COURT OF APPEALS
DECISION
DATED AND FILED

March 23, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2513-CR **Cir. Ct. No. 2006CF291**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CRAIG C. TOLONEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: ANDREW T. GONRING, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Craig C. Tolonen appeals from a judgment of conviction for first-degree reckless homicide in the death of a six-month-old girl, and the order denying his motion for postconviction relief. Tolonen argues on appeal that the circuit court erred when it denied his motion to suppress the

statements he made to the police, that there was insufficient evidence to support his conviction, that WIS. STAT. § 905.13 (2009-10) is unconstitutional, and that he is entitled to a new trial in the interests of justice. We conclude that none of these arguments have merit, and we affirm.

¶2 Tolonen was convicted after a jury trial in the death of Serenitee Halbert. Anissa Francis was the girl's mother. Tolonen was babysitting the girl at Francis's apartment, while Francis and her boyfriend, Junior Weiss, went out drinking. Tolonen also had been drinking. Tolonen was annoyed when the baby woke up early in the morning and was crying. He put her in a bouncy chair, but she did not stop crying. He then picked her up, shook her, and threw her onto a couch. Her mother found the baby sometime later and took her to the hospital. The baby died from the injuries she received.

¶3 While investigating the cause of the baby's injuries, the police became aware that the baby's older brother, Joseph, might also have been injured. The police went to Francis's apartment where Joseph was staying with Tolonen. When the police knocked on the door, they heard a television and a child's voice. The police identified themselves, but Tolonen did not answer the door. Concerned because they knew a child to be in the apartment, the officers pried open the door. When they entered, they saw Tolonen and Joseph. Joseph had extensive bruising on his face. The officers ordered Tolonen down on the ground and handcuffed him. After the scene was secured, the police took the handcuffs off Tolonen and allowed him to stand up. The police asked Tolonen to come to the police station to discuss the injuries to the baby. Tolonen agreed. An officer asked Tolonen if he had a car, but he did not, so Tolonen rode in the front seat of the police car without handcuffs.

¶4 Once at the station, the officer told Tolonen that he was a witness and not under arrest. The interview was recorded. The officer also read Tolonen ***Miranda*** warnings,[1] saying that because Tolonen was not under arrest, the warnings were not really necessary. Tolonen agreed that he was there voluntarily. Tolonen eventually made a statement in which he admitted he had shaken Serenitee and thrown her on the couch. Tolonen neither refused to talk to the police nor asked for a lawyer.

¶5 After Tolonen gave his statement to the police, the officer asked if Tolonen would be willing to go back to Francis's apartment to do a video reenactment of the incident. The reenactment was also recorded, and Tolonen stated on the recording that he was there voluntarily. When the reenactment was finished, the police arrested Tolonen.[2]

¶6 Before trial, Tolonen moved to suppress all statements he made to the police, including the interrogation, the written statement, and the video reenactment. The court held a hearing on the motion, and denied it.

¶7 At trial, Tolonen argued that it was Weiss, and not he, who had caused Serenitee's death. Tolonen also argued that he had been tricked by the police into making a false confession. Tolonen offered the testimony of an expert who said that Serenitee had not been shaken because she had no neck injuries. The State's expert, who had treated Serenitee, disagreed that the evidence showed

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

[2] Junior Weiss was charged with physically abusing Joseph.

she had not been shaken, and said that neck injuries are rare in children with abusive head trauma. The jury found Tolonen guilty.

¶8 Tolonen later moved for postconviction relief, arguing the evidence was insufficient to support his conviction and that he was entitled to a new trial in the interests of justice. Both of these claims were based, in part, on his assertion that Serenitee did not die from shaken baby syndrome, but rather her injuries were more consistent with battered child syndrome. He further asserted that if she died of battering rather than shaking, it was Weiss who caused her injuries.

¶9 We consider first whether the circuit court erred when it denied Tolonen's motion to suppress the statements he made to the police. Tolonen argues that the statements should have been suppressed because the police took the statement in violation of his ***Miranda*** rights. Specifically, he argues that he was in custody when he made the statements and that his waiver of his ***Miranda*** rights was both involuntary and unknowing.

¶10 The circuit court denied the motion, determining that based on the objective circumstances, no reasonable person would have believed he was in custody at the time. The court found that the police handcuffed Tolonen when they first arrived at Francis's apartment as protective measure for the safety of the officers, and that as soon as they completed searching the apartment, they removed the handcuffs and allowed Tolonen to stand. When the police asked Tolonen if he would come to the station to talk about the incident, they asked him if he was able to drive himself. Once they determined he did not have a car, police allowed Tolonen to ride in the front seat of an unmarked car with no restraints on. Further, the officer did not display his gun to Tolonen. Once at the station, Tolonen was left alone in an interview room for fifteen minutes with the door open. During the

interview, Tolonen was given bathroom breaks and was allowed to go outside to the garage to smoke. Further, the questions the police asked Tolonen were primarily to find out how Serenitee had been injured. The court determined that under these facts, Tolonen was not "in custody."

