COURT OF APPEALS
DECISION
DATED AND FILED

April 11, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1069-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KEITH B. KELLY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: DONALD J. HASSIN, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 ANDERSON, J. Keith B. Kelly appeals from a circuit court order committing him to institutional care pursuant to WIS. STAT. § 971.17(1) (1999-

2000)[1] for a period of forty years. Kelly contends that the court erred when it denied his motion to suppress his statements to the police. Kelly argues that his statements to the police were involuntary because the officers took advantage of his borderline intellectual functioning. Kelly argues that the officers tricked him into believing that a scientific test would reveal whether he was lying. We hold that Kelly's statements to the police were voluntary and thus properly admitted at trial. Therefore, we affirm.

BACKGROUND FACTS

¶2 In January 1997, Detective John Fischer interviewed Kelly regarding some fires that had occurred at Kelly's place of employment, at Kelly's apartment, and at a dumpster. Nine months later, on October 29, 1997, the City of New Berlin police were dispatched to a fire at Kelly's apartment complex, the Brittany Apartments. Detective Gary Blunt spoke with two witnesses who had seen a suspicious person on a bicycle watching fire personnel from about 125 yards away. After conferring with Fischer, Blunt showed a photo array to the two witnesses, one of whom identified Kelly's photo. Knowing that Kelly lived at the Brittany Apartments and that he had been a suspect in other area fires, Blunt decided to speak with Kelly and went to find him at the National Regency elderly facility, Kelly's place of employment.

¶3 Blunt took Officer Mark Hurst along because he knew that Hurst was familiar with Kelly from having had past police contacts with him. Upon arrival at the National Regency, the officers learned that Kelly had punched in at 7:44 a.m.—approximately one hour after the Brittany Apartments fire was

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

reported. The officers found Kelly, identified themselves to him and told him they wanted to talk to him about an investigation they were doing. They then asked Kelly if he would willingly come to the City of New Berlin Police Department for an interview, and Kelly agreed to come.

¶4 In the car on the way to the police department, Kelly stated that he did not have anything to do with starting the fire at his apartment building that morning. The officers had not yet mentioned to Kelly the subject matter of their investigation. Blunt then asked Kelly why he thought the officers were there to talk to him about a fire that occurred at his apartment. Kelly stated that he left for work at approximately 6:40 a.m. that morning, and when he got out of eyesight of his apartment building, he heard sirens and he just assumed that there was a fire at his building. Kelly said he did not at any time stop to watch the fire. He also stated that because the police had talked to him in the past, he assumed that they would be coming to talk to him now.

¶5 After arrival at the police station and before questioning, Blunt told Kelly that he was not under arrest, that he did not have to talk to the police or answer any questions, that he could leave at any time, and that Blunt would drive him back to work if he wanted. Kelly indicated that he was willing to stay and talk to the police. Blunt then asked Kelly if he had lit a match or used a lighter or matches since he woke up that morning or within the past twelve-hour period. Kelly responded that he was absolutely positive that he did not use a lighter or any matches since he woke up that morning, either at his apartment or at his place of employment.

¶6 Blunt then told Kelly that he would be able to tell if he was telling the truth because he could swab Kelly's hands and do some type of test to see if

Kelly had used a match or lighter that morning. Using a gunshot residue kit, Blunt proceeded to swab Kelly's hands with plain water, then turned the kit over to Hurst and asked Hurst to leave the room. He told Kelly that he felt that Kelly was not being truthful with him because he had a witness who had observed Kelly watching the fire. Blunt also told him that he felt that Kelly was responsible for starting the fire. Blunt continued, telling Kelly that he thought he was a decent young man and that he did not think Kelly would intentionally try to hurt anyone or kill anyone, but that he felt that Kelly had a problem with starting fires and needed to address this problem. Kelly stated that he did not want to hurt anyone and then confessed to Blunt that he did start the fire at his apartment building that morning.

¶7 At that point, Blunt stopped questioning Kelly and told him that he needed to read him his ***Miranda*** rights.[2] Blunt used a rights card that he carried on his person, but simplified the warnings so that Kelly could better understand them.[3] Kelly told Blunt that he understood his ***Miranda*** rights and that he was willing to speak with Blunt. Kelly then admitted to having started the October 29, 1997 fire and several fires in the past, including one on September 30, 1996, at the Brittany Apartments. Regarding the fire on October 29, Kelly told Blunt that he used a lighter to ignite cardboard boxes in a basement storage locker. When asked why he started the fires, Kelly responded that he had uncontrollable urges to start fires. Kelly also said he got excited by watching the fire equipment and hearing the sirens and by the general excitement caused in response to a fire.

