STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP000319-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TIMOTHY E. DOBBS,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUES PRESENTED

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

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

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

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

STATEMENT OF CRITERIA FOR REVIEW

Review by this Court is necessary to develop and clarify the law regarding expert witness testimony under Wis. Stat. § 907.02. Both the trial court and the Court of Appeals failed to adequately exercise the gatekeeper role required under the amended statute. The trial court erroneously exercised its discretion in excluding the defense expert's testimony on the grounds that the expert would not offer an opinion on the specific facts in this case. However, the expert

was qualified and would be offering opinions on a material issue. Despite this ruling being contrary to the Court of Appeals' decision in *State v. Smith*, 2016 WI App 8, 366 Wis. 2d 613, 874 N.W.2d 610, the Court of Appeals here held that the trial court did properly exercise its discretion. This Court's guidance in developing this newer area of law in Wisconsin is therefore important and a reason for it to take this case on review pursuant to Wis. Stat. § 809.62(1r)(c). The Court of Appeals' decision also appears to be in conflict with the decision in *Smith*, thus justifying this Court's review pursuant to Wis. Stat. § 809.62(1r)(d).

Review by this Court also is necessary under Wis. Stat. § 809.62(1r)(a) to resolve a real and substantial question of federal constitutional law. Statements made by Mr. Dobbs to law enforcement were allowed into evidence in contravention of his constitutional rights. First, law enforcement detained Mr. Dobbs for almost three hours before informing him of his rights. Second, Mr. Dobbs' statements were involuntary because they were made while in pain, distraught, suicidal, and after being held in custody for hours without his medication and while operating on a lack of sleep. This Court's involvement is necessary to preserve a Defendant's constitutional rights in these situations.

STATEMENT OF THE CASE

This is a Petition for Review of the Court of Appeals decision, entered on May 9, 2019, in which the Court of Appeals affirmed the Circuit Court of Dane County, the Honorable Clayton Kawski, presiding. (P-App. 101-106.)

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

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

Mr. Dobbs timely filed a Notice of Intent to Pursue Post-Conviction Relief on June 19, 2017. (R.244.) He then timely filed a Notice of Appeal on February 12, 2018. (R.246.)

ADDITIONAL STATEMENT OF FACTS

The Court of Appeals' decision contains only the barest recitation of the facts. The following additional facts are necessary for consideration of the issues.

This case arose out of a vehicle-pedestrian accident on the morning of September 5, 2015 on the east side of Madison. (R.2:2.) According to a witness, Mr. Dobbs crossed over to the wrong side of the street, went up over the curb, and hit ACM who appeared to have gotten off a bus. (R.266:212-215.) Officer Jimmy Milton of the City of Madison Police Department testified that he responded to a call at 7:23 a.m. about the accident. (R.267:62-64.) As he approached the intersection of Highway 51 and Commercial Avenue a few blocks from the accident, he noticed a vehicle stopped at the light that appeared to match the vehicle in the call. (R.267:67.) The vehicle was stopped in traffic with apparent damage, including a flat front driver's side tire. (R.267:73.)

On approaching Mr. Dobbs, who was the driver and only person in the vehicle, Officer Milton noticed that Mr. Dobbs was trying to remove a splint that he had on his right hand and arm. (R.267:77.) Officer Milton testified that Mr.

Dobbs also had a white bandage on his hand and it was obviously injured. (R.267:79-80.) Nonetheless, he detained Mr. Dobbs and put him in handcuffs. (R.267:77.) Officer Milton told him that he was being detained and put him in his squad car. (R.267:81.) Mr. Dobbs remained in the back of the squad car initially about an hour before Officer Milton took him out to perform field sobriety tests. (R.267:115.)

