2016 IL App (5th) 130377-U

NO. 5-13-0377

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 12-CF-647
	)	
TIMOTHY HILLYER,	)	Honorable
	)	Zina R. Cruse,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Presiding Justice Schwarm and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held*: Defense counsel's failure to request a withdrawal instruction constitutes ineffective assistance of counsel and amounts to prejudicial error. Accordingly, we reverse defendant's conviction for concealment of a homicidal death and remand for a new trial and further directions consistent with this order.

¶ 2 After a jury trial in the circuit court of St. Clair County, defendant, Timothy Hillyer, was convicted of concealment of a homicidal death based on a theory of accountability (720 ILCS 5/9-3.4(a) (West 2010)) and sentenced to 30 months' probation. In this direct appeal, defendant raises the following issues: (1) whether the State proved him guilty beyond a reasonable doubt; (2) whether defense counsel was ineffective for

failing to request a jury instruction on withdrawal; (3) whether his rights to counsel and due process were violated when the police obtained certain statements from him; (4) whether he was denied a fair trial due to the State's introduction of a custodial statement from him in which he asked for a lawyer who could negotiate with the State about a "reduced charge", or, alternatively, by counsel's failure to object to the introduction of that statement; and (5) whether he is entitled to an increase in credit for time served in presentence custody. We reverse and remand for a new trial.

¶ 3 BACKGROUND

¶ 4 Defendant was married, but lived only intermittently with his wife, Marsha. When not living with his wife, defendant stayed at a trailer in Collinsville with Jeff Sminchak and the victim, Russell Miller. Defendant usually slept in a tent behind the trailer. On April 23, 2012, defendant called 911 and reported there was a dead body on the property where the trailer is located. A forensic pathologist, Dr. Raj Nanduri, testified that the body of the victim was badly decomposed, but he determined that the victim died as the result of "a homicidal violent death."

¶ 5 Defendant was interviewed by police at the police station the day he reported finding a body and on each of the three following days. The video of the first interview shows defendant having difficulty signing the *Miranda* form. Defendant explained his right hand is weak because he suffered two strokes in recent years. Defendant was arrested after the second interview. The second interview was terminated after defendant asked to speak to an attorney. The detective told defendant the police could not talk to him anymore unless defendant specifically asked to talk to police. As the detectives left

the room, one of them, Detective Mark Krug, stated, "We're talking to your wife a couple rooms over, just so you know." Approximately 17 minutes later, Major David Roth entered the room where defendant was sitting and told defendant he was under arrest. Roth also told defendant he called the State's Attorney's office and asked for immunity for defendant, but the State's Attorney was unwilling to grant defendant immunity.

¶ 6 Defendant was taken into custody at 6:48 p.m. and was placed in a cell overnight. Defendant complained of being cold and Detective Krug acknowledged there was a problem with the heating and air conditioning at the police station. Defendant testified his cell was bright, making it difficult for him to get any sleep in the jail. Krug admitted the lights are on at all times in the cellblock where defendant was held.

¶ 7 The day following defendant's arrest, the police called defendant's wife and told her defendant needed his medications. Detectives picked up Marsha and drove her to the station. Major Roth met her at the front desk when she dropped off the medications and talked to her. They went outside and smoked a cigarette together. According to Marsha, Roth told her defendant "refused to talk any further" and had requested an attorney. Roth told Marsha the police really wanted to get defendant to talk because at this point defendant was going to be charged with murder. Roth held up his hand and indicated murder was high, but then moved his hand down and said that if defendant talked the charge would be "a lesser charge." Marsha testified Roth asked her several times if she could talk to defendant and persuade him to talk about the case and give the police more information. Marsha was not sure what to do, but ultimately agreed to talk to defendant.

¶ 8 Major Roth admitted he talked to Marsha at the station that day, but denied urging her to talk to defendant after he requested an attorney. He did not recall telling Marsha that defendant could be charged with murder or a lesser offense and using hand gestures to indicate the difference. Roth said Marsha asked him for information about the case, and he told her defendant was being held on a homicide. According to Roth, Marsha asked to speak with defendant and told Roth that defendant "needs to tell you whatever he knows."

