THIRD DIVISION
March 19, 2014

No. 1-13-0120

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 DV 30652
	)	
ALEX JACOB,	)	Honorable
	)	Joel L. Greenblatt,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Justices Neville and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction of domestic battery affirmed over his contention that the trial court erred in denying his pretrial motion to suppress his incriminating statements to police.

¶ 2 Following a bench trial, defendant Alex Jacob was found guilty of domestic battery and sentenced to one year of conditional discharge. On appeal, he contends that the trial court erred in denying his pretrial motion to suppress his incriminating statements to police. We affirm.

¶ 3 Defendant was charged with domestic battery stemming from an incident involving his wife, Priyanka Jacob (Priyanka). Defendant filed a motion to quash his arrest and suppress

evidence, as well as a motion to suppress statements. As relevant to this appeal, defendant claimed that the statements he made to police were inadmissible where, prior to making his initial statements to police, he did not receive warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), and then repeated those statements after being read his *Miranda* rights. The trial court held a joint evidentiary hearing on both motions.

¶ 4 At the hearing, Officer Bernie Conboy testified that on July 16, 2012, he and Officer Messina responded to a domestic battery call at the apartment of defendant and Priyanka in Wheeling, Illinois. When the officers arrived, Priyanka, defendant, and a young child were in the home. Defendant allowed the officers inside, and Messina detained defendant inside the residence while Conboy spoke to Priyanka separately in the hallway. Priyanka told him that she got into an argument with her husband the day before, and that he grabbed her arms and shook her. Conboy observed that Priyanka had scratches on her left forearm and bruises on her arms.

¶ 5 Officer Conboy next spoke with defendant. At the pretrial hearing, the following colloquy occurred between the assistant State's Attorney and Conboy:

> "Q. Did you ask if [defendant] would speak with you?
> A. Yes.
> Q. What did he indicate to you?
> A. He told me yes.
> Q. At that time was he under arrest?
> A. No.
> Q. Was he handcuffed?
> A. No.
> Q. This was in his own home; is that correct?
> A. Yes.
> Q. What did he tell you had happened?
> ***
> A. He told me they were arguing the day before. He told me that while they were arguing verbally, his wife Pri[y]anka had made an

> insulting comment about his sister and he then initiated the physical part of the argument by grabbing her left forearm."

Conboy did not give defendant the *Miranda* warnings prior to defendant's statement because, at that point, defendant was not under arrest and Conboy was investigating the report of domestic violence. After their conversation, Conboy placed defendant under arrest, transported him to the police station, and read him his *Miranda* rights. Defendant indicated that he understood his rights, and, after waiving them, made both written and oral statements to Conboy, which were consistent with his initial statement.

¶ 6 Although Officer Conboy had made the decision to arrest defendant when he finished talking to Priyanka, he clarified that he had not actually placed defendant under arrest at that point. Conboy further testified that defendant was not free to leave while Officer Messina had him detained inside the apartment.

¶ 7 Following the hearing, the trial court denied both of defendant's pretrial motions. In doing so, the court found that Officer Conboy was investigating an allegation of criminality and endeavored to obtain both sides of the story. The court acknowledged that Conboy testified that he believed he had enough information to arrest defendant after talking to Priyanka, but the court indicated that the officer wanted to be sure the events of July 15 unfolded as she described, and thus wanted to interview defendant. The trial court emphasized that when Conboy interviewed defendant, he was in his own home, not handcuffed, and not under arrest. Defendant was only placed under arrest after telling Conboy what he did to his wife, and then made further statements to police after being given *Miranda* warnings at the police station. The court concluded by stating that he did not believe either statement was tainted by the actions of the police.

¶ 8 At trial, Priyanka Jacob testified that on July 15, 2012, she was living with defendant and her 18-month-old child. On that date, defendant began insulting her family. Priyanka responded by insulting defendant's family, and he slapped her in the face and grabbed her arms and neck while she was holding the baby. Priyanka attempted to push defendant away and, in doing so, accidentally scratched his face. Defendant then began pushing her. Priyanka sustained cuts and bruises to her arms and leg. Following these events, the police were called and went to the residence. Priyanka told the police what happened between her and defendant, and they took photographs of her injuries, which were admitted into evidence.

