COURT OF APPEALS
DECISION
DATED AND RELEASED

July 22, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1734-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LLOYD EDWIN SELLERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Lloyd Edwin Sellers appeals from a judgment of conviction after a jury found him guilty of first-degree intentional homicide while armed. He raises three issues for review: (1) whether the trial court properly determined that his statements to police were made voluntarily and in accordance with his right to counsel; (2) whether the trial court erroneously exercised its

discretion when it did not hold a pretrial evidentiary hearing on the admissibility of DNA evidence derived by polymerase chain reaction (PCR) analysis; and (3) whether the trial court erroneously exercised its discretion in admitting testimony on a bus transfer pass that he argues should have been excluded for lack of foundation.

We conclude that the trial court properly determined that Sellers's statements to police were made voluntarily and were not procured in violation of his constitutional rights, that Sellers waived any objection to the lack of a pretrial evidentiary hearing on the DNA evidence, and that Sellers has not demonstrated how receipt of testimony on the bus transfer pass was erroneous because the pass is not part of the appellate record. Accordingly, we affirm.

I.

Sometime after 10:00 p.m. on October 28, 1994, or during the early morning hours of October 29, 1994, Debra Syvock, Sellers's uncle's girlfriend, was stabbed to death in her Milwaukee apartment. Her body was discovered later that day. Police found blood throughout the apartment—on the walls, the ceiling, the hallway floor, and the bathroom sink. They also found a bloody washcloth in the bathroom and bloody oven mitts in the outside garbage. The medical examiner concluded that Syvock had died of a loss of blood from eighteen knife wounds to her body. There were no eyewitnesses to the homicide.

Sellers and his uncle, Sidney Sellers, had been arrested a few days earlier on drug-related charges. While Sellers's uncle remained in jail, Sellers had been released from police custody at approximately 5:00 p.m. on the night of the homicide. Sidney later testified that he and Sellers had sold drugs from Syvock's apartment and that Sellers's knew that "large amounts" of currency were kept at

the apartment, and that a shoebox in Syvock's bedroom, which police had recovered overturned by Syvock's body, was one of the locations in which the currency was stashed.

One witness testified that she spoke to Syvock on the phone between 9:00 and 9:30 p.m. on October 28, 1994, and that she could hear Sellers's voice in the background. Another witness, Tracie Davis, testified that she received a phone call around 10:00 p.m., but that she did not answer the phone. Instead, she used a "call return" feature on her phone to dial the phone number that had just called her. Sellers answered the phone and asked if his brother, Davis's fiancé, could give him a ride. The police found a caller identification device at Syvock's apartment that showed that a call came in at 10:21 p.m. on October 28, 1994—the caller's phone number matched that of Davis's residence.

Leslie Richardson testified that Sellers had been at her apartment in the late afternoon of October 28 and that he had left her apartment wearing a black coat. Sellers returned to her apartment after midnight. He was agitated and was still wearing the black coat. Sellers slept at her apartment overnight. Richardson testified that she kept the black coat as a payment for a debt that Sellers owed her and because she believed he was responsible for the earlier drug-related arrests. She said that she first told police and Sellers that the coat had been stolen, but later turned it over to the police when she discovered "stains" on the coat. Police recovered a bus transfer pass, dated the night of Syvock's homicide, in the pocket of the coat.

According to an analyst with the State Crime Lab, the "stains" on the coat were blood, and samples were sent to a laboratory for DNA analysis. The

laboratory's testing of the blood samples using PCR analysis showed that they matched Syvock's blood.

Police arrested Sellers at 2:55 a.m. on October 31, 1994, after he called police and turned himself in. After many hours of questioning by the police, Sellers admitted killing Syvock. At the suppression hearing, the trial court made the following findings of fact concerning Sellers's questioning by police.

Sellers was interviewed three times over a twelve-hour period. First at around 3:30 a.m., then at 10:30 a.m., and finally at 1:45 p.m. Each interview was conducted by a different detective and each was held in the same interview room at the police station. The trial court found that each detective, before commencing the interview, read Sellers his ***Miranda*** warnings from a standard card delineating those rights and that Sellers waived his rights. Further, the trial court found that the officers offered Sellers food, drink, and bathroom and phone breaks; that the officers did not display their weapons; and that while he was initially handcuffed, the cuffs were removed during the interviews.

The trial court rejected Sellers's version of the interviews with police, finding it "incredible." Sellers had testified that, among other things, the police never read him his rights, that he was handcuffed to a wall at all times, that he was left in wet clothing during the interviews, and that the detectives threatened him unless he confessed. In sum, the trial court found the officers' versions of the interviews more credible. After making these findings, the trial court concluded that, under the totality of the circumstances, the police complied with requirements under the Constitution—that is, that the police gave Sellers the ***Miranda*** warnings, and that Sellers voluntarily waived those rights and gave inculpatory statements to the police.

At trial, Sellers's defense, as presented by his counsel during the opening and closing statements, was that he did not kill Syvock, that his confession was coerced, and that the DNA evidence was unreliable. The only trial testimony that is contested on appeal concerns the specifics of the bus transfer pass found in the coat pocket. One detective testified that he found the transfer pass in Sellers's coat. Another detective testified that, when he initially interviewed Sellers, Sellers told him that he had left Syvock's apartment at 9:00 p.m., that he rode an eastbound bus on Villard Avenue to Sherman Boulevard and then transferred to a southbound Sherman Boulevard bus.

When the detective was later asked on direct examination by the State whether the bus transfer pass showed that it could not have been given on an eastbound Villard Avenue bus, the defense objected, arguing that the detective lacked the foundation to answer the question. The trial court overruled the objection, stating: "I overruled the objection and allowed the examination to continue because the transfer was testified to in terms of its recovery and the facial information, as well as marking of it, was already in the record."

