COURT OF APPEALS DECISION DATED AND FILED

January 28, 2016

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2015AP160-CR

Cir. Ct. No. 2011CF221

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEANETTE M. JANUSIAK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County: PATRICK J. TAGGART, Judge. *Affirmed.*

Before Kloppenburg, P.J., Lundsten, and Blanchard, JJ.

¶1 BLANCHARD, J. Jeanette Janusiak appeals a judgment of conviction for first-degree intentional homicide. Janusiak argues that the circuit court should have suppressed in-custody statements Janusiak made to police because the statements were involuntary and, as a result, the court should not have

allowed the State to use the statements against Janusiak at trial. For the following reasons, we affirm.

BACKGROUND

¶2 Janusiak was charged with first-degree intentional homicide following the death of a four-month old baby while in Janusiak's care. The State sought a pretrial ruling that statements that Janusiak made to police during an interview while Janusiak was in police custody would be admissible at trial.[1] Janusiak argued that the statements were involuntary, and therefore inadmissible.

¶3 It is undisputed that, during the interview with the officers that she now challenges, Janusiak initially repeated the same account that she had given to police after they responded to a 9-1-1 call made by Janusiak.[2] This initial account was that, after she had put the baby on a bed in a bedroom, Janusiak fell asleep in the living room, was awakened by a "choking, gurgley noise," and when she went into the bedroom she found that the baby was not breathing and she called 9-1-1. Janusiak said that she was not aware of any problem with the baby before she was awakened by the sounds.

¶4 However, as the interview that Janusiak now challenges progressed, Janusiak's account changed markedly from the initial claim that she had no

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[1] Janusiak gave multiple statements to police regarding her knowledge of what happened to the baby before she was taken into police custody. However, on appeal she challenges only those statements that she made during her in-custody interview at the police station.

[2] While Janusiak was in custody at the police station, several members of the Reedsburg Police Department interviewed her at various times, including Lieutenant Gary Zellmer, Detective Andrew Stelter, and Chief Timothy Becker. We frequently refer to the interviewers collectively as "the officers."

knowledge of how the baby had been injured. Janusiak at one point said, “She [the baby] fell off my bed, it was off my bed.” Later, Janusiak said, “She hit the table.” Later, Janusiak said, “She went down, she hit the table, there’s a little shelf opening in the table and she hit that. And then she fell and then she (unintelligible). And then I grabbed her.” Later still, Janusiak said, “I set her down on the bed, she fell off the bed…. It was the table. She hit, she hit the table.” Throughout the remainder of the interview, Janusiak remained insistent that this last account was accurate, rejecting the police officers’ position that the baby’s injuries could not have occurred in the manner that Janusiak described, given the medical evidence as the officers understood it.

¶5 At the hearing on voluntariness, Janusiak did not testify. The officers who conducted the interview testified to facts that included the following. Janusiak was cooperative and willing to go to the police station for the interview. Janusiak was not in handcuffs either prior to entering the interview room or during the interview. The entire interview was recorded. Janusiak was read, understood, and waived her ***Miranda***[3] rights. The officers provided Janusiak with soda and with “at least three” breaks during the interview, which Janusiak used to smoke or to use the restroom. Janusiak appeared to understand the interview questions and did not appear to be tired.

¶6 Based on this testimony and a viewing of the recording of the interview, the circuit court determined that the statements were made voluntarily. The court noted that the interview session was lengthy (approximately seven hours including breaks), but found that Janusiak “did not appear to be over tired or

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

unable to exercise her free will during the interview." The court found that there were "at least a couple" breaks in the questioning and that the officers offered Janusiak food and drink during the interview. Addressing Janusiak's arguments that the officers coerced her statements by promising her that she would return home to her children and would not go to jail if she cooperated, the court found that "the officers were confrontational about her explanation for the victim's injuries which they believe did not match what they were being provided by medical professionals." However, the court also found that nothing that the officers did or said "rose to the level of coercive police conduct." The court ultimately concluded that the statements "were voluntary under the totality of the circumstances," because police did not use "improper … practices or coercion" "to obtain the statements."

