COURT OF APPEALS
DECISION
DATED AND FILED

December 11, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2557-CR **Cir. Ct. No. 2006CF70**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DOUGLAS G. HICKS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oconto County: MICHAEL T. JUDGE, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Douglas Hicks appeals a judgment of conviction for repeated sexual assault of the same child. Hicks argues recorded telephone statements he made to his victim were not voluntary and therefore should have

been ruled inadmissible at trial. Hicks also seeks a new trial in the interest of justice. We affirm.

BACKGROUND

¶2 Following a jury trial in 2007, Hicks was convicted of repeated sexual assault of Eric J. In his first appeal, Hicks argued the trial court should have excluded statements he made during a telephone call with Eric. We concluded Eric was acting as an agent of the police and "applied impermissibly coercive tactics to get Hicks to make incriminating statements." ***State v. Hicks***, No. 2009AP3044-CR, unpublished slip op. ¶7 (WI App Mar. 29, 2011). We therefore remanded for the trial court to conduct a full voluntariness balancing analysis, as required by ***State v. Clappes***, 136 Wis. 2d 222, 401 N.W.2d 759 (1987). Hicks further argued in his first appeal that counsel was ineffective for not objecting to inappropriate comments during the State's closing argument. We determined that the comments were improper, but that counsel nonetheless exercised reasonable trial strategy.

¶3 The State alleged Hicks performed oral sex on Eric at least three times between June 1996 and April 1999. Eric was eleven years old when the assaults began. Hicks was his stepfather. Eric testified that Hicks assaulted him between 100 and 120 times and that he first reported the assaults to his girlfriend in December 2004. He reported the assaults to police in April 2005.

¶4 Investigator Dale Janus arranged a phone call between Eric—by then an adult—and Hicks on February 6, 2006, with the goal of getting Hicks to admit to the assaults. Eric called from the police station, where Janus both recorded and listened during the call. Janus gave Eric instructions and advice on how to perform the call, including what to say so as to elicit incriminating statements.

While Janus did not instruct Eric to threaten Hicks, he told Eric "there wasn't anything he could really say wrong."

¶5 The phone call lasted forty-three minutes. Hicks received the call on his cell phone while driving in a company vehicle and attempting to train a new employee. Eric made various threats and promises throughout the call, which Hicks has categorized as follows:

> Threats of death or bodily injury
>
> "No you cannot talk to me later you're going to talk to me right fucking now. If you don't talk, if you hang up this phone I know a lot of people who live on the south side of Chicago who are fucking Russians, fucking ex-KGB mother fuckers, alright, I think you understand where that goes."
>
> "No, it doesn't matter, it doesn't matter. Pull the fucking car over or wherever the hell you are, you're going fucking talk to me about this right now, or you going to have like maybe 30 days to live, alright."
>
> "The only way you're going to keep your ass safe is by telling me what I need to hear right now …"
>
> "Yes, yes you are because it's the truth and that's the only thing that's going to keep you safe."
>
> "Tell me that you're sorry… You won't have to worry about me sending anyone after you, or have to worry about me finding your house and coming after you with a baseball bat or any shit like that, just say it."
>
> General threats of negative consequences
>
> "I need you to answer some things for me, or there's going to be a lot of problems for everyone."
>
> "No, I don't believe you, the first second I think that you're not telling me the truth, it's all going [to] be fucking done, alright."
>
> "I know what the truth is and you're trying to be a fucking asshole about it, you're going to tell the truth or [you're] going to go fucking down, you understand me, I hold all

the fucking power cards here and you're going to do exactly what the hell I say."

"Just like it's probably going to get you fucked up. Because I think you know what happens to child molesters in prison Doug don't you." "They make it like three months and then they're dead."

"It's either going to be by their hand or by mine."

"No, you're going to say it right now, you're going to say it over the phone or it's all going to be over."

"[B]ut if you're not going to play ball with me right now, you're going to get fucking screwed and that's all it comes down to."

