COURT OF APPEALS
DECISION
DATED AND FILED

June 29, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0629-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PATRICIA LABELLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

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

WEDEMEYER, P.J. Patricia LaBelle appeals from a judgment entered after a trial to the court on a charge of theft of movable property not exceeding $1,000, but less than $2,500, from her employer, Pick-n-Save, contrary to §§ 943.20(1)(a) and 943.20(3)(b), STATS. LaBelle raises three claims of error: (1) the trial court erred in refusing to suppress her statement; (2) the trial court

erred in failing to dismiss the charge against her because the State failed to produce exculpatory evidence; and (3) the evidence was insufficient to demonstrate her guilt for theft of movable property.

Because LaBelle's inculpatory statement did not occur while she was in custody, because the evidence not produced by the State was not exculpatory, and because the evidence was sufficient to support the conviction, we affirm.

I. BACKGROUND

On October 2, 1995, LaBelle, who was employed by Pick-n-Save as a check-out cashier, left her shift, which ended at 9:00 p.m., twenty minutes early. In addition, she left her cash drawer in the counting room without going through the normal procedure of being checked out. After she left, her supervisors concluded that the cash drawer she left in the counting room did not contain the correct amount of cash, as reflected by the tapes from the cash register she used.

LaBelle was scheduled to work the following morning, but did not appear. A security agent for Pick-n-Save, who had been apprised of the situation, called LaBelle at her home, but when she did not come to the phone, he drove to her apartment. After some delay, LaBelle responded to the security agent's requests to speak with her. LaBelle admitted her cash drawer was short of cash and that she had taken the money that was missing. She agreed to drive to the store with the agent. After LaBelle arrived at the Pick-n-Save, she agreed to drive back to her apartment with police to assist in further investigation. Shortly thereafter, while standing in a hallway outside of her apartment, she admitted to Detective Thomas Meyer that she took the missing money.

After LaBelle was bound over for trial, she filed a discovery demand requesting that the State produce all cash register tapes that Pick-n-Save had for October 2, 1995. In its return to the demand, the State was unable to produce the desired cash register tape. LaBelle moved to dismiss the charge, but the motion was denied. She also moved for a ***Miranda-Goodchild*** hearing to suppress the statement she had given to Detective Meyer. After a hearing, the trial court denied the motion. LaBelle now appeals.

II. DISCUSSION

A. Suppression Motion.

LaBelle first claims that the trial court erred when it refused to suppress a statement she made to a police detective in the hallway outside of her apartment after the detective requested that she step out into the hallway to discuss the investigation of the missing money. LaBelle argues that the circumstances under which she gave an inculpatory statement were the equivalent of a custodial interrogation, thus warranting a ***Miranda*** warning. She further asserts that her statement was not voluntary. We are not convinced.

The safeguards of ***Miranda v. Arizona***, 384 U.S. 436 (1966) apply only when a suspect is "in custody." ***Id.*** at 444-45. A person is "in custody" for ***Miranda*** purposes when one's "freedom of action is curtailed to a degree associated with formal arrest." ***Berkemer v. McCarty***, 468 U.S. 420, 441 (1984) (internal quotation marks omitted); *see* ***State v. Pounds***, 176 Wis.2d 315, 321, 500 N.W.2d 373, 376 (Ct. App. 1993). Because "custody" is determined by an objective standard, the subjective belief of the suspect and the subjective intent of the police are irrelevant. *See* ***Stansbury v. California***, 511 U.S. 318, 323-24 (1994); ***Pounds***, 176 Wis.2d at 321, 500 N.W.2d at 376. We review the historical

facts determination of the trial court under the clearly erroneous standard, but independently address the legal constitutional question of whether the suspect was in custody. *See* ***id.*** at 320, 500 N.W.2d at 376.

LaBelle claims that the circumstances under which a police detective elicited an inculpatory statement from her rendered the statement inadmissible. Also, LaBelle testified that she felt she was in custody because she was taken from her place of employment and driven to her home to further investigate the money that was missing from her cash drawer.

The record contains the following facts. On the morning of October 3, 1995, the day following the alleged theft, LaBelle returned voluntarily to her place of employment, Pick-n-Save, with a security agent. She then voluntarily returned to her residence with police officers who, without any objection on her part, were allowed to search her apartment for the missing money. When Detective Meyer arrived at LaBelle's apartment, he entered and asked to speak with her in the hallway outside of her apartment. During this conversation, she admitted taking the missing money.

