COURT OF APPEALS
DECISION
DATED AND FILED

February 8, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal No. 2017AP291-CR **Cir. Ct. No. 2013CF226**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVE A. BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dodge County: JOSEPH G. SCIASCIA, Judge. *Affirmed*.

Before Lundsten, P.J., Kloppenburg and Fitzpatrick, JJ.

¶1 PER CURIAM. Steve Brown appeals a judgment of conviction entered after a jury found him guilty of repeated acts of sexual assault of the same

child. Brown's sole claim on appeal is that the circuit court erred in denying his motion to suppress inculpatory statements made during a pre-arrest interview with law enforcement.[1] Brown maintains that the statements were obtained in violation of his constitutional right against self-incrimination because they were made during a custodial interrogation without the warnings required by ***Miranda v. Arizona***, 384 U.S. 436 (1966). Because we conclude that Brown was not in custody for purposes of ***Miranda*** when he made the inculpatory statements at issue, we affirm.

BACKGROUND

¶2 In 2013, the victim reported to police that Brown had sexually assaulted her at his house on multiple occasions between 2000 and 2004, when she babysat his child. A few months after the victim's report, Lieutenant John Kreuziger drove to Brown's house and asked if Brown was willing to "come to the police department to speak with a detective." Kreuziger did not recall Brown's precise response but testified that he "appeared … willing to come to the police department." Kreuziger left and Brown drove himself to the police station. Brown arrived at around 11:40 a.m., and Kreuziger led him to a "general interview room" near the building's main entrance to wait for Detective Ryan Klavekoske. Brown was left alone in the room and the door remained open.

¶3 Klavekoske arrived shortly thereafter and closed the door. The door was unlocked. Brown was told that he was not under arrest, that he did not have

[1] Brown also brought a postconviction motion asserting that trial counsel provided ineffective assistance by failing to argue that Brown's statements to police were involuntary. The circuit court denied Brown's postconviction motion. Brown affirmatively acknowledges that he has abandoned his postconviction claim of ineffective assistance of trial counsel.

to talk to Klavekoske, and that he was free to leave "at any point." Brown indicated that he understood. The interview lasted a little more than one hour and, about halfway through, Klavekoske left Brown alone to make a phone call. Brown made incriminating statements during the course of the interview. Afterward, he drove home. He was soon arrested and charged with one count of repeated sexual assault of a child.[2]

¶4 Brown moved to suppress evidence of his statements to Klavekoske on the ground that they were obtained in violation of ***Miranda***. The State conceded that Brown was not advised of his ***Miranda*** rights before or during the interview. The circuit court denied the motion, determining that Brown was not "in custody" during the interview and, therefore, Klavekoske was not required to provide Brown with ***Miranda*** warnings. The court stated that the only fact weighing in favor of custody was that the door was closed during the interview, but explained that "one would expect" the door to be closed because the interview dealt with "embarrassing or sensitive" topics.

¶5 At Brown's jury trial, the victim testified about the assaults, and Klavekoske testified that, during his interview, Brown admitted to having sexual contact with the victim. Brown testified that he was "tricked" into confessing. The jury found Brown guilty and he received a life sentence. Brown appeals.

[2] Brown was also charged with first-degree sexual assault of a child, but that count was later dismissed on the State's motion.

DISCUSSION

¶6 To safeguard a person's constitutional right against self-incrimination, police may not subject a person to a custodial interrogation unless he or she is warned about the right to remain silent, that any statement made can be used against him or her, and "that he [or she] has a right to the presence of an attorney, either retained or appointed." ***State v. Martin***, 2012 WI 96, ¶¶30-31, 343 Wis. 2d 278, 816 N.W.2d 270 (quoting ***Miranda***, 384 U.S. at 444). If a person is subjected to custodial interrogation without the ***Miranda*** warnings and makes incriminating statements, those statements "cannot be used by the prosecution." ***State v. Lonkoski***, 2013 WI 30, ¶23, 346 Wis. 2d 523, 828 N.W.2d 552.

¶7 On appeal, the parties agree that the police did not advise Brown of his ***Miranda*** rights, and that his inculpatory statements were the result of an interrogation. Further, Brown does not challenge the circuit court's findings of fact. Thus, the question for this court is whether Brown was in custody for purposes of ***Miranda*** when he made incriminating statements to Klavekoske.

¶8 In reviewing the circuit court's decision on a motion to suppress, we accept its findings of fact unless clearly erroneous. ***State v. Morgan***, 2002 WI App 124, ¶11, 254 Wis. 2d 602, 648 N.W.2d 23. The question of whether a defendant is in custody for purposes of ***Miranda***, however, is one of law, which we review de novo based on the facts as found by the circuit court. ***Morgan***, 254 Wis. 2d 602, ¶11.

