No.

IN THE SUPREME COURT OF THE UNITED STATES

PHILLIP JASON GARRETT, Petitioner

v.

STATE OF KANSAS, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT

APPENDIX

Appendix A – Kansas Supreme Court decision reversing the district court and remanding the case to the district court in *State of Kanas v. Phillip Jason Garrett,* decided September 20, 2024.

Appendix B – Kansas Court of Appeals decision reversing the Kansas District Court in *State of Kanas v. Phillip Jason Garrett*, decided October 21, 2022.

Appendix C - Kansas District Court decision transcript granting motion to suppress, *State of Kanas v. Phillip Jason Garrett* decided July 30, 2021.

Appendix D- Kansas District Court decision transcript denying motion to suppress, *State of Kanas v. Phillip Jason Garrett* decided January 27, 2020.

Appendix E - Kansas District Court transcript of motion to suppress, *State of Kanas v. Phillip Jason Garrett* held on January 3, 2020.

Appendix F - Truth Verification Release/Miranda Rights Form provided by Sergeant Cox to Mr. Garrett on November 20, 2018.

Appendix A

319 Kan. 465
Supreme Court of Kansas.

STATE of Kansas, Appellant,
v.
Phillip Jason GARRETT, Appellee.

No. 124,329
|
Oral Argument Held May 15, 2023.
|
Opinion Filed September 20, 2024.

Synopsis

Background: In prosecution for rape, aggravated indecent liberties with a child, aggravated indecent solicitation of a child, and aggravated criminal sodomy, the District Court, 28th Judicial District, Saline County, Jared B. Johnson, J., granted defendant's motion to suppress statements he made during police interview. State appealed. The Court of Appeals, 2022 WL 12129643, reversed. Defendant petitioned for review.

Holdings: The Supreme Court, Wilson, J., held that:

[1] law enforcement tactics during police interview did not constitute overreaching misconduct;

[2] detective's statement that he wanted to tell prosecutor that defendant had cooperated was not a promise of leniency; and

[3] any coercive effect of initial reading of *Miranda* rights was alleviated when defendant was given second *Miranda* advisory.

Court of Appeals affirmed; district court reversed and remanded.

Rosen, J., filed dissenting opinion in which Wall, J., joined.

Wall, J., filed dissenting opinion in which Rosen, J., joined.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

West Headnotes (26)

[1] **Criminal Law** Admission, statements, and confessions

When reviewing a district court's suppression order, an appellate court reviews the district court's findings about historical facts regarding the circumstances of the confession as issues of fact; thus, such findings about these factors must be supported by substantial competent evidence or, in other words, evidence that a reasonable person could accept as adequate to support a conclusion.

[2] **Criminal Law** Evidence wrongfully obtained

In reviewing the district court's factual findings on a motion to suppress, an appellate court does not reweigh the evidence, assess witness credibility, or resolve evidentiary conflicts and disregards any conflicting evidence or other inferences that might be drawn from the evidence.

[3] **Criminal Law** Review De Novo

After assessing the evidentiary sufficiency of the district court's factual findings on a motion to suppress, an appellate court then reviews the district court's ultimate legal conclusion de novo.

[4] **Criminal Law** Review De Novo

Appellate de novo review of a district court's legal conclusion on a motion to suppress involves consideration of whether the state actor overreached, the determination of how the accused reacted to the external facts, and the legal significance of the reaction as issues of law.

[5] **Criminal Law** Statements, confessions, and admissions

The appellate court gives no deference to the trial judge's legal conclusion on a motion to suppress that the accused did not voluntarily confess.

[6] **Criminal Law** Necessity of showing voluntary character

Criminal Law Coercion

The Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment due process clause, bars the State from relying on coerced or involuntary statements to establish a defendant's guilt. U.S. Const. Amends. 5, 14.

[7] **Criminal Law** What constitutes voluntary statement, admission, or confession

A statement can be involuntary even if officers read a defendant their *Miranda* rights and the defendant waived a right to counsel. U.S. Const. Amend. 5.

[8] **Constitutional Law** Circumstances Under Which Made; Interrogation

Due process protects against involuntary confessions caused by coercive police tactics which fall into two broad categories: (1) those that are inherently coercive and a per se violation of the due process clause and (2) those where a state actor uses interrogation techniques that because of the unique circumstances of the suspect are coercive. U.S. Const. Amend. 14.

[9] **Constitutional Law** Circumstances Under Which Made; Interrogation

Police tactics that are inherently coercive, for purposes of due process protection against involuntary confessions, include interrogation techniques that in isolation are inherently offensive to a civilized system of justice and usually involve coercive techniques that included extreme psychological pressure or brutal beatings and other physical harm. U.S. Const. Amend. 14.

[10] **Constitutional Law** Circumstances Under Which Made; Interrogation

In determining whether a confession was obtained in violation of due process, when confronted with a confession alleged to have been caused by law enforcement tactics that were coercive (and thus misconduct) because of the unique circumstances of the suspect, court considers the totality of the circumstances, including circumstances relevant to both law enforcement and the accused, to determine first whether the law enforcement tactics used in the instance constituted overreaching misconduct. U.S. Const. Amend. 14.

[11] **Constitutional Law** Statements, Confessions, and Admissions

In the absence of the State abusing its power, a confession does not violate due process. U.S. Const. Amend. 14.

[12] **Constitutional Law** Circumstances Under Which Made; Interrogation

If police misconduct is found, appellate courts must undertake a causal analysis to determine whether the misconduct resulted in the challenged confession, as would violated due process. U.S. Const. Amend. 14.

[13] **Constitutional Law** Circumstances Under Which Made; Interrogation

A causal analysis is necessary if police misconduct is found related to a confession because the mere presence of police misconduct connected to a confession is not enough to require suppression; the misconduct must cause the defendant's free will to be overborne, such that the resulting confession is not voluntary, and when that happens, law enforcement has violated due process and it is appropriate to suppress the confession for that violation. U.S. Const. Amend. 14.

[14] **Criminal Law** Voluntariness

The State bears the burden of proving the voluntariness of a defendant's confession by a preponderance of the evidence.

[15] **Constitutional Law** Circumstances Under Which Made; Interrogation

Any relevant characteristics of law enforcement tactics and the accused may—and should—be considered in determining whether a confession was coerced in violation of due process. U.S. Const. Amend. 14.

[16] **Constitutional Law** Circumstances Under Which Made; Interrogation

Potential details of an interrogation that may be relevant in determining whether a confession was coerced in violation of due process include: the length of the interview; the accused's ability to communicate with the outside world; any delay in arraignment; the length of custody; the general conditions under which the statement took place; any physical or psychological pressure brought to bear on the accused; the officer's fairness in conducting the interview, including any promises of benefit, inducements, threats, methods, or strategies used to coerce or compel a response; whether an officer informed the accused of the right to counsel and right against self-incrimination through the *Miranda* advisory; and whether the officer negated or otherwise failed to honor the accused's Fifth Amendment rights. U.S. Const. Amends. 5, 14.

[17] **Constitutional Law** Circumstances Under Which Made; Interrogation

Potential characteristics of the accused that may be relevant when determining whether an officer's conduct resulted in a coerced confession in violation of due process include the accused's age; maturity; intellect; education; fluency in English; physical, mental, and emotional condition; and experience, including experience with law enforcement. U.S. Const. Amend. 14.

[18] **Constitutional Law** Circumstances Under Which Made; Interrogation

When evaluating police misconduct, in determining whether a confession was coerced in violation of due process, the appellate court considers the district court's findings about the interview itself and those findings about the defendant that would have been known to (or ascertainable by) law enforcement; only when evaluating voluntariness overall does the appellate court consider the factors which law enforcement would have had no way of knowing, such as a defendant's experience or subjective feelings. U.S. Const. Amend. 14.

[19] **Criminal Law** Statements, confessions, and admissions

Criminal Law Admission, statements, and confessions

The appellate court's task on review of a district court's determination that a confession was coerced in violation of due process is akin to solving a jigsaw puzzle: first sorting out the district court's relevant findings of fact supported by sufficient evidence and then fitting those facts together to assess, as a matter of law, whether the final picture produced by those findings reveals police misconduct, and if the answer is yes, the appellate court then proceeds to determining whether the facts demonstrate, as a matter of law, that the misconduct caused an accused person's will to be overborne, rendering the confession involuntary and inadmissible for violating due process. U.S. Const. Amend. 14.

[20] **Criminal Law** Evidence wrongfully obtained

Criminal Law Statements, confessions, and admissions

When reviewing a district court's determination that a confession was coerced in violation of

due process, the appellate court looks to the factual findings as made by the district court; and considers those findings both specifically and then as part of the overall circumstances to determine whether the law enforcement tactics constituted overreaching misconduct. U.S. Const. Amend. 14.

[21] **Constitutional Law** Particular cases

Criminal Law Particular cases

Criminal Law Representations as to physical evidence

Under totality of circumstances, law enforcement tactics during police interview did not constitute overreaching misconduct in violation of due process, as could render defendant's confession inadmissible in prosecution for rape and related crimes involving a child; while police exaggerated the ability of computerized voice stress analysis (CVSA) to verify truth of statements and suggested justifications for his actions using the "Reid Technique," defendant was a grown man, of average intelligence, was fluent in English, duration of interrogation was not prolonged, he was given the *Miranda* advisory twice, and officers did not indicate that a confession would keep him out of jail. U.S. Const. Amend. 14.

[22] **Constitutional Law** Circumstances Under Which Made; Interrogation

A statement during police interrogation is not involuntary, as would violate due process, simply because a defendant was tired, the condition must have made the defendant seem confused, unable to understand, unable to remember what had occurred, or otherwise unable to knowingly and voluntarily waive the right to remain silent. U.S. Const. Amend. 14.

[23] **Constitutional Law** Particular cases

Criminal Law Promise of leniency in general

Detective's statement during interview of suspect after he was accused of inappropriately touching a minor that he wanted to tell the prosecutor that suspect had cooperated was not a promise of leniency and, thus, could not be considered coercive, as could render suspect's confession involuntary in violation of due process. U.S. Const. Amend. 14.

[24] **Criminal Law** Promise of leniency in general

A promise of leniency can render a confession involuntary if it concerns action to be taken by a public official, would likely cause the accused to make a false statement to obtain the benefit of the promise, and was made by a person whom the accused reasonably believed had the power or authority to execute it.

[25] **Constitutional Law** Particular cases

Criminal Law Repetition

Any coercive effect of initial reading of *Miranda* rights during police interview of suspect who had been accused in inappropriately touching a minor, in which the reasons and importance of the *Miranda* advisory were minimized, was alleviated when suspect was given a second *Miranda* advisory, in which suspect's rights were clearly recited and suspect acknowledged each one, in determining whether suspect's confession was coerced in violation of due process. U.S. Const. Amends. 5, 14.

[26] **Constitutional Law** Circumstances Under Which Made; Interrogation

In some circumstances, an officer's attempt at minimizing a defendant's rights can contribute to a coercive atmosphere that may lead to an involuntary statement, as would violated due process. U.S. Const. Amend. 14.

**1119 *Syllabus By the Court*

1. The protections of the Fifth Amendment to the United States Constitution, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, prohibit the State from relying on coerced or involuntary statements to establish a defendant's guilt. But these protections do not justify evidentiary suppression of confessions that are either unrelated to law enforcement tactics, or are connected to, but not causally related to, law enforcement tactics that constitute misconduct.

2. When determining whether a confession was obtained in violation of due process, a reviewing court must first consider the totality of the circumstances to determine whether any related law enforcement tactics constituted misconduct. If such law enforcement tactics do not constitute misconduct, a resulting confession cannot be rendered inadmissible because of those tactics.

3. If law enforcement committed misconduct related to a confession, a reviewing court must then assess whether, under the totality of the circumstances, the misconduct caused the confession. In other words, the court must consider whether the misconduct caused the defendant's free will to be overborne, such that the resulting confession was not voluntary. If that happened, law enforcement has violated due process and the resulting confession must be suppressed.

Review of the judgment of the Court of Appeals in an unpublished opinion filed October 21, 2022. Appeal from Saline District Court; JARED B. JOHNSON, judge.

Attorneys and Law Firms

Kristafer R. Ailslieger, deputy solicitor general, argued the cause, and Derek Schmidt, attorney general, was with him on the briefs for appellant.

D. Justin Bravi, of Salina Regional Public Defender Office, argued the cause, and Mark J. Dinkel, of the same office, was with him on the briefs for appellee.

Opinion

The opinion of the court was delivered by Wilson, J.:

*466 Police interviewed Phillip Jason Garrett after he was accused of inappropriately touching a minor, L.A. Garrett confessed to some of the allegations during the interview. The district court suppressed his statements after concluding they were involuntary. A panel of the Court of Appeals reversed, holding the district court placed undue weight on the deceptive police practices while excluding "nearly all other relevant components of the inquiry." *State v. Garrett*, No. 124,329, 2022 WL 12129643, at *6 (Kan. App. 2022) (unpublished opinion). Garrett petitioned for review. We affirm the Court of Appeals' reversal of the district court.

FACTUAL AND PROCEDURAL BACKGROUND

In November 2018, L.A.'s biological father reported to Salina police that he found text messages on L.A.'s phone showing Phillip Garrett inappropriately touched her. L.A. was under 14 years-of-age at the time. Police interviewed L.A., and she confirmed Garrett had touched and penetrated her vagina and anus multiple times and rubbed her chest. Officers contacted Garrett and requested he come to the police station, and Garrett agreed.

Detective Tim Brown and Detective Gregory Jones interviewed Garrett in a locked room inside the police headquarters. The interview began with Detective Jones telling Garrett that Jones needed to "jump through some hoops" because the interview was taking place behind locked doors and Jones was a "cop and I ask questions." Jones then read Garrett his *Miranda* rights. The officers asked Garrett about the allegations, and Garrett denied them.

The officers then asked Garrett if he would submit to a computerized voice stress analysis (CVSA) to verify the truth of his statements. **1120 Garrett was hesitant, telling the officers he was very nervous and stressed and worried the stress would negatively impact the results of the test. The detectives offered to bring in Sergeant Sarah Cox, who administers the tests, to better explain the *467 test and allay his fears. While they waited for Sergeant Cox, Detective Brown told Garrett the CVSA is more accurate than a polygraph.

Sergeant Cox entered the interview room and described the test to Garrett. She told him, "They're just a series of yes or no questions. If you're telling us the truth, then you should have no problem, okay? But if you're lying about these specific questions, the stress is going to pop up on those charts like nobody's business and we're gonna know. It is 100% effective." When Detective Brown let Sergeant Cox know

Garrett was worried his general stress was going to alter the results of the test, Cox told him "this test is 100% effective and what I mean by that [is] it doesn't matter if someone is drunk or high or sober, it's still going to measure that frequency and that stress in your vocal cords." Detective Brown told Garrett they appreciated his cooperation so far and thought he would want to continue to cooperate. Garrett eventually agreed to submit to the test.

Sergeant Cox led Garrett into a separate room to complete the CVSA. Before they began, Sergeant Cox handed Garrett a form to read and sign titled "Truth Verification Release Form." The form stated that Garrett was submitting to the test without any "threat, coercion, promise, reward or immunity," and that Garrett released all involved parties from any liability associated with the exam. The form also stated that Garrett understood all materials and recordings from the exam could be released for the purposes of testimony. The bottom of the form included Garrett's *Miranda* rights. Sergeant Cox read each right aloud to Garrett and had him initial beside each one.

After Garrett signed the form, Sergeant Cox offered more details about the exam:

> "[T]he CVSA is actually a tool that's used all over the United States, even the military uses it, to verify whether someone is telling the truth. Okay? Instead of being called a lie detector test, the CVSA is considered a truth verification exam, and it is 100% effective. Okay? The CVSA works by analyzing the stress of one's voice when asked specific questions to determine whether the person being asked those questions is telling the truth or a lie. The test activates off of voice frequency alone so again it doesn't matter how high, drunk, sober a person is, it's going to be 100% accurate."

***468** Sergeant Cox said, "by the time we're done in here, we're going to know what happened and what the truth is." She then administered the test and returned Garrett to the interview room.

After that, Sergeant Cox analyzed the results and concluded "there was stress present, and stress is an indication of deception." She then contacted another CVSA examiner to analyze the results, which is standard protocol. The two examiners then discussed the results and their separate analyses. Their discussion did not cause Cox to change her opinion about the test results.

The officers told Garrett the test had registered stress when Sergeant Cox asked if Garrett had touched L.A.'s anus. Garrett still denied the allegations. Detective Brown said he could tell Garrett loved L.A., and that his love had caused him to make a bad decision. The officers said they wanted to tell the prosecutor Garrett had been cooperative. Garrett eventually confessed to rubbing L.A.'s vagina four or five times.

The State charged Garrett with 11 counts of rape, 8 counts of aggravated indecent liberties with a child, 1 count of aggravated indecent solicitation of a child, and 2 counts of aggravated criminal sodomy.

Garrett moved to suppress the statements he made during the interrogation, arguing they had been coerced. The district court held a hearing on the motion, during which Detectives Jones and Brown and Sergeant Cox testified. The court admitted the recordings of the interview and the CVSA results. Gary Davis, a defense expert, testified about the CVSA and its accuracy. He stated that while he was not familiar with how the test is administered, the CVSA is a real test that has been used in official settings. But Davis ****1121** also testified the test was "[n]o better than flipping a coin" to detect truthfulness. And he agreed literature shows it to be only 15 to 50 percent accurate in detecting truthfulness and that the CVSA cannot discriminate general stress from "case-specific" stress.

The district court initially concluded that Garrett's statement had been voluntary and denied the motion to suppress. We will discuss the district court's findings in more detail below.

Eighteen months later, before trial, the district court reversed its own judgment sua sponte. The court reconsidered the totality of the circumstances and—based largely on the officers' deceptive ***469** description of the accuracy of the CVSA and the postexam interview tactics—concluded Garrett's statements were involuntary. The court then suppressed Garrett's statements.

The State filed an interlocutory appeal, and the Court of Appeals reversed. *Garrett*, 2022 WL 12129643, at *6. The panel majority concluded the district court focused "almost entirely" on "its discontent with the CVSA and its attendant discussions, rather than adhering to its obligation to conduct a full and fair assessment based on the totality of the circumstances." 2022 WL 12129643, at *6. Judge Hurst concurred but wrote separately. 2022 WL 12129643, at *6-11

(Hurst, J., concurring). We granted Garrett's petition for review.

ANALYSIS

Garrett argues the Court of Appeals erroneously reversed the district court's suppression by reweighing evidence and considering the officers' deceptive tactics in isolation rather than together with other coercive factors. He contends that, without these errors, the totality of the circumstances shows his statements were involuntary.

Standard of Review

[1] [2] [3] [4] [5] When reviewing a district court's suppression order, an appellate court reviews the district court's "findings about historical facts regarding the circumstances of the confession as issues of fact"; thus, such findings "about these factors must be supported by substantial competent evidence or, in other words, evidence that a reasonable person could accept as adequate to support a conclusion." *State v. G.O.*, 318 Kan. 386, 407, 543 P.3d 1096 (2024). In making this determination, an appellate court "does not reweigh the evidence, assess witness credibility, or resolve evidentiary conflicts" and disregards "any conflicting evidence or other inferences that might be drawn from the evidence." *G.O.*, 318 Kan. at 407, 543 P.3d 1096. After assessing the evidentiary sufficiency of the district court's findings, an appellate court then reviews the district court's ultimate legal conclusion de novo. *State v. Palacio*, 309 Kan. 1075, 1081, 442 P.3d 466 (2019). As we recently explained, this involves our consideration of

> ***470** "whether the state actor overreached, the determination of how the accused reacted to the external facts, and the legal significance of the reaction as issues of law. We examine the totality of circumstances and assess de novo the trial judge's legal conclusion based on those facts. This means we give no deference to the trial judge's legal conclusion that [the accused] did not voluntarily confess." *G.O.*, 318 Kan. at 407, 543 P.3d 1096.

Garrett argues the Court of Appeals erroneously reweighed the evidence and incorrectly assessed the legal effect of some of the district court's factual findings. Both arguments present legal questions subject to unlimited review. See *State v. Neighbors*, 299 Kan. 234, 240, 328 P.3d 1081 (2014); *Palacio*, 309 Kan. at 1081, 442 P.3d 466.

Discussion

[6] [7] The Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment Due Process Clause, prohibits the State from compelling anyone "in any criminal case to be a witness against himself." This protection bars the State from relying on coerced or involuntary statements to establish a defendant's guilt. *Palacio*, 309 Kan. at 1087, 442 P.3d 466. A statement can be involuntary even if officers read a defendant their *Miranda* rights and the defendant waived a ****1122** right to counsel. 309 Kan. at 1087, 442 P.3d 466.

[8] [9] Due process protects against involuntary confessions caused by coercive police tactics. These tactics fall into two broad categories: "(1) Those that are inherently coercive and a per se violation of the Due Process Clause and (2) those where a state actor uses interrogation techniques that because of the unique circumstances of the suspect are coercive." *G.O.*, 318 Kan. at 397, 543 P.3d 1096. The former group includes "interrogation techniques that in isolation are inherently offensive to a civilized system of justice" and usually involve "coercive techniques that included extreme psychological pressure or brutal beatings and other physical harm." 318 Kan. at 397-98, 543 P.3d 1096. While Garrett claims the police's tactics were coercive, he does not argue they were of the sort that is "inherently offensive to a civilized system of justice."

[10] [11] [12] [13] [14] When confronted, as here, with a confession alleged to have been caused by law enforcement tactics that were coercive (and thus misconduct) "because of the unique circumstances of the suspect," ***471** we consider the totality of the circumstances, including circumstances relevant to both law enforcement and the accused, to determine first whether the law enforcement tactics used *in this instance* constituted overreaching misconduct. In the absence of the State abusing its power, a confession does not violate due process. If such misconduct is found, appellate courts then must undertake a causal analysis to determine whether the misconduct resulted in the challenged confession. *G.O.*, 318 Kan. at 398, 543 P.3d 1096. That causal analysis is necessary if misconduct is found because the mere presence of police misconduct *connected* to a confession is not enough to require suppression. The misconduct must

cause the defendant's free will to be overborne, such that the resulting confession is not voluntary. When that happens, law enforcement has violated due process and it is appropriate to suppress the confession for that violation. See *G.O.*, 318 Kan. at 400, 543 P.3d 1096. The State bears the burden of proving the voluntariness of a defendant's confession by a preponderance of the evidence. 318 Kan. at 403-04, 543 P.3d 1096 (citing *State v. Brown*, 286 Kan. 170, 172, 182 P.3d 1205 [(2008)]).

[15] [16] [17] So what are the characteristics of law enforcement tactics and the accused to be considered here? Because we have described these characteristics, or factors, as nonexclusive, "any relevant factor may—and should—be considered." *G.O.*, 318 Kan. at 402, 543 P.3d 1096. Still, we have previously identified several such factors:

> "Potential details of the interrogation that may be relevant include: the length of the interview; the accused's ability to communicate with the outside world; any delay in arraignment; the length of custody; the general conditions under which the statement took place; any physical or psychological pressure brought to bear on the accused; the officer's fairness in conducting the interview, including any promises of benefit, inducements, threats, methods, or strategies used to coerce or compel a response; whether an officer informed the accused of the right to counsel and right against self-incrimination through the *Miranda* advisory; and whether the officer negated or otherwise failed to honor the accused's Fifth Amendment rights.
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> "Potential characteristics of the accused that may be relevant when determining whether the officer's conduct resulted in an involuntary waiver of constitutional rights include the accused's age; maturity; intellect; education; fluency in English; physical, mental, and emotional condition; and experience, including experience with law enforcement." *G.O.*, 318 Kan. at 403, 543 P.3d 1096.

***472 [18]** When evaluating misconduct, we consider the district court's findings about the interview itself and those findings about the defendant that would have been known to (or ascertainable by) law enforcement; only when evaluating voluntariness overall do we consider the factors which law enforcement would have had no way of knowing, such as a defendant's experience or subjective feelings.

[19] Our task on review is thus akin to solving a jigsaw puzzle: first sorting out the district court's relevant findings of fact supported ****1123** by sufficient evidence and then fitting those facts together to assess, as a matter of law, whether the final picture produced by those findings reveals police misconduct. If the answer is yes, we then proceed to determining whether the facts demonstrate, as a matter of law, that the misconduct caused an accused person's will to be overborne, rendering the confession involuntary and inadmissible for violating due process.

Substantial competent evidence supports the district court's findings of fact.

On January 27, 2020, the district court held an evidentiary hearing on the motion to suppress. At the conclusion of the hearing, the court made the following findings:

- Garrett was brought in for questioning at the Salina Police Department, behind one set of locked doors. The interrogation began at around 1:20 p.m.
- Detective Brown, Detective Jones, and other law enforcement were present throughout the interview.
- Garrett was provided with his *Miranda* warning at the outset. There was some minimization of that process by the detective, who referred to the warning as "hoops that he needed to jump through" because Garrett was arguably in custody.
- Soon it became apparent to Garrett that the interview was about his inappropriate touching and behavior toward L.A.

***473** • The officers were very fair as far as their tone and demeanor, and were not in any way coercive in an outright confrontational sense.

- Garrett's mental condition was stressed; however, he was oriented to time, place, and circumstance.
- Garrett was able to communicate with the outside world.
- The duration of the interrogation was short.
- Garrett is fluent in English.
- Garrett is articulate, and of average or above average intellect.
- At the time of the interview, Garrett's age was close to 40.

- The officer "oversold" the voice stress test. It was presented as 100 percent effective repeatedly, in the context of Garrett denying any inappropriate touching. The test was presented as a foolproof truth confirmation test. Nothing in the literature would indicate that it is 100 percent effective. To assert as much was a deceptive practice.

- Sergeant Cox indicated the CVSA was 100 percent effective for truth confirmation and that the test could differentiate between the stress of the event and the stress of deception. The literature before the court indicated that was not accurate.

- After being confronted with the result of the CVSA, Garrett changed his answers and started disclosing statements that incriminated him.

- Garrett was not threatened.

- No promises were made to Garrett concerning action that would be taken by a public official in reference to a deal or some favorable treatment.

On July 30, 2021, the district court held a hearing on its own motion to reconsider the motion to suppress. No additional evidence was presented. The court stated it did not intend to repeat every finding previously made, and incorporated its findings from January 27, 2020, but also supplemented those with additional findings. The additional findings were to replace any contrary findings from the earlier hearing. The supplemental findings were as follows:

***474** • Garrett's interview was several hours in length, including a significant period the defendant spent alone or isolated.

- The interview was conducted by three different officers at varying points.

- Garrett was in his early 30s at the time and informed officers that he had not eaten or slept and that he was upset. At the time, Garrett worked at Dillons as a backup meat cutter and manager.

- The questioning before the CVSA was nonconfrontational and less direct.

- Detectives told Garrett that nervousness was not part of the equation, that ****1124** they thought it was " 'a fantastic tool, an excellent tool[,]' " or words to that effect.

- Sergeant Cox then arrived and explained the CVSA, and stated the CVSA is 100 percent effective, despite Garrett's stress.

- Detectives asked Garrett if he would agree to take the test, and Garrett acquiesced.

- The CVSA exam occurred in a separate room with Garrett and Cox present. Cox informed Garrett the exam would be recorded and he could stop it at any time.

- Garrett was trying to read a form Cox gave him and he could not make out the word "coercion." Cox pronounced it for him and then he understood it.

- Cox again administered the *Miranda* warnings to Garrett. Garrett was again told he could stop the exam at any time.

- Cox explained they formerly used a polygraph exam but now use the CVSA. Cox said the CVSA is used throughout the United States, and even the military uses it. She explained it is a truth verification exam and it is 100 percent effective. Cox said by the time they were done they would know what happened and what the truth was.

- Cox told Garrett she wanted him to pass the test and remember to be completely honest. Before administering the CVSA, she reviewed with Garrett the specific allegations of how the defendant touched L.A. Garrett denied the allegations.

***475** • Cox then administered the CVSA.

- After the CVSA, law enforcement was not persuaded by Garrett's continued denials and told him they believed he touched L.A. as alleged.

- Garrett was twice given *Miranda* warnings before testing and did not assert he wanted counsel or wished to remain silent.

- Law enforcement's use of the "Reid Technique" to minimize and obstruct claims of innocence were egregious.

We conclude the district court's findings of fact are supported by substantial competent evidence. (While there is some

discrepancy in whether Garrett was "in his early thirties" or "closer to forty[,]" both findings describe Garrett as a mature adult.)

The detectives did not overreach.

Having found that the district court's findings were supported by substantial competent evidence, we next turn to its legal conclusions: that under the totality of the circumstances there was overreaching law enforcement misconduct that caused Garrett's will to be overborne, such that his confession was involuntary. We review these aspects of the district court's decision de novo. In doing so, we note the district court, the Court of Appeals, and the parties did not have the benefit of our decision in *G.O.* clarifying several of the legal principles relevant to the proper legal analysis in this case.

