COURT OF APPEALS
DECISION
DATED AND FILED

September 11, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-1054-CR

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

DAVID J. ARNOLD,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Reversed and cause remanded.*

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

¶1 PER CURIAM. The State appeals an order suppressing incriminating statements that David Arnold made to police. The State argues that (1) Arnold was not in custody when he made the statements, and (2) Arnold's statements were voluntary because the police used no coercive or improper tactics to induce him to make the statements. We agree that Arnold was not in custody

and that his statements to the police were voluntary. We reverse the suppression order and remand to the trial court.

BACKGROUND

¶2 In February 2000, masked intruders armed with paintball guns, baseball bats and numchuks entered a residence located in the City of Eau Claire. Once inside, the intruders assaulted two of the individuals present, took money from one of the residents and fled.

¶3 As part of their investigation, Eau Claire Police Department detectives Paul Miller and Travis Quella interviewed Arnold at Arnold's place of employment. They conducted the interview in a conference room, with the door closed for privacy purposes and Arnold seated between the door and the detectives. Both detectives wore civilian clothes, and neither had his weapon visible.

¶4 At the beginning of the interview, Miller told Arnold that he was not under arrest and was "free to go at any time and that there's nothing that compelled him to either answer our questions or remain there." Although Arnold was not advised of his ***Miranda*** rights before or during the interview, he acknowledged that he understood he was free to leave. *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

¶5 The interview lasted between sixty and ninety minutes. No threats or promises were made to him. Approximately thirty to forty-five minutes into the interview, Arnold made inculpatory statements regarding his involvement in the home invasion. When he requested a cigarette break, he was allowed to leave the

building to smoke a cigarette. Upon returning, Arnold chose not to continue the interview without counsel. The detectives allowed him to leave.

¶6 A month later, Arnold was charged in a criminal complaint with aggravated burglary, party to a crime, and two counts of aggravated battery. An amended complaint modified the battery charges to aggravated battery, party to a crime. A preliminary hearing was held, and Arnold was bound over for trial.

¶7 Arnold filed a motion to suppress the inculpatory statements he made to police. The trial court conducted a suppression hearing and granted Arnold's motion. The State now appeals.

DISCUSSION

I. CUSTODY

¶8 Whether a person is in custody for ***Miranda*** purposes is a question of law this court reviews de novo. ***State v. Mosher***, 221 Wis. 2d 203, 211, 584 N.W.2d 553 (Ct. App. 1998). We review with deference the trial court's factual findings. ***Id.*** at 211-12. However, we independently determine whether, under the facts, Arnold was in custody at the time he made the inculpatory statements to the detectives. *See* ***id.*** The State must prove its compliance with ***Miranda*** by a preponderance of the evidence. ***State v. Agnello***, 226 Wis. 2d 164, 181, 593 N.W.2d 427 (1999).

¶9 An officer must administer ***Miranda*** warnings to an individual before questioning only when there has been a restriction on the individual's freedom so as to render him or her in custody. ***Mosher***, 221 Wis. 2d at 210. The test is whether a reasonable person in Arnold's position would have considered themselves in custody given the degree of restraint under the circumstances. ***Id.*** at

211. We consider the totality of the circumstances to determine whether an individual was in custody for purposes of ***Miranda***. ***Mosher***, 221 Wis. 2d at 210-11.

¶10 Factors to be considered in determining whether an individual is in custody for ***Miranda*** purposes include the suspect's freedom to leave, the purpose, place and length of the interrogation, and the degree of restraint. ***Mosher***, 221 Wis. 2d at 211. Appropriate considerations in determining "degree of restraint" include whether the suspect is handcuffed, whether a weapon is drawn, whether a frisk is performed, the manner in which the defendant is restrained, whether the suspect is moved to another location, whether the questioning took place in a police vehicle, and the number of officers involved. ***Id.***

¶11 The facts here do not show that Arnold was in custody. The detectives repeatedly told Arnold he was free to leave. They conducted the interview as part of their investigation, went to Arnold at his place of employment and questioned him for only sixty to ninety minutes. There is no indication from the record or the court's ruling that Arnold's freedom to leave was restrained in any way.

¶12 Arnold agreed to talk with the detectives about the home invasion. The detectives did not handcuff Arnold, and their weapons were not visible. They did not frisk Arnold or restrain him in any way. After he admitted his role in the home invasion, Arnold was not placed under arrest or taken to the police station and booked.

¶13 Although Miller initially refused Arnold's request for a cigarette break, he changed his mind almost immediately. While he did accompany Arnold outside, Miller noticed Arnold's discomfort and went back inside. Arnold

remained outside alone and unrestrained for several minutes while he finished smoking. He could have left at any time. Arnold did, in fact, leave without recourse shortly after his cigarette break when he decided he did not want to continue without an attorney. He was not arrested until over a month later. No reasonable person in Arnold's position would have considered himself or herself to be in custody.

¶14 ***Miranda*** warnings were not required because Arnold was not in custody when he made the inculpatory statements. Suppression was not warranted on the grounds of ***Miranda*** violations, and we reverse the trial court's decision.

II. VOLUNTARINESS

¶15 The voluntariness of Arnold'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. *See* ***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.*** A statement is voluntary if it is the product of a free and rational choice under the totality of the circumstances. *See* ***id.***

¶16 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.***

¶17 Arnold's argument that he was coerced rests primarily on the faulty premise that he invoked his right to counsel eight to ten times. The detectives testified, however, that Arnold only made two references to an attorney, and the trial court accepted this testimony.[1] When Arnold made the first comment about an attorney, he was advised that he was welcome to obtain one and did not do so. Later in the interview, Arnold returned from his cigarette break and informed the officers that he wanted to leave and did not want to talk to them further without an attorney. The interview ended once Arnold invoked that right, and he left freely.

¶18 Arnold argues that there is further evidence of coercion. He points out that he was not informed of his ***Miranda*** rights. However, we conclude above that Arnold was not in custody, rendering ***Miranda*** unnecessary. Arnold claims that Miller initially denied him a cigarette break. However, Miller changed his mind almost instantly and allowed Arnold to go outside. This was not coercion. Arnold contends that Miller accompanied him outside and insisted upon remaining in his presence. This is not coercion either, especially because Miller noticed Arnold's discomfort, returned to the building and left Arnold outside alone.

¶19 Finally, Arnold argues that he was coerced because the detectives interviewed him for ninety minutes even though he made no incriminating statements for the first forty-five minutes. Although the trial court agreed that the interview lasted "a long, long, long time," the sixty to ninety minutes that the

[1] The trial court stated: "I'm not going to make any finding regarding whether or not I believe that the defendant asked for an attorney other than what the officers agree with."

detectives spent with Arnold was not unreasonable. Our supreme court noted in ***Phillips v. State***, 29 Wis. 2d 521, 536, 139 N.W.2d 41 (1966), that a three-and-one-half hour interrogation did not "violate fundamental fairness or fair play in the criminal process …."

¶20 The trial court made no finding, and there is no evidence in the record, suggesting improper police conduct or coercion. Because the detectives did not use any coercion or improper tactics to induce Arnold to make his inculpatory statements, the inquiry into the voluntariness of those statements ends. *See* ***Clappes***, 136 Wis. 2d at 239-41. There is no need, in fact no basis, for balancing any coercive practices, which do not exist here, against Arnold's personal characteristics. *See* ***id.*** at 239-40. Arnold's statements were the product of his free and rational choice, and we therefore reverse the trial court order suppressing them.

By the Court.—Order reversed and cause remanded.

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