COURT OF APPEALS
DECISION
DATED AND FILED

September 11, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-3288-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID A. BINTZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. David Bintz appeals a judgment of conviction for first-degree murder, party to a crime, contrary to WIS. STAT. §§ 940.01(1) and

939.05,[1] and an order denying postconviction relief. Bintz argues that (1) the trial court erred by admitting "sleep talk" evidence; (2) the court erred by refusing to admit proffered expert testimony at the ***Miranda-Goodchild*** hearing;[2] and (3) the evidence presented at trial was insufficient to support his conviction. Bintz's arguments are unpersuasive, and we affirm the trial court's judgment and order.

BACKGROUND

¶2 In 1987, Sandra Lison, a bartender at the Good Times tavern in Green Bay, disappeared. Bintz sent his brother, Bob, to buy beer at the Good Times tavern the day Lison disappeared. Bintz was angry at the price of the beer, and the brothers decided to go back and rob Lison. They killed Lison in the course of the robbery because she could identify them. A few days later, Lison's body was found in the Machickanee Forest.

¶3 Eleven years later, while Bintz was incarcerated at Oshkosh Correctional Institution for another crime, he awoke his roommate, Gary Swendby, and another inmate in a nearby cell, when he had nightmares and screamed out for someone to kill a woman and make sure she was dead. Bintz thereafter talked to Swendby many times about his involvement in the Lison murder. Bintz also told other prisoners that he was involved in a murder in Green Bay. Detective Robert Haglund took a written statement from Swendby

[1] All references are to the Wisconsin Statutes are to the 1987-88 version unless otherwise noted.

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965). The ***Miranda-Goodchild*** hearing is "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).

containing information about Bintz's sleep talk as well as the contents of their later conversations concerning the Lison murder.

¶4 Haglund, with agent Richard Luell, interviewed Bintz at the Oshkosh Correctional Institution on April 16, 1998. In the course of that interview, Bintz confirmed the truthfulness of Swendby's statement and provided further information about his brother hitting and strangling Lison. Bintz subsequently was charged in 1999 with first-degree murder, party to a crime.

¶5 Bintz filed a motion to suppress his sleep talk statements. The trial court denied the motion. Bintz filed another motion attempting to introduce expert testimony regarding his intelligence and mental condition to disprove the voluntariness of his statements to Haglund and Luell. The trial court excluded the proffered testimony.

¶6 After a May 2000 jury trial, Bintz was found guilty and sentenced to life in prison. The trial court denied his postconviction motion for a new trial. This appeal followed.

DISCUSSION

I. SLEEP TALK

¶7 Bintz argues that allowing witnesses to testify about the incriminating statements he uttered in his sleep was prejudicial error because his sleep talk statements were not sufficiently reliable to be admitted as evidence. Alternatively, Bintz maintains that if sleep talk is admissible at all, an expert foundation is necessary.

¶8 The admission of evidence is a decision left to the trial court's discretion. *See* ***In re Michael R.B.***, 175 Wis. 2d 713, 723, 499 N.W.2d 641 (1993). We must affirm discretionary rulings that are supported by a logical rationale, based on facts of record and involve no errors of law. ***In re Shawn B.N.***, 173 Wis. 2d 343, 367, 497 N.W.2d 141 (Ct. App. 1992).

¶9 However, we need not address whether sleep talk generally is admissible. Nor do we address whether expert foundation is necessary for such evidence. Even if the court erred by admitting the sleep talk evidence, we conclude that it was harmless error.

¶10 An error is harmless if there is no reasonable possibility that the error contributed to the conviction. ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). Only if the error contributed to the conviction must a reversal and new trial result. ***Id.*** The burden of establishing that there is no reasonable possibility that the error contributed to the conviction is on the State. ***Id.***

¶11 There was overwhelming evidence of Bintz's guilt. He expressly confirmed the accuracy of his sleep talk when he was awake and admitted his role in the murder to Swendby. Bintz also made the same confession to four other inmates. Bintz made a full and complete incriminating statement to Haglund, and he even told Haglund that Swendby's recitation of Bintz's earlier confession was true.

