

NOTICE

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2015 IL App (5th) 140154-U

NO. 5-14-0154

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	St. Clair County.
)	
v.)	No. 13-CF-338
)	
KRISTOFER McDAVID,)	Honorable
)	Robert B. Haida,
Defendant-Appellee.)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Chapman and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: Where probable cause existed to arrest the defendant prior to his second videotaped interview; where the *Miranda* warnings given to the defendant prior to an interview with detectives were not so stale and remote that a substantial possibility existed that he was unaware of his constitutional rights at the time of his confession; and, where his confession was voluntary, we reverse the trial court's order granting suppression of his statement at his second interview.

¶ 2 On March 2, 2013, the defendant, Kristofer McDavid, was charged by complaint with first-degree murder. The complaint was superseded by indictment on April 5, 2013, which charged the defendant with one count of first-degree murder for the stabbing that resulted in the death of Carmen R. Boyd (Carmen). On December 27, 2013, the

defendant filed a motion to suppress, and on December 30, a hearing was held on the motion. On March 13, 2014, the trial court granted the defendant's motion in part, ordering suppression of all the statements made by the defendant at the St. Clair County sheriff's department on March 2, 2013. This interlocutory appeal by the State is before this court because the order impairs the State's ability to prosecute the case. Ill. S. Ct. R. 604(a) (eff. Feb. 6, 2013). For the following reasons, we reverse the trial court's order.

¶ 3 This appeal concerns a motion to suppress the defendant's statements, given at two different times and locations, to the Illinois Major Case Squad officers investigating the death of Carmen Boyd in the early morning hours of March 2, 2013. The motion requested the suppression of all the statements made to those investigators just prior to the defendant's arrest, at the time of his arrest, and subsequent to his arrest. The defendant's motion claimed that his second statement in particular was the product of psychological coercion; that he was under the influence of drugs and/or alcohol at the time; that the statement was taken under duress, at night; and, that he was improperly induced into giving it. The defendant also claimed that at the beginning of this statement, he was not read and did not acknowledge his understanding of his *Miranda* rights, or engage in formal waiver of those rights; therefore, the motion requested suppression of "the statement itself, evidence seized, and statements obtained as a result of the illegal questioning of the defendant."

¶ 4 At the defendant's hearing on the motion, Sergeant Kyle Bade testified that he and Detective Jared Lambert were assigned to the investigation of Carmen's death, and that the defendant was developed as a suspect. He testified that on March 2, 2013, they went

to the defendant's residence where he lived with his mother and son, but that the defendant's mother indicated that he was not home. Bade requested that the defendant contact him upon his return and left a business card; the defendant called later that afternoon. The defendant told Bade that he could not come to the Swansea police department because he had to remain home to watch his son, but that they could speak with him at home. Bade and Lambert went to the defendant's residence and sat down for an interview in his living room at 4:55 p.m. Bade testified that the interview lasted approximately 21 minutes, ending at 5:20 p.m. He stated that before speaking with the defendant, he and his partner had no intention of arresting him.

¶ 5 The living room interview was video-recorded and submitted as the State's first exhibit at the defendant's hearing. In the video, the defendant agreed that he could read and write. Bade told the defendant, "You're not in trouble—but I have to read you your *Miranda* rights." The defendant indicated that he understood his right to remain silent; that he did not have to talk to the detectives; that his statements could be used against him in court; that he had a right to have an attorney present; that if he did not have money to hire an attorney, one could be appointed; and that he could stop answering questions at any time. The defendant signed and dated a written form and initialed the individual warnings. The defendant agreed that he was participating in the interview of his own free will; that he was not under the influence of drugs, alcohol, or medication; and that he had no history of mental illness or treatment for mental illness. The defendant told the detectives that he had not wanted to go to Swansea for the interview because he had no one to watch his son, who was at the defendant's grandmother's house.

¶ 6 The defendant indicated that he was 38 years old and had attended 2½ years of college. He had no driver's license and was deaf in his right ear. Approximately five minutes into the interview, the defendant lit a cigarette and stood up, calling out "Where'd the scissors go, mom?" to his mother, presumably in the next room. The defendant then moved from the camera's view and resumed his seat a few moments later with a small object in his hand.

