COURT OF APPEALS
DECISION
DATED AND FILED

September 18, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2735-CR **Cir. Ct. No. 2005CF5836**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL STEWART,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed.*

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

¶1 WEDEMEYER, J. Michael Stewart appeals from a judgment of conviction entered after he pled guilty to one count of first-degree reckless

homicide, contrary to WIS. STAT § 940.02(1) (2003-04).[1] He also appeals from an order denying his postconviction motion. Stewart claims that: (1) the statement he gave confessing to the crime should have been suppressed; (2) his confession was coerced by police; and (3) the trial court erroneously exercised its sentencing discretion when it imposed a sixty-year sentence. Because the initial statement Stewart made admitting to the crime prior to the issuance of ***Miranda*** warnings was not a response to interrogation and was not coerced, the trial court did not err in denying his motion to suppress the statement. Moreover, because the record demonstrates that the sentencing court considered the pertinent sentencing factors and exercised reasonable discretion in imposing sentence, there was no erroneous exercise of sentencing discretion in this case. Accordingly, we affirm.

BACKGROUND

¶2 On September 6, 2003, the body of Deborah Crawford was found at a vacant house located on North 63rd Street. Two years later, in October 2005, the police learned that Stewart may have been involved in the crime due to the presence of his DNA on her body. At approximately 8:00 p.m. on October 11, 2005, Stewart was picked up by a police officer from the Milwaukee Resource Center where he resided, and was brought to the Milwaukee police station.

¶3 He was taken into an interview room, where Milwaukee Police Detective Mark Walton, introduced himself, and advised Stewart that he was there regarding the homicide of Deborah Crawford, simultaneously showing Stewart the booking photo of Crawford. Stewart responded by blurting out that he "did that

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

but it wasn't like that." Walton then advised Stewart of his constitutional rights, which Stewart waived, agreeing to speak with the detective to "set the record straight." Walton's partner, Detective Jason Smith was also present. The detectives first questioned Stewart about some background information, including questions about his family, employment, education, prior criminal contacts, and his medical and mental condition. Stewart indicated that the only medication he was taking was for schizophrenia.

¶4 After the background information, Stewart described from memory what had happened the night of the incident. He told the detectives that at the time of the incident, he had been living in a group home and went out looking for crack cocaine. He was able to panhandle $5, but needed $5 more to buy a dime bag. He then observed Crawford approaching a nearby gas station and asked her about buying crack. After they combined their money and agreed to share the crack, she took him to a car nearby where a dealer sold them a dime bag.

¶5 After the purchase, the two went to a nearby abandoned home that Crawford knew of and sat outside the door. Stewart smoked his crack first and then Crawford smoked hers. Crawford then grabbed what was left of the crack and started walking quickly away. Stewart grabbed her and hit her in the face. She had put the dime bag in her mouth and he was trying to get her to spit it out. He put his hands around her neck and started choking her trying to get her to spit out the crack. During the struggle, Crawford passed out and was bleeding from the blows. Stewart decided to drag her into the abandoned home, where he sexually assaulted her. He indicated he did this because he was mad that she tried to steal the crack. During the half-hour sexual assault, Crawford was unconscious, but according to Stewart, she was still breathing. Afterwards, Stewart went to a nearby gas station to clean himself up, leaving Crawford unconscious in the

abandoned home. Stewart stated that he did not know that she was dead, but thought that when she regained consciousness, she would leave on her own. Stewart did not know Crawford before this incident.

¶6 At the conclusion of the interview, the statement was recorded and reviewed with Stewart, who then signed the statement, acknowledging that what was recorded is what happened.

¶7 Subsequently, Stewart was charged with first-degree reckless homicide. On October 26, 2005, Stewart was evaluated for competency to stand trial. He was found competent by the examining psychiatrist, who concluded that Stewart was coherent, logical and without any thought impairment. At the competency hearing on January 18, 2006, Stewart stated that he had read the psychiatrist's conclusions and agreed with them. The psychiatrist testified that Stewart's "mental illness was sufficiently treated [and] that the symptoms were not interfering with his overall capacities."

¶8 On February 22, 2006, Stewart was evaluated to determine whether he could be held criminally responsible for his conduct. The evaluator concluded that Stewart's schizophrenia was not severe enough to absolve him of legal responsibility.