Before the district court, Garrett focused on the officers' fairness in conducting the interrogation. He argued the officers unfairly coerced him into confessing by downplaying the significance of the interrogation and the *Miranda* warnings, misrepresenting the accuracy and admissibility of the CVSA exam, encouraging him to confess so the prosecutor would look favorably upon him, and utilizing an interrogation tactic called the Reid Technique by minimizing the serious nature of the crime and offering innocent explanations after asserting that the CVSA proved guilt.

After discussing the officers' unfairness in more detail at the second hearing, the district court explained its new ruling:

> ***476** "The Court has reconsidered the totality of the circumstances. Clearly, the defendant was under stress. He reported not sleeping or eating. He had difficulty reading the word 'coercion,' had to be explained to him. Law enforcement minimized the need for *Miranda*. Delayed telling him the specific nature of the allegations. And what troubles the Court most significantly is law enforcement deliberately misled the defendant regarding the effectiveness of the CVSA. As I mentioned previously, they ****1125** oversold it as 100% effective and a way for the defendant to move past this.
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> "The Court understands that law enforcement are allowed to use misleading tactics at times during an investigation; however, the overselling and application of the CVSA process and the post CVSA interview tactics are a bridge too far in these circumstances.
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> ....
>
> "Considering the totality of all the circumstances, including the pre-CVSA tactics and approach, the process used during the CVSA and the post-CVSA tactics and approach, the Court finds the defendant's statements after the CVSA were not voluntary, they were not the product of his free and voluntary will, and the Court is suppressing those statements."

The Court of Appeals rejected what it perceived as the district court's "hard stop against deceptive interview techniques in general." *Garrett*, 2022 WL 12129643, at *5. It then appeared to disagree with the district court's finding that Garrett was stressed and tired and had not eaten: "As the testing period neared, Garrett repeatedly made his current level of anxiety known, explaining that he was 'hyped up' and felt nervous and stressed arguably in a thinly veiled attempt to offer an innocent explanation for any stress registered by the test." 2022 WL 12129643, at *5. The majority described Garrett's mental condition as "stable." 2022 WL 12129643, at *6.

The panel concluded:

> "In our view, the district court entered its second ruling almost entirely as a product of its discontent with the CVSA and its attendant discussions, rather than adhering to its obligation to conduct a full and fair assessment based on the totality of the circumstances. Shining a light on those factors reveals that Garrett's mental condition was stable and he was not subject to undue duress. While he admitted to experiencing stress, the evidence reflects that anxiety started to simmer the night before his interview after reviewing a text on his wife's phone from L.A.'s father about this matter. The manner and duration of Garrett's interview was also nonremarkable. The evidence reflects it started at roughly 1:30 in the afternoon and lasted only about 2 hours, which we find to be a reasonable length of time. While the record is absent any facts addressing whether Garrett sought to communicate with the outside world at the time, there is no evidence suggesting ***477** such a request was made and denied. Finally, turning to Garrett's age, intellect, and background. The evidence adduced demonstrated that Garrett was about 40 years old, married with a family, and worked in two capacities at a local store with one of those roles carrying managerial responsibilities. Accordingly, there is no evidence tending to show Garrett lacked the intellectual capabilities to appreciate his circumstances or what was being asked of him.

> "The undue weight the district court afforded the deceptive techniques, to the exclusion of nearly all other relevant components of the inquiry, gave rise to a finding of involuntariness that is neither grounded in substantial competent evidence nor consistent with the longstanding law in this area. Accordingly, that decision cannot be permitted to stand. The district court's conclusion that Garrett's statements were involuntary and its suppression of the same is reversed." *Garrett*, 2022 WL 12129643, at *6.

[20] Garrett argues the panel erred by reweighing the evidence and considering the legal effect of the relevant factors in isolation, rather than assessing the cumulative effect of all the relevant factors. As to the evidence considered by this court, we look to the findings as made by the district court. And we consider those findings both specifically and then as part of the overall circumstances to determine whether the law enforcement tactics constituted overreaching misconduct.

We believe the dissents' criticism that this review constitutes a "divide and conquer" approach is misplaced. Op. at 1133. Consideration of the cumulative effect of the totality of the circumstances does not require that we neglect to examine each circumstance. Rather, a close examination of the circumstances ****1126** provides greater understanding of their total effect.

[21] When considering all the circumstances related to both (a) law enforcement tactics and (b) what law enforcement knew about Garrett, we conclude that, as a matter of law, the police did not overreach. True, they exaggerated the CVSA's ability to detect truthfulness, which the district court found deceptive. And the district court found it "egregious" that law enforcement minimized and suggested justifications for Garrett's actions, using the Reid Technique.

[22] Even so, law enforcement also understood Garrett was a grown man of apparently average intelligence who was fluent in English. The duration of the interrogation was not prolonged; there was no evidence Garrett was denied any request to communicate with the outside world. Garrett highlights his stress and ***478** tiredness, but he cites no caselaw indicating that either *necessarily* results in involuntary confessions. Appropriate law enforcement interrogation has never required a stress-free environment. Difficult allegations require difficult questions that cause stress. As we have previously explained, "A statement is not involuntary simply because a defendant was tired ... the condition must have made the defendant seem confused, unable to understand, unable to remember what had occurred, or otherwise unable to knowingly and voluntarily waive the right to remain silent." *State v. Galloway*, 311 Kan. 238, 246, 459 P.3d 195 (2020). The district court made no such findings here, regardless of its observation that Garrett reported not eating or sleeping and was, understandably, under "stress."

[23] **[24]** Further, Garrett argues Detective Brown's statement that he wanted to tell the prosecutor that Garrett had cooperated also amplified the coercive nature of the interrogation. Admittedly, a *promise* of leniency can render a confession involuntary if it "concern[s] action to be taken by a public official[,] ... would likely cause the accused to make a false statement to obtain the benefit of the promise[,]" and was made "by a person whom the accused reasonably believed had the power or authority to execute it." *State v. Garcia*, 297 Kan. 182, 196, 301 P.3d 658 (2013). But an officer's statement that they would like to tell a prosecutor that a defendant cooperated is not a promise of leniency. *State v. Johnson*, 253 Kan. 75, 82, 84, 853 P.2d 34 (1993). Nor have we held such a statement to be coercive. See *State v. Harris*, 284 Kan. 560, 581, 162 P.3d 28 (2007) (resulting confession voluntary even though officer told defendant full cooperation would be viewed favorably); *State v. Tillery*, 227 Kan. 342, 344, 606 P.2d 1031 (1980) (confession voluntary when officers told defendant things would "go better" if they told the truth); *State v. Harwick*, 220 Kan. 572, 575, 552 P.2d 987 (1976) (confession voluntary even though officer told defendant that district attorney might be lenient). The officers' statements here were no different than those previously considered to be noncoercive. They did not promise leniency and thus were not improper.

***479** **[25]** **[26]** Next, Garrett argues that the minimization of his *Miranda* rights at the outset of the interview contributed to the coercive environment. We agree that, at least in some circumstances, an officer's attempt at minimizing a defendant's rights *can* contribute to a coercive atmosphere that may lead to an involuntary statement. See, e.g., *G.O.*, 318 Kan. at 407-09, 543 P.3d 1096; *Doody v. Ryan*, 649 F.3d 986, 1002-06 (9th Cir. 2011); *Ross v. State*, 45 So. 3d 403, 434-35 (Fla. 2010), *as revised on denial of reh'g* (2010). But that did not happen here. Garrett was advised of his constitutional rights not once, but twice, before he made incriminating statements. While the reasons and importance of the first *Miranda* advisory were minimized, the second advisory repeated the ones already given and Garrett

acknowledged each one. These rights included his right to stop the interview at any time (remain silent) and demand the assistance of counsel. This clearer and more forceful recitation of Garrett's rights alleviated any coercive effect that the initial reading caused.

Garrett also asserts the officers' deceptive exaggeration of the reliability of the CVSA to identify the "truth" was coercive. He insists this case is like *State v. Stone*, 291 Kan. 13, 29, 237 P.3d 1229 (2010). Despite certain ****1127** similarities, *Stone* is distinguishable. In *Stone*, the detectives falsely told the defendant they had found semen on the victim's pajama top and were sure it would match the defendant's DNA. They were also aggressive in their interrogation and implied the only thing that would keep the defendant out of jail or affect the length of the sentence was a confession. In addition, the defendant had a sore throat, an ankle injury, was suffering from exhaustion, and became confused to the point of offering garbled and disorganized responses throughout the interview and merely adopted the interrogator's suggested version of events. 291 Kan. at 22-23, 237 P.3d 1229. In contrast, here the district court made no finding that officers were aggressive or indicated Garrett's confession would keep him out of jail or affect the length of his sentence, or that Garrett's mental state prohibited him from thinking clearly.

Sometimes deceptive practices by law enforcement constitute misconduct, but not always. The difference is a matter of degree, gauged by what the officers knew or could have ascertained about ***480** the defendant; a lie told to a child, after all, will have a far greater impact than a falsehood given to an adult. Here, nothing about Garrett himself or the other surrounding circumstances of the interrogation could have exacerbated the effect of the deception. While our threshold assessment of misconduct differs from the ultimate question of voluntariness, we note that many cases have found a voluntary confession even when presented with law enforcement's deceptive tactics. See *Frazier v. Cupp*, 394 U.S. 731, 737, 739, 89 S. Ct. 1420, 22 L. Ed. 2d 684 (1969) (statements voluntary even though officer falsely told defendant codefendant had confessed to his and the defendant's guilt); *State v. Harris*, 279 Kan. 163, 170, 105 P.3d 1258 (2005) (deceptive interrogation techniques alone do not establish coercion); *State v. Swanigan*, 279 Kan. 18, 32, 106 P.3d 39 (2005) (police free to lie about evidence that fingerprints were found and confirmed to be Swanigan's, but false information must be viewed as a circumstance in conjunction with others, e.g., additional police interrogation tactics); *State v. Wakefield*, 267 Kan. 116, 127-28, 977 P.2d 941 (1999) (questioning officer's false statement to defendant, when viewed as part of the totality of the circumstances, was insufficient to make the otherwise voluntary confession inadmissible).

The alleged deception here stems from the disparity between what officers represented the CVSA's accuracy to be—100 percent—and what a witness reported the scientific literature said: 15-50 percent accuracy. But we disagree with Justice Wall's dissent's claim that "[a]ll the while, police knew the testing was junk science, the results could not be used in court." Op. at 1133. We simply do not know they knew that. No evidence supports the conclusion that the police in this case *knew* the CVSA test—a real test used by other law enforcement agencies—to be "junk science." Op. at 1133–34. Nor do we know from the evidence that CVSA results could never be admissible in court for any reason. To the extent the discrepancy in the CVSA's real versus represented accuracy *was* deceptive, as the district court found it to be, we cannot conclude that it constituted misconduct as a matter of law. As Judge Hurst aptly summarized:

> "[T]he deception here was not pervasive—while the interviewers extolled the accuracy of the CVSA exam, they did not heavily or repeatedly rely on its results. ***481** While the interviewers led Garrett to believe that some of his answers demonstrated stress, they did not say that the exam proved he lied or proved his guilt, and they did not belabor the exam results. They asked Garrett about the results just once or twice before changing tactics. Additionally, the interviewers did not lie about the existence of physical evidence, witnesses, or surveillance footage." 2022 WL 12129643 at *10 (Hurst, J., concurring).

The district court also criticized law enforcement's use of the Reid Technique as "egregious," so some explanation of the Reid Technique is needed. While the district court's use of the word "egregious" creates a negative connotation of these techniques, that conclusive connotation is not universally held. One secondary source more favorable to this law enforcement tactic describes it as follows:

> ****1128** "By virtue of its name, the Reid Technique of Interview and Interrogation may lend itself to the generalization that it teaches interrogators how to become better at eliciting confessions from suspects but no more

than that. Moreover, critics ... broadly assert that the technique is so powerful that interrogators use it to coerce suspects to confess to crimes they haven't committed, yet so flawed that interrogators are unable to tell the difference between someone who is telling the truth and someone who is not. Reid's 'three-part process for solving crime,' however, is much more comprehensive than such generalizations would suggest.

"While behavior analysis and interrogation skills are the primary benefits derived from the textbook and seminars, the technique's overall structure has a system of checks and balances. To review, first there is 'factual analysis.' Prior to interviewing a suspect, interrogators are instructed to gather as much independent evidence as possible from the most reliable sources. Second is the 'behavior analysis' interview, in which investigators look for symptoms of deception, but under the admonition not to put too much weight in any one indicator. Finally, there is the 'nine-step interrogation method,' which is set up in a manner so that innocent people are likely to forcefully deny guilt as early as steps one, two, and three.

"By the time the interrogator reaches what is likely the most suggestive part of the interrogation, innocent suspects will have given many indications of truthfulness, thereby eliminating the need to move into this area. In such cases, Reid advises the interrogator to consider the process of 'stepping down.' Stepping down involves softening the intensity of the interview or terminating it completely. Which way to proceed here depends on whether the interrogator believes the person has some knowledge of the crime (as an accomplice, witness, etc.), or is completely uninvolved.

"Whether or not a confession is voluntary depends on an overall inquiry into the suspect's susceptibility to coercion as well as whether or not the police acted in a manner likely to overbear the suspects' desire not to speak." Goodman, *Getting to the Truth: Analysis and Argument in Support of the Reid Technique of Interview and Interrogation*, 21 Me. B.J. 20, 24-25 (2006).

***482** Garrett submitted no evidence criticizing law enforcement's use of the Reid Technique as used here and cites no law prohibiting these techniques. Indeed, this court noted in *Khalil-Alsalaami v. State*, 313 Kan. 472, 507, 486 P.3d 1216 (2021), that "no Kansas appellate decision had found" " 'minimization' " techniques in interrogation "alone sufficient to render a defendant's confession involuntary."

But we pause to caution that the point is not whether a confession is truthful or false. The point is the process due the accused, *regardless* of the truth of the confession. As one federal district judge recently opined:

"While [Defendant] Monroe [criticizes] the Reid Technique ..., there is nothing impermissible as a matter of law with this interrogation approach; it falls within the range of acceptable interrogation tactics sanctioned by the First Circuit. Monroe offers no authority, and the Court could not find any, for the contention that an agent's minimization of crimes, under these facts, renders a suspect's statements involuntary. Thus, Monroe's argument that the Reid Technique violated his Due Process rights must fail.

"The problem with this result, of course, is that it implicitly condones police interrogation tactics, such as lie detector tricks and the minimization and maximization of crimes, which, again, can lead to—or are at least present in—false confessions. Thus, the use of the Reid Technique on most competent adults is lawful until and unless it fails, and proving its failure is a herculean task to be sure. Generally, it would require overcoming a finding of guilt on a post-conviction claim of actual innocence. The solution to this problem is not to ban the Reid Technique by holding, as Defendant would have it, that its use constitutes a per se Fifth Amendment violation. But, at the same time, law enforcement agents need to consider carefully whether their ****1129** tactics are appropriate in any given situation, and they should be fully trained, using real science (not company promotional propaganda), on the efficacy and frailties of various interrogation techniques.

"Indeed, all agents in the criminal justice system—prosecutors, defense attorneys, and judges—want a system that does not wrongfully convict innocent people. If law enforcement agents are led to believe incorrectly that the Reid Technique possesses a kind of special power to root out the truth—as the company's marketing material implies—they will be misled in certain cases, resulting in false confessions and wrongful convictions. It is also particularly important to recognize the risk of false confessions in vulnerable populations." *United States v. Monroe*, 264 F. Supp. 3d 376, 392-94 (D.R.I. 2017), *aff'd* No. 19-1869, 2021 WL 8567708 (1st Cir. 2021) (unpublished opinion).

***483** Here, law enforcement used both the Reid Technique and deception. We have previously held that neither is

prohibited standing alone. Here, they did not stand alone, and our precedent requires that we consider their cumulative effect. *Stone*, 291 Kan. at 25, 237 P.3d 1229. Even so, considering these and other tactics used by law enforcement, along with the factors relevant to Garrett as known by law enforcement, under the totality of the circumstances we conclude that law enforcement's actions did not go so far as to constitute misconduct in violation of due process. Since the tactics here were not misconduct, Garrett's resulting confession is not rendered inadmissible because of those tactics.

We affirm the Court of Appeals' reversal of the district court's suppression of Garrett's confession, albeit on different grounds. We remand the matter to the district court for further proceedings.

Judgment of the Court of Appeals reversing the district court is affirmed. Judgment of the district court is reversed and remanded.

Rosen, J., dissenting:

Today the majority sanctions law enforcement interrogation tactics that the district court described as "akin to a psychological rubber hose." While the majority may be unbothered, I believe that the deceptive tactics here went too far and functioned to defeat Garrett's free will. I would affirm the district court's suppression of Garrett's statements for the reasons I set out below. And I also join Justice Wall's dissent.

True to the majority's observation, the United States Supreme Court and this court have held that deceptive interrogation practices do not constitute a per se constitutional violation. But in each of those cases, the officers misrepresented existing physical evidence or witness' version of events. *Frazier v. Cupp*, 394 U.S. 731, 737, 739, 89 S. Ct. 1420, 22 L. Ed. 2d 684 (1969) (officer falsely told defendant codefendant implicated him in crime); *State v. Harris*, 279 Kan. 163, 170, 105 P.3d 1258 (2005) (officers lied about physical evidence and eyewitnesses); *State v. Wakefield*, 267 Kan. 116, 126, 977 P.2d 941 (1999) (officers lied about existence of incriminating fingerprints and witnesses).

***484** In contrast, the officers in this case did not misrepresent the existence of physical evidence or witness observations or their cooperation with law enforcement. Their coercion was multi-leveled consisting of numerous acts of deception. The officers began the interrogation by minimizing the importance of the *Miranda* advisement, explaining they merely had to "jump through some hoops" before they began the interrogation—those "hoops" being Garrett's constitutional right to remain silent.

Before the officers relied on the results of the CVSA to wrench a confession out of Garrett, they had to coerce him into taking the exam. To do this, they told Garrett that the CVSA was a reliable tool used by the military that was 100% accurate and would verify that he was telling the truth when he denied the allegations against him. The implication is clear: if Garrett refused to take the CVSA and verify the truth of his statements, he was obviously lying about his innocence. In constitutional terms, Garrett's exercise of his right to remain silent would establish his guilt. This directly contradicts Fifth Amendment jurisprudence, which has long provided that a defendant's custodial silence is "insolubly ****1130** ambiguous" and shall "carry no penalty." *Doyle v. Ohio*, 426 U.S. 610, 618, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). The officers also implied that his agreement to take the test would be communicated to the prosecutor as "cooperation." Garrett thus faced a reality in which his silence proved guilt—regardless of whether he was guilty—and an agreement to take the CVSA might earn him better treatment from the prosecutor. Standing alone, this is highly coercive.

But the officers' coercion continued. After the exam's conclusion, the officers revealed to Garrett that he had failed the test. From Garrett's point of view, a scientific test he (and nearly everyone) has never heard of that law enforcement insists is 100% accurate had absolutely proved his guilt. Guilty or not, his only realistic option was to take the officers up on their offer to tell the prosecutor Garrett had been cooperative. Again, I agree with the district court's assessment of this situation as akin to a "psychological rubber hose."

Other courts have viewed deception regarding the results of lie detector tests to be highly coercive. In ***485** *State v. Matsumoto*, 145 Haw. 313, 327, 452 P.3d 310 (2019), results from the defendant's polygraph were inconclusive, but officers told the defendant he failed. The defendant confessed and the Supreme Court of Hawaii suppressed the confession. In doing so, the court explained why falsely telling a defendant that a scientific test had absolutely shown their guilt was so psychologically impactful:

"The polygraph is a scientific instrument that purports to accurately determine whether the subject of the test is telling the truth. ... An examinee who has not lied does not expect to be given falsified polygraph test results from the police. It is thus not surprising that the presentation of falsified results may have serious and substantial effects on a suspect. '[E]xperiments have shown that ... counterfeit test results ... can substantially alter subjects' ... beliefs, perceptions of other people, behaviors toward other people, emotional states, ... self-assessments, [and] memories for observed and experienced events.' Saul M. Kassin et. al, Police-Induced Confessions: Risk Factors and Recommendations, 34 L. & Hum. Behav. 3, 17 (2010) (citing studies that have tracked the effects of counterfeit test results, along with other deceptive tactics) (internal citations omitted).

"Falsified polygraph results may pressure a suspect into changing the suspect's pre-test narrative. This pressure is intensified when an officer expresses confidence that the suspect is lying and is aggressive in pushing the suspect to confess on the basis of the officer's pre-formed belief of the suspect's guilt. Richard A. Leo & Richard J. Ofshe, The Truth About False Confessions and Advocacy Scholarship, 37 Crim. L. Bull. 293, 293-370 (2001). Falsified polygraph results are geared towards making the suspect believe in one's own guilt or believing that the officer will not stop the interrogation until the suspect confesses guilt. See Klara Stephens, Misconduct and Bad Practices in False Confessions: Interrogations in the Context of Exonerations, 11 Ne. U. L. Rev. 593, 596 (2019) (finding that false polygraph results are 'bad practices' that produce both true and false confessions).

"Once a suspect believes that a confession of guilt is inevitable, the individual is cognitively geared to accept, comply with, and even approve of that outcome. Kassin et. al., supra, at 17, (citing Elliot Aronson, The Social Animal (1999)) (exploring how human beings cognitively respond once they view an outcome as inevitable). That is, false polygraph results may psychologically prime an innocent suspect to make a confession.

....

"Extensive scientific literature and numerous documented cases have demonstrated the coercive nature of falsified polygraph test results; they can change a suspect's beliefs, pressure a suspect to confess, and even cause the suspect to believe they committed the crime when they did not." *Matsumoto*, 145 Haw. at 326-27, 452 P.3d 310, 452 P.3d.

There is no allegation that Garrett was given falsified results from the CVSA. But, like the defendant in *Matsumoto*, he was ****1131** falsely told that a lie detector test absolutely proved his guilt. In ***486** reality, the exam Garrett took was at best no more reliable than a coin flip.

This coercive effect of the CVSA was amplified by the highly dubious indication from the officers that the results could be used against Garrett in court. Before Garrett began his test, he was given a document that informed him the exam would be recorded and could be released for purposes of testimony. I question this representation. Because polygraph results have proven to be scientifically unreliable, they are generally inadmissible in Kansas unless the parties agree to their admission. *Wakefield*, 267 Kan. at 133, 977 P.2d 941. I suspect CVSA results would fair similarly. Nonetheless, the form Garrett signed indicated his results could be used as testimony. This would have cemented Garrett's belief that he had no recourse but to give the officers the confession they wanted. At least one other court has held it was coercive for an officer to falsely tell a defendant his polygraph results would be admissible in court. See *State v. Valero*, 153 Idaho 910, 914, 916, 285 P.3d 1014 (2012) (confession involuntary in part because officers told defendant polygraph results were admissible in court, which is legally incorrect). And this court has hinted that it would agree. See *State v. Sanders*, 223 Kan. 273, 277-78, 574 P.2d 559 (1977) (use of polygraph did not render confession involuntary in part because officers did not discuss admissibility of polygraph results with defendant); see also *State v. Morton*, 286 Kan. 632, 652, 186 P.3d 785 (2008) ("While telling a suspect false information about the evidence against the suspect, standing alone, does not render a confession involuntary, giving the suspect false or misleading information about the law is more problematic.").

When the officers did not obtain a confession after convincing Garrett to sit for the CVSA and revealing the supposed 100% reliable results, they deployed another deceptive tactic. The officers began minimizing the nature of the alleged crimes and offering justification for their commission. Standing alone, I agree that this was not enough to render a confession involuntary, but it certainly piled on to the already highly coercive nature of the interrogation. Our Court of Appeals has described how this tactic can influence a person's free will:

> ***487** "Although innocent, an individual may attribute the purported evidence against him or her to a horrible and likely uncorrectable mistake rather than to the interrogator's deception. And the interrogator's categorical dismissal of each protest of innocence can cement that fear. The individual then considers the minimalized admission of guilt the interrogator has offered to be the best way out of an exceptionally bad predicament. See Kassin, 34 Law & Hum. Behav. at 14, 16-19; Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques,* 33 Fordham Urb. L.J. 791, 817-19 (2006); Ofshe & Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action,* 74 Denv. U. L. Rev. 979, 985-86 (1997)." *State v. Fernandez-Torres*, 50 Kan. App. 2d 1069, 1087, 337 P.3d 691 (2014).

Aggravating all this deception was Garrett's emotional state. The district court found Garrett had emotional turmoil, intense stress, and had not slept or eaten. It was noticeable because it interfered with his understanding of the CVSA consent form—he did not know the meaning of at least one term, and he attributed his confusion to his emotional and physical state.

The district court here thoroughly considered the interrogation and carefully analyzed the voluntariness of Garrett's statements. This is evident in the detailed description of the court's findings and legal conclusions and in the court's commendable decision to correct its earlier order after giving it more thought. The district court made findings supported by substantial competent evidence that: (1) Garrett was emotionally confused and volatile, to the extent it interfered with his comprehension of the CVSA consent form; (2) officers minimized the importance of his *Miranda* advisement to induce him into the interrogation; (3) multiple officers repeatedly misstated the reliability of CVSA testing; (4) the CVSA consent form indicated the test results could be used as evidence ****1132** against Garrett; and (5) post-testing, the officers minimized the nature of the alleged crimes, offered justification for their commission, and suggested the prosecutor would view Garrett's confession favorably as a form of cooperation. Based on these findings and in light of the totality of the circumstances, like the district court, I conclude the officers' collective deceptive and coercive practices here fell too far over the line.

The majority acknowledges that the officers' misrepresentation of the accuracy of the CVSA was deceptive but concludes it was unproblematic because the officers' reliance on the CVSA results was not " 'pervasive.' " Op. at 1127–28 ***488** (quoting *State v. Garrett*, No. 124,329, 2022 WL 12129643, at *10 [unpublished opinion] [Hurst, J., concurring]). I do not understand this characterization or the reasoning. The officers began discussing the CVSA 30 minutes into the interview and did not abandon the topic until they had convinced Garrett to sit through the exam, administered the exam, and revealed the results over an hour later. After telling Garrett the exam showed he was being dishonest when he denied the allegations, the officers wrested a confession out of him in under 10 minutes. So, the officers may have mentioned the exam results only a few times after the exam was complete, but that was all it took for officers to get him to involuntarily waive his constitutional rights. I cannot see how this means use of the results was not pervasive or did not function to overpower Garrett's will.

I believe that the majority's rubber-stamp of the deception in this case paves the way for an onslaught of even more coercive trickery during police interrogations. Hyper-realistic digital impersonation that can be nearly impossible to debunk, or "deep fakes," as they have come to be known, are ever present. Chesney & Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 Cal. L. Rev. 1753, 1758 (2019). Advances in technology will continue to make these digital impersonations increasingly convincing. 107 Cal. L. Rev. at 1758. I fear it will not be long before law enforcement tests the limits of creating fabricated images of a detainee at the scene of the crime or artificially create other evidence in order to convince a suspect to forego their right to remain silent or cooperate with an investigation. The majority's blanket endorsement of deceptive police tactics, even in the face of a new and unfamiliar technology like the CVSA, signals this kind of highly concerning deceit is fair game.

This court has historically permitted the use of deceptive interrogation tactics. But I believe we should have drawn a line today and affirmed the district court's judgment to suppress Garrett's statements. As Justice Wall adeptly points out in his separate dissent, when the circumstances are analyzed in their totality, they show Garrett's confession was involuntary. Also worth mention, it appears the Court of Appeals believed that Garrett's confession ***489** was truthful, and this may have influenced their voluntariness analysis. *Garrett*, 2022 WL 12129643, at *5 (opining "given the fact Garrett was able to independently provide details of the incidents, he knew participation in the test

would require him to be dishonest"). To the extent this had any role, it was misguided. While coercive interview tactics have certainly resulted in false confessions—which demonstrates the psychological power of those tactics—false confessions are not the animating concern behind suppressing involuntary statements. Courts guard against coercive interrogative pressure to protect the individual's constitutional right to remain silent and to due process of law. Guilty or not, our Constitution guarantees every person these rights. The United States Supreme Court has emphasized this truth:

> "Our decisions under [the Due Process Clause] have made clear that convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an **1133 accused out of his own mouth." *Rogers v. Richmond*, 365 U.S. 534, 540-41, 81 S. Ct. 735, 5 L. Ed. 2d 760 (1961).

I would remember this today, and for the reasons stated hold that Garrett's confession was involuntary. I would affirm the district court's judgment to suppress his statements.

Wall, J., joins the foregoing dissenting opinion.

Wall, J., dissenting:

I join Justice Rosen's dissent in its entirety. I write separately to critique the majority's application of the controlling legal standard for voluntariness.

Under that legal standard, Garrett's custodial statements must be suppressed unless the State proves by a preponderance of evidence that they were voluntary under *the totality of the circumstances*. *State v. Spencer*, 317 Kan. 295, 297, 527 P.3d 921 (2023). The majority opinion fails to analyze voluntariness under this standard.

