

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 2, 2013

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2012AP140-CR

Cir. Ct. No. 2008CF4185

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LADARIUS MARSHALL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 FINE, J. Ladarius Marshall appeals the judgment entered on his guilty plea to second-degree reckless homicide as party to a crime and use of a dangerous weapon. See WIS. STAT. §§ 940.06(1), 939.05 & 939.63(1)(b). His sole

claim on appeal is that the circuit court erred when it did not grant his suppression motion.¹ We affirm.

I.

¶2 On June 16, 2008, just before midnight, Lavare Gould was shot and killed in the 2600 block of North 37th Street. On August 16, 2008, police arrested then-sixteen-year-old Marshall after his co-actor, Michael Winston, told police that he and Marshall went to North 37th Street to shoot another person, but Marshall ended up shooting Gould.

¶3 Police arrested Marshall at 6:25 a.m. at the home of his grandmother, who was his legal guardian. After processing, police put Marshall in an interview room at 7:36 a.m. Police interviewed Marshall five times between 10:45 a.m. and 9:01 p.m. that day. Police detectives Gus Petropoulos and Michael Braunreiter started the first interview at 10:45 a.m. by reading Marshall his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and asking him if he understood them. When Marshall said he understood those rights, the detective asked: “[A]re you now willing to answer questions or make a statement?” Marshall answered: “I don’t want to make no statement. I’ll answer some questions.” Marshall then answered questions for some fifty-eight minutes, and denied any involvement in the shooting. After fifty-eight minutes, Marshall said: “I ain’t going to talk no more. I’m through talking. I don’t want to talk no more.” The detectives stopped asking him questions and left the room. Petropoulos said, however, “You think about things, okay? And we’ll be back in a couple of minutes.”

¹ A person may appeal an order denying a suppression motion even though that person has pled guilty. WIS. STAT. § 971.31(10).

¶4 The detectives returned to the interview room shortly before 2:00 p.m., because Marshall told officer James Thelen, who was posted outside the room, that he “wanted to talk” to them again. Braunreiter asked Marshall, “you said you wanted to talk to us?” Marshall replied: “Well, yeah. I asked him [Thelen] what was going on?” Braunreiter then asked Marshall whether he felt like talking and Marshall replied, “I got nothing to say.” Braunreiter responded, “Yeah, I can understand that. We’ll just sit in here and give you a little talk. You don’t mind that? ... What kind of sports you like?” The detectives and Marshall then talked about sports. Then, Braunreiter said:

I tell you, I know that you said it, that you don’t have nothing to say, okay? But to be truthful with ya, folks always have something to say, okay? And if you’re willing right now, we’d like to talk to ya about what brought you here, but if you haven’t noticed already, Gus and I, we ain’t into twisting arms and yelling and screaming at folks and that kind of thing. You know, we don’t do that, okay?

MR. MARSHALL: Uh huh (affirmative).

DETECTIVE BRAUNREITER: All we try to do is like now, just be civil. Have a nice conversation, try to work some things out. Would you be willing to try to work some things out with us?

MR. MARSHALL: I just said, I told you-all. I just told you-all, all I know.

DETECTIVE BRAUNREITER: Right. I understand. Like I said, there’s some things that we need to try to iron out, try to straighten out, okay? And without you agreeing to talk with us, well, we’re not going to -- you know, we’re not going to waste your time. We’re not going to waste our time. You know how that goes. I mean, right?

MR. MARSHALL: Uh huh (affirmative).

DETECTIVE BRAUNREITER: I mean, I know you’re sitting in here not much to do and I apologize for that. I wish there was something -- some other way -- where to put ya, you know what I mean? But there ain’t, so

if we go to talking again, before we get to talking again, I got to read you your rights again. You know what I mean? Those are the rules.

MR. MARSHALL: I know.

....

DETECTIVE BRAUNREITER: Well, I know and then without -- you know, at the risk of getting your [sic] irritated again, and that ain't our -- that ain't our design. That ain't what we want, okay? We just want to carry on a conversation with you. We don't want you pissed at us. You know, enough people in the world pissed at us. We don't even want more. You know what I mean?

MR. MARSHALL: Uh huh (affirmative).

....

DETECTIVE BRAUNREITER: Anyway I know you've got some things on your mind right now. Certainly Gus and I probably ain't high up in your mind.

Do you want to have a little conversation with us?

MR. MARSHALL: About what?

DETECTIVE BRAUNREITER: Pretty much the same thing.