Threats of continued harassment

"Yes you are, you're going to say it or this is going to carry on as long as it needs to. I'll call back tomorrow, and the day after that, the day after that, until you say it. Say it."

"No, no, we're going to go forward, this is going to go on as long as it needs to. Because now I have the power, I got you to tell me what I needed, one part of what I needed to hear, now we're going to go forward until I get the rest of it."

Threats of going to the police

"I'm saying that if you say it, I'm not going to go to the cops, if you say, what, come on, what, no say it, you're going to say it or I'm going to go to the cops and this time you're going to go down one way or another."

"You can't get out of this, you're either going to say it, or you're going to get fucking screwed. I'm going to go to the cops if you don't answer me."

"Do this and I, I should still probably really go to the police, just tell me how old I was and I, I won't."

> Threats of talking to Hicks's son … about alleged molestation
>
> "You're going to ruin [your son's] life if you don't answer me. If you don't answer me [he] is never, if you don't answer me right now I'm going to tell [him] and [he] is going to know that I'm telling the truth."
>
> "Yes it will if you want to see your child again, if you don't want him to ever know about this you're going to say it."
>
> Promises
>
> "Just admit it. This will all end, all of this will end if you say, Eric I'm sorry for sexually molesting you. Say it. Right now and this will all be over and you will never hear from me again."
>
> "Tell me that you're sorry, tell me that you're sorry for sexually molesting me and this will all be over. I'll fucking go away and you will never see me again."
>
> "Say you're sorry and we can all go back to this being like normal and you will never hear from me again and there'll never be any more problems like this …"

¶6 After Eric threatened to tell Hicks's son about the alleged assaults, the following exchange occurred:

> [Hicks:] Eric, I am sorry.
>
> [Eric:] You're sorry for what, come on, go forward, you're sorry for what.
>
> [Hicks:] Just, you just told me to say it, I'm sorry.
>
> [Eric:] No say I'm sorry for sexually molesting you. This isn't going to end until you reach that point. We got the sorry part out now we just need to end the sexually molesting me part.
>
> [Hicks:] That's going to keep you from uh, trying to upend, upend on [my son?]
>
> [Eric:] Yes it will if you want to see you[r] child again, if you don't want him to ever know about this you're going to say it. You're going to say Eric I'm sorry for sexually molesting you.

[Hicks:] Eric, I'm sorry for molesting you.

¶7 At the initial postconviction motion hearing, trial counsel testified that Hicks said he "really wasn't all that threatened" by Eric's phone call. Hicks, however, testified he told counsel he did feel threatened and was particularly concerned about the threats of preventing visitation with his son. Hicks testified, "[T]hat's the one that hit home and led me to cooperate with Eric." Hicks told police before trial, and the presentence investigator after trial, that he only told Eric what he wanted to hear in order to end the phone call. Hicks also told the presentence investigator that he worried he might lose his son if he did not respond as Eric demanded.

¶8 On remand, Hicks testified at the ***Clappes*** hearing about his reasons for cooperating during the phone call. As the jury had learned at trial, Hicks was previously tried on sexual assault charges, resulting in a hung jury and then an ***Alford***[1] plea to reduced charges. Hicks testified about specific instances of harassment at his home due to the prior case, as well as job losses. Hicks stated that, based on his prior experience, he knew he could "lose it all again" just by Eric making accusations to the police.

¶9 Nonetheless, the trial court determined Hicks's statement was voluntary. It reasoned:

> The ultimate determination of whether the Hicks confession is voluntary under the totality of the circumstances standard requires this Court to balance the personal characteristics of Hicks against the pressure imposed upon him by [Eric] during the one-party consent phone call. Hicks' personal characteristics show a person with a strong personality. He talks politely and has a good

[1] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

> appearance. He is articulate and has an exemplary work record showing confidence, responsibility and leadership. Hicks does not have a shy or withdrawn personality. Hicks reports that he is in good physical and emotional health. Hicks has had no drug or alcohol issues.
>
> This Court finds that Hicks['s] confession on the one-party consent phone call was a product of free and unconstrained will, reflecting deliberateness of choice. Hicks was not a victim of an unequal confrontation by the state which exceeded Hicks['s] ability to resist. The Court, in balancing the personal characteristics of Hicks against the pressures imposed upon him by [Eric] in the one-party consent phone call, finds that Hicks['s] confession was voluntary.

