

NOTICE
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2018 IL App (4th) 160141-U

NO. 4-16-0141

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

November 5, 2018

Carla Bender

4th District Appellate Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Sangamon County
CAMMIE KELLY,)	No. 11CF385
Defendant-Appellant.)	
)	Honorable
)	John W. Belz,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Holder White and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err by denying defendant’s motion to suppress the evidence where the totality of the circumstances did not show a reasonable person would have felt unable to end the interview and leave.

¶ 2 In May 2011, the State charged defendant, Cammie Kelly, by information with three counts of first degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2010)) for the death of K.G., who was 11 months old at the time of his death. A grand jury later indicted defendant on an additional charge of aggravated battery of a child (720 ILCS 5/12-4.3(a) (West 2010)). In August 2014, defendant filed a motion to suppress all of her statements made during her January 20, 2011, interrogation at the Springfield Police Department. The State filed a response, asserting defendant was not in police custody during the interview. After a hearing, the Sangamon County circuit court denied defendant’s motion to suppress in January 2015.

¶ 3 After a December 2015 trial, a jury found defendant guilty of the lesser charge of

involuntary manslaughter. In January 2016, defendant filed a motion for a new trial, asserting, *inter alia*, the circuit court erred by denying defendant's suppression motion. At a joint February 2016 hearing, the court denied defendant's posttrial motion and sentenced her to four years' imprisonment for involuntary manslaughter. Defendant filed a motion to reconsider her sentence, which the court denied. Defendant appeals, contending (1) the circuit court erred by denying her motion to suppress because she was subject to a custodial interrogation without being advised of her rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and (2) the circuit clerk erred by imposing fines on defendant. We affirm.

¶ 4

I. BACKGROUND

¶ 5 On January 18, 2011, defendant, who was 63 years old, was operating a day care in her apartment, and one of the children in her care was K.G. That day, K.G. collapsed while in defendant's care and died two days later.

¶ 6 Defendant's August 2014 motion to suppress sought to suppress all of her statements made during her January 20, 2011, interrogation at the Springfield Police Department. Defendant argued her statements were involuntary because, *inter alia*, the interview was inherently coercive and she was subjected to duress during the interrogation. She also asserted she was not given her constitutional rights before the custodial interrogation began. The State filed a response, asserting defendant's statements were voluntary and she was not in police custody during the interview. On November 13, 2014, the circuit court commenced the hearing on defendant's motion to suppress. Defendant presented (1) the testimony of Rick Dhabalt, a detective with the Springfield Police Department; (2) Dhabalt's police report; (3) the transcript of the January 20, 2011, interview of defendant; and (4) the videotape of that interview.

¶ 7 Detective Dhabalt testified he was the lead investigator on K.G.'s case. On the

day of K.G.'s injury, he went to defendant's apartment and took a general statement from defendant and received general information. In the early morning hours of January 19, 2011, Detective Dhabalt spoke with doctors at St. John's Hospital, who informed the detective K.G.'s injuries were not accidental and K.G. was the victim of shaken baby syndrome. After learning that information, Detective Dhabalt considered defendant a suspect. At 10:15 a.m. on January 20, 2011, Detective Dhabalt was on a conference call with Dr. Channing Petrak, other medical personnel, and others involved in investigating the case. Dr. Petrak reported K.G. had suffered extensive bilateral retinal hemorrhages consistent with trauma. K.G. also had a right side hemorrhage and swelling on both sides of his brain with more swelling on the right side. Dr. Petrak had also observed bruising on K.G.'s upper left ear and the left side of his neck. She explained the bruise on the top of K.G.'s ear would have been caused by either a pinch, pull, or striking force. Detective Dhabalt relayed to Dr. Petrak defendant's description of what took place on January 18, 2011. Dr. Petrak believed defendant's description of the events was inconsistent with the medical findings. Dr. Petrak also stated K.G. was going to die.

¶ 8 After the conference call, defendant called Detective Dhabalt to find out what was going on. Detective Dhabalt and Detective Mike Flynn picked defendant up at her apartment and drove her to the police station. The detectives did not drive a marked patrol vehicle and were wearing plain clothes. Defendant was not handcuffed, and she sat in the front seat of the car. On the way to the police station, defendant told the detectives she had a problem with her eye and had a doctor's appointment that afternoon. The detectives assured defendant she would be allowed to go to her doctor's appointment. They arrived at the police station at around 12:56 p.m. The detectives recorded their interview of defendant, and the State's Attorney prepared a transcript of the interview from the recording. The interview ended at approximately 2:49 p.m.

The detectives interviewed defendant for about two hours.

