COURT OF APPEALS
DECISION
DATED AND FILED

February 18, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP504-CR **Cir. Ct. No. 2010CF1732**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONNELL DONYELL FARR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS R. CIMPL and ELLEN R. BROSTROM, Judges. *Affirmed*.

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Ronnell Donyell Farr appeals a judgment of conviction, entered after a jury found him guilty of first-degree intentional homicide with the use of a dangerous weapon. *See* WIS. STAT. §§ 940.01(1)(a),

939.63(1)(b) (2009-10).[1] He also appeals the order denying his postconviction motion, filed under WIS. STAT. § 809.30.[2] Farr argues: (1) he was denied his right to due process by coercive police conduct during his interrogations; (2) the fruit of his involuntary confession should have been excluded; and (3) a new trial is warranted in the interests of justice. We disagree and affirm.

BACKGROUND

¶2 Farr was charged with one count of first-degree intentional homicide with the use of a dangerous weapon. He filed a ***Miranda-Goodchild*** motion challenging the admissibility of statements he made to police.[3] The trial court denied Farr's motion and the case proceeded to a jury trial.

¶3 After the jury found him guilty of the crime charged, Farr was convicted and sentenced to life imprisonment with eligibility for release to extended supervision in 2051. He filed a postconviction motion seeking a new trial in the interests of justice or, in the alternative, "a full and fair ***Miranda[-]Goodchild*** hearing." Farr argued that his right to remain silent and his request for counsel were not honored during the interrogation process. He

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] The Honorable Dennis R. Cimpl presided over Farr's jury trial, sentenced Farr, and entered the judgment of conviction. The Honorable Ellen R. Brostrom denied Farr's postconviction motion.

[3] *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). A ***Miranda-Goodchild*** hearing is "designed to examine (1) whether an accused in custody received ***Miranda*** warnings, understood them, and thereafter waived the right to remain silent and the right to the presence of an attorney; and (2) whether the admissions to police were the voluntary product of rational intellect and free, unconstrained will." ***State v. Jiles***, 2003 WI 66, ¶25, 262 Wis. 2d 457, 663 N.W.2d 798.

asserted that the trial court erred when it concluded that his confession was voluntary and that if the trial court had properly excluded his involuntary confession, it also would have excluded Henry Pringle's statement implicating Farr as "fruit of the poisonous tree." The postconviction court denied Farr's motion without a hearing.

DISCUSSION

A. *Judicial estoppel.*

¶4 Farr submits that because his confession was involuntary, it was improperly admitted at trial. He argues that detectives denied him of his right to remain silent and his right to counsel. We need not address the merits of these claims because we conclude they are barred at the outset by the doctrine of judicial estoppel.

¶5 The doctrine of judicial estoppel "protect[s] against a litigant playing 'fast and loose with the courts' by asserting inconsistent positions in different legal proceedings." ***State v. Ryan***, 2012 WI 16, ¶32, 338 Wis. 2d 695, 809 N.W.2d 37 (citation and one set of quotation marks omitted). It is used to prevent a litigant from asserting a position in a legal proceeding that is clearly inconsistent with an earlier position. ***Id.*** "For judicial estoppel to be available, three elements must be satisfied: (1) the later position must be clearly inconsistent with the earlier position; (2) the facts at issue should be the same in both cases; and (3) the party to be estopped must have convinced the first court to adopt its position." ***Id.***, ¶33. Whether the elements are met is a question of law, which this court reviews *de novo*. ***Id.***, ¶30.

¶6 The State explains that it did not introduce any evidence of statements made to the police by Farr in its case-in-chief. Specifically, the State asserts that it did not—at any time—introduce evidence of Farr's confession to Detective Rodolfo Gomez. Rather, it was Farr, who introduced the testimony of his confession to Gomez over the State's objection.[4]

¶7 Given the context surrounding the admission of this evidence, we agree with the State that Farr, having insisted on introducing the evidence of his statement to Gomez over the State's objection, is now estopped from arguing on appeal that because his confession was involuntary, it was improperly admitted at trial. Farr's current position is in direct contradiction with his position during trial when he actively sought the admission of this evidence. The elements of judicial estoppel are met, and as a result, Farr's claims pertaining to the legality of his confession are barred.[5]

[4] Farr writes in his reply brief: "Only after the State said it would use Farr's confession, called witnesses to convince the trial court of its admissibility, and won a ruling that Farr's confession was admissible did the defense introduce Farr's confession, which then elicited an objection from the State's prosecutor." We are not convinced by Farr's assertion that the State's approach amounts to playing fast and loose with the judicial system or that the State has unclean hands. The State did not use the confession in its case-in-chief; therefore, if Farr wanted to keep it out of evidence, he should not have introduced it. This was not a situation where he was pre-empting the impact of evidence that would be offered later by presenting it first. As the postconviction court explained: "The fact is … that the State did *not* use the confession in its case-in-chief, *and* the State only mentioned the defendant's statements to police during its rebuttal argument—only after the defense's closing argument commented on how forthcoming the defendant was with detectives during the interrogation process."

