COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP800-CR **Cir. Ct. No. 2002CF141**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TAMMY E. MILLERLEILE, A/K/A TAMMY E. MCGAHEY,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Tammy Millerleile appeals a judgment, entered upon a jury's verdict, convicting her of first-degree reckless homicide. Millerleile also appeals the order denying her motion for postconviction relief. Millerleile challenges the admission of incriminating statements she gave to the police. She

also seeks a new trial in the interest of justice. We reject Millerleile's arguments and affirm the judgment and order.

BACKGROUND

¶2 The State charged Millerleile with first-degree reckless homicide for causing the death of a fourteen-month-old child who was in her care. Millerleile moved to suppress statements she gave to the police in which she admitted shaking the child. The trial court suppressed Millerleile's initial confession, concluding she was in custody and the police had not advised her of her ***Miranda***[1] rights. The court also suppressed subsequent statements as fruits of the initial, tainted statement. Although these statements could not be used during the State's case-in-chief, the court determined the statements were nevertheless voluntary and, therefore, admissible on cross-examination.

¶3 The State appealed the suppression order and this court reversed, holding that ***Miranda*** warnings were not required because Millerleile was not in custody when she made the first incriminating statement. ***State v. Millerleile***, No. 2002AP3413-CR, unpublished slip op. (WI App Aug. 5, 2003). Our supreme court denied Millerleile's petition for review, and the statements were ultimately introduced as evidence at trial during the State's case-in-chief. A jury found Millerleile guilty of the crime charged, and the court imposed a twenty-year sentence consisting of sixteen years' initial confinement and four years' extended supervision. Millerleile filed a postconviction motion that again argued her statements should have been suppressed. The trial court denied the motion and this appeal follows.

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

DISCUSSION

¶4 Millerleile argues that she was in custody when she gave the first incriminating statement. The trial court denied this claim, citing the doctrines of issue preclusion and law of the case. It is a "longstanding rule that a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal." ***Univest Corp. v. General Split Corp.***, 148 Wis. 2d 29, 38, 435 N.W.2d 234 (1989). Further, issue preclusion prevents "relitigation in a subsequent action of an issue of law or fact that has been actually litigated and decided in a prior action." ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995).

¶5 While Millerleile's brief-in-chief acknowledges that the trial court's decision was based on these doctrines, she does not otherwise discuss its ruling. Rather, Millerleile argues this court erred in the State's appeal when we held that she was not in custody. An appellant's failure to refute the grounds of the trial court's ruling is a concession of the validity of those grounds. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994).

¶6 In her reply brief, Millerleile cites irrelevant case law, attempting to treat this court's decision in the State's appeal as if it was an advisory opinion, subject to independent review. Millerleile also appears to confuse the concept of finality for purposes of appeal with issue preclusion and law of the case. This court's decision in the State's appeal is not a "non-final" order within the case. Rather, it is a final adjudication on the issue of whether Millerleile was in custody when she made the initial incriminating statement.

¶7 Millerleile also argues that issue preclusion bars litigation in subsequent cases, not within the instant case. She is mistaken. Our supreme court has recognized that although issue preclusion ordinarily arises in a subsequent lawsuit, the doctrine is equally applicable when one party seeks to bar another from relitigating a prior adjudication "within the four corners" of the same lawsuit. ***Estate of Rille v. Physician's Ins. Co.***, 2007 WI 36, ¶41, 300 Wis. 2d 1, 728 N.W.2d 693. Millerleile fails to establish that the trial court erred by rejecting her attempts to relitigate whether she was in custody when she gave the first incriminating statement. We therefore affirm that ruling.

¶8 Millerleile further claims that her statements should have been suppressed as involuntary.[2] The State has the burden of proving a statement was voluntary by a preponderance of the evidence. ***State v. Agnello***, 2004 WI App 2, ¶8, 269 Wis. 2d 260, 674 N.W.2d 594. The voluntariness of a statement is determined by applying constitutional principles to historical facts. *See* ***State v. Hoppe***, 2003 WI 43, ¶34, 261 Wis. 2d 294, 661 N.W.2d 407. We defer to the trial court's findings of fact concerning the circumstances surrounding the making of the statements, and independently review the court's application of constitutional principles to those facts. ***Id.***

¶9 "In determining whether a confession was voluntarily made, the essential inquiry is whether the confession was procured via coercive means or whether it was the product of improper pressures exercised by the police." ***State v.***

[2] This court questions whether Millerleile should have raised this argument as an alternate ground to sustain the suppression order in the earlier appeal. Because the State, however, does not assert that Millerleile forfeited her challenge to the voluntariness of the statements, we will address it on the merits.

Clappes, 136 Wis. 2d 222, 235-36, 401 N.W.2d 759 (1987). "The presence or absence of actual coercion or improper police practices is the focus of the inquiry because it is determinative on the issue of whether the inculpatory statement was the product of a 'free and unconstrained will, reflecting deliberateness of choice.'" ***Id.*** at 236 (quoting ***Norwood v. State***, 74 Wis. 2d 343, 364, 246 N.W.2d 801 (1976)). If the defendant fails to establish that the police used actual coercive or improper pressures to compel the statement, the inquiry ends. ***Id.*** at 239-40. However, if the defendant establishes coercive conduct, the court must undertake a balancing analysis, weighing the personal characteristics of the defendant against the coercive police conduct, to determine whether the statement was voluntary. ***Id.*** at 236-37.

