everyone knows that.

(113: at 1:17:07-:25).

Edson's testimony about telling Rejholec he believed Rejholec was lying and the consequences of a jury believing he was lying, is confirmed by the DVD. (100:32-33).

> Edson: I'm going to be straight with you, Dan. I don't believe you. (113: at 43:30)….And I'll be honest with you. When I make that leap from not believing you about the computer it's not a far leap for me to make based upon the interview that I participated with, with [N.R.H.] today

> about the other stuff that happened. (113: at 43:49-44:04)….Because I'm telling you right now, if I'm sitting here in this chair and, and I don't believe what you're saying, I think a judge and a jury is going to have even more questions. And when you get to that point you don't want a judge and a jury making judgment against you based upon the fact that they think you're lying.

(113: at 44:54-45:13).

> Edson: And what I know about computers, your story is a lie. (113: at1:04:23)….The jury is going to see it that way, too.

(113: at104:54).

> Edson: And you just keep stacking up the lies and it gets worse and worse and worse for you until at some point the jury says we're going to make an example out of this guy.

(113: at1:05:27-35).

> Edson: I, I'm trying to help you out, Dan. I know you're scared.
>
> Rejholec: I don't know what's going to happen.
>
> Edson: Yes, I know that, ok? And what I'm going to tell you is if, if you're honest with me I can be there to help you, and make sure that you're treated fairly and that you don't spend, you know, the rest of your life or a long time in prison. But I need you to be honest with me.
>
> Rejholec: But I'd still be going to prison?

> Edson: Well you're, sure, you're gonna be, you're gonna be, well I don't know if you're going to jail or if you're going to go to prison, ok? I really don't, and a lot depends on your honesty and your willingness to say I'm sorry for what happened.

(113: at 1:12:30-1:13:04).

> Edson: If they believe you, that if it was a mistake and an isolated incident, that you're not out there, you know, looking to, to victimize other people, then they're more likely to, you know, give you probation and to give you counseling and resolve it that way.

(113: at 1:13:15-:33).

> Edson: I don't think you belong in prison for a long time and you probably need some counseling, Dan. (113: at 121:09-:13)….I'm just saying, you don't seem to be the kind of person that needs to be in prison. You maybe, maybe just need to talk to somebody and work it out. (113: at 1:21:34-39)….I'm just saying, I don't think you belong in prison for a long time and I think you probably just need to talk to some people and get this squared away. And the first step in that is always just acknowledging what happened, right?
>
> Rejholec: Yes.

(113: at 122:06-:27)

Edson's testimony that he read Miranda warnings to Mr. Rejholec, which included the right to counsel and right to remain silent, is confirmed by

the DVD. (100:18-19; 113: at 4:05-5:41). The DVD shows Edson read the waiver and warnings from a form, that Edson then directed Mr. Rejholec to sign the waiver form, and that Rejholec complied with the directive. *Id.* The DVD also shows Edson later returned to the topic of Mr. Rejholec's right to counsel:

> Edson: This stuff always comes out in the end. And you're not, if, if your attorney's any good they're probably not going to let you tell your side of the story. They're not going to let you get in front of a jury so the jury is not going to hear your side of the story. They're not gonna, all they're gonna know is that you lied, ok?

(113: at 45:15-:31)

Much later in the interview, with Mr. Rejholec repeatedly denying anything improper occurred with N.R.H., Edson again returned the topic of Mr. Rejholec's right to counsel:

> Edson: We're really, you know, at an impasse now and once, once we're done talking, you and I are not going to have another chance to talk, Dan, ok? Because most likely you'll get an attorney either through a public defender or you'll hire an attorney yourself, and the first thing that attorney is going to tell you is, you're not going to talk to the police anymore. You're not going to get to a chance to tell your story. So the jury is never going to hear your side of the story. They're never going to hear that you're sorry. They are never going to be able to hear that [T.T.], ah, er, [N.R.H.], um, you know,

> manipulated whatever this and that. This is your opportunity to tell the truth and to tell your side of the story.

(113: at 1:07:45-1:08:22).

> Edson: I feel like we're, like we're moving backwards, Dan. We're moving backwards. (113: at 1:14:52-:57)….You don't have any reason to trust me other than you have my word. And I'm, I'm telling you that I am a man of my word. And I hope you believe me because I'm looking you in the eye and I'm telling you that I'm a man of my word and I'm here to help you out, to get through this. But I can't help you, Dan, if you're not being honest with me. I just have to go do my report and say we had, you know, part ways, you and I will never have a chance to talk again. And I won't be able help to advocate for you.

(113: at 1:15:24-:52).

