

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 22, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-1309-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEPHEN M. WOLFE,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Racine County: NANCY E. WHEELER, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Stephen M. Wolfe has appealed from a judgment convicting him upon no contest pleas of first-degree intentional homicide in violation of § 940.01, STATS., and armed burglary in violation of § 943.10(2)(b), STATS. Both convictions were as a party to the crime and habitual offender. Wolfe also appeals from an order denying his motion to withdraw his no contest pleas. He contends that no factual basis existed for the homicide conviction and that his no contest pleas resulted from the trial court's erroneous denial of a motion to suppress evidence. Because the trial court properly denied

the suppression motion and a factual basis existed for the homicide plea, we affirm the judgment and the order.

After sentencing, a defendant who seeks to withdraw a guilty or no contest plea must establish by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice. *State v. Krieger*, 163 Wis.2d 241, 249, 471 N.W.2d 599, 602 (Ct. App. 1991). A manifest injustice occurs when the trial court fails to establish that the conduct which the defendant admits constitutes the offense charged. *White v. State*, 85 Wis.2d 485, 488, 271 N.W.2d 97, 98 (1978). The purpose of this requirement is to assure that the facts supporting the charge actually constitute the statutory offense. *State v. Mendez*, 157 Wis.2d 289, 295, 459 N.W.2d 578, 580 (Ct. App. 1990).

Wolfe pled no contest to a charge of first-degree intentional homicide as a party to the crime. He does not dispute that he and an accomplice, Garry Borzych, went to the home of an eighty-seven year old woman to burglarize it and that the woman was killed during the burglary. He also acknowledges that because he was charged as a party to the crime of first-degree murder, the intent element of that charge could be satisfied by evidence that either he or Borzych had the requisite intent to kill the victim. He contends, however, that no factual basis existed to support a finding that either he or Borzych intended to kill the victim.

At the plea hearing, the trial court found that the criminal complaint provided a factual basis for the no contest plea. We agree. The complaint relates that Wolfe and Borzych went to the victim's home intending to burglarize it. The complaint also sets forth Wolfe's admission that he and Borzych encountered the victim, who was sleeping in a bedroom. Wolfe further admitted that while in the home he armed himself with a knife for the purpose of tying the victim up and that he put the knife in his pocket when he realized it had his fingerprints on it. He also admitted that the victim was killed during the burglary.

The complaint indicated that the victim had been stabbed at least twice—once in the head and once in the back. It also indicated that she had been beaten severely about the face, head and body, and that a nightstand drawer with blood on it was found smashed on the floor next to the bed where

she had been sleeping. In addition, the compliant set forth the medical examiner's conclusion that she had been strangled and died as a result of asphyxiation.

Intent to kill may be inferred from the nature of the victim's wounds, see *State v. Kramar*, 149 Wis.2d 767, 793, 440 N.W.2d 317, 328 (1989), and from the actor's conduct, *Shelley v. State*, 89 Wis.2d 263, 273, 278 N.W.2d 251, 256 (Ct. App. 1979). Here, the stab wounds and the evidence of strangulation clearly support a finding that the inflictor of the assaults intended to kill the victim. Furthermore, it does not matter whether either Wolfe or Borzych entered the victim's home with the intent to kill her or whether the intent was formed only at the time the wounds were inflicted and the strangulation occurred. See *State v. Stortecky*, 273 Wis. 362, 379, 77 N.W.2d 721, 730 (1956). Consequently, a factual basis existed for Wolfe's conviction.

Wolfe also contends that he is entitled to withdraw his no contest pleas because they were induced by the trial court's erroneous denial of his motion to suppress a statement made by him to police. He contends that the statement should have been suppressed because it was involuntary. He contends that the police improperly used his attachment to his infant daughter to induce him to confess and that he was intimidated by the county sheriff.

When a motion to suppress is filed, the State bears the burden of proving voluntariness beyond a reasonable doubt. *State v. Mitchell*, 167 Wis.2d 672, 696, 482 N.W.2d 364, 374 (1992).¹ In determining whether a statement was voluntarily made, the essential inquiry is whether the confession was procured via coercive means or whether it was the product of improper pressures exercised by the police. *State v. Clappes*, 136 Wis.2d 222, 235-36, 401 N.W.2d 759, 765 (1987). This determination requires a consideration of the totality of the circumstances surrounding the statement, requiring the court to balance the personal characteristics of the defendant against the pressures imposed upon him or her by police to induce the defendant to respond to questioning. *Id.* at

¹ On appeal, the State contends that its burden of proof when voluntariness is challenged should be reduced to proof by a preponderance of the evidence. However, as also acknowledged by the State, this court is bound by Wisconsin Supreme Court precedent. *State v. Grawien*, 123 Wis.2d 428, 432, 367 N.W.2d 816, 818 (Ct. App. 1985). In any event, the issue is immaterial here because the trial court's denial of the suppression motion was proper under either burden.

236, 401 N.W.2d at 765-66. While evidence that police are taking subtle advantage of a person's personal characteristics may be a form of coercion, *State v. Xiong*, 178 Wis.2d 525, 534, 504 N.W.2d 428, 431 (Ct. App. 1993), there must be some affirmative evidence of improper police practices deliberately used to procure a confession, *Clappes*, 136 Wis.2d at 239, 401 N.W.2d at 767.

