COURT OF APPEALS
DECISION
DATED AND FILED

March 10, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3406-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LUCIAN AGNELLO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

CURLEY, J. Lucian Agnello appeals from a judgment of conviction entered after he pleaded guilty to first-degree intentional homicide, party to a crime, contrary to §§ 939.05 and 940.01(1), STATS. Before pleading guilty, Agnello made a motion to suppress his confession and was granted a hearing. Agnello claims that the trial court committed constitutional error by

allowing the prosecutor to cross-examine him at the suppression hearing regarding the truthfulness of his confession, and erred by finding his confession to be voluntary. Agnello also claims that the trial judge erred by declining to recuse herself at his sentencing hearing. We conclude that although the prosecutor's cross-examination of Agnello regarding the truthfulness of his confession is problematic, Agnello failed to raise a sufficiently specific objection to the cross-examination. Therefore, because Agnello failed to reasonably advise the trial court of the basis for his objection, we decline to address this issue on appeal. We also conclude that the trial court properly found Agnello's confession to be voluntary and, hence, admissible. Finally, we conclude that the trial judge properly declined to recuse herself. Therefore, we affirm the judgment.

I. BACKGROUND.

On the night of February 19, 1996, Agnello was arrested in connection with the murder of his foster father, Theodore Agnello. Agnello was taken to a police station and placed in an interrogation room sometime between midnight and 1:00 a.m. The next day, beginning at approximately 6:00 a.m., Agnello was questioned by police detectives, with breaks taken at various periods during the day. At approximately 3:20 p.m., Agnello signed a confession.

Agnello was charged with first-degree intentional homicide, party to a crime. He filed a motion to suppress his confession based on allegations of involuntariness and the denial of his request for counsel during police questioning. On April 19, 1996, the trial court held a suppression hearing at which Agnello testified. On cross-examination, the prosecutor repeatedly questioned Agnello concerning the truthfulness of his confession. Over Agnello's defense counsel's general relevancy objection, the trial court allowed the questioning and required

Agnello to answer. The trial court then found that Agnello's testimony concerning the events surrounding the confession was incredible, and found that his confession was voluntary.

On May 14, 1996, Agnello pleaded guilty to first-degree intentional homicide, party to a crime. At the sentencing hearing, Agnello requested that the trial judge recuse herself. Agnello based his motion on the fact that the trial judge had learned that Agnello's codefendant, Douglas Stream, was employed by a window company that had worked on her home, and that she had called the window company and requested that her file be secured to prevent access to her home address. The trial judge found that her actions did not prevent her from acting impartially, and she declined to recuse herself. The trial court then sentenced Agnello to life in prison with a parole eligibility date in fifty-five years. Agnello now appeals.

II. ANALYSIS.

A. Cross-Examination Regarding Truthfulness of the Confession

Agnello claims that the trial court committed constitutional error, under ***Rogers v. Richmond***, 365 U.S. 534 (1961), and ***Jackson v. Denno***, 378 U.S. 368 (1964), when it allowed the prosecutor to cross-examine him regarding the truthfulness of his confession during the ***Miranda-Goodchild*** hearing,[1] and relied on his testimony in determining the confession's admissibility. We conclude that Agnello has waived his right to make this argument on appeal.

[1] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis.2d 244, 133 N.W.2d 753 (1965).

At the ***Miranda-Goodchild*** hearing, Agnello testified that the police had not read him his ***Miranda*** rights, that the police had refused his request for a lawyer, and that his confession was coerced by the tactics the police used during the interrogation. On cross-examination, the prosecutor asked Agnello numerous questions concerning the truthfulness of his confession which the trial court required Agnello to answer. Early in the cross-examination, in response to the prosecutor's question, "But you and Mr. Stream planned this killing; is that correct?" Agnello's counsel objected by stating, "I object, Your Honor. I don't think that is relative [sic] to the purposes of this hearing." It is unclear whether the word "relative" is an error attributable to the court reporter or to Agnello's counsel. In any event, the trial court apparently interpreted the objection as pertaining to relevancy, and overruled it, stating, "This goes to his credibility. Answer the question."[2]