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[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[3] At the suppression hearing, Blunt acknowledged that he knew at the time of the interrogation that Kelly was "considered to have some type of learning disability."

¶8 On October 31, 1997, a criminal complaint was filed charging Kelly with three felonies: two counts of intentionally damaging the building of another by means of fire without the other's consent contrary to WIS. STAT. § 943.02(1)(a), and one count of recklessly endangering the safety of another under circumstances which show utter disregard for human life contrary to WIS. STAT. § 941.30(1).

PROCEDURAL BACKGROUND

First Motion to Suppress

¶9 The first motion to suppress was addressed by the trial court in March 1998. The issue was limited to whether the record was sufficient to show that the State established by a preponderance of the evidence that not only were Kelly's ***Miranda*** rights read to him, but that he knowingly understood those rights and therefore intelligently waived them. Each side presented expert testimony regarding Kelly's capacity to knowingly and intelligently waive his ***Miranda*** rights. Both parties had previously stipulated that the issue of whether Kelly's statements to the police were voluntary would not be tested at the suppression hearing.[4] Kelly's attorney, Thomas Brown,[5] argued that the reading and

[4] When the voluntariness issue is addressed at the same time as the issue of knowing and intelligent waiver, the hearing is called a ***Miranda-Goodchild*** hearing. The supreme court has defined a ***Miranda-Goodchild*** hearing as "a combined procedure designed to determine the following issues: (1) the voluntariness of a defendant's statement; (2) whether proper ***Miranda*** warnings were given; and (3) whether the defendant's statement was made as a result of a knowing and intelligent waiver of the ***Miranda*** privilege." ***State v. Hockings***, 86 Wis. 2d 709, 715-16, 273 N.W.2d 339 (1979); *see also* ***Miranda***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

[5] After the suppression hearing, Kelly's attorney, Brown, told the court on July 23, 1998, that it was Kelly's desire to proceed with court-appointed counsel or with counsel from the public defender's office. Subsequently, Kelly met the criteria for public representation and Brown was allowed to withdraw.

explanation of Kelly's ***Miranda*** rights, while proper, were "not sufficient … given [his] circumstances." In essence, Brown argued that while the officers apprised Kelly of his ***Miranda*** rights, Kelly was not capable of waiving his ***Miranda*** rights because of his mental capacity.[6] Kelly's expert, Dr. Kenneth Smail, agreed, testifying that Kelly did not possess the requisite capacity to knowingly and intelligently waive his rights under ***Miranda***.

¶10 The trial court disagreed. The trial court found that there were some "inconsistencies" in Smail's testimony. The trial court found that the standards of the tests that Smail ran on Kelly were not complied with and that the "protocols of [the] test[ing] were not carried out." The trial court went on to say that it was "not satisfied Dr. Smail offered [the court] a sound basis on which to adjudge [Smail's] ability to score this test." The trial court also registered concern that the "test itself measures only the ability to some extent to understand specific words and not concepts," and that at least three times "words were read to [Kelly and] scored upon his ability not to understand the concept but to understand a particular word, whereas in reality, at least on this record, those words weren't even used by Detective Blunt during the course of [apprising Kelly of his ***Miranda*** rights]." The trial court concluded that it was "not persuaded" by Smail's testimony.

¶11 The trial court stated that considerations of the "larger sphere of the events might well offer the Court a better and more well-reasoned decision respecting Mr. Kelly's capacity on [the day in question]." Some of these considerations included the trial court's finding that Kelly's tenure at public high

[6] Kelly did not dispute the fact that he was properly advised of his ***Miranda*** rights.

school "assisted in particular respect with Mr. Kelly's intellectual capacity to knowingly and intelligently waive" his ***Miranda*** rights. In addition, the trial court noted that the State's expert, Dr. Frederick Fosdal, testified that Kelly understood what was going on. Fosdal based his opinion in part on Kelly's ability to understand other concepts such as attorney/client privilege and doctor/patient privilege. The trial court pointed out that Kelly was not a "novice to the criminal justice system with respect to having contact with police officers." The trial court summed up the ***Miranda*** test as a question of whether, under the circumstances that attenuated Kelly's confrontation with police on that day, Kelly understood his ***Miranda*** rights.

¶12 In its oral decision on June 22, 1998, the trial court refused to suppress Kelly's statements, finding that "the record supports every reasonable inference as well as factually that Mr. Kelly did understand [his] rights as were granted to him under [the ***Miranda***] decision." The trial court held that the State had met its burden and had proven Kelly's understanding of his rights at the time by a preponderance of the evidence. Kelly does not appeal the trial court's decision to deny his first motion to suppress.

