**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**December 7, 2005**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2005AP1223-CR** **Cir. Ct. No. 2001CT199**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CHARLES S. RUSSELL,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Washington County: PATRICK J. FARAGHER, Judge. *Affirmed.*

¶1 BROWN, J.[1] Charles S. Russell appeals from his judgment of conviction for operating a motor vehicle while intoxicated on the theory that the prosecutor denied him a fair trial by directly commenting in her closing argument on his decision not to testify. She argued that without Russell's testimony, the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

defense could not establish that his failure to submit to a blood test was the result of confusion about his rights rather than belligerence associated with having too much to drink. We assume without deciding that the prosecutor's statements stepped over the line. However, we hold they do not meet the standard for reversible error. The prosecutor intended her remarks not to imply guilt from Russell's decision not to testify but rather to highlight the insufficiency of the evidence supporting Russell's theory of the case. Thus, we affirm.

¶2 In order to put the prosecutor's remarks in their proper context, we set forth the facts at some length. On November 4, 2001, a police officer stopped Russell for speeding. When the officer made contact with Russell, he detected a strong odor of intoxicants on Russell's breath and noticed that he had bloodshot, glossy eyes and slurred speech. Russell disputed the officer's admonition that he had been driving above the speed limit. He also invoked the Fifth Amendment and declined to answer the officer's inquiry whether he had been drinking, although he did state his belief that he was within legal limits for driving. The officer called a colleague for backup so that he could administer field sobriety tests.

¶3 Both officers asked Russell several times during the stop to step out of the vehicle and perform sobriety tests. Russell responded that he would rather park his car and find some other way home. Upon being informed that this was not an option, he asked to talk to his lawyer before taking a field sobriety test and argued that he should not have to perform such tests because he was stopped for speeding. Russell also stated repeatedly that he would comply with the officers' requests but did not do so, instead holding onto the steering wheel.

¶4 Eventually, the two police officers had to grab Russell by his arms and pull him out of the vehicle. The officers noticed that he staggered as he walked to the rear of his vehicle. Russell was asked again to perform sobriety tests, and again, he refused to do so. The officers placed him under arrest for operating a motor vehicle while under the influence of an intoxicant. He resisted by tensing his arms, so they cuffed his hands behind his back.

¶5 The officer who initially conducted the stop took Russell to the hospital for a blood draw. He read Russell the Informing the Accused form and asked him to submit to the blood test. Russell would not answer yes or no. He stated that he did not understand why he could not have his own test and asked whether the form "superceded" his ***Miranda***[2] rights. The officer stated he could not interpret the form but could only reread it, which he did. After several more requests to submit to a blood draw, Russell still would not give a direct response so the officer had the sample taken without Russell's cooperation. Because of Russell's resistance, however, the officer kept him cuffed during the test and held onto his arms.

¶6 Russell also had to be restrained shortly thereafter. The arresting officer attempted to give him a citation for OWI, and Russell resisted. He refused to take the document or allow the officer to put them in his pocket and stood up. In response to this resistance, the officer and a colleague grabbed his arms and held him down on a gurney until he promised to calm down.

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

¶7 Back at the police station, Russell requested an alternate test, and the arresting officer allowed him to take a breath test. Despite the officer's instructions to provide deep, steady breaths, Russell gave short, weak breath samples. The samples registered as .08 and .09%. When the blood results came back, they calculated his blood alcohol level as .153%.

¶8 At trial, the State presented evidence consistent with the above facts. The defense rested without calling any witnesses, and the trial proceeded to closing arguments. The State's argument emphasized Russell's repeated failures to comply with the officers' directives, attributing his belligerence to impaired judgment resulting from alcohol consumption. Anticipating the defense's argument, the prosecutor made the following remarks:

> Now you heard the testimony that the defendant was requested to submit to an evidentiary test of his blood. I suspect that the defense would have you believe that this really wasn't a refusal and that you shouldn't really consider it, because, after all, the defendant just didn't understand.
>
> Again, you need to look at the evidence that is on the record. While it is true that a defendant has the absolute constitutional right to remain silent and not testify, the fact of the matter is in this particular trial he didn't, so you don't have any evidence as to what the defendant was thinking.