¶7 At trial, the State was permitted to play for the jury a recording of Janusiak's interview, and the officers testified regarding the interview. Janusiak was convicted of first-degree intentional homicide and now appeals. Additional facts are discussed below as necessary.

DISCUSSION

¶8 "The question of voluntariness involves the application of constitutional principles to historical facts. We give deference to the circuit court's findings regarding the factual circumstances that surrounded the making of the statements. However, the application of the constitutional principles to those facts is subject to independent appellate review." ***State v. Hoppe***, 2003 WI 43, ¶34, 261 Wis. 2d 294, 661 N.W.2d 407 (citations omitted). "The government bears the burden of establishing—by a preponderance of the evidence—that a

confession was voluntary." ***State v. Moore***, 2015 WI 54, ¶55, 363 Wis. 2d 376, 864 N.W.2d 827.

¶9 Neither side disputes the circuit court's findings of historical fact. Therefore we turn to the determination of whether, based on those findings, Janusiak's statements were voluntary.

¶10 To determine whether a defendant's statements were voluntary, we balance the personal characteristics of a defendant against "pressures and tactics" that police used to induce the statements, considering the totality of the circumstances. ***Hoppe***, 261 Wis. 2d 294, ¶¶38-39. More specifically, as our supreme court explained in ***Hoppe***:

> The relevant personal characteristics of the defendant include the defendant's age, education and intelligence, physical and emotional condition, and prior experience with law enforcement. The personal characteristics are balanced against the police pressures and tactics which were used to induce the statements, such as: the length of the questioning, any delay in arraignment, the general conditions under which the statements took place, any excessive physical or psychological pressure brought to bear on the defendant, any inducements, threats, methods or strategies used by the police to compel a response, and whether the defendant was informed of the right to counsel and right against self-incrimination.

Id., ¶39 (citations omitted).

¶11 Janusiak argues that her personal characteristics made her particularly vulnerable to police pressures and tactics, and that the officers' pressures and tactics were coercive. On appeal, Janusiak focuses primarily on two facts and two allegations. The two facts are that the interview lasted approximately seven hours, including breaks, and that Janusiak was in custody throughout the interview. The two allegations, which as we explain below we

conclude distort the factual record, are that a social worker "threatened" Janusiak during the interview with removal of her children from the home unless she cooperated with police and that police "promised" that she would be released from custody and could return home to her children if she cooperated during the interview.

¶12 The State makes no substantive argument regarding Janusiak's personal characteristics. Instead, the State argues that the police did not coerce Janusiak into giving the challenged statements.[4]

Personal Characteristics

¶13 We start with Janusiak's personal characteristics. It is uncontested that, at the time of the interview, Janusiak was 24 years old, was a mother of four children and pregnant with her fifth child, did not appear to be particularly tired during the course of questioning, and had ceased crying and was calm by the time the officers began to question her. The circuit court did not make a finding regarding Janusiak's apparent level of intelligence, but she had completed schooling through the 11th grade, and testified that, at least by the time of trial, she had obtained a high school equivalency diploma. As for prior experience with law enforcement, the parties stipulated that Janusiak had five prior convictions, at least one of them an obstruction charge for lying to the police.