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[2] The complete text of the prosecutor's cross-examination of Agnello, to the point when Agnello's counsel objected, is as follows:

> PROSECUTOR:
>
> Q. Sir, you signed the statement at the end and you wrote down the words, "this is true"; is that correct?
>
> A. I wrote down the words?
>
> Q. Answer my question. Did you write it down?
>
> A. Yes, I was told to.
>
> Q. And you wrote down, "this is true," and you signed it; is that right?
>
> A. Yes, I was told to.
>
> Q. And you did that because what is in the statement is true; is that correct?
>
> A. No. Because I was extremely tired and scared.
>
> Q. The fact that you told them that the shotgun was in the attic of Mr. Stream's house, you told them that; is that correct?
>
> A. Doesn't say that in the report.

(continued)

The general relevancy objection which Agnello made at trial is very different than the argument Agnello now makes on appeal. During the hearing, Agnello merely stated that the evidence was irrelevant, and he now cites to authority for that proposition, specifically arguing that, according to ***Rogers v. Richmond***, 365 U.S. 534 (1961), and ***Jackson v. Denno***, 378 U.S. 368 (1964), the prosecution's cross-examination was irrelevant and constitutionally impermissible. Agnello bases his claim on the United States Supreme Court's holdings in ***Rogers*** and ***Jackson*** that a trial court's determination of whether a confession was voluntarily given should not be affected by considerations regarding the truthfulness of the confession. *See* ***Rogers***, 365 U.S. at 543-44 ("[T]he question

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> Q. You're going to have to answer my questions. Did you tell them that?
>
> A. In the report it says I did.
>
> Q. I would ask that you instruct that he answer the question.
>
> THE COURT: You have to listen to the question very carefully and answer the question that's asked.
>
> PROSECUTOR:
>
> Q. You told them that the shotgun was in Mr. Stream's attic; is that correct?
>
> A. Yes.
>
> Q. And you told them that you and Mr. Stream had planned on this killing; is that correct?
>
> A. I don't quite remember that.
>
> Q. You could have told them that? You don't remember telling them that?
>
> A. I don't remember that.
>
> Q. But you and Mr. Stream had planned this killing; is that correct?
>
> DEFENSE COUNSEL: I object, Your Honor. I don't think that is relative to the purposes of this hearing.
>
> THE COURT: This goes to his credibility. Answer the question.

whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined … [is] to be answered with complete disregard of whether or not petitioner in fact spoke the truth."), *see also* ***Jackson***, 378 U.S. at 376-77 ("It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession …. Equally clear is the defendant's constitutional right at some stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession."). Although we find Agnello's claim raises some concern, it is clear that he failed to present the trial court with any information concerning either ***Rogers*** or ***Jackson***, and, at the suppression hearing, he failed to develop the argument he now makes on appeal beyond a general claim that the evidence was irrelevant.

The specific ground for objection must be stated at trial in order for the objection to be preserved on appeal. *See* § 901.03(1)(a), STATS; *see also* ***Vollmer v. Luety***, 156 Wis.2d 1, 10, 456 N.W.2d 797, 801 (1990) ("[I]n the absence of a specific objection which brings into focus the nature of the alleged error, a party has not preserved its objections for review."). An objection is sufficient to preserve an issue for appeal if it apprises the court of the specific grounds upon which it is based. *See* ***Holmes v. State***, 76 Wis.2d 259, 271, 251 N.W.2d 56, 62 (1977). "To be sufficiently specific, an objection must reasonably advise the court of the basis for the objection." ***State v. Peters***, 166 Wis.2d 168, 174, 479 N.W.2d 198, 200 (Ct. App. 1991). The rule requiring a specific, contemporaneous objection advances a number of important objectives, including:

(1) enabling the record to be made when witnesses recollections are freshest; (2) enabling the judge, who has observed the witnesses' demeanors, to make factual determinations; (3) giving the trial court the opportunity to exclude evidence, which might lead to the defendant's acquittal; and (4) encouraging the parties to view the trial as an event of significance that should be kept as error-free as possible. *See* ***State v. Davis***, 199 Wis.2d 513, 517-19, 545 N.W.2d 244, 245-46 (Ct. App. 1996).

