COURT OF APPEALS
DECISION
DATED AND FILED

November 2, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1429-CR **Cir. Ct. No. 2003CM194**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

COLLEEN M. NOVAK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: JOSEPH D. MC CORMACK, Judge. *Reversed and cause remanded.*

¶1 NETTESHEIM, J.[1] A jury found Colleen M. Novak guilty of two counts of obstructing an officer pursuant to WIS. STAT. § 946.41(1). Novak appeals from the ensuing judgment of conviction. She raises two issues: (1) the trial court erred by denying her motion to suppress her statement which she contends was the product of custodial interrogation; and (2) the trial court erred when it barred her proffered cross-examination of a State's witness with regard to a tape-recorded statement previously given by the witness. We reject Novak's argument that her statement to the police should have been suppressed. Instead, we agree with the trial court's ruling that Novak was not in custody at the time she provided her statement. However, we agree with Novak's further argument that the trial court erroneously restricted her cross-examination of a key State's witness. We reverse and remand for a new trial.

BACKGROUND

¶2 On the evening of October 4, 2002, Novak's teenage daughter, Erica, and a friend, Cristiana Barbatelli, attended a high school football game. Prior to attending the game, the girls had arranged for Cristiana to sleep over at the Novak residence. The girls had also arranged to "toilet paper" the neighboring Weismueller residence during the sleepover.

¶3 After the game, Novak picked up the girls from the football game and drove them to the Novak residence. A critical issue in this case is whether Novak knew of the girls' plan to toilet paper the Weismueller property. Cristiana testified that the girls spoke of the plan on the trip back from the football game and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

that Novak told them to be careful. Novak testified that no such conversation took place.

¶4 Upon arriving at the Novak home, the girls changed into their pajamas, watched some television, and ate some snacks. After Novak retired for the night, the girls changed their clothes, sneaked out of the house, and toilet-papered the neighboring Weismueller property. They then returned to the Novak home, obtained some ketchup and eggs and more toilet paper, and returned to the Weismueller property where they continued to toilet paper the property, "egged" and "ketchuped" the Weismueller mailbox, and pulled some plants from their containers.

¶5 The Weismuellers reported the incident to the Mequon Police Department. Officer Darin Selk inspected the Weismueller property the next morning and noticed footprints leading from the Weismueller property to the Novak residence. Selk then went to the Novak residence and made contact with Novak. Selk asked Novak if she knew anything about the matter and Novak replied that she did not. When Selk asked about other people in the home, Novak responded that she had picked up Erica and Cristiana from the football game the night before but she doubted that they were involved because they "could not have left the residence without her knowing." Novak then allowed Selk to look around the property. Outside the garage service door, Selk discovered two pairs of muddy tennis shoes with what appeared to be toilet paper embedded in the treads.

¶6 Selk then questioned the girls, both of whom denied any involvement in the Weismueller incident. They explained the toilet paper and mud on their shoes by stating that a friend of theirs had been wrapped in toilet paper at the football game and that the spectator area was muddy due to a recent

rain. Before leaving, Selk again spoke with Novak, who indicated that the Weismuellers "were a problem neighbor, always yelling at her children for stepping foot on their property, causing too much noise, etc., and that they were a problem neighbor for everyone in the neighborhood."

¶7 Several days later, Officer Mario Valdes, the juvenile officer at the girls' school, spoke with Cristiana. This time Cristiana admitted her involvement in the Weismueller incident. She also told Valdes that the girls had told Novak about the incident the following morning prior to Selk's arrival.

¶8 As a result of this information, Valdes telephoned Novak and asked her to come to the police station to discuss the matter. Novak complied and met with Valdes on October 11, 2003. This meeting serves as the basis for Novak's motion to suppress. At this interview, which lasted approximately two hours, Valdes advised Novak that based on his conversation with Cristiana, there was a possibility that Erica was involved and that Novak knew about the girls' involvement prior to Novak speaking with Selk. Novak denied this accusation and, as a result, the conversation between the two became agitated and loud. Although Valdes never formally arrested Novak, he did "book" her at the conclusion of the interview by having her fingerprinted and photographed. Novak was then released.