> Rejholec: So what about having a lawyer involved or, ah, what you're saying can be used in a court?
>
> Edson: Right, yeah. Like I said, I read you your Miranda warnings and you certainly can have the right to talk to a lawyer. And what I told you before is that's fine. If you tell me you wanna talk to a lawyer, then you and I are done talking, ok? And like I said, you don't get, you know, if that's what you want, then you have to tell me that's what you want, ok? I'm just trying to get to the truth. I'm just trying to give you an opportunity to tell your side of the story before it's too late to be able to do that.

(113: at 1:16:21-:54).

> Edson: And I'm here to tell you Dan, I'm not the one that's gonna judge you. I'm not the one. I'm just here to get the facts and to support your end of this, and to tell your story. That's all I'm here for Dan.

(113: at 1:17:54-1:18:06)

> Edson: And you know right now, I'm the one that's going to be able to help you the most, I think, by telling your story, especially if you tell me that you're, you're, you know, sorry for what happened, that it was a mistake.
>
> Rejohlec: Yeah, I'm sorry.

(113: at 1:19:00-1:19:16).

> Edson: When was the first time that N.R.H. was kind of putting the moves on you? How long ago was that? [long pause]
>
> Rejholec: [unintelligible] probably the week I watched her.

(113: at 1:22:37-1:23:00).

Rejholec then told Edson N.R.H. the previous week came home from school and "started getting all, acting funny" and wanted to "rub on" his leg and "groin area," adding "she came onto me and just started doing it." (113: at 1:23:42-1:24:02). Rejholec then admitted taking naked pictures of N.R.H. and showing N.R.H. nude pictures. (113: at 1:27:25, 1:27:47).

Edson then after a long silence told Rejholec:

> Edson: I believe Dan that, ah, on more than one occasion the two of you were at least partially naked together, um, either you touching her vagina, her touching your penis you putting your tongue on her vagina or her putting your penis in her mouth. I'm trying to decide in my own head how often I think that happened…can you give me an idea whether it was just for a second or whether it was a prolonged, you know, several seconds or minutes and how many times that might have happened….
>
> Rejholec: A couple of times.

(113: at 1:28:57-1:29:54, 1:30:13)

After Edson's testimony, the court indicated it would watch the DVD and took the case under advisement. (100:44). The court convened for an oral ruling on July 21, 2017. Mr. Rejholec's attorney made no additional argument, indicating he would "just rest on the contents of [his] motion." (103:2-3). The court ruled by stating "looking at a totality of circumstances and the defendant's personal characteristics, I'm going to deny the defense motion. I don't believe the statements were coerced." (103:3) (App. 105).

Thereafter, Mr. Rejholec pled guilty to count one, repeated sexual assault of the same child, and the two remaining counts were dismissed but read in. Following sentencing, Mr. Rejholec timely filed a notice of intent to pursue postconviction relief. (67).

Mr. Rejholec litigated a postconviction motion requesting sentence modification which, after a hearing, the circuit court denied. (84:1-18; 111:1-17).

Mr. Rejholec timely filed a notice of appeal from the judgment of conviction and from the order denying his postconviction motion. (93). The only issue being raised on appeal is plea withdrawal based on a challenge to court's erroneous ruling in denying Mr. Rejholec's suppression motion.

ARGUMENT

Officer Edson's Reid-style interrogation which included lies about what evidence police possessed and misinformation and lies about the legal process and the consequences of Mr. Rejholec invoking his right to counsel rendered Rejholec's self-incriminatory statements coerced and involuntary in violation of Mr. Rejholec's right to due process.

Mr. Rejholec filed a motion to suppress statements extracted by police during custodial interrogation, arguing the statements were coerced and involuntary. After viewing the interrogation DVD the circuit court denied the motion stating "I don't believe the statements were coerced." (103:3) In so ruling, the court erred. Undisputed facts establish officer Edson obtained the statements not just by coercive Reid-style interrogation; i.e. isolating Rejholec, minimizing through victim blaming and

implying leniency, maximizing by threatening lengthy incarceration, and lying about evidence, but also and most critically by effectively counter-manding *Miranda* warnings telling Rejholec if he invoked his right to counsel the jury would never get to hear his side of the story; something which could only occur by talking to Edson who would then advocate for him. Accordingly, this court should reverse the circuit court's suppression ruling, permit Mr. Rejholec to withdraw his plea, and remand the case for further proceedings.

A. Relevant law and standard of review.

Due process dictates that admissibility of a defendant's confession obtained through custodial interrogation turns on the government proving by a preponderance of evidence the statement was voluntary and not the product of coercion. *Rogers v. Richmond*, 365 U.S. 534, 540 (1961); *State v. Moore*, 2015 WI 54, ¶ 55, 363 Wis. 2d 376, 864 N.W.2d 827.[2] A confession is "voluntary" if "it is 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.'" *State v. Lemoine*, 2013 WI 5, ¶ 17, 345 Wis. 2d 171, 827 N.W.2d 589 (citing *State v. Hoppe*, 2003 WI 43, ¶ 36, 261 Wis. 2d 294, 661 N.W.2d 407).