Agnello's objection did not "apprise the court of the specific grounds upon which it [wa]s based," nor did it "reasonably advise the court of [its] basis." *See* ***Holmes***, 76 Wis.2d at 271, 251 N.W.2d at 62; ***Peters***, 166 Wis.2d at 174, 479 N.W.2d at 200. Without reference to the statements made by the Supreme Court in ***Rogers*** and ***Jackson***, and without any other explanation or argument by the defendant's counsel, evidence concerning the truthfulness of a defendant's confession might reasonably seem relevant to a trial court attempting to appraise the credibility of a testifying witness. Thus, Agnello now presents an argument he did not ask the trial court to address. If we were to address Agnello's argument, we would undermine the objectives of the rule requiring a specific and contemporaneous objection. Thus, in order to preserve the objectives of the rule requiring a contemporaneous and specific objection to every perceived trial court error, we must decline to address this argument. *See* ***Davis***, 199 Wis.2d at 517-19,

545 N.W.2d at 245-46. Therefore, we conclude that Agnello has waived his right to make this argument on appeal, and we decline to address it.[3]

B. Voluntariness of Agnello's Confession

Agnello also claims on appeal that the trial court erred by finding his confession to be voluntary. We disagree.

We first note that the parties disagree regarding the State's burden of persuasion. The State claims that, according to ***State v. Albrecht***, 184 Wis.2d 287, 516 N.W.2d 776 (Ct. App. 1994), it need only prove that the confession was given voluntarily by a preponderance of the evidence. *See* ***id.*** at 301, 516 N.W.2d at 781. Agnello, however, claims that the Wisconsin Supreme Court has specifically declined to lower the burden of proving voluntariness at a ***Goodchild*** hearing, from "beyond a reasonable doubt" to a "preponderance of the evidence," *see* ***State v. Wallace***, 59 Wis.2d 66, 79-80, 207 N.W.2d 855, 862 (1973), and that recent Wisconsin Supreme Court cases have held that the State bears the burden of proving voluntariness of a confession beyond a reasonable doubt. *See* ***State v. Mitchell***, 167 Wis.2d 672, 696, 482 N.W.2d 364, 374 (1992).

It is now settled that the State's burden to prove that a defendant confessed voluntarily is by a preponderance of the evidence—not beyond a reasonable doubt. First, that is the standard applicable under RULE 901.04, STATS.,

[3] Although we hold that Agnello has waived his constitutional argument, we note that a prosecutor's inquiry into the truthfulness of a defendant's confession may run afoul of the rule enunciated in ***Rogers v. Richmond***, 365 U.S. 534 (1961), and ***Jackson v. Denno***, 378 U.S. 368 (1964). The United States Supreme Court appears to have laid down a broad rule prohibiting any reliance by the trial court on testimony or evidence concerning the truth or falsity of the defendant's confession when determining the confession's voluntariness. *See generally* ***Rogers***, 365 U.S. at 534; ***Jackson***, 378 U.S. at 368.