*490 Instead, the majority uses a clever analytical device—divide and conquer. It isolates each circumstance that contributed to the environment of coercion. Then, it points to caselaw suggesting each circumstance falls short of coercion on its own. *State v. Garrett*, 319 Kan. at —— – ——, 553 P.3d at 1124–29. The problem with this approach is that the Constitution requires us to consider the forest, not each tree. And when we do, the State's overreaching is apparent.

This critique is not groundbreaking. We recognized the illegitimacy of the divide-and-conquer approach in *State v. Stone*, 291 Kan. 13, 237 P.3d 1229 (2010)—cited by the majority. There, the district court reviewed each of the three alleged deceptive practices in isolation. It then cited caselaw to support its conclusion that each factor, alone, did not render the defendant's statements involuntary. 291 Kan. at 23, 237 P.3d 1229. *Stone* held the district court erred by "failing to look at the circumstances of the interrogation in totality." 291 Kan. at 29, 237 P.3d 1229. Even if each circumstance fell short on its own, the coercive environment became evident upon "a review of ... all of these circumstances, as the law requires." 291 Kan. at 32-33, 237 P.3d 1229.

Since *Stone*, Kansas appellate courts have "specifically rejected a divide-and-conquer approach to assessing the involuntariness of a confession." *State v. Fernandez-Torres*, 50 Kan. App. 2d 1069, 1092, 337 P.3d 691 (2014). Instead, the circumstances must be analyzed collectively. 50 Kan. App. 2d at 1092, 337 P.3d 691.

And when the court applies the legal standard correctly, it is often outcome determinative. Take *State v. Swanigan*, 279 Kan. 18, 106 P.3d 39 (2005), for instance. There, the defendant argued the totality of the circumstances rendered his statements involuntary. Those circumstances included detectives lying about the evidence and threatening to tell the prosecutor about the defendant's lack of cooperation. *Swanigan* held that "[a]lthough any one of these factors ... may not be sufficient to show coercion, the combination of all of them" does. 279 Kan. at 39, 106 P.3d 39; see also *Stone*, 291 Kan. at 32-33, 237 P.3d 1229. The same holds true here.

Garrett was sleep-deprived when he was summoned to police headquarters for custodial interrogation. From the start, he expressed *491 confusion with the written advisement. But

police diminished the importance of his constitutional right to silence and leaned on him to submit to their truth-verification technology. They repeatedly told Garrett this technology discerns truth from falsehood with 100% accuracy. And that the reliability of testing is not affected by other variables like intoxication or anxiety. The consent form for testing also suggested that the results could be used against him in court. All the while, police knew the testing was junk science, the results could not be used in court, and that Garrett's Fifth Amendment rights were not "hoops" to jump through. In fact, the district court was particularly troubled that "law enforcement deliberately misled the defendant regarding the effectiveness of the CVSA."

This conduct put Garrett in an untenable situation. He could assert his constitutional rights or roll the dice and submit to testing. If he chose the former, this would have been viewed as an admission of guilt by silence ****1134** given law enforcement's misrepresentations about the test's accuracy. So Garrett chose his only path to exoneration and submitted to testing. Police later told Garrett he had "failed." And based on the misrepresentations in the consent form, he had reason to believe that evidence would come in at trial. Even so, the police overbore Garrett's will only after they continued to minimize the seriousness of the alleged conduct and imply that "cooperation" might encourage the prosecutor to be lenient.

This story is not conveyed through the majority's divide-and-conquer analysis. By focusing on parts of the story in isolation, the true nature of overreaching is skewed and diminished. And that is problematic here because the totality of the circumstances yields coercion greater than the sum of its parts. But the device serves the majority well. How else could the story of Garrett's interrogation be characterized as a proper exercise of State power in a civilized system of justice?

Rosen, J., joins the foregoing dissenting opinion.

All Citations

319 Kan. 465, 555 P.3d 1116

Appendix B

518 P.3d 1276 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

STATE of Kansas, Appellant,
v.
Phillip Jason GARRETT, Appellant.

No. 124,329
|
Opinion Filed October 21, 2022.

Appeal from Saline District Court; JARED B. JOHNSON, judge.

Attorneys and Law Firms

Kristafer R. Ailslieger, deputy solicitor general, and Derek Schmidt, attorney general, for appellant.

Mark J. Dinkel, public defender, of Salina Regional Public Defender Office, of Salina, for appellee.

Before Cline, P.J., Isherwood and Hurst, JJ.

MEMORANDUM OPINION

Per Curiam:

***1** The State appeals the district court's suppression of Phillip Jason Garrett's confession to sexually violating his stepdaughter. During Garrett's law enforcement interview, detectives stretched the truth and told Garrett that their Computer Voice Stress Analyzer test was 100 percent accurate. Garrett voluntarily agreed to submit to the test and the results purportedly suggested he lied about his innocence, so the detectives suggested he simply acknowledge his guilt. Over the course of the interview, Garrett eventually confessed, and the State charged him with 11 counts of rape, 8 counts of aggravated indecent liberties with a child, 1 count of aggravated indecent solicitation of a child, and 2 counts of aggravated criminal sodomy. Prior to trial, Garrett moved to suppress his confession and, following a hearing, the district court concluded his confession was voluntary. Roughly 18 months later, however, the same judge inexplicably shifted course and, sua sponte, suppressed the confession, primarily because he now held the opposite opinion as to whether the officers' statements concerning the efficacy of the CVSA test adversely affected the voluntariness of Garrett's confession. The State appeals, arguing that a review of the totality of the circumstances demonstrates Garrett's confession was voluntary and the district court erred in ordering it suppressed. We agree with the State. Where the district court weighed the officers' misrepresentations contrary to the controlling legal authority for that principle, its ruling cannot stand. The district court's conclusion that Garrett's confession was involuntary is reversed.

FACTUAL AND PROCEDURAL BACKGROUND

In November 2018, 12-year-old L.A. disclosed to Salina Police detectives that her stepfather, Phillip Jason Garrett, repeatedly sexually assaulted her. Not long after, Garrett agreed to meet with and be interviewed by law enforcement authorities. Garrett met with the detectives in the station's media room, which was behind a locked door and adjacent to the lobby of the building.

Detectives Tim Brown and Gregory Jones started the interview at about 1:20 p.m. Jones told Garrett that they had to "jump through some hoops real quick" and then read Garrett his *Miranda* rights. Garrett waived his rights and agreed to speak with the detectives. Brown and Jones informed Garrett they needed to know about any possible sexual contact that occurred between him and L.A. and inquired about the nature of their relationship. Garrett said the two shared a good relationship and did not report any concerns. When Jones asked Garrett whether he had noticed changes in L.A.'s physical development, Garrett responded that he thought of her as his daughter, so he did not view her in that light. They likewise posed the opposite question, whether Garrett thought L.A. viewed him as a romantic interest rather than a father figure. Garrett denied such a possibility, citing L.A.'s lack of maturity and her apparent interest in other young girls. The detectives then shifted to a more pointed line of questioning and wanted to know whether Garrett ever accidentally touched L.A. inappropriately. Garrett replied that he sometimes tickled the young girl but denied that he ever touched her in an improper manner. Jones then asked whether Garrett would take a Computer Voice Stress Analysis (CVSA) test to verify the truth of his statements. Garrett acknowledged that while the prospect made him nervous, he had nothing to hide. The detectives reassured him that his nervousness would not impact the exam.

***2** Jones stepped out of the room to secure a CVSA technician and, while he was gone, Garrett shared with Brown that he had not eaten or slept since the previous evening because he knew something was going on with L.A. and the police wanted to talk to him about it. He expressed dismay over L.A.'s allegation that he behaved inappropriately and guessed it might be possible she was upset over a conversation they shared her about sexual orientation. Brown assured him that the CVSA test provided a reliable tool in helping to establish a person's innocence and that it was "actually more accurate" than a polygraph exam.

Jones returned a few moments later with Sergeant Sarah Cox, a CVSA technician. Cox explained that the test "measures the frequency in one's voice to determine whether or not that person is lying" and that it is "one hundred percent effective." Garrett reiterated that the test made him anxious, and the detectives again assured him that if he had done nothing wrong there was no cause for concern. Detective Brown then asked Garrett if he was willing to take the exam to verify his truthfulness, and Garrett expressed hesitancy and that he was second-guessing himself. At that point, Detective Brown said "we're not accusing you of anything" and the CVSA tool can help them "eliminate you of being a suspect of any wrongdoing." Cox then asked if Garrett was willing to take the exam and offered to do it at that time. All three law enforcement officers then left the room, and Garrett waited alone for the test to begin for roughly 24 minutes.

Prior to administering the CVSA test, Cox presented Garrett with forms to sign. While reviewing them, Garrett inquired about the meaning of the term "coercion." Cox explained the contents of the documents to Garrett, but he claimed to be so devastated by L.A.'s allegations that much of the information Cox provided made little sense to him. Cox again informed him that the CVSA test is a highly effective truth verification exam.

Sergeant Cox started the exam with a reminder to Garrett of the allegations against him, that he touched L.A.'s vagina and anus and penetrated her vagina with his finger. She asked Garrett whether he had done each of these things, and he answered "no" to all. After the CVSA began, Garrett again denied touching L.A. in the manner described and reiterated that he was "extremely nervous." Cox explained that what Garrett was experiencing is known as "situational stress" and it would gradually dissipate as they progressed through the exam. During a second round of the same questions, Garrett again denied touching L.A. inappropriately.

After the test, Jones, Brown, and Cox reentered the interview room to discuss the results with Garrett. Cox explained the readout and clarified that it revealed a degree of stress accompanied Garrett's denial that he touched L.A.'s anus. When Cox asked why that might be, Garrett simply responded by again denying he ever touched L.A. in that way.

Brown said he believed Garrett loved and cared for L.A., and he did not think Garrett was "preying on children," but offered that perhaps something might have gone "too far" and Garrett possibly made a bad decision. When Garrett again denied wrongdoing, Brown clarified that he did not believe Garrett was a "monster," but simply that he suffered a critical lapse in judgment. Brown said the detectives believed L.A.'s claims that Garrett sexually assaulted her, and that Garrett also knew her statements to be true. He told Garrett that he would prefer to be able to tell the prosecutor that Garrett was cooperative, acknowledged wrongdoing, and expressed remorse. Garrett acknowledged that he never wanted to hurt his kids, and when Brown asked whether Garrett would have stopped if L.A. had asked him to, Garrett threw his hands up and said, "yes." Garrett then confessed to touching L.A.'s vagina with his hand four or five times but claimed to have no recollection of any penetration. Brown replied that penetration did occur which prompted Garrett to offer additional details about the assaults. At the end of the interview, the detectives placed Garrett under arrest.

***3** The State charged Garrett with 11 counts of rape, 8 counts of aggravated indecent liberties with a child, 2 counts of aggravated criminal sodomy, and 1 count of aggravated indecent solicitation of a child. Prior to trial, Garrett moved to suppress his confession, arguing his statements were elicited in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

The court conducted a hearing on Garrett's motion during which Cox, Jones, and Brown all testified about their interaction with Garrett. Videos of Garrett's interview, as well as his CVSA results, were admitted as exhibits. Gary Davis, an expert on truth verification technology, testified on Garrett's behalf and cited research that claimed the CVSA is, at best, 50 percent effective.

The court took the matter under advisement and ultimately denied Garrett's motion upon finding that the totality of

the circumstances demonstrated Garrett's statements were a product of his free and voluntary will. It highlighted the following factors in support of its conclusion:

1. Jones was "very fair" in his tone and demeanor;

2. Garrett was stressed, but oriented to his time, place, and circumstance, and he was not denied the ability to communicate with the outside world;

3. The interview was brief;

4. Garrett was articulate, fluent in English, appeared to be "of average or above average intellect," and was about 40 years of age at the time of the interview;

5. Garrett was not coached in the specifics of the incidents or their timeline. The information he provided about the acts was unique to him; and

6. The detectives did not promise Garrett favorable treatment of any kind in exchange for a confession.

Roughly 18 months later, the district court reversed course, sua sponte, based largely upon the manner in which the CVSA was described and presented to Garrett. While the district court acknowledged that misleading a suspect is not entirely prohibited, in the court's opinion the extent to which the detectives oversold the CVSA process and their post-CVSA interview tactics strained the boundaries of permissible conduct. Thus, Garrett's resulting statements were involuntary, and suppression was the appropriate remedy.

The State timely appeals the district court's suppression of Garrett's confession.

ANALYSIS

The District Court Erred When It Granted Garrett's Motion to Suppress

The State argues the district court erred when it found the law enforcement officers' interview techniques yielded a coerced confession. Appellate courts review suppression decisions under a bifurcated standard. First, they review factual findings for substantial competent evidence. Second, the legal conclusion drawn from those factual findings is a question of law subject to de novo review. *State v. Harris*, 279 Kan. 163, 167, 105 P.3d 1258 (2005).

The use of a defendant's confession obtained by either physically or mentally coercive tactics is prohibited by the Fourteenth Amendment. *Leyra v. Denno*, 347 U.S. 556, 558, 74 S. Ct. 716, 98 L. Ed. 948 (1954). In determining the voluntariness of a confession, courts must look to the totality of the circumstances, including: (1) the accused's mental condition; (2) the manner and duration of the interrogation; (3) the ability of the accused to communicate on request with the outside world; (4) the accused's age, intellect, and background; (5) the fairness of the officers in conducting the interrogation; and (6) the accused's fluency with the English language. *State v. Stone*, 291 Kan. 13, 21, 237 P.3d 1229 (2010). Voluntariness does not stem from a tally of factors for each side. Rather, it is the collective effect of those circumstances that drives the assessment. *State v. Fernandez-Torres*, 50 Kan. App. 2d 1069, 1076, 337 P.3d 691 (2014).

***4** In attempting to explain its rationale for arriving at an alternate conclusion on the voluntariness of Garrett's statement, the district court offered that the factor it found the most troubling was how the interviewing officers purportedly misled Garrett with respect to the effectiveness of the CVSA. From the district court's perspective, the CVSA was "akin to a psychological rubber hose" that rose to the level of an impermissibly manipulative technique. In its brief to us, the State asserts that the exaggeration of the CVSA's effectiveness, even if deceptive, does not flout either Kansas or federal law. Because discussions about the CVSA were the primary factor behind the district court's shift in opinion, we largely begin and focus our analysis there, despite its alignment with the fifth factor listed above—the fairness of the officers' conduct.

There is not a blanket prohibition on deceptive interview techniques. See *Frazier v. Cupp*, 394 U.S. 731, 739, 89 S. Ct. 1420, 22 L. Ed. 2d 684 (1969). In *State v. Wakefield*, 267 Kan. 116, 977 P.2d 941 (1999), Wakefield confessed to a murder after a detective falsely told him that his fingerprints were found at the scene. Adopting the holding in *Frazier*, the Kansas Supreme Court held that a detective's misrepresentations do not automatically render an associated confession involuntary, so long as the totality of the circumstances reflects that the individual's statements stemmed from his or her free and independent will. 267

Kan. at 127. A similar conclusion was reached in *State v. Harris*, 279 Kan. 163, 105 P.3d 1258 (2005), where Harris confessed to a murder after a detective falsely told him several people identified him as the perpetrator and that the police had certain physical evidence connecting him to the killing. Again, the Kansas Supreme Court held that those deceptive interrogation techniques did not establish coercion that required invalidation of the confession. 279 Kan. at 170.

A panel of this court examined a similar issue in *State v. Bush*, No. 87,093, 2003 WL 27393413 (Kan. App. 2003) (unpublished opinion). There, after Bush took a polygraph exam, a detective told him that it was "obvious" that Bush sexually assaulted the minor in question. 2003 WL 27393413, at *4. Bush, operating under the belief that the polygraph established that he was lying about his innocence, provided law enforcement with a written confession. On appeal, Bush argued the police capitalized on his "ignorance about polygraph examinations to coerce his confession." 2003 WL 27393413, at *4. This court rejected the argument and found that the evidence viewed in its totality demonstrated there was sufficient evidence to show the confession was voluntary. Specifically, Bush signed a *Miranda* waiver, was not threatened or promised anything for his confession nor was he interrogated for an extenuated time period, he was not denied contact with the outside world, and did not suffer from any mental disability. 2003 WL 27393413, at *5. Thus, any ignorance Bush suffered concerning the nuances of lie-detection technology did not render his confession involuntary.

Kansas is not an island in its stance on this matter. In *Whittington v. State*, 147 Md. App. 496, 512-27, 809 A.2d 721 (2002), on appeal from the murder conviction she acquired after killing her husband, Whittington argued that the district court erred in denying her motion to suppress because the interviewing officers used a false gunshot residue "blow back" test and a voice stress test as part of a long interview to coerce her confession. The reviewing court was not persuaded and instead concluded that " '[p]olice officers, charged with investigating crimes and bringing perpetrators to justice, are permitted to use a certain amount of subterfuge, when questioning an individual about his or her suspected involvement in a crime,' " thus the complained of tactics did not render Whittington's confession involuntary. 147 Md. App. at 521, 527. *Contee v. United States*, 667 A.2d 103 (D.C. 1995), provides another compelling example. In that case, Contee also underwent a CVSA as part of a murder investigation. The interrogating detective told Contee that the results dispositively revealed he was lying about his lack of involvement. After Contee confessed and was convicted of the murder, he appealed and argued the detective's deceptive statements related to the reliability of the CVSA rendered his confession involuntary. The D.C. Court of Appeals disagreed and held that the challenged conduct alone did not transform Contee's confession into an involuntary one. The rest of the evidence surrounding the issue revealed "no circumstances of coercion or trickery that, in combination with the CVSA test, can fairly be said to have overborne appellant's free will and compelled his confession." 667 A.2d at 104-05. See also *Townes v. State*, 253 So. 3d 447, 498 (Ala. Crim. App. 2015) (trickery or deception by law enforcement officers, in isolation, is not coercive enough to render incriminating statements involuntary); *State v. Graham*, 223 N.C. App. 150, 157-58, 733 S.E.2d 100 (2012) (confession was not involuntary simply as a product of law enforcement officer's false statements that Graham failed a polygraph test and was incriminated by a DNA test); *People v. Mays*, 174 Cal. App. 4th 156, 165, 95 Cal. Rptr. 2d 219 (2009) (provided a law enforcement officer's misrepresentations are not of the kind likely to produce a false confession, incriminating statements prompted by deception are admissible in evidence).

***5** The district court wandered astray here in taking a hard stop against deceptive interview techniques in general. That position does not align with the current state of the law. Going a step further, there is not substantial competent evidence to sustain the court's conclusion that Garrett's will was overborne in this regard. As the testing period neared, Garrett repeatedly made his current level of anxiety known, explaining that he was "hyped up" and felt nervous and stressed arguably in a thinly veiled attempt to offer an innocent explanation for any stress registered by the test. Further, given the fact Garrett was able to independently provide details of the incidents, he knew participation in the test would require him to be dishonest, presumably with the hope that he could suppress any incriminating, corresponding stress levels. Had he fully embraced the officers' assertions that the test was 100 percent effective, he likely would have seized one of the multiple opportunities they offered for him to either decline or refuse to continue with the test. So, while law enforcement's deception about the reliability of lie detection technology is relevant to the involuntariness analysis, it is not dispositive. The totality of the interview techniques demonstrate that Garrett voluntarily spoke to the

detectives and the deception alone fails to provide the support required to treat Garrett's confession coerced and involuntary.

The district court's disagreement with the interview tactics also extended to those interactions the detectives had with Garrett following the exam, which the district court characterized as "too egregious for the court to ignore." Garrett claims the detectives employed the Reid technique—a practice where the interviewer offers an understandable justification for illegal behavior presumably to prompt incriminating crimes. The State contends that this methodology was not employed but that even if elements of it are present, the technique was not unduly coercive.

The detectives here denied that they wholesale employed the Reid technique. Rather, they merely implemented some of its tactics. The technique was part of a voluntariness issue addressed by a panel of this court in *Fernandez-Torres*, 50 Kan. App. 2d at 1086-87, which provided the following description:

> "The officer first should isolate the suspect in unfamiliar surroundings, such as a police interrogation room. Then, the guilt of the suspect 'is to be posited as a fact.' The questioner should solicit reasons why the suspect might have committed the offense, such as a bad family life or having drunk too much. The technique then instructs the officer 'to minimize the moral seriousness of the offense.' The intended effect of the technique is 'to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty.' To complete the strategy, the questioner must dismiss and discourage any contrary explanation, i.e., innocence. This technique, often referred to as the Reid method, remains widely used. [Citations omitted.]"

The *Fernandez-Torres* panel wrote that this technique carries "the potential to undermine free will through psychological ploys crafted to introduce inculpatory statements with what amount to undue influences on some suspects in some circumstances." 50 Kan. App. 2d at 1092. For that reason and others, the panel concluded Fernandez-Torres' confession was coerced and suppression was proper. 50 Kan. App. 2d at 1092-93. But see *United States v. Jacques*, 744 F.3d 804, 812 (1st Cir. 2014) (the exaggeration of evidence along with use of the Reid technique did not make a confession involuntary); *State v. Rejholec*, 398 Wis. 2d 729, 750, 963 N.W.2d 121 (Wis. Ct. App. 2021) (the defendant "offers no authority concluding that the use of the Reid technique itself creates a coercive environment"); *Shelby v. State*, 986 N.E.2d 345, 365-66 (Ind. Ct. App. 2013) (use of the Reid technique did not render the confession involuntary).

But *Fernandez-Torres* also involved several troubling factors that are not present here. For example, Fernandez-Torres did not speak English fluently and received the help of a translator whose skills were subpar. Additionally, Fernandez-Torres had a below-average intellect and possibly suffered from a learning disability. Thus, while the panel did not speak favorably of the Reid technique, it also rejected "a divide-and-conquer approach to assessing the involuntariness of a confession." 50 Kan. App. 2d at 1092. In other words, again, a single deceptive interrogation tactic viewed in isolation does not establish coercion—it must be viewed alongside other factors to assess the totality of the circumstances, including Fernandez-Torres' low intellect, and the botched translation. Similar aggravating factors are not present here, and there is otherwise no evidence to support the district court's conclusion that the officers' post-exam interview tactics were too egregious to allow for a finding of voluntariness.

***6** In our view, the district court entered its second ruling almost entirely as a product of its discontent with the CVSA and its attendant discussions, rather than adhering to its obligation to conduct a full and fair assessment based on the totality of the circumstances. Shining a light on those factors reveals that Garrett's mental condition was stable and he was not subject to undue duress. While he admitted to experiencing stress, the evidence reflects that anxiety started to simmer the night before his interview after reviewing a text on his wife's phone from L.A.'s father about this matter. The manner and duration of Garrett's interview was also nonremarkable. The evidence reflects it started at roughly 1:30 in the afternoon and lasted only about 2 hours, which we find to be a reasonable length of time. While the record is absent any facts addressing whether Garrett sought to communicate with the outside world at the time, there is no evidence suggesting such a request was made and denied. Finally, turning to Garrett's age, intellect, and background. The evidence adduced demonstrated that Garrett was about 40 years old, married with a family, and worked in two capacities at a local store with one of those roles carrying managerial responsibilities. Accordingly, there is no evidence tending to show Garrett lacked the intellectual capabilities to appreciate his circumstances or what was being asked of him.

The undue weight the district court afforded the deceptive techniques, to the exclusion of nearly all other relevant components of the inquiry, gave rise to a finding of involuntariness that is neither grounded in substantial competent evidence nor consistent with the longstanding law in this area. Accordingly, that decision cannot be permitted to stand. The district court's conclusion that Garrett's statements were involuntary and its suppression of the same is reversed.

Reversed.

Hurst, J., concurring:
I join with the majority in holding that the district court erred in suppressing Garrett's statements, and its decision must therefore be reversed, but I do not join the court's opinion.

The facts and procedural posture are largely undisputed, and Garrett's police interview was recorded and available for both the district court and this court to review. Garrett moved to suppress his statements to police during his interview, claiming they were involuntary, and the district court initially denied the motion and found the statements were voluntary. Months later, however, the district court sua sponte determined that the unfairness of the interview weighed heavily in favor of finding that Garrett's statements were involuntary under the totality of the circumstances. The district court based its finding on the interviewers' use of the Reid interview techniques coupled with their deceptive statements promoting the accuracy of the Computer Voice Stress Analysis (CVSA) exam.

Whether a defendant's statement or confession is voluntarily given is determined under the totality of the circumstances, based upon multiple factors including the:

(1) Defendant's mental condition;

(2) interview's manner and duration;

(3) defendant's ability to communicate on request with the outside world;

(4) defendant's age, intellect, and background;

(5) officer's fairness in conducting the interview; and

(6) defendant's fluency with the English language.

State v. Stone, 291 Kan. 13, 21, 237 P.3d 1229 (2010).

A totality of the circumstances standard can give rise to differing opinions on the weight or importance of each factor under the given circumstances.

On appeal, this court reviews the district court's decision to suppress Garrett's statements using a two-prong approach, first reviewing the district court's factual determinations for substantial competent evidence, without reweighing the evidence, and then reviewing its ultimate legal conclusions de novo. *State v. Garcia*, 297 Kan. 182, 186, 301 P.3d 658 (2013). This court's ultimate inquiry is whether Garrett's statements were a product of his "free and independent will" or if his will was overborne by the State's coercive conduct. See, e.g., *State v. Swanigan*, 279 Kan. 18, Syl. ¶ 2, 106 P.3d 39 (2005). While no single factor is dispositive of coercion, unfair interview techniques—including deception—considered under a totality of the circumstances can overcome a defendant's free will, thereby rendering their statements involuntary. See, e.g., *Garcia*, 297 Kan. at 197 (finding unfair interview technique of implicit promise of leniency rendered confession involuntary under the totality of the circumstances); *Swanigan*, 279 Kan. at 39-40 (finding unfair interview technique of telling defendant false information about evidence rendered confession involuntary under the totality of the circumstances).

I. *Substantial competent evidence supports the district court's findings.*

***7** Under the first prong, substantial competent evidence supports the district court's determination that the interviewers engaged in unfair, deceptive interview techniques. In addition to lying about the effectiveness of the CVSA exam, which is similar to lying about the existence of evidence, the interviewers admitted to employing some of the Reid interview techniques which a panel of this court explained "may induce individuals to give necessarily false confessions to crimes they never committed, especially if they are guileless or otherwise particularly susceptible to external influences." *State v. Fernandez-Torres*, 50 Kan. App. 2d 1069, 1087, 337 P.3d 691 (2014).

Interviewer Deception about the CVSA Exam

After Garrett denied inappropriately touching his stepdaughter, the interviewers asked if he would submit to a CVSA exam to determine his truthfulness. The interviewers ultimately lied to Garrett about the CVSA exam effectiveness and results. Detective Jones explained the CVSA as a "truth verifying test" and asked if Garrett was willing to submit to the exam "in order to verify what you're saying is true." Garrett expressed his nervousness, and the interviewers explained that nervousness was "not part of the equation" and that being nervous during the exam was normal but would not affect the results. Detective Jones then suggested bringing in a CVSA technician to ease Garrett's concerns and explain the CVSA exam process. While waiting for the technician, Detective Brown brought the conversation back to the CVSA exam and explained it was a "fantastic tool to help us move past any wrongdoing that uh, that you uh, may be accused of." Detective Brown further described the CVSA exam as an "excellent tool" and stated that it was "normal to be nervous." Garrett explained that he was worried his nervousness and lack of sleep and food would be interpreted by the exam as deception and asked if the exam was like a polygraph. Detective Brown responded that the CVSA was similar to a polygraph but was "actually more accurate" than a polygraph and the administering technician could better explain how it works.

Sergeant Cox then entered the interview room and explained that she was one of the department's CVSA examiners and was there to explain how the exam worked. She said the CVSA exam was different than a polygraph but it "does measure the frequency in one's voice to determine whether or not that person is lying." She explained the CVSA exam process and that Garrett would be asked three types of questions—one of which required him to intentionally lie so they could "see what your lie patterns look like in chart formation." Sergeant Cox further explained to Garrett that he would have no problem if he was telling the truth, but if he was "lying about these specific questions the stress is going to pop up on those charts like nobody's business and we're going to know." Cox stated to Garrett that the exam is "a hundred percent effective." She further reassured Garrett that his underlying stress level would not influence the exam results and that the CVSA exam "is a hundred percent effective" and "it doesn't matter if someone is drunk or high or sober, it's still going to measure that frequency in that stress ... in your vocal cords." Garrett expressed apprehension about the CVSA exam, and the interviewers reassured him again that the exam would "verify that what you're saying is true" and that "the CVSA is a wonderful tool because it helps us ... eliminate you as being a suspect of any wrongdoing."