DISCUSSION

¶10 Hicks argues the court erroneously determined his statement was voluntary. He also seeks a new trial in the interest of justice, based on the prosecutor's improper remarks during closing argument.

¶11 When reviewing a trial court's determination of the voluntariness of a defendant's confession, we will affirm the court's findings of historical facts unless they are clearly erroneous. *See* ***State v. Agnello***, 2004 WI App 2, ¶8, 269 Wis. 2d 260, 674 N.W.2d 594. However, the application of the constitutional standard to historical facts is a question of law that we decide independent of the trial court. ***Id.***

¶12 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. ***Clappes***, 136 Wis. 2d at 236.

¶13 To determine the voluntariness of a defendant's statements, the pertinent inquiry is whether the statements were coerced or the product of improper pressures exercised by the person conducting the interrogation. ***State v. Hoppe***, 2003 WI 43, ¶37, 261 Wis. 2d 294, 661 N.W.2d 407. Coercive or improper police conduct is a necessary prerequisite for a finding of involuntariness. ***Id.*** We apply a totality of the circumstances test to determine whether a defendant's statements are voluntary. ***Id.***, ¶38. That test involves a balancing of the defendant's personal characteristics against the pressures imposed upon the defendant by law enforcement. ***Id.***

¶14 The relevant personal characteristics include the defendant's age, education and intelligence, physical and emotional condition, and prior experience with law enforcement. ***Id.***, ¶39. The personal characteristics are balanced against the police pressures and tactics that 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. ***Id.*** The State must prove by a preponderance of the evidence that the statements were voluntary. ***Id.***, ¶40.

¶15 Hicks argues his statements were involuntary because the tactics used were extremely coercive and improper, his past experience with the consequences of sexual assault allegations made him particularly vulnerable to the coercion applied, and it is apparent the statements were the actual product of the coercion because Hicks merely repeated exactly what he was instructed to say. He

also emphasizes that he did not have prior experience being interrogated by police and was not given Miranda warnings.

¶16 First, we observe that Hicks's experience with law enforcement and the absence of Miranda warnings are irrelevant factors. Hicks's statements were not made to a law enforcement officer, and Hicks was unaware that Eric was acting as an agent of the police or that the call was being recorded. Thus, there was simply no pressure to comply with police authority. *See* ***Illinois v. Perkins***, 496 U.S. 292, 296-97 (1990).

¶17 Next, we view it significant that Hicks was not in physical proximity to Eric during the course of the threatening encounter. Although the various threats were intended to induce Hicks to stay on the line, he nonetheless could have terminated the call at any time and suffered no immediate risk of physical harm. Thus, the various threats of violence carried substantially less coercive effect, even had Hicks taken them seriously.

¶18 Having reviewed Hicks's own testimony, his statements to police and the presentence investigator, and his trial attorney's testimony,[2] it was apparent to the trial court that Hicks did not take the threats of harm seriously. Hicks repeatedly denied any wrongdoing despite those repeated threats. Indeed,

[2] Hicks asserts that the trial court merely recited his trial attorney's testimony without making any credibility determination, and found that Hicks's testimony was consistent and cogent. While we are troubled by the State's misleading suggestion that the court expressly accepted counsel's testimony over Hicks's, we nonetheless accept counsel's testimony to the extent of any conflict. If the trial court had concluded Hicks actually felt threatened by the numerous threats of physical violence, it would have been compelled to conclude Hicks's statements were involuntary. Although the better practice would have been to make explicit credibility findings, such findings are implicit in the court's decision. *See* ***State v. Echols***, 175 Wis. 2d 653, 673, 499 N.W.2d 631 (1993).

his trial counsel testified that Hicks stated he was amused by the assertion that Eric had connections with Russians. Thus, the only threat that might have had an actual coercive effect upon Hicks was the threat to report the sexual assault allegations to Hicks's son. This is the threat, however, that we view as least problematic.