¶ 9 At the beginning of the interview, the detectives did not read defendant her *Miranda* rights or tell her she was free to leave. Also at that time, defendant was the only suspect. The detectives first asked defendant questions to ascertain who had been at defendant's apartment on the day K.G. was injured. Detective Dhabalt admitted the interview turned accusatory and that he shook defendant's water bottle in an accusatory manner to show the vigor of shaking that caused K.G.'s injuries. He also admitted it was not until page 43 of the 50-page transcript when Detective Flynn informed defendant she did not have to talk to them and was not being held. At the end of the interview, defendant's son-in-law took defendant to her doctor's appointment.

¶ 10 A review of the videotape shows the interview was conducted in a small room with no windows. The door was shut during the interview but did not appear to be locked, as Detective Dhabalt left the room a couple of times to answer telephone calls. The videotape also indicates defendant was wearing a jacket and had her cellular telephone in the pocket of her jacket. She also had several purple file folders containing records for her day care center. Late in the interview (page 41 of the 50-page transcript), defendant's cellular telephone rings, and Detective Dhabalt states, "I don't want you to answer that." Defendant complies with the request. Additionally, during the interview, defendant stated she had been running her day care for 15 years.

¶ 11 During the interview, defendant stated K.G. was dropped off at her residence at around 9:50 a.m. on January 18, 2011. Defendant repeatedly admitted she was the only adult with K.G. after he was left in her care. She watched a total of six children that day. K.G. was the last child to get picked up that day, as his mother worked until 7:15 p.m. Of the other five

children, the last one left around 5:40 p.m. that day. After the last child left, defendant tried to engage K.G. in a game of peek-a-boo, but he was not interested. Defendant assumed he was not feeling well because he had an ear infection. She tried comforting him with a bottle and a teething ring. K.G. eventually dozed off and slept for a short period on the floor. At around 7:15 p.m., defendant woke K.G. up and changed his diaper. After that, defendant picked up K.G. and took him to the hallway near the front door where she put the children's coats on them to go home. Defendant went to sit him down, and he went stiff legged. She told K.G. she was going to get his jacket, and he sat down. Defendant then turned around to get his jacket, and when she turned back around, she saw K.G. go limp. She picked K.G. up to see what was wrong and talked to him. She then went outside to see if the air would help. After a few seconds, defendant took K.G. to a neighbor, who was in the medical field. Defendant agreed with the detectives a few times that she shook K.G. in an effort to revive him but consistently denied shaking him hard. She explained she could not shake K.G. violently due to arthritic hands.

¶ 12 In a January 6, 2015, docket entry, the circuit court denied defendant's motion to suppress her statements. The court found "the totality of the circumstances clearly indicate the Defendant was not in police custody during the interview of Jan 20, 2011." The court noted a review of the interview videotape and all facts show a reasonable person would have believed he or she was free to leave and end the interview at anytime. It also noted defendant was of sufficient age and intelligence to handle the interview with the detectives. The court also expressly found defendant's statements were knowing and voluntary.

¶ 13 In December 2015, the circuit court held a jury trial on the four charges against defendant. Detective Dhabalt testified at defendant's trial on behalf of the State. Detective Flynn and defendant did not testify. The evidence at trial that could be relevant to the motion to

suppress but was not presented at the hearing on the motion to suppress follows. Detective Dhabalt was contacted on January 19, 2011, by a caseworker for the Department of Children and Family Services (DCFS) asking for information about the incident. The caseworker indicated DCFS did not want the day care to open. At around 11 a.m. on January 20, 2011, Detective Dhabalt learned that K.G. had died. After receiving the news of K.G.'s death, Detective Dhabalt had a short meeting with other law enforcement professionals and determined they needed a formal statement from defendant. Detectives Dhabalt and Flynn started to drive to defendant's address, and defendant called Detective Dhabalt as he was driving. Defendant said she had wanted to talk to him. Detective Dhabalt informed defendant he was around the corner from her house and was on his way to speak with her. He further asked her if she could get ready and go down to the police station because he wanted to take a statement from her. Defendant agreed. Detective Dhabalt also asked her to bring some paperwork about the other children in the day care. Detective Dhabalt interpreted his conversation with defendant to mean defendant was coming to the police station to give a more detailed statement to assist the doctors treating K.G. Detective Dhabalt did not tell defendant she was a suspect. Additionally, Detective Dhabalt assisted defendant from her apartment to the unmarked police car. He also assisted her into the police department's interview room.

¶ 14 When Detective Dhabalt gave additional testimony about his January 20, 2011, interview with defendant, defense counsel did not ask the circuit court to reconsider its denial of the motion to suppress in light of the new evidence. Defense counsel did object to the State's request to admit the video and transcript of the January 2011 interview. Defense counsel stated he was objecting to preserve the issue raised in the motion to suppress. However, defense counsel did not note any new evidence. The circuit court stood by its prior ruling and allowed

the video and transcript into evidence.