¶ 7 The defendant told the detectives that he had known Carmen Boyd, his friend Stacy's cousin, for a couple of years, and that he would party with her once in awhile. He stated that he had sex with Carmen "once in a blue moon" and the last time that he tried to get a hold of Carmen was five days ago, and the time before that was several months before. The defendant stated that he last spoke to Carmen "the other night at Stacy's" and clarified that they did not speak in person, but communicated by text message. The defendant stated that he had erased the messages from his phone. When confronted with the detectives' knowledge about Carmen's phone records from the night she was murdered, the defendant admitted that he called her at 12:39 a.m., while at Stacy's, and that she called him back one minute later.

¶ 8 The detectives asked the defendant if he had any current injuries; he told them that he had just cut his finger on the scissors he had retrieved to open a package, and showed them his right hand. When asked about a mark on his right palm, the defendant stated that it was a cigarette burn. When asked if he knew what happened to Carmen, the defendant stated that Stacy told him that Carmen was shot in the face. The detectives inquired about his whereabouts on Thursday night and early Friday morning, and the

defendant told them that he was drinking and smoking at Stacy's house. He admitted that he had paid Carmen for sex in the past, and that he last saw Carmen around two or six months before, when he dropped her off at her apartment in his mother's car.

¶ 9 The detectives stepped out of the room to confer, and the defendant examined his right hand. The detectives returned, and the defendant reiterated that he was at Stacy's that evening, from approximately 10 p.m. on Thursday to 1:30 or 2 a.m. on Friday; he then made the approximately 15-minute walk home. He told the detectives that he heard about Carmen's murder around 4 p.m. on Sunday. The defendant allowed the detectives to look at his phone and to inspect his hand for markings. The defendant agreed that he would be willing to talk to the detectives again if they had further questions, telling them to "feel free." He agreed that the detectives had treated him fairly, and he consented to be photographed. The video concluded at 5:20 p.m.

¶ 10 At the hearing, Bade testified that he wore a business suit to the interview, and he did not have any weapons displayed. He confirmed that no threats or force were used against the defendant. Bade stated that after the interview concluded, he and Detective Lambert left the residence and parked a few streets away. The detectives then contacted Jeff Wild, commander of the major case squad, to discuss how to proceed. Detective Bade believed that there were falsehoods in the defendant's statement, and it was determined that another recorded statement should be attempted at the police station. Another major case squad team, Investigator Scott Toth and his partner, were sent to join Bade and Lambert.

¶ 11 When the four officers arrived at the defendant's residence, Bade and Lambert for

the second time, Bade believed that the defendant opened the door. He noted that the defendant appeared surprised to see him. Bade testified that he told the defendant, untruthfully, that there was possibly a malfunction of the recording equipment used for the first interview, and that they "needed to speak with him at a department." Bade clarified that the defendant was not told that he had to come to the police department, but that the detectives "advised [the defendant] that we would like him to come." Bade testified that the deception was employed to secure the defendant's voluntary cooperation, and to keep him from getting "excited [or] keyed up" by accusing him of the suspected lies at that point in time. The defendant consented to come to the police department, and he was not placed in handcuffs. The defendant indicated that his driver's license was suspended, and that he could not legally drive himself to the station. Bade did not again inform the defendant of his *Miranda* rights.

¶ 12 Investigator Scott Toth testified that when he and the other three detectives went to the defendant's residence, about an hour had passed since the first interview had ended. He stated that while he could not remember his exact words, he told the defendant that he needed to speak with him at the station, and that the defendant "could have told me no at that time." Toth noted that though the defendant "said something like, oh, shit, this stuff scares me," the defendant voluntarily accompanied him. Toth transported the defendant in his unmarked "investigative car" to the St. Clair County sheriff's department; he did not handcuff the defendant or tell him that he was under arrest, and the defendant rode in the front seat of the car.

¶ 13 Toth testified that Bade had told him that he had advised the defendant of his *Miranda* rights at the house prior to the first interview; for this reason, Toth did not again advise the defendant of his rights during the interview at the police department. Toth did not refer to the written form that the defendant had executed, nor did he tell the defendant that the waiver was still in effect. Toth testified that he conducted the second video-recorded interview at the St. Clair County sheriff's department around 6 p.m. and that the defendant agreed to answer his questions; at no point did the defendant ask to end the interview or for an attorney. Toth confirmed that he did not display any weapons, and that no force or threats were used during the interview. Toth agreed that he recalled the defendant saying in the interview that he had been drinking and smoking all day long, but that Toth understood the defendant to be referring to the previous Thursday, on the night of the incident. Toth testified that the defendant admitted to stabbing Carmen, and that the factual account was consistent with how Carmen had been murdered. When the interview was complete, the defendant was taken into custody.

