COURT OF APPEALS
DECISION
DATED AND RELEASED

February 25, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0707-CR

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

State of Wisconsin,

Plaintiff-Respondent,

v.

Oscar Howard,

Defendant-Appellant,

Patricia Lee Fenske,

Defendant.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed*.

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Oscar Howard appeals from the judgment of conviction, following a jury trial, for physical abuse of a child—recklessly

causing great bodily harm, party to a crime, and from the trial court orders denying his postconviction motions. We affirm.

On November 12, 1994, Oscar Howard and Patricia Fenske brought their[1] one-and-one-half-year-old daughter, Janeena, to Milwaukee Children's Hospital where she was diagnosed as having suffered a broken left femur as a result of physical contact. The evidence consisted primarily of police accounts of the parents' statements on the morning after the incident, and testimony of the doctors who examined Janeena. The evidence established that the parents, during the course of an argument, struggled over Janeena and, while Howard held the child, Fenske pulled her at an angle causing the broken leg. Dr. Stephen Lazoritz, a pediatrician and the Medical Director of the Child Protection Center of Children's Hospital, used a doll to demonstrate the child's position and explain his opinion that the combined actions of both parents were necessary to cause the injury.

Jury deliberations lasted two days. According to the statements of four jurors filed in support of Howard's postconviction motions, on the second day a juror brought a Cabbage Patch doll with which various jurors performed demonstrations of Fenske's and Howard's conduct. Howard contends that he is entitled to a new trial because of this jury conduct.

Denying Howard's motion for a new trial, the trial court's very detailed and well-reasoned written decision explained, "Although there is a possibility that some jurors may have not reenacted Dr. Lazoritz's demonstration *precisely*, ... in light of the totality of what has been presented ... any distinction is not critical." Accordingly, despite concluding that the evidence of jury misconduct was competent under § 906.06(2), STATS.,[2] and that

---

[1] The complaint alleged that "Fenske states that she is the mother ... and that ... Howard believes he is the child's natural father, but he is not." Howard testified that he believes he is the father. In this opinion we will refer to Fenske and Howard as the parents.

[2] Section 906.06(2), STATS., provides:

> INQUIRY INTO VALIDITY OF VERDICT OR INDICTMENT. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or

the jury's experiments with the doll involved extraneous information that was potentially prejudicial under ***State v. Eison***, 194 Wis.2d 160, 533 N.W.2d 738 (1995), the trial court concluded:

> ... that the evidence against Howard was so strong that there is not a reasonable possibility a hypothetical average jury could have been prejudiced by the use of the Cabbage Patch doll in the jury room, particularly where the jurors had heard detailed testimony relating to the physical positions of both parents, their actions, and the general movement in which they were engaged while pushing and pulling on the baby; and particularly where an actual demonstration was performed by the doctor with another doll as to how the baby was held and what movements had occurred.

Howard argues that the jury's experimentation with the doll was prejudicial. The State counters by arguing not only that the jury conduct was non-prejudicial, but also that the evidence of the jury conduct was incompetent and inadmissible. We need not address the State's intriguing theories regarding the competency of the evidence of juror misconduct because we conclude beyond a reasonable doubt that, assuming the Cabbage Patch doll demonstrations were extraneous and potentially prejudicial, there still is "no reasonable possibility" that a hypothetical average jury could have been prejudiced.

(..continued)

> any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may the juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received.

Under § 906.06(2), STATS., when a trial court concludes that evidence of juror misconduct is competent and admissible and that the extraneous information is potentially prejudicial, the trial court "must then determine, as a matter of law, whether the extraneous information constituted prejudicial error requiring reversal of the verdict." ***Eison***, 194 Wis.2d at 177, 533 N.W.2d at 744. In making that determination, the trial court "must assess, as a matter of law, whether the conviction must be reversed because there is a reasonable possibility that the [jury misconduct] would have had a prejudicial effect upon a hypothetical average jury." ***Id.*** at 177, 533 N.W.2d at 745. In measuring whether such a reasonable possibility exists, we adhere to "the constitutional error test for criminal cases ... namely, that the state 'must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" ***Id.*** at 178, 533 N.W.2d at 745 (quoting ***Chapman v. California***, 386 U.S. 18, 24 (1967)).

We independently review the trial court's determination of prejudice. *See* ***id.*** As our supreme court has explained, we consider the "totality" of factors including:

> the nature of the extraneous information, the circumstances under which it was brought to the jury's attention, the nature and character of the state's case and the defense presented at trial, and the connection between the extraneous information and a material issue in the case.

Id. at 179, 533 N.W.2d at 745. We conclude that the totality of factors establishes beyond a reasonable doubt that the jury demonstrations with the doll did not contribute to the verdict.