II.

A.

Sellers first argues that the trial court improperly determined that his statements to police were made voluntarily and in accordance with his

constitutional rights.[1] We disagree.

Because they are issues of constitutional fact, we review the sufficiency of ***Miranda*** warnings and whether they were voluntarily waived *de novo*. ***State v. Santiago,*** 206 Wis.2d 3, 18, 556 N.W.2d 687, 692 (1996). "Findings of historical fact underlying the ultimate finding of constitutional fact are reviewable under the clearly erroneous standard." ***Id.*** at 17 n.10, 556 N.W.2d at 692 n.10.

> When the State seeks to admit into evidence an accused's custodial statement, both the United States and Wisconsin constitutional protections against compelled self-incrimination require that it make two showings. First, the State must prove that the accused was adequately informed of the ***Miranda*** rights, understood them, and knowingly and intelligently waived them. "[T]he waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Second, the State must prove that the accused's statement was given voluntarily.

Id. at 18-19, 556 N.W.2d at 692-93 (citations omitted). The State's burden on these issues is by the preponderance of the evidence. ***Id.*** at 29, 556 N.W.2d at 697.

The bulk of Sellers's argument on this issue depends on a conclusion that the trial court's findings of fact were clearly erroneous. The record does not support Sellers's contention. Sellers contends that his confession was coerced; however, the trial court rejected Sellers's version of his questioning by police.

[1] Although in his briefs Sellers mentions that both his Fifth and Sixth Amendment rights to counsel were violated, his argument is really premised only on the Fifth Amendment. Accordingly, we need only address whether his Fifth Amendment rights were violated. *See* ***Dumas v. State***, 90 Wis.2d 518, 523, 280 N.W.2d 310, 313 (Ct. App. 1979) (constitutional arguments raised but not argued need not be addressed).

The trial court found Sellers's version "incredible," and further found that the officers' testimonies were more credible. The trial court is the sole judge of the credibility of witnesses. *See* ***State v. Owens,*** 148 Wis.2d 922, 929-30, 436 N.W.2d 869, 872-73 (1989).

Based on the trial court's findings of fact which are not clearly erroneous, we conclude that the State has met its burden in showing that the police read Sellers his ***Miranda*** rights, and that he voluntarily waived those rights. Sellers has presented nothing in his appeal that undermines the trial court's findings and conclusions concerning his questioning by police. Accordingly, we conclude that the trial court properly rejected Sellers's motion to suppress his statements to police.

B.

Sellers next argues that the trial court erroneously exercised its discretion when it did not hold a pretrial evidentiary hearing "on the admissibility of the PCR method of DNA analysis." We do not address the merits of his arguments because we conclude that he waived any argument on this issue when he agreed, through his defense counsel, to have the trial court determine the admissibility of the evidence based on the record of a prior Milwaukee County Circuit Court case involving the same issue.

The State submitted the blood sample recovered from the coat to a laboratory for DNA analysis using the PCR method. After the results were received from the lab, the State forwarded them to Sellers's defense counsel. Counsel later informed the trial court that, after reviewing the evidence, counsel did not believe it was necessary to hold an evidentiary hearing on its admissibility. Counsel informed the court that she had not discussed her opinion with Sellers.

The prosecutor noted that the same PCR protocol, by the same lab, had been at issue in another case involving the trial court, and the trial court found the evidence admissible. The trial court later offered defense counsel the opportunity to question the State's DNA expert before or at trial, which defense counsel accepted. Sellers was not present during this exchange; however, the trial court stated that the issue would be revisited in Sellers's presence.

Prior to jury selection, the trial court reviewed the State's proffered DNA issue in Sellers's presence. Sellers's counsel indicated that, with the aid of a DNA expert, she had reviewed the record in the previous case in which the PCR method of DNA analysis was found admissible. Counsel agreed to allow the trial court to use the record from the earlier case to decide the admissibility of the DNA evidence in Sellers's case. Sellers's was present, but never objected to his counsel's actions. The trial court found the DNA evidence admissible.

Based on the above record, we conclude that Sellers waived any objection to a lack of an evidentiary hearing on the admissibility of the DNA evidence when his counsel agreed to allow the trial court to determine the admissibility of the evidence using the record from a prior case that addressed the same issue concerning the same PCR method and same laboratory. *See* ***State v. Rivest,*** 106 Wis.2d 406, 412 n.1, 316 N.W.2d 395, 398 n.1 (1982) (concluding that where defendants stipulate to use of a transcript of prior hearing, they cannot later contend that they were deprived of an evidentiary hearing). Further, although Sellers seemingly argues otherwise, the trial court did not have to address him personally on this matter—the trial court could rightfully conclude that Sellers's counsel could make the decision within her overall trial strategy. *See* ***Taylor v. Illinois***, 484 U.S. 400, 417-18, (1988) (defense counsel "has—and must have—full authority to manage the conduct of the trial").

C.

Finally, Sellers argues that the trial court erroneously exercised its discretion when it permitted a police officer to testify that, based on the bus transfer pass found in the coat pocket, Sellers had taken a bus from Syvock's residence long after he stated that he did. Sellers contends that there was an insufficient foundation to admit the officer's testimony on this issue. The bus transfer pass, however, is not part of the appellate record. Accordingly, we cannot conclusively judge whether it was error to admit the officer's testimony on the bus pass; the record before us supports the trial court's decision. Because it was Sellers's burden to ensure that the appellate record was sufficient for us to address the issue he raised, we affirm. *See* ***State v. Smith***, 55 Wis.2d 451, 459, 198 N.W.2d 588, 593 (1972).

In sum, we conclude that none of the issues raised in Sellers's brief require a reversal. Accordingly, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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