¶9 Based on Cristiana's statement that Novak knew about the girls' plan and Novak's failure to so admit in her conversations with Selk and Valdes, the State charged Novak with two counts of obstructing an officer pursuant to WIS. STAT. § 946.41(1). Novak filed a motion to suppress the statements she made to Valdes on the grounds that the interview was custodial interrogation and she had not been advised of her rights under ***Miranda v. Arizona***, 384 U.S. 436

(1966). The trial court ruled that Novak was not in custody and denied the motion.

¶10 At the trial, the State's first witness was Cristiana, who testified that she and Erica told Novak about the plan to toilet paper the Weismueller property on the way home from the football game and that they also told her about the accomplished deed the following morning before the arrival of Selk. Following Cristiana's direct testimony and outside the presence of the jury, Novak's attorney sought permission to cross-examine Cristiana about a tape-recorded statement Cristiana had made to Erica during a math class at the girls' school. Novak's attorney did not seek permission to play the tape during the cross-examination since he could not authenticate the tape through Cristiana. Instead, he wanted to alert Cristiana to the existence of the tape. Novak's attorney stated, "But in it [Cristiana] contradicts a great deal of the statements which she gave to the police." Later, counsel said, "[I]f I raise in her mind the specter that she's going to contradict something that's on a tape and that causes her to give a slightly different version on the stand, I think that's fair game. If she's given contradictory statements at another place [and] time, taped notwithstanding authenticated on it." Still later, as part of an offer of proof, Novak's counsel said that his questions to Cristiana "would include the concept of whether or not she might alter her answers if she knew that she had been tape recorded."

¶11 The State did not dispute the existence of the tape and further stated that it knew about the tape in advance of trial. However, the State contended that

the tape was the product of Erica's harassment and intimidation of Cristiana in an effort to get Cristiana to change her story.[2]

¶12 The trial court denied Novak's request to alert Cristiana about the tape during the cross-examination. Noting the State's contention that Cristiana's statements on the tape had been coerced, the court ruled that any reference to the tape put the admissibility of the tape at issue. Thus, the court ruled that it would first have to rule on the admissibility of the tape before it would allow Novak's counsel to refer to it.

¶13 The jury found Novak guilty of both counts. Novak appeals. We will recite additional facts as we address the issues.

DISCUSSION

Motion to Suppress

¶14 Novak sought to suppress her statements made to Valdes on the grounds that Valdes' questioning of her was the functional equivalent of custodial

[2] In fact, the State had previously alerted Erica's social worker about the tape. In response, the social worker revised Erica's supervision rules to bar any contact between Erica and Cristiana.

interrogation, which required the ***Miranda*** warnings.[3] The trial court denied the motion, ruling that Novak was not in custody. We agree.

¶15 Novak initially argues that Valdes' questioning of her constituted interrogation under ***Miranda***. We need no persuasion on this point. Valdes clearly suspected that Novak had not been forthright with Selk about her knowledge of the girls' plan to toilet paper the Weismueller property when Selk initially investigated the matter. In fact, during the course of the interview, Valdes advised Novak of his suspicion that Novak had lied to Selk and that Novak might be lying to him during the interview. This clearly constituted interrogation under ***Rhode Island v. Innis***, 446 U.S. 291 (1980), and ***State v. Cunningham***, 144 Wis. 2d 272, 276-82, 423 N.W.2d 862 (1988). The trial court also appears to have conceded this point since the court's ruling denying Novak's motion to suppress was based solely on the court's holding that Novak was not in custody.

