COURT OF APPEALS
DECISION
DATED AND FILED

November 1, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-1000-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL D. BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: JACQUELINE R. ERWIN, Judge. *Affirmed*.

Before Vergeront, P.J., Roggensack and Deininger, JJ.

¶1 PER CURIAM. Daniel Brown appeals a judgment of conviction and an order denying his postconviction motion. The issues relate to whether certain statements by Brown should be suppressed, whether the court erred by admitting certain expert testimony and several sentencing matters. We affirm.

¶2 Brown argues that certain statements he made should be suppressed because they were taken during a police interrogation before he was given the warnings set forth in ***Miranda v. Arizona***, 384 U.S. 436 (1966). The threshold question is whether Brown was in custody at the time, since ***Miranda*** warnings are not required until the defendant is in custody. ***State v. Armstrong***, 223 Wis. 2d 331, 344-45, 588 N.W.2d 606 (1999), *modified on other grounds*, 225 Wis. 2d 121, 591 N.W.2d 604. Brown argues that the trial court erred in concluding that he was not in custody. The determination of custody is based on whether a reasonable person in the suspect's position would have considered himself to be in custody, considering the degree of restraint under the circumstances. ***State v. Gruen***, 218 Wis. 2d 581, 594, 582 N.W.2d 728 (Ct. App. 1998).

¶3 Brown has not argued that the trial court's findings of historical fact were clearly erroneous, and therefore we will proceed based on those findings. *See* ***Armstrong***, 223 Wis. 2d at 352. Brown argues that on those facts a reasonable person would have concluded he was in custody. This is a question of law we review without deference to the trial court. ***Gruen***, 218 Wis. 2d at 589, 598.

¶4 Brown argues that we should conclude he was in custody because he was a suspect in a homicide, he was transported to a police station by police and the interrogation had turned accusatorial. The State, in response, notes that Brown voluntarily agreed to travel with police to the station, that he did so in the front seat of the vehicle, that he was not restrained at the police station and that he was told several times by officers that he was not under arrest and was free to leave. Under these circumstances, we conclude that a reasonable person would not believe himself to be in custody. The accusatorial nature of the interrogation was not sufficient to cause a reasonable person to believe he was no longer free to leave.

¶5 Brown also argues that we should hold, under the state constitution, that when a suspect makes an ambiguous request for counsel during interrogation, police must seek clarification before proceeding further with the interrogation. The State suggests that this issue need not be addressed unless Brown was undergoing a custodial interrogation when he made the allegedly ambiguous request. We have already concluded above that Brown was not in custody at that time. However, we will briefly address the issue.

¶6 Brown concedes that, under case law applying the federal constitution, police have no obligation to clarify an ambiguous statement. *See* ***Davis v. United States***, 512 U.S. 452, 459 (1994). Instead, he argues that we should interpret the Wisconsin Constitution, art. I, § 8(1), to impose such a requirement. The language of that provision is virtually identical to the corresponding federal provision. Brown has not offered any convincing argument based on Wisconsin case law or legal history as to why we should reach a different interpretation on this point. Therefore, we decline to impose that requirement in this case.

¶7 The next issue is whether the trial court erroneously admitted expert testimony by Darald Hanusa, a psychotherapist. We review a trial court's evidentiary decisions under the erroneous exercise of discretion standard. ***State v. Richard A.P.***, 223 Wis. 2d 777, 791, 589 N.W.2d 674 (Ct. App. 1998). The main issue at trial was whether Brown fired shots at his wife intentionally or whether it was instead reckless. Hanusa testified in general terms about what he described as a "profile" of a violent domestic abuser. He also testified about a list of what he called "lethality factors or risk factors" in an abuse situation which "gives us some sense" of being able to "predict … how risky" the situation is for violence. However, Hanusa did not give any testimony specific to Brown and testified that

he did not do an assessment of whether Brown was an abuser. Furthermore, he testified that the lethality or risk factors were not "of any use whatsoever" in distinguishing between a reckless homicide and an intentional one.

¶8 On appeal, Brown argues that all of Hanusa's testimony should have been excluded as irrelevant and as lacking sufficient scientific reliability because of the unreliability of predicting human behavior. We conclude that at least some of Hanusa's testimony was properly admitted as relevant to provide context for the jury on the subject of abusive relationships. As to the unreliability of predictions, this argument is not persuasive because Hanusa did not make any prediction or analysis that was specific to Brown. To the extent that any of Hanusa's testimony should not have been admitted, the error was harmless. Hanusa himself admitted that the lethality or risk factors were not "of any use whatsoever" in determining whether this homicide was reckless or intentional, which was the main issue before the jury. Brown argues that Hanusa's testimony must have led to jury confusion, but we do not see that potential to be so great that there is a reasonable possibility it contributed to the conviction. *See* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985) (stating test for harmless error).

¶9 Brown argues that there were several errors with respect to sentencing. The standards for the trial court and this court in sentencing matters are well-established and need not be repeated here. *See, e.g.,* ***State v. Thompson***, 172 Wis. 2d 257, 263-65, 493 N.W.2d 729 (Ct. App. 1992). Brown was convicted of first-degree intentional homicide, as a repeater and by use of a dangerous weapon. On that charge the court sentenced Brown to life in prison without parole, plus five consecutive years in prison. Brown argues that the life sentence without parole was an erroneous exercise of discretion because it was unduly harsh. We conclude that it was a reasonable exercise of discretion based on the facts of this crime. He argues

that the court failed to expressly consider possible alternative sentences. However, there is no requirement that the court do so. What the court must, and did, consider was the gravity of the offense, the character and rehabilitation needs of the defendant and the need to protect the public. ***Id.*** at 264. Finally, he argues that it is "possible" to conclude that the court was following a rigid sentencing policy with respect to defendants convicted of killing a domestic partner. Brown cites no specific language from the sentencing hearing, and we see no basis whatsoever in the record from which to draw this inference.

¶10 Brown also moved for resentencing due to a new factor, namely, a diagnosis that he suffers from bipolar disorder, which might affect his culpability. To obtain sentence modification based on a new factor, a defendant must show both that the fact in question was not in existence or overlooked at sentencing and that it would frustrate the purpose of the sentence imposed. ***State v. Johnson***, 210 Wis. 2d 196, 203, 565 N.W.2d 191 (Ct. App. 1997). There must be a nexus between the fact and the sentence imposed. ***Id.*** The circuit court examined Brown's allegation of bipolar disorder, but concluded that there was insufficient evidence to show that this disorder caused Brown to commit the crime and that the presence of the disorder was not sufficient to change the court's assessment of the other components of the sentencing decision. We conclude the court properly exercised its discretion and reached a reasonable result.

¶11 Finally, Brown argues that the court erred by imposing an additional five years on the penalty of life in prison without parole. The court apparently did so based on one of the penalty enhancers Brown was charged with, although the court did not state which enhancer it was using. Brown argues that we should strike this portion of the sentence because it was imposed as a separate and distinct penalty, in addition to the sentence imposed for the underlying crime. However, as the State

points out, when the underlying penalty is a period of unknown length, such as life in prison, it is difficult to see how a court could impose the enhancer by any method other than stating it as a separate additional term.

By the Court.—Judgment and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5. (1999-2000).