COURT OF APPEALS
DECISION
DATED AND RELEASED

June 11, 1997

NOTICE

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.

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

No. 95-3478-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

THOMAS D. MYERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: EMMANUEL VUVUNAS, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Thomas D. Myers appeals from a judgment convicting him of party to the crime of second-degree murder and intermediate aggravated battery with a weapon, and from an order denying his postconviction motion for a new trial.[1] On appeal, Myers challenges the voluntariness of his

[1] Myers was acquitted of kidnapping and second-degree sexual assault.

inculpatory statements to sheriffs, whether a post-polygraph inculpatory statement should have been suppressed and whether trial counsel was ineffective for failing to pursue an intoxication defense. We reject Myers' claims and affirm.

Myers was charged in the May 1987 death of Daette Berndt. Berndt was found floating in a retention pond in southern Kenosha county. Myers was first questioned regarding the death in May and June 1987. Law enforcement resumed its inquiries of Myers in June 1993. Myers argues that he was in custody from 5:00 p.m. on June 1, 1993, until the afternoon of June 3, 1993, when he was arrested. During this time Myers had several interviews with officers, took a polygraph examination arranged by officers, and made inculpatory statements. Myers moved to suppress statements he gave to law enforcement on June 1, 2 and 3, 1993. The trial court found that Myers' interviews on June 1 and 2 and prior to his arrest on June 3 did not occur while he was in custody. The court found that at various points on these dates Myers received ***Miranda*** warnings and that he never invoked his ***Miranda*** rights. The trial court concluded that Myers' statements were voluntary and therefore admissible.

The trial court's factual findings on the motion to suppress will not be disturbed unless they are clearly erroneous. *See* ***State v. Lee,*** 175 Wis.2d 348, 354, 499 N.W.2d 250, 252 (Ct. App. 1993). However, we independently apply constitutional principles of voluntariness to the facts found by the trial court. *See* ***State v. Clappes,*** 136 Wis.2d 222, 235, 401 N.W.2d 759, 765 (1987).

An individual must receive ***Miranda***[2] warnings when he or she is subject to "custodial interrogation." *See* ***State v. Leprich,*** 160 Wis.2d 472, 476,

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

465 N.W.2d 844, 845 (Ct. App. 1991). Custodial interrogation means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." ***Id.*** at 476-77, 465 N.W.2d at 845 (quoting ***Miranda v. Arizona,*** 384 U.S. 436, 444 (1966)). "The ultimate inquiry is whether there is a formal arrest or restraint on freedom of movement of a degree associated with a formal arrest. In making this determination, a court should consider the totality of the circumstances. The defendant's freedom to leave the scene and the purpose, place and length of the interrogation are all relevant factors." ***Leprich,*** 160 Wis.2d at 477, 465 N.W.2d at 846 (citations omitted).

The trial court's finding that Myers was not in custody is not clearly erroneous and there was no basis to suppress his inculpatory statements as having been obtained in violation of ***Miranda***. At the evidentiary hearing on Myers' motion to suppress, members of the Kenosha County, Wisconsin, and Lake County, Illinois sheriff's departments testified that Myers willingly accompanied them to the sheriff's department to be interviewed regarding the Berndt murder. Myers was free to leave at any time and returned to his home on the evenings of June 1 and 2 after interviews with law enforcement authorities. Sheriff's deputies accommodated Myers and allowed him to sleep later on the morning of June 2 before picking him up for further interviewing. Myers never resisted or expressed any reluctance about the interviews. Finally, a form used by the polygraph examiner advised Myers of his ***Miranda*** rights and had Myers confirm that he was

not under arrest and was free to leave at any time.[3] We agree that Myers was not in custody until he was arrested on June 3.

We turn to Myers' contention that the circumstances under which he gave the June 2 and 3 inculpatory statements were coercive and the result of improper pressures exerted by law enforcement. Myers contends that various pressure tactics were employed by officers to coerce inculpatory statements from him. He contends that he was subjected to extreme psychological pressure because: (1) officers told him that his girlfriend claimed that he was violent with her; (2) the polygraph examiner[4] falsely told Myers that his examination revealed that he was involved in the victim's death; (3) officers lied when they told Myers that his former wife was being questioned in the next room and that Brad Nix (another suspect in the crime whom Myers contended transported the victim to Kenosha county where she was found) was on his way to be interviewed; and (4) officers showed Myers graphic photographs of the victim and asked him to imagine how her mother must feel not knowing how and why her daughter died. Myers contends that under the totality of these circumstances, his statements to sheriffs on June 2 and 3 were not voluntary and should have been suppressed. The trial court found that the June 2 and 3 statements were not coerced and declined to suppress them.

