

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Case No. 2008AP000500

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN K. AVERY,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING POST-CONVICTION
RELIEF ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE
COUNTY, THE HON. PATRICIA MCMAHON, PRESIDING

NON-PARTY BRIEF OF THE INNOCENCE NETWORK

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INTRODUCTION

The trial court refused to grant Brian Avery a new trial due in large part to his supposed confession and eyewitness identifications. A variety of factors in the case, however, powerfully undermine the reliability of this evidence. Moreover, false confessions and eyewitness misidentifications occur with alarming regularity, and as in Avery's case, often result in wrongful convictions.

The evidence against another Wisconsin defendant, Francis Hemauer, seemed compelling. But, like Avery, the two most important pieces of evidence at trial—Hemauer's confession and the victim's identification—turned out to be completely false. A teenage girl, who had been abducted, raped, and stabbed nearly to death in Milwaukee, had identified Hemauer as her attacker. Hemauer then admitted under questioning that he had probably raped her but could not remember because he sometimes blacked out from heavy drinking. Although Hemauer subsequently disavowed his statements and even called several alibi witnesses at trial, the jury, armed with the victim's identification and Hemauer's own admissions, convicted him. He served eight years before newly available testing exonerated him. Collins, *Improving Eyewitness Evidence Collection Procedures in Wisconsin*, 2003 Wis. L. Rev. 529, 534-35 (2003).

Hemauer's case is unfortunately not an isolated incident. Nationally, hundreds of inmates have been exonerated. Many of these convictions, like Avery's, were based on both false confessions and mistaken eyewitnesses: Dennis Brown, Bruce Godschalk, Nathaniel Hatchett, and Arthur Lee Whitfield. *The Innocence Project*, at <http://www.innocenceproject.org>. As these exonerations demonstrate, juries do convict innocent people based on false confessions and inaccurate eyewitness testimony.

As compelling as these individual cases are, the numbers further demonstrate the dangers of false confessions and eyewitness errors. In recent years, post-conviction DNA analysis has led to over two hundred exonerations. Of these exonerations, nearly a quarter involved false confessions, while a staggering three-quarters involved eyewitness misidentification. *Id.* at <http://www.innocenceproject.org/Content/351.php>. Indeed, false confessions and eyewitness misidentification are leading causes of wrongful convictions. In studies of false confessions, approximately eighty percent of false confessors who went to trial were wrongfully convicted. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 Wis. L. Rev. 479, 485 (2006). Mock jury studies show that jurors "tend to discount the possibility of false confessions as unthinkable, if not impossible." *Id.* Similarly, eyewitness experiments

demonstrate that jurors “believe eyewitnesses, even when they are wrong, and find [their] testimony so persuasive that it may well color their view of all of the other evidence in the case.” O’Toole & Shay, *Manson v. Brathwaite Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 Val. U.L. Rev. 109, 134-35 (Fall 2006). In one study, eyewitness confidence proved a better predictor of conviction than eyewitness accuracy: eyewitnesses who wrongly identified an innocent suspect convinced 70% of mock jurors to convict. *Id.* Thus, innocent people can and do falsely confess to crimes they did not commit, and eyewitnesses can and do mistakenly identify innocent people as perpetrators.

Wrongful convictions based on false confessions and eyewitness misidentifications have captured the attention of numerous state courts and governments. Indeed, Wisconsin, in the years after Avery’s trial, has been at the forefront of addressing the causes of wrongful convictions. In 2005, the state Supreme Court acknowledged the reality of false confessions and required the recording of custodial interrogations to reduce the possibility of false confessions in juvenile cases. *In re Jerrell*, 2005 WI 105, ¶¶ 26-27, 55-59, 283 Wis. 2d 145, 699 N.W.2d 110. The legislature extended recording requirements to adult felony interrogations. Wis. Stat. § 968.073. Similarly, the Wisconsin Department of Justice recently developed procedures to reduce the risk of

eyewitness identification error. See *Model Policy and Procedure for Eyewitness Identification*, <http://www.doj.state.wi.us/dles/tns/EyewitnessPublic.pdf>. In addition, a 2005 Wisconsin statute requires state law enforcement agencies to adopt policies “designed to reduce the potential for erroneous identifications by eyewitnesses in criminal cases.” Wis. Stat. § 175.50.