¶9 Stewart eventually entered a plea of guilty to the charge of first-degree reckless homicide and the State recommended prison time of an undetermined amount. The presentence investigation report recommended twenty to twenty-five years of initial confinement followed by seven to ten years of extended supervision. The trial court imposed the maximum penalty of forty years' initial confinement followed by twenty years of extended supervision. Judgment was entered.

¶10 Stewart filed a postconviction motion seeking suppression of his confession and modification of his sentence. The trial court denied the motion. Stewart now appeals.

DISCUSSION

A. Suppression—Interrogation

¶11 Stewart's first contention is that the trial court should have granted his motion to suppress his confession because the detective "interrogated" him before reading him his constitutional ***Miranda*** rights. We are not convinced.

¶12 We review a motion to suppress in two steps. ***State v. Eason***, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625. We uphold the trial court's factual findings unless clearly erroneous, but we apply constitutional principle to the facts *de novo*. ***Id.*** Here, the facts are undisputed so only the legal question remains. *See* ***State v. O'Brien***, 223 Wis. 2d 303, 315, 588 N.W.2d 8 (1999).

¶13 Stewart argues that because of his mental condition, the detective should not have immediately displayed the picture of Crawford. Rather, ***Miranda*** rights should have been read immediately before any conversation with Stewart. He asserts that the initial exchange where Detective Walton introduced himself, indicated why Stewart was there and showed him the picture was the functional equivalent of interrogation, particularly in light of Stewart's mental condition. The trial court ruled:

> I find that Mr. Stewart was not being interrogated [prior to reading him his rights.] … [R]eally you have to start somewhere. And for Detective Walton and Detective Smith to start by saying hello, my name is Mark Walton, I'm a detective and I'm here to talk to you about this or that or the other thing, you know, that's not interrogation.

> And if, … I though there was any basis or concern that … this might be some sneaky technique like the historic decisions of other courts at other times which a police officer might intentionally seek to have someone blurt out some kind of confession, well, then I would act on that. I don't see any of that here….
>
> As a matter of fact, I do not see any basis for me to find that Detective Walton was interrogating Mr. Stewart at that time. Instead he did … what he had to do under the law. He stopped Mr. Stewart and at that point read the rights.

We agree with the trial court's conclusion. The Fifth Amendment to the United States Constitution protects an individual's right against self-incrimination. ***State v. Cunningham***, 144 Wis. 2d 272, 276, 423 N.W.2d 862 (1988). In order to protect that right, the State may not use as evidence a suspect's statement obtained during custodial interrogation unless the police employed the safeguards set forth in ***Miranda v. Arizona***, 384 U.S. 436 (1966). ***State v. Leprich***, 160 Wis. 2d 472, 476, 465 N.W.2d 844 (Ct. App. 1991). ***Miranda*** warnings must be given when a defendant is both "in custody" and subjected to "interrogation" by police. ***State v. Mitchell***, 167 Wis. 2d 672, 686, 482 N.W.2d 364 (1992). The State has the burden of proving whether interrogation occurred such that ***Miranda*** warnings are required. ***State v. Armstrong***, 223 Wis. 2d 331, 351, 588 N.W.2d 606 (1999). Not all statements obtained by the police after a person has been taken into custody are considered to be the product of interrogation. ***Rhode Island v. Innis***, 446 U.S. 291, 299 (1980). "Any statement given freely and voluntarily without any compelling influences is … admissible." ***Miranda***, 384 U.S. at 478.

¶14 Here, it is undisputed that Stewart was in custody as he was in the Wisconsin Resource Center serving time in an unrelated matter. The police brought him from the Resource Center to the police station to question him regarding the homicide of Crawford. The only issue is whether the initial interaction between Stewart and the detective constituted "interrogation."

¶15 Stewart argues that the initial interaction was the "functional equivalent" of interrogation, based on the factor test discussed in ***State v. Hambly***, 2006 WI App 256, 297 Wis. 2d 851, 726 N.W.2d 697 and ***State v. Bond***, 2000 WI App 118, 237 Wis. 2d 633, 614 N.W.2d 552, *aff'd* 2001 WI 56, 243 Wis. 2d 476, 627 N.W.2d 484. The five factors to consider to determine if the conduct was the functional equivalent of interrogation are whether: (1) the officer's words were "normally attendant to arrest and custody"; (2) the officer had "specific knowledge" about the person s/he should have known was reasonably likely to elicit an incriminating response; (3) an impartial observer would perceive the officer's intent to elicit such a response; (4) the officer's words were provocative; and (5) the officer spoke directly to the suspect. ***Bond***, 237 Wis. 2d 663, ¶¶13-21. Moreover, a suspect's unusual susceptibility can be a factor in the analysis. *See* ***Cunningham***, 144 Wis. 2d at 281.