¶ 9 The police arranged for Marsha and defendant to meet. At that point, defendant had been in custody for approximately 18 hours. Defendant testified an officer came to his cell and asked if he wanted to speak with his wife. Defendant agreed and met his wife in an interview room where they spoke for approximately 15 minutes. Marsha told defendant about her conversation with Roth and urged defendant to talk to the police because they were going to charge him with murder whether he killed the victim or not. Defendant testified that Marsha told him he might be charged with a lesser offense if he talked to the police about what he knew. After talking to his wife, defendant told an officer he wanted to talk to the detectives again. Defendant said he would not have asked to speak with the detectives again if he had not spoken to his wife.

¶ 10 A video shows an officer confirming that defendant wanted to speak to detectives. The video also shows that defendant requested a blanket because he was "freezing." The video shows another officer giving defendant a blanket a few minutes later. Detectives Mueth and Krug entered the room approximately 10 minutes later and Mueth left immediately to get a space heater. Krug showed defendant the *Miranda* form defendant

previously signed and defendant said he understood those rights were still in effect. Krug admitted defendant was "more tired" and "drained" than in his previous interviews.

¶ 11 Defendant told the detectives his wife suggested he ask them what the charges were and whether they could be reduced if he gave them information. Krug told defendant they could not make any promises or deals. Defendant explained that was why he asked for an attorney the previous day because he wanted to get the State's Attorney's office involved. Krug told defendant the police were talking to the State's Attorney's office. The detectives then interviewed defendant for approximately two hours before defendant returned to his cell.

¶ 12 On April 26, 2012, at 11:37 a.m. Detectives Mueth and Mason met with defendant, who was wrapped in a blanket. Mueth testified defendant was "upset" and "emotional" during this interview, which lasted approximately three hours. They gave defendant *Miranda* warnings again. Defendant complained about how light it was in his cell, and Mueth agreed it is difficult to sleep in the cells because the lights are so bright. Defendant told the detectives he was not going to be able to protect his family and knew he was going to go to jail because Roth told him he could not get immunity.

¶ 13 During this interview, defendant told Mueth and Mason he believed Sminchak strangled the victim. Defendant made incriminating statements about attempting to help Sminchak move the victim's body, but said he "couldn't" do it. At the end of the interview, defendant repeated his wife's prediction that he was going to be charged with murder and he was going to go to jail for Sminchak.

¶ 14 Ultimately, the trial court issued an order allowing the State to introduce into evidence the DVDs of all four interviews at trial. The trial court specifically noted defendant was read his *Miranda* rights, treated well, and "was not in custody until some time [*sic*] during the second interview, his Constitutional rights were respected, his waivers were knowing and voluntary." The trial court believed Marsha "was acting as a responsible citizen and wife," not an agent of police when she talked to defendant. The trial court found the facts did not prove the police planted information and put Marsha in a position to convince defendant to talk despite his request for an attorney. The trial court ordered the attorneys to work together with regard to making appropriate redactions to the DVDs.

¶ 15 At trial, the evidence showed that the victim disappeared sometime after March 26, 2012. Mark Reinacher, the victim's friend and coworker, formally reported the victim missing on April 15, 2012. Reinacher was aware that the victim and Sminchak had problems getting along. Reinacher recounted how the victim told him about an argument he had with Sminchak over a wood stove in the trailer during which Sminchak hit the victim, and the victim called police. Reinacher testified that after the victim disappeared, he noticed a "real bad smell" by the garage similar to a "mouse that's been dead in a trash can." Reinacher also noticed that the victim's dog had been placed on "a very short leash" outside the trailer.

¶ 16 On April 23, 2012, the police received a call that a dead body had been found at the trailer. Defendant and Sminchak met the police at the trailer and directed them to the victim's body, which was lying underneath a tarp. The officers detected a strong, foul

odor consistent with a decaying body. Detectives Krug and Mueth spoke separately with defendant and Sminchak at the scene. Defendant told Krug that earlier that day Sminchak told him to call the police because "we found Russ." Defendant told Krug he did not know how the victim ended up there.