Second Motion to Suppress

¶13 In August 1998, Attorneys Robin Dorman and Donna Martinez, both from the state public defender's office, became successor counsel replacing Brown. On January 22, 1999, successor counsel asked the court to consider suppressing Kelly's statements on grounds of involuntariness. Both sides had an opportunity to brief the matter. In an affidavit by Martinez, she averred that she would "not request a further evidentiary hearing in this matter because she believe[d] testimony sufficient to decide this motion ha[d] been elicited in prior evidentiary hearings held in this case." Thus, no further evidence was offered to

assist in the trial court's voluntariness determination. On February 12, 1999, the trial court, before issuing its oral decision, allowed the parties to be heard on any additional points.[7] After which, the trial court stated:

> The sole issue that I can determine that would bear as to the involuntariness of this statement deals with the perhaps trickery of Detective Blunt … that in asking Mr. Kelly whether or not he had handled matches or a lighter that day the suggestion was that there was….
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> ….
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> … [a] scientific test … that would determine whether or not the response to whether he handled matches or a lighter that day was a truthful response…. We understand the circumstances that attenuate Mr. Kelly in life, and I won't burden the record additionally with what the Court had made a part of its earlier decision on the Miranda issue….
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> [Kelly's confession] was made at the outset of questioning after Mr. Kelly had made a voluntary trip to the police department at the request of Detective Blunt. It was not done after prolonged questioning. It was not done after some denial of the basic human needs of Mr. Kelly had been requested. It was not made as a part of any threat, promises for consideration, or whatever.

¶14 The trial court held that the officer's effort to trick Kelly into believing a scientific test existed which could show whether a person had handled

[7] Kelly's counsel wanted the trial court to apply a "beyond a reasonable doubt" standard to the State's burden of proving that Kelly's statements were voluntary or to stay the proceedings until a pending state supreme court case addressing the proper standard was decided. The trial court rejected this request in the interest of moving the case forward. The trial court stated that ***State v. Albrecht***, 184 Wis. 2d 287, 516 N.W.2d 776 (Ct. App. 1994), was on point and provided the precedential standard: proof by a preponderance of the evidence. Additionally, the trial court stated that "whether or not the standard is … a preponderance of the evidence or beyond a reasonable doubt, the Court in measuring this statement as against either standard is satisfied that it was voluntar[y]."

Subsequently, the pending state supreme court case was decided on May 20, 1999, and reaffirmed that "the State must prove by a preponderance of the evidence that a defendant's confession was voluntarily obtained." ***State v. Agnello***, 226 Wis. 2d 164, 182, 593 N.W.2d 427 (1999).

matches or a lighter was not intended to take advantage of Kelly's borderline intelligence. The trial judge pointed out that he, a judge, did not have any idea as to whether such a test existed. The trial court reasoned that the "same statement could have been made to anyone lacking in sophistication as to police procedures and the availability of scientific testing and perhaps been taken as true." Therefore, the trial court concluded, the officer's action was "simple chicanery" that could have tricked a person of any intelligence level. He stated that "what Detective Blunt did in my opinion … was nothing that any reasonable police officer under any circumstances might well have contrived in an effort to get to what he believed to be the truth of the matter." The trial court did not believe that this "single act by the police department here was to overcome the will of the defendant to resist questioning and made this statement involuntary." The trial judge stated:

> … I don't think this particular trickery overcame the will of Mr. Kelly based upon Mr. Kelly's lack of sophistication…. In other words what Detective Blunt did in my opinion … was nothing that any reasonable police officer under any circumstances might well have contrived in an effort to get to what he believed to be the truth of the matter.
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> ….
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> Now, from that came the flood apparently of information from Mr. Kelly concerning his involvement in all of this, and it occurred [in] a very, very short period of time under what might be described as at least on the balance of this record anything but coercive circumstances.
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> ….
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> … [A]s the Court described in its earlier decision on the Miranda issue, Mr. Kelly is someone who apparently has a propensity for speaking up and speaking about what is going on. There can be no protection from that. If it led Mr. Kelly to make a statement that was clearly against his interests, the Court cannot now go back and say, Mr. Kelly, you should not have said that to the police, it was not in your best interests to do so, therefore we're going to

> exclude it because it may go at some point in time before the trier of fact as a piece of evidence that would inculpate him in a crime.
>
> Nor [does this record reflect coercion] and, frankly, I think under these circumstances the Court might anticipate there would be some conflicting argument here that, in fact, on this record that Mr. Kelly was in any way coerced or that his will to resist was overcome by this simple chicanery offered by Detective Blunt.

