COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2017AP730-CR **Cir. Ct. No. 2016CF92**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

BRANDON L. SCHERZ,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Washburn County: EUGENE D. HARRINGTON, Judge. *Reversed and cause remanded for further proceedings*.

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Brandon Scherz was charged with second-degree sexual assault, possession of marijuana, and possession of drug paraphernalia. Following an evidentiary hearing, the circuit court suppressed statements that Scherz made to police before and after his arrest. The State appeals the suppression ruling pre-trial pursuant to WIS. STAT. § 974.05(1)(d)3.[1] We agree with the State that the circuit court erred. In particular, we reject the proposition that fact finding by the circuit court supports its suppression ruling. We also decline to affirm on the alternative ground that the circuit court could have excluded the evidence under WIS. STAT. § 904.03. Accordingly, we reverse and remand for further proceedings.

Background

¶2 On August 15, 2016, at approximately 9 p.m., the alleged victim, A.S., spoke with a police officer named Wayne Johnston and told Johnston about an encounter she had with Scherz on Sunday, August 7, 2016. A.S. told Officer Johnston that she had dated Scherz off and on for about two years, ending about three years earlier. A.S. said that on Sunday, August 7, she was at Scherz's residence helping him sort personal belongings. At one point, according to A.S., Scherz hugged her and she responded by putting her hands in front of her and telling Scherz that she was not going to have sex with him or allow him to kiss her. Subsequently, despite A.S.'s protests, Scherz had sexual intercourse with A.S. A.S. also told Officer Johnston that she had been concerned about irritation in her vaginal area and had gone to a hospital where she was "given antibiotics as well as treatment for possible sexually transmitted diseases."

[1] All references to the Wisconsin Statutes are to the 2015-16 version.

¶3 After hearing A.S.'s allegations, Officer Johnston, at 11:38 p.m. that same evening, arrived at Scherz's residence and knocked on his door.[2] Scherz came outside. After being advised by Johnston that Johnston was there about an incident at Scherz's residence about a week earlier involving A.S., Scherz made statements regarding this encounter with A.S. Officer Johnston told Scherz that he wanted Scherz to provide a written statement, and Scherz indicated that he would provide such a statement and that he wanted to "get some clothes on."

¶4 Officer Johnston followed Scherz into Scherz's residence and observed a marijuana pipe on the kitchen table and the smell of burnt marijuana. Scherz changed his mind about giving a written statement. Johnston then informed Scherz that he was under arrest based on statements Scherz made outside the residence about A.S. and based on marijuana-related observations the officer made inside Scherz's residence. Johnston allowed Scherz to get dressed and then put handcuffs on him. During the drive to the jail, Scherz made additional statements about the incident with A.S. that were not in response to questions.

¶5 An evidentiary hearing was held to determine whether Scherz's statements to Officer Johnston should be suppressed. The circuit court suppressed all of Scherz's statements, and this pretrial State's appeal followed.

Discussion

¶6 Although the State is the appellant, we organize our discussion around the circuit court's reasoning and arguments made by Scherz. It is

[2] A second officer was present with Officer Johnston, the primary investigating officer, but for ease of discussion in this opinion we ignore this second officer except to note here that he was present with Johnston at Scherz's residence.

undisputed that, if these justifications for suppression fail, then the circuit court erred in suppressing Scherz's pre- and post-arrest statements to police.

A. Whether the Circuit Court Found Officer Johnston's Testimony to Be "Unreliable" Regarding the ***Circumstances*** *Surrounding Scherz's Statements*

¶7 Scherz argues that the State's various arguments fail to come to grips with express and implied fact finding by the circuit court regarding the circumstances surrounding Scherz's statements. So far as we can tell, fact finding by the circuit court regarding these circumstances is germane to four possible grounds for suppressing Scherz's statements:

1) That Scherz was in custody when he made statements while standing outside his residence and, thus, should have had the benefit of ***Miranda*** warnings when he responded to Officer Johnston's question about A.S.

2) That, post-arrest—when Scherz was plainly in custody and made incriminating statements—Officer Johnston prompted Scherz with questions without first providing ***Miranda*** warnings.

