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Supreme Court No. 95941-2
(COA No. 75992-2-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

State of Washington,

Respondent,

v.

Andre Jean Ash,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Andre Jean Ash, petitioner here and appellant below, asks this Court to accept review of a Court of Appeals opinion that concluded he voluntarily “confessed” to assaulting his son, A.A. A copy of the Court of Appeals’ opinion and its April 27, 2018, order denying Mr. Ash’s motion to reconsider are attached to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. In *State v. Broadaway*, 133 Wn.2d 118, 942 P.3d 363 (1997), this Court held that when a court assesses the voluntariness of a confession, it *must* consider the interrogator’s misrepresentations or promises to the defendant and determine whether a causal relationship exists between these misrepresentations and the defendant’s confession. Mr. Ash’s interrogator repeatedly made numerous misrepresentations throughout the interrogation, but the Court of Appeals’ opinion largely fails to consider the numerous misrepresentations made throughout Mr. Ash’s interrogation and its causal relationship to Mr. Ash’s “confession.”

Does the Court of Appeals’ opinion conflict with *Broadaway*?
RAP 13.4(b)(1).

2. When police officers work together, the “fellow officer rule” assumes the officers share each other’s knowledge. One of the officers

behind Mr. Ash's interrogation misrepresented A.A.'s condition to the interrogating officer. The interrogator used this misrepresentation throughout Mr. Ash's interrogation, and this misrepresentation was critical in inducing Mr. Ash's "confession." However, the Court of Appeals deemed this lie insignificant because the interrogating officer was unaware of the other officer's misrepresentation.

When the government orchestrates a lie to induce a confession, must the Court consider the ruse's effect even when the interrogating officer is unaware of the government's ruse? RAP 13.4(b)(3).

3. In *State v. Eserjose*, 171 Wn.2d 907, 259 P.3d 172 (2011), this Court reaffirmed that appellate courts assess conclusions of law de novo. Here, the Court of Appeals' opinion evinces it only evaluated whether substantial evidence supported the trial court's findings. Does the Court of Appeals' opinion conflict with *Eserjose*? RAP 13.4(b)(1).

4. Both our State and Federal constitutions protect individuals from coercive police tactics. The highest court in New York ruled that deceptive interrogation methods that appeal to a parent's instincts to help their injured child are inherently coercive because such methods would prompt any caring parent to provide whatever information could be helpful, even if the information was potentially incriminating. Here, Mr. Ash's interrogator repeatedly told him doctors needed information to treat his

son, but this was untrue. As the highest court in New York ruled, should this Court also rule that it is inherently coercive for interrogators to use deceptive methods that appeal to a parent's instincts to help their child? RAP 13.4(b)(3).

5. In *State v. Rupe*, 101 Wn.2d 664, 679, 683 P.2d 571 (1984), this Court recognized that a defendant's weakened physical or emotional state can result in a false confession. Mr. Ash received a third less sleep than he normally obtains the night before the interrogation, and he also became distraught during the interrogation. The Court of Appeals concluded that because Mr. Ash's interrogator deemed his mental health as "suitable" to undergo a polygraph examination, his mental health was also "suitable" to deliver a free confession. Consistent with both the federal and state constitutions, does it follow that a person's suitability to undergo a polygraph examination renders him suitable to deliver a free confession? RAP 13.4(b)(3).

6. Mr. Ash's interrogator used the Reid Technique throughout Mr. Ash's interrogation. This technique is notorious for resulting in false convictions in notable cases. Since the time of Mr. Ash's "confession," the company that trains police officers in this technique stopped training police officers in this technique.

Should this Court accept review to assess how a court should assess these methods to evaluate the voluntariness of a confession? RAP 13.4(b)(3), RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

A.A.'s injuries.

In February of 2015, A.A. was born to parents Andre Ash and Tambra Shean. 2RP 186; Ex. 6, pg. 12. Ms. Shean cared for the baby during the day and Mr. Ash cared for his son in the evenings while Ms. Shean slept. Ex. 6, pg. 17.

On March 14, 2015, Mr. Ash took his son to the doctor after A.A.'s maternal grandmother noticed a bump on A.A.'s head. 2RP 166; Ex. 6, pg. 6. Doctors noted that A.A. had a large "goose egg" on his left forehead but no other bruising. Ex. 7, pg. 3. However, A.A. had several rib fractures at different stages of healing, a skull fracture, and a leg fracture. Ex. 3, pg. 10, Ex. 7, pg. 5. The doctors believed A.A.'s head trauma and rib fractures were consistent with repeated abusive injury. Ex. 7, pgs. 5-6.

Both parents categorically denied abusing their son. Ex. 3, pg. 3; 2RP 53, 57. However, the police quickly "bumped" Mr. Ash to the top of their suspect list because they believed he did not display much emotion upon hearing the news of his son's injuries. 2RP 53-54, 57. Mr. Ash is

“very quiet and does not say much,” and Mr. Ash’s father, Robert Ash, describes his son as a “reserved person.” Ex. 2, pgs. 6-7; 3RP 179-80.