Officer Milton testified that he saw no signs of impairment, no slurred speech, and nothing unusual in how Mr. Dobbs walked. (R.267:208.) He did, however, notice a can of compressed air in the driver's console. (R.267:93-94.) Officer Milton decided to have Mr. Dobbs perform field sobriety tests to determine if he was impaired. (R.267:103.) Mr. Dobbs was cooperative and agreed to do the tests. (R.267:114-15.) Based on the field sobriety tests and preliminary breath test, Officer Milton did not find that Mr. Dobbs was impaired; and despite detaining Mr. Dobbs, Officer Milton did not arrest him. (R.267:145-46.) However, he suspected that he was under the influence of an inhalant and therefore arranged to have a drug recognition officer examine Mr. Dobbs. (R.267:145-46.) He also asked Mr. Dobbs to submit to a blood test, put him back in the squad car, and transported him to Meriter Hospital. (R.267:146-47.) At the hospital Officer Milton read the "Informing the Accused" to Mr. Dobbs and he agreed to the blood draw if he could also do a breathalyzer. (R.267:148-49.)

At the hospital, Nicholas Pine, a police drug recognition expert ("DRE"), put Mr. Dobbs through further testing. (R.269:837-39.) After the testing and examination, Officer Pine concluded that Mr. Dobbs was impaired from cannabis use. (R.269:871, 879-80.) However, testing found that Mr. Dobbs had no Delta-9 THC, the active THC metabolite, in his system. (R.269:901, 917-18.) The only THC metabolite in Mr. Dobbs system was carboxy THC. (R.218, R.269:977-78.) The State's expert agreed that carboxy THC is not an active substance and has no effect on a person—it simply means that sometime in the past the person

had ingested THC. (R.269:978-80.) Officer Pine also specifically ruled out Mr. Dobbs being impaired from an inhalant as believed by Officer Milton. (R.269:980-82.)

Contrary to Officer Pine's conclusion, at trial the State presented Amy Miles from the State Crime Lab to opine that Mr. Dobbs was under the influence of inhalants. (R.269:922.) However, there were issues with her testing. The first test only showed a peak where a volatile from an inhalant might be expected, but because the lab did not do a confirmatory test until twenty-five days later, it may have dissipated and there was no evidence of a volatile on the confirmatory test. (R.269:1018-21.)

In closing argument the State focused on the inhalant as causing Mr. Dobbs' impairment and the accident. (R.270:1275, 1287.) The jury returned a guilty verdict on the homicide by intoxicated use of a vehicle, but not on the charge of hit and run. (R.225.)

Pre-Trial Motions

Prior to trial, the court heard a number of motions, including a motion to suppress and *Daubert* motions of both State and Defense experts. At issue on this appeal are the court's rulings regarding the suppression motion and excluding Defense Expert Dr. Lawrence White.

Motion to Suppress

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

evidentiary hearings on June 17 and June 21, 2016. (R.253 and 254.)

As noted above, at approximately 7:30 a.m. Officer Milton observed what he thought was the accident vehicle a few blocks away from the accident scene and he positioned his squad car to prevent Mr. Dobbs from driving away. (R.253:8.) He then approached the driver's side door and verbally instructed the driver, Mr. Dobbs, to show his hands and exit the vehicle. (R.253:8-9, 39.) He then immediately placed him in handcuffs and put him in the rear seat of his squad car. (R.253:9, 39.)

Officer Milton told Timothy Dobbs that he was being detained for an accident investigation, but did not tell him that he was under arrest. (R.253:11.) Officer Milton questioned Mr. Dobbs about some scratches and bruises on his face and also noted his arm was in a sling. (R.253:11-12.) Mr. Dobbs had a gauze bandage on his hand, but Officer Milton was able to successfully handcuff him. (R.253:40) Mr. Dobbs was wearing shorts, shoes, but no shirt. (R.253:13.) After detaining him, Officer Milton asked Dobbs questions about his identification as well as information about from where he was coming and to where he was going. (R.253:13.) Mr. Dobbs told Officer Milton he was adjusting the sling on his arm, lost control of the vehicle and hit the curb, causing damage to his vehicle. (R.253:14.) At some point during this initial questioning, Officer Milton informed Mr. Dobbs that he was suspected of striking a person, but did not tell him that the person had been killed or even injured. (R.253:14, 41.) Mr. Dobbs asked Officer Miller about the person's condition, but Officer Milton withheld that information. (R.253:66.) During this initial stop, Officer Milton noted an air duster canister in the front console area of Dobbs' vehicle, two dents in the hood of the truck, and a tree branch stuck near the hood. (R.253:16.)