[2] U.S. Const. amends V & XIV; Wis. Const. art. I, § 8.

SCOTUS in *Miranda v. Arizona*, 384 U.S. 436, 448 (1966), recognized "coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of unconstitutional inquisition." The Court addressed the danger of police tactics (e.g. the Reid technique) engineered to deprive the suspect of "every psychological advantage" through isolation, minimization, projecting an "aura of confidence" of guilt, dismissing all protestations of innocence, and offering partial but imperfect "legal excuses;" all with "dogged persistence" "leaving the subject no prospect of surcease." *Id.* 384 U.S. at 449-51, 455. The Court noted that "to induce a confession out of trickery" or inducement by leveraging false "hope or fear" would render the confession involuntary; citing the Court's long history of reversing convictions in such situations. *Id.* at 453, 461-62; *e.g. Bram v. United States*, 168 U.S. 532, 542-43 (1897) (confession "must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight."). The Court also singled out "deceptive stratagems such as giving false legal advice" as a form of coercion. *Id.* at 455.

Miranda implied that the government inducing a self-incriminating statement through lies, deceit or trickery would render the statement involuntary and violate due process. *Id.* at 443, 453. However, three years later the Court ruled "[t]hese cases must be decided by the 'totality of circumstances'" and that police lying about what evidence it had (falsely telling Frazier his co-defendant confessed) "while relevant" to the totality of circumstances voluntariness inquiry,

was "insufficient" on its own "to make the otherwise voluntary confession inadmissible." *Frazier v. Cupp*, 394 U.S. 731, 739 (1969).

That remains the state of the law—"coercive or improper police conduct is a prerequisite for a finding of involuntariness" with the issue resolved by examining the "totality of circumstances." *Hoppe*, 261 Wis. 2d 294, ¶¶ 37-38. This "involves balancing of the personal characteristics of the defendant against the pressures imposed upon the defendant by law enforcement officers." *Id.* at ¶ 38. Relevant personal characteristics may include "the defendants age, education and intelligence, physical and emotional condition, and prior experience with law enforcement." *Id.* ¶ 39. This is "balanced against the police pressures and tactics used to induce the statements, such as…the general conditions under which the statements took place, any excessive …psychological pressure brought to bear on the defendant, any inducements or threats, methods or strategies used by police to compel a response, and whether the defendant was informed of the right to counsel and right against self-incrimination." *Id.*

The question of voluntariness is one of constitutional fact, which requires the reviewing court to give deference to the circuit court's findings of "historical facts," but application of the historical facts to constitutional principles—i.e. the decision as to whether a statement was voluntary—is resolved by independent appellate review. *Id.* at ¶ 34. In the case at bar the circuit court made no factual findings; the

facts derive from the interrogation DVD (113) and Edson's largely undisputed testimony, consequently this court's review is *de novo*.

B. Edson's "Reid-style" interrogation: isolation, false evidence and the psychology of inevitability.

The Court in *Miranda* expounded in detail on the coercive nature of Reid-style interrogations. *Id.* 384 U.S. at 445-67. More recently the Court noted "the need even within our own system to take care against going too far [as] 'custodial interrogation, by its very nature, isolates and pressures the individual,' and there is mounting empirical evidence that these pressures can induce a frighteningly high percentage of people to confess to crimes they never committed." *Corley v. U.S.*, 556 U.S. 303, 320-21 (2009) (citations omitted). Social science has proven why this occurs and a mountain of Innocence Project exoneration cases proves it true. *See* Saul M. Kassin, et al: *Police-Induced Confessions: Risk Factors and Recommendations*, Law Hum Behav (2010), pp. 14-23. (App. 118-127)

Here officer Edson testified he was familiar with the "Reid school or model of interview." and the DVD shows he deployed aspects of it with ruthless efficiency. (100:6-7; 113). The DVD shows Edson isolated Mr. Rejholec in a cramped window-less 8'x8' holding cell with Rejholec seated on a back-less metal stool; a room which by design engenders claustrophobic isolation to heighten a suspect's

distress and incentive to remove him or herself from the situation. *Miranda*, 384 U.S. at 449-50, 455; Kassin et al., *Id.* p. 16. (App. 120). The DVD shows Rejholec under psychological pressure or duress, as confirmed by Edson even during the interrogation observing and articulating Rejholec to appear "scared" and "nervous." (113: at 1:12:30, 1:14:50).

