**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**January 27, 2016**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2014AP2189-CR** **Cir. Ct. No. 2011CF353**

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

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JOSE L. CABRERA-GARCIA,**

**DEFENDANT-APPELLANT.**

APPEAL from a judgment of the circuit court for Washington County: JAMES G. POUROS, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Jose Cabrera-Garcia appeals from a judgment convicting him of first-degree sexual assault of a child under thirteen after a jury trial. On appeal, Cabrera-Garcia challenges the circuit court's refusal to suppress

his inculpatory statements and the use of the victim's inconsistent out-of-court statements to counter her trial testimony. We discern no circuit court error, and we affirm.

¶2 Officer Eric Rasmussen was assigned to investigate a high school student's claim that Cabrera-Garcia had sexually assaulted her approximately two years before. As part of his investigation, Officer Rasmussen asked Cabrera-Garcia to travel to the police department for an interview. During the September 15, 2011 interview at the Hartford Police Department and before he received ***Miranda***[1] warnings, Cabrera-Garcia admitted that the victim had seen him unclothed, had seen him masturbating, and she had manipulated his penis at his request. The circuit court denied Cabrera-Garcia's motion to suppress these inculpatory statements.

¶3 On appeal, Cabrera-Garcia argues that the circuit court should have suppressed his inculpatory statements because he was interrogated in custody and without ***Miranda*** warnings. The State concedes that Cabrera-Garcia was interrogated, but because he was not in custody during that interrogation, ***Miranda*** warnings were not required.

¶4 If a person is not in custody at the time he or she is interrogated, ***Miranda*** warnings are not required. ***State v. Grady***, 2009 WI 47, ¶18, 317 Wis. 2d 344, 766 N.W.2d 729. "A person is in 'custody' if under the totality of the circumstances 'a reasonable person would not feel free to terminate the

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

interview and leave the scene.'" ***State v. Lonkoski***, 2013 WI 30, ¶6, 346 Wis. 2d 523, 828 N.W.2d 552 (citation omitted). That the interview occurred at the police department is not dispositive on the question of whether Cabrera-Garcia was in custody. ***Id.***, ¶28. Considerations relevant to the custody determination include "'the defendant's freedom to leave; the purpose, place, and length of the interrogation; and the degree of restraint.'" ***Id.***, ¶6 (citation omitted). If Cabrera-Garcia was not in custody when he made his inculpatory statements, he was not entitled to the remedy of suppression under ***Miranda***. ***Lonkoski***, 346 Wis. 2d 523, ¶24.

¶5 When reviewing a circuit court's decision on a motion to suppress, we will affirm the circuit court's findings of fact unless they are clearly erroneous. ***Id.***, ¶21. We independently apply the constitutional principles to the facts. ***Id.***

¶6 As part of the evidentiary hearing on Cabrera-Garcia's motion to suppress, the circuit court reviewed the audio and video recording of his police department interview. The court deemed the testimony of Officer Rasmussen more credible than that of Cabrera-Garcia.

¶7 Officer Rasmussen testified that he telephoned Cabrera-Garcia on September 13, 2011, Cabrera-Garcia traveled voluntarily to the police department, and he agreed to speak with Officer Rasmussen. When Cabrera-Garcia arrived at the police department, he was not arrested, handcuffed, patted down or restrained in any way. During the interview, Cabrera-Garcia conversed with Officer Rasmussen entirely in English, and he later made a written statement in Spanish. Cabrera-Garcia brought his young child to the interview, the interview room door was neither shut nor locked, and Cabrera-Garcia was not prevented from leaving the room. There were numerous interruptions during the interview including when

Cabrera-Garcia's child came into the room, when Officer Rasmussen left the room, and when Cabrera-Garcia visited the restroom. In light of the multiple interruptions, the interview itself was not lengthy. At seven minutes into the interview, Officer Rasmussen told Cabrera-Garcia that he could leave whenever he wished because it was just an interview.

¶8 Cabrera-Garcia made his inculpatory statements between fifty-five and sixty-five minutes into the interview. Cabrera-Garcia began his written statement at seventy-nine minutes into the interview. Cabrera-Garcia received ***Miranda*** warnings approximately two and one-half hours after the interview started. Cabrera-Garcia was arrested two and one-half hours into the interview.

