COURT OF APPEALS
DECISION
DATED AND FILED

November 30, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2172-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC RODRIGUEZ,

DEFENDANT-APPELLANT,

TOMAS RODRIGUEZ,

DEFENDANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Eric Rodriguez appeals from a judgment of conviction entered after a jury found him guilty of three counts of first-degree

intentional homicide, as a party to a crime, *see* §§ 940.01(1), 939.05, STATS., one count of delivery of heroin, as a party to a crime, *see* §§ 961.41(1)(d)(1), 961.14(3)(k), 939.05, STATS., and one count of delivery of cocaine, as a party to a crime, *see* §§ 961.41(1m)(cm)(1), 961.16(2)(b)(1), 939.05, STATS. Rodriguez also appeals from an order denying his motion for postconviction relief. Rodriguez argues that because Spanish is his primary language he did not understand his ***Miranda*** rights when the police read them to him in English, and the trial court, therefore, erred in denying his motion to suppress his custodial statement to the police.[1] Rodriguez further argues that the trial court erred in refusing to recuse itself from deciding his suppression motion because the trial court was biased against him and had predetermined the issue; that the trial court improperly prevented him from testifying at the hearing by warning him that he was subject to the penalty of perjury; that the trial court erred in rejecting testimony from an expert witness regarding Rodriguez's competence in the English language; and that the trial court erred in summarily denying his postconviction motion, which sought to revisit the issue of whether he understood and validly waived his ***Miranda*** rights. Finally, Rodriguez requests that we exercise our power of discretionary reversal because, he claims, the real controversy has not been fully tried. We affirm.

BACKGROUND

¶2 On January 4, 1997, three homicide victims, Josephine Lopez, Harry Hernandez and Winfred Dill, were found in a Milwaukee home. Each of the victims were shot many times. The police investigated the victims' backgrounds

[1] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

and discovered that Rodriguez and his father were acquainted with one of the victims. The police, therefore, went to Rodriguez's home to question him about the homicides, on January 5, 1997, at about 1:00 p.m.

¶3 After talking with Rodriguez for about twenty minutes, the police asked him to come to the police station for further questioning. Rodriguez agreed to go to the police station, and, on the way there, he showed the police where his father lived so that they could interview him as well. At the police station, two detectives interviewed Rodriguez for approximately an hour to an hour and a half. They then left Rodriguez and went to interview his girlfriend and his father.

¶4 Two other detectives interviewed Rodriguez later that day, over a four-hour period. At the end of those four hours, they arrested Rodriguez as a suspect in the homicides. Over the next two days, Rodriguez was interviewed several times. Before each interview, the police read Rodriguez his ***Miranda*** rights, and Rodriguez indicated that he understood those rights and that he wanted to waive those rights and speak to the police. The police talked to Rodriguez for a total of about six and a half hours during those several interviews.

¶5 Before trial, Rodriguez filed a motion to suppress the statements he gave to the police while he was in custody. He asserted that he did not understand his ***Miranda*** rights because they were read to him in English rather than Spanish, and that, therefore, his waiver of those rights was not valid. After a hearing, the trial court denied Rodriguez's motion to suppress. Portions of Rodriguez's custodial statements were introduced at trial, and Rodriguez was ultimately convicted.

¶6 Rodriguez subsequently filed a postconviction motion, again asserting that he did not validly waive his ***Miranda*** rights because he did not

understand them when they were read in English. The trial court denied the postconviction motion without a hearing.

DISCUSSION

*A. The evidence presented at the suppression hearing supports the trial court's conclusion that Rodriguez understood his **Miranda** rights, and knowingly and intelligently waived them.*

¶7 Rodriguez argues that the trial court erred in denying his motion to suppress his custodial statements to the police. He asserts that his primary language is Spanish, and that he did not understand his ***Miranda*** rights because the police read them to him in English. Therefore, Rodriguez argues, he did not validly waive his ***Miranda*** rights, and his custodial statements are inadmissible.

¶8 When the State seeks to admit a defendant's custodial statement, the State must prove, by a preponderance of the evidence, that the defendant "was adequately informed of the ***Miranda*** rights, understood them, and knowingly and intelligently waived them." ***State v. Santiago***, 206 Wis.2d 3, 12, 18, 556 N.W.2d 687, 690, 692–693 (1996).[2] Rodriguez does not challenge the content of the ***Miranda*** rights that were read to him in English; rather, he asserts that he neither understood those rights nor knowingly and intelligently waived them because he did not have a sufficient understanding of the English language. Whether Rodriguez's understanding of English was sufficient to enable him to understand his ***Miranda*** rights, and to knowingly and intelligently waive those rights, is a question of fact. *See generally* ***State v. Yang***, 201 Wis.2d 725, 732–742, 549 N.W.2d 769, 771–775 (Ct. App. 1996). We will not overturn the trial court's

[2] The State must also prove that the defendant's statement was given voluntarily. *See* ***State v. Santiago***, 206 Wis.2d 3, 19, 556 N.W.2d 687, 693 (1996). Whether Rodriguez's statement was given voluntarily is not at issue.

determination unless it is clearly erroneous. *See* ***State v. Lee***, 175 Wis.2d 348, 354, 499 N.W.2d 250, 252 (Ct. App. 1993); § 805.17(2), STATS.