The morning after A.A.’s hospital, Detective Nicole Stone and Sergeant Cheol Kang arrived at Mr. Ash’s home and asked if he would take a polygraph exam. 2RP 7, 3RP 170, 192; Ex. 2, pg. 13. Mr. Ash agreed, believing the exam would clear his name and help him get his son back. 3RP 196. However, Mr. Ash never agreed to be subjected to a *police* interview, and did not know a police detective would conduct the “exam.” 3RP 197, 205.

Detective Stone spoke to Detective Karen Kowalchuk, Mr. Ash's would-be "polygraph examiner," before the exam took place. 3RP 108, 110. Detective Stone initially told Detective Kawolchuk that A.A. had Shaken Baby Syndrome, as doctors suspected he had this condition. But Detective Stone learned before the interrogation that A.A. actually did not have Shaken Baby Syndrome and was expected to make a full recovery; however, she did not correct Detective Kawolchuk’s understanding of A.A.’s condition. 2RP 98-99, 3RP 98, 110, 133, 151-52; Exs. 9 & 10. Detective Kawolchuk later delivered this false information to Mr. Ash during the interrogation described below. Ex.3, pg. 11; Ex. 6, pgs. 39, 41.

Detective Kawolchuk is trained in the Reid technique of police interrogation. 3RP 134, 144-61. The purpose of this interrogation method

is to extract confessions, but it oftentimes leads to "confessions" from innocent people. 1RP 22. The Reid technique instructs law enforcement officers to isolate its interrogation subjects from the outside world and refute any of the subject's claims of innocence. Alan Hirsch, *Going to the Source: The New Reid Technique & False Confessions*, 11 Ohio St. J. Crim. L. 803, 805 (2014). Interrogators are instructed to minimize the nature and consequences of the accused's crime. *Id.* For example, interrogators can "minimize" the accused's crime by conveying to the subject that the criminal act was merely an understandable accident. *Id.* Interrogators may also "confront" the accused with "irrefutable evidence, sometimes fabricated" that the subject is guilty. *Id.* These techniques convey to the subject that maintaining one's innocence is futile. *Id.*

The interrogation.

Detective Kawolchuk interrogated Mr. Ash in a closed eight-by-twelve room. 3RP 114-15. Only Mr. Ash and Detective Kawolchuk were present in the room, and she was wearing plain clothes. Ex. 1. Detective Kawolchuk did not inform Mr. Ash that she was a police officer. Exs. 1, 6. Mr. Ash told Detective Kawolchuk that he only had four hours of sleep the night before and that he was tired. Ex. 6, pg. 10. Detective Kawolchuk asked if he was still "OK to take the test," and Mr. Ash replied he "did[n't] know what that mean[t] really" Ex. 6, pg. 10. To follow up, Detective

Kawolchyk simply asked if he was going to fall asleep, to which Mr. Ash replied, "I'm not gonna fall asleep." Ex. 6, pg. 10. Mr. Ash reaffirmed that he was tired three more times throughout the "exam." Ex. 6, pgs. 48, 65, 67.

Before Detective Kawolchyk began to purportedly administer a polygraph examination, Mr. Ash related several possible accidental sources him and Ms. Shean surmised could be behind A.A.'s injuries in response to Detective Kawolchyk's questioning. Ex. 6, pgs. 24-37. Detective Kawolchyk discredited Mr. Ash's theories. Ex. 6, pg. 38.

In the middle of the "exam," Detective Kawolchyk falsely told Mr. Ash that doctors diagnosed his son with Shaken Baby Syndrome. Ex. 6, pgs. 39, 41. Detective Kawolchyk swiftly proceeded to share stories about how nannies in England were once actually trained to shake babies to stop them from crying in the 1950s and 1960s. Ex. 6, pg. 39. She also stated, "sometimes you're just shaking [babies] a little bit and they stop crying and you shake them a lot and they stop crying....But people shake their babies. It just happens." Ex. 6, pg. 39. Detective Kawolchyk admitted using these stories to "minimize" the crime per the Reid technique. 3RP 149-50.

Though Mr. Ash briefly wondered if he could have accidentally shaken his son, he ultimately denied doing so and began crying. Ex. 6,

pgs. 40, 43. He also denied that Ms. Shean shook her son. Ex. 6, pg. 44. Detective Kawolchyk shared that she has allegedly spoken to people from all walks of life who have shaken their babies and that people understand that "accidents happen" and that if her child was injured, she would want the doctors to know exactly how it happened so that her child could get the best possible care. Ex. 6, pgs. 41-42. Despite Detective Kawolchyk's questioning and "stories" about parents who have shaken their children, Mr. Ash still denied shaking his son 18 times before Detective Kawolchyk even began to attach him to the polygraph machine. Ex. 6, pgs. 39-46.