Officer Milton questioned Mr. Dobbs without a *Miranda* warning while he was handcuffed and locked in the

rear of the squad vehicle. (R.253:43-44.) Mr. Dobbs answered questions, including questions relating to the fact that he suffers from anxiety and depression, that he takes medication, but he had not had any of his medication that morning including his pain killers for his hand injury. (R.253:45-46.) Mr. Dobbs answered questions about prior damage to his vehicle, his depression and anxiety, his broken hand, and that he remembered hitting the curb but did not remember anything else. (R.51.) After Officer Miller informed him that a pedestrian was involved, Mr. Dobbs continually asked for more information about the situation and whether anyone had actually been injured. (Id.) Mr. Dobbs also said shortly before 8:25 a.m. that the pain in his hand was killing him and he did not take his pain medication that morning. (Id.)

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

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

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

While still sitting in the squad vehicle at Meriter Hospital, Officer Milton read Dobbs the *Miranda* warnings and asked him if he would be willing to answer questions. (R.253:28) That was the first time Officer Milton informed Mr. Dobbs of his rights. (R.253:54). Officer Milton testified that he told Mr. Dobbs that he was under arrest, that the pedestrian had died, and that he wanted to conduct an interview with him. (R.253:55-56.) Officer Milton informed Mr. Dobbs that the interview was going to be recorded, and he was being arrested for homicide for negligent operation of a motor vehicle because the pedestrian that had been struck was deceased. (R.253:29, 56.) Mr. Dobbs was emotional and began to cry. He became so hysterical that several minutes passed before Officer Milton could continue with questioning. (R.253:29-30.) Officer Milton testified that he had specifically withheld the information that the pedestrian had died because he did not want to create additional hardship for Mr. Dobbs emotionally and wanted to conduct his investigation without Mr. Dobbs' emotions interfering.

(R.253:66-67.) Officer Milton was afraid Mr. Dobbs' emotional state would detrimentally impact the investigation if he learned of the death of the pedestrian. (R.253:67.)

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

After Officer Milton informed Mr. Dobbs that the person he hit died, Mr. Dobbs began to cry and express his distress. (R.52.) Officer Milton also informed him that the charges would include homicide by negligent use of a vehicle. (Id.) Officer Milton said that he did not the know details from the scene but affirmed Mr. Dobbs was under arrest, and his statement was going to be recorded. (Id.) Mr. Dobbs can be heard crying. (Id.) After Officer Milton read the *Miranda* rights to Mr. Dobbs, he had to ask Mr. Dobbs to respond verbally, as he continued to cry. (Id.) Officer Milton then proceeded to question Mr. Dobbs for over an hour. During the interrogation, Mr. Dobbs continued to cry and often was unable to answer questions. (Id.) He also told Officer Miller that he had not slept in about forty hours. (Id.)

Officer Milton testified that Mr. Dobbs was so distraught about what had happened that a turning point came when he questioned Mr. Dobbs about being untruthful. It was then that Mr. Dobbs changed his answer to Officer Milton's question about huffing while driving. (R.253:58-59.) Mr.

Dobbs was so upset that he had killed someone that he told the officer he did not care what happened to him. (R.253:61.)