¶11 When the officers took Tolonen back to the apartment to re-enact the incident, he again was not handcuffed or restrained. He rode in the backseat of the unmarked car this time because there was another officer in the front. The circuit court concluded that nothing changed when they left the department that made the situation custodial.

¶12 When reviewing a motion to suppress:

> [W]e engage in a two-step inquiry. First, we apply a deferential standard to the trial court's findings of historical fact, and will "thus affirm the [trial] court's findings of fact, and inferences drawn from those facts, unless they are clearly erroneous. Second, we review the [trial] court's application of constitutional principles to the evidentiary facts. This second step presents a question of law that we review independently."

State v. Gralinski, 2007 WI App 233, ¶13, 306 Wis. 2d 101, 743 N.W.2d 448 (citations omitted). When determining whether a person is in custody for ***Miranda*** purposes, the relevant inquiry is how a reasonable person in the situation would understand the situation. ***State v. Morgan***, 2002 WI App 124, ¶10, 254 Wis. 2d 602, 648 N.W.2d 23. In making such a determination:

> [W]e consider the totality of the circumstances, including such factors as: the defendant's freedom to leave; the purpose, place, and length of the interrogation; and the degree of restraint. When considering the degree of restraint, we consider: whether the suspect is handcuffed, whether a weapon is drawn, whether a frisk is performed, the manner in which the suspect is restrained, whether the suspect is moved to another location, whether questioning

> took place in a police vehicle, and the number of officers involved.

Id., ¶12 (citations omitted).

¶13 We agree with the circuit court that under the totality of the circumstances, a reasonable person would not have considered himself in custody. Once the officers determined for their own safety that the apartment was safe, Tolonen was not handcuffed, or restrained in any way. The police asked Tolonen to come with them to talk, and he agreed to do so. As the circuit court found, nothing changed when the officers and Tolonen went back to the apartment to reenact the crime. The circuit court properly denied Tolonen's motion to suppress the statements he made to the police.

¶14 Tolonen next argues that the evidence was insufficient to support his conviction because the evidence shows that Weiss, and not he, killed Serenitee. We disagree.

> [A]n appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citations omitted).

¶15 The evidence before the jury was that Tolonen had shaken and thrown Serenitee. The State presented sufficient medical evidence linking

Serenitee's injuries to Tolonen's actions. The defense argued that it was Weiss's actions, and not Tolonen's, that caused her death. The jury, however, found otherwise. There was more than enough evidence to support the conviction.

¶16 Tolonen next argues that WIS. STAT. § 905.13 is unconstitutional because it prevented him from putting on his defense when Weiss invoked his right against self-incrimination. The statute prohibits any adverse inference being drawn from a witness's decision to invoke his or her right against self-incrimination in a criminal case. Tolonen argues that the statute violates his due process rights because it does not apply to civil cases. *See* WIS. STAT. § 905.13(4). This issue is controlled by ***State v. Heft***, in which the supreme court said that "[t]he distinction between civil and criminal treatment of a witness's invocation of the Fifth Amendment privilege and inferences drawn therefrom is rational and, therefore, valid." ***Heft***, 185 Wis. 2d 288, 302, 517 N.W.2d 494 (1994). The court concluded that WIS. STAT. § 905.13 did not violate the defendant's due process or equal protection rights. ***Id.*** at 303-04. Consequently, we also conclude that Tolonen's due process rights were not violated when Weiss invoked his right against self-incrimination.

¶17 Tolonen's final argument is that he is entitled to a new trial in the interests of justice. Under our discretionary power, we may reverse a judgment or order appealed from, regardless of whether a proper objection was made, for two reasons: (1) if it appears from the record that the real controversy has not been fully tried, or (2) it is probable that justice has for any reason miscarried. WIS. STAT. § 752.35. We may exercise our discretionary power to reverse under the first standard by considering the totality of the circumstances to determine whether a new trial is required "to accomplish the ends of justice because the real controversy has not been fully tried." ***State v. Wyss***, 124 Wis. 2d 681, 735-36, 370

N.W.2d 745 (1985), *overruled on other grounds by* ***State v. Poellinger***, 153 Wis. 2d 493, 505-06 and n.6, 451 N.W.2d 752 (1990). We are not required under the first standard to determine that there is a substantial probability that a new trial would reach a different result. ***Id.*** at 735. When we consider whether justice has miscarried, however, we must conclude that the defendant should not have been found guilty and that justice demands the defendant be given another trial. ***Id.*** at 736.

¶18 Tolonen argues that the real controversy was not tried because of significant developments in the science concerning shaken baby syndrome. Further, he asserts that his medical expert refuted the testimony of the State's expert about the cause of Serenitee's injuries. As we have already discussed, however, it was the jury's role to decide which expert to believe, and they chose to believe the State's.

¶19 As to developments in the science concerning shaken baby syndrome, we are not convinced that the real controversy was not tried. The issue tried and decided by the jury was whether Tolonen was responsible for the baby's injuries. The testimony at trial was that Serenitee's injuries could have been caused by being shaken or by being thrown. Tolonen admitted to having done both. We conclude that the real controversy was fully tried. Consequently, we decline to exercise our discretionary power to reverse in the interests of justice.

¶20 For the reasons stated, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

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