which specifically encompasses the "[a]dmissibility of confessions," *see* RULE 901.04(3)(a), STATS. ***State v. Rewolinski***, 159 Wis.2d 1, 16 & n.7, 464 N.W.2d 401, 407 & n.7 (1990) (State's burden at suppression hearings is proof by a "preponderance of the evidence"); ***State v. Jones***, 192 Wis.2d 78, 114a, 532 N.W.2d 79, 94 (1995) (*per curiam* on motion for reconsideration) (whether law-enforcement officers complied with ***Miranda v. Arizona***, 384 U.S. 436 (1966)) (correcting earlier misstatement to the contrary); ***State v. Albrecht***, 184 Wis.2d 287, 301, 516 N.W.2d 776, 781 (Ct. App. 1994) (voluntariness); ***State v. Lee***, 175 Wis.2d 348, 362-64, 499 N.W.2d 250, 256-57 (Ct. App. 1993) (whether waiver of ***Miranda*** rights was knowing and intelligent). Significantly, ***State v. Santiago***, 206 Wis.2d 3, 28–29, 556 N.W.2d 687, 696-97 (1996), reaffirmed the vitality of ***Jones*** and ***Lee***. *See also* ***Colorado v. Connelly***, 479 U.S. 157, 168 (1986) (whether law-enforcement officers complied with ***Miranda***). Second, the United States Supreme Court reminds us that the "evidentiary standard" under Fed. R. Evid. 104, the federal analogue to RULE 901.04, is "unrelated to the burden of proof on the substantive issues, be it a criminal case or a civil case." ***Bourjaily v. United States***, 483 U.S. 171, 175 (1987) (internal citations omitted).

Agnello's reliance on a passing comment in ***Mitchell***, 167 Wis.2d at 696, 482 N.W.2d at 374, that the State must prove "beyond a reasonable doubt" *both* compliance with ***Miranda*** and that a defendant's confession was voluntary is without merit. As already noted, the supreme court in ***Jones*** corrected a similar error it had made in connection with the ***Miranda*** element of a confession's admissibility. ***Jones*** did not cite ***Mitchell***, either in the original majority opinion or in the *per curiam* correction. Second, as ***Lee*** points out, the burden of proof was *not at issue* in ***Mitchell*** and the decision was not, therefore, a repudiation of the burden of proof recognized by both its earlier decision in ***Rewolinski*** and the United States Supreme

Court's analysis in ***Connelly***. *See* ***Lee***, 175 Wis.2d at 362-64, 499 N.W.2d at 256-57. Although it is true that ***Rewolinski*** dealt with search-and-seizure, and that ***Connelly***, ***Jones***, and ***Lee*** concerned rights created by ***Miranda***, we see no analysis that supports imposing a higher burden of proof on the voluntariness issue than that which applies either to rights under the Fourth Amendment or to ***Miranda*** rights.

Applying the preponderance of the evidence standard, we are satisfied that the trial court correctly determined that the confession was voluntary. In ***State v. Clappes***, 136 Wis.2d 222, 401 N.W.2d 759 (1987), our supreme court stated: "In determining whether a confession was voluntarily made, the essential inquiry is whether the confession was procured via coercive means or whether it was the product of improper pressures exercised by the police." ***Id.*** at 235-36, 401 N.W.2d at 765. Examples of improperly coercive police tactics include: questioning a defendant for excessively long periods of time without breaks for food or rest; threatening a defendant, with physical violence or otherwise; making promises in exchange for the defendant's cooperation; engaging relays of interrogators to question a defendant "relentlessly"; or conducting questioning so as to "control and coerce the mind of the defendant." *See* ***id.*** at 239, 401 N.W.2d at 767. If there is no affirmative evidence of improper police practices deliberately used to procure a confession, the inquiry ends and the confession is deemed to be voluntary. *See* ***id.*** at 239-40, 401 N.W.2d at 767. However, if there is evidence of coercive or improper police pressures, the personal characteristics of the defendant must be balanced against the police pressures and tactics. *See* ***id.*** at 236, 401 N.W.2d at 766. The defendant's personal characteristics which are relevant to this analysis include: the defendant's age; his or her education and intelligence; his or her physical and emotional condition; and his or her prior experience with the police. *See* ***id.***

On appeal, we will not disturb the trial court's findings of evidentiary or historical fact unless they are contrary to the great weight and clear preponderance of the evidence. *See* ***id.*** at 235, 401 N.W.2d at 765. "Therefore, disputes as to the factual circumstances surrounding the admission must be resolved in favor of the trial court." ***Id.*** (citation omitted.) We must, however, independently review the application of constitutional principles to the facts as found by the trial court. *See* ***id.***