¶ 9 Officer Conboy testified similarly to his testimony at the pretrial hearing, and the written statement defendant signed at the police station after he received his *Miranda* warnings was admitted into evidence. He further testified that during his initial conversation with defendant inside defendant's residence:

> "I informed him that when I spoke to his wife, she made an allegation that he had battered her the day before. I asked him to tell me his side of the story and what had happened. He told me that *** the day before he had gotten into an argument with his wife. While they were arguing, his wife had made insulting remarks about his sister, and that he reached out and grabbed her arm because those remarks upset him. *** He told me that when he grabbed her, she reached up and scratched his face after he grabbed her arm."

¶ 10 Defendant testified that Priyanka insulted his sister and was yelling and pointing at his face from a distance of less than two feet. He felt threatened by Priyanka and was afraid of her hitting him, so he grabbed her arms to defend himself. Priyanka scratched his eyes, and pictures of his injuries were admitted into evidence. Defendant admitted that he "gave [Priyanka] a gentle stroke on her cheek," but never choked her, pulled her around, or reached for her throat.

¶ 11 Following closing arguments, the trial court found defendant guilty of domestic battery. In doing so, the court found Priyanka's testimony credible, and defendant's testimony incredible.

¶ 12 On appeal, defendant contends that the trial court erred when it denied his motion to suppress statements, and allowed into evidence his pre- and post- *Miranda* statements. He argues that the first statement he made to Officer Conboy should have been suppressed because it was given while he was subjected to a custodial interrogation absent *Miranda* admonishments. Although the later statement he made at the police station was given after receiving *Miranda* admonishments, defendant argues that pursuant to *Missouri v. Seibert*, 542 U.S. 600 (2004), these statements should also have been suppressed because they were not sufficiently attenuated from the first unlawfully obtained statement.

¶ 13 The State responds that the trial court did not err in admitting these statements because defendant was not in custody when he was initially interviewed by Officer Conboy, and thus Conboy was not required to *Mirandize* him when he simply asked defendant for his side of the story. Even assuming there was a *Miranda* violation with respect to the first statement, the State maintains that suppression of the latter post- *Miranda* statement was not warranted because there was no evidence that the police engaged in a deliberate "question first" interrogation technique, as occurred in *Seibert*. The State finally maintains that even if the trial court's decision in denying defendant's motion to suppress statements was manifestly erroneous, any error was harmless where the trial court found defendant guilty on the strength of Priyanka's testimony.

¶ 14 "When reviewing a trial court's ruling on a motion to suppress evidence, we accord great deference to the trial court's factual findings and will reverse them only if they are against the manifest weight of the evidence." *People v. Schoening*, 333 Ill. App. 3d 28, 31 (2002).

However, we review *de novo* the trial court's legal conclusions and will reverse the ruling only if the court improperly applied the law to the facts. *Id*.

¶ 15 The fifth amendment of our federal constitution protects against involuntary self-incrimination (*People v. Lopez*, 229 Ill. 2d 322, 355 (2008)), and, in *Miranda*, the Supreme court held that when an individual is taken into custody or otherwise deprived of his freedom by the authorities, he must be warned prior to any questioning of certain rights to which he is entitled. See *Miranda*, 384 U.S. at 478-79 (listing the rights defendant must be warned of when he is taken into custody). Pursuant to *Miranda*, the failure to give the prescribed warnings and obtain defendant's knowing waiver of those rights when he is subjected to a custodial interrogation generally requires exclusion of any custodial statements. *Lopez*, 229 Ill. 2d at 355-56.

¶ 16 Custody is what triggers the applicability of *Miranda* pre-interrogation admonishments. See *People v. Slater*, 228 Ill. 2d 137, 149-50 (2008), quoting *Yarborough v. Alvarado*, 541 U.S. 652, 661 (2004) (recognizing that *Miranda* warnings were designed to ensure that any inculpatory statement made by a defendant is not due to "'the compulsion inherent in custodial surroundings'"). Accordingly, it is well-recognized that *Miranda* is not triggered, and admonishments are not required, when police conduct general investigatory on-the-scene questioning as to the facts surrounding a crime. *People v. Parks*, 48 Ill. 2d 232, 237 (1971); *People v. Peterson*, 372 Ill. App. 3d 1010, 1018 (2007). That is because "[i]n such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present." *Miranda*, 384 U.S. at 478.