MR. MARSHALL: You can talk. I ain't got nothing to say. You can talk to me.

¶5 The Detective Braunreiter then re-advised Marshall of his *Miranda* rights, and Marshall again responded that he understood those rights. Then Braunreiter asked: “[r]ealizing that you have these rights, are you now willing to answer questions or make a statement?” to which Marshall responded, “I ain’t going to make no statement.” The detective said “Okay. Questions?” to which Marshall answered “I’ll let you-all talk[,]” and said he would answer questions the detectives asked. The questions and answers continued until 3:55 p.m. when Marshall said, “I ain’t got nothing else to say.” The detectives then left the room.

¶6 At 4:20 p.m., Marshall asked Thelen if he could talk to Braunreiter alone. Marshall told Braunreiter that he remembered his rights and did not need them re-read. During this interview, Marshall told Braunreiter that Winston “was already shooting and then I seemed like I was shooting at somebody, but I really shot at air. I shot through the air.” Marshall said that he then told Winston, “I think I shot somebody and [Winston] say, I shot a dude upon the porch a couple of times. I really didn’t do no shooting. I didn’t even do nothing. I was just pretending like I was playing along.” This third interview ended at 5:40 p.m. when Marshall said he needed to use the restroom.

¶7 Detectives Timothy Heier and Matthew Goldberg started the fourth interview with Marshall at approximately 7:41 p.m. after a shift change. Goldberg re-advised Marshall his *Miranda* rights. Marshall said he understood them. Goldberg asked “are you now willing to answer questions or make a statement? Do you want to talk to us about this?” Marshall said no and the detectives packed up their things, took them out of the room, and then told Marshall “that we were done.”

¶8 When the detectives came back to tell Marshall what Heir said was “a courtesy [as to] what would happen next” in the processing, Marshall would not let them leave. Rather, he said that “he wanted to talk to us some more.” This was the fifth interview, and at approximately 7:51 p.m., which was ten minutes after the detectives had re-advised Marshall of his *Miranda* rights in the fourth interview, Goldberg again told Marshall what his *Miranda* rights were. And again, Marshall said that he understood them. The following, like the other quotations of Marshall’s interactions with the various detectives, is from the interview transcript:

DETECTIVE: Okay. Now realizing you have these rights, are you now willing to answer questions or make a statement?

MR. MARSHALL: [Indecipherable].

DETECTIVE: You don't want to make a statement?

MR. MARSHALL: No. I'll talk to you all, but I'm not making no statement.

DETECTIVE: Oh. That's what talking to us is, is just making a statement. You want to talk?

MR. MARSHALL: Yeah I'll talk [Indecipherable] incident [indecipherable] no statement.

DETECTIVE: Okay. That's fine. You want to talk to us though?

MR. MARSHALL: [Indecipherable].

DETECTIVE: You don't mind if we talk to you. You don't mind if we show you pictures. You don't mind any of that?

MR. MARSHALL: Uh-uh [negative].

¶9 In this fifth interview, Marshall told police that:

- “Mike Winston” “led me into this, get me in this.”
- Winston said “Let's go down there” and “rob somebody.”
- Winston gave him a “three fifty-seven ... revolver,” and told him “stay right here in case somebody comes through, somebody, in case somebody gets to shooting back at us.”
- “I saw somebody on the porch reaching for a gun and I just shot through the porch a couple times.”

- “I shot in the air. I didn’t shoot at, nothing like shoot at nobody. I shot in the air. I didn’t shoot at nobody.”
- “I know nobody -- they couldn’t see me because we had on hoodies all the way to cover our face. So I know nobody couldn’t see me.”
“All this was covered. All you could see is our eyes.”²

¶10 When Marshall then told the detectives “I don’t want to talk no more[,]” they ended the interview, and took him to the phone to call his grandmother. The State charged Marshall in adult court with first-degree intentional homicide as party to a crime and possession of a dangerous weapon by a child.

¶11 Marshall sought to suppress his statements, claiming that the detectives ignored what he asserted were his requests to remain silent, and that his statements to them were not voluntary. The circuit court held an evidentiary hearing on Marshall’s suppression motion.

¶12 Officer Thelen testified at the suppression hearing that he “monitor[ed]” Marshall by “sit[ting] outside the door,” and “checked” on him “every ten or fifteen minutes to make sure he’s okay.” Thelen said that Marshall “did request to talk to both detectives again” after the first interview, and that after the second interview, Marshall asked “that he speak directly to Detective Braunreiter only.”