¶ 15 After the close of evidence, the State dismissed the aggravated-battery-of-a-child charge and requested an instruction on involuntary manslaughter. The circuit court granted the request over defendant's objection. The jury found defendant guilty of involuntary manslaughter (720 ILCS 5/9-3(a) (West 2010)).

¶ 16 In January 2016, defendant filed a motion for a new trial, asserting, *inter alia*, defendant's statements to the police were involuntary and their admission at trial constituted reversible error. At a joint hearing in February 2016, the circuit court denied defendant's motion for a new trial and sentenced defendant to four years' imprisonment. Defendant filed a motion to reconsider her sentence, which the court denied after a February 23, 2016, hearing.

¶ 17 On February 23, 2016, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Dec. 11, 2014). Accordingly, this court has jurisdiction under Illinois Supreme Court Rule 603 (eff. Feb. 6, 2013).

¶ 18 II. ANALYSIS

¶ 19 A. Motion to Suppress

¶ 20 Defendant first asserts the circuit court erred by denying her motion to suppress because the police subjected her to a custodial interrogation without advising her of her *Miranda* rights. The State contends the circuit court's finding defendant was not in custody was not against the manifest weight of the evidence.

¶ 21 In reviewing a circuit court's ruling on a motion to suppress evidence, this court applies a two-part standard of review. *People v. Timmsen*, 2016 IL 118181, ¶ 11, 50 N.E.3d 1092. First, we uphold the circuit court's factual findings unless they are against the manifest weight of the evidence. *Timmsen*, 2016 IL 118181, ¶ 11. Second, this court reviews *de novo* the

circuit court's ultimate legal conclusion regarding whether suppression is warranted. *Timmsen*, 2016 IL 118181, ¶ 11.

¶ 22 Citing *People v. Gilliam*, 172 Ill. 2d 484, 501, 670 N.E.2d 606, 614 (1996), defendant asserts this court may consider the entire record, including trial testimony, in reviewing the circuit court's denial of defendant's motion to suppress. However, our supreme court later addressed the issue in *People v. Brooks*, 187 Ill. 2d 91, 127-28, 718 N.E.2d 88, 108-09 (1999), and explained when a reviewing court can and cannot consider trial evidence in reviewing the denial of a motion to suppress. The supreme court noted a reviewing court may consider trial evidence in affirming the circuit court's denial of a motion to suppress because when a court affirms a suppression ruling based on trial evidence, "it is akin to a harmless error analysis." *Brooks*, 187 Ill. 2d at 127, 718 N.E.2d at 109. However, that same reasoning does not apply when the defendant asks the reviewing court to rely upon trial evidence to reverse the circuit court's decision. *Brooks*, 187 Ill. 2d at 127, 718 N.E.2d at 109. Our supreme court explained a circuit court's decision on a motion to suppress remains subject to change until final judgment. *Brooks*, 187 Ill. 2d at 128, 718 N.E.2d at 109. Thus, by not asking the circuit court to reconsider its ruling on the motion to suppress when the new evidence is introduced at trial, the defendant forfeits the right to argue it on appeal. *Brooks*, 187 Ill. 2d at 128, 718 N.E.2d at 109. Accordingly, for a reviewing court to consider trial evidence in reversing a circuit court's denial of a motion to suppress, the defendant must properly preserve the issue in the circuit court by asking the circuit court to reconsider its denial of the motion to suppress at the time the new evidence is introduced at trial. *Brooks*, 187 Ill. 2d at 128, 718 N.E.2d at 109.

¶ 23 While defendant raised an objection to the State's introduction of the video and transcript of the January 20, 2011, interview, defendant never asked the circuit court during the

trial to reconsider its ruling on the motion to suppress based on the new evidence introduced at trial. Accordingly, this court can only consider the trial evidence for affirming the circuit court's ruling.

¶ 24 Regarding the determination of whether defendant was in custody for purposes of *Miranda*, defendant's brief solely cites Illinois law. However, *Miranda* is a United States Supreme Court opinion, and that court has handed numerous cases over the years interpreting its decision in *Miranda*. The United States Supreme Court most recently explained "custody" for *Miranda* purposes as follows:

"As used in our *Miranda* case law, 'custody' is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion. In determining whether a person is in custody in this sense, the initial step is to ascertain whether, in light of 'the objective circumstances of the interrogation,' [citation], a 'reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.' [Citation.] And in order to determine how a suspect would have 'gauge[d]' his 'freedom of movement,' courts must examine 'all of the circumstances surrounding the interrogation.' [Citation.] Relevant factors include the location of the questioning [citation], its duration [citation], statements made during the interview [citations], the presence or absence of physical restraints during the questioning [citation], and the release of the interviewee at the end of the questioning [citation]." *Howes v. Fields*, 565 U.S. 499, 508-09 (2012).

