COURT OF APPEALS
DECISION
DATED AND FILED

May 2, 2019

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2018AP319-CR **Cir. Ct. No. 2015CF1938**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY E. DOBBS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: CLAYTON PATRICK KAWSKI, Judge. *Affirmed*.

Before Sherman, Blanchard and Fitzpatrick, 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. Timothy Dobbs appeals a judgment of conviction. The issues relate to exclusion of expert testimony on false confessions and whether statements by Dobbs should have been suppressed. We affirm.

¶2 A jury found Dobbs guilty of homicide by intoxicated use of a vehicle. Dobbs admitted to police that he huffed from a canister of air duster while driving, and then passed out.

¶3 The first issue is whether the circuit court erred by granting the State's motion to exclude proposed testimony by Dobbs's expert on the subject of false confessions. The court heard pre-trial testimony by the expert, and then ruled that the testimony did not satisfy the requirements of one of the rules on expert testimony, WIS. STAT. § 907.02(1) (2017-18).[1] More specifically, the court concluded that the expert's testimony would not assist the trier of fact to determine a fact at issue because the expert had not applied the principles and methods to the facts of the case. We review the decision on admission of expert testimony for erroneous exercise of discretion. ***State v. Smith***, 2016 WI App 8, ¶4, 366 Wis. 2d 613, 874 N.W.2d 610 (2015).

¶4 On appeal, Dobbs acknowledges that the expert was not going to apply his expertise on false confessions to the specific facts of Dobbs's case. Dobbs argues instead that it is not necessary for the expert to do that for the testimony to assist the jury, and thus be admissible.

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

¶5 Dobbs relies on ***Smith***, in which we held that the State's expert testimony on reactive behaviors common among child abuse victims was properly admitted even though the expert was not going to "testify about specifics involving this case." ***Id.***, ¶6. Dobbs asserts that his own case presents "exactly the same situation" as ***Smith***. He asserts that "[u]nder the State's argument in this case, the State's expert should not have been able to testify in ***Smith***."

¶6 We conclude that Dobbs's argument fails because he does not recognize the role that discretion plays. ***Smith*** demonstrates that the circuit court has discretion to decide whether all of the factors set out in the statute must be met for the evidence to be admissible, and has discretion to admit evidence even though the expert is not going to apply his or her knowledge to the facts of the case before the court. However, the existence of that discretion does not mean that the court is *required* to admit evidence when that factor is not satisfied.

¶7 Here, the court reasonably concluded that the expert would not assist the trier of fact unless the expert also applied his knowledge about false confessions to the specific circumstances in Dobbs's case. The court might also have reasonably admitted the testimony, as Dobbs argues, but that is not a basis for reversal under the applicable standard of review.

¶8 Dobbs next argues that the circuit court erred by denying his motion to suppress statements that he made to police. He relies on two legal theories.

¶9 The first theory is that police interrogated Dobbs before giving him a ***Miranda***[2] warning. Dobbs argues that we should conclude that he was in custody,

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

and thus a ***Miranda*** warning was required, immediately upon being removed from his own vehicle and placed in the back seat of a squad car while handcuffed.

¶10 Whether the facts show that Dobbs was in custody is a question of law we review independently. ***State v. Bartelt***, 2018 WI 16, ¶25, 379 Wis. 2d 588, 906 N.W.2d 684. The test is whether there was a formal arrest or a restraint on freedom of movement to a degree associated with formal arrest. ***Id.***, ¶31. We look at the totality of the circumstances to determine whether a reasonable person would not have felt free to terminate the interview and leave the scene. ***Id.***

¶11 The facts that Dobbs relies on to establish custody upon his being placed in the squad car are that he was handcuffed, placed in the locked back seat of a squad car, and told by the officer that he was being "detained." We conclude that these facts are not sufficient to lead a reasonable person to believe they had been arrested.

¶12 Our conclusion is based on ***State v. Blatterman***, 2015 WI 46, ¶30, 362 Wis. 2d 138, 864 N.W.2d 26. In that case, our supreme court held that the defendant was only temporarily detained, and not arrested, when being held handcuffed in the rear of a squad car while an investigation proceeded. ***Id.***, ¶¶7-8, 18-23. The court held that the defendant was not arrested until he was involuntarily transported to a hospital. ***Id.***, ¶¶24-28.

¶13 The facts in ***Blatterman*** are similar to the situation that Dobbs was in when he was first placed in the squad car. Accordingly, because Blatterman was held not to have been arrested, we conclude that Dobbs was not in custody for ***Miranda*** purposes when he was first placed in the squad car.

¶14 Dobbs's custody argument also includes references to other facts that occurred later, such as field sobriety tests, consensual transport to the hospital for a blood draw, and the length of his time with police before he was given a ***Miranda*** warning. However, Dobbs does not explain how those facts are relevant to determining whether he was in custody *upon being placed in the squad car*, which is the conclusion he asks us to reach. Accordingly, we do not further discuss those other facts.

¶15 Dobbs's second legal theory for suppression is that his statements were involuntary. Statements are involuntary if they were coerced or the product of improper pressures; coercive or improper police conduct is a necessary prerequisite for a finding of involuntariness. ***State v. Hoppe***, 2003 WI 43, ¶37, 261 Wis. 2d 294, 661 N.W.2d 407. We look at the totality of the circumstances, and balance the personal characteristics of the defendant against the police pressure. ***Id.***, ¶38. We independently review the application of these constitutional principles to the historical facts found by the circuit court. ***Id.***, ¶34.

¶16 Dobbs appears to argue that his statements before being given a ***Miranda*** warning were involuntary because he was not given that warning. While the giving of that warning is a factor to consider in deciding voluntariness, we have already concluded that Dobbs has not established that the warning was required to be given when he was first detained. Accordingly, the absence of the warning is not a basis to conclude that the pre-warning statements were involuntary.

¶17 Beyond that, Dobbs argues that the post-***Miranda*** warning statements he made after being informed of the death of the pedestrian were involuntary. He argues that they were involuntary due to his highly emotional

state, pain from his hand, and several other factors. However, Dobbs does not clearly identify any specific police conduct that he wants us to conclude was improper or coercive. While it may be true that Dobbs was in an emotionally and physically uncomfortable state, from the perspective of police conduct this appears to have been an ordinary interrogation. We are unable to conclude that Dobbs was in such a severe state that even an ordinary interrogation exceeded his ability to resist.

By the Court.—Judgment affirmed.

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