Agnello claims on appeal that the police employed a number of improperly coercive tactics, including: (1) handcuffing him to a wall in the interrogation room; (2) isolating him; (3) questioning him for long periods of time with "relay teams"; (4) depriving him of sleep; and (5) depriving him of food. Agnello, however, failed to present all but one of these arguments to the trial court. Agnello's written motion to suppress his statements was pure boilerplate and failed to alert the trial court to any specific allegedly improper police tactic. Similarly, at the close of the suppression hearing, Agnello only made one specific argument in support of his involuntariness claim, namely, that the police improperly deprived him of sleep. Issues not raised before the trial court will normally not be considered for the first time on appeal. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980). The trial court, which is in a much better position to evaluate the credibility of the witnesses, is best suited to making the important factual determinations which underlie any ***Goodchild*** hearing voluntariness determination. However, by failing to present to the trial court the issues relating to the alleged handcuffing, food deprivation, isolation, and lengthy relay questioning, Agnello has deprived the trial court of its ability to make factual findings regarding these matters. Therefore, we decline to address these issues on appeal.

With respect to the remaining issue, Agnello's alleged sleep deprivation, the trial court made a factual finding that "the number of hours that [Agnello] was … awake according to the evidence in this case [did not] constitute such undue fatigue as to render the statement involuntary in this case." The trial court also made a factual finding that "the detective testified that [Agnello] was fully coherent and that he did not appear to be unintelligibly fatigued such that it would render his statement involuntary." Thus, although the trial court did not make an express finding regarding the amount of time Agnello had been awake before confessing, the court clearly found that Agnello was not "unduly" or "unintelligibly" fatigued. This finding is not clearly contrary to the great weight and clear preponderance of the evidence; thus, it will not be disturbed. *See* ***Clappes***, 136 Wis.2d at 235, 401 N.W.2d at 765.[4] Thus, we conclude that the trial court properly found that Agnello's confession was given voluntarily and did not err by refusing to suppress it at trial.

C. Judicial Disqualification Claim

[4] Agnello testified at the suppression hearing that he awoke at approximately 8:00 a.m. on Sunday, February 18, 1996. He testified that, after he was arrested, he was placed in the interrogation room at approximately 1:00 a.m., February 19, 1996. Police officers testified that Agnello was placed in the interrogation room at approximately 2:00 a.m. Although Agnello claimed that he was interrogated the entire night, the police officers testified that he was left alone in the interrogation room from approximately 2:00 a.m. until 6:00 a.m. One officer testified that Agnello "could have snoozed if he wanted to" during this period. When police officers questioned Agnello at 6:00 a.m., he did not appear exceptionally tired, and did not complain that he was tired. During the day, the police officers questioned Agnello at various times, and took significant breaks between interviews. Agnello testified that during these breaks he "dozed off." Another officer testified that during all of the interviews Agnello never complained of being tired and appeared "alert and attentive and fully aware of what was going on." Agnello eventually confessed at approximately 3:20 p.m. Given these facts, we can not conclude that the trial court's finding that Agnello was not "overly" fatigued was clearly contrary to the great weight and clear preponderance of the evidence.

There are two bases for Agnello's claim that the trial judge improperly refused to recuse herself at the sentencing hearing. First, § 757.19(2)(g), STATS., requires mandatory disqualification of a judge "[w]hen a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." The Wisconsin Supreme Court has held that the test for determining whether the basis for disqualification under § 757.19(2)(g) has been met is subjective. ***State v. American TV & Appliance***, 151 Wis.2d 175, 182, 443 N.W.2d 662, 665 (1989).