Before Detective Kawolchyk hooked up Mr. Ash to the polygraph machine, he told her he was upset and tired, but he would "try" to take the test. Ex. 6, pg. 49. In the middle of the "polygraph exam," Detective Kawolchyk told Mr. Ash that his son's "injuries will heal and life will go on." Ex. 6, pg. 52. But amidst the questioning, Mr. Ash expressed he had his doubts and that he perhaps accidentally caused his son's injuries. Ex. 6, pg. 53.

Detective Kawolchyk stepped out of the room, told Mr. Ash to "hang tight," and spoke to Detective Ernst and Detective Stone. Ex. 2, pg. 11, Ex. 6, pg. 53. She told the detectives that she could not actually administer the polygraph exam because Mr. Ash could not answer whether he caused his son's injuries because he was unsure, and polygraph exam

responses require only "yes" or "no" answers. 3RP 125. However, Detective Stone and Detective Ernst asked Detective Kawolchyk to continue her interrogation. Ex. 3, pg. 11. The officers did not correct Detective Kawolchyk's understanding of A.A.'s condition and allowed her to continue to convey to Mr. Ash that his son had Shaken Baby Syndrome. Ex.3, pg. 11; Ex. 6, pgs. 39, 41.

When Detective Kawolchyk returned to the room, she proceeded to question Mr. Ash and tell him repeatedly 1) everybody understands that accidents happen; 2) A.A. will receive better care if he reveals how his injuries truly happened; 3) she "knew" the baby was shaken; 4) she "can tell when people are telling [her] the truth;" 5) either he or Ms. Shean shook the baby and no possibility exists that a third party shook the baby; 6) everyone just wants an explanation of what happened and then he can go back home to Ms. Shean; 7) "fathers, mothers, providers, daycare workers, nannies[...]squeeze a baby when the baby is crying to stop it from crying;" 8) A.A. will heal and then Mr. Ash can have a life with his son again; and 9) Ms. Shean will forgive him for shaking A.A.; and 10) no matter what he told her, he would go home. Ex. 6, pgs. 54-57, 60-61, 66, 74, 78.

Detective Kowalchyk also told Mr. Ash that she previously conducted a polygraph exam on a father who shook his daughter and all

the father needed to do to get his daughter back was take some “anger management classes” because he was "upfront" with CPS. Ex. 6, pg. 56.

The “confession.”

After two and a half hours of interrogation, Mr. Ash's resolve began to deteriorate. Mr. Ash asked Detective Kowalchuk if they could "get this over with," told her he was tired, and admitted to possibly shaking his son. Ex. 6, pg. 67. Detective Kowalchuk took out a doll and shook it in front of Mr. Ash; Mr. Ash stated he shook the baby in the same manner as Detective Kowalchuk. Ex. 6, pg. 68. In reply to Detective Kowalchuk's questioning, Mr. Ash conceded he may have squeezed A.A.'s ribs too hard when he shook the baby, but if he did, it was not on purpose. Ex. 6, pg. 69. Mr. Ash said he shook the baby when he was crying to try to relax him. Ex. 6, pg. 70. When asked if this happened more than once, Mr. Ash responded that "it must have." Ex. 6, pg. 71. And when asked if the baby's head could have accidentally hit the wall when he “shook” the baby, Mr. Ash simply replied “yes.” Ex. 6, pg. 72.

The next day, when Mr. Ash was arrested, he asked, "how am I supposed to go to anger management classes when I'm in jail?" Ex. 2, pg. 12.

Mr. Ash moved to suppress his “confession,” but the court denied the motion. 1RP 12, 134-35.

The Court of Appeals' opinion.

After hearing oral argument,¹ the Court of Appeals affirmed the trial court's finding that Mr. Ash freely "confessed" to injuring his son. Opinion at 3-8.

D. ARGUMENT

1. This Court should accept review because the Court of Appeals' opinion conflicts with this Court's opinion in *Broadaway*.

This Court should accept review because the Court of Appeals' opinion conflicts with *Broadaway*. RAP 13.4(b)(3).

In *Broadaway*, this Court held "a court *must* consider any promises or misrepresentations made by the interrogating officers...[and] determine whether there is a causal relationship between the promise and the confession" to assess the voluntariness of a confession. 133 Wn.2d at 132 (internal citations omitted) (emphasis added).

Numerous misrepresentations abounded throughout Mr. Ash's interrogation. Detective Kawolychyk repeatedly conveyed to Mr. Ash throughout his interrogation that "people understand" that "accidents happen," parents just get "frustrated" with babies, and no matter what he

¹ *Court of Appeals Division One Oral Argument Calendar*, Wash. Courts, https://www.courts.wa.gov/appellate_trial_courts/appellatedockets/index.cfm?fa=appellatedockets.showDocket&folder=a01&year=2018&file=20180301 (last visited May 25, 2018).

said, he would be free to leave and even be able go to work the next week.