¶10 Here, Millerleile emphasizes that her incriminating statement was made during an interrogation that began with the police informing her that the child had died. Citing ***McKinley v. State***, 37 Wis. 2d 26, 154 N.W.2d 344 (1976), Millerleile argues that "informing [her] of the child's death" was "a coercive police stratagem that would leave any reasonable person in a state of mind that would render statements involuntary." In ***McKinley***, a defendant signed a written confession shortly after being taken to the morgue to view the victim's body. ***Id.*** at 31-32. There, the court held that "where the confession follows the morgue viewing as closely in time as occurred here it should be held as a matter of law that the confession is the result of such psychological pressure as to render the same involuntary." ***Id.*** at 37.

¶11 Millerliele submits that "[w]hile the [***McKinley***] line of cases speak to the psychological effects of morgue viewing, the same reasoning should be applied to confessions that are taken as a result of interrogations that begin with the police informing the suspect that the victim, who was in care of the suspect,

had died." We are not persuaded. Our supreme court has held that the use of gruesome photographs of a victim during interrogation is significantly less coercive than a viewing of the deceased's body. *See* ***State v. Woods***, 117 Wis. 2d 701, 730, 345 N.W.2d 457 (1984); ***State v. Wallace***, 59 Wis. 2d 66, 85, 207 N.W.2d 855 (1973). It follows, therefore, that informing Millerleile of the child's death is not comparable to the morgue viewing condemned in ***McKinley***.

¶12 Millerleile also challenges what she characterizes as "an accusatory line of questioning and an inference of leniency if a confession was given." Millerleile had initially told police that the child fell down the stairs. Although the detectives told Millerleile that the child's injuries "may be inconsistent with a fall and that there was a chance that maybe he was shaken," an accusation of lying does not constitute improper police procedure. *See* ***State v. Owen***, 202 Wis. 2d 620, 642, 551 N.W.2d 50 (Ct. App. 1996).

¶13 With respect to the "inference of leniency," a detective told Millerleile that if she had shaken the child, "it would be in her best interests to be honest … because the autopsy would show it anyway." This court has held that "[a]n officer telling a defendant that his cooperation would be to his benefit is not coercive conduct, at least so long as leniency is not promised." ***State v. Berggren***, 2009 WI App 82, ¶31, 320 Wis. 2d 209, 769 N.W.2d 110. Because the detective's statement did not promise leniency, but merely encouraged honesty, it was not coercive.

¶14 Millerleile also claims her statements were involuntary because the police used the "question-first" strategy condemned by the United States Supreme Court in ***Missouri v. Seibert***, 542 U.S. 600 (2004). At issue in ***Seibert*** was a "police protocol for custodial interrogation that calls for giving no warnings of the

rights to silence and counsel until interrogation has produced a confession." ***Id.*** at 604. There, the initial police questioning occurred after arrest but before advising the suspect of ***Miranda*** rights. ***Id.*** at 604-05. The Supreme Court held that ***Miranda*** warnings given mid-interrogation, after the defendant gave an unwarned confession, were ineffective, and thus a confession repeated after the warnings were given was inadmissible at trial. ***Id.*** at 616-17. Unlike the defendant in ***Seibert***, however, Millerleile was not arrested and then questioned before being informed of her ***Miranda*** rights. Rather, she voluntarily came to the station to discuss the incident and, as this court determined in the earlier appeal, Millerleile was not in custody when she first confessed. ***Miranda*** warnings, therefore, were not required. When Millerleile was placed under arrest, she was immediately informed of her ***Miranda*** rights. The police in the present matter did not engage in the type of "question-first" conduct denounced by the ***Seibert*** Court.

¶15 Because Millerleile was not subjected to police tactics that were inherently coercive, we conclude her statements were voluntary without resort to the balancing test. *See* ***Clappes***, 136 Wis. 2d at 239-40. Even were we to reach the balancing test, we agree with both the State's and the trial court's analysis.

¶16 Alternatively, Millerleile seeks a new trial in the interest of justice. WISCONSIN STAT. § 752.35[3] permits this court to grant relief if we are convinced "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." In order to establish that the real controversy has not been fully tried, Millerleile must convince us "that the jury was precluded

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

from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998). To establish a miscarriage of justice, Millerleile "must convince us 'there is a substantial degree of probability that a new trial would produce a different result.'" ***Darcy***, 218 Wis. 2d at 667. An appellate court will exercise its discretion to grant a new trial in the interest of justice "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶17 Here, Millerleile does not specify which ground for reversal in the interest of justice she is relying on. Rather, she asserts that her "confession is false and was extracted in a predatory manner." She further asserts that the judicial system should be protected from false confessions and, therefore, wrongful convictions. As the State aptly notes, Millerleile's assertion that her confession was extracted in a predatory manner is merely a hyperbolic rephrasing of her claim that the confession was involuntary. That argument was rejected above.

¶18 To the extent Millerleile claims her confession was false, "the truthfulness of a confession can play no role in determining whether the confession was voluntarily given." ***State v. Agnello***, 226 Wis. 2d 164, 174, 593 N.W.2d 427 (1999). In any event, Millerleile fails to explain the factual basis for her conclusory allegation that the confession was false. We do not consider arguments that are not supported by appropriate references to the record, *see* ***State v. Lass***, 194 Wis. 2d 591, 604-05, 535 N.W.2d 904 (Ct. App. 1995), or address issues that are inadequately briefed, *see* ***State v. Flynn***, 190 Wis. 2d 31, 58, 527 N.W.2d 343 (Ct. App. 1994). Accordingly, we decline to exercise our discretionary authority under WIS. STAT. § 752.35 to grant Millerleile a new trial.

By the Court.—Judgment and order affirmed.

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