COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2502-CR **Cir. Ct. No. 2005CF193**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

QUENTIN J. LOUIS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Marathon County: VINCENT K. HOWARD, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 BRUNNER, J. The State of Wisconsin appeals a final order granting Quentin Louis a new trial. Louis was convicted of first-degree reckless homicide for shaking his infant daughter, Madelyn, to death. At trial, the State's case was predicated upon expert medical testimony that Louis's guilt could be

inferred from the nature of Madelyn's injuries. The circuit court concluded the controversy was not fully and fairly tried because the jury did not hear medical testimony that Madelyn's injuries might have other causes. Accordingly, it ordered a new trial in the interest of justice using its discretionary authority to set aside the verdict. *See* ***State v. Henley***, 2010 WI 97, ¶65, 328 Wis. 2d 544, 787 N.W.2d 350. We conclude the court properly exercised its discretion and affirm.

¶2 As an alternative basis for affirming the court's order, Louis argues the circuit court improperly admitted a confession he gave to police shortly after Madelyn's death. Because Louis's confession was voluntary, we conclude it is admissible at his new trial.

BACKGROUND

¶3 Four-month-old Madelyn suddenly stopped breathing on March 18, 2005 while in Louis's care. Three days later, Madelyn died from what was ultimately diagnosed as shaken baby syndrome. An autopsy revealed a subdural hematoma—blood on the surface of the brain—and retinal hemorrhaging.

¶4 Police first interviewed Louis at the hospital. Louis stated that he left Madelyn with Lisa, a friend, and went to change a tire on his girlfriend's car. Lisa sent a text message asking him to return because Madelyn was fussy and Lisa was becoming frustrated. Louis returned home and put Madelyn to bed, and Lisa left. Madelyn later woke up. Louis told police that as he was feeding her, she suddenly stopped breathing and went limp. Louis said he shook Madelyn lightly while calling her name to revive her. Police concluded the interview, searched Louis's residence, and awaited the autopsy results.

¶5 Louis consented to an interview with two officers at a police station after the autopsy was completed. During the interview, Louis changed his story several times. One of the officers explained that Madelyn's injuries were inconsistent with Louis's stories. Louis continued to deny any involvement, but eventually just "stared into space." The other detective then "got loud" with Louis and tried to get his attention by slapping the table and calling Louis's name. The detective demanded that Louis explain why his versions of events did not match the evidence. Louis then confessed that he became frustrated with Madelyn's crying and shook her as hard as he could. Louis unsuccessfully attempted to have his confession suppressed as involuntary.

¶6 Louis was convicted of first-degree reckless homicide following a jury trial. The State relied on the confession and medical evidence to prove its case. Multiple doctors testified that Madelyn's injuries were consistent with shaken baby syndrome. Doctor Robert Huntington, a forensic pathologist, testified that usually the onset of neurological symptoms immediately follows the trauma, but conceded he had seen a delay—known as a "lucid interval"—of up to three-quarters of a day. On his attorney's advice, Louis did not present any expert medical testimony.

¶7 Louis sought a new trial in a postconviction motion, raising newly discovered evidence, ineffective assistance of counsel, and interest of justice arguments. Underlying each argument was the notion that the jury should have heard medical testimony from expert defense witnesses regarding possible alternative causes of Madelyn's death. Louis relied on ***State v. Edmunds***, 2008 WI App 33, ¶23, 308 Wis. 2d 374, 746 N.W.2d 590, in which we noted the emergence of a "legitimate and significant dispute within the medical community

as to the cause" of those symptoms commonly associated with shaken baby syndrome.

¶8 Doctor Patrick Barnes, a pediatric neuroradiologist, testified on Louis's behalf at the postconviction hearing. His testimony revealed that until 1998, the medical community viewed the presence of some or all of a triad of symptoms—retinal and subdural hemorrhaging and brain injury—as exclusively characteristic of shaken baby syndrome. Barnes found substantial qualitative problems in the medical literature supporting the triad theory.[1] Although the triad of symptoms may indicate shaken baby syndrome, the medical community no longer considers those symptoms exclusively characteristic of that form of abuse. Barnes noted recent biomechanical literature that concluded the type of brain injury commonly associated with shaken baby syndrome requires some type of impact and cannot be caused by shaking alone. In addition, Barnes testified that an injured child might experience a lengthy lucid interval, during which the child could display nonspecific symptoms like "irritability, maybe excessive crying, poor feeding, [or] not sleeping or sleeping too much …." Barnes' review of Madelyn's medical records led him to conclude that her injuries were not characteristic of abuse and did not implicate Louis as Madelyn's last caretaker. In Barnes' opinion, no medical expert could determine with any certainty what in particular caused the injuries that led to Madelyn's death.