Ex. 6, pgs. 42-43, 54-56.

Detective Kawolchuk also heavily insinuated that all Mr. Ash needed to do to reunite with his son was take anger management classes, so long as he was "upfront" about what happened. Ex. 6, pg. 56.

According to Detective Kawolchuk, A.A. would one day forgive his father for having "shaken" him. She told Mr. Ash, "you're gonna be the person that [A.A.] admires and respects the most." Ex. 6, pg. 54. Detective Kawolchuk suggested that Ms. Shean would forgive Mr. Ash for "shaking" A.A., stating that in her experience, parents who confess to this crime "eventually rekindle their relationship and everything is good." Ex. 6, pg. 61. These false assurances were designed to lull Mr. Ash into a false sense of security that little to no interfamilial repercussions and zero criminal consequences would flow from his confession. Mr. Ash clearly believed that taking anger management classes would reunite him with his son because of the statement he made when he was arrested ("how am I supposed to take anger management classes when I'm in jail?"). Ex. 2, pg. 12.

Rather than assess these misrepresentations and their connection to Mr. Ash's "confession," the Court of Appeals' opinion is silent regarding these circumstances. Because the Court's opinion undoubtedly strays from

the rule announced in *Broadaway*, this Court should accept review. RAP 13.4(b)(3).

2. This Court should accept review because this case presents an important constitutional question regarding a court’s consideration of governmental misrepresentations in relation to the voluntariness of a confession.

This Court should accept review to answer the following question: when the government orchestrates a lie to induce a confession, must the Court consider the ruse’s effect even when the officer who delivers the misrepresentation is unaware of the government’s ruse? RAP 13.4(b)(3).

In assessing the voluntariness of a confession, “a court must consider *any* promises or *misrepresentations* made by the interrogating officers.” *Broadaway*, 133 Wn.2d at 132 (internal citations omitted) (emphasis added); accord *State v. Unga*, 165 Wn.2d 95, 119, 196 P.3d 645 (2008). Moreover, “the ‘fellow officer rule’ allows for the use of the information possessed by the police as a whole *when they are acting in concert*.” *State v. Butler*, 2 Wn. App. 2d 549, 570-71, 411 P.3d 393 (2018).

Detective Stone watched the entire interrogation and encouraged Detective Kawolchuk to continue interrogating Mr. Ash. Ex. 3, pg. 11. Detective Stone learned that A.A. did not have Shaken Baby Syndrome and that A.A. would make a full recovery, but she never corrected

Detective Kawolchyk's understanding of A.A.'s condition. Detective Kawolchyk acted in concert with Detective Stone in this lie. This lie to permeated throughout Mr. Ash's interrogation, resulting in Mr. Ash's "confession."

Rather than assess the connection between Detective Stone's deception and Mr. Ash's confession, the Court of Appeals' opinion concludes, "[Detective] Kawolchyk did not engage in deception by repeating this information to Mr. Ash." Opinion at 6.

This Court should accept review. RAP 13.4(b)(3).

3. This Court should accept review because the Court of Appeals' opinion conflicts with this Court's opinion in *Eserjose*.

This Court should accept review because the Court of Appeals' opinion conflicts with *Eserjose*. RAP 13.4(b)(1).

In relevant part, the Court of Appeals' opinion in Mr. Ash's case announced the standard of review for an involuntary confession case as follows:

When reviewing a trial court's conclusion of voluntariness, an appellate court determines whether there is substantial evidence in the record from which the trial court could have found that the confession was voluntary by a preponderance of the evidence. An appellate court accepts unchallenged findings as true on appeal and reviews conclusions of law de novo.

Opinion at 3 (internal citations omitted) (emphasis added).

The italicized portion cites to *Broadaway*. In *Broadaway*, this Court decided whether an appellate court must conduct an independent review of the record in a confession case. 133 Wn.2d at 131. The court noted, “*in recent opinions*, Washington courts have said that the question on review is whether there is substantial evidence in the record from which the trial court have found that the confession was voluntary by a preponderance of the evidence.” *Id.* at 129. (emphasis added). This Court did not endorse this standard of review in its ultimate conclusion. Instead, this Court held that findings of fact entered in a suppression hearing will be verities on appeal in unchallenged, and, if challenged, would be verities on appeal if supported by substantial evidence. *Id.* at 131. But the ultimate question of whether the confession was “voluntary” is still reviewed *de novo* and is not bound by the “preponderance of the evidence” standard of review. *See State v. Eserjose*, 171 Wn.2d 907, 912, 259 P.3d 172 (2011).

Here, the Court of Appeals did not assess whether Mr. Ash’s “confession” was voluntary *de novo*. Instead, it appears the Court only assessed whether substantial evidence supported the findings. Opinion at 4-8. As such, the Court of Appeals’ opinion is inconsistent with *Eserjose*, and this Court should accept review. RAP 13.4(b)(1).