¶9 The circuit court considered Cabrera-Garcia's argument that his inculpatory statements should be suppressed because he was not proficient in English, the language in which the interview was conducted. The court found that the interview recording demonstrated Cabrera-Garcia's "very good English language skills," and Cabrera-Garcia understood Officer Rasmussen, as Officer Rasmussen credibly testified. The court found that Cabrera-Garcia did not need an interpreter at the police department to assist him in the interview.[2]

¶10 The circuit court concluded that the State met its burden to show that a reasonable person in Cabrera-Garcia's position would not have considered himself to be in custody before he was actually arrested. Under the totality of the circumstances, Cabrera-Garcia was not in custody such that ***Miranda*** warnings were required.

[2] The circuit court declined to rule on the admissibility of Cabrera-Garcia's Spanish language written statement because the statement had not been translated into English.

¶11 The circuit court further concluded that Cabrera-Garcia's inculpatory statements were voluntary. The court considered the circumstances under which Cabrera-Garcia agreed to come to the police station, his personal characteristics (he was employed, his first language was Spanish but he was "very good in English," and his interactions with his child at the police station involved tutoring his child in English, even when Officer Rasmussen was out of the interview room). The court did not find any of Officer Rasmussen's conduct to be coercive or improper. Under the totality of the circumstances and balancing Cabrera-Garcia's personal characteristics against Officer Rasmussen's conduct, Cabrera-Garcia's inculpatory statements were voluntarily made. The circuit court denied Cabrera-Garcia's suppression motion.

¶12 On appeal, Cabrera-Garcia argues that under the totality of the circumstances, he was in custody when he made inculpatory statements before he received ***Miranda*** warnings. He argues that the circumstances surrounding his freedom to leave, the purpose, place and length of the interrogation, the degree of restraint, and his personal characteristics support an objective belief that he was in custody.

¶13 Cabrera-Garcia claims that he did not think he was free to leave the police station. To the extent Cabrera-Garcia's appellate argument relies on his own testimony at the suppression hearing, we note that the circuit court found that Officer Rasmussen's testimony was more credible than Cabrera-Garcia's testimony. We are bound by the circuit court's credibility determination. ***State v.***

***Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345.[3] We address this claim no further.

¶14 Cabrera-Garcia argues that the place of interrogation argues in favor of a custody determination. We disagree. As we have stated, being interrogated at a police department is not dispositive on the question of whether Cabrera-Garcia was in custody. ***Lonkoski***, 346 Wis. 2d 523, ¶28. That Cabrera-Garcia reached the interview room via a secure entrance does not outweigh the characteristics of the interview room, whose door was open and unlocked and out of which Cabrera-Garcia and his child freely passed.

¶15 Cabrera-Garcia argues that the circuit court's finding about his English-language ability was inconsistent with the presence of a Spanish language interpreter at his trial. An interpreter can be required for a court proceeding when a "defendant's difficulty with English may impair his or her ability to communicate with counsel, to understand testimony in English, or to make himself or herself understood in English." ***State v. Yang***, 201 Wis. 2d 725, 734, 549 N.W.2d 769 (Ct. App. 1996). That Cabrera-Garcia had an interpreter for trial does not undermine the court's findings that Cabrera-Garcia had sufficient English language skills for the interview, and Cabrera-Garcia cites no authority to the contrary. ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

[3] During his suppression hearing testimony, Cabrera-Garcia conceded that he believed he was not under arrest when he entered the interview room, Cabrera-Garcia never stated that he wanted to leave, but he believed he would be able to leave at the conclusion of the interview. Even if we were to consider Cabrera-Garcia's testimony on this point, the testimony goes against him.

¶16 The circuit court's findings of fact are not clearly erroneous based on the evidence adduced at the suppression hearing. Cabrera-Garcia voluntarily appeared at the police department for an interview, he was not restrained in any way, he was free to leave, only one officer questioned him, the interview was not lengthy, and the interview room door was neither closed nor locked. ***Lonkoski***, 346 Wis. 2d 523, ¶¶30-32. Applying the objective test for custody, ***id.***, ¶27, we conclude that Cabrera-Garcia was not in custody such that ***Miranda*** warnings were required. The circuit court properly denied Cabrera-Garcia's motion to suppress.

¶17 We turn to the use of the victim's inconsistent out-of-court statements to counter her trial testimony. The criminal complaint alleged that the victim told Officer Rasmussen that Cabrera-Garcia had offered her money to manipulate his penis and she did so, she observed Cabrera-Garcia masturbating on numerous occasions, Cabrera-Garcia masturbated in her presence, and Cabrera-Garcia asked her to have sex with him for money.