¶16 In analyzing the facts in the instant case against the ***Bond/Hambly*** factors, we agree with the trial court that the initial exchange between the detective and Stewart did not constitute interrogation. Detective Walton testified that he introduced himself, indicated that he was investigating the homicide of Crawford, and simultaneously displayed Crawford's booking photo. When Stewart replied that he "did that but it wasn't like that," Walton stopped Stewart to read and explain his constitutional rights. The admission by Stewart occurred within thirty seconds of entering the room. It was done in response to the detective's introduction/explanation of why Stewart was brought over. Walton testified that he displayed the picture so that Stewart could see who Crawford was, not because he believed it would elicit an incriminating response. There is nothing in the

record indicating that the detective's photo display was designed as some trickery to elicit a confession.

¶17 Rather, the record demonstrates that the detectives exerted substantial efforts to make sure Stewart understood he did not have to talk to them, he did not have to answer any questions, and that he could have an attorney. Stewart appeared to understand his rights, and was calm and cooperative. He seemed "eager" to explain what had happened.

¶18 Moreover, we are not convinced that Stewart's mental condition rendered him unusually susceptible. The competency examination conducted approximately two weeks after the confession reported that Stewart was coherent, logical and without any thought impairment. His mental condition was being sufficiently treated so that the symptoms were not interfering with his overall capacities. In addition, there was no evidence presented in the trial court demonstrating that Stewart was unusually susceptible to persuasion. Rather, the evidence suggests quite the opposite—that Stewart was eager to share what had happened, rather than having the police elicit the information from him.

B. Suppression—Voluntariness

¶19 Stewart also contends that his statement should have been suppressed on the grounds that it was not voluntary. Specifically, he argues that showing him the picture given his mental condition, constituted a psychological coercive police technique to obtain a confession.

¶20 Determining whether a confession was voluntarily made depends on whether any coercion or improper pressures were used by police. ***State v. Clappes***, 136 Wis. 2d 222, 235, 401 N.W.2d 759 (1987). The inquiry focuses on

whether the "inculpatory statement was the product of a 'free and unconstrained will, reflecting deliberateness of choice.'" ***Id.*** at 236 (citation omitted). In making this determination, we review "the totality of the facts and circumstances surrounding the confession." ***Id.*** Our review requires balancing the personal characteristics of the defendant against the pressures imposed by the police. ***Id.*** Relevant factors to consider include: the defendant's age, education, intelligence, physical and emotional condition and any prior experience with police. ***Id.*** These personal factors are balanced against the pertinent police pressures including length of the interrogation, any delays, the conditions under which the confession occurred, the physical or psychological pressure used by police, and any threats or promises made to induce the confession. ***Id.*** at 236-37.

¶21 In applying these standards, we agree with the trial court that the statements Stewart made in this case were voluntary. First, in reviewing his personal characteristics, there is nothing to suggest that his age, intelligence or education disadvantaged him. In addition, Stewart had several past experiences with the criminal justice system, including several convictions. Further, there is no evidence that his mental condition adversely caused him to confess. The evidence reflects that his schizophrenia was controlled by medication. During the questioning as to his background and personal information, the police observed that Stewart seemed calm, coherent and reasonable. He appeared to understand his rights and wanted to tell the police what had happened.

¶22 Second, in examining the police pressure factors, the record does not demonstrate that any coercive or improper police tactics occurred. The interrogation was relatively short—just over three hours. During that time, all of Stewart's request for food and breaks were granted. He was given food, drink and cigarettes during this time. He did not appear sleepy or state that he was tired.

Stewart's main basis for asserting involuntariness of his statement was that the police showed him a picture of Crawford. He claims that this fact, together with his mental condition, constituted improper psychological coercion. We cannot agree.

¶23 As noted above, there is no evidence in the record that the picture of Crawford was intended to solicit a confession. Rather, it was used in the introduction so that Stewart could connect the name Crawford with what she looked like. Moreover, we are not convinced that Stewart's mental condition compromised the voluntariness of his confession. The evidence in the record demonstrates that his schizophrenia was being successfully treated, and thus did not make him susceptible to "subtle coercion." In fact, the record further reflects that Stewart refused to answer certain questions during other proceedings in this matter, clearly reflecting that he was not susceptible to pressure to provide information. In addition, the psychological evaluation conducted shortly after the confession resulted in a conclusion that Stewart was able to think and act in a coherent and logical way without any thought impairment.