¶9 At the hearing on Rodriguez's motion to suppress, two detectives who were present during Rodriguez's various interviews testified that all of the detectives consistently spoke English to Rodriguez, and that he responded to them in English. The detectives testified that Rodriguez appeared to understand the questions that they asked him and that he appropriately responded to those questions in English. The detectives testified that Rodriguez did not appear to have any problem communicating in English, and that Rodriguez had told them that he could speak and read English, and that he could write some English.

¶10 Rodriguez's probation officer also testified at the hearing. She testified that she first met with Rodriguez in May of 1996, that she had approximately ten office meetings with Rodriguez, that she occasionally visited Rodriguez at home or talked to him on the phone, and that all of her communications with Rodriguez were in English. She testified that Rodriguez was able to speak English quite well.

¶11 Additionally, the State presented testimony from two officers who had arrested Rodriguez on charges arising prior to the homicides. One officer testified that he arrested Rodriguez in 1995, subsequent to a routine traffic stop, for possession of a concealed weapon. He said that he read Rodriguez his ***Miranda*** rights in English, that Rodriguez said he understood and wanted to waive those rights, and that Rodriguez then gave a statement in English explaining where and why he obtained the gun. The second officer testified that he interviewed Rodriguez after he was arrested in 1996 for possession of heroin. He testified that, after getting some general background information from Rodriguez and

determining that Rodriguez was lucid, he read Rodriguez his ***Miranda*** rights and asked him if he would make a statement. The officer testified that Rodriguez answered a few questions, but then stopped responding and asked for a lawyer. The State also presented testimony from an officer who interviewed Rodriguez regarding his brother's murder in December of 1993. The officer testified that he and Rodriguez spoke to one another in English, and that Rodriguez gave him background information about his brother and suggested a possible motive for the murder.

¶12 The foregoing evidence provided overwhelming support for the trial court's conclusions that Rodriguez was sufficiently competent in the English language that he understood his ***Miranda*** rights, and that he knowingly and intelligently waived those rights. *See* ***Lee***, 175 Wis.2d at 364, 499 N.W.2d at 257 ("[T]he validity of any ***Miranda*** waiver must be determined by the court's inspection of the particular circumstances involved, including the education, experience and conduct of the accused as well as the credibility of the police officers' testimony."). The trial court's determination was not clearly erroneous.[3]

[3] Within his argument that the trial court erred in denying his suppression motion, Rodriguez argues that § 885.37, STATS., "should be extended to custodial interrogations of the accused so that they do in fact have the capacity to understand their rights and proceedings." Defendant-Appellant's Brief at 17. Section 885.37 provides for appointment of an interpreter when a court is on notice that a defendant has a language difficulty. We need not extend § 885.37 to custodial interrogations to protect the ***Miranda*** rights of a defendant. As noted, in order to admit a defendant's custodial statement at trial, the State must show that the defendant understood and validly waived his ***Miranda*** rights. *See* ***Santiago***, 206 Wis.2d at 12, 556 N.W.2d at 692–693. The statute has no bearing on the trial court's factual determination that Rodriguez understood English well enough to understand and validly waive his ***Miranda*** rights.

B. The trial court did not display bias against Rodriguez.

¶13 Rodriguez argues that the trial court erred in refusing to recuse itself from deciding his suppression motion because the trial court was biased against him and had predetermined the outcome of the suppression hearing. In support of this argument, Rodriguez asserts that the trial court improperly prevented him from testifying at the hearing by warning him that he was subject to the penalty of perjury, and that the trial court improperly excluded testimony from an expert witness regarding Rodriguez's competency in the English language.

¶14 At the suppression hearing, Rodriguez took the stand to testify on his own behalf. The clerk advised Rodriguez to remain standing and raise his right hand while she administered the oath. Rodriguez raised his right hand, but, in response to the oath, Rodriguez said, in Spanish, that he did not understand what the clerk was saying. Rodriguez was, therefore, sworn-in through his court-appointed interpreter.

¶15 Rodriguez's attorney then handed him a document and asked him, in English, to look at it. Rodriguez's attorney asked Rodriguez if he understood what he was being asked, and instructed Rodriguez to lean forward and speak into the microphone. Rodriguez leaned forward and said something, in Spanish, into the microphone. At that point, the trial court interrupted the examination and noted that Rodriguez was responding appropriately to commands given in English, despite his claim that he did not understand what was being asked of him. The trial court, therefore, asked the interpreter to warn Rodriguez that he was testifying subject to the penalty of perjury.

