COURT OF APPEALS
DECISION
DATED AND FILED

May 23, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1942-CR **Cir. Ct. No. 2005CF286**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

GINA M. SCHEFSKY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Affirmed*.

Before Snyder, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. The State appeals from an order suppressing statements made by Gina Schefsky, a daycare worker charged with causing great

bodily harm to a child. *See* WIS. STAT. § 974.05(1)(d)3. (2005-06).[1] The issue is whether Schefsky was subject to a custodial police interview which should have been preceded by ***Miranda***[2] warnings. We conclude that Schefsky was in custody and affirm the order suppressing her oral and written statements.

¶2 A two-year-old child's arm was broken in three places while at daycare. After initially talking to Schefsky and others at the daycare center, an Ozaukee County sheriff detective asked Schefsky to meet him at the sheriff's department to talk further. Schefsky was escorted from the department's lobby through a locked door into an interview room. The detective closed the door to the room but did not lock it. A social worker was present during the meeting. The detective was wearing street clothes and did not display his gun or badge. Schefsky was not read ***Miranda*** rights. After denying any connection to the child's injuries, the detective told Schefsky that if she continued to deny that the injuries occurred while the child was in her care he would have no choice but to conclude that she was trying to cover up an intentional act and his only alternative would be to request felony charges of child abuse against her. Thereafter Schefsky indicated that she had pulled the child up from the floor too quickly and was worried that the child might have been injured. The detective left Schefsky alone to write a written statement. When he returned, he had Schefsky add to the statement her explanation that she had pulled the child up quickly. The entire meeting lasted approximately two and one-half hours. On Schefsky's motion to suppress her statements, the trial court found that the statements were voluntary

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

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

but that a custodial interrogation occurred which should have been preceded by ***Miranda*** warnings.[3]

¶3 ***Miranda*** warnings are required when a suspect is in custody. ***State v. Goetz***, 2001 WI App 294, ¶10, 249 Wis. 2d 380, 638 N.W.2d 386.

> A person is in custody for purposes of ***Miranda*** if the person is either formally arrested or has suffered a restraint on freedom of movement of the degree associated with a formal arrest. The test for custody is an objective one. Courts ask whether a reasonable person in the suspect's position would have considered himself or herself to be in custody.

Id., ¶11 (citations omitted).

¶4 The State bears the burden of providing by a preponderance of the evidence whether a custodial interrogation took place. ***State v. Armstrong***, 223 Wis. 2d 331, 345, 588 N.W.2d 606 (1999). Whether a person is in custody for ***Miranda*** purposes is a question of law and reviewed de novo. ***State v. Mosher***, 221 Wis. 2d 203, 211, 584 N.W.2d 553 (Ct. App. 1998). The trial court's findings of historical fact are accepted unless they are clearly erroneous. ***Id.***

¶5 Warnings are not required simply because a person is questioned in the police station. ***State v. Pheil***, 152 Wis. 2d 523, 531, 449 N.W.2d 858 (Ct. App. 1989). Likewise, we cannot exclude the possibility that a custodial interrogation occurred just because no physical restraint was utilized and Schefsky appeared at the department voluntarily. The totality of the circumstances must be considered. ***State v. Pounds***, 176 Wis. 2d 315, 321, 500 N.W.2d 373 (Ct. App.

[3] The trial court ruled that because they were voluntary, the statements could be used by the State as rebuttal evidence.

1993). The relevant factors include: the defendant's freedom to leave the scene; the purpose, place and length of the interrogation; and the degree of restraint. ***State v. Gruen***, 218 Wis. 2d 581, 594, 582 N.W.2d 728 (Ct. App. 1998). Where, as here, there is no actual restraint is involved our focus turns to the "specific police practices employed during questioning which tend to either mitigate or aggravate an atmosphere of custodial interrogation." ***Mosher***, 221 Wis. 2d at 214, (quoting ***United States v. Griffin***, 922 F.2d 1343, 1349 (8th Cir. 1990)). We consider:

> (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; or, (6) whether the suspect was placed under arrest at the termination of the questioning.

Id.

¶6 The trial court's findings on these factors cut both ways. Schefsky met with the detective in an unlocked room. Yet she was not told that she was free to leave at any time or that she was not considered under arrest. Although Schefsky was free to move about the room, she was not offered the opportunity to take a break from the interview or otherwise test her freedom of movement. Schefsky voluntarily appeared at the sheriff's department for the requested meeting but was escorted through a locked door into a room where a child welfare social worker was present. There is no indication that the social worker's presence at the meeting was explained to Schefsky. Schefsky initially denied any

involvement in the child's injuries and the detective continued to press her for answers, thus, dominating the interview.

¶7 The critical point in the interview is the detective's advisement that if Schefsky continued to deny involvement, he would have no alternative but to request felony child abuse charges against her. That was a strong-arm tactic intended to produce Schefsky's admissions. The threat of criminal charges would lead a reasonable person to conclude that they were not free to leave the custody of the officer. The threat, coupled with the absence of any advisement that she was free to go and the detective's domination of the interview, created a custodial interrogation which should have been preceded by ***Miranda*** warnings.

By the Court.—Order affirmed.

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