¶13 Braunreiter testified at the hearing that:

² Many of the contractions quoted in the Record omitted the apostrophe. We have added the apostrophes where omitted.

- Marshall was not “restrained in any manner” during any of the interviews, that he read Marshall his *Miranda* rights before both the first and second interviews. He also testified that he asked Marshall if he wanted them re-read before the third interview, but Marshall said he remembered his rights.
- Marshall said each time that he understood his rights.
- Marshall said “that he didn’t want to make a statement but that he would answer questions.”
- No one “threaten[ed] [Marshall] in any manner.”
- When Marshall said that he “didn’t want to talk” anymore, the detectives left the room, but later “received information” that “Marshall wanted to speak to us again.”
- Thelen told him after the second interview that “Marshall wanted to speak with me, not myself and Detective Petropoulos, specifically me.”

¶14 Heier testified at the hearing and related the following:

- When he first entered the interview room for what was the fourth interview, Marshall said “he wanted to make a phone call and talk [t]o his grandma” so the detectives “took him ... into a hallway where there is a phone on the wall ... and we attempted to make contact, [but] [t]here was no answer.” He told Marshall they “would try again later.”

- After the attempted phone call, they went to a different interview room, left the door open, read Marshall his *Miranda* rights, and asked Marshall if he wanted to make a statement. When Marshall said no, the detectives “stopped and noted the time at 7:45 p.m. and left the room.”
- Detectives Heier and Goldberg returned to tell Marshall “the next step” but Marshall “was surprised that it was done and that he wanted to talk some more, and we explained that he ended it, and he indicated that he wanted to talk.”
- After the detectives told Marshall about his rights under *Miranda* for the second time, Marshall told them “that he understood them and that he would talk to us, but he did not want to make a statement.”
- “I indicated and wanted to clarify and clear it up as I had done earlier, talking is making a statement, and that it’s the same thing, what do you want to do, and he indicated that he would talk to us.”
- The detective also told the circuit court that there were “no threats or promises, anything that would make him speak a second time, that this was totally something that he wanted to do.” “He was not handcuffed at any time during the interview.”
- “At 9:01 p.m.,” Marshall told the detectives that “he wanted to again make that attempt to call his grandma.” They took him to the phone, and “[h]e made somewhere around 7 or 8 different calls, talked for ten minutes in an attempt to contact various family members.”

¶15 Petropoulos testified at the hearing that Braunreiter read Marshall his rights in the first and second interview, that Marshall appeared to “understand those rights,” and that “it appeared that Mr. Marshall understood what was being said. He comprehended what was being said because his answers were appropriate to the questions.”

¶16 Marshall did not testify, but his mother and grandmother both testified that they called the police station to try to get information, but were not given any. His mother testified that Marshall was in “special aid class” at school because he has “retardation.” His grandmother testified that she was his legal guardian and he has “[m]ild retardation.” When asked, “If you had been given” the “opportunity” “to be present with him during” “questioning” “would you have come?” she answered “[m]ost definitely.”

¶17 Psychologist Deborah Collins, who had done what she said was “a forensic evaluation” of Marshall, testified at the hearing that Marshall “functions somewhat ... above the range of mild mental retardation,” that “his cognitive limitations” at school are due to “problems in school adjustment, behavioral issues,” “cannabis abuse,” and that “[h]e hadn’t been identified ... with mild mental retardation, and if that were the case, the school setting would have most likely identified that.”

¶18 At the end of the suppression hearing, the circuit court found:

- At the time of the crime, Marshall “was functioning at a somewhat higher than borderline intellectual capacity. He had not had any identification of mental retardation. He has some cognitive limitations, but ... higher than the borderline intellectual functioning, as Dr. Collins has described.” Although he “had

academic delays” the delays “went beyond his cognitive abilities and included behavioral issues, things such as cannabis abuse.”

- Marshall was put in an interview room at 7:36 a.m. He was “not restrained, not -- not handcuffed.”
- The first interview started at “10:45 a.m. and lasted until 11:43 a.m.” Marshall “was read his constitutional rights,” and he said that “he did understand each of the rights.” “He said he was not going to make a statement but would answer questions.” “There were no threats to him at that time.” “The interview stopped when the defendant said he didn’t want to talk any more.”
- The second interview started at 1:58 p.m. after Marshall told officer Thelen that he wanted to talk to the detectives. “They again advised the defendant of his constitutional rights ... [and] [t]he defendant agreed to talk with the officers. That interrogation questioning stopped at 3:55 p.m. when the defendant stated he didn’t want to talk any more.”
- “The defendant, after about 20 minutes, told the officer he wanted to talk to Detective Braunreiter but only to Detective Braunreiter. Detective Braunreiter came back and started another interview at 4:20 p.m. He asked the defendant if he remembered his constitutional rights” and Marshall said “he didn’t need to have his rights read to him again.”
- Marshall “was provided ... [a] McDonald’s hamburger and fries. He had at least one soda. During all of these interviews, again, there

were no threats, no physical threats made to the defendant, no promises were made to him.”