> THE COURT: Ms. Bartholomew, I want you to interpret something for the defendant.

> We are proceeding with the interpreter and I want the interpreter to tell Mr. Rodriguez, so there is no misunderstanding, I will not have people playing games in this courtroom. And I'm telling you right now, [counsel for Rodriguez], I have strong suspicions about whether or not, please. I have strong suspicions, based on what I have seen in the four minutes since we have started this exercise, about whether this man understands English. Those suspicions are that he does, based on my watching his reactions to things and watching him raise his hands [sic] in response to the clerk's directions and she didn't raise her hand and him follow suit. So, I want Mr. Rodriguez to understand, if he's playing games here and I become convinced of that, that amounts to perjury, because he's under oath.

¶16 Rodriguez's attorney then asked the trial court to recuse itself from deciding the suppression motion because the trial court had expressed a suspicion that Rodriguez understood English. The trial court denied the motion, explaining that it had not yet drawn any conclusions regarding Rodriguez's ability to understand English. The court expressed that it merely wanted to warn Rodriguez about the potential consequences if the court was convinced at the end of the hearing that Rodriguez had been lying while testifying under oath. Rodriguez's attorney then advised Rodriguez not to testify, and Rodriguez left the witness stand.

¶17 Rodriguez then presented testimony from a witness who taught English as a second language. The witness had tested Rodriguez to determine his level of proficiency in the English language. Based on Rodriguez's test results, the witness concluded that Rodriguez would not have understood his ***Miranda*** rights when they were read in English. The witness testified, however, that she could not determine whether Rodriguez intentionally performed poorly on the test in order to understate his ability to communicate in English. She further testified that the results of the test were invalid if Rodriguez had intentionally under-reported his English skills.

¶18 In denying the suppression motion, the trial court found that the foregoing witness's testimony did not rise to the level of expert testimony because the witness could not determine whether Rodriguez had intentionally performed poorly on the English test and the results of the test were thus not helpful to the trier of fact.[4] The trial court, therefore, concluded that her testimony should not be considered. Notwithstanding this conclusion, the trial court also found that the witness's testimony was overwhelmed by the evidence indicating that Rodriguez could understand and speak English.

¶19 Due process dictates that a judge presiding over criminal proceedings must be impartial and unbiased. *See* ***State v. Rochelt***, 165 Wis.2d 373, 378, 477 N.W.2d 659, 661 (Ct. App. 1991). Determining whether a judge is impartial and unbiased involves a two-step inquiry; we evaluate the existence of bias in both a subjective and an objective light. *See* ***State v. McBride***, 187 Wis.2d 409, 415, 523 N.W.2d 106, 110, (Ct. App. 1994). "The subjective component is based on the judge's own determination of whether he will be able to act impartially." ***Id.*** If the judge subjectively believes that he or she can act impartially, the subjective test is satisfied. *See* ***id.*** "Under the objective test, we must determine whether there are objective facts demonstrating that [the trial judge] was actually biased." ***Id.***, 187 Wis.2d at 416, 523 N.W.2d at 110.

[4] RULE 907.02, STATS., provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

¶20 As noted, the trial court denied Rodriguez's recusal motion and explained that it had not yet drawn any conclusions from the evidence. We may presume from the trial court's refusal to recuse itself that the trial court subjectively believed that it could decide the suppression motion in an impartial manner. *See* ***id.***, 187 Wis.2d at 415, 523 N.W.2d at 110. The subjective test is thus satisfied. *See* ***id.***[5]

¶21 Rodriguez argues, however, that the trial court's perjury warning and the trial court's rejection of the testimony regarding Rodriguez's performance on English competency tests demonstrate that the trial court was objectively biased against Rodriguez. We disagree.

¶22 Rodriguez asserts that the trial court's observation that Rodriguez's actions appeared to belie his testimony demonstrates that the trial court had predetermined the suppression issue and was thus required to recuse itself. He also asserts that the trial court's warning that he was testifying subject to the penalty for perjury improperly prevented him from testifying on his own behalf. Contrary to Rodriguez's assertions, however, when the trial court denied the recusal motion it explained that it had not yet drawn any conclusions from the evidence. Moreover, a trial court may express its opinion on issues as they arise