A court faced with a challenge to the voluntariness of a confession or other inculpatory statement must examine the totality of the facts and circumstances surrounding the challenged statements. *See* ***Clappes,*** 136 Wis.2d at

[3] Because he was not in custody, the ***Miranda*** warnings Myers received were extraneous.

[4] Myers voluntarily took a polygraph examination on June 2, 1993.

236, 401 N.W.2d at 765. The court must balance the personal characteristics of the defendant, such as age, education and intelligence, physical and emotional condition and prior experience with the police, *see* ***id.*** at 236, 401 N.W.2d at 766, against the pressures imposed upon the defendant by officers in order to induce him or her to respond to the questioning. Such pressures include the length of the interrogation, the general conditions under which the confessions took place, any excessive pressure brought to bear on the defendant, any inducements, threats, methods or strategies utilized by officers to compel a response, and whether the defendant was informed of the right to counsel and the right to avoid self-incrimination. *See* ***id.*** at 236-37, 401 N.W.2d at 766.

Examining the totality of the circumstances, we conclude that Myers' claims of law enforcement overreaching do not reach the level of coercion. Myers was interviewed over three days. The undisputed testimony at the suppression hearing was that Myers was afforded whatever comforts he required during the interviews, he was free to leave at any time, he was returned home each night and he was allowed adequate rest before the next day's meeting with officers.[5] There was no testimony that Myers was or appeared to be in a diminished physical, emotional or intellectual state during his June 1 to 3 contacts with sheriffs.[6]

[5] Myers contends that the sheriff woke him up on the morning of June 3 to transport him to the Waukegan, Illinois, police department for further questioning. Detective Zielsdorf testified that Myers was returned home between 6:00 and 7:00 p.m. on June 2 after completing a polygraph examination and interview. He testified that Myers was asleep when officers arrived at his home the morning of June 3 to pick him up for another interview. However, Myers did not decline to accompany officers to Waukegan. Myers signed a ***Miranda*** acknowledgment of rights form at approximately 9:48 a.m. on June 3. While the officers may have awakened Myers, there is no evidence that they arrived at his home at an unreasonably early hour on June 3.

[6] Myers did not testify at the suppression hearing and did not offer any witnesses.

We turn to Myers' specific complaints of coercion. Myers alleges that officers told him that his girlfriend claimed he had been violent with her. Detective Fagen testified that he made such a remark. However, Myers did not argue to the trial court that this was a basis to find that his statements were not voluntary. Therefore, it is waived on appeal. *See* ***State v. Ledger,*** 175 Wis.2d 116, 135, 499 N.W.2d 198, 206 (Ct. App. 1993). More importantly and dispositively, we conclude that this issue is inadequately briefed on appeal. We do not consider it further. *See* ***State v. Pettit,*** 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992).

Myers complains that the polygraph examiner falsely told him that the test showed he was involved in the victim's death. We reject this claim for two reasons. First, Myers did not argue this ground at the suppression hearing and therefore it is waived on appeal. *See* ***Ledger,*** 175 Wis.2d at 135, 499 N.W.2d at 206. Second, the premise of Myers' complaint is flawed because the record demonstrates that the polygraph examiner, Michael Masokas, did not make a false statement to Myers.

Masokas testified that after the polygraph examination concluded, he told Myers that the test indicated that he was involved in the victim's death. In his report to the sheriff, Masokas opined that based on Myers' responses, he was not being truthful when he denied doing anything to cause the victim's death, denied knowing who caused her death and denied seeing the victim after she left a party they both attended the night she died. Masokas opined at the suppression hearing that the test results indicated that Myers was "either directly involved in causing her death or may have been present or may have had knowledge."

Myers' reliance on ***State v. Lee,*** 122 Wis.2d 266, 362 N.W.2d 149 (1985), is misplaced because ***Lee*** involved a defendant who had invoked his right to counsel before police used his stepmother to elicit a confession. *See* ***id.*** at 270, 362 N.W.2d at 150. Here, Myers never invoked his right to counsel, was not under arrest and had signed a consent to the polygraph indicating that he could discontinue it and leave at any time. The polygraph examiner's statements did not coerce Myers into making subsequent inculpatory statements.