After questioning Mr. Dobbs, Officer Milton transported him to the City County Building garage area so Officer Fleischauer could continue the questioning and ask Mr. Dobbs to sign various consent forms. (R.253:33.) Officer Fleischauer talked with Mr. Dobbs in the basement of the City County Building at about 1:30 p.m.—six hours after the accident. (R.254:156-57.) This conversation was not audio recorded. Although Officer Fleischauer testified he thought it was being recorded, he did not know why it did not. (R.254:163-64.) Mr. Dobbs told Officer Fleischauer he was willing to answer a "couple more questions." (R.254:157.) Mr. Dobbs was not handcuffed but Officer Fleischauer testified that he was very sad and cried. (R.254:157-158.) Answering questions, Mr. Dobbs said he had been huffing Dust-Off spray as pain management in addition to using an antidepressant and prescribed pain medication. (R.254:158.) Mr. Dobbs again stated his hand was infected, and the officer observed it was visibly swollen and reddened. (R.254:161-62.) Officer Fleischauer had already been informed by Officer Milton that Mr. Dobbs admitted to huffing at the time of the crash. (R.254:161.) Mr. Dobbs told Officer Fleischauer he had gotten a good deal on Dust-Off at Menards and opened one of the canisters while driving home, inhaled the substance and lost consciousness. (R.254:159) Mr. Dobbs also told Officer Fleischauer he wished he could trade places with the pedestrian who had been hit and wanted to cooperate fully. (R.254:160-61.) Officer Fleischauer confirmed Mr. Dobbs was on antidepressants as well. (R.254:162.)

Following the questioning by Officer Fleischauer, Officer Milton transported Mr. Dobbs to the Public Safety Building to book him and process him into the jail. (R.253:36, 62.) The jail, however, would not accept him due to concerns about his medical condition. (R.253:62-63.) The

jail asked that he be taken back to the hospital for medical clearance. (R.253:63.)

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

After being admitted to St. Mary's, Mr. Dobbs asked if could call his father to take care of his pets. (R.253:101.) After dialing, Officer VanHove remained in the room while Mr. Dobbs spoke with his father. (R.253:102-103.) Officer VanHove heard him tell his father that he had just killed a 51 year old man near Walmart. (R.253:102.) Mr. Dobbs told his father he went to Menards to buy Dust-Off, was driving home, and that he thought he hit a tree. (R.253:102.) Mr. Dobbs also told his father that he took a puff of Dust-Off. (R.253:102.) Mr. Dobbs told Officer VanHove that he understood his rights, wanted to be honest, and deserved any punishment that was given. (R.253:102-103.) Mr. Dobbs also told him he had a death wish, wanted to die, and was refusing medical treatment. (R.253:105.) He again said he would trade places with the deceased pedestrian if he could. (R.253:105.) Officer VanHove spoke with Mr. Dobbs' father on the phone, and his father was concerned that Mr. Dobbs was suicidal and needed his prescription medication. (R.253:107-108.) Eventually, he agreed to receive medical

treatment for his injuries after Sgt. Quast spoke with him and told him that if he refused treatment he would likely be transported to the Winnebago facility to be given antibiotics before being brought back to the Dane County Jail. (R.253:109-110.)

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

The next day, September 6, 2015 at about 7 a.m., Officer Baldukas went to St. Mary's Hospital to take a copy of the Informing the Accused Form to Mr. Dobbs. (R.253:118.) He identified himself as a police officer there to deliver paperwork. Mr. Dobbs responded by stating that he blew .00. (R.253:119-120.) He also said he took a puff of duster. (R.253:120.) Officer Baldukas reminded him he was under arrest and had rights associated with that. (R.253:120.) Mr. Dobbs did not remember the paperwork that he previously reviewed, so Officer Baldukas went over it briefly with him again. (R.253:122.)

Officer Baehmann was assigned to guard Mr. Dobbs on September 6, 2015 at St. Mary's. (R.253:124-25). Mr. Dobbs was handcuffed to the hospital bed and Officer Baehmann remembers cuffing and uncuffing him several times for various reasons. (R.253:126.) Mr. Dobbs started to cry and asked whether the pedestrian he hit had a family.

(R.253:127.) He said he took one puff to relieve the pain in his hand and he did not remember anything; he did not remember hitting anyone. (R.253:127.) Mr. Dobbs told Officer Baehmann he must have passed out. (R.253:128.)