3) That the pre-arrest statements made outside the residence were coerced and, thus, involuntary.

4) That the post-arrest statements made during the drive to the jail were coerced and, thus, involuntary.

Regarding each possible ground, as we now explain, the circuit court made findings or reached conclusions that defeat the possible ground or there is no record support for the ground.

¶8 As to the first ground, pre-arrest custody requiring ***Miranda*** warnings, the circuit court specifically concluded that Scherz was not in custody before he was arrested. This conclusion is amply supported by Officer Johnston's

testimony and the circuit court's findings relating to Officer Johnston's behavior. Scherz does not argue otherwise.

¶9 We note that the circuit court expressed concern about the officer's subjective intent to arrest Scherz, regardless whether Scherz incriminated himself. It might be that the circuit court wondered if the officer's subjective intent was significant in terms of whether Scherz was in custody and, thus, whether ***Miranda*** warnings were required. If so, that concern was misplaced. As the State points out, the officer's subjective intent is relevant only to the extent that it is "'conveyed, by word or deed, to the individual being questioned.'" *See* ***State v. Mosher***, 221 Wis. 2d 203, 216, 584 N.W.2d 553 (Ct. App. 1998) (quoted source omitted). There is nothing in the record to support the factual inference that Officer Johnston communicated his intention to arrest Scherz to Scherz.

¶10 As to the second ground, possible improper post-arrest questioning while Scherz was in custody, the circuit court specifically found to the contrary. The court found that Scherz's statements "were the spontaneous blurting that is the exception to the post-arrest non-mirandized statements that people make." Again, this finding is well supported by Officer Johnston's testimony.

¶11 As to the third ground, pre-arrest coercion, the circuit court's findings on the topic are inconsistent with the conclusion that police engaged in coercion. When speaking on the topic of whether Scherz's pre-arrest statements were voluntary, the circuit court stated: "I don't think the officer did anything to intimidate Scherz. He didn't come with his guns. He didn't come overbearing." Indeed, the court made no observations or comments about police behavior that would support the conclusion that Scherz's pre-arrest statements were involuntary. Support for that ground for suppression would have to come in the form of some

sort of comment by the circuit court indicating the court's belief that Officer Johnston engaged in coercive activity. *See* ***Colorado v. Connelly***, 479 U.S. 157, 167 (1986) ("[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment."); *see also* ***State v. Hoppe***, 2003 WI 43, ¶37, 261 Wis. 2d 294, 661 N.W.2d 407 (citing ***Connelly*** for the same proposition). The circuit court made no such comments or observations.

¶12 As to the fourth ground, post-arrest coercion, the situation is somewhat more complicated. Referring to Scherz's post-arrest statements that were made while Scherz was in the squad car, the circuit court stated: "I'm not satisfied that the Defendant's purported statements actually were his own free will, act, and deed." It is unclear from the record what the circuit court meant to convey, but it is plain that the circuit court did not find coercive activity by the officer. More to the point, as we detail below we find no support for a determination that the State failed to meet its burden in this regard.

¶13 After clarifying that the circuit court's main reason for suppressing Scherz's post-arrest statements was that the court was "not so sure ... what the contents of the admission was," the court stated: "But secondly, there was no Miranda warning, and I'm not satisfied that the Defendant's purported statements actually were his own free will, act, and deed." The reference to ***Miranda v. Arizona***, 384 U.S. 436 (1966), suggests that the circuit court thought the absence of a ***Miranda*** warning supported the view that the post-arrest statements were involuntary. However, the absence of ***Miranda*** warnings was not a basis for suppression because Scherz's post-arrest statements, as the circuit court acknowledged, did not result from police questioning. As the Supreme Court stated in ***Miranda*** itself: "Volunteered statements of any kind are not barred by

the Fifth Amendment and their admissibility is not affected by our holding today." ***Id.*** at 478.

¶14 We have searched the record for any support for the conclusion that Scherz's post-arrest statements were coerced or otherwise involuntary. As noted above in the pre-arrest context, that support would have to come in the form of some indication of coercive police activity. We find no indication of coercive police activity, and Scherz does not contend that there is. Accordingly, we agree with the State that, if the circuit court meant to rule that Scherz's post-arrest statements were involuntary, that ruling cannot stand.