Myers contends that officers misled him into thinking that his former wife was being interviewed in the next room and that Nix was scheduled to be interviewed. Myers does not elaborate on this claim and he did not raise it in the trial court. Our review of the record indicates that Detective Zielsdorf testified that Nix was scheduled to be picked up for an interview on June 3, the same day that Myers alleges he was told Nix was going to be interviewed. Myers' former wife was interviewed at the sheriff's department on June 3, although apparently not at the same time as Myers was interviewed. We conclude that these statements to Myers reflected the officers' intention to interview other individuals. They do not render Myers' subsequent confession involuntary. *See* ***State v. Fehrenbach,*** 118 Wis.2d 65, 66-67, 347 N.W.2d 379, 380 (Ct. App. 1984) (citing ***Frazier v. Cupp,*** 394 U.S. 731, 739 (1969) (even if police use deceit, such does not make a confession which is otherwise voluntary under the totality of the circumstances inadmissible)).

Myers argues that the officers improperly pressured him by asking him to consider the victim's mother and displaying graphic photographs of the victim. As to the first claim, Myers did not raise it in the trial court. Furthermore, he inadequately briefs it on appeal. *See* ***Pettit,*** 171 Wis.2d at 646, 492 N.W.2d at 642.

As to the effect upon him of photographs of the victim, we conclude that the photograph display is just one factor to be considered when assessing the totality of the circumstances for purposes of determining the voluntariness of a confession. *See* ***State v. Woods,*** 117 Wis.2d 701, 730, 345 N.W.2d 457, 472 (1984), *aff'd sub nom.* ***Woods v. Clusen***, 794 F.2d 293 (7th Cir. 1986). This tactic has been decried where the defendant was repeatedly shown photographs of the victim who was the defendant's friend or relative. *See* ***id.*** Here, the victim was not a friend or relative of Myers. Myers met the victim at a party and later made a disparaging remark about the victim to her mother when the mother was attempting to locate her missing daughter. Myers also refused to look at the photographs and the officers did not present the photographs to Myers again. We conclude that the photograph display did not render Myers' subsequent confession involuntary.

Finally, we note that when Myers made his inculpatory statements on June 3, he acknowledged his constitutional rights and stated that he wished to make a voluntary statement, that no threats or promises were made to induce him to make a statement, that he was giving the statement freely, and that he never asked for counsel. He also stated that he had been treated well by officers during his interviews. Under the totality of these circumstances, we conclude that Myers' inculpatory statements were voluntary and the trial court did not err in declining to suppress them.[7]

[7] We disagree with Myers that reviewing the various pressure tactics he claims were used is a "hypertechnical" exercise. Analyzing the totality of the circumstances does not require ignoring the component circumstances.

Myers contends that a statement he made on June 2 directly after the polygraph examination should have been suppressed because it was part of the polygraph examination.[8] Again, Myers did not make this argument in the trial court and it is waived on appeal. *See* ***Ledger,*** 175 Wis.2d at 135, 499 N.W.2d at 206. Even if it were not waived, we would conclude that the post-polygraph statement should not have been suppressed because the post-polygraph interview was distinct in time and content from the examination. *See* ***State v. Johnson***, 193 Wis.2d 382, 388, 535 N.W.2d 441, 443 (Ct. App. 1995). Myers was interviewed by the polygraph examiner approximately fifteen minutes after the polygraph examination concluded in a different room from that used for the examination. *See* ***id.*** at 389, 535 N.W.2d at 443.

Myers argues that his trial counsel were[9] ineffective because they failed to investigate the effects of alcohol on his memory as an explanation for the inconsistent statements he gave regarding the murder and on his ability to form the intent to be a party to the crime of second-degree homicide. Myers contends that trial counsel could have requested an intoxication instruction.

To prevail on a claim of ineffective assistance of counsel, a defendant must prove that: (1) his or her counsel's action constituted deficient performance; and (2) the deficiency prejudiced his or her defense. *See* ***State v. Brewer***, 195 Wis.2d 295, 300, 536 N.W.2d 406, 408 (Ct. App. 1995). Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *See* ***State v. Smith***, 170 Wis.2d 701, 714, 490 N.W.2d 40, 46 (Ct. App.