The technique instructs police "to display an air of confidence in the suspect's guilt" and to "maintain only an interest in confirming certain details" with the "guilt of the subject…posited as a fact." *Miranda*, 384 U.S. at 450. The DVD establishes Edson did this throughout, telling Rejholec, e.g. "I'm going to be straight with you Dan, I don't believe you…." (113: at 43:30), "I know that you had [N.R.H.] at your place and showed her images on your computer." (113: at 46:22), "I know that you had sexual contact with her. I know you did. And I'm, I'm going to prove it through forensic evidence." (113: at 59:00), "Forensic evidence is going to prove otherwise Dan, I know that." (113 at 103:45), "Your story is a lie." (113: at 1:04:26).

The technique instructs police to confront the suspect with evidence real or, as here, contrived to project inevitability whereby "cognitive and motivational forces conspire to promote their acceptance." Kassin et al. pp. 16-17. (App. 120-21). Here, Edson had no evidence beyond N.R.H.'s claims, so he fabricated the existence of incriminating DNA and computer evidence. Early in the interview Edson told Rejholec "we collected what appears to be, um, male semen from [N.R.H.'s] abdomen and from her

vagina." (113: at 32:45-33:51). Edson told Rejholec he spoke with his landlord about his computer (113: at 43:10) and they would "uncover forensic evidence based either off of your computer or DNA evidence or off of the router with the IP log of proof of what happened." (113: at 45:32-45:42). More pointedly, Edson later told Rejholec:

> …we took swabs of various different sources from her body that we use a special light to find things that, that light up and that, you know, certain bodily fluids, blood, semen, urine, those kind of things all have a different kind of glow under a special kind of light, they all fluoresce at a different color. And so we examined her and then we find bodily fluid stains that, you know, stay on the body. And even after you take a shower, certain remnants of that stay on there. We are able to use a cotton swab and swab that off of there. And we've collected a couple of samples from that, as well as from clothing, as well as from bedsheets, ok? Towels, some towels, we've got some stuff from towels. Um, you know. Obviously, I'm not going to lie to you. We don't have all of those results back yet. But those are being processed right now and then very shortly we'll have the results back, ok? Um. And that stuff doesn't lie. I mean DNA evidence has been proven to be very reliable in court and it doesn't lie.

(113: at 54:52-56:01).

Edson told Rejholec the evidence doesn't lie, but Edson acknowledged at the suppression hearing

he did. None of the forensic evidence Edson described existed. (100:11, 27, 39).

The technique instructs police to utilize minimization tools such as victim blaming or implied leniency to lead the defendant to confirm the inevitable by confessing. *Miranda*, 384 U.S. at 450-51; Kassin et al., *Id.* at pp. 18-19. (App. 122-23). Edson worked to falsely align himself with Rejholec telling him "it's going to be hard for me to help you…to make sure that you get treated fairly and that, you know, your story gets told in the proper way, ok." (113: at 53:11-53:20); "I don't think you're a bad person" (113: at 1:03:10); "I'm, I'm telling you I'm a man of my word and I hope you believe me because I'm looking you in the eye and I'm telling you that I'm a man of my word and I'm here to help you out, to get through this" (113: at 1:15:29-1:15:36); and "I'm just here to get the facts and to support your side of this, and to tell your story." (113: at 1:17:58-1:18:03).

Throughout the course of the interrogation, Edson interjected victim-blaming, telling Rejholec:

> Edson: You seem like a real decent guy, Dan. You really do. Um, I have a feeling that things kind of got moving kind of fast with, [N.R.H.], with her attitude. She's 14, she's, ah, clearly has a little bit of an attitude and I can see how things would quickly with her encouragement and, and you know, things like that would get out of control pretty quickly and before you had a chance to stop it, ok?

(113: at 47:12-47:39)

> Edson: DNA evidence has proven to be very reliable and it doesn't lie…the more evidence we get like that, the less people are going to have, are going to want to sympathize with your and say you know what, this guy, hey, she was hittin' on him, she put the moves on him, she was relentless, she wouldn't stop. I can see how this would happen.

(113: at 55:57-57:16)

> Edson: I think part of her personality got into your head and the circumstances and such…it created a perfect situation where she was able to manipulate, manipulate that to her advantage and unfortunately you got sucked into that.

(113: at 1:03:08-1:03:24)

> Edson: You seem like a good man to me. And you seem like you got caught up in a situation that got way out of control, way out of control, and it's hard for people to fault you for that because it could happen to anyone, especially with a teenage kid. They're manipulative, everyone knows that, ok.

(113: at 1:17:08-1:17:28)

Edson further leveraged minimization by promising or implying leniency, telling Rejholec "things go much easier" if a person confesses and they "get the hammer dropped on them" if they don't. (113: at 46:04, 46:14). Edson further told Rejholec:

> Edson: People who, who lied, end up getting much worse treated. It's so much better to just

> get it out in the open for your own benefit and for your case's outcome in the long run.

