STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2015AP160-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEANETTE M. JANUSIAK,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF THE
CIRCUIT COURT FOR SAUK COUNTY,
PATRICK J. TAGGART, JUDGE

BRIEF FOR PLAINTIFF-RESPONDENT

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ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal because it would add nothing to the arguments in the briefs. The opinion should not be published because this appeal involves only the application of settled law to the facts of this case.

ARGUMENT

I. Janusiak's statements that a child in her care was injured when the child accidentally fell off a bed were not coerced.

The defendant-appellant, Jeanette M. Janusiak, never confessed that she intentionally injured an infant in her care by smashing the child's head against a wall so as to fatally fracture her skull.

Rather, the statements Janusiak challenges as involuntary are statements she made after about five hours of interrogation that abandoned her previous claims that she had no knowledge of how the child was injured, and asserted instead that the child was injured when she accidentally fell off a bed.

These statements purporting to portray an accidental injury were not a confession since they were intended to deflect any suggestion that she was guilty of a criminal act. *State v. Hockings*, 86 Wis. 2d 709, 727, 273 N.W.2d 339 (1979); *State v. Cartagena*, 40 Wis. 2d 213, 218, 161 N.W.2d 392 (1968).

Nevertheless, the statements were incriminating because the district attorney used them as evidence against Janusiak at her trial (91:627-28, 630; 96:1325-26, 1330-31). *Rhode Island v. Innis*, 446 U.S. 291, 301 n.5 (1980); *State v. Cunningham*, 144 Wis. 2d 272, 279, 423 N.W.2d 862 (1988). It does not matter that the statements were exculpatory instead of inculpatory when they were made, *Innis*, 446 U.S. at 301 n.5; *Cunningham*, 144 Wis. 2d at 279, or that they were false. *State v. Agnello*, 226 Wis. 2d 164, 174-77, 593 N.W.2d 427 (1999).

To be used against Janusiak, the incriminating statements had to be voluntary. *State v. Moats*, 156 Wis. 2d 74, 93-94, 457 N.W.2d 299 (1990).

Janusiak asserts that her interrogators were trying to coerce her into giving a statement by making improper threats about what would happen if she did not speak and improper promises about what would happen if she did. But even assuming for the sake of argument that Janusiak might be right as far as she goes, she does not go far enough to warrant the suppression of her statements about a fall off the bed.

Even assuming for the sake of argument that there might have been some improper police conduct, the mere fact that the police acted improperly does not necessarily mean that evidence obtained following that impropriety should be suppressed. *Herring v. United States*, 555 U.S. 135, 140 (2009). Rather, suppression should be a last resort instead of a first impulse. *Herring*, 555 U.S. at 140.

The exclusionary rule enjoins the government from benefitting from evidence it has unlawfully obtained. *United States v. Crews*, 445 U.S. 463, 475 (1980). The rule is "premised on suppressing evidence that 'is *in some sense* the product of illegal governmental activity.'" *State v. Knapp*, 2005 WI 127, ¶ 22, 285 Wis. 2d 86, 700 N.W.2d 899 (quoting *Nix v. Williams*, 467 U.S. 431, 444 (1984)).

Thus, the remedy in a criminal proceeding is limited to denying the state the fruits of its transgression. *United States v. Morrison*, 449 U.S. 361, 366 (1981). A court must identify and neutralize the taint by tailoring relief appropriate to the circumstances. *Morrison*, 449 U.S. at 365.

The police should be put in the same position they would have been in if the misconduct had not occurred, not in a worse position. *Nix*, 467 U.S. at 443. A criminal should not be set free just because the constable has blundered. *Nix*, 467 U.S. at 447.

So the relevant question in this case is not whether the police might have engaged in some coercive activity, but whether they actually coerced Janusiak into making the chain of statements about the baby falling from the bed.

The record shows that not only did the police not coerce Janusiak into making these statements, they actually tried to get Janusiak to abandon or retract them. But Janusiak had the will to resist these efforts to the very end, and continued to maintain that the baby fell from the bed despite everything the police did to try to convince her to stop saying that (111:299).

At first, Janusiak repeated the same story she related when the police were first called to her home the night before (89:183-86; 91:600-08). Janusiak told the police that she put the baby on the bed, then fell asleep in the living room (111:27). Janusiak said she was awakened by choking, gurgling sounds, and when she went into the bedroom she found that the infant was not breathing (111:28-30). Janusiak claimed she was not aware of anything that might have happened to the child (111:142).

When the police speculated that the child's injuries might have been accidental, Janusiak repeated that nothing happened to the child (111:143). Even when the police told Janusiak that she would not be in trouble if what happened was an accident, she denied that any accident happened (111:153-54, 157, 169). Janusiak specifically denied that the child had been dropped or had fallen (111:187-89, 201-02, 211).

After these claims of ignorance went on for a while, the police told Janusiak that they would have to arrest her because she had no explanation for what happened to the child (111:214-16). But the police told Janusiak that they would be "happy to listen" if she had "something more to add" that would "help explain what happened" to the child (111:217).