4. This Court should accept review to determine whether it is inherently coercive for interrogators to use deceptive methods that

appeal to a parent's instincts to help their child to extract a confession.

This Court should accept review to determine whether it is inherently coercive for interrogators to use deceptive methods that appeal to a parent's emotional desire to help his severely injured child. RAP 13.4(b)(3).

In *People v. Thomas*, the defendant and his wife took their infant son to the emergency room after finding their child limp and unresponsive. 22 N.Y.3d 629, 636-37 (N.Y. 2014). The treating doctor believed the baby was the victim of blunt force trauma. *Id.* at 637. The doctor informed the police and CPS about the child's condition. *Id.* The police arrived at the defendant's home and escorted him to an interrogation room, where they read the defendant his rights. *Id.*

The ensuing interrogation was filled with falsehoods, but chief among the falsehoods was the interrogators' conveyance to the defendant that he must tell them what happened to help save the baby's life. The baby was already dead. *Id.* at 638.

The defendant ended up "confessing" to his interrogator's version of the alleged events: one of the officers told the defendant he must have thrown the baby above his head into a low lying mattress and "reenacted" how the defendant must have thrown his son. *Id.* at 640. The defendant

later agreed that he threw his son in precisely the same manner and reenacted the event in precisely the same way. *Id.* at 640-41.

The highest state court in New York found the defendant's "confession" was involuntary and ordered its suppression for several reasons. Critically, the court believed it was "patently coercive" that interrogators falsely told the defendant that his assistance was essential to help the doctors "save" his son's life, which would "prompt any ordinarily caring parent to provide whatever information they thought might be helpful, even if it was incriminating." *Id.* at 643. "[This] falsehood was coercive by making the defendant's constitutionally protected option to remain silent seem valueless." *Id.*

Detective Kawolchuk repeatedly conveyed to Mr. Ash that he needed to tell her what happened so that doctors could effectively treat his son, who she claimed had SBS. After Detective Kawolchuk told Mr. Ash doctors knew for a fact his son had SBS, either him or Ms. Shean shook the baby, and that this was likely just an understandable "accident" Mr. Ash "confessed" to shaking his son. RP 199-200.

This Court should accept review. RAP 13.4(b)(3).

- 5. This Court should accept review to determine if it follows that if someone is suitable to take a polygraph examination, they are also suitable to deliver a free confession.**

This Court should accept review to determine if it follows that if someone is suitable to take a polygraph examination, they are also suitable to deliver a free confession. RAP 13.4(b)(3).

In *State v. Rupe*, 101 Wn.2d 664, 679, 683 P.2d 571 (1984), this Court recognized that a defendant's weakened physical or emotional state can result in a false confession. Other states and empirical research also recognize that a person's lack of sleep can render them more susceptible to delivering a false confession. *See, e.g., Pyles v. State*, 947 S.W.2d 754 (Ark. 1997) (finding confession involuntary in part because the defendant was tired and emotional when he "confessed"); *see also* Steven J. Frenda et. al., *Sleep Deprivation & False Confessions*, 113 PNAS 2047, 2047 (2016) (describing study linking sleep deprivation with false confessions).

Mr. Ash received a third less sleep than he normally obtains the night before his interrogation and ensuing "confession." Ex. 6, pgs. 2, 40, 43. Additionally, Mr. Ash became emotionally distraught and cried during the interrogation.

But here, the Court of Appeals' opinion concludes the "suitability questions" Detective Kawolchuk used to determine Mr. Ash's suitability to undergo a *polygraph examination* were satisfactory to determine Mr. Ash's suitability to freely confess. Opinion at 5. But a person's suitability to answer "yes" or "no" questions in a polygraph examination is dissimilar

to a person's suitability to deliver a free confession. The Court of Appeals' conclusion improperly conflates the ability to answer "yes" or "no" questions with the ability to freely confess.

6. This Court should accept review to determine how a court should weigh the use of the Reid Technique in evaluating the voluntariness of a confession.

Mr. Ash's interrogator used the Reid Technique of police interrogation. This technique is notorious for resulting false confessions in notable cases like the Central Park Five. *See* Chester Soria, *False Confessions: NYC Still Struggles in the Aftermath of the Central Park Five*, Juv. Just. Information Exchange (Nov. 7, 2013).² Since the time after Mr. Ash's "confession," the company that trains police officers in the Reid Technique stopped doing so because it recognized that the technique "is not a useful way of getting truthful information." Eli Hager, *The Seismic Change in Police Interrogations*, The Marshall Project (Mar. 3, 2017).³

Moreover, courts throughout the country have found confessions involuntary where interrogators used Reid Technique methods to extract confessions. *See Commonwealth v. DiGiambattista*, 813 N.E.2d 516

² <https://jjie.org/2013/11/07/false-confessions-nyc-still-struggles-in-aftermath-of-central-park-five/>.

³ <https://www.themarshallproject.org/2017/03/07/the-seismic-change-in-police-interrogations>.

