COURT OF APPEALS
DECISION
DATED AND FILED

April 1, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP79-CR **Cir. Ct. No. 2004CF243**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JENNIFER L. WARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Oneida County: MARK MANGERSON, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Jennifer Ward appeals a judgment convicting her of first-degree reckless homicide in the death of her seven-month-old nephew.[1] Ward made three incriminatory statements to police, first at the hospital, second at the sheriff's department later that day, and third the next day at the sheriff's department. She argues that her statements and waiver of counsel were involuntary because: (1) she had suffered a seizure when she was informed of the infant's death; (2) she suffered from back pain and headaches during the interrogations; (3) she was held incommunicado; and (4) the police used deceit to trick her into confessing. We reject these arguments and affirm the judgment and order.

¶2 Ward called 911 to report the child was not breathing. Upon learning of the baby's death, Ward became hysterical and blacked out. She was transported to a hospital where detective Glen Schaepe interviewed her with permission from hospital personnel. Schaepe recorded the interview. Ward initially denied knowledge of how the baby died. She stated that after cleaning the baby she "plopped" him on the bed. Schaepe asked Ward to come to the sheriff's department for further questioning.

¶3 At the sheriff's department, detective Jim Wood read and explained to Ward her ***Miranda***[2] rights. At this interview, which was video-recorded, Ward recalled telling Schaepe that she had plopped the baby on the bed and then stated, "I threw [him] on my bed." Ward then used a teddy bear to demonstrate throwing

[1] Ward also appeals an order denying a postconviction motion, but does not pursue the issue raised in the motion.

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

the child and said "I did get mad" and "I know now that I … killed him." The officers then took Ward into custody and prohibited her from making any phone calls as they executed a search warrant for her home.

¶4 The next morning, Ward called her jailer and asked to speak with detectives. After again being advised of her ***Miranda*** rights, Ward stated, "If I wasn't willing to talk to you why would we be here." At the interview, Ward said "I didn't say I killed my nephew," but she admitted she "tossed" the baby and also shook him.

¶5 The trial court's ruling on a motion to suppress evidence presents a mixed question of fact and law. *See* ***State v. Wallace***, 2002 WI App 61, ¶8, 251 Wis. 2d 625, 642 N.W.2d 549. We must sustain the trial court's findings of fact unless they are clearly erroneous. When the circumstances surrounding a suspect's confession are at issue, we defer to the trial court's findings regarding the factual circumstances. We decide de novo whether those facts pass constitutional muster. *See* ***State v. Jerrell C.J.***, 2005 WI 105, ¶16, 283 Wis. 2d 145, 699 N.W.2d 110.

¶6 A defendant's statements are voluntary if they are the product of free and unconstrained will, reflecting deliberateness of choice as opposed to the result of conspicuously unequal confrontation in which the pressures brought to bear by the police exceed the suspect's ability to resist. ***State v. Hoppe***, 2003 WI 43, ¶36, 261 Wis. 2d 294, 661 N.W.2d 407. We examine the totality of these circumstances, balancing the personal characteristics of the suspect against the pressures imposed by the police. ***Id.***, ¶38. Among the factors to be considered are the suspect's age, education and intelligence, physical and emotional condition, prior experience with the police, whether the suspect was apprised of his or her

rights, whether any request for counsel was made, the length and conditions of interrogation and any physical or psychological pressures, inducements, methods or strategies used by the police to obtain the confession. *See* ***State v. Verhasselt***, 83 Wis. 2d 647, 653-54, 266 N.W.2d 342 (1987). The State has the burden of proving by the preponderance of evidence that the statements were voluntary. ***Hoppe***, 261 Wis. 2d 294, ¶40.

¶7 Ward's argument that she suffered a seizure, rendering her subsequent statements involuntary, is not supported by the record. The only reference to a seizure was made by a police officer who witnessed Ward blacking out after she learned the baby had died. Ward told Schaepe at the hospital that she had apparently "blacked out." Questioning occurred only after hospital personnel allowed Schaepe to interview Ward. Nothing in the record suggests that her medical condition led to any confusion. The medical reports showed that Ward was discharged from the hospital with no instructions to return, no medications and no further concern about her mental status. The totality of the circumstances does not support Ward's assertion that the officers exploited her medical condition.