Since not all restraints on a defendant's freedom of movement amount to custody for purposes of *Miranda*, the second step addresses "whether the relevant environment presents the same

inherently coercive pressures as the type of station house questioning at issue in *Miranda*.” *Howes*, 565 U.S. at 509. The Supreme Court has made clear “ ‘the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody.’ ” *Howes*, 565 U.S. at 509 (quoting *Maryland v. Shatzer*, 559 U.S. 98, 112 (2010)).

¶ 25 The evidence at the suppression hearing showed defendant was 63 years old and found to be of “above average intelligence” by the circuit court. While the detectives had discussed talking with defendant again, it was defendant who initiated the contact with the police on January 20, 2011, by calling Detective Dhabalt. Detectives Dhabalt and Flynn then picked defendant up in an unmarked car, and defendant sat in the front seat of the car on the way to the station. She was never handcuffed or restrained in any fashion. While on the way to the police station, defendant noted her doctor’s appointment that afternoon, and the detectives assured her she would be able to make the doctor’s appointment. Once at the police station, Detectives Dhabalt and Flynn interviewed defendant in an interview room with the door shut. At the beginning of the interview, the detectives offered defendant something to drink, and defendant accepted a bottle of water. During the interview, defendant kept her jacket on and had her cellular telephone in the pocket of the jacket. She also had file folders that contained information about the children in her day care. The detectives did not engage in any conduct indicating a formal arrest procedure. The interview lasted around two hours, and defendant was allowed to leave when the interview concluded.

¶ 26 The location and length of the interview weigh in favor of custody. See *Yarborough v. Alvarado*, 541 U.S. 652, 665 (2004). On the other hand, the absence of physical restraints and defendant’s release at the end of questioning do not favor custody. Most of defendant’s argument focuses on statements made during the interview by the detectives.

Moreover, we note she concedes the interview was noncustodial in the beginning but asserts the later accusatory tone of the detectives' questions rendered the interview custodial.

¶ 27 However, the United States Supreme Court has emphasized a noncustodial situation is not converted into a custodial one because “the questioning took place in a ‘coercive environment.’” *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977). The *Mathiason* court explained,

“Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.” *Mathiason*, 429 U.S. at 495.

The *Mathiason* court also noted the police officer's false statement to the defendant during the interview was irrelevant to whether the defendant was in custody for purposes of *Miranda*. *Mathiason*, 429 U.S. at 495-96.

¶ 28 Later, in *Stansbury v. California*, 511 U.S. 318, 325 (1994), the United States Supreme Court further stated the following:

“An officer's knowledge or beliefs may bear upon the custody issue if they are conveyed, by word or deed, to the individual being questioned. [Citation.] Those beliefs are relevant only to the extent they would affect how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action. [Citation.] Even a clear statement

from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest. The weight and pertinence of any communications regarding the officer's degree of suspicion will depend upon the facts and circumstances of the particular case. In sum, an officer's views concerning the nature of an interrogation, or beliefs concerning the potential culpability of the individual being questioned, may be one among many factors that bear upon the assessment whether that individual was in custody, but only if the officer's views or beliefs were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave." (Internal quotation marks omitted.)

¶ 29 While the detectives' questions clearly indicated defendant was the prime suspect and the only one who could have caused the injuries to K.G., the detectives did not indicate defendant was not free to leave. The detectives assured defendant before the interview she would be able to make her doctor's appointment that afternoon and later in the interview again told her she would make her doctor's appointment. The detectives also confirmed defendant understood she was not being held. The only restriction on her freedom was when Detective Dhabalt indicated he did not want defendant to answer her cellular telephone. However, defendant was able to keep her cellular telephone and later left the police station. Thus, we disagree with defendant the accusatory tone of the detectives' questions rendered a noncustodial interview a custodial one.

¶ 30 Given the totality of the objective circumstances of defendant's interrogation, we find a reasonable person in defendant's position would have felt he or she was able to end the

interview and leave. Since defendant has not satisfied the freedom-of-movement test, we need not address the second part of the *Miranda* custody test. Accordingly, we find the circuit court did not err by denying defendant's motion to suppress the evidence.

¶ 31

B. Fines

¶ 32 Defendant also asserts the circuit court improperly imposed five fines. While defendant's appeal was pending, the supreme court handed down its decision in *People v. Vara*, 2018 IL 121823, ¶ 23, which held the appellate court lacks jurisdiction to review a circuit clerk's recording of mandatory fines that were not included in the circuit court's final judgment. The parties agree this court lacks jurisdiction to address defendant's challenge to her fines under *Vara*. Accordingly, we do not address this issue.

¶ 33

III. CONCLUSION

¶ 34 For the reasons stated, we affirm the Sangamon County circuit court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 35

Affirmed.