¶ 17 The State played all four of defendant's redacted interviews for the jury. Defense counsel renewed his objection to the third and fourth interviews. The trial court overruled the objections. The main evidence against defendant was statements he made during the fourth interrogation. During that interview, defendant told police he did not say anything earlier because he was afraid for himself and his family. Defendant described Sminchak as "the kind of person that would kill my kids, and then he'd probably sit down and eat a meal." Defendant said the incident between Sminchak and the victim occurred on March 29, 2012, and concerned drugs and money.

¶ 18 Defendant told police he believed Sminchak strangled the victim. Defendant said he heard yelling and then a gasping or gurgling sound in the living room of the trailer. He also heard a "thumping" sound, like someone being hit. Defendant was outside of the trailer and was too scared to go inside. Defendant went back to his tent. When he went back to the trailer about 15 minutes later, he found Sminchak inside the trailer smoking a cigarette.

¶ 19 The victim was lying on the floor in the hallway on his back. The victim was purple, so defendant assumed he was dead. When defendant asked Sminchak what happened, Sminchak replied, "Nothing." Sminchak told defendant he "needed a hand."

Sminchak got a clear, long, plastic bag and lifted the victim up by his shirt collar and put the bag over him. Sminchak directed defendant to grab the victim's head and help him carry the victim out of the trailer. Defendant said he "dropped his end" and told Sminchak he "couldn't" do it.

¶ 20 Defendant told the detectives, "I couldn't carry him. I had no grip in my hand. I was shaking like a leaf *** I dropped my end. I told him I couldn't [inaudible]. So he drug him the rest of the way out of there, and threw him out like a piece of garbage." Defendant also told the detectives he set the victim down in the hallway inside the trailer. According to defendant, Sminchak drug the victim outside of the trailer, rolled him over, and layered beer cans and clothes on top of him.

¶ 21 Defendant told the detectives he stayed in the trailer that night, but could not sleep because he was afraid Sminchak would kill him. Sminchak left the trailer about 5:30 a.m. the following morning. When detectives asked defendant where his clothes from that day were, he said he threw them away because he had urinated on them. Sminchak returned that evening and acted like nothing had happened. Defendant took the dog for a walk and noticed a tarp over the victim's body. Defendant denied seeing Sminchak place the tarp over the victim's body. Sminchak told defendant to forget about what happened and everything would be okay. When defendant asked if they could at least bury the body, Sminchak told defendant not to worry about it.

¶ 22 Defendant admitted he failed to say anything to visitors to the trailer about what had happened to the victim, but he hoped someone would find the victim's body.

Defendant said he knew he would be in trouble for not saying anything, but also knew he would be in trouble with Sminchak if he did say something. Defendant said the last time he saw Sminchak was April 8, 2012, and he was unaware of Sminchak's current whereabouts.

¶ 23 After the jury watched the fourth videotaped interview, Detective Mueth testified defendant was definitely afraid of Sminchak and afraid for his own family. Mueth testified that no one had yet been charged with the victim's murder nor had anyone besides the defendant been charged with concealing the victim's body.

¶ 24 The trial court granted the State's request for a jury instruction on accountability and defendant's request for a lesser-included offense instruction on attempted concealment of a homicidal death. The jury found defendant guilty of concealment of a homicidal death. The trial court denied defendant's motion for a new trial. After a hearing, defendant was sentenced to 30 months' probation. Defendant filed a timely notice of appeal.

¶ 25 ANALYSIS

¶ 26 The first and second issues raised are interrelated and dispositive of this appeal; thus, we will address them together. The first issue raised by defendant is whether the evidence was sufficient to prove beyond a reasonable doubt that he was accountable for Sminchak's concealment of the victim's homicidal death. Defendant insists the State failed to prove beyond a reasonable doubt that he shared Sminchak's criminal intent to conceal the victim's death. Moreover, even assuming *arguendo* that the State proved

criminal intent, defendant insists he terminated his accountability by entirely withdrawing from the offense and communicating his withdrawal to Sminchak. Finally, defendant contends that given the evidence, his trial counsel was ineffective for failing to offer an instruction on withdrawal (Illinois Pattern Jury Instruction (IPI) 5.04) as a defense to the State's accountability theory.