¶ 14 The March 2, 2013, recording of the defendant's second statement was submitted into evidence as the State's second exhibit. The recording began at 6 p.m. and concluded at 9:07 p.m.; the following is a short synopsis of relevant portions of the interview. Toth told the defendant that he knew that the defendant had been with Carmen that night, and asked if he and Carmen had been in a fight. He told the defendant that the crime scene had been analyzed for the previous 24 hours, and that blood belonging to someone other than Carmen was found inside the apartment. Toth told the defendant that they both knew that Carmen was not shot, but was stabbed.

¶ 15 Toth told the defendant to calm down and have a cigarette. The defendant then told Toth that "she came at me with the fuckin' knife" and that he caught it with his hand. When she pulled out another object, he "smacked it right back in her fuckin' face." Toth asked if he pulled the knife out of her neck; the defendant became visibly upset and said "what have I done." When Toth asked what happened after her neck was cut, the defendant told him that she grabbed his leg, and he kicked her arm away; he noted that her pants were down. The defendant stated that he did not know how many times he hit Carmen, as "everything was flashing in and out" and that when he saw the blood, he panicked. He agreed that the fresh cuts on his hand were the result of that incident. The defendant continued to insist he did not remember his actions, but told Toth about pulling the knife out of her throat and stated that "I'm not gonna tell you I didn't stab her."

¶ 16 The defendant said that he walked home after he left Carmen's apartment, and he went in through the back door. He took a shower, left his clothes in the bathroom, and threw them in the garbage cans next to his landlord's garage the next day. The defendant agreed to give a DNA sample. He consented to a search of his residence and the grounds and seizure of his clothing.

¶ 17 At the suppression hearing, the defendant testified that he remembered both the interviews. He stated that his mother answered the door when the officers returned to his home after the first interview, and "she let the officers in and told me I needed to go with them to the police station." He recalled four officers being present, noting, "Four officers at my door telling me I had to go with them. I was—didn't feel like I could say no." The defendant stated that he was not sure if he agreed to have an interview with Toth, noting

that he was drunk that day, but testified that he "probably did agree" to giving a second interview at the station. The defendant agreed that he could not legally drive, so the police were doing him a courtesy, "if you want to call it that," by taking him to the police department. The defendant agreed that he was not placed under arrest, and he was not handcuffed on the drive or when he arrived at the station.

¶ 18 The defendant testified that at the beginning of the second interview, he agreed to answer questions; he did not tell the officer that he did not want to speak to them, or that he wanted to leave, or that he wanted to end the interview. The defendant agreed that he did not request an attorney because he "wasn't aware that [he] needed one at the time." The defendant testified that he did not feel free to leave at any time during the second interview.

¶ 19 On March 13, 2014, the trial court issued a written order granting the defendant's motion to suppress statements in part. The court found that the defendant was not in custody during his first interview with investigators. The court noted that upon the officers' return, the defendant was not handcuffed and rode in an unmarked police car to the station. However, the court also noted that the defendant was placed in a closed-door interview room, the defendant was questioned by one officer, no *Miranda* warnings were administered, and the defendant testified that he did not feel that he could refuse to go with the four officers that came to his home. The court stated that "[i]t was reasonable under all the circumstances for the defendant to believe that he was in custody at this time." The court found that no evidence was presented at the hearing to establish probable cause to believe that a crime had been committed by the defendant, and that

"based upon the totality of the circumstances the defendant was in custody at the point in time when he was placed in the closed-door interview room at the Sheriff's Department."

The State appeals the order granting suppression of the defendant's statement.

¶ 20 In determining whether a trial court has properly ruled on a motion to suppress, findings of fact and credibility determinations are accorded great deference; as such, those determinations will be reversed only if they are against the manifest weight of the evidence. *People v. Slater*, 228 Ill. 2d 137, 149 (2008). However, the ultimate question of whether the evidence should be suppressed is subject to *de novo* review. *People v. Pitman*, 211 Ill. 2d 502, 512 (2004).

¶ 21 We note initially that we agree with the trial court that the defendant was not in custody during the first interview. Therefore, we first address the State's argument that the trial court erred in finding that no evidence in support of probable cause to arrest the defendant was presented at the suppression hearing.

