2012 IL App (4th) 110735-U

Filed 7/11/12

NO. 4-11-0735

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
XAVIER F. CORDOVA,	)	No. 09CF1073
Defendant-Appellant.	)	
	)	Honorable
	)	James E. Souk,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justice Appleton concurred in the judgment.
Justice Steigmann specially concurred.

ORDER

¶ 1 *Held:* (1) The appellate court reversed defendant's conviction based upon the trial court's error in denying defendant's motion to suppress his statements made to police where defendant was in custody and before *Miranda* warnings were given.

(2) The admissible evidence sufficed to permit the jury to find defendant guilty beyond a reasonable doubt; double jeopardy does not bar the State from retrying defendant.

¶ 2 In February 2011, a jury found defendant, Xavier F. Cordova, guilty of involuntary manslaughter of a household member (720 ILCS 5/9-3(f) (West 2008)). The trial court sentenced defendant to 8 1/2 years in prison, with 2 years of mandatory supervised release (MSR) and credit for 4 days previously served. Defendant appeals, arguing (1) the trial court erred in denying defendant's motion to suppress, (2) the State did not prove defendant guilty of involuntary manslaughter of a household member beyond a reasonable doubt, and (3) the trial

court abused its discretion in sentencing defendant. We agree with defendant on his first issue. We reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 On November 24, 2009, a grand jury indicted defendant and charged him with involuntary manslaughter of a household member (720 ILCS 5/9-3(f) (West 2008)), his roommate Mitchell Robinson (Mitch), a Class 2 felony. Defendant filed a motion to suppress his statements made during his interview with the Normal police. In January 2011, the trial court held a hearing on defendant's motion. The evidence at the suppression hearing was as follows.

¶ 5 A. The Evidence At The Suppression Hearing

¶ 6 Detective Brad Park testified, on September 27, 2009, at approximately 12:45 a.m., Detective Larimore contacted him at his residence. Detective Larimore informed Detective Park that someone placed a 9-1-1 call from 406 Broadway in Normal, Illinois, at 12:13 a.m. When the patrol officers arrived on the scene, they discovered Mitch unresponsive. Detective Larimore instructed Detective Park he was needed to assist in interviewing six "partygoers" and "friends" of Mitch who were at the scene. When Detective Park arrived at the station at approximately 1 a.m., the individuals to be interviewed had already arrived.

¶ 7 Detective Park interviewed three people in the following order—Bryant Jancik, Alison Drinkwater, and defendant. Through his interviews with Bryant and Alison, Detective Park learned Mitch had been "belligerent to other partygoers" and attempts had been made by multiple people to get Mitch to go to bed. Detective Park also discovered defendant had been the last person in the room with Mitch before he was found unresponsive.

¶ 8 Detective Park's interview with defendant occurred at approximately 2:34 a.m.

and lasted 30 minutes. Detective Park did not read defendant *Miranda* warnings (*Miranda v. Arizona*, 384 U.S. 436, 444 (1966)) prior to beginning the interview. Detective Park started the interview by obtaining background information about the evening and the events that transpired. At one point during the interview, defendant revealed to Detective Park he restrained Mitch by putting him in a "sleeper hold." Detective Park questioned defendant about the "sleeper hold" on three separate occasions during the interview. According to Detective Park, after the third discussion concerning the "sleeper hold," and after defendant reported he applied the "sleeper hold" for "10 to 20 minutes," Detective Park stopped the interview. He asked defendant to wait in the room and left for 5 to 10 minutes. When Detective Park returned, he read defendant *Miranda* warnings. Defendant declined to continue the interview and Detective Park escorted him back to the lobby.

¶ 9 Defendant testified he and Mitch were at a friend's birthday party and Mitch "had been drinking a lot." Defendant was the one who placed the call to 9-1-1 and believed Mitch to be unconscious when the paramedics removed Mitch from the apartment. When the police arrived, they told defendant and several others they "had to go to the police station for questioning." Defendant did not feel he had a right to refuse the officers' request. The police transported defendant and three other partygoers to the police station in a police squad car. After his arrival, defendant did not again see anyone he knew or anyone from the party.