¶15 In sum, we agree with the State that neither Officer Johnston's testimony nor the circuit court's statements support Scherz's argument that the circuit court made findings *about the circumstances surrounding Scherz's statements to Officer Johnston* that support suppression.

*B. The Circuit Court's Finding that the Officer's Testimony Was "Unreliable" Regarding the **Content** of Scherz's Statements*

¶16 On appeal, Scherz does not attempt to defend the reason the circuit court gave for suppressing Scherz's statements, namely, the court's concern over Officer Johnston's failure to specify the words that Scherz used when making incriminating statements. Nonetheless, because the circuit court plainly based its ruling on its concern about the lack of specificity in some of Officer Johnston's testimony, we address the topic.

¶17 The State argues that Officer Johnston's lack of precision in recounting Scherz's exact words is not a basis for suppression. We agree and, as noted, Scherz does not disagree. Scherz's implicit concession is appropriate.

¶18 As the State explains, any uncertainty or inconsistency in Officer Johnston's testimony about what Scherz said is a proper subject of cross-examination at a trial, but it is not a basis for suppressing Scherz's statements.

¶19 The circuit court did not point to any authority to support the idea that a lack of clarity as to the particular words used by a defendant is a basis for suppressing the defendant's statements. In contrast, the State explains that Wisconsin courts have recognized three grounds for suppressing evidence obtained by law enforcement:

- "[W]hen evidence has been obtained in violation of a defendant's constitutional rights." ***State v. Raflik***, 2001 WI 129, ¶15, 248 Wis. 2d 593, 636 N.W.2d 690.
- When "a statute specifically provides for the suppression remedy." ***Id.***
- When, although a statute does not provide for suppression as a remedy, suppression serves "to achieve the objectives of the statute." ***State v. Popenhagen***, 2008 WI 55, ¶62, 309 Wis. 2d 601, 749 N.W.2d 611.

Here, there is no statutory violation in play. And, as we have seen, there was no ***Miranda*** violation and no coercion that might render Scherz's statements involuntary. We discern no other possible constitutional violation at the time Scherz made his statements.

¶20 The circuit court seemed to suggest that a fair trial could not be had if Scherz does not know with specificity what words he allegedly said to Officer Johnston. This seems to be a concern about Scherz's due process right to a fair trial. But we fail to understand why that might be true. It is axiomatic that a defendant is not deprived of a fair trial simply because a witness testifying about

what the defendant said cannot recall the particular words used by the defendant. This situation is exceedingly common and, when there is a dispute as to just what a defendant said, such matters go to weight and credibility and are for the fact finder to resolve.

¶21 For that matter, we also agree with the State that the record does not support the circuit court's apparent finding that Officer Johnston "wasn't sure" about Scherz's admissions. Explaining its suppression ruling, the court said that, after Officer Johnston described Scherz's admissions on direct examination, "on cross-examination [Officer Johnston] wasn't sure, and then he had to refresh his recollection by looking at his notes." The court then stated: "[M]y overall conclusion at the end of that process was [that Officer Johnston] wasn't sure [and, therefore, the court was] not sure what the confession or the alleged admission was."

¶22 We repeat that such a finding does not support a recognized basis for suppressing a defendant's statements. But also, the court's comments are not supported by the record. While the circuit court could reasonably find that Officer Johnston did not provide a verbatim recitation of Scherz's statements, there is nothing to suggest that Johnston failed to convey the gist of Scherz's statements. We now summarize the pertinent parts of Officer Johnston's testimony.

¶23 After Officer Johnston drew Scherz's attention to "an incident that occurred at that same residence approximately a week prior with [A.S.]," Scherz, according to Johnston, stated "that he knew why we were there, and he felt guilty and that he believed he did not have consent to have sex with [A.S.]." Testifying about Scherz's later post-arrest statements made on the way to the jail, Officer Johnston testified or agreed that Scherz made the following additional statements:

- Scherz asked "what [the officer] thought about the case, what was right and wrong."
- Scherz said that "[h]e knew he was guilty of what he had done [and h]e also made a comment about some similar situation that had happened in the past with the same subject, same female."
- Scherz said "something about he felt very badly about what happened ... [h]e knew it was wrong."

