COURT OF APPEALS
DECISION
DATED AND FILED

August 1, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP377-CR **Cir. Ct. No. 2012CF6122**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KAWANE J. STROYIER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN SIEFERT, Judge. *Affirmed*.

Before Kessler, Brash and Dugan, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Kawane J. Stroyier appeals from a judgment of conviction, entered upon a jury's verdicts, on one count of homicide by negligent

handling of a dangerous weapon and one count of possession of a firearm by a felon. Stroyier contends that the circuit court erred when it refused to suppress statements he made to police after invoking his right to counsel and his right to remain silent. We reject Stroyier's arguments and affirm the judgment.

BACKGROUND

¶2 Stroyier's cousin, Anton Carter, was shot and killed on December 19, 2012. Police had reason to believe Stroyier had been with Carter at the time and sought him out as a witness. On December 20, 2012, Detective Mark Peterson went to Stroyier's home to interview him about the shooting. Stroyier told Peterson the shooting had occurred around North 19th Street and West Atkinson Avenue and agreed to accompany the detective to the location. At the scene, Stroyier described how two individuals emerged from an alley to rob him and Carter as they returned to their vehicle after buying cigarettes in a nearby store. One of the robbers shot Carter as he tried to flee. Stroyier said that two "good Samaritans" helped him get Carter into a car and drove them to the hospital.

¶3 After visiting the scene, Peterson asked Stroyier to come to the police administration building to look through photographs and attempt to identify the robbers and the people who had rendered aid. Stroyier agreed, but was unable to identify anyone from photographs. During the conversation, Stroyier mentioned his concerns about his probation status. Peterson informed Stroyier that he would be contacting Stroyier's probation agent. The agent requested a probation hold, and Stroyier was taken into custody.

¶4 At 3:53 a.m. on December 21, 2012, Stroyier was interviewed by Detective David Chavez and Joseph McLin. Chavez read Stroyier his ***Miranda*** rights. *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966). Chavez asked Stroyier if

he understood the rights. Stroyier answered, "uh-huh," and Chavez responded, "Okay." Stroyier then said, "Since I'm in custody I think -- I think I need a lawyer then."[1] The conversation continued:

> DETECTIVE CHAVEZ: Okay. Well, I mean, if that's what you want. But I'm telling you --
>
> THE DEFENDANT: Telling me what?
>
> DETECTIVE CHAVEZ: If that's what you want. But we're trying to find out what happened to your fuckin' cousin. If this is where we're going to go, you know what I mean?
>
> ….
>
> THE DEFENDANT: I told you all what happened.
>
> DETECTIVE CHAVEZ: Okay. And those are the things we have to have -- talk to you about. But if you want an attorney, we can't talk to you, okay?
>
> THE DEFENDANT: Okay, we can talk about it.

¶5 Later in the day on December 21, 2012, Stroyier's mother called Peterson and asked to speak with her son. Peterson went to the bull pen, where Stroyier was the only person being held, and called Stroyier's mother, putting the call on speakerphone. After this three- to four-minute call, Stroyier agreed to tell police where the shooting had actually occurred.

¶6 Peterson and Detective Dave Dalland took Stroyier out in a squad car. Stroyier directed them to the area of Third Street and Keefe Avenue, then asked them to drive around a bit before identifying a location on North Palmer

[1] This interview was recorded, and both sides prepared a transcript. In the State's transcript, Stroyier supposedly says "Since I'm in custody I think -- I think I need a lawyer to." The last word in the quote is irrelevant, so we do not discuss the discrepancy further.

Street as the actual site of the shooting. The detectives returned Stroyier to the bull pen in the police administration building.

¶7 Peterson was able to obtain a video of the shooting from a nearby store with exterior cameras. This video showed Stroyier and Carter exiting a car, similar to the one that had taken Carter to the hospital, and running toward the intersection of Palmer Street and Keefe Avenue. Stroyier and Carter were the only two people on Palmer Street at the time that Carter was shot; the video shows Stroyier as the shooter.

¶8 Sometime later on December 21, 2012, Peterson and Detective Steven Caballero questioned Stroyier further. Stroyier was read his rights again. Peterson asked him whether he shot Carter "by accident or did you shoot him on purpose?" Stroyier became emotional and eventually answered, "Fucking killed my best friend. … It was -- it was -- it was an accident." During the course of the interview, though, Stroyier asked to be taken to jail multiple times.