The interviewers' deception about the CVSA exam's effectiveness did not stop once Garrett agreed to take the exam but persisted throughout the examination. While preparing for the CVSA exam, Sergeant Cox explained it was "not to catch [Garrett] in a lie, but to verify the truth." She claimed the CVSA exam was used all over the United States, including by the military, and that it was considered a "truth verification exam and it is a hundred percent effective." She then said that no matter the condition of the examinee—high, drunk, or sober—"it's going to be a hundred percent accurate." Sergeant Cox then minimized the gravity of the accusations by explaining that everyone has made mistakes, and she repeatedly said her job was to get Garrett through the exam and that she wanted him to pass the test.

***8** After the exam, Sergeant Cox explained that a graphic of truthful responses would look like a Christmas tree while answers demonstrating stress would look like a tree trunk. The interviewers then told Garrett that the exam showed that he demonstrated stress when answering specific questions about touching his stepdaughter's anus. Garrett again denied inappropriately touching his stepdaughter.

The State does not deny that the interviewers were wrong about the effectiveness of the CVSA exam but submits that "it seems that the police themselves believed the truth of their assertions" and thus did not engage "in a calculated plan of deception." This court cannot say that an officer's ignorance of the veracity of their statements—when made with the intention of the person relying upon them—makes such statements less deceptive. The district court heard testimony from a defense expert witness that a leading, peer-reviewed field study developed by the National Institute of Justice—a division of the United States Department of Justice—found the CVSA exam to be no more than 15-50 percent effective at detecting deception. The expert also testified that he was unaware of any independent, peer-reviewed study showing that the CVSA exam was 100 percent effective and explained that "[t]here is no unique physiological response for deception." The State provided no evidence that the CVSA exam was 100 percent effective. As such, the district court had substantial competent evidence to support its conclusion that interviewers deceived Garrett about the effectiveness of the CVSA exam.

Other Interview Techniques

Here, detectives employed some of the Reid interview techniques examined by the *Fernandez-Torres* panel. See 50 Kan. App. 2d at 1086-87. Prior to administering the CVSA exam, the interviewers tried to gain Garrett's confidence when they did not initially disclose the purpose of the interview, minimized the *Miranda* warnings, and lied to Garrett about the accuracy and effectiveness of the CVSA exam. After the CVSA exam, the interviewers used the results to question Garrett about his answers which allegedly demonstrated stress, repeatedly interrupted him—which prevented him from denying wrongdoing—told him that they knew the truth, and provided him with an option to minimize his wrongdoing.

When Garrett became upset at the accusations, the interviewers changed tactics and told Garrett they believed he was a loving stepfather, minimized the alleged incident, and suggested to Garrett that he just made an isolated mistake. Garrett again denied wrongdoing. Detective Brown then told Garrett that he believed Garrett made a bad decision, that he remembered it, that he touched his stepdaughter on her genitals, and that Garrett knows it to be true and given the situation he would "much rather go to the prosecutor and say ... Phillip ... owned up to his wrongdoing ... he was cooperative ... those things go a long way." Detective Jones assured Garrett that confessing to the incident "reflects well upon you." Detective Brown said he believed that Garrett did not want to hurt his stepdaughter, things just went too far, and Garrett told her that he would stop if she did not want him to continue the touching. Garrett then confirmed that he recalled telling her that, and Detective Brown said he appreciated Garrett's cooperation. It was after this exchange that Garrett made inculpatory statements about his actions.

***9** The district court correctly determined that these techniques mirrored several of the Reid interview methods which are designed to psychologically overcome someone's reluctance to admit wrongdoing. See *Fernandez-Torres*, 50 Kan. App. 2d at 1086-87 (discussing the Reid interview methods). The inquiry thus becomes whether, under all the circumstances, these techniques and deception did in fact overbear Garrett's independent free will.

Factors Demonstrating Voluntariness

Garrett does not claim, nor does the interview video demonstrate, that his mental state or condition caused him to be overcome by the interviewers' techniques or made him susceptible to coercion. During the interview, he does not appear to experience undue stress or strain. He did not claim he was taking medication or that he suffered from a condition which made it difficult to understand his circumstances. At various points, he did express being nervous, worried, and stressed—but at no point did those feelings manifest in an inability to interact with the interviewers or appreciate the circumstances of the questioning. Moreover, Garrett does not claim any condition or state of being that would make him particularly susceptible to external influences. See *Swanigan*, 279 Kan. at 39-40 (explaining that a defendant's mental state, under the totality of the circumstances, can contribute to involuntary statements).

The manner, duration, and location of the interview were reasonable. Garrett's interview began shortly after 1 p.m. when he voluntarily went to the police station and lasted about two hours, which included about 24 minutes of Garrett waiting in the interrogation room. Garrett was not interviewed at an inconvenient time of day outside of his control, nor was he brought to the police station under duress. Moreover, the interview was not particularly long. Before agreeing to speak to Detective Jones, Garrett knew that his stepdaughter's father had told Garrett's wife that she needed to contact Detective Jones before he would discuss their daughter returning to her and Garrett's house for the holidays. Garrett told detectives that he and his wife speculated about the reasons for police involvement and that Garrett was worried that he could have caused a problem. Although he was not aware of the specific allegations when he arrived at the police station, Garrett knew that he was involved with some problem that required police involvement and caused a parenting time dispute with his wife's ex-husband.

Once at the police station, interviewers read Garrett his *Miranda* rights, asked if he understood them, and asked him to initial each understanding. The interviewers initially minimized the importance of the need to give Garrett his *Miranda* warnings, but later in the interview—after Garrett became aware of the allegations against him—Sergeant Cox read Garrett his *Miranda* rights without minimizing their importance. In fact, she explained that "because I will be asking some questions related to a criminal matter, um, I do have to advise you of your rights, okay? ... It does not mean that you are under arrest at this time, I just want you to know what your rights are." She also told him he could stop the

CVSA exam anytime he wanted. After the first 10-15 minutes of the interview, the interviewers did not disguise or hide the purpose of their questions. Sergeant Cox told Garrett he was being asked questions as part of a criminal investigation, and Garrett understood the consequences enough to deny any wrongdoing.

***10** There is no evidence Garrett was prevented from contacting the outside world during his interview. Interviewers read Garrett his *Miranda* rights twice, which included his right to speak with an attorney and have one present during questioning. He did not make such a request. Garrett's mother was at the police station during the interview, and he did not ask to speak to her. He did not ask to use his phone to call anyone, and there is no evidence that he was told before or during the interview that he was not permitted to make such contact.

Garrett's age, intellect, fluency in English, and background do not make him particularly susceptible to the deceptive interview techniques. Garrett is a native English speaker and did not exhibit any signs of misunderstanding the interviewers' questions or statements. Garrett was about 40 years old at the time of the interview, and he had a spouse, children, and a full-time job. There is nothing in the record indicating he had personal experience with police interview techniques, but he did tell interviewers that he had seen polygraph tests depicted on television and heard they were not accurate. Garrett had enough life experience and intellect to appreciate the seriousness of his situation, to know what the administration of a traditional polygraph exam looked like, to know that polygraph exams are not considered accurate, and to ask questions about the CVSA exam relative to that experience.

II. *Analysis of the Totality of the Circumstances*

Although the district court accurately relied upon substantial competent evidence to find that the interviewers engaged in unfair interview techniques, including deception, the analysis does not stop there. This court must determine whether, under the totality of the circumstances, the unfair interview techniques rendered Garrett's statements involuntary. The type of unfair interview techniques employed in this case, when considered among the many other relevant factors, demonstrate that Garrett voluntarily confessed. While the interviewers lied about the effectiveness of the CVSA exam, they did not overly or repeatedly rely on its results and did not lie about the existence of physical evidence supporting Garrett's guilt. The interviewers' deception *alone* does not necessarily render Garrett's statements involuntary. See *State v. Ackward*, 281 Kan. 2, 10-11, 128 P.3d 382 (2006) (deceptive statements alone do not make a confession involuntary per se); *Stone*, 291 Kan. at 23, 32-33 (finding deceptive techniques combined with other factors made statements involuntary).

In *Ackward*, the interviewer lied to the defendant about the existence of several pieces of evidence, including surveillance camera footage of the defendant, a gunshot residue test that would show if he had "even held a gun within 48 hours," and a cooperating witness. 281 Kan. at 9. The interviewers also implied the defendant's confession would lead to a more lenient result—essentially misstating the law. Ultimately, the court found Ackward's statements voluntary because the unfair or deceptive interview techniques were not pervasive and the other factors did not demonstrate coercion. 281 Kan. at 16. As in *Ackward*, the deception here was not pervasive—while the interviewers extolled the accuracy of the CVSA exam, they did not heavily or repeatedly rely on its results. While the interviewers led Garrett to believe that some of his answers demonstrated stress, they did not say that the exam proved he lied or proved his guilt, and they did not belabor the exam results. They asked Garrett about the results just once or twice before changing tactics. Additionally, the interviewers did not lie about the existence of physical evidence, witnesses, or surveillance footage.

***11** In *Stone*, contrarily, the court found the interviewer's deceptive techniques made Stone's statements involuntary because the officer implied Stone's DNA was on the victim's clothes when there was no such DNA to be tested, repeatedly told Stone to tell the truth while giving him facts, and then told him that only a confession would impact his jail sentence. 291 Kan. at 22-23. Additionally, Stone was sleep-deprived, the interview took place at 1 a.m., and Stone explained that he often became confused when under pressure —which the court witnessed in the interview. Unlike the circumstances in *Stone*, the interviewers here did not lie about the existence of physical evidence, stopped short of implying Garrett could avoid or minimize jail time by a confession, did not repeatedly deny his truthfulness, and conducted the interview at a reasonable time of day. Moreover, unlike Stone, Garrett did not merely adopt the factual statements given to him by the officer.

Although Garrett's initial inculpatory statement was merely a confirmation of a factual statement provided by one of the detectives, Garrett then described his actions and answered questions using his own words and descriptions. He did not merely confirm the interviewers' allegations but provided independent facts describing his illegal conduct. He gave specific accounts and memories of the events wholly unrelated to the interviewers' assertions. Additionally, he continued to deny certain more serious allegations that the officers suggested had occurred—further demonstrating the voluntariness of his inculpatory statements.

The totality of the circumstances demonstrate that the interviewers' unfair interview techniques did not overbear Garrett's free and independent will:

(1) Garrett voluntarily went to the police station with a family member at a reasonable time;

(2) the interview lasted about two hours, which included breaks and the CVSA exam;

(3) the interviewers maintained a calm tone and demeanor;

(4) the interviewers told Garrett he was the subject of a criminal investigation well before he confessed;

(5) Garrett was of an age, language fluency, and intellectual ability sufficient to understand the consequences of his actions and statements;

(6) after a detective initially minimized Garrett's *Miranda* rights, Sergeant Cox provided a second set of *Miranda* warnings without minimization;

(7) Garrett ultimately confessed, providing details and information not suggested to him by the interviewers; and

(8) Garrett continued to deny serious allegations that the interviewers suggested occurred.

CONCLUSION

The district court correctly determined that the interviewers used deception and psychological techniques which contributed to an unfair interview, but that alone did not render Garrett's confession involuntary. The totality of the circumstances demonstrate that Garrett's statements were voluntary, and the district court therefore erred in suppressing them.

All Citations

518 P.3d 1276 (Table), 2022 WL 12129643

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Appendix C

IN THE DISTRICT COURT OF SALINE COUNTY, KANSAS

STATE OF KANSAS, Plaintiff,	)	Case No. 2018-CR-956
v.	)	App. No. 124329
PHILLIP GARRETT, Defendant.	)	

TRANSCRIPT OF COURT'S RULING PROCEEDINGS

Transcript of the Court's Ruling proceedings held in the above-mentioned case before the Honorable Jared Johnson, Judge of the District Court of Saline County, Kansas, at Salina, Kansas, on July 30, 2021.

APPEARANCES:

The Plaintiff, State of Kansas, appears by Mr. Jeff Ebel, Saline County Attorney, 300 West Ash, Salina, Kansas 67401.

The Defendant, Phillip Garrett, appears in person and with counsel, Mr. Mark J. Dinkel, Salina Regional Public Defenders, 234 N. 7th Street, Salina, Kansas 67401.

(The following proceedings are had on July 30, 2021, in the case of State of Kansas vs. Phillip Garrett, Case No. 2018-CR-956.)

THE COURT: Counsel, we'll proceed with State of Kansas Phillip Garrett.

(Mr. Dinkel and the defendant approach counsel table.)

THE COURT: 18-CR-956. You may want to have a seat.

MR. DINKEL: Okay.

THE COURT: This is going to take a moment. And defendant appears in person with Mr. Dinkel. State appears by Mr. Ebel.

Thank you, counsel, for agreeing to set the hearing today. The Court set today's hearing to announce that I have reconsidered a prior ruling in this case; specifically, as it relates to the voluntariness of the defendant's statements to law enforcement after the CVSA.

And for the State's information, as you were not part of that prior hearing, or series of hearings, the CVSA is the voice stress analysis similar to a lie detector test, in theory.

On January 27, 2020, this Court addressed the

Jackson v. Denno analysis, motion to suppress, ultimately finding that the statements or statement was voluntary. I noted that the burden was on the prosecution to prove by a preponderance of the evidence that the statement was voluntary; in other words, was the statement a product of the defendant's free and voluntary will. The law requires this Court to look at the totality of the circumstances and to take into account a nonexclusive list of factors: The defendant's mental condition; the manner and duration of the interrogation; the ability of the accused to communicate on request with the outside world; the defendant's age, intellect and background; the fairness of the officers in conducting the interrogation; and the accused fluency with the English language.

I do not intend to repeat every finding of fact the Court previously made as they relate to the list of factors I've just referenced. I do incorporate my findings and supplement them with additional findings today and replace them with any findings that conflict.

In reviewing the matter for trial, the Court has come to the conclusion that the totality of the circumstances of that interview demonstrate that the statement made by the defendant after the CVSA was not the product of the defendant's free and voluntary will.

The interview was several hours in length, including a significant time the defendant spent alone or isolated. The interview was conducted by three different officers at varying points in the process. The defendant was in his early 30s at the time and informed officers that he had not eaten or slept and that he was upset. The defendant at the time worked at Dillons as a backup meat cutter and manager. He repeatedly informed them that he was stressed or upset, or words to that effect.

At the outset of the interview, law enforcement minimized, to some extent, the need for Miranda. Specifically, Detective Jones indicated that he needed to jump through some hoops, stating that one could argue the defendant was detained. Detective Jones did provide the Miranda Warning. Detective Jones informed the defendant that he was there because of contact between the defendant and Lily, or Lillian. The questioning before the CVSA was nonconfrontational and less direct. The defendant continually denied anything inappropriate occurred with the alleged victim before the CVSA.

Detectives asked if he would be willing to take the CVSA and explained that it was a truth verifying test to verify what you say is true. When asked if he

would take the test, the defendant responded, quote, I guess. Detectives told the defendant that nervousness was not part of the equation. The defendant told them he had nothing to hide. He also told them he was stressed but would at least listen in regards to Sergeant Cox's talking about the CVSA. Detectives told the defendant, "I think it's a fantastic tool, an excellent tool," or words to that effect. This is the point where the defendant tells detectives, "I haven't slept or ate," and that he was so upset.

Sergeant Cox arrives and explains that she administers the CVSA, that there are four examiners within the department. She explains that it is different than a polygraph, the defendant would only be hooked up to a microphone. That the test measures frequency to determine if the defendant is lying. She explains there are three types of questions.

Sergeant Cox explains that the CVSA is 100% effective. The defendant told her that he is under stress currently, she said that is normal.

Sergeant Cox again stated that the CVSA is 100% effective. She told the defendant it doesn't matter if someone is drunk, high, or whatever.

The defendant commented that he felt that he was shaking, extremely hyped up, etc., or words to that

effect.

The defendant was told that the CVSA is a wonderful tool, if you haven't done anything we can move on or past it. The defendant again said he was really upset.

This all leads up to law enforcement asking the defendant if he would agree to take the test, which the defendant acquiesces and ultimately does agree to participate in the CVSA.

The exam occurs in a separate room with the defendant and Sergeant Cox present. Sergeant Cox informs the defendant that the exam is recorded and that he can stop it at any time.

The defendant informs her that he is, quote, so devastated right now that some of the words don't make sense, end quote. He was trying to read a form she gave him and he could not make out the word "coercion." Sergeant Cox pronounced it for him and then he understood it.

Sergeant Cox administered Miranda.

The defendant was again told he had the right to stop the exam at any time.

Sergeant Cox explained that they used to use a polygraph but now they use the CVSA. Sergeant Cox said the CVSA is used all over the United States, even the

military uses it. She explained it it is a truth verification exam and it is 100% effective.

Sergeant Cox said it analyzes the stress of one's voice and that it is 100% accurate, no matter if you are high, drunk, etc. Sergeant Cox said by the time we are done we are going to know what happened and what the truth is.

Sergeant Cox asked the defendant to explain what the allegations were, specifically where they are saying he touched the child. The defendant said they just said it was inappropriate touching and then remembered one of the detectives mentioned genitals or genitalia.

Sergeant Cox told him she wanted him to pass the test and remember to be completely honest. She then tells the defendant more specifics about the allegations, that the defendant allegedly touched and penetrated the victim's vagina and touched the victim's anus.

Sergeant Cox said, "Now that you know the allegations was there anything you would like to disclose?" The defendant continued to deny the allegations.

Sergeant Cox then ran through the nine questions she intended to ask, including two questions she told

the defendant he should lie on. And those questions in total are as follows: (1) Is your name P.J.? (2) Is today Tuesday? (3) Is this the month of November? (4) Are we in the city of Salina? (5) Are you wearing shoes? (6) Am I wearing shoes? (7) Did you put your finger in Lily's anus? (8) Did you put your finger in Lily's vagina? (9) Have you ever driven over the posted speed limit?

Sergeant Cox then proceeded to ask those same questions in a different order. She went through the questions in the following order, using the assigned numbers I just gave them, 1, 3, 5, 7, 9, 2, 4, 6, and 8. She repeated the same questions in the order I just referenced a second time under the theory that it reduces overall stress leaving only the stress for untruthful responses. In total, she asked the defendant the nine questions three times. More importantly, questions 4 and 6 were the questions relating to Lily. Specifically, question 4 asked, Did you put your finger in Lily's anus?" and question 6 asked, "Did you put your finger in Lily's vagina?" The defendant answered no to those questions each time he was asked.

Sergeant Cox told the defendant if he was lying stress would pop up on the charts like nobody's

business, or words to that effect. She talked to him about the cold call process. He told her that he was devastated and upset. The defendant was returned to the interview room and after some time the detectives confronted him with the CVSA results.

Sergeant Cox talked about Christmas trees, specifically that you like to see Christmas trees on truthful answers and tree trunks, or some type of spread on nontruthful ones, and asked the defendant to identify the ones on the chart. And the defendant said 6, and then said no. Sergeant Cox interjected and redirected the defendant to identify ones that don't look like Christmas trees. The defendant identified 1, 5, 2, and 9, maybe 7, he said. He did not identify 4 or 6.

Sergeant Cox said, out of nine several have stress, and she said the defendant said 4 and 5, or identified 4 and 5, and the defendant responded no, 5. Then Cox said 4 was not pointed. The detective said the test indicates you are experiencing stress and asked why. The defendant said because I am stressed.

The interview after the CVSA is distinctly different in tone and style. The detectives, especially Brown, became more confrontational. After Sergeant Cox built up the CVA as 100% effective, used

across the U.S. and by the military, the detectives asserted that the test showed stress on question 4, which they previously explained means deception. Sergeant Cox went as far as trying to say the defendant said question 4 showed stress when he didn't.

After laying that groundwork, that this 100% effective lie detection device detected stress on question 4, which equates to a lie, Detective Brown proceeded to ignore the defendant's denial and told the defendant: "I think you remember it." "I think you remember what you did." "I think you did touch her on her vagina and anus." "That is what she told us occurred." "That is what we believe to be true." "That is what you know to be true."

Then law enforcement asserted to the defendant that they would much rather go to the prosecutor and let them know the defendant owned up to it, that he cooperated, that it reflects well on you.

The defendant stated that he doesn't remember doing anything and Detective Brown told him that wasn't believable.

And of course this is not a comprehensive recitation of the interview but the salient facts that the Court found significant.

I will not restate all of the Court's prior

findings and concerns regarding law enforcement's misuse of the CVSA, I went into detail of those at the previous hearing regarding what the Court found to be misleading and essentially without foundation by bolstering the effectiveness of the CVSA, but I am incorporating those prior findings regarding the CVSA by reference.

The Court has reconsidered the totality of the circumstances. Clearly, the defendant was under stress. He reported not sleeping or eating. He had difficulty reading the word "coercion," had to be explained to him. Law enforcement minimized the need for Miranda. Delayed telling him the specific nature of the allegations. And what troubles the Court most significantly is law enforcement deliberately misled the defendant regarding the effectiveness of the CVSA. As I mentioned previously, they oversold it as 100% effective and a way for the defendant to move past this.

The Court understands that law enforcement are allowed to use misleading tactics at times during an investigation; however, the overselling and application of the CVSA process and the post CVSA interview tactics are a bridge too far in these circumstances, and in these particular circumstances.

To highlight this, law enforcement attempted to identify question 4 as if the defendant said the result showed deception when he did not identify question 4. Instead, they tell the defendant, in effect, this 100% effective advanced machine used by the military and across the U.S. shows deception to question 4. They do not accept his denials and tell him they believe he did it.

Considering the totality of all of the circumstances, including the pre-CVSA tactics and approach, the process used during the CVSA and the post-CVSA tactics and approach, the Court finds the defendant's statements after the CVSA were not voluntary, they were not the product of his free and voluntary will, and the Court is suppressing those statements.

I know that is a change from the Court's past position, and that we have trial set up for the end of August, so the Court wanted to get this on the docket as soon as possible once I determined that would be my course.

Any further findings requested by either counsel?

MR. DINKEL: Judge, this, this same issue has bothered me over the past couple of weeks. I remember one of my final conversations with Mr. Nowak about this

case was he brought in the CVSA charts. I think we put those in evidence at the hearing, the graphs. If not, they probably should be in evidence at this point if they haven't been put into evidence. But Mr. Nowak came to me, and he said, you know, he said, they tell him that it needs to look like a Christmas tree to be a truthful response. And he showed me the chart. And he said, he said, "Mark, which one of these to you look most like a Christmas tree, most pyramidal?" And it was the no answer to one of the sexual abuse questions, is what it looked like. And to me that raised a possible specter that they maybe even lied to Mr. Garrett about the results of the CVSA test.

I questioned Mr. Davis, our expert witness, about are there any experts on CVSA that we could call in to maybe interpret these charts, or the accuracy of these things, or if there's any indication of wrongdoing about the administration of the test and the reporting of the results to Mr. Garrett, and Mr. Davis told me, he said the CVSA is a business thing, run to market to the police and stuff, and he says they have everybody sign nondisclosure and confidentiality agreements. And so, he said, he advised that there are no experts. Mr. Davis, unfortunately is, was a polygraph expert, but he's familiar with the controversy surrounding CVSA.

And I as a defense attorney, I'm just dismissive of all of these truth-telling devices. There's no proof in science that any of them are accurate. And, of course, we put the study, the, I forget what the name, the name of the study, but the study about the accuracy of CVSA, it's the premier study on this device, and we put that into evidence. I'm aware that we put that into evidence at the hearing, and I thought we put the charts into evidence as well, but certainly we would offer those as additional support.

THE COURT: Well, counsel, the Court wasn't opening it for additional evidence to be presented on that point, I understand your point. There's pages of my prior ruling criticizing the CVSA and the law enforcement's use of it. What the Court did by revisiting this was essentially revisit the totality of the circumstances and the effect in conjunction with the other aspects of this process. But the effect that what I believe was a deliberate misleading, what I found to be a deliberate misleading of the defendant through the use of CVSA by overselling it.

MR. DINKEL: Yeah.

THE COURT: Repeatedly overselling it. And I have commented at length about this at a prior hearing regarding the fact that it cannot be 100% effective,

even internally looking at their own analysis of what the Defense presented through its experts and testimony and through the --

MR. DINKEL: Sure.

THE COURT: -- State's own witnesses.

So that ruling really hasn't changed. What I'm changing is the impact of the totality of it; the defendant's condition at the time --

MR. DINKEL: Sure.

THE COURT: -- the egregious nature of those misleading tactics, along with the other interview tactics, what you'd referred to before as the Reid Technique in cutting off denials. What the Court viewed as now, those post interview tactics combined with asserting this is 100% effective, military used across the U.S., was too egregious for the Court to ignore. So that's the change.

MR. DINKEL: Well the CVSA is just part of the Reid Technique. It's a method of cutting off the denial by saying this machine, this objective machine, says that you're lying. And that may itself been a lie based upon the reports resulting in the CVSA.

THE COURT: And I'm not making new findings as it relates to the Reid Technique, just more just me reviewing what was already in the record and the

totality of the circumstances and that analysis.

Mr. Ebel.

MR. EBEL: Your Honor, and I'm not doing this, I'm doing this with the utmost respect, I'm behind the 8 ball.

THE COURT: Yes.

MR. EBEL: I don't know what the Court had previously ruled. So I'm throwing that out there, I'm not trying to question the Court with these questions, ask the Court.

THE COURT: Yes.

MR. EBEL: But, one, I guess, if this came before the Court on a Jackson v. Denno hearing is the Court finding that the defendant was not Mirandized before all of this?

THE COURT: No. What the Court found before and even today, I referenced that he was Mirandized twice.

MR. EBEL: Okay.

THE COURT: He was Mirandized by Detective Jones. He said he had to jump through some hoops, one could argue that he's in detention, and he read him his Miranda. He didn't tell him the nature of the allegations. At some point he tells him it was an inappropriate touching or contact. And then later on, Cox Mirandizes him again, Sergeant Cox, right before

the CVSA, and before that even tells him specifically the areas of touching that's accused.

MR. EBEL: And the Court then is not, and I'm assuming, I haven't heard any argument to the contrary, that the defendant did not make any assertions that he was wanting counsel or was wishing to remain silent; is that correct?

THE COURT: No. That is correct; no.

MR. EBEL: Okay. Make sure that's clear. The Court is solely basing, my understanding, again, I'm just behind the 8-ball on this so. The Court is only saying that this was not a free and voluntary confession, even though that's not what Jackson v. Denno addresses?

THE COURT: Jackson v. Denno addresses whether the statement was voluntary.

MR. EBEL: If there was not Miranda.

THE COURT: Right.

MR. EBEL: But there was Miranda.

THE COURT: Right. The Court is finding that ultimately even with Miranda it's not a voluntary confession, it should be suppressed. That Miranda, and that's one aspect for the Court to consider, I understand. But the Court is looking at the totality of the circumstances. Including inclusion of two

Miranda Warnings.

MR. EBEL: Okay.

THE COURT: And including Sergeant Cox mentioning that he could stop the CVSA at any time. The Court recognizes that.

MR. EBEL: Okay. Thank you.

MR. DINKEL: Your Honor, there is a difference between suppression versus, on Miranda, versus voluntariness. If there's a Miranda violation then the suppressed statement can still be used in impeachment. But if there's an involuntary statement then that statement cannot even be used to impeach testimony. To my understanding.

THE COURT: Counsel, the Court hasn't found a Miranda violation.

MR. DINKEL: Yeah, I understand. Yeah.

THE COURT: And I'm not finding a Miranda violation.

MR: DINKEL: Yeah, I understand. And he was read his rights, I think it showed that on. But, but the, the part with the CVSA really was the psychological rubber hose that broke the camel's back.

THE COURT: That's what the Court is finding. That it's essentially the Defense's motion to suppress, and looking at the motion to suppress. And we

addressed both the motion to suppress and Jackson v. Denno simultaneously. As then, as I recall too, the Defense filed a supplemental motion to suppress after, thereafter, and I, I denied it after that as well, I think in, early last year. But, in effect, what the Court is ruling is that, as Mr. Dinkel said, it was akin to a psychological rubber hose, using the CVSA misleading tactics to overcome the defendant's free and voluntary will.

MR. EBEL: Okay. Thank you.

THE COURT: Anything else, counsel?

MR. DINKEL: I don't believe so. Thank you, Your Honor.

THE COURT: We're going to take a short recess. Thank you.

END OF PROCEEDINGS

C E R T I F I C A T E

STATE OF KANSAS)
) SS.
COUNTY OF SALINE)

I, Susan B. Goldammer, a Certified Court Reporter for the State of Kansas and the regularly appointed, qualified and acting official reporter for the 28th Judicial District of the State of Kansas, do hereby certify that, as such official reporter, I was present at and reported the above and foregoing proceedings in Case No. 2018-CR-956, State of Kansas, Plaintiff, vs. Phillip Garrett, Defendant, heard on July 30, 2021, before the Honorable Jared Johnson, Judge of said Court.

I further certify that at the request of Mr. Mark Dinkel, Attorney at Law, a transcript of my shorthand notes was typed and that the foregoing transcript consisting of 20 pages is a true and correct transcript of my notes, all to the best of my knowledge and ability.

SIGNED, OFFICIALLY SEALED, AND DELIVERED, this 15th day of December, 2021.