Officer Johnston was never asked to specify the particular words that Scherz used. And, nothing in the examination or cross-examination of the officer brought into question the officer's memory of what was said, with two arguable exceptions.

¶24 First, there was some back and forth regarding what Officer Johnston said to Scherz about consent. That is, there was questioning as to whether Johnston asked Scherz whether Scherz had A.S.'s consent, or whether, instead, Scherz made his initial statement about the lack of consent without prompting.

¶25 The second exception relates to whether Scherz actually made the second statement about "guilt." There was no challenge to Officer Johnston's testimony that Scherz's initial pre-arrest statements included the statement that Scherz "felt guilty." But Scherz's counsel did challenge Johnston's assertion that during the ride to the jail Scherz said "he was guilty of what he had done." Defense counsel pointed out to Officer Johnston that this statement did not appear in Johnston's police report.

¶26 The first does not implicate Officer Johnston's recollection of what *Scherz* said. The second does not remotely support suppressing all of Scherz's

statements. At best, it is fodder for challenging the accuracy of just one of the admissions Officer Johnston asserts that Scherz made.

¶27 Our discussion so far puts to rest Scherz's argument that the circuit court's fact finding supports suppression because of a possible ***Miranda*** violation or the possibility of involuntary admissions. We choose, however, to comment on Scherz's argument that the situation here is like the following hypothetical:

> [A] defendant filed a motion to suppress evidence obtained from his home. He argued that, despite what the police officer alleged in his report, he did not in fact give police consent to enter his home.
>
> At the suppression hearing, the officer testified that when he arrived at the defendant's home, he asked the defendant if he could come inside and the defendant said "sure, it's cool." He also testified that he did not have his gun drawn.
>
> The defendant testified on direct examination that the officer did have his gun drawn, and that when the officer asked if he could come inside, he was fairly confident he said "no, you may not." However, on cross, when asked "didn't you in fact tell the officer 'it's cool'", the defendant answered, "it's possible I said that." On re-direct, the defendant clarified that he did not think he said "it's cool" but was having a hard time remembering exactly what he said.
>
> The circuit court denied the motion to suppress. In so doing, it stated that the defendant did not even seem sure of what he did or did not say to police.
>
> If the defendant appealed, the State would appropriately point out that the court had made the fact-finding that the defendant's testimony was unreliable or incredible. Though the court did not explicitly state that it was making the finding that the defendant's testimony was incredible as to whether he consented, the court's comments and ruling demonstrate that finding. The State would also appropriately point out that this Court is bound by the circuit court's fact-findings, including its credibility determinations.
>
> The same is true here.

The same is *not* true here. The comparison is off. First, here, we do not have competing narratives and we do not have comparable uncertainty on the part of the testifying officer about what Scherz said.

¶28 A more fundamental problem with the hypothetical is that it is directed at the constitutionality of the search, rather than the result of the search. An apt hypothetical would involve some lack of clarity as to what the officer observed after entering the hypothetical defendant's home. But that apt hypothetical would not help Scherz because the "unreliability" issue would not implicate the constitutionality of the search. Rather, it might raise credibility issues for a jury as to what police found inside the residence. It follows that Scherz's hypothetical is not instructive.

¶29 Accordingly, we conclude that there is no basis in the record supporting the circuit court's decision to suppress Officer Johnston's testimony about Scherz's admissions based on statutory or constitutional violations.

C. Exclusion Under Section 904.03

¶30 Scherz urges us to affirm the circuit court on a discretionary theory not relied on by the circuit court. Scherz argues that the circuit court *could have* exercised its discretion to exclude Scherz's incriminating statements under WIS. STAT. § 904.03 and that we should affirm exclusion of the evidence on that ground. We decline for two reasons.

¶31 First, we are uncertain whether the circuit court would have so exercised its discretion. It is true that the circuit court seemed to be concerned that there was a fairness issue in permitting Officer Johnston to testify at trial about Scherz's admissions, apparently because Johnston did not purport to use the same

words that Scherz had used. But the circuit court also expressed other concerns. We are not convinced that, if the court properly understood that there was no statutory or constitutional violation requiring suppression, the court would have viewed this "fairness" issue in the same manner.