¶9 Stroyier was charged with one count of second-degree reckless homicide and one count of possession of a firearm by a felon. Stroyier moved to suppress "all statements … allegedly made by [Stroyier] to law enforcement officers" over the course of what he described as five distinct interrogations. These "interrogations" were: (1) Peterson's interview of Stroyier at his home on December 20, 2012; (2) the early morning interview on December 21, 2012, conducted by Chavez and McLin; (3) the phone call to Stroyier's mother from the bull pen; (4) the ride in the squad car to locate the shooting scene on Palmer Street; and (5) the December 21, 2012 interview by Peterson and Caballero.

¶10 The circuit court ultimately granted the motion in part and denied it in part.[2] The specific findings will be discussed herein, though we note that Stroyier's admission that he killed his "best friend" Carter accidentally was not suppressed.

¶11 The jury convicted Stroyier of the firearm possession and homicide by negligent handling of a dangerous weapon, a lesser-included offense of second-degree reckless homicide. The circuit court imposed consecutive sentences totaling eight years' initial confinement and eight years' extended supervision. Stroyier appeals.

DISCUSSION

¶12 In partially granting the motion to suppress, the circuit court suppressed any of Stroyier's statements that were given in the fifth interview after he stood up and told Peterson, "Just take me to jail."[3] This suppressed some but not all of Stroyier's incriminating statements; his admission that he killed Carter remained admissible. The issue on appeal is whether suppression should start at an earlier point because Stroyier invoked either the right to counsel or his right to terminate questioning and remain silent.

[2] The Honorable Daniel L. Konkol heard the suppression motion and made an oral ruling. The Honorable John Siefert subsequently presided over trial and imposed sentence. Later, the Honorable Frederick C. Rosa entered an order vacating a DNA surcharge, though that order is not before us on appeal.

[3] The circuit court had actually ruled that suppression started after "the point that [Stroyier] said leave me alone, take me jail," but Stroyier never said that exact phrase. He did, however, say, "Just leave me alone and just take me," near the end of the interview as his approximately ninth request to be taken to jail. To avoid confusion over the circuit court's ruling, the parties agreed before trial that suppression should begin from the point when Stroyier "actually makes the pro-active step of standing up" along with his second request to be taken to jail.

A. Standard of Review Generally

¶13 We use a two-step process to review a circuit court's decision on a suppression motion. *See* ***State v. Harris***, 2017 WI 31, ¶9, 374 Wis. 2d 271, 892 N.W.2d 663. We first review the circuit court's factual findings, which we uphold unless clearly erroneous. *See* ***id.*** We then independently apply constitutional principles to the facts. *See* ***id.***

¶14 In ***Miranda***, "the Supreme Court formed a set of procedural guidelines designed to protect a suspect's rights under the Fifth Amendment from the 'inherently compelling pressures' of custodial interrogation."[4] ***State v. Markwardt***, 2007 WI App 242, ¶23, 306 Wis. 2d 420, 742 N.W.2d 546 (citation omitted). These rights include the right to legal counsel and the right to remain silent. *See* ***id.*** The right to remain silent includes the right to terminate questioning after it has begun. *See* ***id.***, ¶24.

¶15 Invocation of either right must be unambiguous and unequivocal. *See* ***State v. Cummings***, 2014 WI 88, ¶¶50-51, 357 Wis. 2d 1, 850 N.W.2d 915. Whether an individual has adequately invoked either right is a question of constitutional fact. ***Id.***, ¶43. Similar to our review of a suppression motion, we uphold the circuit court's findings of historical fact unless clearly erroneous, then independently apply constitutional principles to those facts. *See* ***id.***, ¶¶43-44 (right

[4] Prior to questioning, suspects must be warned that they have the right to remain silent, that anything they say can be used against them in a court of law, that they have a right to an attorney, and that if they cannot afford an attorney one will be provided free of charge. *See* ***State v. Quigley***, 2016 WI App 53, ¶31 n.7, 370 Wis. 2d 702, 883 N.W.2d 139; ***Miranda v. Arizona***, 384 U.S. 436, 479 (1966).

to remain silent); ***State v. Edler***, 2013 WI 73, ¶20, 350 Wis. 2d 1, 833 N.W.2d 564 (right to counsel).