/S/ Susan B. Goldammer

Susan B. Goldammer, RPR, CSR
Certified Court Reporter
Reporter No. 0772

Appendix D

IN THE DISTRICT COURT OF SALINE COUNTY, KANSAS

STATE OF KANSAS, Plaintiff,	Case No. 2018-CR-956
v.	
PHILLIP GARRETT, Defendant.	App. No. 124329

TRANSCRIPT OF COURT'S DECISION/MOTION

Transcript of the Court's Decision/Motion proceedings held in the above-mentioned case before the Honorable Jared Johnson, Judge of the District Court of Saline County, Kansas, at Salina, Kansas, on January 27, 2020.

APPEARANCES:

The Plaintiff, State of Kansas, appears by Ms. Amy Norton, Asst. Saline County Attorney, 300 West Ash, Salina, Kansas 67401.

The Defendant, Phillip Garrett, appears in person and with counsel, Mr. Mark Dinkel, Salina Regional Public Defenders, 234 N. 7th Street, Salina, Kansas 67401.

(The following proceedings are had on January 27, 2020, in the case of the State of Kansas vs. Phllip Garrett, Case No. 2018-CR-956.)

THE COURT: That leaves Mr. Garrett's case, State of Kansas versus Phillip Garrett, 18-CR-956. He does appear with Mr. Dinkel. The State by Ms. Norton. On for the conclusion of the Motion to Suppress.

Counsel, is there any additional argument?

MR. DINKEL: I don't believe so, Your Honor.

MS. NORTON: Not from the State.

THE COURT: And, counsel, the Court in evaluating the Jackson v. Denno, the voluntariness of the interrogation, the interview, the defendant's statement, would note that the Court is to consider whether the statements are voluntary; that the burden is on the prosecution to prove by a preponderance of the evidence that the statement was voluntary. In other words, was the statement a product of the defendant's free and voluntary will.

The Court looks at the totality of the circumstances and takes into account the following nonexclusive list of factors; the defendant's mental condition, the manner and duration of the interrogation, the ability of the accused to

communicate on request with the outside world, the accused or defendant's age, intellect and background, the fairness of the officers in conducting the interrogation, the accused's fluency with the English language.

And the Court would note that the defendant was brought in for questioning November 20th, 2018, at the Salina Police Department, behind at least one set of locked doors in the media room at that department. I believe the interrogation began at 1:20 p.m. or thereabouts.

Detective Tim Brown was present at some point, Sarah Cox was present, multiple officers were present throughout the interview.

The defendant was provided with his Miranda Warning at the outset. The Court would say that there was, in effect, some minimization of that process by the detective, referring to it as "hoops that he needed to jump through," or "steps that needed to be taken," something to that effect, because the defendant was, or one could argue that he was in custody.

Wasn't described to the defendant exactly what the allegations were at the beginning of that, but throughout that, very quickly into the interview it became apparent it was in relation to inappropriate

touching and behavior toward this child.

The Officer, Detective in this case, whether it be Jones or Brown, and Jones was present as well, Jones was very fair in the Court's view as far as his tone, demeanor, he was not yelling at the defendant, he was not in any way coercive in an outright confrontational sense. The defense was not asserting as such, a little more maybe insidious type of coercion is the Defense's assertion through probably the term manipulation would be appropriate for the Defense's version of the offense.

The Court finds that the accused mental condition was stressed; however, he was oriented to time, place, circumstance. He quickly became aware of the nature of the interview and interrogation. The accused repeatedly though indicated that he was stressed and that obviously was a disturbing accusation.

He was able to communicate with the outside world but I don't believe there was any request to do so, so there's no confirmation that he was provided that opportunity, though he was not prevented from it.

The duration in this Court's view of the interrogation was short. He's fluent in English and was at the time. The defendant was articulate, he was, appeared of average or above average intellect, there's

nothing to indicate otherwise.

Overlooking where I wrote his age, I believe he's in his 30s. Is that correct, counsel? No.

THE DEFENDANT: Forty-two.

THE COURT: Forty-two. Apologize. Well, now you're 42.

THE DEFENDANT: Yeah.

THE COURT: So at the time of the interview he was closer to 40; I apologize. I know it was testified at some point regarding his age.

The issue really centers around fairness of the officers conducting the interrogation, specifically around the, what I'll refer to as the voice stress test, or lie detector. And clearly the officer oversold it. It was presented as 100 percent effective repeatedly, in the context of the defendant denying any inappropriate touching, consistently denying, then being offered this opportunity for a voice stress analysis. And it was presented as in a foolproof lie detector, or truth confirmation test. Nothing in the literature would indicate that it's 100 percent effective. And the Court would find that to be a deceptive practice by the police department in an effort to gain confidence in the process. That in and of itself does not make a interrogation, interview, or

statement involuntary. Law enforcement is permitted to do such things and such tactics.

The Court would also note that the officer brought in, Sarah Cox was brought in as the expert on the voice stress analysis. During the interview, as presented to the defendant, Detective Jones or Detective Brown, I can't remember, one of the two indicated that they weren't familiar with the actual workings of it, I believe it was Jones, and said they could bring someone in to help explain it further. And the person brought in was Sarah Cox who indicated a 100 percent effective for truth confirmation. Also, indicated that it could, in essence, differentiate between the stress of the event and the stress of a deception, which is what she was articulating the machine does, is picks up the nuance with the stress of a deception, and that is what is the truth confirmation, or the lie detector, in essence. The literature would seem to indicate that that's not accurate either, that there's not necessarily evidence that it can differentiate between the high levels of stress from the event or the actual interrogation, and a deception to a question.

The Court is also very dubious about the procedure for that test. Obviously, asking control questions where someone knows that there's a lie without any

psychological investment in the deception would seem to indicate that it's going to have a different result than someone who's fabricating a response to something that would put their liberty at stake. I don't, the Court fails to see how there's any testimony provided that's an actual control question.

The Court would also note that Detective Cox, Sarah Cox indicated, that there were stressful responses to all but one of his responses, to a second set of questions, which is the set of questions they're looking at to try and get past the stress of the first set. What that tells the Court is that the machine is not 100 percent effective. The literature doesn't indicate it is. If it shows stress on every question, even known truthful questions, for example, was the interview in Salina, Kansas, was he wearing shoes, is she wearing shoes, things of that nature, then it would seem to indicate those are not deceptive questions by the very workings of the machine. However, the detective indicated it showed stress on all but one question.

The Court's expressing that at length because it's further indication this is not 100 percent effective, it does not distinguish between the stress of deception and the event. And that was communicated to the

defendant, that it was, in effect, foolproof.

In the totality of the circumstances, the defendant is of an age, intellect and background, he's articulate, he's aware of the circumstances, he's aware of what he's being accused of as the interview proceeds, especially prior to the interrogation. The, although it wasn't stated up front, clearly it was known by the time the stress tests were conducted. He was consistent in his denial, and then after being confronted with the result of the test, the stress of the test, he modified or changed his answers and started disclosing statements that were contrary to obviously his liberty interest and incriminated him.

I'd note as well that he wasn't fed that information regarding the specifics of the timeline. He wasn't given the information regarding the actual, what he disclosed, it was still unique to him and he was denying other aspects of what she indicated during her interviews, the victim.

And although the officers were overselling, and we'll say not truthful in the accuracy of the machine and the veracity of that test, the Court still finds that looking at the totality of the circumstances the defendant was not under some compulsion, infliction or threats, or suffering. It was not a prolonged

interrogation. There's nothing to indicate that rendered the statement involuntary. The Court would also note that had he wasn't threatened, although there was some statement by Detective Brown regarding he wished he could, be able to go to the prosecutor and tell the prosecutor that the defendant felt bad, he cooperated. There's no promises concerning action that would be taken by a public official in reference to a deal or some favorable treatment.

And that any statement by Officer Brown or Detective Brown, even in conjunction with the deception as it relates to the lie detector, was not likely to cause the defendant to make a statement falsely, nor would have made a person whom the defendant reasonably believed to have the power or authority to make a deal. In other words, it wasn't a promise to gain favorable treatment. He had been given Miranda. He was in custody and he was subject to interrogation. But all of the totality of the circumstances would indicate that it was a free and voluntary statement. It was a product of his free and voluntary will. Even if he was deceived regarding the effectiveness of the stress test, even if there was minimization regarding the need for Miranda, the Court understands the Defense's points but does not find it rises to the level of overcoming

his free and voluntary will.

I find by a preponderance of the evidence that the statement was voluntary for all of these reasons. Ask the State to journalize that.

Counsel, we have a Motion in Limine, I believe the defense was going to file an amended motion.

MR. DINKEL: Yes, I will be. And I'll be filing a rape shield motion as well. So, that actually is pretty much ready for Mr. Garrett's signature, we've been reviewing it Friday and we'll do so again this morning, but I expect that rape shield motion probably to be on file within the next day or two, and then I'll be filing an Amended Motion in Limine as well to bring up the -- I forgot, oh, the discussion of pornography was one of the things.

THE COURT: Marital.

MR. DINKEL: Yeah.

THE COURT: Marital use of that.

MR. DINKEL: Marital use of pornography and not impacting on any of these charges.

MR. DINKEL: Does the Defense have a, do you have a decision made regarding your wish to pursue the stress test for the jury?

MR. DINKEL: I'm really not planning on doing that. I'm still, you know, I think I'll just, I'll ask

the Court to probably enter an order in limine that reference to that be excluded from the trial.

THE COURT: I'm not trying to influence your decision either way, but my mind is open to that idea, counsel.

MR. DINKEL: Yeah.

THE COURT: I'm not trying to influence you, I want you to know any question or comments I had previous in these proceedings regarding the admissibility of it. Obviously, now that I've heard all of the testimony, the effect on the defendant's statement, I'm open to evaluating whether you want to use that or not. Not trying to influence your decision strategially, I just didn't want you to be influenced by any comment I had made previously.

MR. DINKEL: Sure. No. I think that going down that road would pose more danger to Mr. Garrett than benefit, so. I'm disinclined to adopt that as a trial strategy.

THE COURT: State, anything else to address. We have some redaction, Motion for Redactions, are those still in dispute?

MS. NORTON: Do we, can we just set another pretrial and we can address then any motions might file, redactions or?

THE COURT: We can. We can.

THE BAILIFF: March 6th, at 9:00 a.m.

THE COURT: That's good.

MR. DINKEL: What day?

THE COURT: March 6th, at 9:00. We're set for trial on the 24th of March.

MR. DINKEL: That will be fine.

MS. NORTON: That's fine.

MR. DINKEL: I'll just motion my motions up for that date and time.

THE COURT: Thank you, counsel. Anything else before I step down?

MR. DINKEL: Don't believe so.

MS. NORTON: No.

THE COURT: We're in recess.

END OF PROCEEDINGS

C E R T I F I C A T E

STATE OF KANSAS)
) SS.
COUNTY OF SALINE)

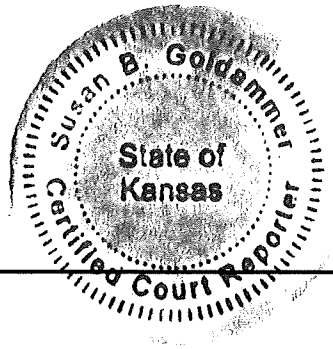
I, Susan B. Goldammer, a Certified Court Reporter for the State of Kansas and the regularly appointed, qualified and acting official reporter for the 28th Judicial District of the State of Kansas, do hereby certify that, as such official reporter, I was present at and reported the above and foregoing proceedings in Case No. 2018-CR-956, State of Kansas, Plaintiff, vs. Phillip Garrett, Defendant, heard on January 27, 2020, before the Honorable Jared Johnson, Judge of said Court.

I further certify that at the request of Mr. Jeff Ebel, Saline County Attorney, a transcript of my shorthand notes was typed and that the foregoing transcript consisting of 13 pages is a true and correct transcript of my notes, all to the best of my knowledge and ability.

SIGNED, OFFICIALLY SEALED, AND DELIVERED, this 5th day of October, 2021.

/S/ Susan B. Goldammer

Susan B. Goldammer, RPR, CSR
Certified Court Reporter
Reporter No. 0772



Appendix E

IN THE DISTRICT COURT OF SALINE COUNTY, KANSAS

STATE OF KANSAS, Plaintiff,	Case No. 2018-CR-956
v.	App. No. 124329
PHILLIP GARRETT, Defendant.	

TRANSCRIPT OF MOTION TO SUPPRESS/MOTIONS

Transcript of the Motion to Suppress/Motions proceedings held in the above-mentioned case before the Honorable Jared Johnson, Judge of the District Court of Saline County, Kansas, at Salina, Kansas, on January 3, 2020.

APPEARANCES:

The Plaintiff, State of Kansas, appears by Ms. Ellen Mitchell, Saline County Attorney, 300 West Ash, Salina, Kansas 67401.

The Defendant, Phillip Garret, appears in person and with counsel, Mr. Mark Dinkel, Salina Regional Public Defenders, 234 N. 7th Street, Salina, Kansas 67401.

I N D E X

E X H I B I T S

STATE'S EXHIBITS	MARKED	OFFERED	RECEIVED
# 1 - DVD (Deft interview)	19	20	20
# 2 - DVD (Cox CVSA)	83	23	23
# 3 - FA, Inc. cover page	57	57	60
# 4 - Copy/Release form	89	89	89
# 5 - 1st Test	91	93	93
# 6 - 2nd Test	91	93	93
# 7 - Test Graph 1st	92	93	93
# 8 - Test Graph 2nd	92	93	93
DEFENDANT'S EXHIBITS			
# 1 - FA, Inc. (Davis paperwork)	62	63	63

(The following proceedings are had on January 3, 2020, in the State of Kansas v. Phillip Garrett, Case No. 2018-CR-956.)

THE COURT: State of Kansas versus Phillip Garrett, 18-CR-956. He does appear with Mr. Dinkel, the State by Ms. Mitchell.

Counsel, there was an e-mail regarding the Motion to Withdraw, which seemed to indicate, it was from the Defense, communication with Ms. Effenbeck, and I believe it was sent both to the State and me, seemed to indicate the Defense is withdrawing its motion.

MR. DINKEL: I believe so, Your Honor. I think we can go ahead and proceed to handle this. It does create stress in our caseload, but at this point, we're to this point, and it sounds like Ms. Effenbeck wouldn't be able to get to the same point we are.

THE COURT: Her involvement would necessitate a continuance?

MR. DINKEL: Yes.

THE COURT: If granted? If the Court were to allow the withdrawal?

MR. DINKEL: Yes.

THE COURT: Which I'm not saying I would have. So we'll remove that from today's docket.

That leaves the Jackson v. Denno motion, Motion to

Suppress, the Motion for Redaction, Video, and the Motion in Limine. Any other motions, counsel?

MS. MITCHELL: Judge, the Motion to Redact is really going to depend -- I didn't file a response because it depends on the Court's ruling today. And I filed the Jackson v. Denno because no motion to suppress had been filed. But I think the Motion to Suppress takes care of the determination of whether or not it's voluntary. So I don't know that it's necessarily going to be a separate hearing on that motion.

And before we start today, I wanted to kind of outline what the purpose of the Motion to Suppress hearing is today. I'm not sure I understand it. The State believes that the state of the law in Kansas is that a CVSA is comparable to a polygraph and they're not admissible. And the determination, unless both parties agree, the analysis there is the same as you do in polygraph cases. We do not intend to introduce the CVSA, to talk about it, mention it, the same way that we do with polygraphs or treat it the same. So I'm not certain what the purpose is today. I don't want to get into a debate whether it's polygraph versus CVSA, I don't think that's the, should be the purpose of today's hearing, unless somehow that can tie into the

case. But that's my concern, is I don't want to have a scholarly discussion on CVSA versus polygraph, Chevy versus Ford, Pepsi versus Coke, anything like that. We're not seeking to admit it. We're not agreeing to admit the CVSA.

THE COURT: Maybe I can take a stab at clarifying. And the Defense can correct me if I'm wrong, Mr. Dinkel, I'll try to sum is up as briefly as possible.

There's two purposes, from what I've been described in court by Mr. Nowak. The first, as it relates to a voluntariness determination under the Jackson v. Denno or Motion to Suppress; specifically, that the defendant was denying and then was confronted essentially with what was purported to be 100 percent effective process of determining lying or truth veracity, and subsequently to that changed to making admissions regarding the allegations. Then the second would be if, depending, I assume, on the Court's ruling of the Jackson v. Denno, at trial, if the defendant's statements came in, the Defense was considering possibly intending to use the same analysis to show the change in his statement and that, in fact, the theory being that he was telling the truth initially or the jury could weigh the veracity of that and only change to comply with what he is being presented with falsely

that's 100 percent accurate.

Defense, is that consistent with your position today?

MR. DINKEL: That's, I think, where we have been up to this point.

I will tell the Court, that I'm really looking seriously at that second prong of this, about whether to even proceed that way at trial with trying to admit CVSA results. The concern with CVSA and lie detector results at trial is the possibility to prejudice the jury. That's why they're inadmissible at trial absent stipulation or other factors.

And, so, what we, Jacob and I had discussed up to this point was, that if we sought to admit them at trial we would ask for a cautionary instruction that the jury is not to consider them as scientific evidence or things of that nature, just simply in connection with the voluntariness of Mr. Garrett's confession. I do think they're admissible at suppression hearing on the voluntariness of confession. Case after case dealt with these.

THE COURT: I don't think there's an objection to that, is there, State?

MS. MITCHELL: No.

THE COURT: I don't think that's the issue. It's

appropriate for my consideration for voluntariness.

Just to clarify that second point that you're still debating. Mr. Nowak, at least my -- the Defense, not the State, the Defense would be offering that evidence at trial. Not for the purpose of showing its validity, but on the contrary to show essentially that the validity was inflated as reported to the defendant and that created a statement that was contrary to --

MR. DINKEL: Uh-huh.

THE COURT: -- he had been saying previously. To explain a change and for him to be able to explain that. So, would not be admitted based on foundation of it being scientifically valid but the opposite of that.

MR. DINKEL: Sure, yeah. And in looking at that, I, I'm not convinced that we, that we stand more to gain than potentially to lose by putting that in as evidence at the trial. So I, I mean, I'm still considering that, but right now I'm kind of leaning against it. And the reason, the reason being is that in reviewing, and I've reviewed his statement extensively, sentence by sentence so, in the last several days, is that following the administration of the CVSA Mr. Garrett went back to the room and he continued to deny that anything had occurred. And then it was further, what I would argue, or acts of coercion

that eventually procured a change in statement.

And, so, for me, I think that that may be enough to work with there as far as an argument to the jury that the statement was coerced. And, and there will be, we'll submit a written instruction on that as well for their consideration of a confession. There have been instructions floating around in, I think, the federal courts as well as some of the state courts concerning confession. I think we've also proposed them in the past, and they've been given, I think the Gilliland case was one main where we had an instruction on voluntariness of the confession, and other cases. I know I've had confession cases, like the Artis Cobb case that was over in Geary County, a three week double homicide trial over there where we had a significant issue with the voluntariness of the confession, presented that to the jury as well.

THE COURT: So for today, the second point that you're still considering, which the Court has not ruled on, will not be subject to discussion because you're still evaluating.

MR. DINKEL: Still evaluating that.

THE COURT: We can set over another pretrial conference. I'd like to have that vetted before we get to trial.

MR. DINKEL: I think we may be having ultimately a motion in that nature of a rape shield motion. Because one of the things that Mr. Garrett discusses in the course of the statement is, and the timing with which these allegations surfaced, was a discussion that he had with the alleged victim concerning her, I guess her sexual preferences, then for lack of a better word, and that she was, and concerned about. He discussed that with the detectives. And of course the Court will see some of that discussion, there's some extensive information presented during his statement on that. So I think we'll probably have a, probably at least a rape shield motion on that issue for presentation during the trial. And that's something that still lies ahead.

I noticed, in reviewing the motions that Mr. Nowak prepared, that the Motion in Limine doesn't contain any references to evidence of pornography, but that is indicated in the redactions, there's all sorts of case law concerning whether pornography is, mostly saying it's irrelevant unless somehow the juvenile was involved. There's no indication of that here. But it wasn't in the Motion in Limine, but we would, you know, also be seeking a limine order on. I think it was Mr. Garrett's wife who went in and told police that they maybe, perhaps viewed pornography together or

something like that as adults that doesn't involve children.

THE COURT: You'll file a motion in limine to address at a later hearing for that.

MR. DINKEL: Yeah, I can do that, follow up on that.

THE COURT: Would Defense agree that the State's motion, Jackson v. Denno, and your Motion to Suppress are, in effect, one in the same as it relates to the voluntariness?

MR. DINKEL: There, there, there is, and some of these cases, and Mr. Nowak talked about the Wisconsin line of jurisprudence about suppression of a polygraph, post polygraph examination and factors to consider therefrom, and I think there's an unpublished decision that maybe discusses a little bit some of that in Kansas, gets into a little bit. But there's a -- there's some cases out of Wisconsin, and then there was a Supreme Court case by the name of Wyrick that concerned I believe the issue of Miranda readvisement for post polygraph discussion. And I believe, and I don't know that I have that with me because I wasn't really planning on arguing it, but there's been some issue with regard to whether a second Miranda advisory may or should be performed for a post polygraph

discussion. Because some of the -- it seems like in reviewing that issue in the last couple of days and reading some of the cases on it that have the polygraph, is looked at as the defendant initiating contact with the police and agreeing to provide a statement to the police, but then when the polygraph is over then it's kind of like the roles are reversed and the police are then maybe interrogating the defendant again.

So I don't have the Wyrick case with me, but I believe in that case the Supreme Court had indicated that a second advisement was not required. Apparently, there's been some federal circuit cases, and I don't know if this Wisconsin -- some of these Wisconsin cases seem to suggest that the post polygraph examination should be separate in time and space from the polygraph examination itself.

THE COURT: Let's proceed on the Motion to Suppress.

MS. MITCHELL: Thank you.

Judge, I, the State is going to call Detective Jones. I think it might be easiest to start with him and for the Court to view the video of what all took place and then maybe come back and pick up some loose ends. But it might be easiest for the Court to see

that first.

THE COURT: Thank you.

(The witness is sworn by the reporter.)

MR. DINKEL: Your Honor, we will call Mr. Gary Davis later, he's sitting in the courtroom. I haven't sought a sequestration order, I don't know if the State wants him to, he's seen all of the evidence so I don't, I don't, all of the evidence pretty much recorded in this case I think from everybody's standpoint other than maybe...

MS. MITCHELL: I don't care if he's present. I'm going to have some objections to his testimony but it's not going to be that he's present.

THE COURT: Okay. You may proceed.

MS. MITCHELL: Thank you.

GREGORY JONES,

Called as a witness on behalf of the Plaintiff, State of Kansas, having been duly sworn on oath to state the truth, the whole truth, and nothing but the truth, testifies as follow:

DIRECT EXAMINATION

BY MS. MITCHELL:

Q Can you state your name and employment?

A Gregory Michael Jones. I'm a detective for the Salina Police Department.

Q Officer Jones, how long have you worked for the police department?

A It will be 17 years coming February.

Q What are your current job duties with the Salina Police Department?

A I'm employed as part of the Drug Task Force.

Q Prior to becoming a member of the Drug Task Force what were your job duties?

A I was in the Criminal Investigations Bureau, and before that I was in Patrol.

Q Thank you. Were you, when did you move to the Drug Task Force?

A It would have been shortly after Labor Day of this year.

Q Were you assigned the case of -- that eventually led to the charges in State v. Phillip Garrett?

A Yes.

Q And were you the primary investigator in that case?

A Yes.

Q Can you set the stage for the Court... Let me ask you, did you have the opportunity to interview the defendant, Phillip Garrett?

A Yes.

Q And when did that interview take place?

A November 20th.
Q Of what year?
A 2018.
Q And where did that interview take place?
A At the Salina Police Department's media room.
Q What time of the day was that?
A It was at approximately 1:20 p.m. in the afternoon.
Q And was anyone else present when you interviewed him?
A Yes.
Q Who was that?
A Detective Tim Brown. He's now a sergeant.
Q And later did Sergeant Sarah Cox have some participation in the interview of the defendant?
A Yes.
Q Was your interview recorded?
A Yes.
Q Can you set the stage as to what had occurred up until November 20th, of 2018, that had led you to interview the defendant?
A Yes. One of our patrol officers was dispatched to a call in which the victim in this, the female in this case had contact with her biological father, he had found something on her cell phone that was suspicious, and as a

result of that finding it was reported to us that she had been inappropriately touched by her stepfather.

Q Okay, and that's what was on her cell phone that she had shared with a peer?

A Correct.

Q And let's call her L.A. today?

A L.A.

Q It's hard, I know, not to use her name, but for the purposes of the record. So, as a result of what her father saw that she had communicated to a friend, a report was made with the Salina Police Department, is that correct?

A Correct.

Q And had L.A. been involved in an interview at the, at CAPS?

A Yes.

Q Through the Child Advocacy Center, Chris's Place?

A Yes.

Q Did you conduct that interview or did someone else?

A I did.

Q And can you just very basically and generally set forth what the allegations were?

A It was reported to us initially that she had been inappropriately touched. And when I say that I mean that her stepfather, Mr. Phillip Garrett, touched her on her

privates, her genitals.

Q Okay.

A So we had conducted an interview of L.A., interviewed her, and she corroborated that and stated that he had touched her multiple times.

Q Did she indicate during her interview at Chris's Place whether or not there had been any penetration involved?

A Yes.

Q And did she indicate there had been?

A Yes, multiple times is what she stated, that he had penetrated her vagina.

Q Did she indicate whether that was with his penis or something else?

A It was with his fingers.

Q Okay. And so going -- in addition did she allege any anal penetration?

A Yes.

Q And, again, was that with his fingers?

A Yes.

Q And then that he had otherwise fondled her?

A Correct.

Q And that included on her chest?

A Correct.

Q So, going into your interview with the defendant,

you're looking for evidence as to whether or not he had fondled her, penetrated her vaginally, and penetrated her anally with his finger, no penis involved?

A Correct.

Q Okay. So do you happen to recall how it is that the defendant came to be at the police department?

A If I remember correctly, we asked him to come down and he showed up.

Q Okay. And had L.A.'s parents been advised as to the results of the interview of -- that she had given at Chris's Place and that the defendant would subsequently be interviewed? If you recall.

A We may have briefly touched base. I don't recall any specifics in regards to that.

Q Okay. So he's asked to come down, he reports to the police department, you have an interview room set up with a recording device, and you and Officer Tim Brown conduct the initial part of the interview, is that correct?

A Our conversation with Mr. Garrett took place in the media room. We have separate interview rooms.

Q Right. Okay.

A They're kind of set up a little different. Ours took place in what we call the media room. But we do interviews in the media room but it's got a different atmosphere.

Q Okay. And we call it the media room because that's where they do the morning briefings with the media?

A Correct.

Q Is the media room behind a locked door?

A Yes.

Q And is -- once -- other than being in the lobby of the police department is everything else behind a locked door?

A Yes. In fact, it's the door from the lobby into the hallway that leads to the media room that is locked.

Q Okay, and so that's locked to everybody?

A Everybody, everyone that's not employed.

Q Right. And so if I went to the police department I couldn't enter into through that door without assistance from an officer or an employee?

A Correct.

(State's Exhibit No. 1 is marked for identification.)

Q (By Ms. Mitchell) I'm going to hand you what I will mark as State's Exhibit No. 1 and ask if you're familiar with this?

A I am.

Q And is that a DVD that contains the recording of the interview with Mr. Garrett?

A It is.

Q And have you had the opportunity to look at that disk?

A Yes.

Q And review it?

A Yes.

Q And did you do so again with Sergeant Brown today?

A I did.

Q And did you place your initials on it?

A I did.

Q And are they still on that disk?

A They are.

MS. MITCHELL: Judge, I'd move for admission of State's Exhibit No. 1, the recorded interview.

MR. DINKEL: Can I just voir dire him?

THE COURT: You may.

MR. DINKEL: And what is the date of that interview?

THE WITNESS: The interview was November 20th.

MR. DINKEL: November 20th. And what was the date of the CAPS interview?

THE WITNESS: CAPS interview was on November 8th.

MR. DINKEL: Okay. All right. Thank you. Nothing further. I have no objections to the admission of the exhibit.

THE COURT: It's admitted as 1.

MS. MITCHELL: And, Judge, can I play it?

THE COURT: You may.

MS. MITCHELL: I'm going to try to do it myself. Can I ask for Amy's assistance, the TV part of it.

THE COURT: Yes.

(An assistant from the County Attorney's office assists Ms. Mitchell.)

MS. MITCHELL: We're ready to play.

THE COURT: You may.

(The DVD begins to play.)

THE COURT: Counsel, would you pause it and note the time? We're going to take a lunch break.

MS. MITCHELL: Okay. It's at 1:32.

THE COURT: Thank you. We'll break until 1:00 o'clock. Come back at 1:00, we'll continue this. We're in recess.

(After a lunch recess is taken, the following proceedings are had at approximately 1:00 p.m.)