¶9 Doctor Jerome Plunkett, who also testified for Louis at the postconviction hearing, stated definitively that Madelyn "wasn't shaken." When

[1] Barnes stated that much of the medical literature displayed circular logic; patients presenting with the triad were assumed abused, and thus those injuries became characteristic of abuse without regard to other possible causes.

an infant is shaken, the force travels through the neck before reaching the head. According to Plunkett, shaking a baby severely enough to cause hemorrhaging in the brain will also cause "structural failure of the neck." Madelyn showed no structural neck damage. In addition, Plunkett testified that Madelyn's retinal hemorrhaging could not have been caused by shaking. He also noted that Madelyn had an unexplained chronic subdural hematoma that occurred at least a month before her death. In short, Plunkett found "no evidence that shaking had anything to do with Madelyn's collapse on the 18th or her original subdural hematoma." He concluded that Madelyn's treating physicians simply assumed she had shaken baby syndrome.

¶10 Doctor Huntington was recalled by the State at the postconviction hearing. To the State's surprise, Huntington changed two key aspects of his trial testimony. Huntington indicated that, contrary to his trial testimony, he now believed that shaking could not cause severe brain injury without an impact. Huntington also stated that certain spinal cord injuries he observed in Madelyn and mentioned at trial were not confirmed by subsequent neuropathologic examination and "should not be trusted."

¶11 The circuit court rejected Louis's newly discovered evidence and ineffective assistance arguments. However, the court granted Louis a new trial in the interest of justice:

> [The] recent change within the medical community that challenges the shaken baby syndrome goes directly to the major issue at trial of whether shaking Madelyn could have caused her death. [The] jury did not hear about the debate over SBS or a possible other cause of death based upon the autopsy. Instead, the State assertively and repetitively relied upon shaken baby syndrome to prove both that Louis must have shaken Madelyn and by that means caused her death.

Consequently, the court concluded that the real controversy was not fully tried.

¶12 The State appeals, arguing the circuit court erroneously exercised its discretion by granting Louis a new trial. Louis responds that the circuit court properly exercised its discretion because the jury did not hear medical evidence relevant to the central issue in the case. In the alternative, Louis requests that we affirm the order for a new trial because the circuit court improperly denied his suppression motion.[2]

DISCUSSION

I. Postconviction Motion for New Trial

¶13 "A circuit court invokes its discretion in resolving a defendant's motion for a new trial." ***State v. Eison***, 194 Wis. 2d 160, 171, 533 N.W.2d 738 (1995). We will not overturn the circuit court's decision unless it has erroneously exercised its discretion. ***Id.*** A discretionary determination must be the product of a rational mental process by which the facts and law relied on are stated on the record and considered together for the purpose of achieving a reasonable determination. ***State v. Cesar G.***, 2004 WI 61, ¶42, 272 Wis. 2d 22, 682 N.W.2d 1. "An appellate court will affirm a circuit court's discretionary decision as long as the circuit court examined the relevant facts, applied a proper standard

[2] The State agrees Louis was not required to file a cross-appeal because a respondent may raise an error that, if corrected on appeal, would sustain the judgment. *See* ***Auric v. Continental Cas. Co.***, 111 Wis. 2d 507, 516, 331 N.W.2d 325 (1983).

of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach."[3] ***Id.*** (internal quotation marks omitted).