¶32 Second, the record, at least as developed so far, does not support exclusion under WIS. STAT. § 904.03. That is, we agree with the State that, if the circuit court had excluded Johnston's testimony based on § 904.03, the court would have misused its discretion. Although a circuit court has broad discretion to exclude evidence under § 904.03, the record must still support a "rational basis" for the decision to exclude evidence. *See* ***Martindale v. Ripp***, 2001 WI 113, ¶¶28-29, 246 Wis. 2d 67, 629 N.W.2d 698 ("We will not find an erroneous exercise of discretion if there is a rational basis for a circuit court's decision."). As we now explain, there is no basis in the suppression hearing testimony for excluding the evidence under § 904.03.

¶33 WISCONSIN STAT. § 904.03 permits the exclusion of evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Here, there is no possible reason to exclude the evidence based on "confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." That leaves "unfair prejudice."

¶34 "Unfair prejudice [within the meaning of WIS. STAT. § 904.03] results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its

decision on something other than the established propositions in the case." ***State v. Sullivan***, 216 Wis. 2d 768, 789-90, 576 N.W.2d 30 (1998). In this regard, the circuit court made multiple statements suggesting that Scherz could not get a fair trial if Scherz did not know with more precision the words that Officer Johnston contended Scherz used. For example, the circuit court stated: "[T]o get a fair trial, [Scherz] is entitled to know what he said to whom and when."

¶35 We take it as a given that in some situations a witness's testimony about what another actor said can be so vague as to be properly excluded under WIS. STAT. § 904.03 based both on limited probative value and unfair prejudice. The question here, then, is whether it is reasonable to conclude that the probative value of Officer Johnston's testimony would be outweighed by Scherz's inability to defend himself against what the circuit court apparently viewed as Johnston's characterizations of what Scherz said, rather than Scherz's own words. The answer to this question is no.

¶36 First, Scherz does not argue that Officer Johnston's testimony about Scherz's admissions lacks probative value, nor could he reasonably do so. As detailed elsewhere in this opinion, Officer Johnston attributed to Scherz statements that plainly evince consciousness of guilt and, more to the point, constituted an expression that could be reasonably interpreted to be an admission that Scherz had a sexual encounter with A.S. without her consent. And, we repeat, the accuracy of Officer Johnston's assertions about what Scherz said, with the exceptions that we have already discussed, went unchallenged.

¶37 So, why would Scherz be unfairly prejudiced by Officer Johnston's testimony? As best we can tell, the circuit court was concerned that Johnston might have misinterpreted Scherz's statements and that, for some reason, jurors

would not be well equipped to sort that out. But that is exactly what we expect jurors to do. That is, jurors routinely listen to a witness's description of something the witness heard or saw and then assess that witness's credibility, taking into consideration, among other factors, the nature of the observations and whether the witness might misconstrue something the witness heard or saw.

¶38 Here, the officer's testimony is unremarkable. There is nothing to distinguish it from the sort of testimony routinely and properly presented to juries in criminal trials where a defendant has made unrecorded admissions to a police officer.

¶39 Finally, we address Scherz's argument that there is a fairness problem because Officer Johnston testified on direct examination that Scherz, while riding to the jail, admitted that he knew he was guilty, but the officer admitted on cross-examination that his report did not include that particular admission. As the State points out, Scherz does not explain why the officer's failure to include that particular admission in his report results in unfair prejudice. To the contrary, when a police officer asserts that a defendant made a substantial admission, but the officer has omitted that admission from his or her report, that situation creates an opportunity for the defense to cast doubt on the officer's credibility. More importantly, the situation is not something jurors are ill prepared to deal with. These sorts of inconsistencies are exactly the disputes we trust jurors to sort through.

¶40 In sum, at least based on the record so far, we discern no rational basis to deprive a jury of Officer Johnston's testimony about the statements Scherz made to that officer.

Conclusion

¶41 For the reasons above, we reverse the suppression ruling of the circuit court and remand for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded for further proceedings.

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