Following an evidentiary hearing on Wolfe's suppression motion, the trial court made findings of fact and determined that the statement was voluntary. The trial court's factual findings regarding the circumstances surrounding the statement cannot be disturbed unless they are clearly erroneous. *Xiong*, 178 Wis.2d at 531, 504 N.W.2d at 430. We independently review the facts as found to determine whether any constitutional principles have been offended. *Clappes*, 136 Wis.2d at 235, 401 N.W.2d at 765.

In determining that Wolfe's statement was voluntary, the trial court found, as conceded by Wolfe in his brief on appeal, that he was properly advised of his *Miranda* rights before making his statement and understood and waived them. The trial court also found that Wolfe never asked to stop the questioning and that his request to speak to one detective alone was honored. It found that no promises or threats were made and that a generally friendly atmosphere prevailed, even after Wolfe initially gave a statement which the interviewing detectives indicated they disbelieved. While recognizing that the interview was lengthy, the trial court concluded that the length alone did not render Wolfe's statement involuntary since the police engaged in no improper practices during the questioning.

The trial court also specifically found that Wolfe initiated the idea of giving a confession if he would first be allowed to see his daughter. It further found that neither of the interviewing detectives dwelled on Wolfe's child and that they instead accommodated his request to see the child.

The trial court's determination that the length of the interview, standing alone, was not coercive is supported by evidence that Wolfe was offered food, drink and cigarettes, was allowed to use the rest room, and appeared calm and friendly. Its findings are also supported by the testimony of the interviewing detectives, who stated that no promises or threats were made and that Wolfe's request to speak to one of them alone was honored. The

detective who remained with Wolfe also testified that after the second detective left, Wolfe acknowledged that his initial statement denying culpability was false. He testified that Wolfe then told him that he would give a complete confession if his daughter and girlfriend were first brought down to the police station to see him. The detective testified that he told Wolfe that the sheriff would have to approve the meeting, approval was obtained, and after seeing his daughter and girlfriend Wolfe gave his confession.

The interviewing officers also testified that during the course of their interview with Wolfe, the sheriff entered the room and spent ten to fifteen minutes with him. The detective who remained present during the encounter between Wolfe and the sheriff testified that the sheriff told Wolfe that he did not believe his initial statement, that Wolfe should tell the truth, and that they put people in prison with less evidence than they had against him. The detective acknowledged that Wolfe seemed upset by the sheriff and that the sheriff appeared to be trying to intimidate Wolfe. However, the detective also testified that after the sheriff left, they "kind of apologized" for the intrusion and asked Wolfe if he would like to go on. The detective indicated that the interview then continued and the interruption was forgotten. The testimony further indicated that another half hour to forty-five minutes went by before Wolfe asked to speak to one of the detectives alone and initiated the requests that led to his confession.

The detectives also acknowledged discussing Wolfe's daughter with him, telling him that they believed they had enough information to send him to prison and asking him whether his daughter would not respect him more if he told the truth. However, they denied ever telling Wolfe that he might not see his daughter again if he did not admit his involvement in the crimes.

Based on this record and the trial court's factual findings, no basis exists to conclude that Wolfe's confession was improperly induced. While the interviewing detectives discussed Wolfe's daughter, no officer suggested that Wolfe's ability to see her again was conditioned upon giving an inculpatory statement, nor did the officers initiate the idea of bringing her to see Wolfe. Rather, the evidence supports the trial court's finding that it was Wolfe who first stated that he would give a complete confession if he was able to see his daughter. Moreover, at the time he initiated this idea, Wolfe had already told

the detective that he had lied in his earlier statement and that he was, in fact, present at the crimes.

The detectives' statement that Wolfe's daughter would respect him more if he told the truth was not, standing alone, improperly coercive. Cf. *Barrera v. State*, 99 Wis.2d 269, 292-93, 298 N.W.2d 820, 831 (1980) (holding that a discussion of religion which culminated with a statement that the defendant would have to "face up to it when he met his maker" did not render a confession involuntary), *cert. denied*, 451 U.S. 972 (1981). Moreover, the evidence establishes no nexus between the sheriff's statements and Wolfe's confession. The sheriff's contact with Wolfe was very short and contained no reference to Wolfe's daughter. While his statements may have been upsetting to Wolfe, no basis exists for concluding that they were dishonest or so overbearing as to be coercive. Most importantly, Wolfe's announcement that he would confess did not come until at least a half hour after the sheriff left and after the interview had returned to being cordial.²

The trial court therefore properly determined that Wolfe's confession was voluntary and denied his motion to suppress. Consequently, no basis exists to disturb his no contest pleas on the ground that they were improperly induced.

By the Court.— Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

² Wolfe contends that he asked to see his daughter and then, when told it would have to be approved by the sheriff, said he would confess because he knew the sheriff would otherwise never approve his request. However, evidence at the suppression hearing belies this contention. It instead indicates that Wolfe told the detective that he would give a confession if he could see his daughter and then was told that the arrangement had to be approved by the sheriff.