After additional briefing following the evidentiary hearing on the motion to suppress, the Circuit Court issued a written decision on July 31, 2016 denying Defendant's motion. (R.67, P-App. 107-12.) The decision was issued by The Honorable David T. Flanagan on the day that he retired. The Honorable Clayton Kawski presided over subsequent hearings and the trial. On September 9, 2016, the Defense filed before Judge Kawski a motion for reconsideration among other grounds that the court did not address all issues, did not apply the law to its factual findings, and after initially indicating that the motions should be decided by the judge who would preside over trial the court issued a truncated briefing schedule and rushed the decision. (R.68.) The court orally denied this motion. (R.256:3-8, P-App. 113-19.)

Dr. Lawrence White

Given the various statements made by Mr. Dobbs while in custody and the circumstances surrounding them, the Defense named Dr. White to testify about false confessions and the situations in which they are likely to arise. (R.80:1.) The State filed a motion to exclude the testimony. (R.85.) The State did, however, stipulate to his qualifications and agreed that he is an expert regarding false confessions and can talk generally about the area. (R.258:12.)

At a hearing on February 7, 2017, Dr. White testified and summarized his false confession research. (R.258:15.) His Curriculum Vitae was marked as an exhibit (R.93), as well as an article that he co-authored on false confessions: "An Empirical Basis for the Admission of Expert Testimony on False Confession." (R.94.) Specifically, he has conducted research regarding police interrogations and confessions, taught a seminar entitled "The Psychology of Interrogation

and Confessions," published approximately twenty research reports and book chapters, and consulted on forty to forty-five criminal cases involving contested confessions, including about ten in Wisconsin. (R.258:16-17, 32.)

Among other areas, Dr. White would offer opinions on how false confessions occur more often with certain types of interrogations and that they even occur when law enforcement act in good faith believing the suspect is guilty and applying certain interrogation techniques. (R.258:19-22.) Importantly relevant to this case is that when the police use powerful psychological techniques, although they can induce the guilty to confess, they also can induce the innocent to give false confessions. (R.258:22.) Some of these techniques are isolating the suspect, cutting him or her off from family members, confronting the suspect with evidence of guilt, and lengthy and persistent questioning. (R.258:22.) He also referenced empirical studies regarding what potential jurors know about the frequency of false confessions. (R.258:25-26.)

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

ARGUMENT

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

The admissibility of expert testimony in Wisconsin is governed by Wis. Stat. § 907.02. *See Seifert v. Balink*, 2017 WI 2, ¶ 50, 372 Wis. 2d 525, 888 N.W.2d 816; *State v. Giese*, 2014 WI App 92, ¶17, 356 Wis. 2d 796, 854 N.W.2d 687. The legislature amended § 907.02 in 2011 to codify the standard from *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993) and subsequent cases. *Seifert*, at ¶ 51. Under amended § 907.02 and *Daubert*, the trial court serves as a gatekeeper. "This gatekeeper obligation 'assign[s] to the trial court the task of ensuring that a scientific expert is qualified' and that his or her 'testimony both rests on a reliable foundation and is relevant to the task at hand." *Id*. at ¶ 57, *quoting Daubert*, 509 U.S. at 597. This gate-keeper role is a change from the prior standard looking only at whether "the witness is qualified to testify and the testimony would help the trier of fact understand the evidence or determine a fact at issue." *Giese*, 2014 WI App 92, at ¶17, quoting *State v. Kandutsch*, 2011 WI 78, ¶26, 336 Wis. 2d 478, 799 N.W.2d 865.