B. The "Interrogations"

¶16 "Generally, a defendant must be subjected to custodial interrogation in order to get the protections of ***Miranda***[.]" ***Edler***, 350 Wis. 2d 1, ¶32 n.11; *see also* ***State v. Lonkoski***, 2013 WI 30, ¶41, 346 Wis. 2d 523, 828 N.W.2d 552. "[P]olice must immediately cease questioning a suspect who clearly invokes the ***Miranda*** right to counsel at any point during custodial interrogation." ***State v. Jennings***, 2002 WI 44, ¶26, 252 Wis. 2d 228, 647 N.W.2d 142; ***Edwards v. Arizona***, 451 U.S. 477, 484-85 (1981). The same is true if the defendant clearly invokes the right to remain silent. *See* ***State v. Ross***, 203 Wis. 2d 66, 74-76, 552 N.W.2d 428 (Ct. App. 1996).

¶17 "A person is in 'custody' if under the totality of the circumstances 'a reasonable person would not feel free to terminate the interview and leave the scene.'" ***Lonkoski***, 346 Wis. 2d 523, ¶6 (citation omitted). We consider all of the circumstances surrounding the interrogation, but the ultimate question is whether there was a formal arrest or restraint of movement of the degree associated with a formal arrest. *See* ***id.***; *see also* ***State v. Quigley***, 2016 WI App 53, ¶32, 370 Wis. 2d 702, 883 N.W.2d 139. Interrogation "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." ***Rhode Island v. Innis***, 446 U.S. 291, 301 (1980) (footnote omitted). Thus, while Stroyier complains about five "interrogations," we must first determine which, if any, were

custodial interrogations for which he was entitled to the protections of ***Miranda***. Ultimately, we conclude only two of the interviews were custodial interrogations.

¶18 Stroyier's first contact with Detective Peterson was non-custodial, and the circuit court found it did not become custodial until the probation agent requested a hold on Stroyier. We agree. Several factors are relevant to the totality-of-the-circumstances assessment, including "'the defendant's freedom to leave; the purpose, place, and length of the interrogation; and the degree of restraint.'" ***Lonkoski***, 346 Wis. 2d 523, ¶6 (citation omitted). The interview began at Stroyier's home, as police originally believed Stroyier to be a witness, not a suspect. He voluntarily accompanied Peterson to the first "scene," riding unrestrained in the front passenger seat of Peterson's car. Stroyier also voluntarily accompanied Peterson to the police administration building. At the point where Peterson had to effectuate the probation hold, he handcuffed Stroyier for the first time and took him to the bull pen, which the circuit court described as "basically a large cell." At that point, however, Peterson had ceased any questioning. On appeal, Stroyier does not contend this was a custodial interrogation.

¶19 Stroyier's second contact with police was the early morning interview with Chavez and McLin. The parties do not dispute that this was a custodial interrogation, or that Chavez appropriately read Stroyier his ***Miranda*** rights prior to the start of questioning. This is the interview in which Stroyier claims he invoked the right to counsel; if so, questioning should have terminated immediately. *See* ***Jennings***, 252 Wis. 2d 228, ¶26. We will return to the question of whether Stroyier invoked the right to counsel below.

¶20 The third "interrogation" occurred when Peterson called Stroyier's mother from the bull pen following her request to speak to her son. While Stroyier

was in custody, he does not argue there was any questioning by police. The circuit court found that Peterson had not told Stroyier's mother what to ask, nor had he participated in the phone call.

¶21 After Stroyier spoke to his mother, he agreed to show police the actual crime scene. While Stroyier characterized the car ride as his fourth interrogation—and it was certainly custodial—he does not contend there was any actual interrogation, as defined by ***Innis***, during this ride.

¶22 The final interrogation occurred after Stroyier was taken back to the police administration building following the trip to the actual crime scene. Again, it is not disputed that this was a custodial interrogation or that ***Miranda*** warnings were properly issued at the outset. Regarding this contact, the issue is at what point did Stroyier invoke the right to terminate questioning and remain silent—before or after admitting he had shot Carter.