¶ 10 When defendant arrived at the police station, an officer placed him in a room alone, "off the lobby," and told defendant to wait in that room. Defendant was never told he was free to leave. Defendant waited approximately an hour before he was taken to another room and interviewed by Detective Park. Detective Park did not read defendant *Miranda* warnings when

he began the initial interview. The interview lasted approximately 30 minutes before Detective Park exited the interview room and asked defendant to remain in the interview room. Detective Park was absent from the interview room for 5 to 10 minutes. When he returned, he read defendant *Miranda* warnings. Defendant declined to continue the interview and left the police station.

¶ 11 The State admitted an audio recording of defendant's interview into evidence. The trial court took the matter under advisement. On January 7, 2011, the court denied defendant's motion.

¶ 12 B. The Evidence At Trial

¶ 13 At a February 2011 jury trial, the following evidence was presented.

¶ 14 On September 26, 2009, defendant and Mitch attended a birthday party in Normal. It was undisputed Mitch was intoxicated and making a nuisance of himself. Several people from the party testified to multiple attempts to get Mitch to lie down in a room at the party and sleep off his intoxication.

¶ 15 The first attempt to remove Mitch from the party was made by defendant and Micah Yeagle, the host of the party. Micah testified he and the other partygoers took Mitch's alcohol from him and asked him to go to bed. When Mitch refused, Micah picked Mitch up and put him in Micah's bed. Mitch attempted to get back up, and Micah "pushed him back with [his] fingertips in his chest, just gently enough not to hurt him *** but to l[ie] him back down." Micah and defendant left Mitch on the bed with the lights off. Mitch remained in the room for less than 10 minutes, then returned to the party in the living room.

¶ 16 Micah testified Mitch was "really just too drunk" to partake in the party, yet he

continued to drink. Defendant and Micah tried to replace Mitch's alcohol with root beer and get him to lie down. They carried Mitch back to the bedroom together, each having one arm under Mitch, and put him back in the bed. Mitch tried to "pop up one more time" and they "gently pushed him back down and said [']Mitch, you need to go to sleep.['] " They turned off the lights and left Mitch in the bedroom. After putting Mitch down, Micah showered and left the party for a date, somewhere between 11 and 11:30 p.m.

¶ 17 Mitch did not remain in the room. Defendant testified Mitch behaved at first but began to "annoy people," so defendant attempted to return Mitch to the bedroom for a third time. Defendant told Mitch to lie down, but Mitch would not stay on the bed. Defendant "just push[ed] him back down onto the bed and sa[id] [']go to sleep.['] " Defendant and Mitch were in the room for approximately six minutes before defendant left the room for the third time. Mitch was lying on the bed when defendant left the room and "seemed asleep." Mitch remained in the room for two minutes and then returned to the party.

¶ 18 Defendant testified he was the only person in the room with Mitch on the fourth and final attempt to get Mitch to go to sleep. Defendant had to push Mitch onto the bed to get him to lie down, and he had to keep his hand on Mitch's chest to prevent him from getting back up. "Eventually, [defendant] decided that [he] should try to put [Mitch] in a sleeper hold to get him tired," to physically wear him out. Defendant testified this lasted for five minutes on and off and Mitch broke free from the "sleeper hold" several times. He also testified Mitch was still up and trying to leave the room when defendant left the room. Defendant left the room and gave up on his attempt to get Mitch to go to sleep because Mitch urinated on him. Defendant and one other person returned to the room shortly thereafter and found Mitch unresponsive, draped over a

table.

¶ 19 At approximately 12:13 a.m. defendant placed a call to 9-1-1, explaining Mitch was unresponsive and not breathing. Police and paramedics responded to the call. An ambulance took Mitch to the hospital. Mitch never regained consciousness and died later that afternoon.

¶ 20 Normal police transported defendant and several others to the police station for questioning, and Detective Park interviewed defendant. Although *Miranda* warnings had not been given before the interview, the interview was used by the State and admitted into evidence at trial. Defense counsel made no objection. An audio recording of the interview was played and the jury was provided a typed transcript of the interview. During the interview, defendant told Detective Park he was the last person in the room with Mitch before he was found unresponsive. Defendant said Mitch was drunk and had been "annoying" people at the party, so he attempted to get Mitch to lie down. Defendant "tr[ied] to put [Mitch] in a sleeper hold, and it seemed to *** work[], and he *** calm[ed] down." Defendant told Detective Park he did this "off and on" for "[t]en minutes, twenty minutes maybe."