THE COURT: State of Kansas versus Phillip Garrett, 18-CR-956. He again appears with Mr. Dinkel. The State by Mr. Mitchell.

Detective Jones can retake the stand. Thank you, Detective.

We will continue with the video. Left off at 1:32.

(The DVD is played.)

(At approximately 1:24 p.m. Ms. Mitchell and Mr. Dinkel confer, after which the following proceedings are had.)

MS. MITCHELL: Judge?

THE COURT: Yes.

MS. MITCHELL: We've discussed it, and that big chunk of blue that you see there, we're going to fast forward through that, and then pause it, play the CVSA recording from Officer Cox, and then come back and finish that last red zone.

THE COURT: Okay. Thank you.

MS. MITCHELL: So that you have it in order, and that will save us some time as well.

THE COURT: Thank you.

MR. DINKEL: It seems to be, watching this just recently, what he's doing there is just holding his hands, occasionally shakes his head no, perhaps throughout until the end. There's nothing really beyond that.

THE COURT: Okay.

MS. MITCHELL: Fast forward.

MR. DINKEL: That's fine.

I think they bring him a water about the 2:07 mark.

(Continues to fast forward the video.)

MS. MITCHELL: So, at, what is it, about 2:17 he heads off for the CVSA approximately.

MR. DINKEL: Yeah, 2:17:18.

MS. MITCHELL: So, I'm going to pause this at 2:41.

MR. DINKEL: 2:41:14 is what I have is return time from the CVSA.

MS. MITCHELL: And, Judge, at this time I'd move for admission of State's Exhibit No. 2, which is Sarah Cox's CVSA analysis.

MR. DINKEL: No objection.

THE COURT: Two is admitted.

MS. MITCHELL: And I'd also ask for a, well, for now we're still okay on the sequestration.

Can you play this one?

(Ms. Mitchell's assistant plays the DVD.)

MS. MITCHELL: Now 1.

Judge, it's not playing on your screen, it's playing on our laptop still but...

THE COURT: Might be a problem with your disk. This has happened -- is it on disk?

MS. MITCHELL: Uh-huh.

THE COURT: It's happened before like that, and sometimes it's a dirty or scratched disk. Sometime.

COUNTY ATTORNEY ASSISTANT: The connection is going in and out.

(The DVD continues to play.)

MS. MITCHELL: It's still playing on our laptop.

COUNTY ATTORNEY ASSISTANT: There's something with the connection lagging.

(The DVD continues to play, after which the following proceedings are had.)

MS. MITCHELL: Judge, we're putting State's Exhibit No. 1 back in for display. Is there a suggested time?

MR. DINKEL: It starts at 2:52. He's in the, returns from CVSA at 2:41:14. At 2:52 the police return.

THE COURT: And for the record this is the media room, counsel?

MS. MITCHELL: Yes. Going to be back where that solid red line --

MR. DINKEL: Yeah, it's where that red line is, yeah.

MS. MITCHELL: There we go. That's good. We're starting at 2:51:39. The defendant is back in the room alone. I'm good. Thank you for helping.

(The DVD begins to play.)

MS. MITCHELL: Judge, it says waiting for

connection.

THE COURT: Okay. Is your staff member available?

MS. MITCHELL: Yeah.

THE COURT: Going to take a brief break while you get your staff member.

(After a recess is taken, the following proceedings are had at approximately 2:15 p.m.)

MS. MITCHELL: We switched boxes and it works now. And Brock indicated if it quits working again he'll hook me up on his tablet. He has a personal tablet that's wireless.

THE COURT: That's fine.

(The DVD is played, after which the following proceedings are had.)

Q (By Ms. Mitchell) Investigator Jones, do you happen to recall what L.A.'s date of birth is, or how old she was at the time of this?

A I just know she was a sixth and seventh grader.

Q Okay. But she was under the age of 14?

A Correct.

Q Do you recall the defendant's age?

A At that time he was born in '77, so 39.

Q Did it appear to you that the defendant spoke fluent English?

A Yes.

Q Did you ever have any concern about his ability to understand the questions and what was happening?

A No.

Q Is it fair to say that he was at least of average, if not better, intellect?

A Yes.

Q At any time did he ever request to leave or call someone?

A No.

MS. MITCHELL: I don't have any other questions for him.

THE COURT: Cross.

CROSS-EXAMINATION

BY MR. DINKEL:

Q Now, the first thing that Mr. Garrett asked you when he arrived at the station was that he was interested in knowing why he was there, is that right, why, what was going on?

A I imagine he was wondering what was going on.

Q Okay, do you remember him saying that at the outset?

A I'm sure he probably said something in that regard.

Q Okay. Did he make a statement that at about 1:16 and ten seconds on that recording that he wants to know

what's going on?

A I don't know exactly what the numbers are but he probably wanted to know what was going on, he was stressed out, it's evident in the video.

Q Okay. And did you advise him what was going on, did you answer his question there?

A There was a point where I told him there was a discussion that needed to be had on inappropriate touching.

Q Okay, but it wasn't at that point, was it?

A I don't know exactly when it was.

Q Okay. You responded to that question about what's going on with you having to jump through some hoops first, is that right?

A Sound like something I would say, yeah.

Q And those hoops were getting his date of birth, his address, where he lived, you gave him a business card, right?

A Correct.

Q Why did you give him a business card?

A I said in the video, so he would know who he spoke with.

Q And you indicated to him that he was in a secure facility and you're almost being detained because of the locked doors, is that right, that you were behind locked doors?

A I said someone could probably argue, because those doors are locked, he is behind locked doors, that he's being detained.

Q Okay. You didn't tell him that you had advised him of the rights because he was the subject of a criminal investigation, did you?

A I advised him of his rights because I was a cop and asking questions, and because he was behind locked doors.

Q No, I'm asking you, you didn't tell him, you didn't advise him that the reason you were advising him of his rights was because he was the subject of a criminal investigation, did you, you never told him that?

A Not in those words.

Q Okay. Well not ever when you advised him of his rights, correct?

A Well, custody plus interrogation requires Miranda. So he's behind locked doors and I'm a cop asking questions.

Q I understand, that's what's going through your mind. What information has been communicated to him about that situation?

A That I'm advising him of his rights.

Q Okay. Because you have to jump through hoops, right?

A I have to advise him of his rights.

Q Because he's in a secure facility?
A Correct.
Q Not because he's under criminal investigation, correct? That's -- you didn't tell him that?
A I didn't say it directly in those words.
Q Okay. Now, do you advise anyone who walks past those locked doors of their rights whenever somebody walks behind those locked doors?
A No.
Q Okay. Why not?
A Some people that we speak with are victims of crimes.
Q Some people may be there just for business reasons?
A Correct.
Q At numerous points in this investigation and did you hear statements from Detective Brown that the police knew he was guilty?
A I heard Detective Brown make statements to that effect.
Q Okay. And this was -- this was before Mr. Garrett admitted any guilt, is that right?
A Yes.
Q And then there were some statements by I believe Detective Brown made during this investigation that he would

go to the prosecutor and intercede on Mr. Garrett's behalf, is that right?

A I think he said something to the effect that he would like to be able to tell the prosecutor that Mr. Garrett was cooperative.

Q Okay. And in fact Detective Brown told Mr. Garrett he didn't believe he was a child molester going out into the community molesting children, right?

A I think he used the word predator, or something to that effect.

Q He didn't believe he was a predator, is what he told him?

A That's what he told him.

Q Going out into the community molesting children, right?

A Something to that effect, yes.

Q Okay. Have you been trained in the Reid Technique of interrogation?

A I went to a Reid class after I became a detective, so I have attended a training seminar.

Q Where was that held?

A It was in Omaha, Nebraska.

Q Okay. And the Reid Technique deals with concepts, concepts, interrogation concepts such as minimization, is that correct?

A I think that's included in there, I don't know if it's exclusive to Reid.

Q Okay. And minimization, you're trying to make somebody feel at ease and that they're not really in any sort of trouble, is that right, serious trouble anyhow?

A I mean minimization is minimization. It's...

Q What's your understanding of what you're supposed to do with minimization?

A I mean, I don't think it's exclusive to simply interviews, it's simply putting less weight or less value or using different choices of words in regards to making a situation less than what it might normally be.

Q Well, in fact, well for about at least for the, the first five minutes of this interview there was no discussion about this being a sexual sort of allegation at all, was there?

A That's correct.

Q Okay. And then, then it started opening up about the concern was between, about contact between some unexplained contact between Lillian and Mr. Garrett, right?

A Correct.

Q And their relationship together, right?

A Correct.

Q And then it kind of went in from there to how well did he get along with her and what was the discipline like

in the household?

A I believe that was discussed.

Q And then Mr. Garrett would tell you that, what, he disciplined them maybe by taking away privileges, iPads, and phones, and things of that nature, right?

A Correct.

Q Okay. And after that point then it's, I think maybe at some point after that then you start talking about how Lillian, or L.A. is coming of age?

A I mentioned that at some point.

Q In the Reid Technique then are you taught that it is important to cut off denials?

A I think that's part of the Reid Technique, I don't know if it's exclusive to Reid.

Q Okay. And you're taught as an interrogator if somebody tries to deny to cut off that denial, is that right?

MS. MITCHELL: I want to object just for foundation. I think you need to ask him if he even uses the Reid Technique and was it used in this case. If he didn't it's irrelevant, if he did then it's relevant.

THE COURT: Sustained.

MR. DINKEL: Judge, I don't think I have to take the witness's word that he used a certain technique. I

can identify it, I can discuss those techniques with him and then identify the points at which they occurred in the interrogation.

THE COURT: Counsel, if this witness was not utilizing a specific technique that you're referring to --

MR. DINKEL: That means that I have to believe his testimony, and that requires the Court to believe his testimony, and that means that his testimony is not subject to cross-examination or evaluation.

THE COURT: I think you've gone way past the, put the cart before the horse. It's a foundation question. You're talking about a technique utilized by law enforcement --

MR. DINKEL: That he's been trained in.

THE COURT: He went to one training some time ago.

MR. DINKEL: He's familiar with the subject matter.

THE COURT: Well, by the way he's answered the questions, the impression the Court got, so far, is that he wasn't using it, very possibly wasn't using it. He may know some aspects of it. You may want to clarify that. The objection is sustained.

Q (By Mr. Dinkel) Investigator Brown in this case, as well as yourself, told Mr. Garrett that you knew he

committed the offense, is that right? Investigator Brown told -- excuse me, I'll rephrase that. Investigator Brown told Mr. Garrett that you knew he committed the offense?

A That's correct.

Q Okay. Did you you tell Mr. Garrett that you knew he committed the offense?

A I think Mr. -- Detective Brown is the one that said that, and said that I knew it too, to Mr. Garrett.

Q Okay. Okay. Okay. Up to that point Mr. Garrett had denied committing the offense, is that right?

A He denied committing the offense until after we sat down again after the CVSA.

Q After the CVSA, but even after the CVSA he continued denying the commission of the offense?

A Briefly.

Q But there was one point in this interview, and it is at 2:57:46, where Investigator Brown, let's see, excuse me. There was one point in this interview where Mr. Garrett said it only happened one time and Investigator Brown says, denies that, says you know that wasn't the only time, you know that, I know that, she knows that, Detective Jones knows that, is that right?

A There was something to that effect in the video, yes.

Q Okay. Detective Brown indicated to Mr. Garrett

that he would like to go to the prosecutor and say Mr. Garrett owned up to his wrongdoing, feels bad about it, he's remorseful, he was cooperative?

A Again, something to that effect, yes, Mr. Brown said that --

Q Is that the sort of strategy taught in the Reid method of interrogation?

A I don't know if it's exclusive to Reid. I can't remember all aspects of the Reid interview. I have the book here, as you required, it's rather thick.

Q Sure. Sure. Could I see that book?

THE COURT: You may approach.

Counsel, are you going to lay a foundation that he was using the Reid Technique; I've sustained the objection already?

MR. DINKEL: Well I asked him if he, if that sort of technique is used in the Reid method, was one of the questions that I have.

THE COURT: His response was equivocal.

MR. DINKEL: That...

THE COURT: Counsel, I believe his response was that he was not sure. In effect. Words to that effect.

Q (By Mr. Dinkel) The statements that you know that to be true, we believe that to be true, Detective Jones

knows that to be true, things of that nature, I know that, she knows that, that's a cutting off of denial, isn't it?

A I think it could be construed that way.

Q Yeah. We're not, we're not taking you're -- you know, I mean this is in response to him saying he didn't do it, right?

A Correct.

Q Okay, and you're saying I'm not taking that, right, we know that you did it?

A Those were the things that Detective Brown said in the interview.

Q Okay. Okay. And that's a Reid Technique of cutting off denial?

A It may be in there; I don't know if it's exclusive to Reid.

Q Okay. Isn't the whole use of a polygraph a technique to cut off denial?

A I don't know anything about --

MS. MITCHELL: Judge, I'm going to object, no polygraph was used in this case.

THE COURT: Sustained.

Q (By Mr. Dinkel) Or a CVSA?

A I have never been to any CVSA training. I don't know a whole lot about it.

Q Okay. But a CVSA is going to either say that

somebody is telling the truth or they're lying, right?

MS. MITCHELL: Your Honor, I'm going to object, he indicated he hasn't been trained in it.

THE COURT: Sustained as to foundation.

Q (By Mr. Dinkel) Okay. Did you discuss the CVSA exam with Mr. Garrett?

A I did.

Q What did you tell him about the CVSA?

A I brought it up, said we have this tool at our disposal, and I'd bring somebody else in, somebody who's trained, a technician who could answer additional questions in regards to what he may have about it.

Q And did you hear also Detective Brown talk about the CVSA to Mr. Garrett?

A I did.

Q And say how useful -- how useful a tool it was, and what a great thing it was?

A Yes.

Q The Reid Nine Step of Interrogation is, the Step No. 3 is handling denials, in your book, that that you've been trained on. And it differentiates --

MS. MITCHELL: Judge, I'm going to object for relevance.

THE COURT: Sustained. Again, we don't have foundation that he was util -- trained in Reid other

than the one time, and more importantly utilizing the Reid Technique.

Mr. Dinkel, a simple way to approach that is to ask him if he was utilizing the Reid Technique.

MR. DINKEL: Well I'm not going to ask a question I don't know what the answer to is. And what I suspect may be the answer to that.

THE COURT: Then how are you going to lay a foundation?

MR. DINKEL: Because I think it's a cumulative thing here as far as the Reid Technique being used in this interview. Whether one person did it or not doesn't mean that they all didn't do it together.

THE COURT: Then you may have, then it's still using the Reid Technique, whether it's one officer, multiple officers who are coordinating use of the Reid Technique. There will be no further questions about the Reid Technique until you can establish a foundation for this witness. I've sustained that objection now multiple times.

MR. DINKEL: Well we've had him indicating that cutting off denial, and that denial was cut off in this interview, that that's part of the Reid Technique being used. I mean that's evidence that's being used, Your Honor.

THE COURT: No, I think you need to listen to his answers closer. Because he is not unequivocally saying that that is a part of the Reid Technique. He's not saying that he's even sure when asked a question that's the Reid Technique or exclusive to the Reid Technique. There's been no indication that he was using the Reid Technique. One could argue, potentially, that Detective Brown was blatantly using the Reid Technique maybe, but this witness has not testified to that effect.

MR. DINKEL: Yeah.

THE COURT: Part of the foundation for any witness, when you're going to get into a specific technique, is to lay the foundation of what it is, how they know what it is, and if they were using it. If he denies that he was using it after laying a foundation if he knows the steps of it, I can take that into consideration. But again, you're you're putting the cart before the horse, you're not even addressing the foundation of the Reid Technique with him. That's why the objection is sustained.

MR. DINKEL: Well, that's why I was going over the book with him on handling denials. And that's where, that's where we got, that's where I got cut off right now, is that I was, there's a chapter on handling

denials there that I was going to go over it with him on.

THE COURT: There is. You need to establish a foundation of the Reid Technique being used in this instance and his knowledge of --

MR. DINKEL: Well I think there's, again, as the Court itself pointed out. It could be that there's evidence that Detective Brown did it. So I'm not asking him whether he did it, I'm asking what the hallmarks of the Reid Technique are, if there's evidence it was used in this case, which there is. The Court has even alluded to that.

THE COURT: Because I'm familiar with Detective Brown. I know that we've had him testify before regarding the Reid Technique. He's been through the steps with me, and I saw him use a few of the steps.

MR. DINKEL: Sure.

THE COURT: This witness has not done that. Until you ask him if he knows what the Reid Technique is, if he knows what the steps are, was he utilizing the Reid Technique, or does he use some other technique, then I'm going to continue to sustain that objection offered by the State. It's not relevant because you haven't laid the foundation.

MR. DINKEL: Well isn't part of the foundation

what the training is?

THE COURT: Yes, but you skipped over that. You asked him if he went to a training, which he did --

MR. DINKEL: Using the Reid Technique would come after laying the foundation.

THE COURT: You have not tried to lay a foundation with him yet. You asked him a --

Mr. DINKEL: Well --

THE COURT: -- question about training. Mr. Dinkel, the objection is sustained. I'm not going to bicker about it with you back and forth on the record. If you lay a foundation then we can proceed.

MR. DINKEL: Well my next question, Your Honor, is to ask him about Step 3 of the Reid Technique, handling denials, and what type of denials are out there to be handled.

THE COURT: I think you need to ask him if he had independent knowledge regarding what Step 3 is.

Q (By Mr. Dinkel) Well, you've read the book that's before you, is that correct?

A I went to some training.

Q Okay.

A In Omaha. I think it was 40 hours, it might have been less than that.

Q But you brought your book from training, and that

book has notations --

THE COURT: Counsel, counsel, let him answer the question. He's not done answering.

Q Okay.

A That was, when I became an investigator...

Q Sure.

A I'm thinking Fall of 2016...

Q Sure.

A And then I put this book on a shelf...

Q Yeah.

A The one thing I remember most about the Reid Technique was the guy in the initial first day or so said the Reid Technique most resembles salesmanship. And I took that more than anything away from the Reid Technique. So when I say it's not exclusive to the Reid Technique I'm saying there's aspects of maybe Dale Carnegie, the father of modern salesmanship, that I think is part of the Reid Technique. There's a book I've partially read right now called The Interrogator, that you can get on Amazon, and it's about a master interrogator for the Luftwaffe back in the 40s. The subpoena you gave me, in reference to bringing this, caused me to break this out.

Q Sure.

A And then I did some research online in regards to the Reid Technique and rediscovered that Reid came about in

1950.

Q Uh-huh.

A Okay, so. Do I use the Reid Technique? There might be some aspects that could be seen in part of my interviews. Also, I've been a cop for 17 years.

Q Sure.

A You don't ask the kid that stole a candy bar did you steel a candy bar. You might talk to him a little bit about building rapport --

Q I agree.

A -- and things of that nature.

Q There's a lot in Reid that's good; I agree.

A And.

Q You know, the thing is you use what you're taught as a cop, right?

A But part of that is on-the-job experience.

Q Sure. And how often on that on-the-job experience do you get people coming in and denying that they committed any crime?

A All of the time.

Q And in order to close cases, if you, you just don't except those denials, do you?

A That's not true. We close cases in various different ways. We're out to get the truth.

Q Sure. But you don't accept somebody denying

something that you believe might not be true?

A People lie to us all of the time. And sometimes we have to call them out on it.

Q Yeah. And so then you have to employ various techniques to overcome those denials, isn't that right?

A You don't necessarily believe it the first time you hear it.

Q Yeah. And so what sort of training other than Reid do you have for overcoming denials?

A I would say on-the-job training.

Q Okay. And what tech -- what techniques do you employ to overcome denials?

A I might move on to different relevant subject matter or things of that nature.

Q Okay. Were you the person who initially, the investigator who initially brought up the CVSA with Mr. Garrett?

A I think I was.

Q Why did you do that?

A It's a tool that our department wants to utilize.

Q Okay. And that's a tool that you're familiar with that can be used to overcome a denial, can it?

A What I've been told is it's a truth verification test.

Q Yeah.

A And this is just preliminary information that I'm given by the people that attend the training. All right, so I took that little bit of information and that's what I typically utilize. But I don't understand the process, I don't know all the ins and outs. This CVSA interview of Mr. Garrett, I think that might be the first one I've ever seen in its entirety, and that was here today.

Q Well there's going to be outcomes to a truth verification test, aren't there? There's just going to be one of two outcomes; it's either the truth or a lie.

THE COURT: Counsel, I don't know if you have foundation for this witness.

Q (By Mr. Dinkel) Well you've seen these administered, right?

A Yeah, but I'm not always privy to the outcome.

Q Well you were in this case.

MS. MITCHELL: Judge, I think his testimony was he had never seen one from start to finish, and his first time was today, just now, watching Sarah Cox's video.

THE COURT: That's my concern, Mr. Dinkel. He doesn't have a foundation to tell me if there's an inconclusive outcome, for example, or, that it's similar to a polygraph. He has no training or experience in this method of technology.

Q (By Mr. Dinkel) Did you discuss the results of the

truth verification test in this case with Sarah Cox and Tim Brown?

A We probably had a brief discussion.

Q Okay. And what did that discussion entail?

A A lot of what we discussed in those post CVSA discussions are the Christmas tree shape that you heard her talking about with Mr. Garrett.

Q Sure. Sure.

A All right. They talk about things called carryover. Maybe the stress from one question could lead to another.

Q Yeah.

A I don't know what a lot of that means. I haven't been to any training. I know that the technicians that administer the CVSA, whenever they get the results they typically collaborate with each other. So that would be Sergeant Cox, now Lieutenant Feldman, Sergeant Larson, and perhaps now even Detective Carswell has been to that training.

Q Uh-huh.

A A lot of that discussion is over my head. Those are some of the buzz words I've heard, are carryover, Christmas trees, that's about it.

Q And you picked up on that from Sarah Cox?

A Well from when they're having this discussion.

I've certainly probably asked some questions in regards to the CVSA but...

Q Of Sarah Cox?

A I imagine so. All of them I imagine.

Q Okay. Is this the only case that you worked on that involves a CVSA?

A I don't think so, but I can't think of any off the top of my head.

Q And aren't you familiar with the, the, perhaps a CVA is also used internally within the police department?

A Yeah, that's true.

Q Okay. Have you ever had to take that?

A No.

Q Why would you not tell Mr. Garrett about what the accusations were against him?

A I think we did discuss it. Inappropriate touching.

Q Okay, why wouldn't you tell him that upfront in response to his question of why he was there?

A Part of the interview process is building rapport. I also got to get some basic information first. I mean it's a process; you just don't start from the get-go with the accusation.

Q But one of the things that you would tell him about, this came from your mouth during this interview, is

that the police office, police department deals with a lot of stuff, including family drama sorts of things?

A We do.

Q Okay. Why did you make that statement?

A It's a true statement.

Q Okay. Did you consider this to be family drama in this case?

A It's an accusation that was made between family members, step family members, okay? Sometimes accusations turn out to be false.

Q Yeah.

A Who knows what it was.

Q Yeah. But you had talked with L.A. a couple of weeks before this, right?

A Correct.

Q About November 8th?

A Correct.

Q And you didn't believe it to be false, did you?

A I know what she said in regards to her interview.

Q Sure. Yeah. And you took it at face value, didn't you?

A I wouldn't say that.

Q Okay.

A People, in my line of work people make accusations, and it's usually one person's word against

another, and we have to try to determine where the truth is.

Q Why would Detective Brown, before Mr. Garrett said anything, advise him that you knew this to be true?

MS. MITCHELL: Your Honor, I'm going to object. He can't testify as to why Detective Brown did something.

THE COURT: Sustained as to speculation.

Q (By Mr. Dinkel) Did you tell Detective Brown that you knew this to be true?

A I did not.

Q Okay. Did he hear you tell anybody that you knew this to be true?

A No.

Q Did you ever tell Detective Brown that you knew this to be true?

A No.

MR. DINKEL: Okay. I have nothing further.

THE COURT: Any redirect?

MS. MITCHELL: No.

THE COURT: You may step down. Thank you, Detective.

Any other witnesses from the State?

MS. MITCHELL: I believe I have two. Well I need to offer Officer Brown for cross-examination, but I'd like to put Sarah Cox on first. Those would be my only

witnesses. I know they also have received subpoenas from the Defense, and we probably need to get his expert in before the end of the day, too.

THE COURT: Why don't we just take the expert up now --

MR. DINKEL: Okay.

THE COURT: -- to ensure that we get him in. My understanding is that he traveled from out of state.

MR. DINKEL: Are you ready to testify?

We're taking you out of order.

GARY DAVIS,

Called as a witness on behalf of the Defendant, Phillip Garrett, having been duly sworn on oath to state the truth, the whole truth, and nothing but the truth, testies as follows:

DIRECT EXAMINATION

BY MR. DINKEL:

Q Please state your name.

A Gary Davis, D-a-v-i-s.

Q And Mr. Davis, how are you employed?

A Hang on a minute; I'm going to turn my hearing aids down.

Q Okay. How are you employed?

A I am the President of Forensic Assessments, Incorporated, and Director of the Marston Polygraph

Association -- I mean -- Academy.

Q How long have you been employed in that capacity?

A Almost 50 years now.

Q Are you familiar with truth verification technology?

A I am.

Q And what sorts of truth verification technology are you familiar with?

A Uh, statement analysis, written and oral, body language, verbal analysis, polygraph, CVSA, layered voice stress.

Q Okay. Does layered voice stress also go by LVA, Layered Voice Assessment?

A Yes.

Q What's the difference between that and CVSA?

A Not much.

Q The -- do you use -- have you used computerized polygraphs?

A Yes.

Q Okay. And how long have you been conducting truth verification examinations?

A Thirty-eight years.

Q Okay. Do you train others to do that?

A I do.

Q And are you currently employed in California in

training --

A I'm the director of a school out there.

Q And what sort of students do you train?

A Law enforcement. In that class I have two Koreans from the Administrative Justice; two Filipinos from the National Police; law enforcement from Northern California, Arizona, and Vancouver.

Q Have you trained various law enforcement people in Kansas?

A I have not had anybody from Kansas.

Q Okay.

A Not in this school. Now I have a school in Florida I did.

Q Have you conducted polygraph examinations within Kansas?

A Oh, yes.

Q Okay. All right. And many of those do you think you conducted?

A Well my log book has 27,000 tests on it. I can't tell you how many from Kansas.

Q Okay. And how about CVSA examinations, have you conducted any of those?

A I have never run one, no.

Q Okay. And what familiarity do you have with the CVSA?

A I'm a member of the Academy of Forensic Sciences, I read the Journal, I've done online research about the various scientific publications relating to that technology.

Q Okay. And you said that you're a member of the Academy of Forensic Sciences?

A Yes.

Q And so what experience do you have with CVSA through that organization?

A Just the research projects. That's all the academy is, is a source of research in the forensic sciences.

Q All right. Are you familiar with various scientific studies that have been conducted on CVSA?

A Yes.

Q And what sort of familiarity do you have with that?

A Again, it's the same process. Back in about 1987 I was asked by the Stolzen Company (sp) to look at voice stress analysis for incorporation into the polygraph.

Q Okay.

A And at that time I looked at what little research was done, that had been peer reviewed, and we decided not to incorporate that into polygraph. Since that time I've looked at a lot of research that I use in my classes when I teach, alternate forms of detection deception.

Q And so do you teach about the CVSA in the classes that you teach?

A Yes, I do.

Q Okay. And are you familiar with scientific studies that have been done on it?

A Yes, I am.

Q What studies are you familiar with?

A Oh my gosh, there's dozens of them. One of the better studies was done in Oklahoma, financed by the Institute of Justice, where they tested inmates, or probationers, with the CVSA, and then did the drug test. You know, that's a controlled study.

Q Okay.

A In the field. As opposed to a lab report.

Q Okay. Do you know what the name of that study is?

A Dalripple, or someody like that. Dalripple. I don't know specifically.

Q Are you familiar with the name Damphousse?

A That's pretty close to Dalripple. Starts with a D.

Q Have you read that study?

A Not recently, but yes.

Q And can you describe what that study involved?

A It involved testing probationers or parolees for compliance with the drug prohibitions with their

supervision, and then following that with voice stress tests.

Q Are you familiar with the National Research Council, too?

A Yes.

Q And what does the National Research Council do?

A It is an advisory board for the President of the United States on scientific evidence.

Q Okay. And are you familiar with the National Research Council weighing in on reliability of CVSA examinations?

A I don't know that I would call it "weighing in," but, yes, they made a statement.

Q What did they say about it?

A That it needs --

MS. MITCHELL: I'm going to object. I think the articles speak for themselves. They, just, Mr. Davis was retained by the Defense. The Court ordered them to direct any of his reports to us prior to his testimony. His report basically consists of just a very few lines that say, I think it's five lines here. "At the request of the Kansas Board of Indigent Defense Services and Mr. Jacob Nowak, Esquire, I conducted a review of the literature on the validity and reliability of Computer Voice Stress Analysis. To

complete the review of the literature, I searched academic data bases, the Credibility Assessment Library at the Department of Defense and other publicly available information sources."