¶ 17 To determine whether a defendant is "in custody" for *Miranda* purposes, courts must consider the circumstances surrounding the interrogation, and determine whether a reasonable

person in those circumstances would have felt that he was free to terminate the interrogation and leave. *Slater*, 228 Ill. 2d at 150; see also *Schoening*, 333 Ill. App. 3d at 32 (applying a similar standard to determine if a custodial situation occurred in the home). Our supreme court has identified a number of relevant factors to be considered in determining whether a defendant's statement was made in a custodial setting, including: (1) the location, time, length, mood, and mode of the questioning; (2) the number of law enforcement officers present during the questioning; (3) the presence or absence of any friends and family of the individual at the time of questioning; (4) any indicia of formal arrest, including the use of weapons or force, physical restraint, or booking procedures; (5) the manner in which the individual arrived at the place of questioning; and (6) the age, intelligence, and mental makeup of the accused. *Slater*, 228 Ill. 2d at 150. No single factor is dispositive. *People v. Beltran*, 2011 IL App (2d) 090856, ¶ 37.

¶ 18 Here the record reflects that the officers arrived at defendant's apartment mid-afternoon on a weekday. The police separated defendant from Priyanka, and Officer Messina detained defendant while Officer Conboy first spoke to Priyanka in the hallway outside the apartment. She told Conboy that defendant grabbed her arms and shook her, and Conboy observed that Priyanka had scratches and bruises on her arms. Conboy next asked if defendant would speak with him, and, after answering affirmatively, defendant stated that while he was arguing with his wife he grabbed her arm. After their conversation, Conboy arrested defendant and transported him to the police station where he read him his *Miranda* rights. Defendant, however, argues that Conboy was required to administer *Miranda* admonishments before questioning him. He observes that Conboy testified that he made the decision to arrest defendant before he was even questioned, and, accordingly, Conboy was required to inform defendant of his *Miranda* rights

prior to asking him about the argument. He argues that defendant's incriminating response was thus obtained while he was in custody in contravention of *Miranda*, and the trial court should have suppressed his statement at the pretrial hearing.

¶ 19 Based on a review of the record, and all the relevant factors, we do not agree that defendant's response was obtained during the course of a custodial interrogation in contravention of *Miranda*. Although Officer Conboy testified that he made the decision to arrest defendant after interviewing Priyanka, we note that "a police officer's subjective belief, uncommunicated to the person in question, and/or his testimony that the person was not free to leave, is not the controlling factor in deciding whether a person is in custody." *People v. Kilfoy*, 122 Ill. App. 3d 276, 287 (1984). That is because "[i]f undisclosed, the officer's knowledge, suspicion, intent, focus, subjective view, or thought of any kind can neither influence the defendant nor affect the coercive atmosphere of the interview in any way." *People v. Goyer*, 265 Ill. App. 3d 160, 167 (1994). Here, although Conboy possessed a subjective belief that defendant was in custody following Priyanka's statements, there is no evidence that this belief was ever communicated to defendant. Accordingly, we do not give this factor significant weight.

¶ 20 In addition, the remaining factors do not support defendant's contention that he was under arrest when Officer Conboy questioned him. Only two police officers were present at the scene to investigate a possible domestic battery, and they did not have probable cause to arrest anyone upon their arrival. Although the police separated defendant from Priyanka for purposes of conducting their investigation, there was no indicia of formal arrest where defendant was not handcuffed or physically restrained. Moreover, the questioning occurred inside of defendant's home during daylight hours and there is no evidence that Conboy attempted to intimidate

defendant. Instead, Conboy told defendant that Priyanka alleged that he battered her the day before, and requested his side of the story. Without being asked any further questions, defendant confessed to initiating the physical part of the argument by grabbing Priyanka's arm. We also note that there is nothing in the record to suggest that defendant's age or intelligence had any effect on his ability to understand and process what was occurring. Based on our analysis of all the relevant factors, we find that defendant was not subjected to a custodial interrogation when Conboy spoke to defendant inside of his residence; rather, we find that the questions posed here fell within the category of preliminary on-the-scene questions that do not require *Miranda* warnings. *Peterson*, 372 Ill. App. 3d at 1018-19.