¶16 We therefore turn to the custody question.[4] It is the State's burden to show by a preponderance of the evidence that Novak was not in custody. *See* ***State v. Armstrong***, 223 Wis. 2d 331, 344-46, 588 N.W.2d 606 (1999), *modified*

[3] There is a potential additional issue of first impression raised by the facts of this case to which the State briefly alludes but then does not develop. Unlike the usual ***Miranda v. Arizona***, 384 U.S. 436 (1966), situation where the defendant seeks to suppress a statement or confession regarding a crime previously committed, here the statement that Novak seeks to suppress *constitutes the crime itself* (obstructing an officer). As the State notes, "The theory of the prosecution was not that Novak confessed to a crime, but that she lied." However, the State does not further develop this argument and, instead, responds to Novak's argument on the basis that Novak brings the issue to us—that she was in custody during the interview with Valdes and was therefore entitled to the ***Miranda*** warnings. Although we find the potential issue very interesting, we do not venture into those uncharted waters since the State has not substantively briefed the question.

[4] In addressing this question, we properly consider the evidence presented at both the motion to suppress hearing and the trial. *See* ***State v. Gaines***, 197 Wis. 2d 102, 106 n.1, 539 N.W.2d 723 (Ct. App. 1995).

on other grounds, and reconsideration denied, 225 Wis. 2d 121, 591 N.W.2d 604 (1999). We review this question independent of the trial court's ruling. *See* ***Armstrong***, 223 Wis. 2d at 353. In making this decision, we examine the totality of the circumstances bearing on the custody question. ***California v. Beheler***, 463 U.S. 1121, 1125 (1983); *see also* ***State v. Gruen***, 218 Wis. 2d 581, 594-96, 582 N.W.2d 728 (Ct. App. 1998).

¶17 The most compelling fact in support of the trial court's ruling that Novak was not in custody is that Novak was not under arrest at the commencement of the interview. To the contrary, Novak voluntarily appeared at the police station in response to Valdes' request for an interview. Other factors also support the trial court's ruling. Valdes had known Novak and her family for about three years. The interview did not take place in an interrogation room, but rather in Valdes' office, which Valdes described as "kind of laid out very informal, very casual. Because they do conduct some interviews there with parents and children." The door to the office was open at the beginning of the interview, but soon thereafter, Valdes closed the door so as not to disturb other people in the area because Novak became agitated and loud. Valdes acknowledged that he also might have become loud in his exchanges with Novak but that he did so in an attempt to control the situation. At no time did Valdes handcuff Novak or otherwise place any other physical restraint on her person. Valdes was not armed, and he was wearing civilian attire with a police shield on his belt and a pocket badge. It was not until the end of the interview that Valdes informed Novak that he would be referring the matter to the district attorney and that he would "book" her.

¶18 A person is in custody for purposes of ***Miranda*** if the person has suffered a restraint on freedom of movement of the degree associated with a

formal arrest. ***Beheler***, 463 U.S. at 1125. We ask whether a reasonable person in the suspect's position would have considered herself to be in custody. *See* ***Gruen***, 218 Wis. 2d at 594. On this question we consider such factors as the suspect's freedom to leave, the purpose, place, and length of the interrogation and the degree of restraint employed. ***Id***.

¶19 The facts recited above readily convince us that Novak was not in custody during her interview with Valdes. The mere fact that the interview became confrontational did not transform the event into a custodial situation. The trial court found that Novak's agitated condition had "more to do with her than anything Mr. Valdes did. And I don't think that that suddenly turns that into a ***Miranda*** situation just because of that." We agree. In summary, we hold that none of the relevant facts demonstrate any restraint against Novak's person, much less any restraint of the degree associated with an arrest. *See* ***Beheler***, 463 U.S. at 1125. We uphold the trial court's ruling that Novak was not in custody.

Restriction on Cross-examination of Cristiana

¶20 Novak also argues that the trial court erred when it barred her from cross-examining Cristiana about her tape-recorded statement made to Erica during a math class at the girls' school. The trial court history of this issue is set out in our recital of the factual history of this case, but we repeat it here with some additional details.

¶21 During her direct testimony as the State's first witness, Cristiana stated that on the way home from the football game, the girls had told Novak about their plans to toilet paper the Weismueller property. Cristiana also testified that the girls had told Novak the following morning, before Selk's arrival, that

they had carried out their plans. Cristiana further stated that Novak told her not to talk or brag about the matter at school.