I think these articles that he compiled could possibly be admitted for the Court's review if the right foundation is laid, but I think otherwise his testimony is restricted because he didn't send us any kind of report on his comments, or his thoughts or opinions of these, and the literature will actually speak for itself and the Court can render its own opinion.

THE COURT: His letter didn't render an opinion as to the validity of the test performed on the defendant?

MS. MITCHELL: It did not.

MR. DINKEL: Now. The -- well he indicated he didn't have any problems with the procedure that was used in this case. Now --

THE COURT: So generally then his comments would not be regarding whether protocol was followed for the CVSA but more to the general validity of the CVSA --

MR. DINKEL: General validity. I think, we discussed this while the hearing has been going on, but I think he feels like the questions that were asked were appropriate and that the administration of the

test looked -- would that be correct -- the administration of the test looked -- did you have any issues with regard to --

THE WITNESS: Yeah, I didn't have any problem with the mechanics of the test.

THE COURT: Counsel, I'm going to allow it for that reason. The Court, based upon his training, experience, I mean that many years in the polygraph field, as well as being an educator in that field, consisting, including teaching on this subject and from his research, and I'm familiar with the article that Defense provided as well as the civil lawsuit from California was attached, I'm going to allow him to proceed to answer the questions, it would be helpful.

MS. MITCHELL: Talking about what has the Defense provided prior to today.

THE COURT: I don't think there's any criti -- there's no criticism on the performance of the test, my understanding, but he's just going to address the validity of the CVSA in general.

MR. DINKEL: That's pretty much it.

THE COURT: Does he not opine as to that in your letter?

(State's Exhibit No. 3 is marked for identification.)

MS. MITCHELL: He doesn't. And I mean... I'm going to mark, just for the Court's review, here's State's Exhibit No. 3. Here's the first page, and then followed by his, just all of the articles that are, or studies that are attached. But that's it.

MR. DINKEL: This is the complete set here. And I think primarily, the principal article, did the Court say it was familiar with it, was the Damphousse?

THE COURT: The Damphousse.

MR. DINKEL: The Damphousse.

THE COURT: The Oklahoma research that you provided as far as the motion indicating that their CVSA and the LVA combined are at best 50 percent effective. A coin flip I believe is the quote they used in the article.

MR. DINKEL: Well I think the Damphousse said that it detects 15 percent of the lies in the Oklahoma field study.

MS. MITCHELL: Judge, we're not here to argue that point yet. I would ask the Court to, rather than before we start discussing the studies, the Court to make that determination.

MR. DINKEL: This is -- this is the entire stack that he has provided.

THE COURT: Is there another page for this letter?

It seems to end.

MS. MITCHELL: Well, it's many many pages. Then he just starts review -- not reviewing, but I'll just show you.

MR. DINKEL: It looks like it's been maybe prepared maybe for some other purposes, not simply for this case.

THE COURT: Yes.

MS. MITCHELL: There's many many pages, a notebook full. So what it is is just a listing of the articles, the literature.

MR. DINKEL: Yeah.

MS. MITCHELL: I think those articles speak for themselves.

MR. DINKEL: Well he's got some articles that speak well of the CVSA, I think, in there. But the question is, you know, maybe, to what scientific rigor was addressed to them; is that correct?

THE WITNESS: I found one article that was published in a purported peer-review journal, where it was a survey of users of the instrumentation and how that, how reliable they felt it was.

MR. DINKEL: And then some of the articles --

MS. MITCHELL: Judge, I'm going to ask again before we start discussing articles that the Court

determine.

THE COURT: I understand, counsel. I'm admitting 3. And the Court is going to allow him to testify. What this, I anticipate what this witness will do is effectively collate their current state of the research based upon his training, experience, his independent performance in preparation for today, and then essentially reiterate what the research says in that letter.

MR. DINKEL: We have the Damphousse right here.

MS. MITCHELL: My problem is that's not what we got. And if he wanted to give his opinion... I'm familiar with Mr. Davis. I've probably used him as a witness in the 80s, or early, many years ago when he... I mean, I don't question his qualifications as far as being knowledgeable in the area of polygraphs. He's been doing them for years and we've used him. I am just saying his, there is no written report that was submitted saying here's my opinion on this literature. And so I believe that he is prohibited procedurally from giving his opinion on these studies. I think he can say here are the studies that are relevant and the Court can review them, but I don't think he can give his opinion on them since they didn't have him do that in writing and submit to the State prior to this

hearing.

MR. DINKEL: And I think he can summarize the conclusions of the studies, and that's just what I'm driving at here.

MS. MITCHELL: And I think the Court can do that on its own.

THE COURT: You're not going to ask him what his opinion is of the CVSA, independent?

MR. DINKEL: No, I don't intend to.

THE COURT: Okay. And, again, counsel, I'm going to allow him to collate the research that's provided, essentially giving me a summary. That would be helpful.

MR. DINKEL: Yeah, and I just have this as... This is what... This is what you have and I thought --

THE COURT: And I understand the State's point. There's not a clean sentence or paragraph in his paper stating here is my opinion so that the Defense can -- or State can respond appropriately.

MS. MITCHELL: Like I say, there were five lines saying I gathered the literature and that's the end.

THE COURT: All right. I understand. I'm going to allow it. You may proceed.

MR. DINKEL: Well I just intend to mark this as -- I don't have very many questions of him really.

THE REPORTER: Okay. State's 3? Do I keep that?

MS. MITCHELL: I have it. I put it back --

MR. DINKEL: I might just ask him about the conclusions of the study, so.

THE COURT: And counsel, the Court is finding as a matter of record that's consistent with his training and experience. He is not the practical administrator of the CVSA, he's a polygraph expert, and expert in the field of technology regarding truthfulness, and so his research into that information would be helpful to the Court, and relevant to Jackson v. Denno question.

(Defendant's Exhibit No. 1 is marked for identification.)

MR. DINKEL: Your Honor, I have Defendant's Exhibit 1.

Q (By Mr. Dinkel) Mr. Davis, is that, are those the documents we've been talking about as far as the various studies --

A Yeah, that's what I was charged with doing.

Q Yes.

A Was the research.

Q Okay.

A And, you know, as everyone represents, it speaks for itself.

Q Okay. And when we talk about the CVSA, is there

just one manufacturer for that instrument, or do you know?

A There are a number of manufacturers using the technology. The original manufacturer was Dektor, D-e-k-t-o-r, Incorporation. They're still in business. Then next came Humbolt, who is the National Institute of Truth Verification, and they're still in business. And then Layered Voice Stress, I haven't heard anything about them in years.

Q Okay. And are you familiar with which model was used in this case?

A It was the National Institute -- NITV. National Institute of Truth Verification.

MR. DINKEL: Okay. Your Honor, I would move for admission of Defendant's Exhibit No. 1 which is the collection of the articles.

THE COURT: Any objection to 1 by the State?

MS. MITCHELL: No.

THE COURT: They're admitted as 1, including the cover letter and summation by Mr. Davis.

Q (By Mr. Dinkel) Now, just to highlight, summarize a little bit some of the studies. Would you describe the Damphousse study as probably the most extensive study that's been done on the CVSA?

A It's the best study that I've seen from the field.

MS. MITCHELL: Your Honor, I don't know that he

should be rendering his personal opinion, that's the best study I've ever seen. That was not in what he provided to us.

MR. DINKEL: Well, the, the, he provided in the literature the various studies. I mean it's just his opinion on it. I don't think he has to index every opinion in an expert report. The ultimate expert report is to answer the question that's presented, and the question that's presented here is was there a misrepresentation in describing this machine as 100 percent accurate, 100 percent effective?

THE COURT: I'm overruling the objection. Within the study itself it gives the reasons why they believe they're the best study, essentially. Because of the factors they took into consideration from prior failed studies.

MS. MITCHELL: I agree with that. I'm just saying he shouldn't be able to render his opinion what he thinks of those because they weren't included in a written submission of expert testimony in advance of the hearing today.

THE COURT: I understand. That objection is overruled.

You may proceed.

Q (By Mr. Dinkel) So would you describe the

Damphousse study as perhaps the most thorough investigation of the CVSA?

A It was very extensive, yes.

Q And you said it was funded by the government; is that right?

A Right.

Q By the Department of Justice?

A National Institute of Justice. That's a division of the United States Department of Justice.

Q And as you indicated it was -- it was a controlled study; is that right?

A No, because they didn't program people so they could tell for sure. What they did was they took it into the field and investigated drug abuse.

Q Okay. Now, some of these studies indicate that... Do the studies indicate whether the CVSA is able to discriminate general stress and rule that out from case specific stress?

A No.

Q Okay. So if somebody, and according to these studies, if somebody is in investigation and they're feeling stress that it could pick up on that?

A Everybody in investigation feels stress. You're looking at a change from, you know, the law of initial values. There is no unique physiological response for

deception.

Q Okay. And would that even be true of polygraph tests?

A Absolutely. Polygraph and -- there is no lie detector.

Q Okay.

A Now we can make a highly accurate inference, but we are not lie detectors.

Q Okay. So your understanding from these studies is that the voice stress analysis measures some sort of vibration in the throat?

A Microtremors, yes.

Q Microtremors. And polygraph by comparison measures, what, blood pressure?

A We measure a total of five different physiological responses.

(The reporter asks for a recess. After a recess is taken, the following proceedings are had.)

THE COURT: Back on the record. All parties appear.

Counsel?

Q (By Mr. Dinkel) Mr. Davis, do you remember the discussion previously about the Christmas tree and stuff like that?

A Yes.

Q Okay. And is that information contained in the Damphousse study?

A I believe it is.

Q I'm asking you to refer to Page 10 of the Damphousse study.

A Yes.

MS. MITCHELL: Did you give this to us?

MR. DINKEL: Yeah, it's on Page 10 of his... The Damphousse study is...

THE COURT: It's attached to the Motion to Suppress. The last article.

MR. DINKEL: Page 10.

Q (By Mr. Dinkel) And does the Damphousse study show what various responses should be for truthful and lying responses?

A It does in Figure 3 of that page.

Q Okay. And does that figure show a more spread out and a peak for a truthful response?

MS. MITCHELL: Your Honor, I'm going to object for leading.

THE COURT: Sustained.

Q (By Mr. Dinkel) How would you describe the picture for the truthful response?

A Inverted "V".

Q Inverted "V"?

A "V" as in Victor.
Q Could it be described as pyramidal?
A Yeah.
Q And how would you describe the response on Page 10 for the lying?
A A plateau.
Q Now this, or would, could a tree trunk shape be used to describe that?
A I guess you could.
Q Okay. It's, compared to the other one, it's, the lying response has long straight sides?
A Correct.
Q Would you say?
A Correct.
Q While the other, as you indicated the other one has kind of spread out sides?
A Correct.
Q The lying response, is that narrower than the truthful response, the base of it?
A I don't think so.
Q Okay.
A Now, by looking.
Q Okay.
A Not measuring.
Q Okay. I see. What sort of education did you have

prior to entering into your field?

A Well I was a graduate of Wichita State University.

Q Okay. And what major were you?

A I think I was lucky to get through. General Studies.

Q General Studies. Okay. And then did you have training beyond that?

A Of course. I went, graduate studies at the University of Louisville, Louisville, Kentucky.

Q What kind of graduate studies was that?

A Administration of Justice.

Q And when did you first become familiar with lie detection or truth verification technology?

A Probably in the mid '70s.

Q Okay.

A That was the rage.

Q And through what platform did you become acquainted with that?

A Decktor was making presentations to law enforcement agencies.

Q Pardon me?

A The Decktor Corporation was making presentations to the law enforcement community.

Q Oh, were you employed with that corporation?

A No, I was with the Sedgwick County Sheriff's

Office.

Q Okay. Okay. And did you engage in, I guess, polygraphy or lie detection through the Sedgwick County Sheriff's Office?

A No. KBI.

Q Okay. So in the past you've worked for KBI as a polygraph examiner?

A Correct.

Q Okay. Did you reference LINK in any of your materials, Lie Detection through Voice Analysis?

A Should be one of them that was in there.

Q Okay. And LINK, is that a study that was done for the CIA?

A I think they say it was done for the government, but the CIA was...

Q Okay. Is it a declassified document?

A Yes.

Q Okay.

MR. DINKEL: I don't believe I have anything further. Thank you.

THE COURT: State?

CROSS-EXAMINATION

BY MS. MITCHELL:

Q Have you attended the CVSA training for any of the manufacturers?

A Nothing beyond their demonstrations.
Q The Academy Forensics Sciences, what do you have to do to become a member of that academy?
A You have to be voted on.
Q By your peers?
A Yes.
Q Is it very, kind of through any kind of requirement that you published or --
A No.
Q That maybe they want to limit it to those that have worked in the law enforcement field and not, or in the forensic science field --
A Yes.
Q -- as opposed to those who haven't?
A Correct.
Q And that would require requesting admission to the Academy and paying an annual due?
A Right, and being recommended by an existing member.
Q Right. The -- although you teach about CVSA you were never formally trained in that area?
A No, I was not.
Q One of -- in reading the literature, and the literature that you provided has both pros and cons of CVSA; is that correct?

A That was my intent, yes.
Q And you have included all of the literature that you were able to run across.
A No, I probably would have had close to a thousand pages.
Q Okay. And so what restrictions did you use in determining which literature to attach and which not to?
A The most succinct and the latest.
Q Okay. Are there critics of the Damphousse study?
A Of course.
Q What are the primary criticisms of that study?
A I don't know.
Q Do, in reviewing the literature, do the proponents of CVSA feel strongly that loss of jeopardy is an important element, or a necessity in the CVSA being effective?
A A loss of jeopardy?
Q Right.
A I'm not sure what that means.
Q So the propo -- those that believe in CVSA, isn't it their opinion that you can't just conduct a test in a laboratory with volunteers?
A That's what they said, yes.
Q And isn't it true that their opinion is there has to be some sort of a risk or loss of jeopardy that attaches with the deception or the interrogation or the CVSA is not

effective?

MR. DINKEL: Judge, I think that maybe the correct framing would be that there has to be jeopardy, there has to be skin in the game.

MS. MITCHELL: Right.

MR. DINKEL: Loss of jeopardy but...

THE COURT: That's the --

MR. DINKEL: You said lots of jeopardy or loss of jeopardy?

MS. MITCHELL: I did say loss, l-o-s-s.

MR. DINKEL: Yeah, now I say maybe lots of jeopardy, or some jeopardy would maybe be the more accurate description as far as I understand those studies go.

THE COURT: I think the question is fair; you may ask it.

Did you understand the question?

THE WITNESS: I understand it.

THE COURT: You may answer.

A If that were the case, then the comparison or controls they use have no value.

Q And I'm not following you now. If what, so do the critics, or do those that advocate CVSA say a necessary element is jeopardy?

A That's what they say.

Q And those that are the proponents of CVSA would say you can't just do a study to determine if people are lying or not?

A The only person that has put that forward is Dr. Charles Humble.

Q And isn't it true that we couldn't, for instance, just hook up to determine if I drank more than three sodas today, or if I ate more than two pieces of pizza for lunch, because I wouldn't really have any, be any jeopardy to lose by answering those questions falsely.

A Psychologists talk about differential salients. And that is something that CVS people are ignoring. And that's apparent when they're using -- excuse me -- a lie question that means nothing. So it has no value for comparison to relevance. So it's really a matter of differential salients in what is important to the person being tested at that particular point in time.

MS. MITCHELL: I don't have any other questions, Judge.

THE COURT: Thank you.

Any redirect?

MR. DINKEL: Just a follow-up.

REDIRECT EXAMINATION

BY MR. DINKEL:

Q Is what you're saying then, if jeopardy is

significant, then a control question such as am I wearing glasses that somebody is instructed to lie on is meaningless?

A It depends on how that is presented. You know, it's a matter of salience, which is important. You know, is the lie that this question have value. If you're a guilty person you're expected to react bigger to the relevant question. A truthful person is expected to react bigger to the comparison question. But they have to have some emotional involvement for that to make it important. And it has to be explained in that manner. And I did not see that occur. In fact, I haven't seen it occur in any of the tests I've observed.

MR. DINKEL: Okay. Nothing further. Thank you.

THE COURT: I have a question.

EXAMINATION

BY THE COURT:

Q Sir, one of the issues, and you were here and observed the video and testimony from Detective Jones, as well as hearing and seeing the video of Sergeant Cox, and Detective Brown, who indicated on repeated occasions that the CVSA exam was 100 percent effective and that stress will not effect the results of the examination. So my question really is two-fold. First, is there anything in the literature that you've provided me that would indicate that

the stress of such an event as being interrogated does not effect the results?

A There should be, yes.

Q There should be some literature?

A Yes.

Q Okay.

A Now, I watched the inter -- this was not an inter -- did not appear to be an interrogation for the CVSA.

Q Okay. And then the second is, is there any literature, or what does literature say regarding the rate of effectiveness for determining truthfulness as to a relevant question during a CVSA? For example, I'm going to get her name wrong, the doctor's Oklahoma study said anywhere from 15 to 50 percent, but that was combined with that other version as well?

A No better than flipping a coin.

Q That's generally what the literature --

A That is correct.

Q So 100 percent, there's nothing in the literature that indicates it's 100 percent effective based upon studies performed?

A Yes, there is no 100 percent test, period, of any kind. Even dead people are making mistakes.

Q All right. In the literature you provided there's no indication of 100 percent effective?

A No.

THE COURT: Counsel, any follow-up questions based upon that?

MR. DINKEL: I don't believe so.

MS. MITCHELL: It just renews my objection to him being able to render those kinds of opinions. Because had I known that he would be permitted to do that I would have brought the people in from the manufacturer's office with their studies and that sort of thing. But that's my objection to him being able to render opinions that weren't given to us in advance.

THE COURT: What opinion do you believe I just asked him to provide?

MS. MITCHELL: How effective is the CVSA?

THE COURT: My question specifically was was there anything in the literature that would indicate that the CVSA performs at 100 percent effectiveness. I was asking specifically so that when I'm going through the literature I knew what to look for. I did not ask for his opinion as to the effectiveness of CVSA. But other than his additional comment regarding deceased individuals making mistakes, which I will disregard.

MR. DINKEL: He's unaware of any studies that say it's 100 percent effective. I'm unaware of any studies that say it's 100 percent effective. The scientific

rigor is that if you want to make those sort of claims you subject them to peer review, you know. And the Damphouse study has been out there for peer review. It's -- it's -- Damphouse --

THE COURT: Counsel, I don't mean to cut you off, but any additional questions for this --

MR. DINKEL: I -- I do have.

FURTHER RECROSS-EXAMINATION

BY MR. DINKEL:

Q Damphouse and -- are you familiar with Damphouse and their study addressing the criticisms that were made at the --

A Yes.

Q -- at the end of the study?

A Yes.

Q And one of the criticisms was, is it, would it be correct in saying that well sometimes these drug -- drug tests are not accurate?

A There are no perfect tests.

Q Yeah. That drug testing is not accurate, so if you have a inaccurate drug test on top of a CVSA rating it doesn't necessarily mean that the CVS result was bad.

A That makes sense, yeah. There's not one published peer-reviewed study showing CVSA works. The manufacturer said that on television, on ABC news.

Q Yeah. Okay. And are you aware of any anecdotal cases where maybe a CVSA has produced a false confession?

A Well, yeah.

MS. MITCHELL: Your Honor, I'm going to object again. That's outside of --

THE WITNESS: Well, yeah.

THE COURT: Is that outside the scope of the research you provided?

MR. DINKEL: Is it, is it in, is it in any of your research here about that, about any false confessions?

THE WITNESS: I don't know if it addresses it in there or not. I know it was in the video material I sent.

MR. DINKEL: The video. What you just referred to on the ABC study or whatever.

THE WITNESS: Yeah.

THE COURT: And for that reason the objection is sustained.

MR. DINKEL: Okay.

Q (By Mr. Dinkel) And I guess that was a ABC television show, right?

A Correct.

Q Like a news documentary?

A Yes.

Q And did the, did the CVSA people also deal with

other -- not the CVSA people -- the Damphouse study people, did they deal with other criticisms as well in their study and address those criticisms?

A Yes.

Q Now, regarding Ms. Mitchell's questions about any studies by a manufacturer showing 100 percent effectiveness. Are you aware of any such studies?

A I'm aware of a number of them.

Q Okay. From manufacturers?

A From manufacturers and from people who develop techniques.

Q Okay. And have any of those subjects, studies been subjected to the rigors of peer review?

A Yes.

Q Okay. And which studies are you familiar with in that regard?

A Well, Dickhart (sp), but primarily in Bolligar (sp).

Q Okay.

A What the research shows that people who develop their own techniques and then validate it tend to dramatically inflate the accuracy of the test.

Q Okay.

MS. MITCHELL: And I'm going to object. Those aren't...

MR. DINKEL: Those are polygraph studies I think is what he's referring to.

MS. MITCHELL: Right, but weren't provided to us in advance, those opinions.

THE COURT: Sustained as to relevance.

Q (By Mr. Dinkel) How about CVSA studies? Are you familiar with anything like that that were discussed in your reports?

A No.

MR. DINKEL: Okay. Thank you. I have nothing further.

THE COURT: Any questions based upon that, Ms. Mitchell?

FURTHER REDIRECT EXAMINATION

BY MS. MITCHELL:

Q What was the conclusion of the Chapman study then?

A Of which one?

Q Of the Chapman study?

A I don't know. I've got so many studies I can't tell you by name.

Q And the incident that you're talking about on television, was that like 14 years ago on PrimeTime or one of those types of TV shows?

A The second edition. There are two versions of the same program.

Q Right.
A I don't know the dates.
Q But --
A They're elderly. Maybe that's not the right word.
Q It's PrimeTime TV, I think, in 2006. And you think there was one even earlier than that?
A I think so. Or later. Probably later.
MS. MITCHELL: Thank you. I don't have anything further.
THE COURT: You may step down, sir. Thank you.
THE WITNESS: Thank you very much.
THE COURT: You may be excused.
MR. DINKEL: Well, Your Honor, I'd ask that he remain until after Sarah Cox testifies so that he can be called with any rebuttal should he be needed.
THE COURT: That's fine.
Sarah Cox next, excuse me?
MS. MITCHELL: I could. I'm going to offer Tim Brown as well.
THE REPORTER: Mr. Dinkel, do you want to hand me that exhibit?
MS. MITCHELL: And, Judge, he's --
MR. DINKEL: Oh, Exhibit 1?
THE COURT: I have it.
THE REPORTER: Okay. You have it.

MR. DINKEL: I think I've got a document up here, too.

MS. MITCHELL: Judge, we'd ask that there be a sequestration order then, so. I don't think it's fair to him to come in --

MR. DINKEL: That's fine. That's fine.

MS. MITCHELL: -- and critique of her testimony.

MR. DINKEL: I agree. I agree.

THE COURT: Just step out in the hallway. Thank you.

(State's Exhibit No. 2 was previously marked for identification.)

(The witness is sworn by the reporter.)

SARAH COX,

Called as a witness on behalf of the Plaintiff, State of Kansas, having been duly sworn on oath to state the truth, the whole truth, and nothing but the truth, testifies as follows:

DIRECT EXAMINATION

BY MS. MITCHELL;

Q Could you state your name and employment?

A My name is Sarah Cox. I work at the Salina Police Department, here in Salina, Kansas.

Q When did you start with the Salina Police Department?

A October of 2001.

Q Do you have any educational background prior to joining the Salina Police Department?

A Yes. Attended the University of Kansas. Majored in Sociology. After that went to the Kansas Law Enforcement Training Center where I received certification as a law enforcement officer.

Q And you've worked with the Salina Police Department continuously ever since?

A That is correct.

Q When you first started with the police department did they use CVSA?

A No, they did not.

Q Did they use polygraphs?

A Yes, they did.

Q And since that time has the Salina Police Department as a general rule quit using polygraphs?

A Yes.

Q And you are now using the CVSAs?

A Correct.

Q About when did that change take place?

A Shortly after our current chief, Chief Brad Nelson, came to us. I'm going to estimate approximately five years ago.

Q And when he came, that type of administrative

decision was made to switch from polygraphs to CVSA; is that correct?

A Yes.

Q Were certain members of the police department selected to receive training in CVSA?

A Yes.

Q And were you one of those persons?

A Yes.

Q At the time were you working in Investigations or somewhere else?

A Yes, I was.

Q What type of training did you receive in CVSA?

A Initially, I attended the Certified Examiner's course for the CVSA. And since then I have gone to two recertification courses.

Q So your original training, what type of a training was it?

A Um, basic knowledge on the use of the instrument itself, and interpretation of charts.

Q How long was the training?

A It was a 40-hour training session.

Q Okay. Your recertifications, how often do you recertify in the CVSA?

A Every two years.

Q And have you recertified every -- at least every

two years since your initial training?

A Yes.

Q What's involved in the recertification programs?

A Again, attending a Certified Examiner's course. It's kind of an abbreviated session on like the initial training course. Again, scenario-based training and also testing on the evaluation of charts.

Q Do you know the number of CVSA trained staff at the Salina Police Department currently?

A Yes, there are four.

Q Okay. And who are the four?

A Myself, Sergeant Rachel Larson, Lieutenant Jim Feldman, and Detective Aaron Carswell.

Q Do the four of you ever review, peer review each other's work?

A No. Well when you say review, as far as like can you -- can you expand on that question; I'm sorry?

Q Do you ever ask Rachel Larson, for example, to look at this chart?

A Oh, yes.

Q For her opinion?

A Yes.

Q And do you sometimes do that prior to meeting with a suspect or a defendant?

A Yes.

Q In between the CVSA and the actual meeting?
A Yes.
Q Were you asked to participate in the investigation of allegations made by someone whose initials, a lady whose initials are L.A. against her stepfather, the defendant in this case?
A Yes.
Q Were you asked to then conduct a CVSA?
A Yes.
Q You probably don't know this, but we've already viewed your recorded interview, or CVSA, with the defendant. We went from the first part of Detective Jones' interview to your CVSA and then back to the concluding interview.
A Okay.
Q So, when you first stepped into the room where Mr. Garrett was, and Investigators Brown and Jones, did you have a lot of information about the case?
A Very little. I was given basically an overview kind of summary as to what those allegations were, the reason for the defendant having come to the police department for questioning.
Q Okay. In this case was Phillip Garrett willing then to submit to a CVSA?
A Yes.
Q Let's talk generally. What does your training

tell you, how do you conduct a CVSA, what are the steps, what's the protocol that you follow?

A That we initially make contact with the suspect in cases, or the person that is going to be questioned, and ask them basic questions with regard to what was being alleged. It's more of an informal interview, not interrogation style. The purpose of this type of interview is to put the person at ease prior to administering the exam.

Q Is it the goal of a CVSA to attempt to reach the truth of what has happened?

A Yes.

Q Do you see any value in causing someone to confess to a crime they didn't commit?

A No.

Q In this case, then you start off, your goal is to put him at ease, to remove the interrogation-type atmosphere; is that correct?

A Correct.

Q And after you do that what's your next step?

A I then explain how the CVSA works and we go over the questions that are to be asked. I ask the person who the examine is being administered to if they understand each question, if they have any issues with the way questions are worded, and then we do the exam.

Q Is the person submitting to a CVSA, is any type of

equipment attached to that person?

A Yes. When using the CVSA the only piece of equipment that is attached to them is a microphone that is attached to the laptop.

Q Was your CVSA conducted in a room different than the media room of the Salina Police Department where the interrogation had been previously?

A Yes.

Q Where is the CVSA room?

A It is located on the top floor of the Salina Police Department.

Q Is that room used solely for that purpose?

A Yes, it is.

Q If a person wanted to walk out of the top floor of the Salina Police Department and head down the stairs, can they, could they do so without assistance?

A Yes, they could.

Q They don't have to wait to be --

A No.

Q -- the door to be unlocked or anything like that?

A No.

Q Did you ask Phillip Garrett to sign a truth verification release form?

A Yes, I did.

Q And was he willing to do so in this case?

A Yes.

(State's Exhibit No. 4 is marked for identification.)

Q (By Ms. Mitchell) I'm going to hand you what's been marked as State's Exhibit No. 4 and ask if you can identify this.

A Yes. This is a copy of the truth verification release form signed by the defendant.

Q And that was done in your presence?

A Yes.

MS. MITCHELL: I move for admission of State's 4.

MR. DINKEL: No objection.

THE COURT: Four is admitted.

Q (By Ms. Mitchell) After signing that form is that when you then began to explain to him what the process would be?

A Yes.

Q You developed the questions, in this case nine questions. Is it always nine questions?

A In most cases yes.

Q You talk about, you list your questions as IR, C and R. What do those stand for?

A Those are the three types of questions that we ask on the CVSA. IR stands for irrelevant questions. R would be relevant questions, and C would be the control questions.

Q Okay. Is that part explained to a suspect or someone submitting to the CVSA?

A Yes. Yes.

Q Okay. In the video we saw that you administered the CVSA questions twice; is that standard?

A Yes, it is.

Q And why is that?