[8] In the statement, Myers expanded on his theory of Nix's involvement in the victim's death and described how he saw the victim drive off with Nix on the night she died.

[9] Myers had two trial attorneys.

1992). The trial court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. *See* ***id.*** However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. *See* ***id.***

When we address whether counsel's performance was deficient, we determine whether trial counsel's performance fell below objective standards of reasonableness. *See* ***State v. McMahon***, 186 Wis.2d 68, 80, 519 N.W.2d 621, 626 (Ct. App. 1994). This standard encompasses a wide range of professionally competent assistance. *See* ***id.*** We do not look to what would have been ideal, but rather to what amounts to reasonably effective representation. *See* ***id.*** The defendant has the burden to prove that counsel was deficient; counsel is presumed to have provided adequate assistance. *See* ***Brewer***, 195 Wis.2d at 300, 536 N.W.2d at 409.

Myers argues that trial counsel was aware that he had made inconsistent statements to officers, that he was intoxicated on the evening the victim died, and that an expert could have opined that Myers' intoxication contributed to his inconsistent statements. He contends that counsel had a duty to investigate the effects of alcohol on his ability to recall events and to form the intent to be a party to the crime.

At the postconviction motion hearing, lead trial counsel, Labish Bergovoy, testified that he did not consult with an expert regarding the effects of the alcohol Myers ingested the night of the murder. Counsel testified that his investigation suggested only one factually consistent position, i.e., that Myers was not present when the victim was killed. Myers and other witnesses claimed that he was not present when the victim was killed. Counsel testified that

Myers was able to recall events with specificity and that this ability undermined any claim that he was too intoxicated to recall the events. Counsel testified that for strategic reasons he did not want to place inconsistent theories of defense, alibi and intoxication—the latter might permit an inference that Myers was present at the murder—before the jury. Counsel testified that he was unaware of a successful use of an intoxication defense where the defendant did not testify and he had never seen the defense used in a party to the crime situation.

Co-counsel Ann Jacobs testified that she was greatly concerned with any theory of defense which was predicated on Myers having been at the scene of the crime.

The trial court found that defense counsel could not ignore Myers' views on the theory of defense, including his desire to avoid a defense which placed him at the scene of the crime. The court found that if Myers had pursued an intoxication defense, he would have had to testify, which would have made him vulnerable to questioning about his inconsistent statements to officers. Based on the evidence adduced at the postconviction motion hearing, these findings are not clearly erroneous.

Myers argues that the intoxication defense was a "valid avenue of defense." Trial counsel evaluated the facts and determined that it was not. The reasonableness of counsel's actions can be evaluated in light of the defendant's statements and conduct. *See* ***State v. Pitsch,*** 124 Wis.2d 628, 636-37, 369 N.W.2d 711, 716 (1985). We will not second-guess counsel's trial strategy if it was founded on a reasonable view of the facts and the law. *See* ***State v. Felton,*** 110 Wis.2d 485, 502-03, 329 N.W.2d 161, 169 (1983). A trial attorney may select a particular strategy from the available alternatives and need not undermine the

chosen strategy by presenting inconsistent alternatives. *See* ***State v. Hubanks***, 173 Wis.2d 1, 28, 496 N.W.2d 96, 106 (Ct. App. 1992). We conclude that trial counsels' performance was not deficient.[10]

Finally, Myers contends that trial counsel was ineffective for failing to request an intoxication instruction. Such an instruction would have to have been premised upon evidence trial counsel chose not to present and a defense trial counsel chose not to pursue. *Cf.* ***Bergeron v. State,*** 85 Wis.2d 595, 606, 271 N.W.2d 386, 389 (1978) (an instruction is to be given only where the evidence reasonably requires it). We have already upheld trial counsels' decision to forego an intoxication defense as a proper exercise of professional judgment. Therefore, we need not address this claim further. *See* ***State v. Courtney E.,*** 184 Wis.2d 592, 603 n.6, 516 N.W.2d 422, 426 (1994).

By the Court.—Judgment and order affirmed.

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

[10] Having found no deficient performance, we need not address the prejudice prong of the ineffective assistance analysis. *See* ***State v. Moats,*** 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990).