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

In excluding Dr. White, the court relied upon *Bayer v. Dobbins*, 2016 WI App 65, 371 Wis. 2d 428, 885 N.W.2d 173

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

The standard is whether Dr. White would assist the jury, not whether Dr. White had specific opinions based on the specific facts of this case. "Under this [*Daubert*] test, the court's function 'is to ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues.'" *Smith*, 2016 WI App 8, at ¶5, *quoting Giese*, at ¶18. Dr. White's opinions and research were highly relevant to a material issue. Mr. Dobbs' alleged confessions were a primary, if not the primary, issue of fact in the case. Dr. White's research and elucidation of issues and circumstances surrounding false confessions would have given the jury important information on which to determine for itself whether Mr. Dobbs' confessions were truthful or false. By excluding this evidence, the Defense was deprived of a major scientific basis for arguing to the jury that it could find that Mr. Dobbs' statements were not truthful.

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

leeway" in determining admissibility consistent with the goal of ensuring reliability and relevancy. *Id.* at ¶7.

Therefore, the trial court also erroneously exercised its discretion because its decision is not in accordance with accepted legal standards. *See Smith*, 2016 WI App 8, at ¶4. As noted above, Dr. White's opinions were relevant to the material issue of the truthfulness of Mr. Dobbs' statements. "The accuracy of the facts upon which the expert relies and the ultimate determinations of credibility and accuracy are for the jury, not the court." *Giese*, 2014 WI App 92, ¶23 (citation omitted). The trial court here usurped the jury's role by preventing it from hearing Dr. White's testimony.

The Court of Appeals distinguished *Smith* on the grounds that Appellant's argument overlooked the trial court's discretion. (P-App. 103.) The Court of Appeals stated that the trial court could within its discretion exclude the testimony, but also could have allowed the testimony. (Id.) Yet, this is neither what the Court in *Smith* held, nor is it consistent with the Legislature's intent in amending Wis. Stat. § 907.02. Under the newer standard, the trial court is to serve as a gatekeeper. *See Seifert*, at ¶ 57. Yet, under the Court of Appeals' reasoning here, the gate freely swings to and fro without any real set standards other than judicial discretion. The Court of Appeals in *Smith* held that an expert need not offer opinions directly on the facts of the case as long as they were relevant to the material issue of the case. Yet here, the Court of Appeals held that it is within a trial judge's discretion to exclude such testimony.

The Court of Appeals decision at the very least guts the significance of the decision in *Smith* and more importantly appears in conflict with the decision. Thus, it is important for this Court to take this case under review to clarify the standards necessary for admission of expert testimony and to resolve the apparent conflict between the Court of Appeals decision here with that of *Smith*.

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

The determination of whether a person is in custody is based on whether a reasonable person in that position would have considered himself to be in custody. *State v. Swanson*, 164 Wis. 2d 437, 446-7, 475 N.W.2d 148 (1991), *abrogated on other grounds by State v. Sykes*, 279 Wis. 2d 742, 695 N.W.2d 277 (2005). It is a totality of the circumstances test, which takes into account the factors that bear on the person's state of mind. A court should consider what a neutral, reasonable person would have felt—neither someone overly apprehensive nor someone insensitive to the circumstances of the situation. *State v. Morgan*, 2002 WI App 124, 254 Wis. 2d 602, 648 N.W.2d 23. The court also should consider whether the person was free to leave, and the place and length of the interrogation. *State v. Lonkoski*, 2013 WI 30, ¶6, 828 N.W.2d 552.

The first issue to be determined is at what point the detention was converted to a seizure requiring probable cause and whether such probable cause existed at that point. The predicate permitting seizures upon suspicion short of probable cause is that law enforcement interests warrant a limited intrusion on the personal security of the suspect. *See, e.g., United States v. Brignoni-Ponce*, 422 U.S. 873, 881–82 (1975); *Adams v. Williams*, 407 U.S. 143, 145-46 (1972). It is the State's burden to prove that the seizure was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure. *Florida v. Royer*, 460 U.S. 491, 500 (1983).