¶ 22 The first question for our review is whether the defendant was, prior to his confession during his interview at the police station, arrested without probable cause and seized in violation of his rights. Both the United States and Illinois Constitutions protect individuals from unreasonable searches and seizures. U.S. Const., amend. IV; Ill. Const. 1970, art. I, § 6. A seizure, for fourth amendment purposes, is synonymous with an arrest; absent probable cause or a warrant based thereon, an arrest is violative of the fourth amendment protections. *People v. Melock*, 149 Ill. 2d 423, 436 (1992).

¶ 23 Probable cause to arrest exists when the facts known to the officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the arrestee

has committed a crime; the standard for determining whether probable cause is present is the probability of criminal activity, rather than proof beyond a reasonable doubt. *People v. Wear*, 229 Ill. 2d 545, 563-64 (2008). The existence of probable cause depends on the totality of the circumstances at the time of arrest. *Id.* at 642.

¶ 24 Given the totality of the circumstances, we find that the detectives had probable cause to believe that the defendant had murdered Carmen even before the second interview. Prior to the first interview, the crime scene had been analyzed and the detectives, knowing that such a personal and violent crime was likely committed by a person known to Carmen, had developed the defendant as a suspect within 24 hours. Another person's blood and DNA were found in Carmen's apartment, and therefore the detectives were looking for someone with fresh lacerations who had recently been in contact with Carmen. During the first interview, the defendant was evasive about his recent contact with Carmen until confronted with the phone records, and admittedly had deleted the text messages from his phone within the relevant time frame. The detectives noted the cuts to the defendant's hand, which could reasonably be suspected to resemble defensive wounds. Bade testified that they suspected the defendant was lying and clearly thought him capable of deducing this, hence the malfunctioning-camera fabrication. The trial court made no findings of fact relevant to its conclusion that no probable cause existed after the first interview. Thus, given the totality of the circumstances, we find that the detectives did have probable cause to arrest the defendant at that point.

¶ 25 We also note that the police are entitled, based on their experience and knowledge, to proceed with caution if they so choose. "The police are not required to guess at their

peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long." *Hoffa v. United States*, 385 U.S. 293, 310 (1966). Though the detectives had sufficient probable cause after the first interview, their concern about this very scenario instead prompted them to fabricate a story that would bring the defendant to the station voluntarily for a second interview. We find that a reasonably cautious person would believe that the defendant took part in this crime, and based on the evidence in the record before us, the trial court's determination was erroneous.

¶ 26 We next address the trial court's findings regarding when and where the defendant was in custody for fourth amendment purposes. A person has been arrested when his freedom of movement has been restrained by means of physical force or a show of authority. *United States v. Mendenhall*, 446 U.S. 544, 553 (1980). The relevant inquiry is whether, under the circumstances, a reasonable person would conclude that he was not free to leave. *Id.* at 554. Additional factors considered in this determination include the intent of the officer, the understanding of the suspect, and whether the suspect was told that he was free to leave or that he was under arrest. *Melock*, 149 Ill. 2d at 437.

¶ 27 We begin by noting that the court did not make a finding that the defendant was in custody when the officers came to his home for the second time; rather, the court found that it was reasonable *for the defendant* to believe that he was in custody at that point. The defendant's subjective belief in such a scenario is simply one circumstance in the totality of circumstances that a court must consider when determining whether a defendant is in custody.

¶ 28 Near the end of the first interview, the defendant told the detectives to "feel free" to talk to him again if they had further questions. The detectives were admitted into the defendant's home upon their return. Detective Bade asked the defendant if he would be willing to come to the station for a second video interview, and testified that the video-camera-malfunctioning ruse was concocted specifically so that the defendant would not become nervous or intimidated by their unexpected return. While the defendant testified that he "didn't feel like he could say no" and admitted to being scared, he also testified that he "probably did agree" to go with the detectives in order to conduct another interview at the station. Though we agree that the appearance of two more officers lends a more coercive nature to the second visit, the detectives were dressed in plainclothes, and the defendant was not handcuffed or told that he was under arrest. The defendant was transported in Toth's vehicle, but the defendant admittedly could not legally drive himself; further, the vehicle was unmarked, and the defendant rode in the front seat. We find that the totality of the circumstances lacks a show of physical force or authority by the detectives, and that a reasonable person of the defendant's age and intelligence would have concluded that he could have declined this second encounter. Therefore, we find that the defendant was not in custody at any point prior to being placed in the station's interview room.