¶22 Before cross-examining Cristiana and outside the presence of the jury and Cristiana, Novak's counsel advised the trial court about the tape recording and stated that it "contradicts a great deal of the statements which she gave to the police." Counsel further stated that he did not intend to introduce the tape into evidence "at this point" noting that Cristiana could not authenticate the tape since "she didn't have possession of the tape recorder." Nonetheless, counsel contended that this did not bar him from alerting Cristiana to the existence of the tape, which might "raise in her mind the specter that she's going to contradict something that's on a tape and that causes her to give a slightly different version on the stand."

¶23 The State did not dispute that the tape existed and conceded that it knew of the existence of the tape in advance of trial. However, the State contended that the tape was the product of "witness intimidation" and harassment by Erica. The State also said that Cristiana "may have said some things to get them to go away so there's the evidentiary issue about the presentation of the tape."

¶24 The trial court recognized that Novak was entitled, as a general matter, to impeach Cristiana with any prior inconsistent statements. However, the court was of the opinion that since Novak sought to specifically reference the tape, the court was first required to rule on the admissibility of the tape, particularly in light of the State's contention that Cristiana's statements were, in the court's words, "coerced." Therefore, the court barred Novak from cross-examining Cristiana about the tape recording or alerting her to the fact of its existence.

Novak contends that the trial court's ruling was contrary to the rules of evidence and also violated her constitutional right to confront her accuser.

¶25 For openers, the State contends that Novak has waived the question of the admissibility of the tape recording since she never sought to introduce the tape. But the State misperceives the thrust of Novak's argument both in the trial court and on appeal. Novak did not seek to introduce the actual tape recording or its contents through Cristiana. Rather, Novak merely sought to alert Cristiana to the fact that the tape recording existed in order to learn whether Cristiana would adhere to, or disavow, any of her direct examination testimony. Novak renews the same argument on appeal. We summarily reject the State's waiver argument.

¶26 We therefore turn to the merits of the issue. At the outset, we make two *very important* threshold observations. First, this case does not present the question of whether the tape recording existed. To the contrary, the State conceded that the tape existed and that it had known about the tape in advance of the trial. Thus, this is not a case where Novak sought to test Cristiana's direct examination testimony based on a fictional event or without any foundation.

¶27 Second, Novak's attorney made an adequate offer of proof regarding the contents of the tape, and we do not read the State to contend otherwise. WISCONSIN STAT. § 901.03(1)(b), entitled "Offer of proof" states that the exclusion of evidence is not error unless, inter alia, "the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked." In ***Milenkovic v. State***, 86 Wis. 2d 272, 272 N.W.2d 320 (Ct. App. 1978), the court said, "The offer of proof need not be stated with complete precision or in unnecessary detail but it should state an evidentiary hypothesis underpinned by a sufficient statement of facts to warrant the conclusion

or inference that the trier of fact is urged to adopt." ***Id.*** at 284. Although no published Wisconsin case has addressed whether an attorney can make the offer of proof, we observe that a respected evidentiary commentator has recognized such a procedure.

> A party may also make an informal offer of proof by means of what is sometimes called a "lawyer offer," as opposed to a "witness offer." In a lawyer offer, the attorney simply states the testimony that he expects the witness to give if allowed to testify. This lawyer offer, of course, can be very detailed or can be very short and simple, consisting of a general summary of the purport of the excluded evidence.

1 Wigmore, Evidence § 20a, p. 859 (Tillers rev. 1983).

¶28 In this case, Novak's attorney stated that Cristiana's statement on the tape contradicted the statement she gave to Valdes. The State as much as conceded this point when it argued that Cristiana's taped statements were the product of Erica's "witness harassment" and intimidation. Finally, the trial court's ruling appears to accept Novak's contention that the tape recording might impeach Cristiana's direct testimony. But the court instead ruled that it first had to rule on the admissibility of the tape recording. We hold that Novak made an adequate offer of proof.

