COURT OF APPEALS
DECISION
DATED AND FILED

January 17, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0910

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

IN THE INTEREST OF EDUARDO R.,
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

EDUARDO R.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: THOMAS R. COOPER, Judge. *Affirmed.*

¶1 CURLEY, J.[1] Eduardo R. (E.R.) appeals from the dispositional order adjudging him delinquent after he was convicted of one count of second-

[1] This appeal is decided by one judge, pursuant to WIS. STAT. § 752.31(2).

degree reckless homicide, contrary to WIS. STAT. § 940.06,[2] and one count of felon in possession of a firearm, contrary to WIS. STAT. § 941.29 (2).[3] On appeal, E.R. argues that the trial court erred when it denied his motion to suppress three statements he made to the police. E.R. also challenges the trial court's finding of guilt because, he claims: (1) the evidence was insufficient to convict him of second-degree reckless homicide; (2) the trial court relieved the State of its burden of proof as to the elements of criminal recklessness; and (3) the trial court failed to apply the proper standard of proof. This court rejects all of E.R.'s arguments.

I. BACKGROUND.

¶2 On January 6, 1999, Efrain C. returned to his residence around 2:00 a.m. and found that his son, E.C., and his son's friend, E.R., had been shot. At the time, Efrain C. owned two guns, a silver .22-caliber handgun, and a black .22-caliber handgun, which he kept unloaded in a case under his bed. When Efrain C. discovered the boys, E.C. was unconscious. He never regained consciousness. E.R., however, was still conscious. Efrain C. asked E.R. what happened, and E.R. replied that he and E.C. "were trying to see who could draw the fastest," and that the guns accidentally discharged. Efrain C. found his guns on the bed near the boys. Efrain C. called 911 and then picked up the two guns and moved them to a table next to the bed before the police arrived.

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise indicated.

[3] Although the notice of appeal indicates that E.R. is appealing from the trial court's adjudication on both counts, he limits his arguments to this court to challenging the guilty verdict for second-degree reckless homicide and, therefore, we address only this charge.

¶3 Milwaukee Police Officers Reilly and Randow were the first police officers to arrive at the scene. Officer Reilly observed that E.C. had suffered a bullet wound to the head, and that E.R. had sustained a bullet wound to his neck. Shortly thereafter, the paramedics arrived. The paramedics worked on E.R. for approximately twenty minutes before he was placed in an ambulance and taken to the hospital.

¶4 Officer Reilly rode in the ambulance with E.R. On the way to the hospital, Officer Reilly asked E.R. what had happened to him. E.R. told Officer Reilly that he and E.C. had been playing with Efrain C.'s guns, and were having a contest to see who could draw the fastest when the guns discharged. E.R. further indicated that both boys knew that the guns were loaded. After E.R. arrived at the hospital, he was taken to the intensive care unit, where Milwaukee Police Detective Lange spoke with him. At that time, E.R. was not under arrest, nor did Detective Lange place him under arrest prior to taking his statement. Detective Lange asked E.R. how the shooting occurred. E.R. related the same story to Detective Lange that he had given to Officer Reilly. After Detective Lange took E.R.'s statement, he placed E.R. under arrest by arranging to have a hold placed on him at the hospital.

¶5 Four days later, Detective Wesolowski went to the hospital to interview E.R. When Detective Wesolowski arrived at E.R.'s hospital room, E.R.'s father and physical therapist were in the room with E.R. Detective Wesolowski identified himself and explained to E.R.'s father that he wished to take a statement from E.R. regarding the shooting. E.R.'s father consented, but insisted that he and E.R.'s therapist be allowed to remain in the room during the interview. Detective Wesolowski agreed.

¶6 Detective Wesolowski then identified himself to E.R. and advised E.R. of his ***Miranda*** rights, which E.R. waived. During the interview, E.R. related how the boys were alone in E.C.'s house at the time of the shooting. He stated that E.C. retrieved two handguns from his father's bedroom and the boys decided to have a contest to determine who could draw the fastest. However, E.R. now claimed he did not know the guns were loaded. He further maintained that he and E.C. had checked the guns to make sure they were not loaded. The interview ended after approximately fifteen minutes, when E.R. stated that he was tired and did not wish to answer any further questions.