¶19 There are two possible takes on the threat to report the allegations to Hicks's son. Either it was a threat to report actual sexual assaults, or it was a threat to report false allegations. If it was the latter, then the threat carried less coercive strength, respectively. Hicks would, obviously, know the allegations were false and would have less reason to be concerned about any consequences of the reporting. Hicks's claim that he was falsely accused in the past and suffered grave consequences is not particularly convincing. Hicks was found guilty in the prior case based on his own plea.

¶20 If, on the other hand, the threat was to truthfully report sexual assaults, then the threat potentially carried significant coercive effect. Hicks would know the sexual assaults occurred and would have substantial reason to fear the reporting of those acts. We do not view such a threat, however, impermissibly coercive in the constitutional sense. That is, we are not particularly troubled by a sexual assault victim threatening to report the sexual assault. This is not a case of a victim attempting to extort money; Eric merely sought and obtained an apology for the alleged assault.

¶21 As noted above, the trial court found Hicks had no particular susceptibility to coercive tactics. It found Hicks was an adult of normal education and intelligence; had no physical, emotional, or substance abuse issues; and had a strong personality. Hicks himself indicated he "really wasn't all that threatened"

by Eric's phone call. Therefore, having considered the totality of the circumstances, we agree with the trial court that Hicks's statements were made voluntarily. That is, we are satisfied that Eric's varied threats did not overcome Hicks's will to resist.

¶22 Hicks next renews his argument that he is entitled to a new trial based on the prosecutor's inappropriate suggestion during closing argument that the jury should convict him in this case because justice was not done in the prior sexual assault case where Hicks pled to lesser charges. Hicks seeks a new trial in the interest of justice. In his initial appeal, Hicks raised this issue under the guise of both ineffective assistance of counsel and interest of justice. We concluded the comments were inappropriate, but determined trial counsel made a reasonable strategic decision not to call the jury's attention to the statement.

¶23 The State argues Hicks cannot raise the issue again because our rejection of it is the law of the case, seizing on our statement that "[w]e reject the closing argument issue." ***Hicks***, No. 2009AP3044-CR, unpublished slip op. ¶1. However, our decision never acknowledged that Hicks made an interest of justice argument.

¶24 We need not resolve whether Hicks is precluded from renewing his argument. We decline to exercise our discretion to reverse in the interest of justice. *See* WIS. STAT. § 752.35.[3] "Our discretionary reversal power is formidable, and should be exercised sparingly and with great caution." ***State v. Williams***, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719. We

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

exercise it "only in exceptional cases." ***State v. Armstrong***, 2005 WI 119, ¶114, 283 Wis. 2d 639, 700 N.W.2d 98.

¶25 As we observed in the first appeal, the impermissible argument consists of three sentences in an eleven-page closing argument. Prior to hearing the comments, the jury had been instructed that closing arguments "are not evidence." More importantly, the jury was already well aware of the facts surrounding the earlier sexual assault charges against Hicks and knew that the case had ended with Hicks pleading guilty to two misdemeanors and being placed on probation. Because the defense delved into the circumstances of the prior sexual assault case in detail, the prosecutor's comments did not tread new ground. Indeed, Hicks had the opportunity to tell the jury why he pled guilty in the earlier case even though he insisted he had not committed the charged crimes. In the end, we are satisfied that the real controversy—assessing the credibility of the accuser and accused—was fully tried in this case.

By the Court.—Judgment affirmed.

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