When Janusiak started to accuse the police of telling her what to say, they interrupted to say "to fall [or] roll off the bed, no it's [not] like that" (111:224). "No, we're not looking at a fall off the bed" (111:223).

Thus, the police made absolutely clear to Janusiak that they were definitely not telling her to say that the child fell off the bed.

Undeterred, Janusiak said "maybe she could have fallen" (111:225). When the police sought clarification by asking "[d]id she fall," Janusiak asserted for the first time, "She fell off my bed, it was off my bed" (111:225).

Janusiak needed no coaching from anyone to blame the bed for the baby's injuries. About a month earlier Janusiak told the baby's mother that the baby bruised her eye when she rolled off the bed (89:141-42; 93:937).

After Janusiak said precisely what the police did not want her to say, they repeatedly warned her that they did not believe her assertion that the child fell because the child's skull could not have been fractured by a fall from a bed (111:227-30, 233). The police told Janusiak that if she persisted in telling this incredible tale she would be going to jail (111:244-45).

Thus, the police did not coerce Janusiak into stating that the child fell from a bed by threatening to put her in jail if she did not say that. If there was any coercion from a threat to put Janusiak in jail, it would have been coercion to say something other than that the child fell off the bed.

Indeed, when Janusiak did not succumb to any police coercion to say something other than that the child fell, the police told Janusiak to "stop, stop with the whole falling off the bed thing" (111:254).

It could hardly be more obvious that the police were not coercing Janusiak to say that the child fell off the bed when they expressly told her to stop saying that.

But Janusiak did not stop. She kept saying that the child fell off the bed, even though the police told her that they did not want her to keep saying that (111:257).

Trying to move the inquiry past this stalemate, the police put out the possibility of something happening like the child rolling off the bed after being dropped there (111:263-64).

But Janusiak adamantly denied she ever did anything like that (111:263-64). She protested that she would not admit to throwing the child just to satisfy the police (111:264). Janusiak stated that she was not going to tell the police that she did something she did not do, and that she did not throw the child on the bed (111:264).

But having insisted that she would never tell the police that she threw the child, Janusiak asked the police if they wanted her to tell them that (111:268).

They replied, "No, no, no, no, no, no" (111:268). They said they did not want to put words in her mouth, and were not telling her to say she threw the child (111:268).

Janusiak did not say that she threw the child. But she did embellish her same old story about the child falling off the bed by asserting that the child hit the night table when she fell (111:269). Janusiak embellished her story a second time by asserting that the child hit an open drawer when she hit the night table when she fell, prompting the police to comment that every time they attempted to end the interview Janusiak added a little bit more (111:273, 275).

Attempting to end the interview did not coerce Janusiak to add to her story about the child falling from the bed. She was the one who prolonged the questioning.

Janusiak finally told the police she had nothing else to say (111:276-77). The baby fell off the bed and hit the night table drawer (111:276-77). That was Janusiak's story until the end of the interview (111:284-87, 294, 297, 299, 304-05, 309-11).

As the supreme court discussed in *Phillips v. State,* 29 Wis. 2d 521, 530, 139 N.W.2d 41 (1966), even when the police make threats dangerously close to those disapproved in *Lynumn v. Illinois*, 372 U.S. 528 (1963), to deprive a mother of the custody of her child, there remains a distinction between motivation and compulsion.

Janusiak might have been motivated to keep making untruthful, unbelievable and unwanted statements that a child in her care was injured when she accidentally fell off a bed in a desperate effort to avoid going to jail for intentionally killing the child. She might have hoped that if she kept repeating those statements long enough the police would eventually believe her. But she was not coerced to make those statements. The police interrogation did not compel Janusiak to make those statements; it was only the occasion. *See Hockings*, 86 Wis. 2d at 727-28.

Since Janusiak's statements about the baby falling off the bed were not coerced by the police, they were properly used at Janusiak's trial to show, as the police kept saying during the interrogation, that Janusiak was lying about how the baby was injured (91:627-28, 630; 96:1325-26, 1330-31).

II. Any error in admitting evidence of Janusiak's statements about an accidental fall would have been harmless.

The harmless error rule applies to coerced statements. *Arizona v. Fulminante*, 499 U.S. 279, 295 (1991); *State v. Mark*, 2005 WI App 62, ¶ 31, 280 Wis. 2d 436, 701 N.W.2d 598, *aff'd*, 2006 WI 78, 292 Wis. 2d 1, 718 N.W.2d 90; *Agnello*, 226 Wis. 2d at 178.

Even if Janusiak's statements about an accidental fall would have been coerced, their use as evidence would have been harmless because any error would not have contributed to Janusiak's conviction, and she would have been found guilty even if these statements had not been used. *See State v. Weed*, 2003 WI 85, ¶¶ 29-30, 32, 263 Wis. 2d 434, 666 N.W.2d 485 (discussing harmless error rule); *State v. Harvey*, 2002 WI 93, ¶¶ 37, 40, 46, 49, 254 Wis. 2d 442, 647 N.W.2d 189 (same).