¶7 A delinquency petition was filed based upon the charge of second-degree reckless homicide and felon in possession of a firearm. Prior to trial, E.R. filed a motion to suppress the three statements he made to the police. The trial court denied his suppression motion and the case proceeded to trial before the court. At the close of trial, E.R. filed a motion for a directed verdict, which the trial court denied. The court found E.R. guilty of second-degree reckless homicide and felon in possession of a firearm and adjudged him delinquent.

II. ANALYSIS.

¶8 On appeal, E.R. first argues that the trial court erred when it denied his motion to suppress the three statements he made to the police. This court disagrees.

¶9 E.R. argues that "the trial court erred when it denied [his] motion to suppress [his] un-mirandized and coerced statements." Specifically, he alleges that he was "in custody" when he gave the first statement to Officer Reilly in the ambulance on the way to the hospital, as well as the second statement to Detective Lange after arriving at the hospital, and, therefore, the officers were required to

advise him of his ***Miranda*** rights before taking the statements. He also contends that the third statement, taken in the hospital four days after the shooting, should be suppressed as "fruit of the poisonous tree." Finally, he argues that the statements were involuntary.

¶10 Whether E.R. was "in custody," requiring the officers to administer the ***Miranda*** warning before taking his statement, is a question of law which this court reviews *de novo*. ***State v. Buck***, 210 Wis. 2d 115, 124, 565 N.W.2d 168 (Ct. App. 1997); ***State v. Clappes***, 136 Wis. 2d 222, 235, 401 N.W.2d 759 (1987) ("[Q]uestions of fact involving the application of federal constitutional principles to the facts as found must be independently reviewed by the appellate court.").

¶11 The police are required to administer ***Miranda*** warnings prior to conducting a "custodial interrogation" of an individual. ***Miranda v. Arizona***, 384 U.S. 436, 478 (1966). To determine whether an individual is "in custody" and therefore entitled to the ***Miranda*** warnings, this court must consider whether, under the totality of the circumstances, "a reasonable person viewing the situation objectively would conclude that he was not free to leave but was in custody." ***State v. Koput***, 142 Wis. 2d 370, 380, 418 N.W.2d 804 (1988). Stated differently, "The test is 'whether a reasonable person in the suspect's position would have considered himself ... to be in custody, given the degree of restraint under the circumstances.'" ***State v. Gruen***, 218 Wis. 2d 581, 593, 582 N.W.2d 728 (Ct. App. 1998) (citation omitted). This court is satisfied that E.R. was not "in custody" when he gave either his first or his second statement.

¶12 E.R. was not "in custody" in the ambulance during the ride to the hospital. Officer Reilly did not place E.R. under arrest before getting into the ambulance to ride to the hospital with him, and he estimated that he spoke with

E.R. for approximately half of the ten-minute ride to the hospital. Although Officer Reilly spoke to Efrain C. when he arrived at the scene, Efrain C. simply stated that his son had been shot. He did not tell Officer Reilly about E.R.'s statement regarding the "fast draw" contest. Officer Reilly further testified that, when he got into the ambulance with E.R., he did not know what had happened in the apartment that led to the shooting. Specifically, he did not know whether E.R. was the perpetrator or the victim. Officer Reilly testified that once he got into the ambulance, he asked E.R. his name and what had happened to him. At no time did Officer Reilly handcuff E.R., exercise any other form of physical control over him, or indicate to E.R. that he was in custody. Consequently, there is simply no evidence that E.R. was "in custody" in the ambulance when he gave his statement to Officer Reilly.

¶13 Similarly, there is no evidence that E.R. was "in custody" when he was questioned by Detective Lange at the hospital. Once he arrived at the hospital, E.R. was taken to the intensive care unit, where he spoke with Detective Lange. E.R. was not under arrest, nor did Detective Lange place E.R. under arrest prior to taking E.R.'s statement. Detective Lange stated that E.R. answered his questions for approximately ten minutes. Detective Lange further testified that he did not handcuff E.R. or exercise any other form of physical control over him. Detective Lange did place E.R. under arrest after he took E.R.'s statement. However, there is simply no evidence that E.R. was "in custody" at the time he gave the statement. *See* ***State v. Clappes***, 117 Wis. 2d 277, 286, 344 N.W.2d 141 (1984) (recognizing "the majority view that questioning in hospitals is not custodial when the suspect is not under formal arrest.").

