COURT OF APPEALS
DECISION
DATED AND FILED

July 24, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1145-CR **Cir. Ct. No. 2005CF321**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRANDON L. STEFAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County: DANIEL W. KLOSSNER, Judge. *Affirmed*.

Before Higginbotham, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Brandon Stefan appeals a judgment, entered upon his no contest plea, convicting him of third-degree sexual assault. Stefan argues the circuit court erred by denying his motion to suppress statements made to investigators. We reject his arguments and affirm the judgment.

BACKGROUND

¶2 In September 2005, the State charged Stefan with two counts of repeated sexual assault of a child. Stefan filed a pre-trial motion to suppress statements he made to investigators on grounds that the statements were not voluntary and not electronically recorded. After a hearing, the circuit court denied the motion. A second amended Information charged Stefan with one count of repeated sexual assault of a child and third-degree sexual assault. In exchange for his no contest plea to third-degree sexual assault, the State agreed to dismiss the remaining charge and recommend a withheld sentence with five years' probation. Consistent with the State's recommendation, the court withheld sentence and imposed five years' probation. This appeal follows.

DISCUSSION

¶3 Stefan argues the circuit court erred by denying the suppression motion because his statements were not voluntary. As an initial matter, Stefan urges this court to address the voluntariness of his statements under the standards applicable to juveniles. *See* ***A.M. v. Butler***, 360 F.3d 787 (7th Cir. 2004). Although Stefan acknowledges that he was not "technically a juvenile," Stefan nevertheless argues that "the analyses in cases relating to juvenile defendants are applicable here" because Stefan had just turned eighteen. We are not persuaded. As the circuit court properly noted, Stefan cites no law "holding that a *near*-juvenile is entitled to special constitutional consideration."

¶4 The question of voluntariness involves the application of constitutional principles to historical facts. We give deference to the circuit court's findings regarding the factual circumstances that surrounded the making of the statements. ***Arizona v. Fulminante***, 499 U.S. 279, 287 (1991); ***State v.***

Clappes, 136 Wis. 2d 222, 235, 401 N.W.2d 759 (1987). However, the application of the constitutional principles to those facts is subject to independent appellate review. ***Fulminante***, 499 U.S. at 287; ***Clappes***, 136 Wis. 2d at 235. "A defendant's statements are voluntary if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist." ***State v. Hoppe***, 2003 WI 43, ¶36, 261 Wis. 2d 294, 661 N.W.2d 407.

¶5 "The pertinent inquiry is whether the statements were coerced or the product of improper pressures exercised by the person or persons conducting the interrogation." ***Barrera v. State***, 99 Wis. 2d 269, 291, 298 N.W.2d 820 (1980). Coercive or improper police conduct is a necessary prerequisite for a finding of involuntariness. ***Clappes***, 136 Wis. 2d at 239. We apply a totality of the circumstances standard to determine whether a defendant's statements are voluntary. ***Id.*** at 236. The totality of the circumstances analysis involves a balancing of the personal characteristics of the defendant against the pressures imposed upon the defendant by law enforcement officers. ***Id.***

¶6 As our supreme court has outlined:

> 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.

Hoppe, 261 Wis. 2d 294, ¶39 (internal citations omitted). The balancing of a defendant's personal characteristics against the police pressures reflects a recognition that the amount of police pressure that is constitutional is not the same for each defendant. ***Id.***, ¶40. Further, it is the State's burden to prove by a preponderance of the evidence that the statements were voluntary. ***State v. Agnello***, 226 Wis. 2d 164, 182, 593 N.W.2d 427 (1999).

¶7 Turning to the present case, Stefan, then an eighteen-year-old Marine in training, was questioned by two special agents with the Naval Criminal Investigative Service (NCIS) regarding his alleged sexual contact with a minor. At the suppression motion hearing, Stefan testified that at the time he met with the agents, he had finished one and one-half days of "the crucible"—a final test in Marine recruit training that lasted fifty-four hours and involved a fifty-mile hike on both limited sleep and food. Stefan testified that he slept for three hours on the night before the interview and before his transport to the interview site, he ate one-half of a "Meal Ready to Eat." Stefan acknowledged being read his ***Miranda***[1] rights and signing a form waiving those rights. In fact, Stefan testified: "I wasn't told very much at all until after I was read my rights." Stefan testified, however, that he did not feel he had a choice when signing the form because when he was released to the NCIS agents, his drill instructor told Stefan to "go get done what [he] had to get done." Stefan also testified that he felt pressured to increase the number of incidents admitted in his written statement to conform with the victim's statement.