ARGUMENT

I. FALSE CONFESSIONS

“[A] confession is like no other evidence,” *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991), one that has “profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.” *Bruton v. United States*, 391 U.S. 123, 139-40 (1968) (White, J., dissenting). Many cannot fathom how a person ever would confess to a crime he did not commit, especially when the confession is detailed. The court below, in fact, rejected Avery’s claim that the details in his confession resulted from the police feeding him information. (Appx. at 183.) The court’s conclusion is simply erroneous. False confessions, even detailed ones, happen with unnerving regularity and may result from information provided to the accused by the police. Marcellus Bradford, for example, confessed to a brutal rape and murder only after hours of interrogation where police provided him the significant

details of the crime. Drizin & Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 982-83 (2004) (“*Problem*”).

A. Several of the main causes of false confessions apply in Avery’s case.

Scholars have delved into the psychology of false confessions to determine precisely how and why innocent people admit to crimes they did not commit. Of the key factors that have emerged, several apply to Avery’s case.

Age. False confessions occur much more frequently with the young. Nearly two-thirds of the false confessors in one study were under 25. Drizin, *Problem*, at 945-46. Youth are especially prone to confess falsely due to their impressionability and lesser ability to withstand pressure, particularly when, as noted below, they are subjected to prolonged questioning. Leo, *Bringing Reliability Back In*, at 518-19. For instance, 18-year-old Peter Reilly admitted to matricide after grueling questioning in which the transcript reveals, he “underwent a chilling transformation from denial to confusion, self-doubt, conversion . . . and finally a full confession” Kassin & Gudjonsson, *True Crimes, False Confessions*, *Sci. Am. Mind* 24, 30 (May 2005). Reilly, a year junior to Avery, was later exonerated. *Id.*

Isolation. A key interrogation tactic involves isolating the suspect to create a suffocating environment from which he desperately wants to

escape. Kassin, *Psychology of Confessions*, Am. Psychol. 215, 221 (April 2005). The individual may be placed in special interrogation rooms for protracted periods to amplify the anxiety of police questioning. *Id.* Denying the suspect food and sleep inhibits cognitive reasoning and makes the suspect more likely to confess. *Id.* at 221, 224.

These isolating tactics, however, break down the innocent as well as the guilty. By creating an intense desire to escape the anxiety of custodial interrogation, such tactics create an incentive for the accused to confess, even falsely. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 Fordham Urban L.J. 791, 818-19 n.158 (2006). This is especially true for youth. “One of the most common reasons cited by teenage false confessors is the belief that by confessing, they would be able to go home.” Drizin & Leo, *Problem*, at 969 (footnote omitted). For the 19-year-old Avery, who expressed this very desire, the incentive to confess was overwhelming. Interrogated for hours, handcuffed at times to a wall, exhausted and hungry, Avery was primed to confess in the hope that he might return to his parents. (75:72-73, 79-80, 87.)

Claims of Incriminating Evidence. Once the suspect has been isolated, police may then confront him with claims of incriminating evidence, Kassin, *Psychology of Confessions* at 221, because one of the most critical motivations of those who confess is belief in the strength of

the evidence against them. Kassin, *True Crimes*, at 29. Police employ interrogation tactics that “elicit the decision to confess from the guilty by leading them to believe that the evidence against them is overwhelming.” Ofshe & Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 *Denv. U. L. Rev.* 979, 985-86 (1997) (citing psychological studies).

This tactic, however effective, also ensnares the innocent, particularly when false evidence is presented. In one psychological experiment, participants were wrongly blamed for crashing the experimenter’s computer by hitting a key they had been warned to avoid. Kassin, *Psychology of Confessions*, at 221. When a disguised researcher lied about observing the participant press the forbidden key, the percentage of innocent participants who signed a written confession, admitting they had crashed the computer, increased from 48% to 94%. *Id.* Confronted with strong (but false) evidence, nearly every participant confessed to something they had not done. *Id.* From this and other experiments, researchers have concluded that individuals are more likely to confess falsely when interrogators inflate claims about the strength of evidence or employ false evidence against them. *Id.*

In the notorious Central Park jogger case, five teenagers—just a few years younger than Avery—falsely confessed to rape when police deceptively claimed their fellow suspects had confessed and implicated

the others, and even told one teen that his fingerprints would be found on the jogger's clothes. Gohara, at 792. Similarly, the police told Avery of strong evidence that did not exist—that his parents had viewed a videotape of the robbery and positively identified him—which, when combined with the other evidence and interrogation tactics, readily factored into his false confession.¹