(113: at 53:49-54:00)

> Edson: And you just keep stacking up lies and it gets worse and worse and worse for you until at some point the jury says we're going to make an example out of this guy…All he's done is lie. He's lied to the cops, he's lied to the DA's office, he's lied, lied, lied, lied, lied….They're going to paint you to be the villain, Dan, and I don't think that's fair.

(113: at 1:05:28-1:05:48)

> Edson: I know you're scared.
>
> Rejholec: I don't know what's going to happen.
>
> Edson: Yes, I know that, ok. And what I'm going to tell you is if, if you're honest with me I can be there to help you and make sure that you're treated fairly and that you don't spend, you know, the rest of your life or a long time in prison. But I need you to be honest with me.
>
> Rejholec: I'm still going to prison?
>
> Edson: Well sure, you're gonna be, you're gonna be, well I don't know if you're going to go to jail or if you are going to go to prison, ok, I really don't. And a lot of it depends on your honesty and your willingness to say I'm sorry for what happened. People that don't show remorse…they, they wanna put'em away for a long time. If they believe you, that if it was a mistake…they're

> more likely to, you know, give you probation and to give you counseling and resolve it that way.

(113: at 1:12:28-1:13:32)

> Edson: I don't think that you belong in prison for a long time; that you probably just need some counseling, Dan…I'm just saying, you don't seem to be the kind of person that needs to be in prison. You maybe, maybe just need to talk to somebody and work this out…I don't know, it's not for me to get into your personal, you know, religious stuff, but I don't know if you believe in God or you go to church, if you need to talk to a pastor or something…I'm not here to judge that, I'm just saying I don't think you belong in prison for a long time, and I think you probably just need to talk to some people and get this squared away. And the first step in that is about just acknowledging what happened. [pause] Right?
>
> Rejholec: Yes.

(113: at 1:21:10-1:22:26)

Between these last two statements, Edson returned to the topic of Rejholec invoking his right to counsel (described in more detail below) and how it would mean his side of the story would never be told. Rejholec then abandoned what had been steadfast denial and assented to what Edson claimed happened with the conduct being N.R.H's fault.

C. Misinformation and lies about invoking the right to counsel.

Courts have singled out "deceptive stratagems such as giving false legal advice" as a particularly egregious form of coercion. *e.g. Miranda*, 384 U.S. at 455. SCOTUS has ruled trickery or deception is "relevant to the constitutional validity of a waiver" and objectionable "if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and consequences of abandoning them." *Moran v. Burbine*, 475 U.S. 412, 423-24 (1986). Courts have ruled in the context of custodial interrogation "where the police obtain a confession by misrepresenting the defendant's fundamental constitutional rights it will 'be extremely difficult for the [state]' to demonstrate voluntariness 'in any case.'" *Com. v. Baye*, 462 Mass. 246, 257, 967 N.E.2d 1120 (2012).

The interrogation DVD shows that after reading aloud a *Miranda* rights form Edson directed Rejholec to sign a waiver form, and Rejholec complied. (113: at 4:05-5:41). However, the DVD also shows Edson returned to the topic of Rejholec's rights to remain silent and to counsel, and to the consequences of Rejholec invoking those rights. After hammering a narrative of N.R.H.'s culpability as the aggressor, Edson told Rejholec that if he invoked his right to counsel, "if your attorney's any good they're probably not going to let you tell your side of the story. They're not going to let you get in front of a

jury. So the jury is not going hear your side of the story. They're not gonna; all they're gonna know is you lied, ok? (113: at 45:15-:31).

Becoming frustrated with the "impasse" from Rejholec's protestations of innocence, Edson told Rejholec:

> Once we're done talking, you and I are not going to have another chance to talk, Dan, ok? Because most likely you'll get an attorney either through a public defender or you'll hire an attorney yourself, and the first thing that attorney is going to tell you is, you're not going to talk to the police anymore. You're not going to get to a chance to tell your story. So the jury is never going to hear your side of the story. They're never going to hear that you're sorry. They are never going to be able to hear that [T.T.], ah, er, [N.R.H.], um, you know, manipulated whatever this and that. This is your opportunity to tell the truth and to tell your side of the story.

(113: at 1:07:45-1:08:22).

Edson told Rejholec "you and I will never have a chance to talk again, and I won't be able to help advocate for you." (113: at 1:15:48-:52).

When Mr. Rejholec raised the topic of invoking his right to counsel, Edson deflected and misinformed:

> Rejholec: So what about having a lawyer involved or, ah, what you're saying can be used in a court?