> Section 757.19(2)(g), Stats., mandates a judge's disqualification only when that judge makes a determination that, in fact or in appearance, he or she cannot act in an impartial manner. It does not require disqualification in a situation where one other than the judge objectively believes there is an appearance that the judge is unable to act in an impartial manner; neither does it require disqualification, … in a situation in which the judge's impartiality "can reasonably be questioned" by someone other than the judge.

Id. at 183, 443 N.W.2d at 665. The trial judge expressly made a determination at Agnello's sentencing hearing that she could act in an impartial manner. Therefore, Agnello has not met the subjective test of ***American TV & Appliance***, and § 757.19(2)(g) did not require the trial judge's disqualification.

As noted, there are two bases for judicial qualification. The second basis requires the trial court to be free of partiality which would violate the due process claim. "Due process requires a neutral and detached judge. If the judge evidences a lack of impartiality, whatever its origin or justification, the judge cannot sit in judgment." ***State v. Washington***, 83 Wis.2d 808, 833, 266 N.W.2d 597, 609 (1978). There are two tests to determine whether a defendant's due process right to trial by an impartial and unbiased judge has been violated: (1) a subjective test based on the judge's own determination of his or her impartiality; and (2) an objective test based on whether impartiality can reasonably be questioned. ***State v. Rochelt***, 165 Wis.2d 373, 378, 477 N.W.2d 659, 661 (Ct. App. 1991). In this case, the trial judge's declaration that she was not biased satisfies the subjective due process test. ***Id.*** at 379, 477 N.W.2d at 661. Whether her impartiality can reasonably be questioned is a question of law which we review *de novo*. ***Id.***

Agnello claims that the trial judge's impartiality can reasonably be questioned because, after learning that Agnello's codefendant, Douglas Stream, was employed by a window company that had performed work on her home, the trial judge called the window company and directed it to secure her business file in order to prevent access to her home address. At the sentencing hearing, in response to Agnello's request that she recuse herself, the trial judge stated:

> As far as the objective standard is concerned, I don't believe there is any appearance because of what has occurred that I cannot act in an impartial manner and consider the appropriate sentencing factors which I need to consider in this case. As I've indicated, and I think it would be universally accepted, that all criminal court judges need to be realistically concerned … when defendants may have access to their home addresses, and that concern does not translate into the need to recuse myself because of what has occurred in this case.

We agree with the trial court. The fact that the trial judge took reasonable precautions to insure that Agnello's codefendant did not have access to her home address, in response to a generic concern that all judges share, does not create a reasonable basis for questioning her impartiality. Therefore, we affirm the trial judge's decision not to recuse herself.

By the Court.—Judgment affirmed.

Recommended for publication in the official reports.

No. 96-3406-CR(C)

FINE, J. *(concurring)*. I agree that we should affirm, but write separately on one point.

I agree that Lucian Agnello waived any objection he might have had to an alleged violation by the prosecutor of ***Rogers v. Richmond***, 365 U.S. 534 (1961). A "relevancy" objection does not preserve the right to later assert a constitutional violation, unless that is "necessary to see that justice is done." *See* ***State v. Boshcka***, 178 Wis.2d 628, 642–643, 496 N.W.2d 627, 632 (Ct. App. 1992). This is, essentially, a "plain error" analysis. *See* ***Utah v. Winward***, 941 P.2d 627, 633–634 (Utah Ct. App. 1997); ***Missouri v. Hulsey***, 557 S.W.2d 715, 717–718 (Mo. Ct. App. 1977). As explained below, I do not believe that the trial court's ruling deprived Agnello of "a basic constitutional right." *See* ***State v. Wiese***, 162 Wis.2d 507, 515, 469 N.W.2d 908, 911 (Ct. App. 1991) ("The plain error doctrine should be reserved for cases where there is the likelihood that the erroneous introduction of evidence has denied a defendant a basic constitutional right.").[5]

Prior to ***Mapp v. Ohio***, 367 U.S. 643 (1961), which imposed a search-and-seizure exclusionary rule on the states, many courts distinguished between types of evidence that was gathered illegally by police in determining whether to keep that evidence out of court. On the one hand, "evidence obtained by illegal search and seizure, wire-tapping, or larceny" was not subject to an exclusionary rule because that evidence "may be and often is of the utmost verity." ***Stein v. New York***, 346

[5] I recognize that my view that there was no "plain error" because there was no error at all is circular. I would affirm on the ground that the trial court did not err in overruling Agnello's objection to the prosecutor's questions—not that any objection was waived because Agnello did not frame the objection in constitutional terms. Nevertheless, I agree that Agnello's conviction must be affirmed.