[5] In an effort to avoid this result, Farr argues that judicial estoppel is inapplicable because there is no record of what he argued to support the trial court ruling regarding the admissibility of his confession to Gomez. We are not convinced that this is necessary. In the end, it comes down to Farr arguing on appeal that because his confession was involuntary, it was improperly admitted at trial. But, at trial, he argued that his confession should be admitted—and won. This is sufficient for us to conclude that judicial estoppel applies.

B. ***Fruit of the poisonous tree.***

¶8 According to Farr, it was his involuntary confession that prompted the police to arrest Pringle. Consequently, Farr argues that Pringle's testimony, which implicated Farr, should have been excluded as the "fruit of the poisonous tree."

¶9 The "fruit of the poisonous tree" doctrine seeks to prevent parties from benefiting from evidence that is unlawfully obtained and, therefore, excludes evidence which is obtained by the exploitation of other illegally obtained evidence. *See* ***State v. Roberson***, 2006 WI 80, ¶32, 292 Wis. 2d 280, 717 N.W.2d 111.

¶10 Farr argues: "Pringle was not arrested until after Farr confessed and implicated Pringle." However, even if Pringle's arrest followed Farr's confession, as the State points out, Pringle was known as a potential witness earlier. The State explains:

> The police were already interested in Pringle because of his possible connection to this case within an hour of Farr's arrest. At about three o'clock on the morning of April 1, 2010, the police showed Tasheka Rogers a booking photo of Pringle. Rogers identified the person in the photo as someone nicknamed "Shorty Long," who she said was a close friend of Farr.
>
> When Detectives Corbett and Casper interviewed Farr shortly after noon the same day, they asked him which of his friends were at the bar the night of the shooting. Farr told these detectives that Shorty Long, who the police knew was Pringle, was there.
>
> Thus, the police knew during their first interview with Farr, which Farr has never alleged to be unlawful, that Henry Pringle, a/k/a Shorty Long, was a potential witness who could have information about the homicide Farr was arrested for committing because he was a good friend of

> Farr who was present at the scene of the shooting the night it occurred.
>
> Detective Gomez asked Farr about his "other friend" who was with him the night of the shooting. Farr said this person was a "high school friend." Gomez then asked if that friend was "Pingo," i.e.[,] Pringle, and Farr said yes.
>
> Plainly then, Gomez already knew that Farr's friend Pringle had been with him the night of the shooting. The question asked by Gomez during his interrogation of Farr merely confirmed what the police already knew.

(Record citations omitted.)

¶11 We are not convinced by Farr's assertions that the decision to further investigate Pringle was predicated solely on Farr's own confession. Rather, the police had sufficient reasons apart from Farr's confession to interview Pringle. As such, even if we had concluded that Farr's confession was involuntary, we would nevertheless conclude that Pringle's testimony was not the "fruit" of Farr's statement. *See* ***United States v. Crews***, 445 U.S. 463, 475 (1980) (holding that the exclusionary rule "does not reach backward to taint information that was in official hands prior to any illegality").

C. *New trial in the interests of justice.*

¶12 Finally, we conclude Farr has not demonstrated that he is entitled to a new trial in the interests of justice. *See* WIS. STAT. § 752.35. As summed up by the State, "the power of discretionary reversal does not allow a defendant to get a new trial in order to present a different defense simply because the defense he intentionally selected at the first trial did not work as well as he thought it would." *See* ***State v. Hubanks***, 173 Wis. 2d 1, 29, 496 N.W.2d 96 (Ct. App. 1992) (explaining "the statute [§ 752.35] was not intended to vest this court with power of discretionary reversal to enable a defendant to present an alternative defense at

a new trial merely because the defense presented at the first trial proved ineffective"). We agree that this is not a case that warrants discretionary reversal. *See* ***Vollmer v. Leuty***, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990) (emphasizing that our power of discretionary reversal is reserved for only the exceptional case).[6]

By the Court.—Judgment and order affirmed.

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

[6] We note in passing that Farr's counsel references matters outside the record in the form of counsel's understanding as to what Farr might have heard during a lineup. Although it ultimately did not impact our resolution of this appeal, we take this opportunity to remind counsel that such references are improper given that an appellate court will not consider matters outside the record. *See generally* ***South Carolina Equip., Inc. v. Sheedy***, 120 Wis. 2d 119, 125-26, 353 N.W.2d 63 (Ct. App. 1984) ("An appellate court can only review matters of record in the trial court and cannot consid0er new matter[s] attached to an appellate brief outside that record.").