¶9 The trial court sustained defense counsel's objection and held a conference in chambers. During the conference, the prosecutor explained, "What I am about to argue is that the evidence is uncontroverted as to the defendant's guilt." The court denied defense counsel's motion for a mistrial based on the comment on Russell's silence but admonished the prosecutor not to expound further on the defendant's silence. Following the conference, the State continued its closing:

> The uncontroverted evidence that has been introduced in this case is that the defendant submitted to a blood test very shortly after having been stopped for driving. The best evidence, and the evidence on which you should rely in this case to determine the defendant's guilt is, in fact, the blood test.
>
> ….
>
> Again, relying on your experience in life, you know that alcohol gets out of your system as time goes on. And I am respectfully suggesting that all of the defendant's arguing and bickering and questioning the officers on the legality of the Officers' actions were all just a delay tactic. Why? Because the longer you delay, the more opportunity one has to get alcohol out of one's system. And that's reflected in the two tests that you have. However, the one that was taken most closely to the time of driving indicates beyond a reasonable doubt that the defendant was operating with a .153 percent of alcohol in his blood.

¶10 Defense counsel's argument followed, presenting the anticipated theory of defense. Essentially, that theory was that the breath test accurately determined Russell's blood alcohol content and that his failure to cooperate with the police was more indicative that he was confused about his rights than with poor judgment resulting from alcohol consumption.

¶11 The jury convicted Russell, and he now appeals, renewing his contention that the State improperly commented on his silence during closing arguments. Russell argues that this improper comment denied him his right to a fair trial.

¶12 Although the State may detail the evidence at trial, comment thereon, and argue reasonable conclusions from such evidence, ***State v. Hoffman***, 106 Wis. 2d 185, 219, 316 N.W.2d 143 (Ct. App. 1982), it is constitutionally forbidden to comment on a defendant's decision to not testify, ***State v. Johnson***, 121 Wis. 2d 237, 243-44, 358 N.W.2d 824 (Ct. App. 1984). A prosecutor's

comment crosses this line when "the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." ***Id.*** at 246 (citation omitted).

¶13 Even assuming the State's comment in this case crosses the constitutional line, however, we will not necessarily reverse the conviction. *See* ***State v. Spring***, 48 Wis. 2d 333, 339-40, 179 N.W.2d 841 (1970). We will uphold a conviction as long as the State can demonstrate the error was harmless beyond a reasonable doubt. ***Id.***; *see also generally* ***State v. Hale***, 2005 WI 7, 277 Wis. 2d 593, 691 N.W.2d 637 (reaffirming "beyond a reasonable doubt" standard). We consider several factors, including the character of the remarks in light of their context, any curative instruction and its probable effect, the strength of the evidence against the defendant, and all other facts that bear on the effect the remarks had on the jury. ***Spring***, 48 Wis. 2d at 340.

¶14 In ***Spring***, the prosecutor had commented, "We have not had the benefit of any statement on the part of the defendant," and "have had no denials of the assertions that have been made on the part of the witnesses who have come in and prosecuted this action or been called as witnesses by the prosecution of this action." ***Id.*** at 338. Although the court held that such commentary crossed the line, it held the error harmless, based in part on the "indirect nature and implication" of the remarks, viewed in context, and the strength of the State's case against the defendant. ***Id.*** at 338, 340.

¶15 In this case too, we hold that any error was harmless. If we view the prosecutor's remarks in context with the statements immediately preceding and following these remarks, it is apparent that the focus of the closing argument was not on the lack of testimony but on the lack of evidence. The comment on

Russell's silence was an indirect and inartful attempt to point out that Russell had presented no evidence to rebut the State's theory that Russell acted belligerently throughout his interaction with the officers because his judgment was impaired from drinking too much alcohol.

¶16 In addition to the "indirect nature" of the remark, we note the strength of the State's case. Although the defense attempted to explain Russell's behavior as stemming from confusion about his rights, that theory did not explain all of his recalcitrance. For example, we do not see how confusion factored into Russell's refusal to accept the citation the officer issued or his failure to follow the officer's instructions during the breath test that *he requested*. Moreover, the jury heard evidence that Russell had slurred speech, red and glossy eyes, and that he smelled strongly of alcohol. Additionally, the State introduced the unimpeached results of the blood test. Taking all these factors together, we are convinced beyond a reasonable doubt that the jury would have accepted the State's theory.

¶17 Although the prosecutor's commentary may have impermissibly mentioned Russell's failure to testify, the *import* of the statements was to evaluate the strength of the evidence, which is otherwise permissible. That fact alone diminishes the amount of prejudice resulting from the improper statements. Moreover, the State had a strong case that was unimpeached by other evidence. We conclude beyond a reasonable doubt that the jury would have convicted with or without the objectionable portion of the closing argument. We affirm.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.