¶ 27 The State replies that the facts show defendant was a participant who was aware that Sminchak was preparing to conceal the body. The State further replies that defendant never legally withdrew from the offense, but terminated participation only because he could not physically continue to assist defendant drag the body of the victim out of the residence; thus, any attempt by defense counsel to offer a withdrawal instruction would have been futile. After careful consideration, we agree with defendant that failure to offer a withdrawal instruction constitutes reversible error and he is entitled to a new trial.

¶ 28 Section 9-3.4 of the Criminal Code provides:

> "Concealment of homicidal death. (a) A person commits the offense of concealment of homicidal death when he or she knowingly conceals the death of any other person with knowledge that such other person has died by homicidal means.
>
> ***
>
> (b-5) For purposes of this Section:

'Conceal' means the performing of some act or acts for the purpose of preventing or delaying the discovery of a death by homicidal means. 'Conceal' means something more than simply withholding knowledge or failing to disclose information." 720 ILCS 5/9-3.4 (West 2012).

In the instant case, the State proceeded under an accountability theory.

¶ 29 The Illinois Criminal Code of 2012 provides that a person is accountable for the conduct of another if "either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2012). Under the Illinois accountability statute, the State may prove the defendant's intent to promote or facilitate an offense by showing either of the following: (1) that the defendant shared in the criminal intent of the principal, or (2) that a common criminal design existed. *People v. Fernandez*, 2014 IL 115527, ¶ 21, 6 N.E.3d 145.

¶ 30 In common design rule cases, "the defendant intentionally sets out to promote or facilitate the commission of a crime" so that " 'where one aids another in the planning or commission of an offense, he is legally accountable for the conduct of the person he aids; and that the word "conduct" encompasses any criminal act done in furtherance of the planned and intended act.' " *Fernandez*, 2014 IL 115527, ¶ 21, 6 N.E.3d 145 (quoting *People v. Kessler*, 57 Ill. 2d 493, 497, 315 N.E.2d 29, 32 (1974)). Thus, as explained by our supreme court in *Fernandez*, the common design rule applies only in situations where

the offense the defendant intended to aid or abet and the offense actually committed by the principal are different. That is not the situation here.

¶ 31 The only question in the instant case is whether defendant shared in the criminal intent of the principal. We point out that consent to the commission of the crime, or mere knowledge of it, is insufficient to establish aiding or abetting. *People v. Martinez*, 242 Ill. App. 3d 915, 923, 611 N.E.2d 1027, 1032 (1992). Moreover, the mere presence of the defendant at the scene of the crime is insufficient to make the defendant accountable, even if it is coupled with the defendant's flight from the scene or the defendant's knowledge that a crime has been committed. *Martinez*, 242 Ill. App. 3d at 923, 611 N.E.2d at 1032. A defendant's mental state is ordinarily proved circumstantially by inferences reasonably drawn from the evidence. See *People v. Earl*, 104 Ill. App. 3d 846, 433 N.E.2d 722, 725 (1982).

¶ 32 When a reviewing court is presented with a challenge to the sufficiency of the evidence, it is not our function to retry a defendant. *People v. Givens*, 237 Ill. 2d 311, 334, 934 N.E.2d 470, 484 (2010). Rather, we must consider " 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *People v. Davison*, 233 Ill. 2d 30, 43, 906 N.E.2d 545, 553 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Under this particular standard, a reviewing court must draw all reasonable inferences from the record in the prosecution's favor. *Davison*, 233 Ill. 2d at 43, 906 N.E.2d at 553. A reviewing court should not overturn a defendant's conviction "unless the evidence is so improbable or unsatisfactory

that it creates a reasonable doubt of the defendant's guilt." *Givens*, 237 Ill. 2d at 334, 934 N.E.2d at 484.