¶ 21 Dr. John Scott Denton, a coroner's forensic pathologist, testified for the State. On September 28, 2009, at approximately 11 a.m., Dr. Denton performed an autopsy on Mitch. He testified the cause of death was lack of oxygen to the brain caused by compression, pressure, or strangulation of the neck. Mitch had 30 different injuries to his head and neck, a broken rib, bruises on his body, arms, chest, and buttocks. Mitch had external and internal bruising on his neck, larynx, throat, and windpipe. Dr. Denton concluded the injuries to Mitch's neck were consistent with asphyxia from a choke hold, and in order to cause death, the choke hold could

have been held for three to five minutes continuously or "could [have] be[en] multiple repetitive choke holds." Also present was evidence of petechia or burst blood vessels to Mitch's eyelids, which occurs when pressure is applied to a person's neck, cutting off the blood flow. Mitch had an injury to his tongue consistent with prolonged pressure to the tongue, which usually is a result of being chocked or strangled. He also reported the trauma and bleeding around Mitch's trachea would not be present from choking on vomit; it would only be present from a trauma to the throat. Dr. Denton ruled out any possibility Mitch died from alcohol or drugs.

¶ 22 During direct examination of Dr. Denton, the State asked Dr. Denton to explain what positional asphyxia is and if it was possible Mitch died from positional asphyxia. Dr. Denton explained positional asphyxia occurs when there is pressure on the diaphragm or chest and the chest cannot be inflated to obtain oxygen. He further explained this often happens to intoxicated persons who fall over a chair or end of a couch, causing them to be unable to breath. Dr. Denton concluded those types of positions would not "cause blunt trauma to the neck." Dr. Denton found "based on everything I, I saw and I read" Mitch could not have died from positional asphyxia and concluded with a reasonable degree of medical certainty Mitch's death was a homicide.

¶ 23 On February 17, 2011, the jury found defendant guilty of involuntary manslaughter of a household member. In June 2011, the trial court sentenced defendant to 8 1/2 years in prison, with 2 years of MSR and credit for 4 days previously served. On June 24, 2011, the first day of defendant's sentencing hearing, defendant filed a motion for reconsideration of motion to suppress and a motion for a new trial. The court denied those motions. On July 25, 2011, defendant filed a motion to reconsider sentence, and the court denied that motion.

¶ 24 This appeal followed.

¶ 25 II. ANALYSIS

¶ 26 On appeal, defendant argues (1) the trial court erred in denying defendant's motion to suppress, (2) the State did not prove defendant guilty of involuntary manslaughter of a household member beyond a reasonable doubt, and (3) the trial court abused its discretion in sentencing defendant. We agree with defendant's first contention and reverse and remand.

¶ 27 Defendant argues the trial court erred when it denied his motion to suppress. Defendant argues he was not read *Miranda* rights after being taken into custody, and therefore, his statements made without the benefit of a *Miranda* warning should not have been admitted as evidence at trial. The State argues defendant was not "in custody" when he made such statements. Thus, police were not required to read defendant his *Miranda* rights, and the court properly denied defendant's motion. We agree with defendant.

¶ 28 "In reviewing a circuit court's ruling on a motion to suppress, mixed questions of law and fact are presented." *People v. Pitman*, 211 Ill. 2d 502, 512, 813 N.E.2d 93, 100 (2004). The trial court's factual findings will be upheld unless they are against the manifest weight of the evidence. *Pitman*, 211 Ill. 2d at 512, 813 N.E.2d at 100. Ultimately, we review *de novo* the legal question of whether the evidence should be suppressed. *Pitman*, 211 Ill. 2d at 512, 813 N.E.2d at 101.

¶ 29 *Miranda* warnings need only be given prior to a "custodial interrogation." See *In re Tyler G.*, 407 Ill. App. 3d 1089, 1092, 947 N.E.2d 772, 775 (2010). A "custodial interrogation" is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

Miranda, 384 U.S. at 444. Whether a person is in custody depends upon "(1) the circumstances surrounding the interrogation and (2) given those circumstances, whether a reasonable person would have felt free to terminate the interview and leave." *Tyler G.*, 407 Ill. App. 3d at 1092, 947 N.E.2d at 775. The reasonable person standard mirrors what a person, innocent of any crime, would have thought had they been in defendant's situation. *Tyler G.*, 407 Ill. App. 3d at 1092, 947 N.E.2d at 775. Thus, "the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v. California*, 511 U.S. 318, 323 (1994).