¶8 Likewise, Ward's chronic back pain and headaches do not provide a basis for suppressing her statements. The record contains no evidence that Ward's back pain or headaches made her particularly vulnerable or affected her rational faculties. Ward concedes that her pain was primarily emotional, caused by the baby's death. Mental stress caused by committing a crime and the moral and psychological pressures to confess emanating from sources other than police coercion do not affect the voluntariness of a statement. *See* ***State v. Hanson***, 136 Wis. 2d 195, 216, 401 N.W.2d 771 (1987).

¶9 Ward next argues that during the hospital interview and later at the sheriff's department, she felt isolated from family and friends and was held "incommunicado." Although police excluded Ward's family and friends during the hospital interview, hospital personnel entered and exited the room at various times. In addition, Schaepe told Ward multiple times that she was not under arrest and could leave at any time. During the questioning at the sheriff's department, Schaepe also told Ward that she could leave if she wanted to and the police would provide a ride home. Ward initiated the next interview at the sheriff's department, and Ward was again informed that she had the right to talk to an attorney. Ward's choice to speak to the officers without consulting an attorney contradicts her argument that she was held "incommunicado."

¶10 Ward faults the police for not informing her that her husband and an attorney were waiting to see her. She suggests that had she been permitted to contact her husband, he might have advised her to contact an attorney. ***Miranda*** rights can only be exercised by the suspect, and police have no obligation to allow consultation with someone other than an attorney. ***Hanson***, 136 Wis. 2d at 213.

¶11 Ward argues police told her that her daughter admitted to seeing her shake the baby, but failed to mention that the baby was already unconscious at that time. She contends this information renders her inculpatory statement inadmissible. Ward continued to deny shaking the baby after the police told her of her daughter's alleged statement, although she admitted to "plopping" and "throwing" the baby. While police misrepresentation is a factor to be considered in the totality of the circumstances, it does not by itself render a confession inadmissible. *See* ***State v. Triggs***, 2003 WI 91, ¶24, 264 Wis. 2d 861, 663 N.W.2d 396. Even assuming the police statement was a misrepresentation, the totality of

the circumstances show that Ward's inculpatory statements were not the product of any police misinformation or misconduct.

¶12 Ward's personal characteristics also weigh against her arguments on appeal. The transcripts of the interviews do not depict an anxious or frightened suspect or any cognitive deficiency. *See* ***State v. Wallace***, 2002 WI App 61, ¶22, 251 Wis. 2d 625, 642 N.W.2d 549. Ward was thirty-five years old, had a high school education, and told the officers, "If I feel that uh there's something wrong with what you said or I take exception to it I'll tell ya that. I mean I don't generally sit back and just leave it go." Ward had previous experience with law enforcement from a prior homicide conviction, which also weighs against involuntariness. *See* ***State v. Jones***, 192 Wis. 2d 78, 102, 532 N.W.2d 79 (1995). After reviewing the totality of the circumstances, we conclude that the State met its burden of showing the statements were voluntary.

¶13 Ward next argues that her waiver of her right to counsel was involuntary because her husband hired an attorney who attempted to contact her as police questioned her during the interviews at the sheriff's department. Events occurring outside the presence of the suspect and entirely unknown to her can have no bearing on her capacity to comprehend and knowingly relinquish a constitutional right. ***Moran v. Burbine***, 475 U.S. 412, 422-23 (1986). The Wisconsin Supreme Court adopted this reasoning. *See* ***Hanson***, 136 Wis. 2d 195. Ward argues that ***Hanson*** and ***Moran*** are flawed. This court has no authority to disregard the holdings of higher courts. ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Ward was informed of her right to counsel before both of the interviews at the sheriff's department and she stated she understood that right and she denied any coercion. The record discloses no basis for holding Ward's waiver of counsel involuntary.

By the Court.—Judgment and order affirmed.

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