Length of interrogation. Felony interrogations, according to one study, last less than an hour on average, and less than 10% of them take more than two hours. Leo, *Inside the Interrogation Room*, 86 J. Crim. L. and Criminology 266, 279 (Winter 1996). False confessions, however, typically involve much longer periods of interrogation. More than 80% of false confessors were interrogated for longer than six hours. Drizin, *Problem*, at 948. Avery is in this group. It is clear “interrogation-induced false confessions tend to be correlated with lengthy interrogations in which the innocent suspect’s resistance is worn down, coercive techniques are used, and the suspect is made to feel hopeless, regardless of his innocence.” *Id.* (footnote omitted). Police questioned Katrina French, a Milwaukee woman, for eight hours until she falsely confessed

¹ The State misses the mark with its claim that police deception does not make a confession unreliable, State Br. at 32 n.5, having conflated voluntariness with reliability. As study after study proves, innocent people may voluntarily confess to crimes they did not commit where they are “likely to believe that any reasonable jury, viewing the [false] evidence, will be convinced of [their] guilt.” Gohara, at 818-19. As such, the innocent may rationally conclude that the benefits of confessing outweigh the costs. *Id.*

to strangling a 3-month-old to death. Doege, *Prosecution Backs Taping Interrogations*, Milwaukee J.-Sentinel (May 6, 2002) at <http://www.jsonline.com/story/index.aspx?id=41209>. The 15 hours of police custody and seven hours of interrogation Avery endured certainly contributed to his false confession.²

B. Wisconsin courts and state government recognize the dangers of false confessions and have moved to reduce them.

To curtail the risk of false confessions, the state's highest court mandated videotaped interrogations of juveniles. *Jerrell*, 2005 WI 105, ¶¶ 55-59. The state legislature embraced *Jerrell* and extended it to adult felony interrogations. Wis. Stat. § 968.073. Moreover, the Wisconsin Criminal Justice Study Commission, comprised of law enforcement, the state attorney general's office, and others, issued a position paper on false confessions, highlighting all of the factors listed above as facilitating false confessions. *Position Paper on False Confessions*, http://www.wcjsc.org/Position_Paper_on_False_Confessions.pdf. Wisconsin, a decade after Avery's wrongful conviction, has thus manifested an abiding concern with false confessions.

² Innocent individuals are more likely to waive their *Miranda* rights (as Avery did) and make themselves vulnerable to prolonged interrogation without the procedural safeguards of an attorney—thereby increasing the likelihood of a false confession. Kassin & Norwick, *Why People Waive Their Miranda Rights: The Power of Innocence*, 28 L. & Human Behavior 211, 215-16 (April 2004).

II. EYEWITNESS MISIDENTIFICATION

As with false confessions, eyewitness misidentification also plays a significant role in wrongful convictions.

A. Several factors contributing to eyewitness misidentification were present.

Decades of research reveal specific factors that contribute to the high frequency of eyewitness misidentification. At least four of these factors are directly applicable to the alleged identifications procured from Alcherie Simmons³ and Mueen Hamdan.

Personal Needs and Biases. Personal needs and biases may result in eyewitness misidentification. “Witnesses tend to see what they *want* to see. Thus, the need and desire to produce a complete description of an assailant may foster perception that is more the product of an unconscious imagination than a keen eye.” Woocher, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 Stan. L. Rev. 969, 981 (May 1977).

The police told Simmons that they thought she may have been involved in the Malone Foods robbery, and that if she was holding back any additional information, “now’s the time for her to tell [them].” (73:67.) Simmons understood this as a threat that she would be charged

³ At trial, Simmons denied ever having identified Avery as being involved in the Malone Foods robbery. (See, e.g., 72:23, 25; 73:6, 19-20.) This *amicus* does not attempt to address this factual dispute, but rather assesses the reliability of any such identification in light of the surrounding circumstances.

with a crime if she did not “go along with their program.” (73:12-13.) If Simmons at some point did identify Avery, it could only have been under extremely stressful circumstances. As Simmons perceived, she was interviewed 30 times (73:12), her house had been surrounded by police with dogs (73:17), and she was taken away in handcuffs (73:22-26). Considering the mounting pressure on this 15-year-old girl, and her fear of being treated as a suspect, the reliability of any such identification is highly suspect.

Passage of Time. It is well established that memory fades over time. In one study, 85 convenience store clerks were asked to identify (from target-present or target-absent photo arrays) a previously encountered customer either two hours or 24 hours after the encounter. False identifications from target-absent photo arrays occurred far more frequently after 24 hours (52.4%) than after two (15%). Cutler, *A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eye-Witness Identification Accuracy*, 4 *Cardozo Pub. L. Pol’y & Ethics J.* 327, 336 (April 2006).