¶ 30 Our supreme court has enumerated the following factors in considering whether an interrogation is custodial:

> "(1) the location, time, length, mood, and mode of questioning; (2) the number of police officers present during the interrogation; (3) the presence or absence of family and friends of the individual; (4) any indicia of a formal arrest procedure, such as the show of weapons or force, physical restraint, booking[,] or fingerprinting; (5) the manner by which the individual arrived at the place of questioning; and (6) the age, intelligence, and mental makeup of the accused." *People v. Slater*, 228 Ill. 2d 137, 150, 886 N.E.2d 986, 995 (2008).

On the facts of this case, after having examined and weighed the above factors, we must make an objective determination as to whether " 'a reasonable person, innocent of any crime,' would have

believed that he or she could [have] terminate[d] the encounter and was free to leave." *Slater*, 228 Ill. 2d at 150, 886 N.E.2d at 995 (quoting *People v. Braggs*, 209 Ill. 2d 492, 506, 810 N.E.2d 472, 482 (2003)).

¶ 31 At the hearing on defendant's motion to suppress, defendant testified the officers who arrived at the apartment told defendant he "had to go to the police station for questioning." Defendant said he did not feel he had a right to decline. Uniformed police officers transported defendant and several others to the police station in a marked squad car. Defendant was not accompanied by any family members or friends. Once defendant arrived at the station, he was placed in a separate room alone, off the lobby, for approximately an hour while he waited to be interviewed. At 2:34 a.m, Detective Park interviewed defendant for approximately 30 minutes, left the room for 5 to 10 minutes, and then returned and read defendant the *Miranda* warnings. Defendant's nearly two-hour detention was not a brief, nonintrusive encounter with the police.

¶ 32 Although no indicia of formal arrest, such as fingerprinting, handcuffing, or booking occurred, Detective Park never told defendant he was free to leave. See 3 Wayne LaFavre, Search & Seizure § 5.1(a), at 7-8 (2004) ("The consideration most frequently cited in the cases finding consent is that the police specifically advised the suspect that he was not under arrest or that he was free to leave if he wished ***. Likewise, the cases coming down on the ['in custody'] side of the issue often note that such explanation was lacking.") It is likely the mood of the interview was grave, as defendant's friend and roommate had been taken to the hospital in an unresponsive condition.

¶ 33 We conclude a reasonable person in defendant's situation would not have felt free to terminate the interview and leave the police station. We conclude defendant was in custody

for *Miranda* purposes and the trial court erred in denying defendant's motion to suppress. Defendant's pre-*Miranda* statements should not have been admitted at trial. We reverse defendant's conviction and remand.

¶ 34 Since we reverse and remand, we need not address the remaining issues on appeal. We review the sufficiency of the evidence to determine whether it sufficed for double jeopardy purposes. See *People v. Macon*, 396 Ill. App 3d. 451, 458, 920 N.E.2d 1224, 1230 (2009) ("where a conviction has been set aside because of an error in the proceedings leading to the conviction[,]" the State may retry the defendant; thus, the appellate court must review the sufficiency of the evidence to "prevent the risk of exposing [the] defendant to double jeopardy"). Upon careful review of the record in the light most favorable to the State, we conclude the evidence is sufficient to support the jury's verdict beyond a reasonable doubt. Our determination is not binding on retrial and does not express this court's opinion as to defendant's guilt or innocence.

¶ 35 III. CONCLUSION

¶ 36 We reverse the trial court's denial of defendant's motion to suppress, reverse defendant's conviction, and remand.

¶ 37 Reversed and cause remanded.

¶ 38 JUSTICE STEIGMANN, specially concurring.

¶ 39 Although I agree with the majority, I write specially to emphasize a troubling aspect of this case. That is, the police decided to interrogate defendant in the apparent belief that they did not need to first give him the *Miranda* warnings. But if that was their intent, the police seemingly disregarded both how they conducted their interrogation and where they chose to do it.