¶24 Based on all of these circumstances, we are not convinced that Stewart's statements were involuntarily made. Rather, the record is quite clear that Stewart's inculpatory statements were made with a "free and unconstrained will," and reflected "deliberateness of choice." ***State v. Hoppe,*** 2003 WI 43, ¶36, 261 Wis. 2d 294, 661 N.W.2d 407.

C. Sentencing

¶25 Stewart also claims that the trial court erroneously exercised its sentencing discretion when it sentenced him to the maximum potential sentence

available for first-degree reckless homicide, particularly given the shorter sentence recommendation of the presentence investigation report. We are not convinced.

¶26 Sentencing lies within the sound discretion of the trial court, and a strong policy exists against appellate interference with the discretion. ***State v. Mosley***, 201 Wis. 2d 36, 43, 547 N.W.2d 806 (Ct. App. 1996). The trial court is presumed to have acted reasonably and the defendant has the burden to show unreasonableness from the record. ***Id.*** The primary factors to be considered by the trial court in sentencing are "the gravity of the offense, the character of the offender, and the need for the protection of the public." ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The discretion of a sentencing judge must be exercised on a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). The weight to be given the various factors is within the trial court's discretion. ***Cunningham v. State***, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977).

¶27 Here, the State recommended prison in an undetermined amount. Stewart argued for fifteen years initial confinement, followed by twenty years of extended supervision, for a total of thirty-five years. The presentence investigation report recommended initial confinement of twenty to twenty-five years of initial confinement followed by seven to ten years of extended supervision, for a total of twenty-seven to thirty-five years. The trial court imposed the maximum sentence of forty years initial confinement followed by twenty years of extended supervision, for a total of sixty years.

¶28 We have reviewed the sentencing transcript and the trial court's analysis. The record reflects that the trial court addressed each of the sentencing factors, giving the most weight to the need to protect the community, noting

Stewart's past persistent failure of all other efforts outside of a prison setting and the danger he poses to the community because of his desire to combine illegal drugs with his schizophrenia medication or failure to use his schizophrenia medication.

¶29 The crime that Stewart committed here was horrendous and his attempt to blame his actions on his mental illness are unpersuasive. The record reflects that the day before he killed Crawford, he had been on a grocery shopping trip with his case-worker and had weekly contact before and after the killing. He did not appear to the case-worker to be psychotic. On the day of the killing, he had received $20 for laundry from his case-worker. Stewart himself admitted that he did not hurt Crawford because of voices or any other mental-illness related issue, but because he was mad that she was trying to steal his crack cocaine.

¶30 The crime here as noted by the trial court was "the most awful, horrendous crime that one could imagine." The trial court did take into consideration the mitigating factors of Stewart's mental illness and other personal problems. After balancing all of the pertinent factors, the trial court concluded that the maximum sentence was appropriate for this case. Such decision was based on appropriate factors and rationale, and was reasonable. Thus, the trial court did not erroneously exercise its sentencing discretion.

¶31 Moreover, although the presentence investigation report recommended a shorter time, it also pointed out that "Stewart is of the opinion that he will do what he wants, when he wants and cannot be successfully supervised in the community." The report also noted that:

> Stewart is not sorry for having ended a woman's life over less than $10 worth of a drug, but instead is sorry that he was caught, and now regrets his behavior because of how it

> will affect his future in terms of confinement. It is this agent's belief that Mr. Stewart is a danger to the community.

The trial court is not obligated to explain why it did not choose a particular sentence; it is only obligated to explain why it choose the sentencing imposed. ***State v. Hamm***, 146 Wis. 2d 130, 156, 430 N.W.2d 584 (Ct. App. 1988). The trial court provided a sufficient explanation as to why it imposed the maximum sentence.

¶32 Finally, the length of the sentence imposed by a trial court will be disturbed on appeal only where the sentence is so excessive and unusual and so "disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). That is not the case here. Stewart physically attacked a woman into unconsciousness because he wanted the crack cocaine she had. He dragged her into an abandoned home and sexually assaulted her for thirty minutes despite the fact that she had defecated on herself, while she lay unconscious and bleeding. He then left her lying there without summoning help. Imposition of the maximum sentence in this case was not shocking.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.