¶29 With those two threshold observations in place, we now move to the ultimate question as to whether the trial court's restriction on Novak's cross-examination of Cristiana was correct.

¶30 Novak couches her argument in terms of two constitutional rights. First, she cites to her right to meaningful confrontation via effective cross-examination under ***Davis v. Alaska***, 415 U.S. 308, 318 (1974), and ***State v. Thomas***, 144 Wis. 2d 876, 893, 425 N.W.2d 641 (1988). The primary objective

of the confrontation clause is to promote the reliability of the evidence against a criminal defendant by rigorously testing it in an adversarial proceeding. *See* ***Maryland v. Craig***, 497 U.S. 836, 845 (1990). Thus, the defendant must have meaningful cross-examination. ***State v. Knighten***, 212 Wis. 2d 833, 847, 569 N.W.2d 770 (Ct. App. 1997).

¶31 Second, Novak cites to her right to present favorable evidence under ***Chambers v. Mississippi***, 410 U.S. 284, 302 (1973), and ***State v. Pulizzano***, 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990). Few rights are more fundamental than that of an accused to present evidence on his or her behalf. ***Chambers***, 410 U.S. at 302.[5] Due process prohibits a trial court from applying the evidentiary rules so that critical defense evidence is excluded. ***State v. Smith***, 2002 WI App 118, ¶6, 254 Wis. 2d 654, 648 N.W.2d 15.

¶32 We review the constitutional right of a defendant to confront witnesses and to present evidence as a question of constitutional fact. *See* ***id.***, ¶7.[6] Under that standard of review, we must accept the trial court's findings of evidentiary or historical facts unless they are clearly erroneous. ***Id***., ¶8. But the application of those facts presents a question of constitutional law, a matter that we review independent of the trial court's ruling. *See* ***id***. In this case, the

[5] ***Chambers v. Mississippi***, 410 U.S. 284 (1973), dealt with the right of a defendant to present witnesses in his own defense. We see no reason why the same would not apply to the right of meaningful cross-examination.

[6] We appreciate that ***State v. Smith***, 2002 WI App 118, 254 Wis. 2d 654, 648 N.W.2d 15, makes this standard of review pronouncement in a "right of confrontation" context, not a "right to present witnesses" context. However, we see no reason why the standard should be any different in a "right to present witnesses" setting.

historical facts are not in dispute. Thus, the only question remaining is whether the trial court's ultimate ruling was constitutionally correct.

¶33 While ***Smith*** is not directly controlling on the question before us, we find it highly informative. There, the defendant sought to introduce evidence of a victim's prior inconsistent statement through a police officer after the victim had already testified. ***Id***., ¶10. The trial court rejected the proffered evidence under WIS. STAT. § 906.13(1), which allows for a witness to be examined regarding a prior inconsistent statement. ***Smith***, 254 Wis. 2d 654, ¶10. The trial court reasoned that the defendant should have cross-examined the witness about the statement during the witness's testimony. ***Id.*** However, the court of appeals took note of § 906.13(2)(a) of the statute, which holds that extrinsic evidence of a prior inconsistent statement of a witness is not admissible *unless*: (1) the witness was examined while testifying so as to give the witness an opportunity to explain or deny the statement, (2) the witness has not been excused from giving further testimony in the action, or (3) the interests of justice otherwise require. *See* ***Smith***, 254 Wis. 2d 654, ¶5, n.2. The court of appeals disagreed with the trial court's ruling, noting that the witness had not been excused from giving further testimony under § 906.13(2)(a)1. ***Smith***, 254 Wis. 2d 654, ¶13. In so ruling, the court of appeals noted the right to confront witnesses conferred by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §7 of the Wisconsin Constitution. ***Smith***, 254 Wis. 2d 654, ¶9.