¶ 33 At trial, the State alleged defendant was accountable for Sminchak's actions in concealing the victim's homicidal death. The State admits that the evidence against defendant consists primarily of statements he gave to investigators. During the fourth interview defendant stated his belief that Sminchak strangled the victim. Defendant said he heard yelling inside the trailer and then a gasping or gurgling sound. He was too scared to go inside the residence. He returned to his tent, but upon his return approximately 15 minutes later, he found Sminchak inside smoking a cigarette with the victim lying on the floor in the hallway. Defendant believed the victim was deceased. Defendant watched as Sminchak wrapped the victim in a clear plastic bag. Sminchak directed defendant to grab the victim's head as he was carrying the victim toward the back door. Defendant said he "dropped his end" and told Sminchak he "couldn't" do it. Sminchak then completed the task of getting the victim outside where he layered beer cans and clothes on top of the victim. Defendant then took the dog for a walk and when he returned, he noticed a tarp on top of the victim.

¶ 34 While we might find differently, we cannot say that the evidence was so improbable or unsatisfactory as to create a doubt that defendant shared Sminchak's criminal intent to conceal the victim's body as required under an accountability theory. Viewing the evidence in the light most favorable to the prosecution, defendant's own statement is his undoing. Defendant admitted he helped pick up the body of the victim and tried to assist Sminchak in removing the victim's body from the trailer. While he did

not complete the task, he watched as Sminchak took the body outside the trailer and covered it with beer cans and clothes. However, after careful consideration, we agree with defendant that there is a factual question as to whether he withdrew from the offense.

¶ 35 A defendant will not be held accountable for the conduct of another if, "before the commission of the offense, he or she terminates his or her effort to promote or facilitate that commission and *** (i) wholly deprives his or her prior efforts of effectiveness in that commission, (ii) gives timely warning to the proper law enforcement authorities, or (iii) otherwise makes proper effort to prevent the commission of the offense." 720 ILCS 5/5-2(c)(3) (West 2012). In order to withdraw from a crime, a defendant must not merely withdraw, but also effectively communicate his intent to withdraw. *People v. Rybka*, 16 Ill. 2d 394, 406, 158 N.E.2d 17, 23 (1959). The trier of fact must be able to find that the accused wholly and effectively detached himself from the criminal enterprise before the crime is in the process of consummation or has become so inevitable that it cannot reasonably be stayed. *Rybka*, 16 Ill. 2d at 406, 158 N.E.2d at 23.

¶ 36 In his fourth statement to police, defendant specifically stated he dropped the end of the victim he was holding and told Sminchak he "couldn't" do it. Thus, if believed, defendant effectively communicated his intent to withdraw from the offense before the victim's body was even removed from the trailer. Under these circumstances, the trier of fact could have found that defendant wholly detached himself from the crime.

¶ 37 A defendant is entitled to the submission of appropriate jury instructions on the law applicable to his theory of defense if there was evidence introduced at trial in support of that theory. *People v. Thomas*, 175 Ill. App. 3d 521, 528, 529 N.E.2d 1071, 1075 (1988). This is so even in instances where the evidence is "slight." *People v. Everette*, 141 Ill. 2d 147, 156, 565 N.E.2d 1295, 1298 (1990). We agree with defendant that under the circumstances presented here counsel's failure to request a withdrawal instruction (IPI 5.04) constitutes ineffective assistance.

¶ 38 In order to prevail on a claim of ineffective assistance of counsel, the defendant must show: (1) counsel's performance fell below an objective standard of reasonableness; and (2) but for counsel's errors, there is a reasonable probability the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Failure to instruct the jury on an affirmative defense and on the State's burden of proof for that defense constitutes serious error. *People v. Pegram*, 124 Ill. 2d 166, 174, 529 N.E.2d 506, 509 (1988). "Where defense counsel argues a theory of the case, such as an affirmative defense, but then fails to ensure that the jury is properly instructed on that theory, that failure cannot be called trial strategy." *People v. Gonzalez*, 385 Ill. App. 3d 15, 21, 895 N.E.2d 982, 988 (2008).