> Edson: Right, yeah. Like I said, I read you your Miranda warnings and you certainly can have the right to talk to a lawyer. And what I told you before is that's fine. If you tell me you wanna talk to a lawyer, then you and I are done talking, ok? And like I said, you don't get, you know, if that's what you want, then you have to tell me that's what you want, ok? I'm just trying to get to the truth. I'm just trying to give you an opportunity to tell your side of the story before it's too late to be able to do that.

(113: 1:16:21-1:16:54).

> Edson: And I'm here to tell you Dan, I'm not the one that's gonna judge you. I'm not the one. I'm just here to get the facts and to support your end of this, and to tell your story. That's all I'm here for Dan.

(113: 1:17:54-1:18:06)

> Edson: And you know right now, I'm the one that's going to be able to help you the most, I think, by telling your story, especially if you tell me that you're, you're, you know, sorry for what happened, that it was a mistake.
>
> Rejohlec: Yeah, I'm sorry.

(113: 1:19:00-1:19:16).

Edson's admonition that Rejholec would never be able to tell the jury his side of the story was a lie that undermined the purpose and substance of the *Miranda* warnings. This error alone should be sufficient for this court to rule Rejholec's subsequent

admissions involuntary. *See e.g. Hart v. Attorney Gen. of State of Fla.*, 323 F.3d 884, 894-95 (11th Cir. 2003) (police contradicted *Miranda* warnings telling suspect having a lawyer present would be a "disadvantage" and that "honesty wouldn't hurt him."); *United States v. Anderson*, 929 F.2d 96, 100 (2nd Cir. 1991) (confession coerced when police told suspect he could either have an attorney present during questioning or cooperate with government.); *Com. v. Baye*, *Id.*, 967 N.E.2d at 1125 (confession involuntary where police told defendant if he talked without a lawyer "we can just clear this up…allow[ing] them to 'work something on this case'" that would "put [the case] to rest" and "not 'jam [the defendant's] life up.'"); and *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039, 1047 (9th Cir. 1999) ("the *per se* aspect of *Miranda*" violated where police "attempted to discourage [suspect] from seeking counsel [and] implied that his situation would become much worse if he spoke with an attorney.").

D. Balancing and totality of circumstances.

As noted above, this constitutional issue is resolved by examining the totality of circumstances, balancing the defendant's individual susceptibility against the degree or magnitude of coercion the government inquisitor deploys. *Frazier v. Cupp*, 384 U.S. at 739; *Lemoine*, 345 Wis. 2d 171 at ¶ 18.

Again, SCOTUS has declared "the blood of the accused is not the only hallmark of unconstitutional inquisition." *Miranda*, 384 U.S. at 448. Coercion need not be "egregious or outrageous." *Hoppe*, 261 Wis. 2d 294, ¶ 46. The totality-of-circumstances standard does not allow for elements of coercion to be isolated and dismissed; resolution must account for the total accumulation of coercive pressure brought to bear.

Basic "subtle forms of psychological persuasion" (e.g. Reid-style interrogation) can be sufficient to render a confession involuntary for particularly vulnerable people such as the very young or persons under mental duress. *e.g. Colorado v. Connelly*, 479 U.S. 157, 164 (1986); *Hoppe*, *Id.* At the other end of the spectrum would be an educated adult with counsel, which likely would require something akin to gun-to-head persuasion to render a confession involuntary.

Mr. Rejholec as a 53-year-old unemployed and uneducated person, who Edson described in real time as being scared and nervous in the midst of Reid-style pressures, and who critically here was someone with no prior police contacts or criminal justice experience, falls somewhere in the middle. That is, Rejholec's individual characteristics and situational circumstances made him moderately susceptible to the subtler aspects of the Reid-style psychological coercion Edson deployed, and much more vulnerable or susceptible to Edson's lies about the legal process

and consequences of Rejholec invoking his right to counsel.

The Supreme Court's observations and ruling in *Miranda*, a mountain of social science data and common sense establish Reid-style interrogation as coercive. *Miranda*, 384 U.S. at 448-66; Kassin et al. at 4-21 (App. 108-125). The Reid technique is not designed to discern truth, but to elicit incriminating statements from a person already believed guilty. Kassin et al. at 6-7 (App. 110-111). Its use helps ensure Innocence Project programs thrive, but at a cost in part paid in the broken-glass streets of America at the time this brief is being written. Its penchant for inducing false confessions is among the reasons the practice is banned in other countries. *Id.* at 13-14 (App. 116-117); *Miranda*, 384 U.S. at 486-91.