¶9 A person is in custody "where a reasonable person would not feel free to terminate the interview and leave the scene." ***Martin***, 343 Wis. 2d 278, ¶33. In making this determination, we consider the totality of the circumstances surrounding the interrogation; but, the ultimate question is whether there was a

formal arrest or restraint of movement of the degree associated with a formal arrest. ***Lonkoski***, 346 Wis. 2d 523, ¶6. Relevant factors include the degree of restraint, the defendant's freedom to leave, and the purpose, place, and length of the interrogation. ***Id.***

¶10 We conclude that under the totality of the circumstances here, a reasonable person would not have considered himself or herself in custody. Because the parties' briefs separate their arguments concerning custody into (1) degree of restraint, (2) freedom to leave, and (3) purpose, place, and length of interrogation, we follow suit with some reorganization to minimize redundancy.

¶11 In evaluating the degree of restraint, courts examine circumstances such as "whether the suspect is handcuffed, whether a weapon is drawn, whether a frisk is performed, the manner in which the suspect is restrained, whether the suspect is moved to another location, whether questioning took place in a police vehicle, and the number of officers involved." ***Id.***, ¶28 (quoted source omitted). Here, police never frisked, handcuffed or physically restrained Brown. Brown drove himself to the police station. He was interviewed by a single officer in an unlocked "general interview room" and was allowed to wait alone when Klavekoske left to make a phone call.[3] These circumstances fall far short of the degree of restraint associated with a formal arrest.

¶12 We reject Brown's contention that the fact that the interview room door was closed materially impacts the restraint analysis. As the circuit court

[3] After Klavekoske left, Brown sat by himself with the door closed. An officer soon opened the door, sat on a chair just outside of the room, and chatted with Brown. The officer walked away a couple minutes later. Brown then stayed in the room unrestrained and with the door open until Klavekoske returned.

stated, a reasonable person would expect the door to be closed given the interview's sensitive subject matter. Further, the door was unlocked; Klavekoske opened the door without a key when he left to make a phone call. ***Id.***, ¶32. Both before the interview and for a period during Klavekoske's mid-interview phone call, the door was not only unlocked, but open.

¶13 Next, facts relevant to Brown's freedom to leave support a determination that he was not in custody. Brown agreed to meet with police and drove himself to the police station. He was left alone, unrestrained and in an interview room with an open door, while he waited for Klavekoske. The circuit court found that Brown was told that he was not under arrest, that he was free to leave and could walk out at any time, and that he did not have to answer any questions. Brown more than once indicated to Klavekoske that he understood those advisements.

¶14 During the interview, when Klavekoske reiterated that Brown was not under arrest, Brown replied: "Not yet. I can walk out the front door and you arrest me." Though he agrees that Klavekoske's statements do not weigh in favor of custody, Brown asserts that his own response reflects his belief that he was not free to walk away. Brown's statement does not change our analysis. A person's subjective belief that he will be arrested is "irrelevant" in determining whether he or she was in custody. ***State v. Quigley***, 2016 WI App 53, ¶42, 370 Wis. 2d 702, 883 N.W.2d 139. The test is objective. ***Id.*** Further, Brown's statement falls short of establishing his own subjective belief that he was in custody. To the contrary, it confirms his understanding that he had "[n]ot yet" been arrested.

¶15 Turning to the purpose, place, and length factor, the interview lasted about one hour. *See* ***id.***, ¶38 (an interview of "less than ninety minutes" is "not

lengthy"). Though the interrogation took place in a police station, Brown drove himself there without a police escort. *See* ***Lonkoski***, 346 Wis. 2d 523, ¶28 (that an interview occurred in a police station "may weigh toward the encounter being custodial, but that fact is not dispositive"). While the police station had "a booking area for custodial interviews," the interview was instead conducted in an unlocked room used for "noncustodial interviews, contacts with victims" which was located in an unsecured part of the station near the main entrance. *Cf.* ***State v. Uhlenberg***, 2013 WI App 59, ¶¶2, 13, 348 Wis. 2d 44, 831 N.W.2d 799 (concluding that an interrogation was custodial in part because it took place in a locked interview room in a secure booking area).

¶16 Brown argues that the close-ended, accusatory questions asked during the interview show that he was in custody. We disagree. As the State points out, Klavekoske also asked numerous open-ended questions. We conclude that, when considered alongside the length and place of the interview and in light of the other factors and circumstances, the officer's questioning did not render the interview custodial in nature.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).