(Mass. 2004) (finding a confession involuntary in part because the police used trickery, minimization, and implied promises of leniency to extract the confession); *In re Elias V.*, 188 Cal. Rptr. 3d 202 (suppressing a confession because the police used maximization, minimization, and trickery on a juvenile defendant); *State v. Stone*, 237 P.3d 1229 (Kan. 2010) (finding a confession involuntary in part because the defendant was sleep deprived and the State used deception and other Reid technique methods to obtain the defendant's confession).

This Court has not yet weighed in on this controversial interrogation method. Detective Kawolchuk's use of this method throughout Mr. Ash's interrogation produced an unreliable "confession."

This Court should accept review. RAP 13.4(b)(3), (4).

E. CONCLUSION

Based on the foregoing, Mr. Ash asks this Court to accept review.

DATED this 29th day of May, 2018.

Respectfully submitted,

/s Sara S. Taboada

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Washington Appellate Project
Attorney for Appellant

Appendix A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 75992-2-1
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	UNPUBLISHED OPINION
ANDRE JEAN ASH,)	
)	
Appellant.)	FILED: March 26, 2018

LEACH, J. — Andre Ash appeals his conviction for assault of a child in the second degree. Primarily, Ash challenges the admission of his confession, claiming that unfairly coercive and deceptive tactics produced it. Because substantial evidence supports the trial court’s finding that Ash voluntarily confessed and his remaining challenges lack merit, we affirm.

FACTS

Andre Ash and his girlfriend, Tambra Shean, are the parents of an infant. After a physician at Seattle Children’s Hospital examined a lump on the infant’s head, the hospital notified police about suspected abuse. The police talked with both Ash and Shean at the hospital. Shean told police that she wanted to take a polygraph examination. Ash was initially reluctant to take one but changed his mind two days later.

Three days later, the police gave Ash a ride to the police station for his polygraph examination. The detective examiner, Karen Kowalchuk, told him that he was free to leave at any time, the interview was voluntary, and the interview was being recorded.

When Kowalchuk began questioning Ash about the infant's injuries, she decided she could not conduct the polygraph test because Ash could not provide yes or no answers. Because she had developed a rapport with Ash, she decided to continue to interview Ash without the polygraph test. During the videotaped interview, Ash confessed to shaking the infant, hitting his head on the wall twice, and squeezing him. After the interview, the police drove Ash home. The next day, the police arrested Ash and charged him with assault of a child in the second degree.

Ash asked the trial court to suppress his confession on the grounds that the State coerced it. After a CrR 3.5 hearing, the trial court denied his request because it found that Ash voluntarily confessed. It later convicted Ash at a stipulated bench trial. Ash appealed. About six months later, the trial court entered its findings of fact and conclusions of law supporting the conviction.

STANDARD OF REVIEW

An appellate court reviews a trial court's challenged findings of fact for substantial evidence.¹ "[W]hen reviewing a trial court's conclusion of voluntariness, an appellate court determines 'whether there is substantial evidence in the record from which the trial court could have found that the confession was voluntary by a preponderance of the evidence.'"² An appellate court accepts unchallenged findings as true on appeal³ and reviews conclusions of law de novo.⁴

ANALYSIS

Involuntary Confession

Ash challenges the trial court's finding that the State did not coerce his confession and its conclusion that the State did not violate his Fourteenth Amendment due process rights⁵ and Fifth Amendment protection against self-incrimination.⁶ More simply stated, he claims that his confession was involuntary. We disagree.

¹ Fisher Props., Inc. v. Arden-Mayfair, Inc., 115 Wn.2d 364, 369, 798 P.2d 799 (1990).

² State v. Rafay, 168 Wn. App. 734, 757-58, 285 P.3d 83 (2012) (quoting State v. Broadaway, 133 Wn.2d 118, 129, 942 P.2d 363 (1997)).

³ State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

⁴ State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009).

⁵ U.S. CONST. amend. XIV.

⁶ U.S. CONST. amend. V.

The Fourteenth Amendment's due process clause requires that the State not use methods of physical or psychological coercion to procure a confession.⁷ Methods of coercion offend the underlying principle that the system of criminal law is inquisitorial and not accusatorial.⁸ To determine if the State coerced a confession, the court examines the totality of the circumstances of each case.⁹ Potentially relevant circumstances include the length of the interrogation, its location, its continuity, the defendant's physical condition and mental abilities, and police conduct.¹⁰ "In assessing the totality of the circumstances, a court must consider any promises or misrepresentation made by the interrogating officers."¹¹ The court determines the existence of any causal link between promises or misrepresentations of the officer and the defendant's confession.¹² The court asks whether the defendant's will was overborne by the circumstances.¹³

First, Ash claims that he was vulnerable to coercion because he only slept four hours the night before his interview. Courts have found confessions

⁷ Rogers v. Richmond, 365 U.S. 534, 540, 81 S. Ct. 735, 5 L. Ed. 2d 760 (1961).