¶14 Circuit courts have the discretion to set aside a verdict and order a new trial in cases where the real controversy was not fully tried, regardless of the type of error involved. *See* ***State v. Harp***, 161 Wis. 2d 773, 775, 469 N.W.2d 210 (Ct. App. 1991); *see also* ***Henley***, 328 Wis. 2d 544, ¶65 (criminal defendants may request a new trial in the interest of justice as part of their postconviction motions and appeal). The court need not find a substantial likelihood of a different result on retrial. ***Harp***, 161 Wis. 2d at 775. A new trial may be justified where competent and persuasive evidence was not introduced. *See* ***id.*** at 778 (citing ***Lien v. Pitts***, 46 Wis. 2d 35, 44, 174 N.W.2d 462 (1970)). For example, in ***State v. Hicks***, 202 Wis. 2d 150, 152-53, 549 N.W.2d 435 (1996), our supreme court concluded Hicks was entitled to a new trial because the jury did not hear DNA evidence relevant to the critical identification issue in the case and the state "assertively and repetitively" used the hair sample from which the DNA evidence was derived as proof of Hicks' guilt.

¶15 Here, the jury did not hear testimony on three topics relevant to the medical diagnosis of shaken baby syndrome. First, no testimony offered at trial advised the jury of the legitimate medical debate surrounding shaken baby

[3] The State proposes that we review the circuit court's discretionary ruling de novo because it was purportedly based on an error of law. The State misunderstands the applicable standard of review. We are solely concerned with whether the court erroneously exercised its discretion. A circuit court erroneously exercises its discretion by committing a legal error, such as misinterpreting a statute. When we review a circuit court's exercise of discretion, we reserve the right to decide de novo any questions of law that may arise, but do not decide anew whether the court reached the correct conclusion on the discretionary matter. *See* ***State v. St. George***, 2002 WI 50, ¶37, 252 Wis. 2d 499, 643 N.W.2d 777.

syndrome. Second, the jury was not adequately advised about the possibility of a lucid interval between the trauma and the onset of specific symptoms. Third, the jury was not adequately informed of the medical findings regarding Madelyn's purported spinal injury. All of these topics are highly relevant to the diagnosis of shaken baby syndrome and directly challenge the State's theory at trial.

¶16 Unlike the postconviction hearing testimony, the one-sided testimony at trial suggested unanimity in medical opinion regarding shaken baby syndrome. The State's trial doctors indicated that Madelyn's injuries were consistent with shaken baby syndrome. The postconviction hearing, however, revealed the medical community is sharply divided on whether the symptoms commonly associated with shaken baby syndrome are exclusively characteristic of that diagnosis. Doctors Barnes, Plunkett, and Huntington all concluded that Madelyn's injuries could not have been caused by shaking alone.

¶17 The trial testimony regarding the possibility of a lucid interval was also inadequate and strongly suggested that Louis, as the last person with Madelyn when she stopped breathing, was culpable. At trial, Doctor Huntington stated that the "usual pattern" is that symptoms "immediately" follow trauma. He acknowledged that "you can have delays," but reiterated that there is no lucid interval in "at least three-quarters" of the cases. At the postconviction hearing, Doctor Barnes' testimony implied that lucid intervals were much more common:

> Q. Has … the literature shown that—at least in the biomechanical and other literature—that there can be a lucid interval after a trauma?
>
> A. Oh, certainly. That's—oh, my goodness. That's now well documented throughout the literature from various specialties and disciplines … including in the child maltreatment literature, also, that there can be a delay somewhat in—particularly in a baby, in symptoms or specific symptoms.

> Often these babies will have nonspecific symptoms, in other words, irritability, maybe excessive crying, poor feeding, not sleeping or sleeping too much, and we all think it's the flu or a cold or something like that, when, in fact, it may be a more serious condition, but the baby doesn't have more specific findings such as a seizure or unconsciousness or something like that that tells us that there is a brain injury.

This postconviction testimony is highly relevant to the medical issue at trial; unlike the trial testimony, the postconviction testimony does not support the inference that Louis caused Madelyn's injuries simply because she was in his care at the time she manifested symptoms of trauma.

¶18 The jury also heard inaccurate information about Madelyn's spinal injuries. At trial, the State questioned Doctor Huntington about the significance of the following statement in his report: "There are hemorrhages around spinal nerve rootlets and subtle hemorrhage apparent inside the epidural space inside the spinal canal." Huntington responded, "It, again, shows force applied, again, below the head, around the upper spinal cord. Okay. Again, we are not talking love pats here." At the postconviction hearing, Huntington testified his report's statement about spinal hemorrhages could not be trusted:

> That was, repeat, not confirmed after fixation of the spinal cord, that is, holding it in formaldehyde so as to make for a better examination. That was not confirmed at a subsequent neuropathologic examination by Dr. Salamat. I, therefore, have to say that that is not corroborated and should not be trusted.