¶12 Our review of the record satisfies us that there is no reasonable possibility that the error, if there was one, contributed to the conviction. There was nothing different in Bintz's sleep talk from his other confessions. The sleep talk added nothing. If the trial court erred when it admitted this evidence, the error was harmless.

II. DEFENDANT'S EXPERT TESTIMONY

¶13 Bintz argues that the trial court again committed prejudicial error by refusing to admit expert opinion testimony on Bintz's intelligence and mental condition at his ***Miranda-Goodchild*** hearing. Bintz wanted to develop evidence regarding his intelligence and mental characteristics to show that he was susceptible to police coercion and that his statement confessing to the crime was involuntary. The court recognized that, absent evidence of improper police coercion, the proffered expert testimony was neither relevant nor admissible. The court correctly refused to admit the expert opinion testimony.

¶14 The voluntariness of Bintz's statement presents a question of constitutional fact requiring the reviewing court to apply constitutional principles to the historical or evidentiary facts as found by the trial court. ***State v. Moats***, 156 Wis. 2d 74, 94, 457 N.W.2d 299 (1990). This court independently reviews the constitutional question in light of those facts found by the trial court that are not clearly erroneous. *See* ***id.*** The statement is voluntary if it is the product of a free and rational choice under the totality of the circumstances. *See* ***id.***

¶15 In ***State v. Clappes***, 136 Wis. 2d 222, 241, 401 N.W.2d 759 (1987) (quoting ***Colorado v. Connelly***, 479 U.S. 157, 167 (1986)), our supreme court first recognized that "coercive 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." Only when police conduct is improper or coercive will a court determine voluntariness by examining the totality of the circumstances surrounding the statement. ***State v. Albrecht***, 184 Wis. 2d 287, 301, 516 N.W.2d 776 (Ct. App. 1994). Absent improper or coercive police conduct, courts will not balance the defendant's personal characteristics against the pressure imposed by

the officers to induce a response to questioning. ***Id.*** The State bears the burden of proving the voluntariness of the statement by a preponderance of the evidence. ***Id.***

¶16 The trial court found that the circumstances surrounding Bintz's statement to Haglund and Luell evinced no coercive or improper police conduct. Haglund and Luell were unarmed and in civilian clothing. The record supports the court's finding. The officers questioned Bintz in a large, well-furnished briefing room at the Oshkosh Correctional Institution. They advised Bintz that it was his home and he could leave at any time. Bintz agreed to speak without counsel after he was read his ***Miranda*** rights.

¶17 The tone of the interview was conversational, and the questioning lasted approximately five and one-half hours, with a half-hour break after the first three hours of questioning. Bintz asked for and received antacid tablets and a bathroom break. He made no other requests, even through the officers told him "if he needed anything he could ask us and we'd get it."

¶18 Haglund and Luell employed constitutionally permissible interview techniques. While they plainly intended to move Bintz away from his story of noninvolvement, they acted within entirely permissible bounds. "[T]he policeman is not a fiduciary of the suspect. The police are allowed to play on a suspect's ignorance, his anxieties, his fears, and his uncertainties; they just are not allowed to magnify those fears, uncertainties, and so forth to the point where rational decision becomes impossible." ***United States v. Rutledge***, 900 F.2d 1127, 1130 (7th Cir. 1990).

¶19 The police told Bintz "we don't believe you" twelve to fifteen times during the interview. Bintz relies on this circumstance to argue police misconduct. This, however, does not rise to the level of conduct contemplated as improper.

Examples of inherently coercive police tactics and stratagems include questioning the defendant for excessively long periods of time without breaks for food or rest, threatening him with physical violence, making promises in exchange for cooperation, using relays of interrogators to question the him relentlessly and questioning him in a way that controls and coerces the defendant's mind. ***Clappes***, 136 Wis. 2d at 239. Haglund and Luell allowed Bintz breaks and offered him food. They did not threaten him or make promises to him, and they did not question him relentlessly in a matter that controlled or coerced his mind. Although Bintz became emotional and cried just before he admitted his guilt, nothing in the record suggests that his crying kept him from making a constitutionally voluntary statement.