¶ 40 The parties agree that (1) defendant did not intend to kill Mitch and (2) defendant was the person who called 9-1-1, explaining that Mitch was unresponsive and not breathing. Police and paramedics responded to the call, and Mitch was taken to the hospital.

¶ 41 Under these circumstances, no one should have been surprised, including defendant, that the police would want to talk to him and the others who were present in the apartment about what had happened. Because the police did not give the *Miranda* warnings to defendant before he was interrogated, he moved to suppress the statements he made to them, claiming that he gave those statements when he was subject to a custodial interrogation.

¶ 42 As the majority correctly points out, the *Miranda* warnings are required only when the police conduct a custodial interrogation. That means that the police may interrogate a person who is not in custody without giving those warnings. Thus, the issue in this case is whether the defendant was in custody at the time the police interrogated him. That the police (1) directed him back to the police station for this interrogation and (2) had him then wait by himself in a room there for over an hour before he was interrogated constitute the strongest factors supporting defendant's claim that he was in custody.

¶ 43 As the Supreme Court of Illinois pointed out in *Slater*, the first factors a court should consider in deciding whether an interrogation was custodial were "the location, time,

length, mood, and mode of the questioning." *Slater*, 228 Ill. 2d at 150, 886 N.E.2d at 995. So, given the circumstances of this case, would a reasonable person in defendant's position have felt free to terminate the interview and leave the police station? The majority concludes not, and I agree.

¶ 44 Contrast what the police did in this case with a hypothetical situation in which the police interview defendant and the others but choose to do so in the apartment to which the police were summoned. I understand that good police work would likely require these people to be separated when they are interviewed, but I doubt that would have posed any difficulty had the police so requested. After all, these people were all willing to go to the police station and be separately interviewed there. Had the interrogations occurred in the apartment or, alternatively, almost *any* other location on the college campus (such as some nearby fast food restaurant that was open late), defendant would have had almost no colorable basis to even argue that his interrogation was custodial.

¶ 45 I made this same point over 20 years ago when writing for this court in *People v. Gorman*, 207 Ill. App. 3d 461, 470-71, 565 N.E.2d 1349, 1355 (1991), as follows:

> "Whenever the police choose to conduct 'non-custodial interrogations' at the police station, there is a substantial risk that a court subsequently will disagree that the circumstances were non-custodial. [Citations.] This risk arises because police stations are typically the location of custodial interrogations, thereby giving credibility to a suspect's claim that he believed himself to be in custody despite police testimony about how they treated the

suspect. The interrogating officers ought to know that if the suspect makes incriminating statements and is later arrested, a motion to suppress those statements assuredly will be filed, and the defendant, as in the present case, is almost certain to testify that he believed he was in custody at the time he made those statements. The issue of defendant's custody then becomes a question of fact to be resolved by the trial court in accordance with the criteria discussed earlier. By choosing the police station as the location for their allegedly 'non-custodial interrogations,' police officers give defendants, who later claim they believed they were in custody, the greatest possible advantage to support that claim. As in this case, the setting of the interrogation will be subject to very close scrutiny to see what support it lends to defendant's claim of custody. The placement of furniture, the size of the room, the presence of armed officers, whether doors were opened or closed (and if closed, whether they were locked), the transport of the suspect into the depths of a building where ingress and egress is typically controlled by security measures, all might give support to a defendant's claim that he did not believe himself free to leave.

Perhaps the best means of demonstrating the risk of finding coercion whenever a suspect is interrogated at a police station is to ask whether the same arguments made by the suspect ('I was taken

> to a small room, the door was closed, and I was told to wait, other armed officers were present, *et cetera*') would sound nearly as credible or persuasive if the interrogation had occurred instead at the local Burger King restaurant, a nearby park, the suspect's own residence, or in any location of the *suspect's* choosing. We think not, and the case law in point supports that conclusion."
>
> (Emphasis in original.)

¶ 46 By this special concurrence, I wish to reiterate the concerns expressed in *Gorman* and to again put the police on notice that requiring individuals to come to the police station in order to conduct "noncustodial interrogations" is the single worst thing the police can do to undermine their claim that the interrogations were in fact noncustodial.