¶14 While each case must be considered based on its particular facts, Janusiak shares or nearly shares a number of significant personal characteristics

[4] Because we conclude that the challenged statements were voluntary, we need not and do not reach the State's alternative argument that, even if the statements were involuntary, their use at trial would have been harmless error.

with a defendant whose personal characteristics our supreme court concluded did not make him "particularly vulnerable" to police pressures and tactics. *See* ***State v. Lemoine***, 2013 WI 5, ¶¶21-24, 26, 345 Wis. 2d 171, 827 N.W.2d 589; *see also* ***State v. Reynolds***, 2010 WI App 56, ¶¶40, 51, 324 Wis. 2d 385, 781 N.W.2d 739 (in finding statements voluntary, noting that defendant was 26 years old, with an 11th grade education, and had seven prior convictions). Pertinent factors in ***Lemoine*** included the following: Lemoine "was nearly 23 years old;" he was not a high school graduate, but had earned a high school equivalency diploma; he did not appear to have physical or emotional limitations; and, although Lemoine stated "that he had not slept since the previous day," he was "alert at all times during the questioning with no signs of impairment." ***Lemoine***, 345 Wis. 2d 171, ¶21. The supreme court also noted that, although the circuit court found that Lemoine had no prior convictions or other experience with law enforcement at the time of the interview, Lemoine demonstrated during the interview at least "some familiarity with the criminal justice system." ***Id.***, ¶22.

¶15 As in ***Lemoine***, we see nothing about Janusiak's personal characteristics that made her particularly vulnerable to police pressures and tactics. It appears that the only difference of any potential significance between Janusiak and the defendants in ***Lemoine*** and ***Reynolds*** is that Janusiak had reached an advanced stage of pregnancy. On this topic, Janusiak would have us conclude that pregnancy automatically renders a woman particularly vulnerable to police pressures and tactics, arguing that "[i]t is beyond cavil that any woman in an advanced stage of pregnancy suffers from at least some degree of diminished physical capacity." However, we decline her invitation to adopt such a sweeping generalization. Advanced pregnancy might be a contributing factor if combined with other pertinent facts (*e.g.,* denial of bathroom breaks for someone with a

greater than normal need to take bathroom breaks), but Janusiak fails to point to any such pertinent facts. Contrary to Janusiak's argument to the circuit court that her "advanced state of pregnancy and … fatigue" made her particularly vulnerable to coercion, the court found that Janusiak did not appear particularly tired, that she had several bathroom or smoke breaks, and that she was offered food or drink during the interview. Nothing in the circuit court's findings of fact indicates that Janusiak's pregnancy made her particularly vulnerable and therefore we reject Janusiak's argument to the contrary.

Pressures and Tactics

¶16 We now turn to the pressures and tactics used by the officers, and then consider whether, in light of Janusiak's personal characteristics, the State demonstrated that the police did not overcome Janusiak's ability to resist. *See* ***Lemoine***, 345 Wis. 2d 171, ¶¶25-26. Janusiak argues that the following combined to result in police coercion: the length and custodial nature of the interview; an alleged threat to remove her children from the home if she did not cooperate; and an alleged promise that she could leave jail if she did cooperate.

¶17 To repeat, we review the actions of the officers and their apparent effects on Janusiak through the lens of the historical facts found by the circuit court, which the parties do not dispute. With respect to the nature of the interview, the court found that Janusiak was in custody throughout the interview, that the officers properly informed Janusiak of her ***Miranda*** rights and Janusiak "clearly and voluntarily waived" those rights, and that the interview was "lengthy." With respect to police conduct, the court found that the officers did not subject Janusiak "to any physical coercion," by which the court appeared to mean acts or threats of physical violence or intimidation, and that the officers were generally attentive to

Janusiak's personal needs and did not appear to take advantage of her emotional state when she cried in their presence.

¶18 Taking these facts into account, we reject Janusiak's argument that the facts that Janusiak was not free to leave and was in police custody during the questioning contributed significantly to a coercive atmosphere. In itself, the fact that Janusiak made the statements at issue after receiving the ***Miranda*** warnings weighs in favor of finding her statements voluntary, rather than coerced. Janusiak does not dispute the circuit court's findings that the officers read Janusiak her ***Miranda*** rights prior to questioning her and that she voluntarily waived those rights. "[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that law enforcement authorities adhered to the dictates of ***Miranda*** are rare." ***Reynolds***, 324 Wis. 2d 385, ¶45 (quoting ***Berkemer v. McCarty***, 468 U.S. 420, 433 n.20 (1984)). And here, as in ***Reynolds***, "there is nothing special about this case that transforms it into one of those rare cases." *See* ***id.***

¶19 In addition, Janusiak does not argue, and we see no basis in the record for a potential argument, that at any time during the interview she sought to put a stop to the questioning, or appeared reluctant to speak with the officers. Indeed, she expressed a desire to continue talking when the officers said it was time to end the interview.