Here the armed and imposing Edson isolating Mr. Rejholec in an uncomfortable claustrophobia-inducing room and physically cornering him was a form of purposeful psychological coercion structured to induce anxiety. Edson pressing Rejholec with certitude of his guilt and decisive dismissal of Rejholec's repeated protestation of innocence as lies was another form of coercion designed to induce despair, and engender a sense of hopelessness. These somewhat subtle coercive tactics alone likely will not be viewed under current due process standards as sufficient to overcome Mr. Rejholec's "free and unconstrained will" or "ability to resist" [*Hoppe*, *Id.* at ¶ 36], but they are a factor, a weight, however slight,

which falls on the coercion/involuntary side of the totality of circumstances balance fulcrum.

Case law, social science and common sense establish Edson's persistent lies about forensic DNA and computer evidence proving Rejholec guilty was coercive. This type of trickery or deception can engender a sense of futility or inevitability, producing false confessions in many DNA exoneration cases. Kassin et al. at 16-18, 28-29 (App. 119-120, 131-132). Admonishments such as Edson telling Rejholec DNA evidence that police gathered doesn't lie turns a psychological screw even tighter. While the Supreme Court has ruled this type of police lie does not alone make an "otherwise voluntary" confession inadmissible, such deception is "relevant" to the calculus and is another weight falling on the coercion/ involuntary side of the totality of circumstances balance here. *Frazier*, 394 U.S. at 739.

Edson's minimizing tactic in hammering a contrived and irrelevant narrative of the allegations being N.R.H.'s fault; that she was relentless in coming on to him and that this could happen to anyone, was yet another form of coercion. *Miranda*, 384 U.S. at 450; Kassin et al. pp. 18-19 (App. 121-122). It fit hand-in-glove with Edson's other minimization tactic of promising or implying leniency (probation and counseling) if Rejholec confessed and maximizing tactic of being made an example of and getting "hammered" at sentencing, spending a long time or the rest of his life in prison, if he did not. This brand of coercion is another more significant weight

accumulating on the coercion/involuntary side of the totality of circumstances balance. *See e.g. United States v. Lopez*, 437 F.3d 1059, 1066 (10th Cir. 2006) (misrepresentation of evidence combined with promise of six years' imprisonment rather than 60 rendered confession involuntary).

The coercive techniques outlined above are at minimum sufficient to render the constitutional voluntariness question a close call. But all of it as prelude to Edson's lies about legal process and consequences of Rejholec invoking his right to counsel removes any doubt that Rejholec's statements were coerced and involuntary. Edson telling Rejholec he was there "to help you out" (113: at 1:15:34), that "I'm the one that's going to be able to help you the most" (113: at 1:19:02), coupled with repeatedly telling Rejholec that if he invoked his right to counsel:

> They're not going to let you get in front of jury so the jury is not going to hear your side of the story. They're not gonna, all they're gonna know is that you lied, ok? (113: at 45:25-45:32),

and that:

> Because most likely you'll get an attorney either through a public defender or you'll hire an attorney yourself, and the first thing that attorney is going to tell you is, you're not going to talk to the police anymore. You're not going to get to a chance to tell your story. So the jury is never going to hear your side of the story. They're never going to hear that you're sorry. They are never going to be able to hear that

> [T.T.], ah, er, [N.R.H.], um, you know, manipulated whatever this and that. This is your opportunity to tell the truth and to tell your side of the story. (113: at 1:07:45-1:08:22),

undermine the purpose and substance of the *Miranda* warnings and invalidate the earlier rote-signed waiver.

Edson compounded the error when Rejholec broached the possibility of getting an attorney:

> Rejholec: So what about having a lawyer involved or, ah, what you're saying can be used in a court?
>
> Edson: Right, yeah. Like I said, I read you your Miranda warnings and you certainly can have the right to talk to a lawyer. And what I told you before is that's fine. If you tell me you wanna talk to a lawyer, then you and I are done talking, ok? And like I said, you don't get, you know, if that's what you want, then you have to tell me that's what you want, ok? I'm just trying to get to the truth. I'm just trying to give you an opportunity to tell your side of the story before it's too late to be able to do that.

(113: 1:16:21-:54).

> Edson: And I'm here to tell you Dan, I'm not the one that's gonna judge you. I'm not the one. I'm just here to get the facts and to support your end of this, and to tell your story. That's all I'm here for Dan.

(113: 1:17:54-1:18:06).

> Edson: And you know right now, I'm the one that's going to be able to help you the most, I think, by telling your story, especially if you tell me that you're, you're, you know, sorry for what happened, that it was a mistake.
>
> Rejohlec: Yeah, I'm sorry.

(113: 1:19:00-1:19:16).