U.S. 156, 192 (1953). On the other hand, confessions that were coerced were deemed to be essentially untrustworthy:

> Coerced confessions are not more stained with illegality than other evidence obtained in violation of law. But reliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence.

Ibid.[6] ***Rogers*** changed the focus—from one of trustworthiness to one of process:

> Our decisions under that [the Fourteenth] Amendment 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 accused out of his own mouth. *To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration.* Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use

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[6] ***Chambers v. Florida***, 309 U.S. 227, 237–238 (1940), recounts the historical untrustworthiness of coerced confessions:

> The determination to preserve an accused's right to procedural due process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes. The testimony of centuries, in governments of varying kinds over populations of different races and beliefs, stood as proof that physical and mental torture and coercion had brought about the tragically unjust sacrifices of some who were the noblest and most useful of their generations. The rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment of the helpless or unpopular had left their wake of mutilated bodies and shattered minds along the way to the cross, the guillotine, the stake and the hangman's noose.

> of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verification, confessions were found to be the product of constitutionally impermissible methods in their inducement. Since a defendant had been subjected to pressures to which, under our accusatorial system, an accused should not be subjected, we were constrained to find that the procedures leading to his conviction had failed to afford him that due process of law which the Fourteenth Amendment guarantees.

Rogers, 365 U.S. at 540–541. (Internal citations omitted; emphasis added.) Thus, the truthfulness of an alleged involuntary confession is not relevant on the specific issue of whether that confession was, in fact, coerced. ***Id.***, 365 U.S. at 543–544. Rather than analyze, as did the lower courts in ***Rogers***, whether police artifice could have compelled the defendant to confess *falsely*, the inquiry under the Due Process clause should have been whether the police did anything to extract a statement from the defendant involuntarily, whether or not that statement was true. ***Id.***, 365 U.S. at 544. As ***Rogers*** explained:

> The attention of the trial judge should have been focused, for purposes of the Federal Constitution, on the question whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth. The employment instead, by the trial judge and the [Connecticut] Supreme Court of Errors, of a standard infected by the inclusion of references to probable reliability resulted in a constitutionally invalid conviction, pursuant to which Rogers is now detained "in violation of the Constitution."

Ibid. (quoting 28 U.S.C. § 2241(c)(3)). Stated another way, courts could no longer say: "The confession is true, therefore it was voluntary." Neither ***Rogers*** nor any of its progeny, however, holds that inquiry into the circumstances surrounding the confession may not be had, as it was in this case, to gauge the veracity of a defendant who testifies as a witness at the suppression hearing. Thus, Agnello claimed that he

signed the confession because he was allegedly "told to" and because he "was extremely tired and scared." How else is a prosecutor to challenge this testimony if not to posit that the real reason Agnello signed the confession was because he wanted to assuage his conscience by getting the matter off his chest?

In my view, the trial court accurately perceived the distinction between holding a confession to be voluntary because it is true (forbidden by ***Rogers*** and its progeny) and disbelieving a defendant/witness's claim that the confession was coerced because the trial court credits an alternate explanation as to why the defendant confessed—in the aftermath of the crime, he could not suppress his urge to tell the world about the bad things that he did. *See* THEODOR REIK, THE COMPULSION TO CONFESS (1959) discussed in RALPH ADAM FINE, ESCAPE OF THE GUILTY 114 (1986). This latter line of inquiry is not foreclosed by either ***Rogers*** or its progeny.