¶15 The trial court determined that the State had met its burden by demonstrating by a preponderance of the evidence that Kelly's statement, at the time it was given to Blunt, was voluntary. The motion to suppress on the grounds of involuntariness was denied.

TRIAL

¶16 Subsequently, on November 2, 1999, a bifurcated trial to the bench was held. At the guilt phase, the trial court found that the evidence was overwhelming that Kelly was guilty beyond any reasonable doubt as to Counts One, Two and Three of the information. At the mental disease or defect phase, the trial court found that the record established that Kelly was not guilty by reason of mental disease or defect. For this second conclusion, the trial court relied primarily on the unrefuted testimony of Dr. Lynn Maskel. Maskel testified that at the time of both incidents, Kelly was suffering from mental defects both with respect to borderline intellectual functioning and persuasive developmental disorder.[8] Maskel testified that on both occasions involving the Brittany

[8] We note that Maskel was an expert brought in by the defense after Kelly's suppression motions were denied by the trial court. In other words, Maskel's testimony was not of record and not available to the trial court during consideration of either suppression motion. Thus, we do not consider it in the voluntariness determination before us today. ***Village of Williams Bay v. Metzl***, 124 Wis. 2d 356, 360-61, 369 N.W.2d 186 (Ct. App. 1985) (review confined to consideration of the record below).

(continued)

Apartments fires of October 29, 1997, and September 30, 1996, Kelly's mental defects acted in conjunction with each other to render him lacking substantial capacity to appreciate the wrongfulness of his conduct. The trial court committed Kelly to an institution for forty years.

¶17 Kelly appeals from the commitment order, basing his appeal on the trial court's denial of the second suppression motion. ***State v. Smith***, 113 Wis. 2d 497, 508, 335 N.W.2d 376 (1983).

STANDARD OF REVIEW

¶18 Voluntariness is a question of constitutional fact. On appeal, we apply a different standard of review to a trial court's determination of constitutional fact. We apply a deferential, clearly erroneous standard to a trial court's findings of evidentiary or historical fact. ***State v. Martwick***, 2000 WI 5, ¶18, 231 Wis. 2d 801, 604 N.W.2d 552. We then independently determine the questions of constitutional fact. ***Id.***

In Maskel's report, filed September 9, 1999, she diagnosed Kelly with borderline intellectual functioning. In her opinion, Kelly "is so highly suggestible and desirous to please authority figures, that his statements acknowledging guilt which have been given at various times should not be considered reliable. When questioned, [Kelly] is like a young child who likes the attention and wants to 'get it right' meaning give answers the questioner wants." Maskel went on to report that she "has repeated first hand knowledge of [Kelly's] extreme suggestibility as well as supporting material from collateral sources. This raises significant concern about the validity of answers given to questioning by any source including statements made to the police."

Like the trial court, we consider the evidence brought in through Maskel's report and testimony to be convincing. We do not comment on what our holding may have been had this evidence been available to the trial court when it considered the second motion to suppress.

ANALYSIS

Deferential Review of Evidentiary or Historical Facts

¶19 First, we examine the trial court's findings of evidentiary or historical fact. Unless these findings are clearly erroneous, we will uphold them. Again, we note that in regard to the first suppression motion, the only claim was that Kelly's ***Miranda*** waiver was not knowing and intelligent. After the suppression hearing, when successor trial counsel Martinez raised the issue of voluntariness, she specifically stated that she was not requesting a further evidentiary hearing "because she believe[d] testimony sufficient to decide this motion ha[d] been elicited in prior evidentiary hearings held in this case." Therefore, the only evidence presented to the trial court on the issue of voluntariness was the evidence from the first suppression motion hearing. Upon review, we must rely on the record before the trial court at the time of its voluntariness determination. ***Village of Williams Bay v. Metzl***, 124 Wis. 2d 356, 360-61, 369 N.W.2d 186 (Ct. App. 1985).

¶20 In its decision to deny the first motion to suppress, the trial court acknowledged Kelly's borderline intellectual functioning. The trial court also noted, in contrast to this limited intellectual functioning, that Kelly had successfully held a job and had successfully received his high school diploma after participating in some mainstream and special education classes.