The jury could not have found Janusiak guilty on the basis of the substance of the statements about an accidental fall because they were not admissions of guilt. They were exculpatory.

The district attorney used these facially exculpatory statements to argue that Janusiak was lying about how the infant was injured (91:627-28, 630; 96:1325-26, 1330-31). But there was other evidence that also showed Janusiak was not telling the truth.

Janusiak's initial claim that she did not know how the child was injured, made before and at the beginning of the stationhouse interrogation, before it allegedly became coercive (89:183-86; 91:600-08; 111:27-30, 142), was patently false.

The child suffered three separate skull fractures, one on the right side of her head, one on the left side of her head, and one on the back of her head (91:539; 93:841, 852-55; 94:1036-41). These injuries indicated that there were three separate but nearly simultaneous points of impact (93:853-55; 94:1035-37, 1041-42, 1086-88).

The child also had adult fingertip contusions on her chest, abdomen and hips, evincing the application of violent pressure to the middle of the child's body (93:943-46).

A fall off a bed could not have caused these injuries (93:850-51, 857-58, 879, 957; 94:1100).

There were bloodstains on the wall in Janusiak's bedroom, two of them over the baby's crib (90:304, 334-44). The child's DNA was found in three of these bloodstains (93:751-56, 784, 805).

The only reasonable inference from this undisputed evidence is that the baby was fatally injured when her head was bashed against the wall at least three separate times.

Although Janusiak's expert speculated that the infant's injuries might have been a couple days old (94:1115-16, 1120), the credible testimony of the experts who actually examined the child, based on the established medical facts, was that the child was most probably injured during the late evening of August 17, 2011, or the early morning of August 18 (93:871-72, 956-57; 94:1087).

The child's treating pediatrician, a pediatric radiologist and a pathologist all agreed that the severe head injuries suffered by the child would have left her unconscious almost immediately (93:866, 881, 959; 94:1055, 1077, 1087-88). It is not likely she would have regained consciousness or had any lucid

intervals of the kind observed as late as one o'clock on the morning the child's injuries were reported at any time before she died (89:134-35, 183; 93:881, 962, 966).

The child could not have died a lingering death from a slow accumulation of blood inside her head caused by an earlier injury (93:871; 94:1052, 1064). There was no subdural hemorrhage that would have caused the infant's death in that manner (94:1077). There was no medical mechanism to explain any earlier injury (94:1096).

The child died from a severe acute injury to the brain itself that was immediately lethal (91:548; 93:866; 94:1054-55, 1077, 1088). Death from a direct brain injury is not progressive (94:1097).

Photographs of the child taken in the early morning hours of August 17, 2011, showed no visible injuries to her face, head or arms (91:522-26). The child's mother said that the baby was not injured when she was laying on Janusiak's bed on the evening of August 17, 2011 (89:131-32). Janusiak said that the child was fine at midnight and at one o'clock the next morning (89:134-35, 183).

Under these circumstances, Janusiak, who was caring for the child at the time she was injured (89:116, 172-73, 182-83; 91:579, 584), had to know how her injuries were sustained.

Indeed, a washcloth with the child's blood on it found hidden between the mattress and box spring of the bed (90:357-58, 384; 93:802-03), is graphic evidence that Janusiak knew how the child was hurt.

Janusiak also lied when she said early in the interrogation that the child had nothing more than a diaper rash on her bottom (111:45-52).

The child's rectum and anal area were penetrated by the insertion of an object that caused severe bruising and tearing (91:539, 548; 93:929-30, 948-49; 94:1019, 1026). Graphic photographs of these areas show that no one could have honestly mistaken these serious injuries for a diaper rash (66:exs. 159, 160).

Moreover, the evidence unconnected to any supposedly coerced statements was sufficient to prove not only that Janusiak lied about how the child was injured, but to prove that she was the one who inflicted the injuries.

Janusiak was the only adult in the house when the child was injured (89:172-73; 91:579-80, 587, 599-600). She was therefore the only person who could have possibly inflicted the injuries sustained by the child. She was the only one who could have grabbed the child tightly around the middle of her body and repeatedly smashed her head up against the wall hard enough to fracture her skull several times.

Janusiak was not only the only person who had an opportunity to injure the child, she was the only person who had a motive to injure the child. With four young children of her own, she did not have time to raise someone else's baby (91:579-80; 95:1172-73, 1220). Being addicted to painkillers, it became difficult for Janusiak to manage the child's constant crying (95:1181, 1205-07, 1244-45).

Circumstantial evidence is often stronger and more satisfactory than direct evidence. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). What happened here is obvious. The child was crying in the middle of the night. Janusiak could not handle it. So she hit the baby to shut her up.

This conclusion is inescapable whether or not Janusiak lied about the baby falling off the bed.

CONCLUSION

It is therefore respectfully submitted that the judgment of the circuit court should be affirmed.

Dated: August 13, 2015.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,829 words.

Dated this 13th day of August, 2015.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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Dated this 13th day of August, 2015.

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