C. "Invocation" of the Right to Counsel in the Second Interview

¶23 After Chavez read Stroyier his ***Miranda*** rights at the outset of the second interview, Stroyier said, "Since I'm in custody, I think -- I think I need a lawyer then." Stroyier contends this was a clear and unambiguous invocation of the right to counsel, which should have immediately terminated all police questioning. Instead, Stroyier contends, Chavez improperly continued speaking with him, eventually telling him, "But if you want an attorney, we can't talk to you, okay?" Stroyier then responded, "Okay, we can talk about it." The circuit court concluded that the invocation of the right to counsel here was ambiguous, leaving Chavez free to proceed, and, when Chavez clarified that requesting an attorney would mean police could no longer speak with Stroyier, Stroyier opted to continue speaking rather than request counsel.

¶24 We agree with the circuit court that the invocation in this case was ambiguous. The phrase "I think maybe I need to talk to lawyer" has been deemed equivocal and ambiguous. *See* ***Jennings***, 252 Wis. 2d 228, ¶36; *see also* ***Davis v. United States***, 512 U.S. 452, 459 (1994). Stroyier notes that he did not use the word "maybe," which he asserts changes his statement from equivocal to unequivocal; indeed, the phrase "I think I need an attorney" was previously deemed a sufficient request for counsel. *See* ***Wentela v. State***, 95 Wis. 2d 283, 292, 290 N.W.2d 312 (1980).

¶25 However, our supreme court in ***Jennings*** concluded that

> the former holding of ***Wentela***—that the statement "I think I need an attorney" or "I think I should see an attorney" is sufficient to invoke the right to counsel—has been overruled by the conclusion in ***Davis*** that the nearly identical statement, "Maybe I should talk to a lawyer" is equivocal and therefore insufficient for purposes of the ***Edwards*** rule [requiring cessation of interrogation]. Accordingly, based on ***Edwards*** and ***Davis***, we hereby expressly overrule ***Wentela*** in its entirety.

Jennings, 252 Wis. 2d 228, ¶33. In other words, our supreme court has determined that ***Davis*** makes a statement like Stroyier's insufficient to invoke the right to counsel. We cannot choose to ignore that holding so that we may conclude instead that Stroyier's invocation was clear.[5] *See, e.g.*, ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) (only the supreme court can overrule a previous supreme court case). Accordingly, Stroyier did not

[5] Stroyier asserts that the context of his statement, because it was prefaced with his acknowledgement that he was in custody, makes his invocation clear. *See* ***State v. Edler***, 2013 WI 73, ¶34, 350 Wis. 2d 1, 833 N.W.2d 564 (test for invocation is objective; circumstances of request should be considered). We disagree. At the time, Stroyier's custody was only because of the probation hold, not the shooting—police still considered Stroyier a witness to the shooting.

sufficiently invoke the right to counsel, so police were not required to stop interrogating him or clarify the request.[6] Suppression of Stroyier's statements beginning from the second contact was not warranted.

D. Invocation of the Right to Remain Silent in the Fifth Interview

¶26 By the time of the fifth interview, police had obtained video and knew that Stroyier, not a robber, was the shooter. Peterson and Caballero confronted Stroyier with what they knew from the video, and Stroyier began to get emotional.

> DETECTIVE PETERSON: Describe -- what do they look like? There's nobody on the sidewalk. The only person on the sidewalk running is you; only you. The only person in the street is Anton. So how did Anton get hurt?
>
> THE DEFENDANT: He got shot.
>
> DETECTIVE PETERSON: Was it by accident or was it by purpose? Were you intentionally trying to hurt him? Because you shot him. That's what the video shows. … So did you shoot him by accident or did you shoot him on purpose?
>
> DETECTIVE CABALLERO: Were you just trying to scare him maybe? I mean, you guys are cousins.
>
> THE DEFENDANT: (Inaudible)
>
> DETECTIVE PETERSON: How about telling the truth, okay. Was it by accident or was it on purpose?
>
> THE DEFENDANT: (Inaudible)
>
> DETECTIVE PETERSON: Kawane, look at me.
>
> THE DEFENDANT: I wouldn't shoot Anton.

[6] Stroyier contends that Chavez's response to Stroyier, "If that's what you want," shows Chavez acknowledging an clear invocation of the right. On the contrary, we read Chavez's response as, at best, an invitation for Stroyier to clarify his wishes.

DETECTIVE PETERSON: Look at me. You two are the only one[s] on the video. So did you shoot him by accident?