Aside from undermining *Miranda*, Edson telling Rejholec that if he invoked his right to counsel a jury would never hear his side of the story was a lie, a misstatement of Rejholec's constitutional rights, and an egregious abuse of Rejholec's due process rights. The right to testify at trial is one of the very few decisions personal to the defendant. *Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("[t]he accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or to take an appeal."). Neither a lawyer nor anyone or anything else could have prevented Rejholec from testifying at a trial if Rejholec had been able to get his case to that point. But after his coerced confession a trial would have been pointless and did not happen.

The impact of Edson's misinformation about the consequences of Rejholec invoking his right to counsel is manifest. That Rejholec did not abandon his protestations of innocence under Reid-style coercion until after being told he would never be able to tell and a jury would never hear his side of the story except through Edson is proof Rejholec's self-incriminating statements were coerced and involuntary. The statements cannot be fairly viewed as being the product of Mr. Rejholec's "free and unconstrained will," or reflect a "deliberateness of

choice," but rather they resulted from a "conspicuously unequal confrontation in which the pressures brought to bear [by Edson] exceeded [Rejholec's] ability to resist." *Hoppe*, *Id.* at ¶ 36.

There does not appear to be any case anywhere where a confession has been found voluntary on facts remotely close to those presented here. While no two cases are exactly alike, the Massachusetts' Supreme Court's ruling in *Com. v. Baye*, 967 N.E.2d 1120 (Mass. 2012) (App. 134-144), is compelling and persuasive. In *Baye* the inquisitor officer pressed into the defendant who was seated against a wall, telling him he viewed the incident (an arson fire with deaths) as "sort of mischief, pranking and 'tomfoolery' …[and] an unplanned 'accident.'" *Id.* at 1124. (App. 135). Here, too, Rejholec was isolated and told what was alleged was not his fault.

In *Baye* the officer, like Edson here, told the defendant his involvement had been 'conclusively determined" and that he was "the only person that could help [the defendant] help himself." *Id.* The officer, like Edson here, told him if "he remained silent, it could be 'catastrophic for [him].'" *Id.* In *Baye*, like here, when the accused raised the issue of getting a lawyer in a manner short of actually invoking his right to counsel, the officer deflected; in *Baye* telling the defendant if he just talked to them "[W]e can clear this up" "work something" so that it "would not 'jam [the defendant's] life up,'" and here, with Edson telling Rejholec he would never get to tell his side of the story and get hammered at sentencing. *Id.* at 1125 (App. 135).

The Court in *Baye* ruled the officer in exaggerating the strength of the evidence, minimizing the moral and legal gravity, maximizing by implying harsh treatment if the defendant did not confess, by mischaracterizing the law and dissuading the defendant from invoking his right to counsel by misrepresenting the consequences, all rendered the defendant's confession involuntary. The facts establishing a due process violation are more compelling here because Edson's misinformation and lies about the consequences of Rejholec invoking his right to counsel were more specific and damaging, and directly contradicted not only *Miranda* and Rejholec's 5th and 14th Amendment rights, but also his personal right to testify to tell his side of the story at any trial.

Based upon the foregoing, Rejholec's self-incriminating statements were involuntary and obtained in violation of his right to due process.

E. The error in denying Mr. Rejholec's suppression motion requires that Rejholec be permitted to withdraw his plea.

It is axiomatic that confessions have more impact than most any other form of evidence. Generalized common sense at times leads people to trust confessions as they would other types of behavior that would seem to counter self-interest. Kassin et al., pp. 23-25. Once the state has obtained a false confession, going to trial would for most be a futile exercise, with a judge unlikely to allow a trial-within-a-trial to ferret out the nature of the false confession to blunt its impact. Under such

circumstance an innocent person has a strong incentive to mitigate damage and accept a plea deal.

Here, had the court properly granted the suppression motion Mr. Rejholec would have gone to trial to vindicate his professed innocence. Much of the evidence Edson lied about, particularly supposedly incriminating DNA evidence, did not exist. A trial likely would have turned on the jury's resolution of he-said/she-said testimony, of a defendant with no prior record. Mr. Rejholec, though, was effectively denied that opportunity because of his coerced confession.

CONCLUSION

The circumstances under which Mr. Rejholec's self-incriminating statements were obtained as shown on the DVD recording of his custodial interrogation establish that the statements were coerced and involuntary. The state did not and cannot meet its burden to prove the statements were freely and voluntarily given. To hold otherwise would be to, as the *Miranda* Court cautioned and feared, render the Constitution "but a 'form of words.'" *Miranda*, 384 U.S. at 444. This is not a close case.

Mr. Rejholec asks that the court rule the circuit court erred in denying Mr. Rejholec's suppression motion, vacate his conviction, and remand the case to the circuit court for further proceedings.

Dated this 8th day of June, 2020.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,061 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 8th day of June, 2020.

Signed:

JOSEPH N. EHMANN
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Madison Appellate

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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

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APPENDIX

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