¶18 At Cabrera-Garcia's trial, the victim recanted her statements to police and testified that she fabricated her allegations against Cabrera-Garcia. At trial, the victim specifically denied that she ever touched Cabrera-Garcia or that Cabrera-Garcia ever touched her, that they were ever alone in her house, that she ever saw Cabrera-Garcia without clothes, and that she ever saw Cabrera-Garcia touching his genitals. The victim further denied telling police officers anything about Cabrera-Garcia's behavior. Overall, the victim either denied making the allegations about Cabrera-Garcia or denied that the alleged incidents with Cabrera-Garcia occurred. However, the victim conceded that after she spoke with the police, she had a recorded interview with Amanda Didier, a child protective services interviewer, about what happened with Cabrera-Garcia.

¶19 The victim's trial testimony conflicted with her statements to the police. Given this conflict, the State moved the circuit court to declare the victim a hostile witness under WIS. STAT. § 972.09 (2013-14)[4] and to admit the recording of her interview with Didier as a prior statement inconsistent with her trial testimony. The circuit court agreed with the State that under WIS. STAT. § 908.01(4)(a)1., the victim's statements to Didier were not hearsay because they were prior inconsistent statements.

¶20 When the victim's testimony resumed, the State questioned her about all of her oral and written statements to the police and secured her admission that she met with Didier for a recorded interview. The State then offered the Didier interview as a prior inconsistent statement under WIS. STAT. § 972.09. That statute provides in pertinent part:

> Where testimony of a witness at any preliminary examination, hearing or trial in a criminal action is inconsistent with a statement previously made by the witness, the witness may be regarded as a hostile witness and examined as an adverse witness, and the party producing the witness may impeach the witness by evidence of such prior contradictory statement.

¶21 We review for a misuse of discretion the circuit court's decision to admit the Didier interview as a prior inconsistent statement. ***State v. Lenarchick***, 74 Wis. 2d 425, 436, 247 N.W.2d 80 (1976). We will uphold the circuit court's discretionary decision to admit this evidence "if the circuit court examined the relevant facts, applied a proper legal standard, and reached a reasonable

[4] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

conclusion using a demonstrated rational process." ***State v. Muckerheide***, 2007 WI 5, ¶17, 298 Wis. 2d 553, 725 N.W.2d 930.

¶22 On appeal, Cabrera-Garcia argues that under WIS. STAT. § 972.09, the victim's prior inconsistent statement was her statement to Officer Rasmussen, not her later recorded interview with Didier.[5] However, Cabrera-Garcia offers no authority for the proposition that impeachment of a hostile witness by "evidence of such prior contradictory statement," § 972.09, is limited to other forms of the statement the victim later denies making. We will not make this argument for him. ***Pettit***, 171 Wis. 2d at 646-47.

¶23 The circuit court properly exercised its discretion when it admitted the Didier interview as a prior inconsistent statement. The victim denied making allegations about Cabrera-Garcia to Officer Rasmussen and denied that the conduct she alleged had actually occurred. The victim's denials were not limited to what she told Officer Rasmussen about what happened with Cabrera-Garcia. Her interview with Didier also contradicted her trial testimony. In the Didier interview, the victim stated that Cabrera-Garcia made her touch his penis, made her watch him masturbate and ejaculate, made her watch pornography, Cabrera-Garcia gave her money when he made her touch his penis, and she told her mother about touching Cabrera-Garcia and watching pornography. These statements contradicted the victim's trial testimony that such activity did not occur and that

[5] On appeal, Cabrera-Garcia argues that the State also did not lay an adequate foundation to admit the Didier interview. However, Cabrera-Garcia does not offer a citation to the record indicating that he made this particular objection in the circuit court. For this reason, we do not address this argument. ***State v. Krieger***, 163 Wis. 2d 241, 254, 471 N.W.2d 599 (Ct. App. 1991); ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 (we do not address issues raised for the first time on appeal).

her allegations were fabricated. The Didier interview was a prior inconsistent statement and was properly admitted under WIS. STAT. § 972.09.

¶24 Cabrera-Garcia argues that portions of the Didier interview should not have been admitted. However, he does not identify which portions of the interview should have been excluded. We address this issue no further. ***State v. Krieger***, 163 Wis. 2d 241, 254, 471 N.W.2d 599 (Ct. App. 1991).

¶25 We conclude that the circuit court properly exercised its discretion in admitting the Didier interview as a prior inconsistent statement of the victim. We also affirm the circuit court's denial of Cabrera-Garcia's motion to suppress.

*By the Court.*—Judgment affirmed.

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