DETECTIVE CABALLERO: Tell us -- tell us then what -- tell us then what you're seeing, because maybe we can figure this out, okay, because we can tell that it's fucking eating you up inside, is it not? Is it? It's eating you up inside. Kawane, the only way that we can get this is by getting the truth so that we can recreate -- hey, hey --

THE DEFENDANT: (Inaudible)

DETECTIVE CABALLERO: Come on.

DETECTIVE PETERSON: Was it by accident? Because you shot him. The video shows you shooting him. So what happened?

….

THE DEFENDANT: It doesn't matter.

DETECTIVE CABALLERO: It does matter.

THE DEFENDANT: Because I'm going to jail forever.

DETECTIVE CABALLERO: No. No. (Multiple speakers)

THE DEFENDANT: (Inaudible) what am I going to tell my mom?

DETECTIVE PETERSON: How about starting with the truth.

THE DEFENDANT: (Inaudible)

DETECTIVE PETERSON: What happened?

DETECTIVE CABALLERO: Kawane, you got to tell us what happened.

THE DEFENDANT: Just take me to jail.

DETECTIVE CABALLERO: No. No. That's not what you're here -- Kawane, we're not here to --

THE DEFENDANT: But I'm going -- (Inaudible).

> DETECTIVE CABALLERO: Listen --
>
> THE DEFENDANT: My God.
>
> DETECTIVE CABALLERO: Listen to me. Kawane, listen - - hey, look at me.
>
> THE DEFENDANT: Fucking killed my best friend.
>
> DETECTIVE CABALLERO: Look at me.
>
> DETECTIVE PETERSON: Why? Why did you shoot?
>
> THE DEFENDANT: It was -- it was -- it was an accident.
>
> (Multiple speakers.)
>
> DETECTIVE CABALLERO: You've got to explain that to us.
>
> THE DEFENDANT: It doesn't matter.
>
> ….
>
> DETECTIVE CABALLERO: It does matter because, you know what, people make mistakes. …
>
> THE DEFENDANT: Just take me to jail.
>
> DETECTIVE CABALLERO: No, that's not what we're here for.
>
> DETECTIVE PETERSON: Have a seat.

The circuit court determined Stroyier "was making statements up to the point that he said leave me alone, take me to jail. … [T]hat to me seems pretty unambiguous. Leave me alone. Stop talking to me. … So from that point on, any statements would be suppressed in terms of the violation of the ***Miranda*** warnings."

¶27 The problem with this finding is that Stroyier never said the exact phrase "leave me alone, take me to jail." He did say "just leave me alone and just

take me," although this occurred later in the interview, well after the section quoted above. At trial, Stroyier and the State agreed that suppression should at least start with all of Stroyier's statements following the second time he said, "Just take me to jail," after Detective Caballero told him that people make mistakes. On appeal, Stroyier contends that the first time he said, "Just take me to jail," after Caballero implored him to tell the detectives what happened, was a sufficient indication of his desire to terminate the interview.

¶28 As noted, invocation of the right to remain silent must be unequivocal. ***Markwardt***, 306 Wis. 2d 420, ¶36. "[T]here is no invocation of the right to remain silent if *any* reasonable competing inference can be drawn." ***Id.*** Here, Stroyier's first request to be taken to jail might have been a request to terminate the interview, but it also might have been part of a more general lament, given his apparent angst and certainty that he was going to jail "forever." The intent of his second request is clear, though, because not only did he ask to be taken to jail, but he stood up as if to remove himself from the discussion. This occurred after Stroyier admitted shooting and killing Carter.[7] Consequently, the circuit court properly denied the motion to suppress Stroyier's admission.

E. Conclusion

¶29 An invocation of one's Fifth Amendment rights must be clear and unequivocal. If the invocations are clear, custodial interrogation must cease immediately. Here, the invocations of the right to counsel and the right to remain

[7] Because we conclude suppression was not warranted, we do not reach the issue of harmless error. *See* ***Maryland Arms Ltd. P'ship v. Connell***, 2010 WI 64, ¶48, 326 Wis. 2d 300, 786 N.W.2d 15 (only dispositive issues need be addressed).

silent, which Stroyier claims were unequivocal, were not. Accordingly, we affirm the circuit court's decision denying Stroyier's motion to suppress.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).