¶ 21 In so finding, we are not persuaded by defendant's reliance on *People v. Jordan*, 2011 IL App (4th) 100629. In *Jordan*, the defendant was a passenger in a vehicle that was stopped by police for a routine traffic violation. During the traffic stop, the police questioned the defendant without advising her of her *Miranda* rights, and she admitted to possessing cannabis and owning cannabis inside of the car. She was arrested after police recovered cannabis from her person and the inside of the vehicle. The defendant subsequently filed a motion to suppress the evidence, arguing that it was obtained in violation of her fourth amendment rights and *Miranda*. The motion was granted and the State appealed. This court affirmed, finding that the defendant was in custody, and thus improperly questioned without being advised of her *Miranda* rights because she was detained and isolated from the driver of the vehicle for 27 minutes before confessing, she was locked in a squad car for about 23 minutes, police threatened to send for drug-detection dogs, the scene created a "police-dominated atmosphere," and the object of the investigation was to catch the defendant and the driver in a crime in progress. *Id.*, at ¶¶ 21-24.

¶ 22 Here, however, the police were not attempting to resolve a crime in progress, the scene did not exude a "police-dominated atmosphere," and defendant was not locked in a room in his apartment or otherwise restrained. Furthermore, we note that *In re V.S.*, 244 Ill. App. 3d 478 (1993), also relied on by defendant, actually supports our conclusion that defendant was not in custody when Conboy interviewed him. See *Id.* at 484 (holding that the defendant was not in custody when he was questioned by police at his home about reported sexual abuse where the officers left when asked, the defendant was free to walk in his kitchen and call for advice, and the police told him he was not obliged to talk with them). The police were under no affirmative duty to inform defendant that he was not required to speak to them and there is no evidence that defendant was prevented from doing anything while officer Conboy was speaking to Priyanka. Further, nothing prevented officer Conboy from asking defendant his version of events as part of the investigation.

¶ 23 Because defendant's pre-warning statement was not obtained in contravention of *Miranda*, we necessarily reject his argument that the post- *Miranda* statement that he provided should have been suppressed because it was not sufficiently attenuated from the initial allegedly improperly obtained pre-warning statement. Moreover, even if we were to assume that defendant was in custody and subjected to a custodial interrogation at the time he provided his initial statement and that a *Miranda* violation did occur, we are not persuaded that suppression of his post- *Miranda* statement would have been required.

¶ 24 In *Oregon v. Elstad*, 470 U.S. 298 (1985), the Supreme Court recognized that suppression of all statements following a *Miranda* violation is not always necessary. In *Elstad*, while executing an arrest warrant for the defendant in his home, police asked him questions without

admonishing him of his *Miranda* rights, and defendant made an incriminating response. After being transported to the police station, the defendant was admonished in accordance with *Miranda*, waived his rights, and made another statement. At trial, the defendant's pre-warning statement was suppressed, but his post-warning statement was admitted. The Supreme Court found no error in admitting the post-warning statement, and specifically held:

> "[A]bsent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect had made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights." *Id*. at 314.

¶ 25 The Supreme Court revisited *Elstad* in *Seibert* where the defendant was arrested for murder and interrogated by police, who did not admonish her in accordance with *Miranda*. After making an incriminating statement, the police administered the admonishments, obtained a written waiver of the defendant's rights, and obtained another confession. At the suppression hearing, the investigating officer admitted that he deliberately withheld *Miranda* warnings and employed a question-first, admonish-later interrogation technique. A plurality of the Supreme Court condemned this approach, concluded that the defendant's post-warning statement should be suppressed, and distinguished *Elstad* in which there had been a "good faith *Miranda* mistake" versus the questioning that the defendant had been subjected to, which had been "systematic, exhaustive, and managed with psychological skill." *Seibert*, 542 U.S. at 615-16. The plurality then created a new test to determine whether *Miranda* warnings administered after questioning commenced were effective to protect a defendant's rights against involuntary self-incrimination.

The new test considered the detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the two statements, the continuity of police personnel, and the degree to which the second round of interrogations was a continuation of the first. *Id*. In applying this test, the plurality concluded that the defendant's post-warning statement was inadmissible because it was obtained through a police strategy intentionally designed to circumvent *Miranda*. *Id*. at 616-17.

¶ 26 Justice Kennedy wrote a concurring opinion, which advocated the use of a narrower test than that employed by the plurality to determine the admissibility of post-warning statements applicable in the infrequent case in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning. *Id*. at 622. He specifically explained:

> "The admissibility of postwarning statements should continue to be governed by the principles of *Elstad* unless the deliberate two-step strategy was employed. If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of the prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made. Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver." *Id*.