¶34 Here, unlike ***Smith***, Novak did not seek to introduce Cristiana's prior tape-recorded statement through a third party. Instead, she sought to alert Cristiana to the existence of the tape via cross-examination in order to learn if Cristiana would adhere to, or deviate from, her testimony on direct examination. Despite these procedural differences, we nonetheless conclude that the underlying

principles and teachings of ***Smith*** are relevant to this case. Novak had a fundamental constitutional right to confront Cristiana as to whether she had ever given a prior inconsistent statement. The fact that Novak might be able to introduce such a statement by other means did not trump her right to confront Cristiana with the fact of the tape in an effort to test Cristiana's direct examination testimony. We also observe that, as with the witness in ***Smith***, Cristiana had not yet been excused from further testimony since she had only completed her direct testimony when Novak sought the trial court's permission to alert Cristiana to the existence of the tape via cross-examination.

¶35 In the trial court, the State also argued that the debate about the tape would take the trial into collateral matters involving the circumstances under which the tape was obtained and the ongoing strained relationship between the Novaks and the Weismuellers. But, as we have explained, this issue directly implicated Novak's fundamental constitutional rights to present evidence and to confront Cristiana by meaningful cross-examination—hardly collateral matters.

¶36 We also hold that the trial court erred in its belief that it was required to first rule on the admissibility of the tape before it would allow Novak to cross-examine Cristiana about the matter. As we have explained, Novak's offer of proof contended that the tape contradicted Cristiana's direct examination testimony, and the State conceded as much, saying that Cristiana's statements on the tape were the product of witness harassment and intimidation. As such, the question went to the weight to be accorded the evidence, not to the admissibility of the tape recording.

¶37 In ***Thomas v. State***, 92 Wis. 2d 372, 284 N.W.2d 917 (1979), the supreme court held that a victim's prior statement to the sheriff, which was made

prior to her having any contact with the prosecutor, was properly admitted for the limited purpose of rebutting the defendant's charge of improper influence by the prosecutor. ***Id***. at 389-90. This was so even in the face of the allegation that the victim's statement may have been the result of undue influence exerted by another. ***Id***. The court held that the allegation of undue influence went to the weight, not the admissibility, of the statement. ***Id***. at 390.

¶38 Inconsistencies and contradictions in a witness' testimony are for the jury to consider in judging the credibility of the witness. ***Kohlhoff v. State***, 85 Wis. 2d 148, 154, 270 N.W.2d 63 (1978). "The question of credibility between witnesses or in respect to the same witness is a matter for the jury to determine and not for a trial judge or for this court, unless it can be said that the testimony is incredible as a matter of law." ***Id***. (citation omitted). Surely there is nothing incredible about the fact that Cristiana had made a tape-recorded statement and that it contained statements contrary to her direct examination testimony—particularly where the State conceded as much.

¶39 The State also argues that since the trial court indicated that Novak could ask Cristiana general questions as to any statements she had previously given, Novak should have followed up on this suggestion. For instance, the State suggests that Novak could have asked Cristiana, "Ms. Barbatelli, today you told this jury X. Isn't it a fact that several months after you spoke to the police you told Erica Novak Y." Undoubtedly, Novak could have asked this question, but it begs the issue before us as to whether the specific territory Novak sought to pursue on cross-examination regarding the tape was improper. In suggesting this hypothetical question, the State also says this would have then allowed the trial court to consider the admissibility of the tape. But as we have indicated, the

admissibility of the tape was not a condition precedent to Novak probing this topic on Cristiana's cross-examination.

¶40 WISCONSIN STAT. § 901.03(1) provides that an erroneous evidentiary ruling cannot be the basis for a reversal unless a substantial right of the party is affected. Here, Cristiana was the State's "smoking gun" witness since she was the only witness who testified that Novak had knowledge of the girls' toilet papering of the Weismueller property prior to Novak's encounters with Selk and Valdes.[7] Thus, the trial court's restriction on Novak's cross-examination affected Novak's substantial right, since it precluded meaningful cross-examination and the right to present evidence.

CONCLUSION

¶41 We uphold the trial court's ruling denying Novak's motion to suppress. We reverse the trial court's ruling restricting the cross-examination of Cristiana. We remand for a new trial.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[7] Thus, the State understandably does not make a harmless error argument.