¶ 39 Here, defense counsel argued in closing that even if the jury accepted the fact that defendant picked up the victim and was intending to commit the crime, "he stopped because he couldn't hold him or he couldn't pick him up physically, then why wouldn't he have helped Mr. Sminchak when he was covering him up?" Defense counsel pointed out defendant did not assist Sminchak, he just stood back "and that is not guilty of

concealment of a homicidal death, just standing there not reporting it." Thus, defendant was entitled to a withdrawal instruction and defense counsel's failure to request IPI 5.04 instruction constitutes ineffective assistance of counsel.

¶ 40 The State cites several cases in support of its contention that a withdrawal instruction was properly denied. However, we find all cases distinguishable from the instant case. For example, in *People v. Trotter*, 254 Ill. App. 3d 514, 626 N.E.2d 1104 (1993), defense counsel was held not to be ineffective for not requesting a withdrawal instruction because such an instruction was not warranted where the defendant merely walked away after hitting the victim who was beaten and killed by the remainder of the group. In the instant, case, in his statement to police, defendant was adamant that he neutralized his efforts by putting the victim down and communicating to Sminchak that he could not participate.

¶ 41 After considering the record before us, we find there is a reasonable probability that the jury would have found defendant withdrew from Sminchak's offense had they been given that option. As previously set forth, the evidence against defendant is far from overwhelming. Accordingly, we find defense counsel's failure to request a withdrawal instruction (IPI 5.04) constitutes ineffective assistance. Because defendant was deprived of his right to effective assistance of counsel, we must reverse his conviction and remand for a new trial.

¶ 42 Our finding that defendant is entitled to a new trial does not preclude us from reaching the issue of whether the police violated defendant's right to counsel under the

fifth amendment (U.S. Const., amend. V) and his right to due process guaranteed by the fourteenth amendment (U.S. Const., amend. XIV) by obtaining custodial statements from him without counsel present as this issue will reappear in a new trial. Defendant insists he made it clear at the end of his second interview that he wanted to speak with counsel who could negotiate with the State on his behalf. While the police stopped the interview, they failed to give him access to a lawyer. Instead, a commanding officer told defendant he contacted the State's Attorney's office and was informed there would be no negotiation. Defendant insists the police used coercive tactics, including holding him overnight in a cold, brightly lit cell and arranging for his wife to convince him to talk to police, which violated his rights, thereby making his subsequent two statements inadmissible. The State replies that the trial court properly denied defendant's motion to suppress statements because defendant voluntarily agreed to speak to investigators after having invoked his right to counsel.

¶ 43 When reviewing a trial court's decision on a motion to suppress statements, we give deference to that court's factual findings and will reverse only if they are against the manifest weight of the evidence. *People v. Dilworth*, 169 Ill. 2d 195, 201, 661 N.E.2d 310, 314 (1996). It is only when neither the facts nor the credibility of the witnesses is questioned that the issue becomes a question of law and is subject to *de novo* review. *Dilworth*, 169 Ill. 2d at 201, 661 N.E.2d at 314. Here, the credibility of witnesses is in issue. Defendant disputes the detectives' testimony and challenges their credibility; thus, we review under the manifest weight standard.

¶ 44 Statements made to the police pursuant to custodial interrogation are admissible provided that the defendant has voluntarily, knowingly, and intelligently waived his rights. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). An express written or oral statement by the accused of his desire to waive the right to remain silent or the right to counsel is not required for a valid waiver, although it is considered strong proof of waiver. *North Carolina v. Butler*, 441 U.S. 369, 373 (1979). A defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may support a conclusion that the defendant has waived his rights. *Butler*, 441 U.S. at 373. Waiver can be inferred from the actions and words of the person interrogated. *Butler*, 441 U.S. at 373. The question of waiver must be determined on the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused. *Butler*, 441 U.S. at 374-75. Once an accused has been advised of his *Miranda* warnings and acknowledges his understanding of them, the voluntariness of his subsequent statement is not compromised by the police's failure to repeat the warnings at each successive interview. *People v. Hobley*, 159 Ill. 2d 272, 294, 637 N.E.2d 992, 1002 (1994).