⁸ Rogers, 365 U.S. at 540-41.

⁹ Broadaway, 133 Wn.2d at 132.

¹⁰ State v. Unga, 165 Wn.2d 95, 101, 196 P.3d 645 (2008).

¹¹ Broadaway, 133 Wn.2d at 132.

¹² Broadaway, 133 Wn.2d at 132.

¹³ Broadaway, 133 Wn.2d at 132 (citing State v. Rupe, 101 Wn.2d 664, 679, 683 P.2d 571 (1984)).

involuntary because of a defendant's poor physical and mental condition.¹⁴ Here, the trial court found that Ash appeared to be in normal physical condition and exhibited no injuries or symptoms of pain. Although Ash slept only four hours the night before, he normally sleeps only six hours. Kowalchyk asked "suitability questions" to rule out any concerns regarding drug or alcohol use, prescription medications, mental health or medical issues, pain, and adequate sleep. Kowalchyk also asked Ash if he was too tired to take the polygraph examination, and he replied, "No." We conclude substantial evidence supports the trial court's findings that neither Ash's physical condition nor his mental condition suggested that he was susceptible to coercion.

Next, Ash asserts that Kowalchyk coerced his confession by making misrepresentations. Ash claims that Kowalchyk falsely told him that the infant had shaken baby syndrome. Ash relies on a New York case, People v. Thomas,¹⁵ to demonstrate how an interrogation filled with falsehoods can be coercive. In Thomas, the officers told the defendant several lies that included (1) they were not investigating a crime, (2) the defendant could go home once he told them what happened, (3) that he must tell them what happened to help save the baby's life (the baby was already dead), and (4) the defendant's wife blamed him for the

¹⁴ See Mincey v. Arizona, 437 U.S. 385, 401-02, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978) (holding that the statements were coerced because the officer questioned Mincey when he was hospitalized, severely wounded, and confused).

¹⁵ 22 N.Y.3d 629, 8 N.E.3d 308, N.Y.S.2d 193 (2014).

baby's injuries.¹⁶ Thomas does not apply here. Kowalchyk testified that another officer told her that the infant had shaken baby syndrome and retinal hemorrhaging. Therefore, Kowalchyk did not engage in deception by repeating this information to Ash.

Ash also asserts Kowalchyk used the "Reid technique" throughout questioning to "subjugate the individual to the will of his examiner."¹⁷ The Reid technique uses methods such as isolation, minimization, trickery, and negation of the suspect's version of the events to induce a confession.¹⁸ Kowalchyk testified that she used minimization but no other methods associated with the Reid technique. When asked about the Reid technique's use of maximization, she could not recall because she received the training 14 years earlier. Ash also claims in his statement of additional grounds for review that the creators of the Reid technique expressly advise interrogators to avoid suggesting "counseling" because it may result in false confessions. He cites Commonwealth v. DiGiambattista,¹⁹ a Massachusetts case, to support his assertion that Kowalchyk's suggestion of anger management classes was coercive. But DiGiambattista states that the "mere mention of counseling" alone is not automatically an improper

¹⁶ Thomas, 22 N.Y.3d at 638.

¹⁷ Miranda v. Arizona, 384 U.S. 436, 457, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

¹⁸ Miranda, 384 U.S. at 455-57.

¹⁹ 442 Mass. 423, 813 N.E.2d 516 (2004) (holding that a combination of trickery and implied promises made the confession involuntary).

suggestion of leniency undermining voluntariness.²⁰ Although Kowalchyk suggested that if Ash took anger management classes there was a possibility of reunification with the infant, she did not make it seem like a certainty or make any promises. Thus, the fact that Kowalchyk used minimization and suggested that Ash take anger management classes in an effort to reunite with his son does not show that she coerced Ash into confessing.

Ash also claims that Kowalchyk coerced his confession because she interviewed him for three hours and asked questions that made him emotional. In Spano v. New York,²¹ the United States Supreme Court held that officers coerced Spano's confession with police conduct. Many officers questioned Spano for eight straight hours, beginning in the early evening and going through the night.²² The police ignored Spano's request for an attorney and also used a close friend to interrogate him.²³ By contrast, in Cunningham v. City of Wenatchee,²⁴ the Ninth Circuit Court of Appeals held that the officer's conduct was not coercive. The officer interrogated Cunningham for eight hours and never refused to give Cunningham a break for food or water.²⁵ The officer never yelled or threatened Cunningham.²⁶ The officer asked questions that may have "unsettled"

²⁰ DiGiambattista, 442 Mass. at 439.

²¹ 360 U.S. 315, 324, 79 S. Ct. 1202, 3 L. Ed. 2d 1265 (1959).

²² Spano, 360 U.S. at 322.

²³ Spano, 360 U.S. at 323.

²⁴ 345 F.3d 802 (9th Cir. 2003).

²⁵ Cunningham, 345 F.3d at 810.

