COURT OF APPEALS
DECISION
DATED AND FILED

January 5, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-3048-CR **Cir. Ct. No. 01CF000265**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CARL ANDRE BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: RICHARD J. KREUL, Judge. *Affirmed*.

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

¶1 PER CURIAM. Carl Andre Brown appeals from a judgment of conviction for party to the crime of felony murder. He claims that his statements to police should have been suppressed and that the evidence was insufficient to support the conviction. We reject his claims and affirm the judgment.

¶2 Brown and two others intended to rob two men of a large amount of cocaine outside a drug drop house. One man was killed by a close range shotgun blast. Brown was identified as one of the men running from the scene of the shooting. After his arrest Brown provided an alibi for his whereabouts at the time of the shooting. Brown was interviewed again and confronted with the fact that statements of others did not support his alibi. Brown then told police he had gone along on a planned robbery of the drop house but that he backed out of the robbery before the victim was shot. He said he had remained in the car while his companions committed the robbery.

¶3 Brown moved to suppress his statement made to the police on the grounds that the police violated his ***Miranda***[1] rights by continuing to question him after he requested an attorney and that his statement was involuntary because he believed the interviewing police officer had a reputation for violence. To admit a defendant's custodial statement into evidence the State must prove that the defendant was adequately informed of the ***Miranda*** rights, understood them, and knowingly and intelligently waived them, and that the statement was given voluntarily. ***State v. Santiago***, 206 Wis. 2d 3, 18-19, 556 N.W.2d 687 (1996). The validity of a confession made after a request for counsel involves questions of constitutional fact which are subject to independent appellate review and require an independent application of constitutional principles involved to the facts as found by the circuit court. *See* ***State v. Turner***, 136 Wis. 2d 333, 344, 401 N.W.2d 827 (1987). The circuit court's findings of historical or evidentiary fact

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

will be upheld unless clearly erroneous. *See* ***State v. Henderson***, 2001 WI 97, ¶16, 245 Wis. 2d 345, 629 N.W.2d 613.

¶4 In support of his suppression motion Brown testified that he told the police officer who picked him up on the street that he would like to speak to a lawyer. He indicated that while waiting in the officer's vehicle, he asked that officer two additional times for the opportunity to speak with a lawyer. The arresting officer testified that Brown never indicated he wanted to speak to a lawyer. The circuit court found the officer's testimony more credible and that Brown had not asked for an attorney before being transported to the police department. The court also found that prior to being interviewed at the station, Brown was properly advised of his ***Miranda*** rights and did not make a request for counsel.

¶5 On appeal Brown does not challenge the circuit court's finding that he did not make repeated requests for counsel prior to being transported to the police station. He argues that the custodial interrogation should have ceased when, at the beginning of the interview, he told the officers that neither he nor anyone he knew would have money to get him a lawyer.[2] In support he cites ***Micale v. State***, 76 Wis. 2d 370, 373, 251 N.W.2d 458 (1977), which concluded that the questioning of the defendant should have stopped when, after being advised of his ***Miranda*** rights, the defendant said he could not afford an attorney.

[2] Brown testified at the suppression hearing that when the officer first came into the interview room he asked whether his mother could be reimbursed for the door that the officers had kicked in the night before because his mother did not have enough money to fix the door. He testified that he also indicated that "neither me nor her nor anybody like my girlfriend or anybody would have enough money to get me a lawyer. So I just wanted to get the questioning done and over with as soon as possible." Brown testified that aside from that comment, he never asked the interviewing officer for counsel.

