COURT OF APPEALS
DECISION
DATED AND FILED

November 9, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1606-CR **Cir. Ct. No. 2007CF1**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

OSCAR C. THOMAS,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Oscar Thomas appeals from judgments convicting him of first-degree intentional homicide, first-degree sexual assault and false imprisonment arising out of the death of his former wife and from an order denying his postconviction motion seeking a new trial. On appeal, Thomas argues

the circuit court should have suppressed his first statement to police because it was involuntary and given without ***Miranda***[1] warnings. He also argues that his trial counsel was ineffective and that he presented newly discovered evidence postconviction. We reject these claims and affirm the judgments and the order.

¶2 Thomas argues that the circuit court erred when it declined to suppress his first statement to police.[2] Thomas moved to suppress the statement he gave to Officer Weidner while he was sitting in the back of the officer's squad car. Thomas argued that the statement was involuntary and given without ***Miranda*** warnings.

¶3 At the suppression hearing, Weidner testified that Thomas had called 911. He asked Thomas to step out of the victim's apartment so that rescue personnel would have more room to work on the victim. He then asked Thomas to sit in the rear of his squad car because it was cold outside.[3] Thomas agreed, and the officer patted down Thomas before Thomas entered the vehicle. Thomas sat in the back and the officer sat in the front. The doors were unlocked. The officer told Thomas that because of the victim's grave condition, "we kind of wanted a written statement from him just based on what he knows about what happened." Thomas agreed to give a statement. The officer did not inform Thomas of his ***Miranda*** rights because Thomas was not in custody. Thomas was in the vehicle for fifteen to twenty minutes. Thomas did not decline to answer the officer's

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

[2] Although Thomas gave multiple statements, this is the only statement Thomas challenges on appeal.

[3] The crime took place at the end of December 2006.

questions.[4] After Thomas signed his statement, Thomas left the vehicle and walked away. The officer testified that he did not threaten Thomas, promise him anything or force him to give a statement. Thomas did not make any requests during the interview other than to inquire after the victim's condition.

¶4 Thomas did not offer any evidence in support of his motion to suppress. Thomas argued that he reasonably believed he was in custody when Weidner questioned him in the squad car. The State countered that Thomas was not in custody, and he gave his statement voluntarily.

¶5 After considering the degree of restraint exercised over Thomas by the officer, the circuit court determined that the squad car interview was not a custodial interrogation. The court also determined that Thomas' statement was voluntary.

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

¶7 An individual must receive ***Miranda*** warnings when he or she is subject to "custodial interrogation." ***State v. Leprich***, 160 Wis. 2d 472, 476, 465 N.W.2d 844 (Ct. App. 1991). Custodial interrogation means "questioning initiated

[4] In his statement, Thomas stated that when he checked on the victim, she was asleep but "gurgling." Thomas woke her to make sure she was alright. Thomas then went for a walk and when he returned, he found the victim on the floor, not breathing. He then called 911. Thomas told Weidner that the victim had no medical problems, took no prescriptions and did not drink or use illegal drugs.

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 (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 (citations omitted).

¶8 The circuit court found that the degree of restraint did not suggest that Thomas was in custody in the squad car. This finding is supported in the record. Weidner testified that he and Thomas retreated to the squad car because the victim's apartment was crowded and the weather was inhospitable. Thomas agreed to sit in the squad car, the doors were unlocked, and Thomas was not prevented from leaving. Thomas was in the squad car for fifteen to twenty minutes, and he left the squad car after he gave a statement. The circuit court's determination that Thomas was not in custody is supported by the record. The absence of ***Miranda*** warnings was not a basis to suppress Thomas' statement.

¶9 Although Thomas argues that his statement was not voluntary, Thomas presented no evidence in support of that claim. Rather, Thomas relies upon Weidner's testimony that he told Thomas that because of the victim's condition, "we kind of wanted a written statement from him just based on what he knows about what happened." Thomas contends that Weidner craftily coerced a statement from him by implying that he was required to give a statement.

¶10 Weidner's testimony does not support Thomas' claim that he was coerced. None of the factors that might show coercion or pressure is present in

this record: the interview was not lengthy, the general conditions under which Thomas gave the statement were not difficult, no pressure was brought to bear on Thomas, no inducements or threats were made, and the officer did not use any questionable methods or strategies to compel a response. *See* ***Clappes***, 136 Wis. 2d at 236-37. In addition, there is no evidence that Thomas' personal characteristics rendered the interview coercive. *See* ***id.*** at 236. Under the totality of the facts and circumstances, *see* ***id.***, Thomas' statement was not coerced.

¶11 Thomas next argues that he has newly discovered evidence: a pathologist's opinion that countered the opinion of the Kenosha County Medical Examiner, Dr. Mary Mainland, that the victim died from "manual strangulation." Thomas sought a new trial on this basis and because his trial counsel was ineffective for failing to present such testimony at trial.