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

¶8 Klaya Aardahl, one of the NCIS special agents, testified that the interview lasted from approximately 9:15 a.m. to approximately 2:30 p.m., with a break for Stefan to get a drink of water and use the restroom. Aardahl further testified that Stefan was not physically restrained, nor was he threatened or otherwise promised anything in exchange for his statements. According to Aardahl, Stefan did not appear to be tired and did not complain about wanting sleep.

¶9 Stefan argues his statements were not voluntary because he was eighteen years old, he was not told that he was free to leave, he was questioned for at least six and one-half hours, he was exhausted and had eaten only one meal in the twenty-four hours preceding the interview, and he felt compelled to cooperate because he was a Marine. We are not persuaded.

¶10 As the circuit court found, Stefan was an adult high-school graduate who was read and waived his rights. The interview was held during the day, and Stefan had just eaten and was given a break during the interview. Although he claims he was exhausted, Aardahl testified that Stefan did not seem tired nor did he complain about being tired. To the extent Stefan contends that his status as a Marine in training made him especially vulnerable, the circuit court concluded that as a Marine, Stefan was of at least average intelligence and greater physical and emotional fortitude. While acknowledging that Stefan was "undoubtedly under a certain degree of pre-existing physical and psychological stress," the court nevertheless found no evidence of "any improper pressures or tactics that would have coerced [Stefan]'s statements." Stefan nevertheless emphasizes that he had been conditioned to obey orders immediately and felt that a failure to cooperate would jeopardize his military career. The court concluded, however, that these factors did not suggest impermissible governmental coercion and there was "no

evidence that any of [Stefan]'s Marine instructors or superiors had any involvement in this criminal investigation." We discern no error.

¶11 Ultimately, Stefan urges this court to draw different factual inferences than those we assume were drawn by the circuit court. *See* ***Schneller v. St. Mary's Hosp. Med. Ctr.***, 162 Wis. 2d 296, 311-12, 470 N.W.2d 873 (1991) (a circuit court's findings of fact may be implicit from its ruling). The circuit court's findings, both explicit and implicit, are not clearly erroneous. Based on the totality of the circumstances, the circuit court properly concluded that Stefan's statements were voluntary.[2]

¶12 Stefan alternatively argues that his interview with the NCIS agents should have been electronically recorded. Stefan notes that over a year after Stefan's interrogation, the legislature enacted legislation mandating the recording of custodial interrogations. *See* WIS. STAT. § 968.073(2).[3] Stefan does not dispute that the statute has no retroactive application to his interrogation. Rather, Stefan emphasizes this current policy of recording interrogations to support his argument for an extension of our supreme court's holding in ***State v. Jerrell C.J.***, 2005 WI 105, 283 Wis. 2d 145, 699 N.W.2d 110. There, the court exercised its supervisory

[2] Stefan claims, in conclusory fashion, that the agents violated his constitutional protections by failing to "re-Mirandize" him during the "second interrogation." Presumably, Stefan is referring to the post-break continuation of questioning. This court declines to address issues that are inadequately briefed. *See* ***State v. Flynn***, 190 Wis. 2d 31, 58, 527 N.W.2d 343 (Ct. App. 1994). In any event, our supreme court has recognized that "where the ***Miranda*** rights were properly administered and where there was then a break in the interrogation, under the totality of the circumstances, it was not necessary to re-administer the ***Miranda*** warnings when it was undisputed that the defendant understood them." ***Grennier v. State***, 70 Wis. 2d 204, 213, 234 N.W.2d 316 (1975).

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

power to require that "all custodial interrogation of juveniles in future cases be electronically recorded where feasible, and without exception when questioning occurs at a place of detention." ***Id.***, ¶59. Stefan urges this court to extend ***Jerrell*** to the facts of this case. We decline to do so. An extension of ***Jerrell*** is a matter for the supreme court, not this court.

By the Court.—Judgment affirmed.

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