There is no testimony in the record that she was placed under arrest, that she was handcuffed, or that her movement within her apartment was restricted in any significant manner.[1] The trial court, after hearing the testimony of both LaBelle and Detective Meyer, found "there was no objective evidence of her being

[1] LaBelle testified that the police officers who drove her home told her she was detained and was in custody and could not leave her apartment until the matter of the missing money was resolved. Her testimony stands in contrast to that of Detective Meyer. Although the trial court did not expressly address her version of the events of the morning of October 3, we assume that the trial court made findings discounting her credibility in arriving at its conclusion that she was not "in custody." *See generally* ***State v. Angiolo***, 186 Wis.2d 488, 495-96, 520 N.W.2d 923, 927 (Ct. App. 1994).

in custody," and concluded a custodial condition did not exist. Its findings of fact are not clearly erroneous, and consequently, its conclusion of law is supported by the evidence.

LaBelle also claims that her statement was given involuntarily. Although factual findings are reviewed by the clearly erroneous standard, whether a statement was voluntarily given is reviewed independently. *See* ***State v. Moats***, 156 Wis.2d 74, 93-94, 457 N.W.2d 299, 308 (1990). LaBelle's claim is based upon information that Detective Meyer obtained from the security agent who had driven her back to work, and the contents of the conversation that had occurred in the hallway outside of her apartment. We reject this claim.

When Detective Meyer talked to the security agent from Pick-n-Save, he learned that LaBelle was possibly suffering from some unspecified mental problem. The possibility of an existing mental problem was revealed when LaBelle spoke to the security agent earlier in the day at her apartment. Regardless, the trial court found that LaBelle denied having a mental problem and that her earlier comments to the security agent were just a demonstration of "her weird sense of humor." The trial court further found that Detective Meyer was able to talk to LaBelle coherently and rationally. Finally, LaBelle admitted her willingness to talk "to anyone she thought could straighten the matter out." The trial court did not err in concluding that LaBelle's statement to Detective Meyer was voluntary.

B. Exculpatory Evidence.

LaBelle next claims that the trial court erred when it denied her motion to dismiss based on an alleged failure of the State to produce exculpatory documentary evidence. This claim of error relates to a certain "cash register tape"

that was supposedly attached to a police report dated October 3, 1995, and reflected transactions that were processed on the register that LaBelle operated on October 2, 1995. Upon return for the demand, it was learned that the desired tape was not in the possession of Pick-n-Save, the police department, nor the district attorney's office. Thus, it was not produced.

A negligent failure to preserve evidence violates due process only if the evidence possessed an exculpatory value, which was apparent before it was lost, and the defendant is unable to obtain comparable evidence by reasonably available means. *See* ***State v. Greenwold***, 189 Wis.2d 59, 67, 525 N.W.2d 294, 297 (Ct. App. 1994). Evidence is exculpatory when it raises a reasonable doubt about the defendant's guilt. *See* ***California v. Trombetta***, 467 U.S. 479, 485 (1984).

The record reveals that there were four tapes relating to the cash register that LaBelle used on her shift on October 2, 1995: (1) a tape showing the total monetary amount of all items purchased at her register up to the middle of her shift; (2) a tape showing the total monetary amount of all items purchased at her register by the end of her shift; (3) a tape showing the transactions voided by her during her shift; and (4) a tape showing the individual prices of each item purchased at her register during her shift, the total monetary amount of all items purchased by each customer, and the method of payment by each customer. Tape number four is the focus of LaBelle's claim of error.

It is uncontroverted that one of the Pick-n-Save security agents took tape number four home with him on the evening of October 2, 1995, and later turned it over to an unidentified police officer at Pick-n-Save. Nothing in the record sheds further light on what happened to the tape. There is no evidence that

any police officer deliberately destroyed tape number four in a conscious effort to suppress evidence known to be favorable to LaBelle. There is no evidence that if the tape was negligently lost, it possessed any exculpatory value which was apparent before it was lost. To demonstrate that the missing tape is of an exculpatory nature requires that the tape show that LaBelle's recorded transactions produced net cash of only $1,400, the amount she left in her cash drawer in the counting room when she departed early from her shift. Although LaBelle claimed her register was not working properly, no other corroborative facts were presented to elevate the supposition to a level of an apparent exculpatory explanation sufficient to demonstrate a due process violation. Therefore, we reject this claim.

