COURT OF APPEALS
DECISION
DATED AND FILED

May 13, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP351-CR **Cir. Ct. No. 2011CF3830**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JIMMY SCALES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed.*

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

¶1 PER CURIAM. Jimmy Scales appeals a judgment convicting him of one count of felony murder, with armed robbery as a party to a crime as the predicate offense. He argues that his confession to police should be suppressed because he claims that he did not initiate additional questioning by the police after

he asserted his right to a lawyer. He also argues that his confession should be suppressed because the police did not give him ***Miranda*** warnings before resuming the interrogation. *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966). We affirm.

¶2 Scales was interrogated while in police custody four separate times over a period of three days about an armed robbery during which Sharon Staples was killed. Scales moved to suppress the statements he made. The State informed Scales and the circuit court that it intended to use only the statement Scales made during the fourth interview. Testimony at the hearing on the suppression motion focused primarily on that interview and the events leading up to it. Scales and two detectives testified. The circuit court also read a written transcript of the audio-recordings made of all conversations in the interrogation room. In an oral decision, the circuit court denied the motion to suppress.

¶3 Before questioning a suspect in police custody, government officials are required to give ***Miranda*** warnings "to prevent government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment." ***State v. Hambly***, 2008 WI 10, ¶48, 307 Wis. 2d 98, 745 N.W.2d 48 (quotation marks omitted). "[A]n accused … having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." ***Edwards v. Arizona***, 451 U.S. 477, 484-85 (1981). This rule "is designed to prevent police from badgering a defendant into waiving his previously asserted ***Miranda*** rights." ***Minnick v. Mississippi***, 498 U.S. 146, 150 (1990) (quotation marks and citation omitted). A routine inquiry to the police about a matter unrelated to the police investigation, such as a request for

a glass of water, is not sufficient to initiate further discussion with the police. ***Oregon v. Bradshaw***, 462 U.S. 1039, 1045 (1983). The accused person must show "a desire … to open up a more generalized discussion relating directly or indirectly to the investigation." ***Id.***

¶4 Scales argues that there was no credible evidence adduced at the suppression hearing that he initiated further discussion with the police. On appeal, we will affirm the circuit court's findings of historical or evidentiary fact unless they are clearly erroneous. *See* ***Hambly***, 307 Wis. 2d 98, ¶71. Based on the facts found by the circuit court, whether Scales initiated further questioning in accord with the principles explained in ***Edwards*** is a legal question that we review independently of the circuit court, benefitting from its analysis. *See* ***Hambly***, 307 Wis. 2d 98, ¶71.

¶5 At the suppression hearing, the prosecutor informed the court that he intended to introduce only the fourth of four statements that Scales made to the police. The prosecutor first called Detective James Hutchison, who conducted Scales' third interview on his second day in custody. Hutchison testified that his interview with Scales ended when Scales asked to be taken back to his room in the jail. Hutchison testified that on the way back to his room, Scales told Hutchison that he would speak to another detective. Hutchison said that nothing had prompted Scales to volunteer this information. Hutchison informed his superiors during a briefing that Scales was willing to talk to a different detective.

¶6 The prosecutor next called Detective Daniel Thompson, who interviewed Scales with Detective Gust Petropoulos the day after Hutchison interviewed him. Thompson testified that he read Scales his ***Miranda*** rights and interviewed him for about an hour. Scales then asked for a lawyer, so Thompson

stopped the interview and placed Scales in handcuffs to walk him from the interview room to the location where he would be sent back over to the jail. Thompson testified that they were waiting for Scales to be searched before he was sent back to the jail when Scales said that he wanted to talk to him again. Thompson testified that he asked Scales if he was willing to be taken back upstairs to the interview room and whether he was willing to talk to him without a lawyer, and Scales said yes. Thompson testified that he took him back up to the interview room. After they were in the room, Scale admitted that he knew that his co-defendants had planned a robbery before the crime was committed.

¶7 Scales testified at the suppression hearing that he asked for a lawyer while Thompson was interviewing him. He testified that as Thompson was walking him downstairs from the interview room, Thompson "told me that since I was the oldest, they [were] probably going to point the finger at me." Scales testified that he continued to refuse to talk, so Thompson "started talking to another officer trying to convince me to go back upstairs and he told me—he said: How many young, innocent men that haven't done anything that's been charged with murder?" Scales testified that they then went back upstairs to the interview room and talked. He said he talked to Thompson because he felt like he "didn't have any choice but to talk because they didn't bring my lawyer down."

¶8 Thompson and Scales testified to two starkly different versions of what happened. When there is a conflict in testimony, the circuit court as finder of fact is tasked with resolving it. *See* ***State v. Owens***, 148 Wis. 2d 922, 930, 436 N.W.2d 869 (1989). This is because the circuit court "not only hears the testimony, but also sees the demeanor of the witness[es] and the body language." ***Id.*** at 929. Contrary to Scales' assertion that there was no credible evidence to support the circuit court's finding that he initiated further discussions with the

police, Thompson's testimony constituted credible evidence that Scales resumed discussions with the police pertaining to the investigation. The circuit court found Thompson's testimony to be more credible than Scales' testimony, explaining that it did not believe Scales when he said that he was verbally coerced by Thompson into continuing the interview:

> Mr. Scales' testimony just doesn't make sense. What makes sense is that he did in this case exactly what he did multiple times over the course of four interviews, over the course of days which is the back and forth, the bantering, the interplay between a detective and a defendant where Mr. Scales apparently decided that he was going to confess his involvement, confess his part of what he did or all of what he did, all that on a day-by-day, drip-by-drip process. And ultimately after four days, Mr. Scales decided to talk.
>
> I believe the testimony from the detective struck me as honest and straight forward. I'm less persuaded by the testimony of Mr. Scales. Mr. Scales' testimony is just frankly too convenient.

The circuit court also pointed out that Scales' version of events was undermined by the transcript of the audio-recording, which showed that Scales immediately started talking after he got back in the interview room, confessing that he knew his co-defendants were going to commit a robbery, with little prompting on Thompson's part. Based on the testimony at the suppression hearing, coupled with the circuit court's credibility determinations, and the transcript of the audio-recordings of the interviews, we conclude that Scales resumed discussions with the police of his own accord *after* he requested a lawyer. Thompson did not violate Scales' ***Miranda*** rights when he continued to question Scales because the discussions continued at Scales' behest.

¶9 Scales next argues that his statement to the police should be suppressed because Thompson did not read him the ***Miranda*** warnings when he

continued questioning him. There is no *per se* rule that the police give a suspect the ***Miranda*** warnings after each break in an interrogation. To the contrary, "when ***Miranda*** rights are properly administered, it is not necessary to re-administer the ***Miranda*** warnings at a subsequent interrogation" if the defendant understood his rights. ***State v. Backstrom***, 2006 WI App 114, ¶13, 293 Wis. 2d 809, 718 N.W.2d 246 (citation omitted). Thompson read Scales his ***Miranda*** rights at the beginning of their interview, explaining them in depth even though Scales wanted to ask the police questions before Thompson was done reading him the rights. This occurred only about an hour before the questioning was terminated and then quickly resumed, the point at which Scales contends he should have *again* been read the ***Miranda*** warnings. During the course of his interrogation by police, Scales was informed at least four different times of his ***Miranda*** rights and he asserted those rights at various points over the several days he was in custody and being questioned, terminating interviews with the police. Based on the totality of the circumstances, we conclude that Scales understood his ***Miranda*** rights and knowingly and voluntarily waived them when he decided to resume the interview with police.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).