¶20 Our review of the recording and transcript of the interview confirms the circuit court's assessment that the officers' actions were at times confrontational and probing, but that they did not include improper pressures or heavy-handed tactics. Although the interview lasted approximately seven hours from start to finish, the officers addressed Janusiak's personal needs, allowing for

three breaks for Janusiak to use the bathroom and smoke cigarettes, offering food and drink, and waiting for Janusiak to stop crying and calm down before questioning her. *See* ***Reynolds***, 324 Wis. 2d 385, ¶48 (homicide interviews of 6 and 6 ½ hours leading to challenged statements "not unduly burdensome" where police detectives "ensured that [the defendant] was comfortable, providing him with food, drink, cigarettes, and breaks when needed.").

¶21 We now turn to the main thrust of Janusiak's coercion argument, which is based on her assertions that the officers, through a social worker, "threatened" to remove her children if she did not cooperate, and that the officers "promised" that she could leave jail and return home to her children if she did cooperate. We address in turn the alleged threat and the alleged promise, explaining in each case why we conclude that these statements, when properly understood in context, were insufficient to amount to coercive police conduct that would weigh in favor of a finding of involuntariness.

¶22 Starting with the alleged threat, Janusiak argues that the conduct of Sauk County Human Services Supervisor Hazel Coppernoll was a factor that resulted in the coercion of Janusiak's statements.[5] Coppernoll was present during the questioning for fewer than ten minutes of the seven-hour interview period. Coppernoll informed Janusiak that she was "not taking [Janusiak's children] into custody," but that Coppernoll was concerned for Janusiak's children if it turned out that the baby had been injured in Janusiak's home. Coppernoll also suggested, before leaving the interview room, that Janusiak "be as cooperative as [Janusiak]

[5] We assume without deciding, in Janusiak's favor, that social worker Coppernoll acted as an agent of law enforcement when she briefly interacted with Janusiak while Janusiak was in police custody. The State takes no position on this question.

possibly can." Janusiak argues that Coppernoll's statements amounted to a threat that, when considered with all other factors, resulted in the coercion of Janusiak's statements.

¶23 A fundamental problem with Janusiak's argument is that it exaggerates the facts in describing a "threat." Coppernoll made no threats to take Janusiak's children away. Instead, Coppernoll informed Janusiak that Coppernoll was *not* taking Janusiak's children into custody, but expressed to Janusiak concern that the children might need protection that involved their removal from the home if it were shown that the injuries causing the baby's death happened while the baby was in Janusiak's care. It is true that this raised the specter of removal of the children, which is no doubt a topic that could be exploited in a coercive manner. However, Coppernoll did not say anything approximating, "If you don't confess to harming the baby, your children will be taken away." In fact, if anything, Coppernoll's statements would most likely have had the effect of causing Janusiak to continue to deny that the baby was injured in any manner at her home, whether accidental or otherwise.

¶24 In her principal brief on appeal, Janusiak provides limited portions of Coppernoll's statements to Janusiak during the interview, a partial summary that effectively distorts the facts. For example, Janusiak argues that it was a coercive threat for Coppernoll to advise her, as Coppernoll was leaving the interview room, to "be as cooperative as you can." However, that statement came nearly six minutes after Coppernoll informed Janusiak that she was not taking her children into custody. Moreover, it came on the heels of Coppernoll telling Janusiak, in a seemingly non-threatening vein, "hopefully I won't be back in touch with you[,] we[']re going down to the hospital right now, ..."