¶ 29 Next, we must address whether the defendant was under arrest when he was interviewed at the police station, as the trial court found that the defendant was in custody specifically when he was placed in the closed-door interview room at the station. As previously discussed, the detectives had probable cause to arrest the defendant prior to

this moment, and the defendant's experience prior to this second interview began as a consensual encounter. We note initially that a questioning taking place at the police station is not, in and of itself, sufficient to convert it into an arrest. *People v. Wipfler*, 68 Ill. 2d 158, 168, (1977). However, assuming *arguendo* that the defendant was in custody during the second interview, we conclude that the trial court ultimately erred in suppressing his statement because his *Miranda* acknowledgement and subsequent waiver before the first interview was not so stale as to be inapplicable to the second interview.

¶ 30 The Illinois Supreme Court has held that "fresh *Miranda* warnings are not required after the passage of several hours." *People v. Garcia*, 165 Ill. 2d 409, 425 (1995). A new set of *Miranda* warnings is required "only in those situations where a substantial probability exists that warnings given at a previous interrogation are so stale and remote that a substantial possibility exists that the suspect was unaware of his or her constitutional rights at the time subsequent interrogation occurs." *Id.* at 426. Again, whether the defendant understood his constitutional rights in a post-*Miranda* questioning is a totality-of-the-circumstances analysis. *Id.*

¶ 31 The totality of the circumstances reflects that the defendant was aware of his constitutional rights during the second interview. The defendant correctly points out that two factors present in his case—a change in location and in the identity of the interrogator—have been found by our courts to be factors that could contribute to a conclusion that a defendant may not understand that his rights carried over from a previous interview. See, e.g., *People v. Baltimore*, 292 Ill. App. 3d 159 (1997); *People v. Degorski*, 382 Ill. App. 3d 135, 146 (2008). However, a totality-of-the-circumstances

analysis requires us to put those two facts in the context of that day's events. The first interview was held at the defendant's home at his own request. The defendant had received, understood, and waived his *Miranda* rights less than an hour before going to the second location with Toth, who accompanied him from the scene of the first interview. The defendant had voluntarily agreed to accompany Toth to the second location, and it was abundantly clear that the subsequent interview was about Carmen; indeed, because of the ruse involved, the defendant was under the impression that he would be giving a nearly identical interview. The defendant remained cooperative and did not tell Toth that he did not want to talk or that he wanted to cease the interview and leave.

¶ 32 Further, the defendant did not testify at the suppression hearing that he was unaware of his rights. Rather, the defendant testified only that he was not aware that he needed counsel at that time, implying not an unawareness of his constitutional entitlements but an unawareness of the situation's gravity and the extent of Toth's knowledge of his involvement. His videotaped interviews reflect a competent adult who was capable of connecting the rights he was read only an hour before to the interview in question. As such, we cannot agree that a substantial probability exists that the defendant became unaware of his rights in the time between his acknowledgement and waiver of *Miranda* and his confession.

¶ 33 In sum, the defendant's encounter with the detectives did not amount to an arrest prior to the second interview, and, even assuming that the defendant was in custody at the time of the second interrogation, no *Miranda* violation occurred. However, even where *Miranda* warnings are not required, the fifth amendment still demands that a defendant's

confession be voluntary, and the State must prove that the confession was voluntary by a preponderance of the evidence. *Slater*, 228 Ill. 2d at 159-60. The test for voluntariness is whether the defendant made the statement freely, voluntarily, and without compulsion or inducement of any sort, or whether the defendant's will was overcome at the time he confessed. *Id.* at 160. The reviewing court considers the totality of the circumstances surrounding the statement, including (1) the defendant's age, intelligence, education, experience, and physical condition at the time of the detention and interrogation; (2) the duration of the interrogation; (3) the presence of *Miranda* warnings; (4) the presence of any physical or mental abuse; and (5) the legality and duration of the detention. *Id.*

¶ 34 Again, we find that the totality of the circumstances weighs heavily in favor of finding that the defendant's statement was voluntary. The only factor in the defendant's favor was that he was not reminded of his *Miranda* rights before beginning his interview with Toth; however, as we have already noted, the defendant had very recently heard, understood, and waived these rights, and Toth was not constitutionally required to repeat the advisements. In the videotaped interview, the defendant appears to be an intelligent man in good health. He is given coffee and cigarettes, short breaks, and is not physically restrained. Toth treats the defendant with respect, telling him that he is not a monster and attempting to get him to relax. The defendant's confession begins less than 45 minutes into this interview. As such, we cannot find the defendant's confession was involuntary in this instance.

¶ 35 For the foregoing reasons, the trial court's order suppressing the defendant's second videotaped interview is reversed.

¶ 36 Reversed.