²⁶ Cunningham, 345 F.3d at 810.

Cunningham, but “mere emotionalism and confusion do not invalidate confessions.”²⁷

We see this case is most similar to Cunningham. Kowalchyk interrogated Ash for only three hours. Like Cunningham, she interviewed Ash during regular business hours and told him he could use the bathroom as needed. Unlike Spano, Kowalchyk was the only interviewer, she did not threaten him or ignore any request for an attorney, and Ash was not in custody. Kowalchyk never tried to intimidate Ash but, alternatively, tried to put him at ease by explaining what would take place during the interview. Kowalchyk did not raise her voice, remained calm throughout the interview, and did not stop Ash from talking. She repeatedly told Ash that he was free to leave at any time. Kowalchyk asked Ash if he was too tired to take the examination. He replied, “I can take it.” Thus, substantial evidence supports the trial court’s finding that Kowalchyk’s conduct does not show that she coerced Ash into confessing.

Because Ash’s confession was voluntary, the State did not violate his Fourteenth Amendment rights.

Next, Ash asserts that the police violated his Fifth Amendment protection against self-incrimination when they continued to question him after he invoked his right to remain silent. In Miranda v. Arizona,²⁸ the Supreme Court of the United

²⁷ Cunningham, 345 F.3d at 810.

²⁸ 384 U.S. 436, 444-45, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

States held that when a person is in custody and asserts his right to remain silent, he also has the right to an attorney and the right to have police questioning halted. Thus, to receive these additional protections, a person must be in custody.²⁹ Custody, as defined in Miranda, means that the person has been “deprived of his freedom of action in any significant way.”³⁰ But when a person asserts his right to remain silent when he is not in custody, a court presumes any subsequent statements are voluntary.³¹ “When a defendant is not in custody, he is in control, and need only shut his door or walk away to avoid police badgering.”³² Here, Ash was not in custody. This means that Miranda’s protections do not apply, and it is inconsequential whether he validly invoked his right to remain silent.

The police did not violate Ash’s Fifth Amendment protection against self-incrimination.

Insufficient Findings

Ash originally asserted that reversal was required because the trial court failed to enter written findings of fact and conclusions of law after the stipulated bench trial. But this claim became moot when the trial court later entered written findings of fact and conclusions of law. Ash asserts now that the trial court’s

²⁹ Montejo v. Louisiana, 556 U.S. 778, 795, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009).

³⁰ Miranda, 384 U.S. at 444.

³¹ State v. Sargent, 111 Wn.2d 641, 648, 762 P.2d (1988) (“Once a person is taken into custody, the presumption of voluntariness disappears.”).

³² Montejo, 556 U.S. at 795.

findings are insufficient to permit appellate review because they contain no facts supporting the court's conclusion that he assaulted his son.

Trial courts are required to enter written findings of fact and conclusions of law after a bench trial.³³ The findings should include the elements of each crime separately and specify the factual basis for each.³⁴ The findings of fact do not need to address every contention made by the parties but must be sufficient to inform the appellate court how the trial court decided all material issues.³⁵ But if the trial court fails to enter sufficient findings and conclusions, it is harmless error if the trial court's oral findings are sufficient to permit appellate review.³⁶ Otherwise, a reviewing court must remand for entry of sufficient findings.³⁷

Here, Ash does not cite legal authority showing that the trial court's findings from his stipulated bench trial were insufficient to support his conviction. A court should "not consider claims insufficiently argued by the parties."³⁸ Ash has shown no prejudice from the delayed entry, and the trial court's findings are sufficient to permit meaningful appellate review of the issues raised.

³³ CrR 6.1(d).

³⁴ State v. Denison, 78 Wn. App. 566, 570, 897 P.2d 437 (1995).

³⁵ Daughtry v. Jet Aeration Co., 91 Wn.2d 704, 707, 592 P.2d 631 (1979).

³⁶ State v. Smith, 145 Wn. App. 268, 274, 187 P.3d 768 (2008).

³⁷ Daughtry, 91 Wn.2d at 711.

³⁸ State v. Elliott, 114 Wn.2d 6, 15, 785 P.2d 440 (1990).

CONCLUSION

Because substantial evidence supports the challenged trial court findings about Ash's confession and those findings support the legal conclusion that this confession was admissible, we affirm Ash's conviction.

Leach, J.

WE CONCUR:

Mann, J.

Scherbelle, J.

Appendix B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

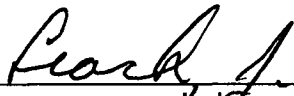
STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 ANDRE JEAN ASH,)
)
 Appellant.)
 _____)

No. 75992-2-1
ORDER DENYING MOTION
FOR RECONSIDERATION

The appellant, Andre Jean Ash, having filed a motion for reconsideration herein, and the hearing panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:



Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 75992-2-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

respondent J. Scott Halloran
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Snohomish County Prosecuting Attorney

petitioner

Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: May 29, 2018

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