A In the Examiner's course they talk about a phenomenon called the first question; stress. And as I indicated to the defendant at the time the test was administered, that the reason we do two tests, the same test, is what we see a lot of times on the first test is what we call situational stress. It's normal, completely normal, for someone to be given the exam and to be nervous, so we do a second test. But prior to the second test, we explain that, about this phenomenon, and reiterate to the person being questioned the importance of telling the truth. That if they were telling the truth that that situational stress would dissipate, or possibly go away, but if they're lying, those lies, in chart formation, will be definitely noticeable.

Q Is this, is the CVSA an investigatory technique?

A Yes.

(State's Exhibit Nos. 5 and 6 are marked for identification.)

Q (By Ms. Mitchell) Let me -- I'm going to hand you State's Exhibits 5 and 6 and ask if you can...

Are you familiar with those exhibits?

A I am.

Q What are they?

A These are the exact questions that I asked the defendant at the time the exam was administered. There are two sheets, one for each run-through or exam administered using the CVSA, and on each sheet the questions are the same.

Q State's Exhibit No. 5, is that from the first test or the second?

A It is from the first one.

Q State's Exhibit No. 6?

A From the second.

(State's Exhibit Nos. 7 and 8 are marked for identification.)

Q (By Ms. Mitchell) Going to hand you what's been marked as State's Exhibits No. 7 and 8, and ask if you're familiar with those.

A I am.

Q And what are they?

A These are then the charts for both exams.

MS. MITCHELL: Judge, I move for admission of State's 5 and 6, which are the -- just the printout of

the questions and it shows the times that they began and ended.

THE COURT: Any objection to 5 and 6?

MR. DINKEL: No, but I'd go ahead and move for admission of 7 and 8 while we're at it.

MS. MITCHELL: And that's fine, Judge, I'd move for admission of 7 and 8.

Q (By Ms. Mitchell) But, before, can you tell us, State's Exhibit No. 7, that's the test results from the first or second, the chart from the first or second?

A No. 7 is from the first.

Q Uh-huh. Okay. And State's Exhibit No. 8, is that from the second?

A Correct.

MS. MITCHELL: Okay.

THE COURT: Five, six, seven and eight are admitted.

Q (By Ms. Mitchell) So you are trained to ask the relevant questions, the control questions, and the irrelevant questions; correct?

A That is correct.

Q And you followed the protocol and you asked the generally used number of nine questions in this case?

A Yes.

Q At, as the defendant was answering the questions

we saw you hit a button on the computer, what were you doing?

A Keying up the microphone to capture his answer.

Q Okay.

A And then also putting in his answer to that question, either a yes or a no.

Q Were you -- as -- at the conclusion of the testing are those charts generated by the software?

A Yes.

Q And that's not something that you have drawn in any way?

A No. No.

Q At the conclusion of the testing then are those charts displayed for you and then printed through the printer that's right there in the room?

A Yes.

Q Okay. What's the protocol say that you do with that chart? When you first get it off the printer what do you do?

A I immediately do what's called a cold call in which I would contact another examiner to examine the charts. Of course, obviously, I would review them myself.

Q Okay.

A As well.

Q Is the suspect removed from the CVSA room at that

time?

A Yes.

Q And what -- in this case was Mr. Garrett returned to the media room?

A Yes.

Q Do you recall who you met with in this case?

A In --

Q Did you have a cold call in this case?

A I believe it was Lieutenant Feldman.

Q Okay. And how does that go? Do you tell him what you see, does he tell you what he sees, or is it a combination thereof?

A I would say a combination thereof. Typically, when I review them, before giving the charts to the other person to conduct their review I don't say anything. I formulate my own opinion and allow them to do their own so I'm not coaching or anything like that. And then we discuss after the other person has had a chance to review if there is deception indicated.

Q Okay. So what is it that your training has taught you to look for in those charts?

A Well, these charts are actually, they display the frequency modulation of the defendant's voice. And these lines with a sharp rise and decay are indicative of the absence of stress. Those patterns though with significant

horizontal movement are indicative of stress and the stress then is basically an indication of deception.

Q Is there a figure that you're sort of taught to look for?

A Yes.

Q And what is that?

A We were taught that if it looks like a Christmas tree, like an A, if you will, then that would be along the lines of a truthful answer.

Q Okay.

A If it looks like a tree trunk where it's kind of spread and you have modulation in these lines that go horizontal in nature that there would be stress.

Q Okay. What opinion based on your training did you formulate when you took a look at State's Exhibit No. 7 and 8? First with State's Exhibit 7, and then we'll move on.

A Well, off the first chart, um, I did detect or determine that the defendant was able to answer truthfully on one question, but --

Q Which is that?

A That would be question No. 3.

Q Okay.

A But most other questions, um, there was an indication of stress.

Q What was question No. 3?

A That would be, "Is today Tuesday?"

Q Okay. What about with Test No. 2, the chart found in State's Exhibit No. 8? What observations did you make?

A Um, stress was present in most all of the questions, um, with the exception I'm going to say of No. 2, which is a control question, but I should explain, um, the reasons for irrelevant, control, relevant questions.

Q Okay.

A The reason we ask irrelevant questions after each either control question or relevant question is to capture, um, what is a delayed stress from the relevant question being asked. So in this case we asked two control questions, let's just say for example it's No. 2, that No. 3 chart then is an irrelevant question. Does that make sense?

Q Yeah. I understand that.

A Okay.

Q So in Chart No. 8, what findings or conclusions did you make based on your training?

A Based on my training, there was stress present, and stress is an indication of deception.

Q Did you discuss that with your cold caller, your cold call with Jim Feldman?

A Yes.

Q And did he cause you to change your opinion in any way?

A No.

Q Once your consult with a peer is concluded, what does protocol tell you to do then?

A Usually, the examiner and a detective will then make contact with the subject who was tested and explain the charts in lay fashion and ask their opinion on how well they did.

Q And is that part of the actual protocol?

A Yes.

Q And are you trained then to ask the defendant or the suspect if they see a Christmas tree, or if they see something different than a Christmas tree?

A I don't know if we were actually trained to have the defendant say that but I typically do.

Q And is that what was done in this case?

A Yes.

Q Now, how many times have you administered a CVSA non-employment related?

A Only 12.

Q Have you administered -- how many times then employment related?

A Fifty-seven total.

Q In this case you -- it appeared that you began to talk about the CVSA, is that correct, and the results, or your charts with Mr. Garrett?

A Um, I believe so.

Q It appeared very quickly though, the investigators, Brown and Jones then took back over and kind of ran with the interview from there?

A Okay.

Q Is that true with you?

A Yes, I would say, yes.

Q In the other cases, did you spend more time with the defendant talking during the post CVSA interview about your findings and that sort of thing?

A Generally, yes.

Q And I think otherwise the video pretty much speaks for itself. I just wanted to ask you...

MS. MITCHELL: I don't believe I have any other questions.

THE COURT: Cross.

CROSS-EXAMINATION

BY MR. DINKEL:

Q Now you indicated to Mr. Garrett that the purpose of this examination was not to catch him in a lie but to verify the truth; is that right?

A Yes.

Q Okay. And you indicate that most of these questions indicate stress and deception, even ones that involve truthful responses; is that right?

A Yes.

Q Okay. Because you indicated like on, I think Test No. 2, the second test, there was stress present in all questions except for two.

A Yes.

Q So how did you determine that he was lying about Question No. 9?

A Um...

MS. MITCHELL: Your Honor, and I think, I think what she says is that she's not there to catch or determine lies, she's observing, and maybe I'll let her rephrase it, but stress which could show deception, but I don't think she --

MR. DINKEL: She said stress indicated deception.

THE COURT: Let me rule on her objection, Mr. Dinkel. Objection overruled. You may proceed.

Q (By Mr. Dinkel) How do you determine that he's lying in Chart No. 9?

A Uh, that's a good question. Um, back to the types of questions that we ask, the irrelevant questions, the control, and the relevant. The irrelevant questions are only asked after the control questions, which I have the defendant lie to me on, or irrelevant question which is related to the topic at hand, the investigation.

Q Okay.

A And to answer your question, I mean, all irrelevant questions that we ask are known answers.

Q Sure.

A Such as, "Is your name Sarah?"

Q Okay. How would you determine he's lying on Question No. 8?

A That is a control question.

Q Which --

A In which I tell --

Q Tell them --

A -- tell them to lie.

Q Okay.

A And I would say, too, that because there are only two control questions asked, um, that if there is stress anywhere other than the control question or the irrelevant question asked after, um, that would indicate stress which is considered deception.

Q You say any question other than 2 and...

A The irrelevant questions asked after the two control questions that would capture, I'm sorry, capture that delayed stress. If there is any other stress located on the charts other than Charts 2/3 and 8/9, then that would be an indication of deception.

Q Okay.

A Because I've only asked the person to lie to me on

those two questions. Everything else should be truthful.

Q Okay. And yet you're showing stress indicating deception on all other questions other than two?

A I would say that there is stress throughout that chart, yes.

Q Now, on the first one you indicated that 3 showed a truthful response and all others showed stress or possible deception; is that right?

A Yes.

Q Including the control questions?

A Yes.

Q Including control questions in which he was instructed to lie to you?

A Yes.

Q As well as tell you the truth?

A No, he was instructed to lie to me. So I would, I would expect to see stress on the lie questions, because he's not telling me the truth.

Q Okay. You don't have a control question that examines truth?

A I guess, I don't understand what you're asking.

Q The truth verification exam, you don't have a control question that looks for truth?

A Well it's a known lie, or I should say it's a known truth if I'm asking the person to lie about it. Such

as, um, am I wearing glasses; okay?

Q Sure.

A I'm not wearing glasses. That's a known truth. But if I ask him to lie to me on that it's a lie.

Q But both of your control questions ask him to lie; is that right?

A Correct.

Q You don't have a control question that asks for a truthful response?

A No.

Q So you don't know what a truthful response looks like then?

A I would say based upon the physiological changes that are measured using this instrument, that, yes.

Q You don't have anything to compare it to. What are you going to compare it to as a control?

A Or a truthful -- I'm sorry -- a known irrelevant question. Which is why we start out with an irrelevant question --

Q But irrelevant questions are irrelevant though.

A But it does go to assist with measuring the stress in one's body.

Q Not if they're all answered stressfully. How does that indicate truth?

A Well, like I said before, it's normal to be

nervous before the exam.

Q Sure. But you're not, you're not, you're not judging a, a, you're not evaluating for a truthful response with a control.

MS. MITCHELL: Your Honor, I'm going to ask that this not be engaged in an argument back and forth, that there be a question.

MR. DINKEL: This is a leading question, I can lead her.

THE COURT: It's getting argumentative. Sustained.

Q (By Mr. Dinkel) Where on this are you asking for a truthful question as a control?

A Like I said, the control questions are not asking for the truth, they are asking for a lie, but we do start out the exam with an irrelevant question, which is asking for the defendant to provide a truthful answer.

Q And --

A And that's a known answer.

Q But your whole description is for, in proceeding with this test, is you're not looking to catch him in a lie you're looking to find the truth. That's your whole preface for this test. Isn't that right? Isn't that what you told him?

A It's to verify truth, yes.

Q And there's not a question on here that looks for a truthful measure?

A All I can tell you is that all of the truth verifications systems, CVSA, included in that measure the changes in physiology.

Q So do you have any training in scientific method?

A No.

Q What is your training before becoming a police officer?

A Before coming -- or becoming a police officer?

Q Yeah.

A I went to college. Like I said, majored in Sociology. I was an intern in Washington D.C. for a law firm there before coming to the Salina Police Department.

Q Did you bring any of the manuals that were subpoenaed as far as instruction manual for CVSA?

A Yes.

Q Does your book here give examples of what are truthful patterns?

A I'm sure it does.

Q Okay. Do you know where those are at in this book?

A Without looking at it. It would be somewhere in Chapter 4, where they talk about charts, the patterns, and interpretation.

Q Does it get -- does it show...

A So it talks about interpreting a chart that has the horizontal lines, to mean that that is stress that is indicated, which is interpreted as deception.

Q You mean the vertical lines?

A Yes, the vertical lines that spread as they go from left to right.

Q Okay.

A Okay. And, and again, like I said, we were just taught in class that if it looks like a Christmas tree, um, or an A shape, that that would be a truthful answer.

Q They don't give you any examples though in the training material there.

A Most of the examples here are indicative of stress and it would be up to us to determine that. There are some here. Because it looks like A. But I don't believe it says anywhere in here that a truthful answer should look like --

Q You're referring to Page, or Item No. 11 there. Or 1 plus?

A It's supposed to look like an A. I was just trying to find an A for you.

Q Well in that one they're saying 73 percent stress; aren't they?

A Yes, but in this one here, as you can see that there is stress indicated there moving from left to right.

If it were a clear pattern, such as No. 3 on Chart No. 1, there's very little, if any.

Q Now, this book says, that in reference to the patterns displayed below, what you're referring to, Pattern 1 plus 73 percent, it says remember the greatest stress is displayed in the following pattern types.

A And like I said, I misspoke, I was just looking for an A for you, or someplace in the book that would indicate that, a truthful response.

Q Okay. Do you assign percentages like this to your scoring?

A No.

Q And why is that?

A Um, as far as like jotting, it's an approximation, it's an interpretation of the chart based on the teaching that we were given.

Q Well the teaching is that below are CVSA patterns and the percentage of stress that should be assigned to them and they put a stress number below.

A I understand that, but that's also an approximation.

Q They don't tell you how to calculate that?

A Well, in the book it does. It does tell you that.

Q Okay. Doesn't -- shouldn't the computer do that, or is that for the examiner?

A In the -- it's for the examiner to do.
Q Okay. And that wasn't done in this case?
A No.
Q Have you had occasion to be subjected to quality assurance testing in your administration of CVSA?
A No.
Q The schooling that you attend, is there any testing that's done there?
A I'm sorry; say that again?
Q The schooling, the training that you have attended, is there any testing done there?
A Yes, there are a test and practicals.
Q A test in administering the CVSA?
A Uh-huh.
Q Okay. And how often do you go to that schooling?
A Every two years.
Q And that's done at each, on each occasion?
A Yes.
Q Did you tell Mr. Garrett and -- well, strike that.

MR. DINKEL: I have nothing further.

THE COURT: Ms. Mitchell anything?

MS. MITCHELL: No.

THE COURT: I have a few questions, very rudimentary.

EXAMINATION

BY THE COURT:

Q Was he wearing shoes that day?

A Yes.

Q Was your office in which you were conducting the examination in Salina, Kansas?

A Yes.

Q Was it done in the month of November?

A Yes.

Q Was that a Tuesday?

A Yes.

THE COURT: Anything based upon that?

MS. MITCHELL: No.

MR. DINKEL: Nothing.

THE COURT: You may step down.

THE WITNESS: Thank you.

THE COURT: Do you intend to ask Detective Brown questions, Mr. Dinkel, before we call him in, do you intend to ask him questions? The State is not going to ask him questions, just presenting him.

MR. DINKEL: Oh, yes, I think I'll ask him some questions.

THE COURT: It's 4:40, and it's been a long day, how long do you expect this to take?

MR. DINKEL: Well I still got Jones out there, too.

MS. MITCHELL: And then he has Angela Fuller --

MR. DINKEL: But she brought that manual there, she's got that.

THE COURT: Who do you intend to present? I'm not going past 5:00.

MR. DINKEL: Okay. Mr. Garrett advised me that he, said that he's not feeling that great, he's had a friend who lost a father; is that right?

THE DEFENDANT: Yeah.

MR. DINKEL: Yeah, and, and so, Mr. Garrett said he didn't feel comfortable in testifying today. I don't know if he wants to testify at this proceeding, but he doesn't care to testify today.

THE COURT: Can't imagine we get to that point in the next 20 minutes.

MR. DINKEL: Okay. So if Sarah Cox is done, then I would excuse Gary Davis, if those two could be excused.

THE COURT: So that would leave Brown. Who else?

MS. MITCHELL: Call Jones.

MR. DINKEL: Brown and possibly Jones, depending upon what Brown's testimony is.

THE COURT: Okay. Let's proceed.

MS. MITCHELL: Just so the record is clear, I am offering Tim Brown as part of the State's case for

cross-examination as he was part of the interview that we played involving Investigator Jones, but I have no questions for him, and I would submit him for cross-examination at this time.

MR. DINKEL: Well, I guess, if the State rests I've subpoenaed him on my own and he would --

MS. MITCHELL: It didn't matter, I just wanted to --

THE COURT: You were making him available because of his out-of-court statements made.

MS. MITCHELL: Right.

MR. DINKEL: I'd just prefer to proceed that the State rest and I call him, and subject to cross -- you know, I'd cross, I'd take him as a hostile witness, I guess, for cross-examination.

THE COURT: I think we'll just proceed as a State's witness and then you can conduct cross.

MR. DINKEL: Okay.

(The witness is sworn by the reporter.)

TIM BROWN,

Called as a witness on behalf of the Plaintiff, State of Kansas, having been duly sworn on oath to state the truth, the whole truth, and nothing but the truth, testifies as follows:

CROSS-EXAMINATION

BY MR. DINKEL:

Q Please state your name.

A Tim Brown.

Q How are you employed?

A Police Officer, City of Salina.

Q And how long have you been employed in that capacity?

A Almost 15 years.

Q Okay, and were you employed in that capacity on November 20th, of 2018?

A I was.

Q And on that occasion did you have opportunity to meet and interview Phillip Garrett concerning a possible sexual offense?

A I did.

Q Okay, and did that interview occur in the media room of the Salina Police Department?

A It did.

Q What did you know about the case before the interview started?

A I knew that there was an allegation that he had done something, basically sexually assaulted his stepdaughter.

Q Did you learn that from Detective Jones?

A I did.

Q Okay. And how much did -- how long did you and Detective Jones talk before you began interviewing Mr. Garrett?

A I don't recall.

Q Okay. That immediately before Garrett came in?

A I don't recall that either, sir.

Q Okay. But you were aware that he was coming in at a certain time, and that to be available for interview?

A Yes, sir.

Q Okay. And how was it that you got assigned to the case?

A Um, I don't know that I was assigned the case, I think I offered to assist Detective Jones with the interview.

Q Okay. How much training have you had in interrogation?

A Um, I had after a 24-hour class in, I believe, November of 2014.

Q Okay.

A It was the Reid Technique, which I don't use.

Q Okay. Was that in Omaha?

A It was not, it was in Salina.

Q Okay. You're familiar with one of the teachings of the Reid Technique is is to cut off denial, is that right?

A I honestly, sir, I didn't look at that manual after the class, and I don't, I don't use the Reid Technique when interviewing.

Q Did you bring the manual with you?

A I apologize to you, Ms. Mitchell, and the Court, I have no idea where my manual is.

Q Okay, have you seen, have you seen the manual?

A I have, yes, I was in, yeah, I was in a 24-hour class.

Q Are you familiar with the contents of it concerning denials?

A I'm no longer familiar with the content of the manual.

Q Have you been trained in other classes about cutting off denial or by anyone in the course of conducting interrogations?

A Not that I recall.

Q Okay. The -- did you discuss your testimony here with Greg Jones before you came onto the witness stand?

A I told Mr. Jones this morning that I had no idea where my manual was.

Q Did he share with you that he was examined about Reid Technique during this hearing?

A No, sir.

Q He didn't?

A No, sir. This was -- this was earlier this morning prior to this hearing.
Q Not during this hearing?
A No, sir.
Q Or about your training or anything?
A No, sir.
Q Okay. But throughout this interview pretty much Mr. Garrett denied the offense, isn't that right?
A No, sir, that's not right.
Q Okay. Throughout the morning, before the CVSA was administered, he denied the offense?
A He did.
Q After the CVSA was administered he denied the offense?
A Up to a point he did.
Q Okay. And then at that point where he no longer denied was when you told him that basically the police knew what happened, right?
A Yes, I think I, if I recall correctly, I informed him that he knew what happened, I knew what happened, and the victim knew what happened.
Q Okay. And how did you know what happened?
A Um, I, I had information from Jones, I knew that we had a credible victim, and I did not believe that the defendant was telling me the truth when he denied that he

did those offenses.

Q And you never, you never talked with the victim, did you?

A No, sir.

Q You ever reviewed -- did you look at her CAC interview?

A No, sir.

Q Okay. And after you said that then he had a change in his statement, is that right?

A I don't know the exact point that he had a change in his statement, but, yes, at some point shortly thereafter he did have, he confessed.

Q It was offered to him during the interview to take a CVSA exam, is that right?

A Yes, sir.

Q Okay. He agreed to do that?

A He did.

Q Did you discuss the results of that exam with Sarah Cox?

A Um, I don't recall discussing the results with her. I think I stayed in the, in the media room for a period of time and then exited, she went upstairs and conducted the exam, came back down, we went back into the media room. I don't recall if I spoke to her directly after the exam or not.

Q Did you recall discussing the results of the exam with Greg Jones?

A No, sir.

Q Did you know what the results of the exam were?

A Well I was present when Sergeant Cox spoke to the defendant about the results of the exam.

Q Did you suggest to Mr. Garrett that you could go to the County Attorney?

A Uh, I did tell Mr. Garrett that I would prefer to express to the County Attorney, or the prosecutor, that he was cooperative, he was forthcoming and assisted us with the investigation.

Q Did you ever tell her that?

A I don't believe I did. It was in the --

Q Okay, you told Mr. Garrett he was forthcoming, correct?

A After he confessed, yes.

Q Okay. Was there any indication to Mr. Garrett, or do you remember when the first indication was referenced to him as to what he was being investigated for?

A It would have been before the CVSA, I believe Mr. -- Detective Jones informed him that there was an allegation that he had done something inappropriate to his stepdaughter.

Q But the specifics of that were not discussed with

him, is that right?

A I don't recall exactly what the language was.

Q Did you tell Mr. Garrett that you don't think he's out there preying on children and this was just an isolated incident?

A I did.

Q Why did you tell him it was an isolated incident?

A Well at that point we had one victim, we didn't have multiple victims so.

Q You didn't know that that victim said there were multiple contacts with him?

A I did.

Q Okay. That wouldn't be an isolated incident with multiple contacts, would it?

A I suppose it would be, yeah, I guess I could have misspoke during the interview.

Q Were you trying to minimize for him why he was there to get him to talk some more?

A Uh, I think that's fair.

Q Okay. That's, you didn't learn that in the Reid Technique?

A I don't recall learning that in the Reid Technique.

Q But despite telling him that this was an isolated incident later on you say to him in this interview, you know

this was not the only time, isn't that right, to try and overcome his denials?

A Not to overcome his denials but, again, I think when I said "incident" I misspoke.

Q Well, the thing he's told you before, you told him that you'd know this wasn't the only time, was that he had said this was the only time, right? That would have been a denial that he did anything more than one time, wouldn't it?

A Yeah, but he had been dishonest earlier in the interview so I didn't --

Q How was he dishonest earlier in the interview?

A Well he denied any wrongdoing, initially.

Q And how do you know that to be dishonest?

A He later confessed. And what he confessed to was consistent with what the victim reported happened.

Q Well he was told that there was digital penetration, is that right?

A I think that's accurate.

Q He never told you during this interview that he digitally penetrated her anywhere, did he?

A He said that he rubbed her vagina and if there was penetration that it would have been accidental.

Q And he never said that he -- there was any such penetration, did he?

A He said that if it occurred it was accidental.

Q And then one of the claims was anal penetration? He absolutely denied that, didn't he?

A Uh, I think at one point he may have said he may have touched it while rubbing her vagina, but, again, I think it was, he indicated would not have been intentional.

Q What are you familiar with what the victim said to Detective Jones?

A I don't know details, I didn't review the CAC, I know that there was a statement to the effect of over a period of time that there was digital penetration.

Q If you don't know the details how can you say he was being dishonest about it.

A I know that. I know there was that allegation.

Q So if somebody denies an allegation they're being dishonest?

A Not always.

MR. DINKEL: Okay, I don't believe I have anything further. Thank you.

THE COURT: Any questions, Ms. Mitchell?

MS. MITCHELL: No.

THE COURT: You may step down.

THE WITNESS: Thank you, Judge.

THE COURT: You're excused.

Counsel, let's recess for the evening. And I have Wednesday, at 9:00 o'clock available, this coming week.

Are you available?

MR. DINKEL: I'm available.

MS. MITCHELL: I will be available if you are.

THE COURT: Okay. What do we have that day?

MS. MITCHELL: We have that jury trial on Tuesday.

THE COURT: If Herrara goes over.

(The Court and bailiff confer, after which the following proceedings are had.)

MS. MITCHELL: Oh, I have a jury trial in 304 on the 8th. I don't even know what it is.

THE BAILIFF: We don't have any jury trials on Thursday.

MS. MITCHELL: I'm good Friday morning, and Thursday morning.

THE COURT: Thursday morning at 9:00 o'clock, that's the 9th?

THE BAILIFF: We have a immunity hearing on self-defense, immunity hearing.

(The Court and bailiff confer, after which the following proceedings are had.)

THE COURT: January 9th, at 9:00 o'clock.

MR. DINKEL: Okay. That will be fine.

THE COURT: Counsel, apparently I misspoke about Detective Brown, but I know that there's a case that you and I did, it was either last year or the year

before, where the Reid Technique was at issue.

MR. DINKEL: Maybe -- was it St. Clair? It was St. Clair.

THE COURT: Maybe it was St. Clair.

MR. DINKEL: Yeah.

THE COURT: Right.

MR. DINKEL: Because that was, that was Malick.

THE COURT: It was Malick. You're right, from the KBI.

MR. DINKEL: He testified to it.

THE COURT: I apologize, that's who I was confusing him with. And that was the interview not of St. Clair, was it?

MR. DINKEL: It was of St. Clair.

THE COURT: It was of St. Clair? Okay.

MR. DINKEL: There was a change in St. Clair's statement --

THE COURT: That's right.

MR. DINKEL: -- about whether he rode his bicycle up to the --

THE COURT: That's right.

MR. DINKEL: And it was shown in the evidence he rode his bicycle up there, but -- but he --

THE COURT: Now I recall.

MR. DINKEL: -- he changed to riding in the car

based upon what Malick was saying.

THE COURT: It was Investigator Malick.

MR. DINKEL: Was that same sequence, yeah.

THE COURT: Thank you, counsel. We're in recess.

MS. MITCHELL: Your memory is certainly better than mine.

END OF PROCEEDINGS

C E R T I F I C A T E

STATE OF KANSAS)
) SS.
COUNTY OF SALINE)

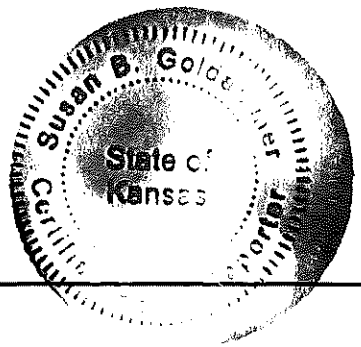
I, Susan B. Goldammer, a Certified Court Reporter for the State of Kansas and the regularly appointed, qualified and acting official reporter for the 28th Judicial District of the State of Kansas, do hereby certify that, as such official reporter, I was present at and reported the above and foregoing proceedings in Case No. 2018-CR-956, State of Kansas, Plaintiff, vs. Phillip Garrett, Defendant, heard on January 3, 2020, before the Honorable Jared Johnson, Judge of said Court.

I further certify that at the request of Mr. Jeff Ebel, Saline County Attorney, a transcript of my shorthand notes was typed and that the foregoing transcript consisting of 124 pages is a true and correct transcript of my notes, all to the best of my knowledge and ability.

SIGNED, OFFICIALLY SEALED, AND DELIVERED, this 5th day of October, 2021.

/S/ Susan B. Goldammer

Susan B. Goldammer, RPR, CSR
Certified Court Reporter
Reporter No. 0772



Appendix F

SALINA POLICE DEPARTMENT

TRUTH VERIFICATION RELEASE FORM

I Phillip Garrett do hereby voluntarily, without any threat, coercion, promise, reward or immunity, submit to a Computer Voice Stress Analysis examination. I further understand that I am free to leave at any time for any reason. I hereby release, absolve, and forever hold harmless the manufacturer/distributor and all related entities, the Salina Police Department, Sarah Cox, its agents and anyone acting in its behalf, from any claims, demands, or other damages from any matter or act, arising out for the aforesaid examination. I understand that this examination may be video and/or audio taped and all materials, recordings, and all other documents may be released for the purpose of testimony and/or training.

To the best of my knowledge, I have no physical or mental condition that would prevent me from taking this examination.

Signature for the person being examined

Signature of Examiner

11-20-18

Date

11/20/18

Date

Miranda Rights

1. Do you understand you have the right to remain silent? Y
2. Do you understand that anything you say can and will be used against you in a court of law? Y
3. Do you understand that you have the right to talk to a lawyer and have him present while you are being questioned? Y
4. Do you understand that if you can not afford to hire a lawyer one will be appointed to represent you without charge? Y

Signature

11-20-18 2:28 p.m.

Date and Time

18CR956
Phillip
Nowak
Garrett