The length of time and the holding of Mr. Dobbs in the back of a squad car while handcuffed converted the detention into a seizure requiring probable cause. However, at that point probable cause did not exist. The trial court erred in finding that there was probable cause (R.67:4, P-App. 110.) because although there was evidence of an accident, there

was no evidence that it was felony traffic crime as cited by the trial court. Moreover, despite finding probable cause, the trial court went on to conclude that Mr. Dobbs was not in custody for purposes of requiring a *Miranda* warning. (R.67:4, P-App. 110.) Thus, the continuing seizure and the statements and evidence obtained as a result should have been suppressed. Even if probable cause existed, however, the statements should have been suppressed.

Mr. Dobbs was contacted by police at approximately 7:30 a.m. (R.253:6.) He was immediately ordered out of the vehicle, handcuffed, and placed in a locked squad car. (R.253:9.) He remained handcuffed in the squad vehicle for almost an hour with Officer Miller periodically questioning him. (R.253:21.) After close to an hour, he was removed from the squad and told to perform field sobriety tests. (R.253:21.) At the close of field sobriety testing, Officer Miller again put Mr. Dobbs in the back of squad vehicle and transported him to the hospital. (R.253:23-24.)

At the hospital, a legal blood draw was performed and then he was asked to perform additional tests. During this second set of tests is the first time a law enforcement officer informed Mr. Dobbs of his rights nearly three hours after he was first detained. (R.253:84.) Nonetheless, he already had provided significant information. When Officer Miller first handcuffed Mr. Dobbs, he did not tell him that he was "arrested." Instead he told him was "detained." Furthermore, he was either in a locked squad car or in the presence of a uniformed and armed officer at all times. He was transported from the stop to the hospital and was in contact with multiple officers. He had been told he was suspected of being involved in an accident where he hit a pedestrian with his truck. Furthermore, Mr. Dobbs suffered from impairing mental and physical conditions of which the officers were well aware. He informed officers consistently of the pain and infection in his hand, which was visibly affected. Mr. Dobbs also informed officers he suffered from depression and anxiety and that he had not had any medication for either pain in his

hand or his depression and anxiety that day. He was in distress, partially unclothed, and questioned by officers throughout the day.

A reasonable person in Mr. Dobbs' circumstances would have felt his freedom was restrained to the degree normally associated with formal custody prior to any law enforcement officer giving the *Miranda* warning. Saying the word "detained" instead of the word "arrested" would not signify any difference to a reasonable lay person, given the act of being handcuffed and placed in a squad vehicle for a long period of time.

The Court of Appeals held that Mr. Dobbs was only temporarily detained for investigative purposes, relying on *State v. Blatterman*, 2015 WI 46, 362 Wis. 2d 138, 864 N.W.2d 26. (P-App. 104.) The Court of Appeals, however, did not cite the standards set forth by this Court in *Blatterman*, but rather only said that the facts were similar and therefore Mr. Dobbs also was not in custody for *Miranda* purposes. A court must engage in a totality of the circumstances test as to whether the length of the stop was reasonable. "In determining whether the length of a stop is permissible, it is 'appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the [person].'" *Blatterman*, 2015 WI 46, ¶ 21, *quoting United States v. Sharpe*, 470 U.S. 675, 686, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985). Applying that test in *Blatterman*, this Court found the length of the investigative stop reasonable. Here, however, the stop went well beyond the necessity and law enforcement detained Mr. Dobbs for almost three hours before first informing him of his *Miranda* rights. All that time, he was held in the officer's car or under the control of law enforcement.

Even if Mr. Dobbs was not in custody for purposes of *Miranda* warnings being required, his statements before and after the *Miranda* warnings were not voluntary and should be

suppressed. Without any discussion of the case law or application of the law to the facts, the trial court simply concluded that the statements were all voluntary and not the subject of coercion. (R.67:6, P-App. 112.) The trial court erred.