When Hamdan made the identification, almost three weeks had elapsed since the robbery. (71:27.) At trial, he even alluded to his fading memory, testifying that he found it difficult to describe the other suspects, as it “ha[d] been a while.” (71:35.)

Poor Observation Conditions. Poor or distracting observation conditions also reduce the reliability of a witness's identification. Woocher, at 978.

As soon as the robbers entered Atari Foods, they ordered Hamdan to the ground and struck him in the head. (71:9.) During the robbery, he remained on the floor, was shot in the neck, and eventually lost consciousness. (71:25, 26, 32.) That he did not have a clear look at the perpetrators is further underscored by another witness's testimony that all of the robbers were wearing masks, and "you could not see their face[s]." (71:15-16.)

Unintentional Suggestion. Research shows that lineup administrators may "inadvertently communicate their knowledge about which lineup member is the suspect and which members are merely fillers to the eyewitness through various verbal and nonverbal means." Wells & Olson, *Eyewitness Testimony*, 54 Annual Rev. of Psychology 277, 289 (2003).

According to Detective Kraft, Simmons identified Avery when he showed her several photographs. (73:45-46.) The lineup was administered by someone (Kraft) who knew that Avery was a suspect. (73:50.) Similarly, Hamdan's identification process was administered by detectives who understood Avery to be a suspect. (69:72.) Under these

circumstances, it is entirely possible that the officers unintentionally cued the witnesses and influenced their identification.

B. Wisconsin courts and state government acknowledge the fallibility of eyewitness identifications.

Considering the factors that result in eyewitness misidentification, the Wisconsin Department of Justice, in its *Model Policy and Procedure for Eyewitness Identification*, provides six major recommendations “designed to ensure that the highest quality evidence possible is obtained from eyewitnesses.” *Id.* at 1, 3. The recommended safeguards include using a “double blind” procedure in which the administrator of a lineup is not aware of who the suspect is, so as to avoid giving unintentional cues. This safeguard, among others, was not in place at the time of Simmons’s and Hamdan’s identifications, further calling into question the reliability of their identifications.

The Wisconsin Supreme Court has also recognized the fallibility of eyewitness identification. In *State v. Dubose*, the Court concluded based on relevant studies that “eyewitness testimony is often ‘hopelessly unreliable.’ The research strongly supports the conclusion that eyewitness misidentification is now the single greatest source of wrongful convictions in the United States, and responsible for more wrongful convictions than all other causes combined.” *State v. Dubose*, 2005 WI 126, ¶ 30, 285 Wis. 2d 143, 699 N.W.2d 582 (citations omitted); *see also*

State v. Shomberg, 2006 WI 9, ¶ 43, 288 Wis. 2d 1, 709 N.W.2d 370 (acknowledging importance of recent reforms and “growing appreciation for the difficulties inherent in eyewitness identification”).

Wisconsin courts have overturned convictions and granted new trials despite eyewitness identifications. For example, in *Garcia v. State*, the Court granted a new trial in the interest of justice, noting “[t]here is nothing in the record to in any way indicate [the eyewitness] was not telling the truth as she believed it to be,” but in light of the new evidence, “she could have been mistaken.” *Garcia v. State*, 73 Wis. 2d 651, 655, 245 N.W.2d 654 (1976); *see also State v. Hicks*, 202 Wis. 2d 150, 154, 172, 549 N.W.2d 435 (1996) (granting new trial despite victim’s identification of defendant). Thus, despite the best of intentions, eyewitnesses make mistakes that lead to the conviction of innocent individuals.

CONCLUSION

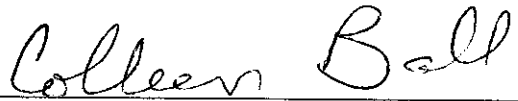
In light of the evidence regarding the factors contributing to both Avery’s false confession and the unreliability of the eyewitness identifications, *amicus* Innocence Network urges this Court to reverse the judgment below, vacate the conviction, and remand for a new trial.

Dated this 2nd day of July, 2008.

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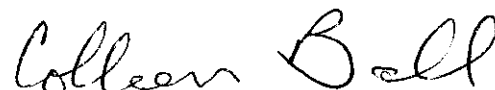
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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wisconsin Statutes § 809.19(8)(b) and (c)(2) for a brief produced with a proportional serif font. The length of this brief is 2,986 words.

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