As Howard explains, "[t]he central issue in the trial focused on whether [his] actions or lack thereof was causal with respect to the injuries that Janeena received during the incident.... It was [his] contention that there was no affirmative conduct on [his] part ... and that he was a victim of circumstances beyond his control." The jury demonstrations with the Cabbage Patch doll, however, would have had little if any bearing on that issue; they were merely cumulative to the trial testimony and doll demonstrations of Dr. Lazoritz.

Moreover, Howard's exculpatory versions of the cause of Janeena's injury were inconsistent with the medical evidence. Finally, in his trial testimony, Howard acknowledged that during his argument with Fenske he held Janeena while Fenske pulled her legs. Thus Howard's admitted conduct, though not the sole cause of injury, was sufficient to constitute a substantial causal factor for one convicted as a party to the crime.[3]

On a related issue, Howard argues that the trial court erred in denying an evidentiary hearing on his motion regarding juror misconduct. Howard sought a hearing to require testimony from the eight jurors who had not provided statements prior to his postconviction motion. As the State responds, however:

> The circuit court accepted the facts asserted in these [four written juror] statements as verities. And Howard has never alleged that any of these jurors could testify to any facts in addition to those recounted in their statements. Thus, there was no need for an evidentiary hearing to prove any of the facts within their knowledge.
> Nor had Howard ever suggested what additional facts, if any, any of the other jurors could have recited at any evidentiary hearing.

The State is correct. The supreme court has explained:

---

[3] Howard also presents separate constitutional arguments for a new trial because of jury misconduct based on his sixth amendment rights to be present and have representation at all proceedings, and to be tried by a fair and impartial jury. As the supreme court explained in ***Eison***, however, "[a]lthough the error of extraneous information in a criminal trial may implicate the defendant's constitutional rights, reversal is not mandated unless the error is prejudicial." ***State v. Eison***, 194 Wis.2d 160, 180 n.4, 533 N.W.2d 738, 746 n.4 (1995). Therefore, having concluded that the trial court correctly determined that the jury misconduct was not prejudicial, we need not address Howard's additional theories. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

> [I]f the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.

Nelson v. State, 54 Wis.2d 489, 497-98, 195 N.W.2d 629, 633 (1972). Further, specifically in the context of a motion for an evidentiary hearing to establish alleged jury misconduct, we explained that a defendant's "preliminary showing must assert facts that, if true, would require a new trial." ***State v. Marhal***, 172 Wis.2d 491, 497, 493 N.W.2d 758, 761-62 (Ct. App. 1992). Here, the trial court accepted Howard's factual premise of jury misconduct. Therefore, even assuming that evidence from additional jurors would have further substantiated Howard's factual allegations, additional evidence would not have advanced his unsuccessful legal theory.

Howard also argues that the trial court erred in denying his motion to suppress his statements to the police. After interviewing Fenske at the hospital, the police went to Howard's home and interviewed him there. Viewing this simply as an investigative interview, the officers did not read Howard his ***Miranda*** warnings.[4] Following an evidentiary hearing, the trial court denied Howard's motion concluding that "[t]here is simply nothing here that leads me to believe that a reasonable person would have believed that he was in custody" and, therefore, that ***Miranda*** warnings were not required. Howard argues that the trial court erred in concluding that he was not in custody.

For ***Miranda*** warnings to be required, a person must be in "custody" and under "interrogation" by the police. ***State v. Mitchell***, 167 Wis.2d 672, 686, 482 N.W.2d 364, 369 (1992). This court's review of a trial court's conclusions about whether certain undisputed facts establish "custody" and "interrogation" is *de novo*. *See* ***State v. Clappes***, 136 Wis.2d 222, 235, 401 N.W.2d 759, 765 (1987) (application of evidentiary or historical facts to constitutional principles presents questions of law independently reviewed on appeal).

---

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

A person need not be under formal arrest to be in a custodial status requiring ***Miranda*** warnings. *See* ***State v. Pounds***, 176 Wis.2d 315, 322, 500 N.W.2d 373, 377 (Ct. App. 1993). To evaluate whether a person is in custody for Fifth Amendment ***Miranda*** purposes, courts must consider the totality of the circumstances and determine whether a "reasonable person in the defendant's position would have considered himself or herself to be 'in custody,' given the degree of restraint." ***State v. Swanson***, 164 Wis.2d 437, 446-47, 475 N.W.2d 148, 152 (1991).