¶14 Nevertheless, E.R. claims that he was "in custody" because he was not able to leave due to his medical condition. While it is true that E.R. was

immobilized by his injury both in the ambulance and at the hospital, in ***Clappes***, our supreme court clarified that a custodial interrogation or the type of deprivation of freedom requiring ***Miranda*** warnings must be "caused or created by the authorities." ***Id.*** at 285. Here, E.R.'s confinement was created by his medical condition, and not by the authorities. Therefore, because a reasonable person in E.R.'s position would not have considered himself to be in police custody, this court is satisfied that the police were not required to administer the ***Miranda*** warning before taking E.R.'s first two statements.[4]

¶15 E.R. also argues that, even if this court determines that he was not in custody, all three statements still should have been suppressed because, he contends, they were coerced and involuntary. For this court to determine that E.R.'s statements were involuntary, he must demonstrate that his statements were "procured via coercive means" or that they were "the product of improper pressures exercised by the police." ***State v. Clappes***, 136 Wis. 2d 222, 235-36, 401 N.W.2d 759 (1987). He has not done so.

¶16 This court is satisfied that the record clearly demonstrates that E.R. made the statements freely and voluntarily. Specifically, both Officer Reilly and Detective Lange testified that E.R. remained conscious and alert during the interviews; that E.R. was coherent and rational; and that his answers to their questions were responsive and informative. Medical personnel were present during both the first and second interview, and at no time did any of them indicate

[4] As noted, E.R. also argues that his third statement, given after he was placed under arrest and issued the ***Miranda*** warning, should nevertheless be suppressed as "fruit of the poisonous tree." ***Wong Sun v. United States***, 371 U.S. 471 (1963); ***State v. Harris***, 199 Wis. 2d 227, 544 N.W.2d 545 (1996). Because this court has already determined that the trial court properly denied E.R.'s motion to suppress his first two statements, his argument regarding the third statement necessarily fails.

that E.R. could not or should not answer questions. At no time during either the first or second interview did E.R. indicate that he did not understand the questions or that he did not want to speak with the police. Prior to the third interview, the officer sought and received permission to conduct the interview with E.R. while his father remained in the room during the interview. When, during the third interview, E.R. did indicate that he was tired and did not wish to answer any more questions, the interview ended immediately. Moreover, E.R. never complained or testified that his statements were coerced or involuntary. There is simply no evidence to support his argument that his statements were coerced or involuntary.

¶17 For all of the above stated reasons, this court is satisfied that the trial court properly denied E.R.'s motion to suppress his statements to police.

¶18 Next, E.R. challenges the trial court's guilty verdict by raising three arguments. First, E.R. argues that there was insufficient evidence to convict him of second-degree reckless homicide. E.R. contends that at trial he presented evidence that the act of pulling the trigger was involuntary. He asserts that this evidence was not rebutted by the State, but rather, "the state argued that the act of pointing a loaded weapon at another person is by itself reckless behavior." E.R. concludes that "[t]he fact that the state did not rebut the involuntary act testimony presented by the defense shows that they did not meet their burden of proving beyond a reasonable doubt that this was a reckless homicide instead of an accident."

¶19 Second, in a related argument, E.R. contends that the trial court's ruling "relieved the State of its burden of proof as to the elements of recklessness and causation in violation of his constitutional rights." Citing WIS JI—CRIMINAL 1060, E.R. asserts that the State was required to establish that he was "aware" that

his "conduct created an unreasonable and substantial risk of death or great bodily harm."[5] E.R. maintains that "[t]he trial court, sitting as trier of fact, inferred that by pointing a weapon at another person, that [he] was aware that his conduct created such a risk of death." He concludes that, in light of the State's failure to rebut the involuntary act evidence, the trial court's inference erroneously created an irrebuttable presumption.