[5] The trial court's subjective conclusions that it could act impartially, and that there was no basis for it to recuse itself, also satisfied the test for recusal under § 757.19(2)(g), STATS. Section 757.19(2)(g) provides that "[a]ny judge shall disqualify himself or herself from any civil or criminal action or proceeding" when the judge "determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." "The basis for disqualification under sec. 757.19(2)(g), Stats., is a subjective one." ***State v. American TV & Appliance***, 151 Wis.2d 175, 183, 443 N.W.2d 662, 665 (1989). "Accordingly, the determination of the existence of a judge's actual or apparent inability to act impartially in a case is for the judge to make." ***Id.*** The record contains no indication that the trial court subjectively believed that it could not decide the suppression motion impartially, or that there was an appearance that the trial court could not decide the motion impartially. The trial court was thus not required to recuse itself pursuant to § 757.19(2)(g).

without being subject to recusal. *See* ***State ex rel. Dressler v. Circuit Court***, 163 Wis.2d 622, 644, 472 N.W.2d 532, 542 (Ct. App. 1991). The trial court's comments do not demonstrate that the trial court was objectively biased against Rodriguez. Further, the trial court's warning did not prevent Rodriguez from testifying on his own behalf. Rather, Rodriguez's attorney, fearing that the trial court would conclude that Rodriguez had committed perjury, advised Rodriguez not to testify.

¶23 Additionally, the trial court's rejection of the testimony from the witness who had tested Rodriguez's level of competency in the English language does not demonstrate that the trial court was objectively biased against Rodriguez. As noted, although the trial court indicated that the testimony did not rise to the level of expert testimony and should not be considered, the trial court nonetheless considered that evidence and determined that it was outweighed by the overwhelming evidence that Rodriguez could understand and speak English.[6] As the trier of fact, it was within the trial court's province to determine the weight of the evidence. *See* ***State v. Poellinger***, 153 Wis.2d 493, 506, 451 N.W.2d 752, 757 (1990). The trial court's conclusion does not demonstrate that it was objectively biased against Rodriguez.

C. The trial court properly denied Rodriguez's postconviction motion.

¶24 Rodriguez filed a postconviction motion and requested another hearing on the issue of whether his understanding of the English language was

[6] We need not decide whether the trial court properly determined that the testimony did not qualify as expert testimony because the trial court nonetheless weighed the testimony in deciding the suppression motion. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (appellate court need only decide dispositive issue).

sufficient to enable him to understand and to validly waive his ***Miranda*** rights. In support of his postconviction motion, Rodriguez presented a report from a witness who had not testified at the suppression hearing. The report was written by a psychologist who had interviewed Rodriguez and tested Rodriguez's language abilities. The psychologist concluded that Rodriguez could not have understood his ***Miranda*** rights when they were read in English. The psychologist also opined that Rodriguez was not under-reporting his abilities to understand and speak English.

¶25 The trial court denied the motion without a hearing. The trial court reasoned that Rodriguez had already had an evidentiary hearing on his ability to understand his ***Miranda*** rights, and the issue had been decided against him. Moreover, the trial court reasoned that the psychologist's analysis, like the analysis of the witness at the suppression hearing, was unreliable because it was based on Rodriguez's representations of his language abilities. The trial court concluded that the psychologist's report would not have changed the outcome of the suppression hearing because there was overwhelming evidence that Rodriguez understood and spoke English well enough to understand and validly waive his ***Miranda*** rights.

¶26 We conclude that the trial court did not err in denying Rodriguez's postconviction motion. First, as the trial court noted, Rodriguez already had an evidentiary hearing on the issue presented in his postconviction motion. Rodriguez presents no authority that would permit him to relitigate his pretrial suppression motion in a postconviction proceeding. *See* ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered."). Second, the trial court concluded that the evidence at the suppression hearing overwhelmingly supported

the finding that Rodriguez understood and validly waived his ***Miranda*** rights, and that the psychologist's report would not have changed the outcome of the suppression hearing. We agree. Thus, Rodriguez is not entitled to a hearing on his postconviction motion. *See* ***State v. Bentley***, 201 Wis.2d 303, 309–310, 548 N.W.2d 50, 53 (1996) (the trial court need not hold an evidentiary hearing on a postconviction motion if the record conclusively demonstrates that the defendant is not entitled to relief).

D. This case is not appropriate for discretionary reversal.

¶27 Section 752.35, STATS., provides:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

If we conclude that the real controversy has not been fully tried, we may grant a request for a new trial based upon that conclusion alone, *see* ***State v. Betterley***, 191 Wis.2d 407, 424–425, 529 N.W.2d 216, 223 (1995); if we conclude that it is probable that justice has miscarried, however, we must also determine that there is a substantial probability that that a new trial would produce a different result, *see* ***State v. Martinez***, 210 Wis.2d 396, 403, 563 N.W.2d 922, 925 (Ct. App. 1997).

¶28 Rodriguez argues that the real controversy has not been fully tried because the trial court did not permit him to present evidence regarding his competency in the English language. We have already concluded that the trial

court properly conducted the hearing on Rodriguez's suppression motion. Rodriguez is not entitled to relief under § 752.35, STATS.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.