¶20 Because Haglund and Luell did not coerce Bintz or use improper pressure to induce him to confess, the inquiry into the voluntariness of Bintz's confession ends. *See* ***id.*** at 239-41. It would have been improper to balance the personal characteristics of the defendant with the practices of the police because the police action was not coercive. ***Id.*** at 239-40. Therefore, the proffered expert testimony regarding Bintz's personal characteristics would have been irrelevant at the ***Miranda-Goodchild*** hearing.

¶21 Additionally, Bintz argues in his reply brief that ***State v. Pheil***, 152 Wis. 2d 523, 449 N.W.2d 858 (Ct. App. 1989), was decided improperly. In ***Pheil***, this court affirmed that a "[d]etermination of whether a statement is voluntary requires a balancing of the personal characteristics of the defendant against the coercive or improper police pressures." ***Id.*** at 535. However, ***Pheil*** acknowledges that this court does not reach the balancing test unless there is a finding of improper or coercive police conduct. ***Id.*** We are not at liberty to overrule, modify or withdraw language in our prior decisions. ***Cook v. Cook***, 208 Wis. 2d 166,

189-90, 560 N.W.2d 246 (1997). Therefore, we apply ***Pheil*** and affirm the trial court's decision to end its inquiry upon a finding of no police coercion.

III. SUFFICIENCY OF THE EVIDENCE

¶22 Finally, Bintz contends that, absent his sleep talk, the evidence presented at trial was insufficient to support a conviction for first-degree intentional homicide as a party to the crime. He characterizes the evidence in the case as: (1) admissions to convicts; (2) admissions to interrogating officers; and (3) sleep talk. We conclude that even without the sleep talk evidence, Bintz's admissions to his fellow prisoners and the interrogating officers provide sufficient evidence to sustain the conviction.

¶23 Where the sufficiency of evidence is challenged, we may not reverse a conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). When more than one reasonable inference can be drawn from the evidence, this court must adopt the inference that supports the conviction. ***Id.*** at 506-07. It is the function of the jury to decide issues of credibility, to weigh the evidence and to resolve conflicts in the testimony. *See* ***id.*** at 506.

¶24 Bintz told Swendby that both he and his brother "killed her and put her in the trunk of a car. … [T]hey took her body up in a woods somewhere up north and dumped her." Bintz further told Swendby that they destroyed the vehicle afterward, and "that he kept telling her (sic) to make sure she was dead. … Telling Bob to make sure she was dead." Bintz made similar incriminating statements to Haglund and four other inmates.

¶25 Bintz confirmed to Haglund that his statement to Swendby was true and correct. They went through the statement line by line, and Bintz said he did not need to give the officers a statement because everything was in Swendby's, "in black and white." He also affirmed that the statement correctly described the events that took place on the night Lison was killed at the Good Times Bar.

¶26 The State argues that this is not a situation where a defendant simply engaged in ambivalent conduct during the commission of a crime. *See* ***State v. Charbarneau***, 82 Wis. 2d 644, 656, 264 N.W.2d 227 (1978). We agree. Here, as in ***Charbarneau***, the combination of verbal acts that aided in the commission of the crime, the sharing of proceeds, and the conscious desire to yield assistance fully support Bintz's conviction as an aider and abettor of the murder. ***Id.*** at 656. "[W]here one person knew the other was committing a criminal act, he should be considered a party thereto when he acted in furtherance of the other's conduct, was aware of the fact that a crime was being committed, and acquiesced or participated in its perpetration." ***Roehl v. State***, 77 Wis. 2d 398, 407, 253 N.W.2d 210 (1977).

¶27 The jury could reasonably have concluded beyond a reasonable doubt that Bintz was aware of his brother's act of strangling Sandra Lison, that Bintz's presence and conduct were for the purpose of assisting his brother, Bob, and that Bintz did assist Bob. Swendby's statement, and Bintz's avowal that it was true, were sufficient to implicate him. Bintz argues nothing more than that inmates are inherently unreliable. Those arguments also were made to the jury. The jury, as fact finders, judged the credibility of the witnesses. The trial evidence fully supported a guilty verdict.

By the Court.—Judgment and order affirmed.

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