¶21 In its oral decision on the second suppression motion, the trial court acknowledged the trickery of Blunt, but found that "this particular trickery" did not overcome Kelly's will. It noted that Kelly voluntarily accompanied the police officers to the police department for questioning and was told he could leave at any time. At the outset of questioning, Kelly confessed that he had started the fire. The confession did not come after prolonged questioning. It did not come after

some denial of Kelly's basic human needs. It was not made as a part of any threat or promise for consideration.

¶22 Additionally, the only expert testimony of record was given at the first suppression motion hearing by Kelly's expert, Smail, and the State's expert, Fosdal. This testimony was contradictory. Fosdal disagreed with Smail, who had testified that Kelly could not knowingly and intelligently waive his ***Miranda*** rights at the time. The trial court found Kelly's expert unpersuasive. Witness credibility findings along with other evidentiary findings are exclusively within the province of the trial court. ***State v. Owens***, 148 Wis. 2d 922, 930, 436 N.W.2d 869 (1989). We do not believe that the trial court was clearly erroneous in any of its findings.

De Novo Review of Constitutional Facts

¶23 We independently review the constitutional fact of voluntariness. A criminal defendant's statements to the police will not be held constitutionally involuntary unless the police engaged in improper or coercive conduct. ***State v. Albrecht***, 184 Wis. 2d 287, 301, 516 N.W.2d 776 (Ct. App. 1994). When determining the voluntariness of a statement, we examine the totality of the circumstances surrounding the statement, weighing the defendant's personal characteristics against the pressures police imposed upon the defendant to induce a response to the questioning. ***Id.*** However, absent improper or coercive police conduct, we *do not* reach this balancing. ***Id.*** Thus, even if Kelly's confession was prompted by mental illness which interfered with his rational intellect and free will, the admission of the confession into evidence does not violate the constitutional prohibition against involuntariness where there is no finding of coercive police conduct. ***Colorado v. Connelly***, 479 U.S. 157, 164 (1986).

¶24 The circumstances surrounding Kelly's confession did not have the trappings of coercive or improper police conduct. Before questioning, Blunt told Kelly that he was not under arrest, that he did not have to talk to the police or answer any questions, and that he could leave at any time. Blunt told Kelly that he would be able to tell if Kelly was telling the truth by performing a test on him to see if he had used a match or lighter that morning. Blunt, using a gunshot residue kit, proceeded to swab Kelly's hands with plain water. Blunt turned the kit over to another officer and asked that officer to leave the room. Blunt told Kelly that he felt that Kelly was not being truthful with him because he had a witness who had observed Kelly watching the fire. Blunt told Kelly that he felt that Kelly was responsible for starting the fire. Blunt told Kelly that he thought he was a decent young man and that Kelly would not intentionally try to hurt anyone or kill anyone, but that he felt Kelly had a problem with starting fires and needed to address this problem. Kelly stated that he did not want to hurt anyone and then confessed to Blunt that he did start the fire at his apartment building that morning.

¶25 At that point, Blunt stopped questioning Kelly and told him that he needed to read him his ***Miranda*** rights. Blunt used a rights card that he carried on his person, but simplified the warnings so that Kelly could better understand them. After listening to his ***Miranda*** rights, Kelly told Blunt that he understood his ***Miranda*** rights and that he was willing to talk. Kelly then confessed to having started the Brittany Apartments fire that day in addition to several other fires in the past.

¶26 Because we hold that the tactics used by the police were neither improper nor coercive, we do not need to examine Kelly's personal characteristics. We agree with the trial court that under the totality of the circumstances, the police conduct was "anything but coercive." "[D]eliberate misstatements by the police

comprise *but one factor* in determining whether a defendant has voluntarily relinquished the right not to undergo custodial interrogation." ***State v. Jackson***, 229 Wis. 2d 328, 339-40, 600 N.W.2d 39 (Ct. App.), *review denied*, 230 Wis. 2d 272, 604 N.W.2d 571 (Wis. Sept. 28, 1999) (No. 98-0525-CR) (emphasis added). The fact that Blunt deliberately tried to trick Kelly by telling him there was a test that would show whether Kelly had lit matches or a lighter in the past twelve hours and then pretending to administer the fake test is *but one factor* in our determination of voluntariness. We agree with the trial court's belief that "this particular trickery [did not overcome] the will of Mr. Kelly [despite] Mr. Kelly's lack of sophistication."

¶27 We agree with the trial court that Kelly's confession occurred in *anything but coercive* circumstances. Under the totality of the circumstances, Blunt's misrepresentation, without more, does not rise to the level of improper or coercive police action. We hold that the record does not support a finding of involuntariness and therefore Kelly's confession was properly admitted. Accordingly, Kelly's commitment must be affirmed.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.