- After the shift change, “Detectives Heier and Goldberger ... went to talk to the defendant ... at 7:41 p.m.” Marshall “asked to call his grandmother ... but there was no answer.”
- The detectives read Marshall his *Miranda* rights and when Marshall said “he didn’t want to make a statement” they “stopped the interview [at] 7:45” and left.
- “A few minutes later, the defendant, probably wondering what was going different since he had previously told the other detectives that he didn’t want to make a statement but was willing to talk, he told these two detectives that he wanted to talk.” Questioning “started again at 7:51 p.m. The defendant was again read his constitutional rights” and “said he would talk with them but not make a statement.”
- “They stopped the interview when the defendant said he didn’t want to talk any more at 9:01 p.m.” Marshall again tried to call his grandmother and “actually made seven or eight phone calls.”
- “None of the officers noticed any type of mental health issues with the defendant” or “encountered any lack of understanding on the defendant’s part. The officers received answers that appeared to be context appropriate and seemed to be responsive to the questions.”
- Marshall “appeared to be alert during the interviews, particularly that last interview.” “At no time ... did the defendant ever ask for an

attorney” or “for his grandmother to be present” or “for his mother to be present.”

- Marshall “was properly advised of his constitutional rights” “he did knowingly and voluntarily waive those rights.”
- “Although, again, he was choosing not to make any formal statement, he was willing to answer the questions the officers were making.”
- Marshall did not have “any type of cognitive disability that prevented him from being able to knowingly and voluntarily waive his rights.” “There were no pressures” used “that exceeded his ability to resist in any way.”
- Marshall’s “young age” and being on “lower end of the intellectual scale” did not affect his ability to “adequately function[] in this matter.”
- The officers did not conduct a sixteen-hour “non-stop interrogation.” Rather, “[t]here were several interrogations” “stopped at [Marshall’s] request” and “then reinitiated” by Marshall.
- “There was no psychological pressure used here. No inducements, threats, or methods, or strategies that were in any way coercive to obtain any type of statement from the defendant. The defendant wasn’t even handcuffed during these statements.”

The circuit court then ruled that Marshall “did not invoke a right to remain silent” and when Marshall wanted to stop talking, “the officers meticulously complied.” The circuit court denied the motion to suppress.

II.

¶19 Marshall makes two claims: (1) that he invoked his right to remain silent; and (2) that his statements were involuntary. In determining whether the circuit court erred in denying Marshall’s suppression motion, we apply two standards of review. First, we uphold any “findings of evidentiary or historical fact unless they are clearly erroneous.” *State v. Hambly*, 2008 WI 10, ¶49, 307 Wis. 2d 98, 126, 745 N.W.2d 48, 62. We defer to the circuit court’s credibility determinations based on those findings “unless the testimony relied upon is incredible as a matter of law.” *State v. Jacobs*, 2012 WI App 104, ¶17, 344 Wis. 2d 142, 155, 822 N.W.2d 885, 891. Second, we “decide *de novo* the legal issue of whether those findings require suppression.” *State v. Douglas*, 2013 WI App 52, ¶13, 347 Wis. 2d 407, 830 N.W.2d 126, 131.

A. *Right to remain silent.*

¶20 A suspect’s right to remain silent includes both the initial right to remain silent and the right to cut off questioning. *State v. Markwardt*, 2007 WI App 242, ¶24, 306 Wis. 2d 420, 434, 742 N.W.2d 546, 553. If the right is unequivocally asserted, police must “scrupulously honor” a suspect’s decision to “cut off questioning.” *Id.*, 2007 WI App 242, ¶¶24, 26, 306 Wis. 2d at 434–435, 742 N.W.2d at 553–554. Police do not need to stop questioning if they reasonably believe the suspect’s statement is ambiguous. *Id.*, 2007 WI App 242, ¶28, 306 Wis. 2d at 435–436, 742 N.W.2d at 554. Further, questioning can start again if the

suspect re-initiates communication with police. See *Edwards v. Arizona*, 451 U.S. 477, 484–485 (1981).