If a defendant's statements are involuntary, it is a violation of due process and suppression is required. *State v. McManus*, 152 Wis. 2d 113, 130, 447 N.W.2d 654 (1989). In determining whether statements are voluntary, the Court looks at the totality of the circumstances. *State v. Clappes*, 136 Wis. 2d 222, 236, 401 N.W.2d 759 (1987). The test is a balancing test of the personal characteristics of the defendant versus the pressures imposed by law enforcement officers. *Id*.; *See also State v. Hoppe*, 2003 WI 43, ¶38, 261 Wis. 2d 294, 661 N.W. 407 (2003). When the police conduct includes more subtle forms of persuasion, the mental condition of the subject becomes a more significant factor. *Id.*; *See also Colorado v. Connelly*, 479 U.S. 157, 164 (1986). Ultimately, the question is whether there was improper or coercive police conduct which produced the statements. *Hoppe*, 2003 WI 43, at ¶37. On the defendant's personal characteristics side of the scale, relevant characteristics include age, education, physical and emotional condition and prior experience with law enforcement. On the law enforcement pressure side, factors include the length of questioning, the general conditions under which statements took place, physical or psychological pressure, methods or strategies used by police to compel a response, and whether the defendant was informed of his right to counsel and right against self-incrimination. *Id.* at ¶39.

Mr. Dobbs was suffering from both mental health conditions and pain from physical injuries. He had a serious infection in his hand, such that the jail would not admit him and which ultimately required surgery the next day. He suffered from depression and anxiety. He had not taken his medications for any of these conditions. He also was partially unclothed. He was distraught that he had hit and injured a

pedestrian. In fact, Officer Milton testified he withheld information about the death of the pedestrian because he was concerned about what a "detrimental effect" that would have on him. Indeed, when he informed him of the death, Mr. Dobbs broke down emotionally, crying and in obvious distress. After provoking this emotional breakdown, Officer Milton then read Mr. Dobbs his *Miranda* rights and questioned him. Mr. Dobbs became suicidal, indicated he wanted to die, and did not care what happened to him. When Officer Milton questioned his truthfulness, Mr. Dobbs simply went along with what the Officer wanted him to say. Thus, although Officer Milton informed Mr. Dobbs of his *Miranda* rights, the statements were not voluntary under these circumstances. In the equation of whether a person has voluntarily provided a statement, being informed of his rights is only one factor—it is not the only factor.

The Court of Appeals rejected the involuntariness argument by finding that there was no evidence of police coercion or improper conduct. (P-App. 105-106.) In ruling such, the Court of Appeals diminishes Mr. Dobbs' condition and misstates the standard used in determining the voluntariness of a confession. Determining voluntariness is a totality of the circumstances review that requires balancing the defendant's characteristics with the police actions. *See Clappes*, 136 Wis. 2d at 236; *Hoppe*, 2003 WI 43, at ¶38. The Court of Appeals here, however, only looked narrowly at the police conduct and missed the significance of Mr. Dobbs' mental and physical conditions.

Mr. Dobbs had been in police presence since approximately 7:30 a.m. He was informed of the death and questioned at approximately 12:30 p.m. Although he was cooperative with all law enforcement directions and requests throughout his contact, being cooperative does not mean the statements he made were voluntary. He had not had any food or any medication during that time. He was suffering physically from a serious infection in his hand and was in pain from the infection and recent surgery. He was suffering

from depression and anxiety, and expressed thoughts of suicide. He was informed of the death of the pedestrian and questioned in such a way to break him down emotionally. There are no indicia that his statements made during this time are reliable. They were involuntary under the circumstances and should have been suppressed. *See Hoppe*, 2003 WI 43, at ¶ 60.

Therefore, it is important for this Court to take this case under review to preserve Mr. Dobbs', and others similarly situated, constitutional rights involving statements made to law enforcement.

CONCLUSION

For the above reasons, Petitioner requests that this Court grant this Petition for Review.

Dated this 29th day of May, 2019.

Respectfully submitted,

_____

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CERTIFICATION AS TO FORM/LENGTH

I certify that this petition meets the form and length requirements of Rules 809.19(8)(b) and 809.62(4) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the petition is 7230 words.

Dated this 29th day of May, 2019.

Signed:

_____

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

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

Dated this 29th day of May, 2019.

Signed:

_____

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APPENDIX

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