¶19 The circuit court's analysis demonstrates that it examined the relevant facts, applied the proper standard of law, and used a rational process to reach a reasonable conclusion. The court noted that based on the medical testimony at trial, the jury could determine, from Madelyn's injuries alone, that: (1) she was shaken; (2) Louis likely shook her; and, therefore, (3) Louis caused

Madelyn's death. The court continued, "The jury did not hear any medical evidence challenging Shaken Baby Syndrome. … Nor did it hear about the possible significance of the lack of any neck injuries or the possibility of a lucid interval." Finally, the court correctly observed that the State "assertively and repetitively" relied on shaken baby syndrome diagnosis to prove its case. We additionally note that the jury may view Louis's confession in a different light with the aid of the new medical testimony. We conclude the circuit court properly exercised its discretion when ordering a new trial in the interest of justice.

II. Suppression of Louis's Confession

¶20 As an alternative basis for affirming the circuit court's order, Louis argues he is entitled to a new trial because his confession was the involuntary result of overbearing conduct by the questioning officers. He contends the circuit court should have granted his pretrial suppression motion.

¶21 The State bears the burden of showing, by a preponderance of the evidence, that Louis's statements were "the voluntary product of rational intellect and free, unconstrained will." ***State v. Jiles***, 2003 WI 66, ¶¶25-26, 262 Wis. 2d 457, 663 N.W.2d 798. "The question of voluntariness involves the application of constitutional principles to historical facts." ***State v. Ward***, 2009 WI 60, ¶17, 318 Wis. 2d 301, 767 N.W.2d 236. We will uphold a circuit court's findings of historical fact unless they are clearly erroneous; that is, unless they are "against the great weight and clear preponderance of the evidence." ***Id.*** Application of constitutional principles to those facts is a question of law. ***Id.***

¶22 Determining whether a statement was voluntary involves "balancing the characteristics of the suspect against the type of police tactics that were employed to obtain the suspect's statement." ***Id.***, ¶19. Relevant characteristics

include the defendant's "age, education, intelligence, physical or emotional condition, and prior experience with law enforcement …." ***State v. Davis***, 2008 WI 71, ¶37, 310 Wis. 2d 583, 751 N.W.2d 332. In evaluating the police conduct, we examine "the length of questioning, general conditions or circumstances in which the statement was taken, whether any excessive physical or psychological pressure was used, and whether any inducements, threats, methods, or strategies were utilized in order to elicit a statement from the defendant." ***Id.*** We determine voluntariness based on the totality of the circumstances. ***Id.***

¶23 While a close case, we conclude, as did the circuit court, that Louis's confession was voluntary. Louis was a twenty-four-year-old of average intelligence. He was short on rest and no doubt grieving over the loss of his child, but was generally alert during the questioning. Louis acknowledged all of the officers' questions and gave responsive, coherent answers. The circuit court concluded Louis's grief and lack of sleep did not render him particularly susceptible to coercion.

¶24 Against that backdrop, we do not view the confession as the product of overwhelming police pressure. Louis was interviewed at the police station, but was told he was free to leave. He was offered breaks during the approximately three-hour questioning. And although the officers used aggressive tactics to elicit the confession, none were so overbearing that we must consider Louis's confession the product of police stratagem rather than free will. The two interviewing officers adopted a permissible "good cop/bad cop" strategy. *See* ***State v. Owen***, 202 Wis. 2d 620, 642, 551 N.W.2d 50 (Ct. App. 1996). They confronted Louis with incriminating medical evidence that they believed inconsistent with his explanation of events, an acceptable tactic that does not amount to "the utilization of overwhelming force or psychology." ***Barrera v.***

State, 99 Wis. 2d 269, 292, 298 N.W.2d 820 (1980) (citing ***Krueger v. State***, 53 Wis. 2d 345, 356, 192 N.W.2d 880 (1972)). The exchange between Louis and the interviewing officers became heated at times, but a confrontational tone to the questioning does not establish coercion. *See* ***State v. Markwardt***, 2007 WI App 242, ¶¶41-42, 306 Wis. 2d 420, 742 N.W.2d 546.

¶25 We conclude the circuit court properly denied Louis's suppression motion. Louis's confession is therefore admissible at his new trial.

By the Court.—Order affirmed.

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