¶12 At trial, Mainland testified that the victim died from strangulation due to physical assault consistent with a choke hold or manual strangulation. While the victim did not have external neck bruising, she did have internal neck injuries, hemorrhaging in her eyes and other injuries associated with strangulation. Mainland could not rule out that the victim had been strangled by someone holding something soft around her throat rather than using bare hands. Mainland was cross-examined about the condition of the victim's body and whether some of the injuries could have resulted from resuscitation efforts.

¶13 Thomas' postconviction forensic pathologist, Dr. Shaku Teas, prepared a letter report in which she opined that the presence of certain injuries on the victim "would be consistent with death occurring as the result of pressure on the neck but there was no anatomical evidence to classify this death as a 'manual strangulation.'" Teas opined that the autopsy findings would not be inconsistent

with Thomas' admission that he had his left arm around the victim's neck, squeezed and the victim struggled. Teas opined that the victim "died as a result of pressure on the neck and the autopsy findings are not inconsistent with Oscar Thomas' statement. There is no physical evidence that 'intentional' pressure was applied to the neck."

¶14 At the postconviction motion hearing, Teas testified that she could not render an opinion as to cause of death. She testified that there was no evidence of manual strangulation, although her letter report concluded that the victim died from pressure on the neck which was not inconsistent with Thomas' statement. Teas noted the absence of bruising on the exterior of the victim's neck. She opined that a medical examiner could not conclude that strangulation occurred when something was placed around the victim's neck to cushion the strangulation and avoid external injuries. Teas testified that many of the autopsy findings upon which Mainland relied to reach a cause of death of strangulation had explanations other than strangulation.

¶15 Trial counsel testified postconviction that he had considered retaining a forensic pathologist to consult about the medical examiner's findings. However, counsel's review of the records did not suggest that there was an issue regarding cause of death. Rather, counsel focused the defense on whether the victim's death was an intentional homicide or a lesser crime.[5]

¶16 The circuit court did not find Teas credible, particularly because she disclaimed any possibility that a person could be strangled during an act of sexual

[5] Counsel's defense strategy had to address Thomas' admission that he had his arm around the victim's neck and squeezed while she struggled.

intercourse, which was an issue in this case based on Thomas' admission that he had his arm around the victim's neck during sexual contact. Given all the other evidence in the case pointing to Thomas' guilt, the court did not find that Teas' testimony persuasive. Therefore, the court concluded that Teas' opinion was not newly discovered.

¶17 Motions for a new trial based on newly discovered evidence are submitted to the circuit court's discretion. ***State v. Terrance J.W.***, 202 Wis. 2d 496, 500, 550 N.W.2d 445 (Ct. App. 1996). "We review a circuit court's determination as to whether a defendant has established his or her right to a new trial based on newly discovered evidence for an erroneous exercise of discretion." ***State v. Edmunds***, 2008 WI App 33, ¶8, 308 Wis. 2d 374, 746 N.W.2d 590.

¶18 The circuit court

> may grant a new trial based on newly discovered evidence only if the following requirements are met: (1) the evidence was discovered after trial; (2) the moving party was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative to the evidence that was introduced at trial; and (5) it is reasonably probable that a different result would be reached at a new trial.

Terrance J.W., 202 Wis. 2d at 500. Here, the circuit court decided the claim on the last requirement: it was not reasonably probable that a different result would be reached at a new trial if Teas testified.

¶19 On appeal, Thomas does not address the circuit court's basis for rejecting his newly discovered evidence claim. Rather, he addresses newly discovered evidence requirements upon which the circuit court did not rely. We agree with the circuit court's discretionary determination that Teas' testimony would not yield a different result at a new trial. First, Teas' opined that the victim

"died as a result of pressure on the neck and the autopsy findings are not inconsistent with Oscar Thomas' statement." It was for the jury to determine whether Thomas' conduct toward the victim demonstrated the requisite intent for first-degree intentional homicide. *See* ***Shelley v. State***, 89 Wis. 2d 263, 273, 278 N.W.2d 251 (Ct. App. 1979). Second, there was more than sufficient evidence of Thomas' guilt: (1) Thomas' admission that he had his arm around the victim's neck and squeezed while she struggled; (2) on the night of the murder, Thomas used crack cocaine, watched pornography and then forced himself sexually on the victim, restraining and strangling her; (3) Thomas contacted the victim's employer in an attempt to retrieve her payroll check; (4) the victim had thrown Thomas out of her home; (5) the victim had refused to give Thomas funds to purchase drugs; (6) Thomas had expressed rage and jealousy about the victim's possible relationship with another; and (7) Thomas was found with the victim's purse.

¶20 Thomas' ineffective assistance of trial counsel claim also fails. Thomas did not demonstrate that his trial counsel's failure to present Teas' testimony would have led to a different result at trial. *See* ***State v. Reed***, 2002 WI App 209, ¶17, 256 Wis. 2d 1019, 650 N.W.2d 885; ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990) (we need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice).

By the Court.—Judgments and order affirmed.

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