¶ 27 Given the lack of a majority opinion in *Seibert*, the Illinois Supreme Court in *Lopez* adopted Justice Kennedy's concurrence to determine the admissibility of a defendant's post-*Miranda* statement. *Lopez*, 229 Ill. 2d at 360. In applying the rationale of the concurrence, the court instructed that a reviewing court:

> "must first determine whether the detective deliberately used a question first, warn later technique when interrogating defendant. If there is no evidence to support a finding of deliberateness on the part of the detectives, [the] *Seibert* analysis ends. If there is evidence to support a finding of deliberateness, then [the reviewing court] must consider whether curative measures were taken, such

> as a substantial break in time and circumstances between the statements, such that the defendant would be able 'to distinguish the two contexts and appreciate that the interrogation has taken a new turn.'" *Id*. at 360-61, quoting *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring).

The *Lopez* court recognized that police officers often refuse to admit on the record that they employed a question-first, warn-later interrogation technique. Therefore, the court set forth objective factors to be considered in determining whether such a technique was utilized, including: the timing, setting, and completeness of the pre-warning interrogation; the continuity of police personnel; and the overlapping content of the defendant's warned and unwarned statements. *Lopez.* 229 Ill. 2d at 361-62.

¶ 28 Keeping these principles in mind, we find that there is no evidence that the officers in this case deliberately employed an improper question-first, warn-later interrogation technique, and thus defendant was not subjected to an improper pre-warning custodial interrogation in an effort to circumvent *Miranda*. Officers Conboy and Messina responded to the domestic violence call at issue, and Conboy interviewed defendant and Priyanka separately. After obtaining Priyanka's side of the story, Conboy asked defendant if he would speak with him, and defendant answered affirmatively, and told Conboy that he started the physical altercation with Priyanka. Conboy then arrested defendant and transported him to the police station where he gave defendant the *Miranda* rights. Based on these facts, we are unable to conclude that defendant was subjected to a pre-warning questioning that was "systematic, exhaustive, and managed with psychological skill," that was designed to force him into making a statement that the officers would use against him after administering *Miranda* warnings. *Seibert*, 542 U.S. at 616. In turn, we also conclude that there was no evidence that defendant's post- *Miranda* statements were involuntarily made.

Accordingly, given that defendant was not subjected to a deliberately improper interrogation technique, and provided voluntary post- *Miranda* statements, the trial court did not err in denying his motion to suppress his statements.

¶ 29 In reaching this conclusion, we find *Lopez*, 229 Ill. 2d at 322, and *People v. Alfaro*, 386 Ill. App. 3d 271 (2008), relied on by defendant to show that he was subject to a question-first, warn-later technique, distinguishable from this case. In *Lopez*, 229 Ill. 2d at 362-64, the supreme court found that the question-first, warn-later technique was used by police where the evidence showed that police brought the 15-year-old defendant into an interrogation room and told him that another person implicated him the murder. After leaving the defendant in the interrogation room for several hours, the same detectives returned, again stated that he was implicated in the murder, and without providing *Miranda* warnings, the detectives asked him if he was involved in the murder. Defendant responded by making an incriminating statement, and then the detectives gave the defendant his *Miranda* warnings. He subsequently gave a handwritten statement confessing to his part in the crime. In *Alfaro*, 386 Ill. App. 3d at 300, the defendant was subjected to an accusatory interview at the police station where the defendant confessed to his involvement in the crime at least twice before receiving *Miranda* warnings.

¶ 30 Although we acknowledge that here Officer Conboy obtained both pre- and post-*Miranda* statements from defendant, which were substantially the same, this fact alone does not align this case with *Lopez* or *Alfaro*. In *Lopez*, our supreme court held that it could "think of no legitimate reason why the detectives failed to give defendant his *Miranda* warnings *** other than a deliberate decision to circumvent *Miranda* in hopes of obtaining a confession, which would ultimately lead to a handwritten statement." *Lopez*, 229 Ill. 2d at 363-64. Here, in

contrast, Officer Conboy simply asked defendant for his side of the story, never accused him of committing the battery, or behaved in a way that was designed to force a confession.

¶ 31 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 32 Affirmed.