¶20 Finally, E.R. argues that because "the state was unable to disprove or rebut the involuntary act evidence presented by the defense," the trial court could not find him guilty of second-degree reckless homicide beyond a reasonable doubt

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[5] WISCONSIN JI—CRIMINAL 1060 provides:

> Second degree reckless homicide, as defined in § 940.06 of the Criminal Code of Wisconsin, is committed by one who recklessly causes the death of another human being.
>
> Before the defendant may be found guilty of second degree reckless homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements of this offense were present.
>
> First, that the defendant caused the death of (name of victim).
>
> Second, that the defendant caused the death by criminally reckless conduct.
>
> The first element requires that the relation of cause and effect exists between the death of (name of victim) and the conduct of the defendant. Before the relation of cause and effect can be found to exist, it must appear that the defendant's conduct was a substantial factor in producing the death.
>
> The second element requires that the defendant caused the death by criminally reckless conduct. This requires that the defendant's conduct created an unreasonable and substantial risk of death or great bodily harm to another person and that the defendant was aware that his conduct created such a risk.[fn4]
>
> If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) by criminally reckless conduct, you should find the defendant guilty of second degree reckless homicide.
>
> If you are not so satisfied, you must find the defendant not guilty.

(Footnotes omitted.)

and, therefore, the court must have erroneously "applied a lower standard of proof when deciding his guilt." This court rejects all three of E.R.'s arguments.

¶21 WISCONSIN STAT. § 940.06 (1) provides: "Whoever recklessly causes the death of another human being is guilty of a Class C felony." *See also* WIS JI—CRIMINAL 1060. "'Criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk…." WIS. STAT. § 939.24 (1). As the State correctly notes, "intent to kill is not an element of Second-Degree Reckless Homicide" and, therefore, it is irrelevant that the State failed to rebut the "involuntary act" testimony presented by the defense. This court agrees with the State that "[I]f [E.R.] was charged with intentional homicide, and the trier of fact were to find that he did indeed pull the trigger of his gun by accident or through an involuntary reaction to being shot in the neck himself, then that would provide a defense on the element of specific intent to kill." However, this court is satisfied that the evidence that was presented by the State was sufficient to convict E.R. of the crime charged — second-degree reckless homicide.

¶22 Specifically, E.R. asserted in his statements to the police that he and E.C. agreed to have a contest to see who could draw and cock their gun the fastest. E.R.'s statements were admitted at trial. These statements recited how E.R. and E.C. then loaded the guns before staging this contest. E.R. stated that after loading the guns, the boys drew and cocked the guns, and then both guns fired. This court cannot conclude that this evidence, "viewed most favorably to the State and the conviction is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451

N.W.2d 752 (1990). E.R.'s version of the events provides the basis for the trial court's decision.

¶23 This court agrees with the trial court's decision that loading and aiming a loaded gun at another person, within the confines of a room, in order to have a fast draw contest, fulfills the definition of recklessness. As the trial court stated:

> The fact that they both handled the guns, they both knew the guns were loaded, or loaded the guns themselves, they agreed to take part in a contest.... I think all of that cumulatively is enough to establish criminal recklessness, and the conduct of the defendant by involving himself in that contest created an unreasonable and substantial risk of death and great bodily harm to another person.

Further, in finding that E.R. was aware that his conduct created an unreasonable and substantial risk of death or great bodily harm, the trial court considered E.R.'s age and experience and concluded that with the information regarding guns generally available to the public, a sixteen-year-old boy would be well aware of the dangers presented by guns. The trial court also indicated that E.R.'s third statement to the police reflected "a certain amount of knowledge on behalf of the defendant of the working of the weapons, which further strengthens the issue of [his] awareness of the dangerousness of guns and created a risk." Finally, the trial court concluded, "based upon the evidence as I have ... deduced ... from this trial, without the benefit of any inference or presumption, that [E.R. is] guilty of second-degree reckless homicide beyond a reasonable doubt." Therefore, this court is satisfied that the evidence was sufficient to support E.R.'s conviction.

¶24 For these reasons, this court also is satisfied that the trial court did not create an irrebuttable presumption, but rather, that the court's conclusion was

firmly grounded in the evidence presented at trial and the totality of the circumstances surrounding the shooting.

¶25 Finally, this court has already determined that the State was not required to disprove or rebut the involuntary act evidence in order to establish that E.R.'s conduct was criminally reckless. First, E.R.'s theory of defense is built upon mere speculation. There is not a shred of evidence in the record to support E.R.'s hypothesis that E.C.'s gun fired first, thus starting the chain reaction of involuntary acts that resulted in E.C.'s death. Therefore, this court also rejects E.R.'s argument that because the State failed to rebut the involuntary act evidence, the trial court must have applied a lower standard of proof in order to find him guilty.

¶26 For all of the above stated reasons, this court affirms the trial court's adjudication of delinquency.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.