¶21 The circuit court found that Marshall never unequivocally and unambiguously invoked his right to remain silent. The Record supports the circuit court’s finding. Although Marshall said he would not make a statement, he agreed to answer questions. Detectives Petropoulos and Braunreiter reasonably interpreted this to mean that Marshall would talk to them in a question and answer format but would not give a narrative. When Marshall told them that he was done talking, the detectives left and did not return until Marshall asked for them. They stopped when Marshall said he had nothing more to say. Marshall then resumed the interviews by asking to talk to Braunreiter alone. That interview ended, not because Marshall said he wanted to stop talking, but because he said he needed to use the restroom. When detectives Heier and Goldberg took over after the shift change, they left the room when Marshall said he would not make a statement. Then, they came back only to tell Marshall that they were moving on to the next step in processing. He responded by saying he wanted to talk to them more.

B. *Voluntariness.*

¶22 A statement is voluntary if it “was the product of a ‘free and unconstrained will, reflecting deliberateness of choice.’” *State v. Clappes*, 136 Wis. 2d 222, 236, 401 N.W.2d 759, 765 (1987) (quoted source omitted). In determining whether Marshall’s statements were involuntary, we look to whether police used “‘improper pressures.’” See *State v. Williams*, 220 Wis. 2d 458, 464, 583 N.W.2d 845, 847–848 (Ct. App. 1998) (quoted source omitted). Our “analysis involves a balancing of the personal characteristics of the defendant against the pressures and tactics” of the police. See *State v. Jerrell C.J.*, 2005 WI

105, ¶20, 283 Wis. 2d 145, 157, 699 N.W.2d 110, 115–116.³ We apply a totality of the circumstances test to determine whether a statement is voluntary. *Id.*, 2005 WI 105, ¶20, 283 Wis. 2d at 157, 699 N.W.2d at 115.

¶23 The circuit court found that the police did not use any coercive tactics, threats, or other pressures. It also found that Marshall appeared to the officers to be alert, that he responded to them appropriately, and that he did not have any mental health or cognitive issues that prevented him from knowingly and voluntarily waiving his rights. Finally, it found that Marshall’s statements were the “product of a free and unconstrained will, reflecting a deliberateness of choice as opposed to the result of a conspicuously unequal confrontation.” These findings are supported by the testimony of the detectives and Dr. Collins. The findings are thus not clearly erroneous.

¶24 Marshall argues, however, that *Jerrell C.J.* requires reversal because it imposes special requirements when the police interview juvenile suspects. He claims that his age, his learning disabilities, and the length of his detention made his statements involuntary under *Jerrell C.J.* We disagree.

¶25 *Jerrell C.J.* noted that ““special caution”” needs to be used in determining whether a juvenile confession is voluntary. *Jerrell C.J.*, 2005 WI

³ ““The relevant personal characteristics of the defendant include the defendant’s age, education and intelligence, physical and emotional condition, and prior experience with law enforcement. The personal characteristics are balanced against the police pressures and tactics which were used to induce the statements, such as: the length of the questioning, any delay in arraignment, the general conditions under which the statements took place, any excessive physical or psychological pressure brought to bear on the defendant, any inducements, threats, methods or strategies used by the police to compel a response, and whether the defendant was informed of the right to counsel and right against self-incrimination.”” *State v. Jerrell C.J.*, 2005 WI 105, ¶20, 283 Wis. 2d 145, 157, 699 N.W.2d 110, 116 (quoted source omitted).

105, ¶21, 283 Wis. 2d at 157, 699 N.W.2d at 116 (quoted source and one set of quotation marks omitted). As we have seen, the circuit court here used special caution when it applied the proper factors and balancing test, and found that: (1) the police did not use any coercive tactics: “no psychological pressure” “[n]o inducements, [or] threats,” (2) Marshall did not have “any type of cognitive disability that prevented him from” “proceeding voluntarily,” (3) although “these officers were adults, [and] the defendant was 16 years and 3 months[,] [t]here were no pressures that were brought to bear on the defendant that exceeded his ability to resist,” and (4) Marshall was not “the subject of 16 hours of non-stop interrogation. ... There were several interrogations ... stopped at his request [and] then reinitiated” by Marshall. These findings are well supported by the Record, which shows that the detectives scrupulously honored Marshall’s requests.

¶26 We affirm.

By the Court.—Judgment affirmed.

Publication in the official reports is not recommended.