¶ 45 In the instant case, defendant was properly advised of his *Miranda* rights before the interviews commenced. He signed a *Miranda* waiver prior to the first interview and was at least made to confirm he knew his *Miranda* rights from the previous reading prior to the following interviews. At the end of the second interview, defendant stated, "This is the part where I say you go get me a lawyer and he tells me that if I get immunity for telling you what I saw, we'll sign off." The detectives interpreted this to mean that

defendant was invoking his right to counsel and immediately ended the interview. Detectives specifically told defendant they could not talk to him again unless he asked to talk with them.

¶ 46 While the detectives were exiting the room, Detective Krug was forthright with defendant and told him they were going to go talk to his wife who was at the police station. Defendant was placed under arrest 17 minutes later by Major Roth. Roth informed defendant that he called the State's Attorney's office, but prosecutors were unwilling to negotiate. There was no evidence presented that Major Roth implied or suggested to defendant that based upon the State's Attorney's office's refusal to grant immunity, defendant should surrender his previously invoked right to counsel. Major Roth merely communicated a statement of fact to defendant.

¶ 47 Furthermore, we are unconvinced by defendant's argument that his right to an attorney was violated because the police directed defendant's wife to "cajole" him into speaking to them. Major Roth and Marsha's testimony conflicted, and it is clear the trial court accepted Roth's version of events. Major Roth admitted that he talked to Marsha, but denied urging her to talk to defendant after he requested an attorney. Roth testified Marsha asked him about the case when she came to the station to deliver defendant's medication, and he told her defendant was going to be charged with homicide. Marsha then asked to speak to defendant and she told Roth defendant "needs to tell you whatever he knows." Thereafter, an investigator asked defendant if he wanted to speak to Marsha, and defendant said he did. A meeting was arranged.

¶ 48 A defendant's voluntary decision to see and speak with a close relative does not trigger the central concerns behind *Miranda* nor does it necessarily produce any more compulsion than that which is inherent in any custodial situation. *People v. Whitehead*, 116 Ill. 2d 425, 439, 508 N.E.2d 687, 691 (1987). In fact, "[s]upport from family members is likely to alleviate the coercive elements of custodial interrogation and should not be discouraged." *Whitehead*, 116 Ill. 2d at 440, 508 N.E.2d at 692. Accordingly, based upon the record before us, defendant has failed to convince us that police incited or coached Marsha into getting defendant to confess.

¶ 49 We are also unconvinced by defendant's argument that the physical conditions at the police station added undue pressure on him to speak to the police. The videotapes confirm the conditions were cold, but they also confirm that the police immediately supplied defendant with a blanket and a space heater when he complained about the temperature. The police also agreed with defendant that it was in fact bright in his cell when he complained about the brightness. While Detective Krug admitted that defendant was "more tired" and "drained" than in previous interviews, the record fails to show defendant was so sleep deprived or exhausted that he was not capable of making a conscious decision to talk to the detectives.

¶ 50 Finally, we have reviewed the cases cited by defendant in support of his argument that his rights were violated by introduction of statements made during the third and fourth interviews after he invoked his right to an attorney and find them distinguishable from the case at bar. For example, in *People v. McCauley*, 163 Ill. 2d 414, 645 N.E.2d 923 (1994), relied on by defendant, defense counsel arrived at the police station and

introduced himself as the defendant's counsel and asked to speak to the defendant. The detectives not only refused to allow counsel to speak with the defendant, but they also failed to notify the defendant that his counsel was present. *McCauley*, 163 Ill. 2d at 418-19, 645 N.E.2d at 927. Here, the police did not block or prohibit defendant from speaking to an attorney.

¶ 51 Under these circumstances, we cannot say the trial court erred in denying defendant's motion to suppress. The record shows defendant reinitiated contact with investigators. Defendant has failed to convince us that his decision to talk further with investigators was a violation of his right to counsel. Accordingly, upon remand, these statements can be admitted during trial.

¶ 52 With regard to the final issue raised in this appeal, the State concedes defendant is entitled to an additional four days of presentence credit for time served.

¶ 53 CONCLUSION

¶ 54 For the foregoing reasons, we reverse the judgment of the circuit court and remand for a new trial. Upon remand, all four of defendant's taped statements may be introduced into evidence, and defendant is entitled to an additional four days of credit for time served.

¶ 55 Reversed and remanded with directions.