We must adopt the trial court's factual findings unless they are clearly erroneous. ***State v. Coerper***, 192 Wis.2d 566, 571, 531 N.W.2d 614, 617 (Ct. App. 1995), *aff'd*, 199 Wis.2d 216, 544 N.W.2d 423 (1996). Whether a suspect was in custody, however, presents a question of law which we determine without deference to the trial court decision. ***Pounds***, 176 Wis.2d at 320, 500 N.W.2d at 376 (Ct. App. 1993). In determining whether a suspect is in custody for ***Miranda*** purposes, "a court should consider the totality of the circumstances" including "[t]he defendant's freedom to leave the scene and the purpose, place and length of the interrogation." ***State v. Leprich***, 160 Wis.2d 472, 477, 465 N.W.2d 844, 846 (Ct. App. 1991).

When the police arrived at Howard's apartment, they knew of Janeena's injury but they did not know whether Howard had caused it. They entered Howard's apartment with his permission. Howard was "fully cooperative." They questioned Howard for between twenty and fifty minutes in his own residence—a place "'not indicative of the type of inherently coercive setting that normally accompanies a custodial interrogation.'" ***Leprich***, 160 Wis.2d at 478, 465 N.W.2d at 846 (Ct. App. 1991) (quoting ***United States v. Helmel***, 769 F.2d 1306, 1320 (8th Cir. 1985)). The police did not arrest, cuff, or confine Howard in any way.[5] They never told Howard he could not leave. Under the totality of the circumstances, the trial court's findings were not clearly erroneous. The trial court correctly concluded that Howard was not in custody when questioned by the police at his apartment and, therefore, that ***Miranda*** warnings were not required.

[5] Although Howard claimed that one of the officers prevented him from getting up to put on a shirt, the police denied his allegation, and the trial court believed the police testimony. Howard also testified that the police told him he would be arrested if he refused to answer their questions, but would be ordered into the district attorney's office on Monday if he answered their questions. The trial court found, however, that Howard's testimony in this regard was not credible.

Finally, Howard argues that the complaint lacks probable cause. The State responds that, under ***State v. Webb***, 160 Wis.2d 622, 467 N.W.2d 108, *cert. denied*, 502 U.S. 889 (1991), a defendant cannot challenge the sufficiency of a complaint on appeal given that subsequent proceedings established guilt. Once again, however, we need not confront the State's theory because, we conclude, the complaint establishes probable cause.

A criminal complaint is sufficient when the alleged facts, together with reasonable inferences drawn from them, allow a reasonable person to conclude that a crime was probably committed and the defendant probably is culpable. ***State v. Adams***, 152 Wis.2d 68, 73, 447 N.W. 90, 92 (Ct. App. 1989). Whether a criminal complaint is sufficient presents a legal issue subject to our independent review. ***State v. Barman***, 183 Wis.2d 180, 201, 515 N.W.2d 493, 503 (Ct. App. 1994).

Howard argues that the complaint is insufficient because it "fails to establish that [he] *caused* the great bodily harm or that [his] actions were reckless." We disagree. Clearly the complaint alleged that Howard's actions, in combination with Fenske's, caused a fracture of the child's femur. According to the complaint, Dr. Lazoritz was presented with the information police had gathered about the parents' altercation. That, together with his medical assessment of the child, led him to conclude that the "height differential" at which the parents were holding the child

> would create an angle in the child's femur, and if there was traction by the mother on the child's leg at an angle, then this angle could cause a transverse fracture of the femur. Merely pulling on the leg would not cause a transverse fracture, but pulling or pushing at an angle as in the struggle, would be a sufficient force to cause a fracture of a femur in an infant this age.

Although not as explicit, the complaint also establishes probable cause that Howard's conduct was reckless. Under § 948.03(1), STATS., "'recklessly' means conduct which creates a situation of unreasonable risk of harm to and demonstrates a conscious disregard for the safety of the child."

The complaint alleges a series of arguments between Fenske and Howard accompanied by their physical struggles over the child. According to Fenske's statement in the complaint, she observed Howard:

> lifting the baby up by the back of her clothes. She states she then attempted to grab for the baby at which time [Howard] pulled the baby close to his upper body. She then began to pull on the lower part of the baby. She states that the baby then began to cry while she was pulling the baby and while [Howard] was securing the baby close to him.

Further, according to Howard's statement in the complaint:

> the two of them engaged in a tussle with the baby. He states that he grabbed the baby under the arms, holding her to his upper body at which time [Fenske] had the baby by the legs and feet. He states that during their scuffle, the baby began to cry.

We are satisfied that these allegations establish probable cause that Howard engaged in conduct presenting an unreasonable risk of harm to and demonstrating a conscious disregard for the safety of the child.

By the Court. – Judgment and orders affirmed.

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