¶6 Although it remains true that police must immediately cease questioning when an accused invokes the right to counsel at any stage of the custodial interrogation, the request for counsel must be clearly and unambiguously made. ***State v. Jennings***, 2002 WI 44, ¶¶26, 29, 252 Wis. 2d 228, 647 N.W.2d 142. The interrogation need not stop when the accused makes any reference to counsel. ***Id.***, ¶31. Additionally, officers are not required to clarify an ambiguous reference to counsel. ***Id.*** Brown's reliance on ***Micale*** is misplaced as it no longer represents the current law.[3]

¶7 A request for counsel must be made "'sufficiently clearly [so] that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.'" ***State v. Long***, 190 Wis. 2d 386, 395, 526 N.W.2d 826 (Ct. App. 1994) (quoting ***Davis v. United States***, 512 U.S. 452, 459 (1994)). Brown's reference to not being able to afford counsel was ambiguous as to whether he was requesting counsel. It provided an explanation for why he would talk to police and did not suggest he wanted counsel. Thus, Brown did not invoke his right to counsel and the subsequent ***Miranda*** advisement and Brown's waiver of those rights supports the admission of his custodial statement.

¶8 Not until his reply brief does Brown develop his claim that his statements to police were involuntary because he was fearful of the officer's reputation for beating confessions out of people. "In determining whether a confession was voluntarily made, the essential inquiry is whether the confession

[3] Although ***Micale v. State***, 76 Wis. 2d 370, 373, 251 N.W.2d 458 (1977), was not directly overruled by the decision in ***State v. Jennings***, 2002 WI 44, ¶¶26, 29, 252 Wis. 2d 228, 647 N.W.2d 142, ***Jennings*** did overrule ***Wentela v. State***, 95 Wis. 2d 283, 290 N.W.2d 312 (1980). ***Jennings***, 252 Wis. 2d 228, ¶¶6, 32-33. The ***Wentela*** decision cited ***Micale*** as support for its decision. *See* ***Wentela***, 95 Wis. 2d at 292.

was procured via coercive means or whether it was the product of improper pressures exercised by the police." ***State v. Clappes***, 136 Wis. 2d 222, 235-36, 401 N.W.2d 759 (1987). The determination of whether a confession is voluntary is made by examining the totality of the circumstances and requires the court to balance the personal characteristics of the defendant against the pressures imposed upon him or her by police in order to induce him or her to respond to the questioning. ***Id.*** at 236. The circuit court found, and Brown does not challenge the finding, that no direct physical or psychological coercive tactics were employed by the police. Thus, the balancing test is virtually unnecessary and the claim of involuntariness fails because there is no "affirmative evidence of improper police practices deliberately used to procure a confession." ***Id.*** at 239-40. Brown's subjective fear is not enough to render the statements involuntary when it was not exploited by the police to compel the statements.[4]

¶9 We turn to Brown's challenge to the sufficiency of the evidence. We may not reverse a conviction on the basis of insufficient evidence "unless the 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).

¶10 Brown's contention is that there was no physical evidence linking him to the crime and that witnesses placing him near the scene of the crime were

[4] We further observe that the circuit court rejected Brown's testimony that he was severely afraid of the officer. That credibility determination is not clearly erroneous. Brown testified that his belief was based on "hearsay," he did not express his fear to anyone, including his girlfriend and father with whom he had contact that day, and he was never left alone with the officer.

unreliable for one reason or another. It is the function of the jury to decide issues of credibility, to weigh the evidence and to resolve conflicts in the testimony. ***Id.*** at 506. We defer to the jury's function of weighing and sifting conflicting testimony in part because of the jury's ability to give weight to nonverbal attributes of the witnesses. *See* ***State v. Wilson***, 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989). Credibility assessments will not be overturned on appeal unless they are inherently or patently incredible, or in conflict with the uniform course of nature or with fully established or conceded facts. *See* ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975).

¶11 The State was required to prove that Brown participated in the attempted armed robbery and that a death resulted from the attempt. The man who was with the shooting victim identified Brown as the shooter. Although the witness did not initially identify Brown and lied to police about why he was at the house, the jury was free to believe his testimony as it was not patently incredible. A witness who knew Brown since he was young testified that after hearing the shot, she looked out and saw Brown running across her lawn carrying something with a long barrel. Again the testimony was not patently incredible even in light of evidence that the witness may have had a motive to lie. The same is true of the jail inmates who testified that Brown admitted to them that he had killed a person. Their testimony called for a credibility determination left to the jury. The evidence was sufficient to convict Brown.

By the Court.—Judgment affirmed.

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