¶25 Janusiak argues that ***Lynumn v. Illinois***, 372 U.S. 528 (1963), requires suppression of her statement, but we conclude that that case is inapposite.[6] In ***Lynumn***, the Court held that threats that a mother's children would be taken away from her unless she "cooperated" "must be deemed not voluntary, but coerced." ***Id.***, at 534. The police in ***Lynumn*** threatened the defendant with the loss of her children if she did not confess to possession and sale of marijuana. ***Id.***, at 530-34. In contrast here, Coppernoll did not threaten to take Janusiak's children away if Janusiak did not confess to harming the baby. To repeat, Coppernoll told Janusiak that she would be "looking very closely" into whether the baby was hurt at Janusiak's home and conveyed the idea that if the baby had been injured in Janusiak's home, social services might take her children away. *See* ***State v. Brock***, No. 2009AP2120, unpublished slip op., ¶11 (Ct. App. 2010) (concluding that statements were not coerced, and ***Lynumn*** did not apply, when police told defendant that if defendant's girlfriend was charged with the crime instead of defendant and if she stayed in jail, their children may be removed from the home).

¶26 We turn now to what Janusiak calls a "promise" by police to release her from custody if she "cooperated" in the interview. Janusiak points to statements of the officers indicating that they did not want her to go to jail, but instead wanted to send her home to her children. Janusiak argues that the officers conveyed to her that if she continued to answer their questions then they would eventually let her go home, and that this was unduly coercive.

[6] As persuasive authority, Janusiak also cites to a number of cases from other jurisdictions with facts similar to those in ***Lynumn v. Illinois***, 372 U.S. 528 (1963). For the same reason that we conclude that ***Lynumn*** is inapposite, we conclude that those cases are inapposite.

¶27 We conclude that this argument fails to come to grips with the finding of the circuit court, interpreting the interview as a whole, which Janusiak does not challenge. The court found that the officers pressed Janusiak on the explicit basis that the medical evidence was highly incriminating, and that her evolving explanations had at each point been inconsistent with what medical professionals were saying about the injuries to the baby. That is, the officers consistently told Janusiak that their understanding of the medical evidence contradicted her ultimate account that the baby sustained the injuries that caused her death (multiple skull fractures) in a fall from the bed, and that her account of a "fall off the bed" could not have produced the injuries as evaluated by medical personnel. The officers also told Janusiak that if she continued to repeat the same account, which they believed conflicted with the incriminating medical evidence, then she would remain in custody. On the other hand, the officers told Janusiak, she could go home if she was able to provide an *exculpatory* explanation of the baby's injuries that did not contradict the medical evidence. In other words, the officers did not tell Janusiak that she could go home if she gave them any explanation whatsoever, but instead told her that she could go home if she had an innocent explanation for the baby's injuries that matched the medical evidence.

¶28 The first pertinent exchange, as cited by Janusiak as support for her argument that the officers applied undue pressure to gain her cooperation, is as follows:

> Police Chief Becker: We don't want you to go to jail, we want to find out what happened.
>
> Janusiak: I don't want to go to jail.
>
> Becker: We want to find out.
>
> Detective Stelter: I want to send you home with your kids, that's what I want.

> Becker: But you're not giving us anything to work with here.
>
> Janusiak: There is nothing else I can think of that (unintelligible) happened to her though…. I'm trying to tell you.
>
> Stelter: There, there's got to be something, there got to be some

Janusiak also points to the following exchange:

> Becker: I feel, I feel terrible for you, but you're kind of, this is the way you want this to go down and that's, that's totally up to you, I understand, if you have [a] reason that you want to go to jail I guess that's, that's fine.
>
> Janusiak: (unintelligible)
>
> Becker: But we're talking about jail, no kids[.]
>
> Janusiak: I'll show you how I picked [the baby] up.
>
> Becker: No family. It doesn't matter how you picked her up.

