COURT OF APPEALS
DECISION
DATED AND FILED

October 6, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2905-CR **Cir. Ct. No. 2006CF341**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC J. HAINSTOCK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sauk County: PATRICK J. TAGGART, Judge. *Affirmed*.

Before Vergeront, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Eric Hainstock appeals a judgment convicting him of first-degree intentional homicide and an order denying his postconviction motions. He contends that the trial court applied the wrong legal standard to his pretrial suppression motion; and that counsel provided ineffective assistance by

failing to raise an additional ground for suppression, failing to seek a change of venue, and failing to challenge a juror at voir dire. We affirm for the reasons discussed below.

BACKGROUND

¶2 The charge in this case arose from allegations by multiple witnesses that Hainstock brought a gun to Weston High School and, during a struggle over the gun, shot Principal John Klang three times. Hainstock stipulated that he caused Klang's death; the sole issue at trial was whether he had the requisite mental state for first-degree intentional homicide, or either of the lesser included offenses of first- or second-degree reckless homicide.

¶3 Prior to trial, Hainstock moved to suppress a statement he had given to police, during which he said that he had fired all three shots into Klang on purpose, and that he had been thinking about doing it for months. The trial court denied the suppression motion following a hearing, finding that there was no improper police conduct or any "actual coercion" against which to balance the defendant's personal characteristics.

¶4 After a jury returned a verdict that Hainstock was guilty of first-degree intentional homicide, Hainstock moved for a new trial on the grounds of newly discovered evidence and ineffective assistance of counsel. Both claims centered on the contention that Hainstock was not competent to waive his ***Miranda*** rights. The trial court denied the postconviction motion without a hearing.

¶5 Hainstock now appeals, renewing his claims that his confession was involuntary and that counsel should have challenged his competency to waive his

Miranda rights. In addition, Hainstock asks us to consider two unpreserved claims that counsel provided ineffective assistance by failing to request a change of venue and by failing to move to strike or make further inquiries of a juror who mentioned a business relationship with the victim's brother. Additional facts relevant to the issues on appeal will be set forth as needed in the discussion below.

STANDARD OF REVIEW

¶6 When we review a suppression motion, we will defer to the trial court's credibility determinations and will uphold its findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2009-10);[1] ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). We will independently determine, however, whether the facts establish a violation of constitutional standards. *See* ***State v. Richardson***, 156 Wis. 2d 128, 137-38, 456 N.W.2d 830 (1990).

¶7 In order to obtain a hearing on a postconviction motion, a defendant must allege sufficient material facts to entitle him to the relief sought. ***State v. Allen***, 2004 WI 106, ¶¶9, 36, 274 Wis. 2d 568, 682 N.W.2d 433. We review the sufficiency of the defendant's allegations *de novo*, based on the four corners of the motion. ***Id.***, ¶¶9, 27.

DISCUSSION

¶8 Before introducing a statement made by a defendant during custodial interrogation, the State must establish by the preponderance of the evidence both

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

that the statement was given voluntarily, and that it was made after a knowing and intelligent waiver of applicable constitutional rights. ***State v. Hindsley***, 2000 WI App 130, ¶21, 237 Wis. 2d 358, 614 N.W.2d 48; ***Miranda v. Arizona***, 384 U.S. 436 (1966).

¶9 A statement is considered voluntary when it is "the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist." ***State v. Jerrell C.J.***, 2005 WI 105, ¶18, 283 Wis. 2d 145, 699 N.W.2d 110 (citations omitted). While some form of coercion is a prerequisite for a finding of involuntariness, police conduct need not be egregious or outrageous to be coercive if the defendant's condition renders him or her uncommonly susceptible to police pressures. ***Id.***, ¶19. Thus, the court must balance the personal characteristics of the defendant (such as age, intelligence, physical and emotional condition, and prior law enforcement contacts) against the tactics used by law enforcement (such as the length of questioning, delay in arraignment, conditions under which the statement took place, and threats or inducements) to determine whether a particular statement was voluntary under the totality of the circumstances. ***Id.***, ¶20.

¶10 Here, it appears that the trial court misstated the test for a voluntary confession when it seemed to imply that "actual coercion" could not occur without improper conduct. The holding of ***Jerrell C.J.*** is that even innocuous interrogations techniques or circumstances of detention may be coercive to a person who is unusually susceptible to pressure. However, we need not discuss whether we would determine Hainstock's confession to be involuntary on *de novo* review, because we conclude that any error was harmless. In other words, we conclude that it is clear beyond a reasonable doubt that a rational jury would still

have found Hainstock guilty of first-degree intentional homicide even if the court had excluded Hainstock's statement to police. *See* ***State v. Harris***, 2008 WI 15, ¶43, 307 Wis. 2d 555, 745 N.W.2d 397.

¶11 In order to find Hainstock guilty of first-degree intentional homicide, the jury needed to be convinced that Hainstock acted with the intent to kill the principal—meaning that Hainstock either had the mental purpose to take the principal's life or Hainstock was aware that his conduct was practically certain to cause the principal's death. *See* WIS. STAT. § 940.01; WIS JI—CRIMINAL 1018. The State provided ample evidence at trial to show that Hainstock acted with intent to kill, including: (1) testimony from two of Hainstock's classmates that about a week and a half before the shooting, Hainstock had commented that he didn't think Klang would live through homecoming; (2) Hainstock's own testimony that he loaded two guns that morning and brought them to school with additional ammunition; (3) testimony from a school maintenance worker that when Hainstock entered the school with a shotgun in his hand, he said he was there "to fucking kill somebody;" (4) testimony from a teacher who observed Hainstock pointing a handgun at Klang's head, while Klang attempted to calm him down, just before Klang tackled Hainstock; (5) testimony from the forensic pathologist who performed the autopsy that Klang suffered three gunshot wounds that all contributed to his death—one that grazed his skull; one that traveled through his chest and abdomen, tore the aorta, and lodged in his kidney; and one that entered his right thigh, damaging major blood vessels; (6) Hainstock's testimony that the handgun he used to shoot Klang needed to be cocked; and (7) Hainstock's admission on the stand that at least one of his shots was on purpose. This evidence—in particular the facts that Hainstock brought *two* loaded weapons to school, and would have needed to recock the handgun before each of

the shots—was inconsistent with the defense theory that Hainstock wanted only to scare someone at the school into listening to his complaints, and that the handgun had gone off accidently during his struggle with the principal. We therefore see no reasonable probability that a rational jury would have acquitted or returned a verdict of guilty on a lesser included offense without Hainstock's statement to police.

¶12 In light of our determination that it is not reasonably probable that the suppression of Hainstock's statement to police on the grounds that it was involuntarily given would have affected the outcome of the trial, we need not consider Hainstock's additional contention that counsel rendered ineffective assistance by failing to challenge Hainstock's competency to waive his ***Miranda*** rights. That claim would merely have provided an additional grounds for suppression. Given the strength of the evidence discussed above, Hainstock would not be able to establish the prejudice element of an ineffective assistance claim. *See* ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12 (discussing test for ineffective assistance of counsel).

¶13 Finally, Hainstock asks this court to address two additional unpreserved ineffective assistance of counsel claims relating to venue and the failure to challenge a juror. Because waiver or forfeiture is a doctrine of judicial administration, this court retains the power to address an issue on appeal, even if it has not been properly preserved. ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980). However, we will typically do so only when the issue sought to be raised is purely a question of law, involving no disputed issues of fact. ***Id.*** Having reviewed Hainstock's arguments, we conclude his venue and juror issues involve too many unresolved factual elements for this court to review for the first time on appeal.

By the Court.—Judgment and order affirmed.

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