C. Insufficiency of the Evidence.

Finally, LaBelle claims that the evidence educed was insufficient to prove beyond a reasonable doubt that she stole over $1,000 from Pick-n-Save. We reject her claim.

The test for reviewing whether the evidence is sufficient to sustain a criminal conviction is not whether the evidence is sufficient to exclude every reasonable hypothesis of innocence, but whether the trier of fact could have been reasonably convinced of the accused's guilt beyond a reasonable doubt by any direct or circumstantial evidence upon which it had a right to rely. *See* ***State v. Poellinger***, 153 Wis.2d 493, 503, 451 N.W.2d 752, 756 (1990). In this role, the finder of fact is free to determine which testimony it finds credible, regardless of any conflicts in the testimony, and is permitted to piece together any evidence it finds credible to construct a chronicle of the alleged crime. *See* ***State v. Sarabia***, 118 Wis.2d 655, 663-64, 348 N.W.2d 527, 532 (1984). Here the evidence is more than sufficient to sustain the conviction.

LaBelle argues there is no evidence that the register tapes were accurate, claiming that only the missing tape number four could conclusively show the amount of cash she should have had in her cash drawer at the end of her shift. Her point is not persuasive.

When LaBelle drove back to Pick-n-Save with the security agent, she admitted she took the missing money. Later the same day, she confessed to Detective Meyer that she took the money and gave it to her daughter to pay for medical bills. She asserts that various witnesses offered contradictory testimony with respect to the amount of money that was allegedly missing. LaBelle's assertion notwithstanding, her Pick-n-Save superiors and the security agent all concluded that the amount missing was $2,512.61. It is not necessary to prove the precise amount that was stolen, only that the amount stolen was over the minimum for the level of the crime charged. *See* ***State v. Kennedy***, 105 Wis.2d 625, 636, 314 N.W.2d 884, 889 (Ct. App. 1981). Thus, we conclude that there was more than enough evidence to support the conviction that LaBelle stole over $1,000.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

SCHUDSON, J. *(concurring).* Although I agree that affirmance is appropriate, I disagree with the majority's reasoning. Primarily, I depart from the majority's determination that the trial court correctly concluded that LaBelle was not in custody when she gave her statement to Detective Meyer outside her apartment.

In its decision denying LaBelle's motion to suppress her statements, the trial court found that "there was no objective evidence of her being in custody" when she gave her statement to Detective Meyer in the hallway outside her apartment. That finding is clearly erroneous. Indeed, LaBelle's custody was established by undisputed evidence at the ***Miranda-Goodchild*** hearing.

At the hearing, in response to her lawyer's questions, LaBelle testified, in part:

> Q: [] Did you believe that your freedom was limited in any way when Officer Meyer was speaking with you?
>
> A: Oh, my freedom had been limited prior to that.
>
> Q: [] But at the time he was speaking with you, did you believe your freedom was limited?
>
> A: Yes.
>
> Q: How so?
>
> A: I was detained.
>
> Q: And why did you consider yourself detained?
>
> A: They told me so when they put me in the police car at Pick 'N Save.
>
> Q: [] So, at the time you had a conversation with him, he informed you that you were detained at that time?

> THE COURT: Excuse me, he's not the one who put her in the squad car.
>
> THE WITNESS: Right[.]
>
> THE COURT: So that's not a conversation with Meyer.

As the undisputed testimony at the hearing further clarified, police officers took LaBelle in a squad car from Pick 'N Save to her apartment, where police told her "to sit in the front room and wait," and where, based on what the police told her, she understood that she "was in police custody until something was resolved, either [until the money] was found or something resolved."

Although Detective Meyer testified that LaBelle "wasn't in custody" when he interviewed her in the hallway, he did not dispute her account of what she was told at Pick 'N Save when other officers "put [her] in the police car." And, as the trial court pointed out, Detective Meyer was not one of the officers at Pick 'N Save involved in detaining or transporting LaBelle. Thus, we are left with an undisputed testimonial record establishing LaBelle's custody.

Nevertheless, I would affirm because the State only used LaBelle's statements in rebuttal, and the testimony at the ***Miranda-Goodchild*** hearing also established that LaBelle's statements to Detective Meyer were voluntary.

Accordingly, I respectfully concur.