¶29 We conclude that the statements made by the officers were not unduly coercive, because the officers told Janusiak that they did not believe her account, and that she would remain in custody unless and until she could provide an exculpatory explanation for the incriminating medical evidence. *See* ***State v. Deets***, 187 Wis. 2d 630, 636, 523 N.W.2d 180 (Ct. App. 1994) ("An officer may express dissatisfaction with a defendant's responses during an interrogation. The officer need not sit by and say nothing when the person provides answers of which the officer is skeptical."); *see also* ***United States v. Hunter***, 912 F. Supp. 2d 388, 393 (E.D. Va. 2012) (finding defendant's statements not coerced despite fact that interviewing agent "challenged [defendant's] version of events and pressed her to disclose what had happened," and suggested that "what happened was simply a 'tragic accident,'" when defendant's statements regarding injuries to a baby

causing skull fractures did not match medical evidence). Janusiak does not argue that the officers did not actually possess medical evidence at the time of the interview that contradicted at least some significant aspects of Janusiak's ultimate account during the interview. Instead, as in ***Deets*** and the persuasive authority ***Hunter***, the officers here pressed Janusiak explicitly on the basis that none of her accounts provided an adequate explanation for the evidence as they understood it.

¶30 Janusiak relies on federal cases stating that a confession "must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." *See* ***United States v. Tingle***, 658 F.2d 1332, 1335 (9th Cir. 1981) (quoting ***Bram v. United States***, 168 U.S. 532, 542-43 (1897)). However, ***Tingle***, ***Bram***, and the other persuasive authority that Janusiak cites are a mismatch to the circumstances here. In those cases, police used threats or promises of harm or negative consequences to the suspect in order to induce cooperation. Here, the officers used the possibility of a positive consequence, release from custody, to encourage Janusiak to give a statement which might be exculpatory.

¶31 "It is not automatically unduly coercive to promise a benefit to a suspect in exchange for cooperation." ***Lemoine***, 345 Wis. 2d 171, ¶28, citing ***State v. Cydzik***, 60 Wis. 2d 683, 692, 211 N.W.2d 421 (1973). For example, we have held that it is not coercive to encourage a defendant's cooperation by informing the defendant of the potential benefits of cooperation, such as the possibility of probation and treatment in ***State v. Berggren***, 2009 WI App 82, 320 Wis. 2d 209, 769 N.W.2d 110, or the possibility that a prosecutor would view a defendant more favorably in ***Deets***, 187 Wis. 2d at 636-37, as long as the benefit is potentially available and is not illusory. Here the potential benefit of cooperation was the possibility of avoiding continued confinement. As we have explained:

> "An officer telling a defendant that his cooperation would be to his benefit is not coercive conduct, at least so long as leniency is not promised." "Similarly, coercive conduct does not occur when ... an officer, without promising leniency, tells a defendant that if he or she does not cooperate the prosecutor will look upon the case differently." "In either case, the officer does nothing other than predict what the prosecutor will do, without making a promise one way or the other."

Berggren, 320 Wis. 2d 209, ¶31 (quoted sources omitted). Thus, in ***Berggren***, it was not improper for a detective to convey to the suspect the detective's belief that conviction for possession of child pornography would result in a probation disposition, that the suspect's confession would result in treatment for him, and that his cooperation would positively affect the prosecutor's approach to the case. ***Id.***, ¶¶29-32. The police did not act coercively in ***Berggren***, but rather made apparently accurate statements about potential beneficial consequences that could come to the suspect if he gave statements that the police believed matched other evidence in their possession. That is the situation here.

¶32 In sum, applying the ***Hoppe*** balancing test to the totality of the circumstances, we conclude that, given Janusiak's personal characteristics, the pressures and tactics of the officers did not overcome her ability to resist. For these reasons, we conclude that the State demonstrated that Janusiak's statements were voluntarily made, and therefore admissible at trial.

CONCLUSION

¶33 For the reasons set forth above, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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