COURT OF APPEALS
DECISION
DATED AND FILED

October 24, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP1001-CR **Cir. Ct. No. 2004CF56**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KURTIS A. GUMIENY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Shawano County: JAMES R. HABECK, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Kurtis Gumieny appeals a judgment convicting him of operating with a prohibited alcohol concentration, sixth offense. Gumieny also appeals an order denying his postconviction motion. Gumieny argues the trial court erred by permitting the State to cross-examine him concerning his failure to

call his mother as a witness. Gumieny further argues the trial court erred by allowing the State to question him concerning his post-arrest failure to contact police with his version of events. We affirm.

BACKGROUND

¶2 On March 9, 2004, the Shawano County Sheriff's department received a call from Kimberly Gumieny indicating that her brother Kurtis Gumieny had arrived home intoxicated and was causing a verbal disturbance. Kimberly informed police that her brother drove home in a van that was parked in the driveway. When police arrived, they noticed Gumieny had a strong odor of intoxicants, his eyes were bloodshot and his speech was slurred. Sergeant Scott Wedemayer asked Gumieny how he got home and Gumieny replied he rode home with Richard Raeder. However, when police contacted Raeder he denied giving Gumieny a ride home. Officer Andrew Thorpe asked Gumieny how many alcoholic beverages he had consumed throughout the day and Gumieny replied "a six pack of beer." Thorpe then asked Gumieny how many beverages he consumed after he got home and Gumieny said he had one beer.

¶3 Thorpe arrested Gumieny and transported him to Shawano Medical Center for a blood test. While at the hospital, Gumieny told Deputy Sandra Finger that Tina Gipp drove him home, and then later told Thorpe that David Stuebs drove him home. Thorpe read Gumieny the pre-interrogation warning from the Alcoholic Influence Report form and Gumieny then declined to answer questions.

¶4 At trial, a state hygiene chemist testified that Gumieny's blood alcohol concentration was .269 grams per one hundred milliliters of blood. The chemist further testified it would take more than thirteen drinks to reach that level.

¶5 At trial, Gumieny testified he had part of a beer at Raeder's home and then drove home in his van. He stated that after having an argument with his sister, he went into his mother's room and drank approximately fourteen shots of Southern Comfort whiskey. The State asked Gumieny if he was aware that his mother was not subpoenaed as a witness. Gumieny responded he was aware of that. The State asked Gumieny if the bottle of Southern Comfort belonged to his mother. Gumieny responded that it was his mother's whiskey.

¶6 The State also cross-examined Gumieny about his statements to police claiming other individuals drove him home. Gumieny testified he did not remember telling police that other individuals drove him home. The State then asked Gumieny if he told the officers about drinking the Southern Comfort after arriving home. Gumieny responded he did not remember. The State then asked Gumieny if he ever attempted to contact the police to tell them about the Southern Comfort. Gumieny responded he had not.

¶7 Gumieny was found guilty of operating with a prohibited alcohol concentration and sentenced to three years of initial confinement and two years of extended supervision. Gumieny filed a postconviction motion claiming the trial court erred by permitting questioning regarding his failure to call his mother as a witness and questioning concerning his post-arrest failure to contact police with his version of events. The court denied his motion.

DISCUSSION

¶8 Gumieny contends the trial court erred when it allowed the State to cross-examine him concerning his failure to call his mother as a witness. Gumieny contends the State's questioning constituted impermissible comment

upon his right against self-incrimination and his right to choose not to present witnesses.

¶9 Questions of constitutional fact are mixed questions of fact and law. ***State v. Jennings***, 2002 WI 44, ¶21, 252 Wis. 2d 228, 647 N.W.2d 142. This court will uphold the trial court's findings of fact unless they are clearly erroneous. ***Id.*** We then independently review whether those facts satisfy the constitutional standard. ***Id.***

¶10 A defendant who testifies on his own behalf waives his Fifth Amendment privilege against self-incrimination "with respect to matters reasonably related to the subject matter of his direct examination …." ***Neely v. State***, 97 Wis. 2d 38, 49, 292 N.W.2d 859 (1980). WISCONSIN STAT. § 906.11(2)[1] permits cross examination "on any matter relevant to any issue in the case, including credibility." Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01.

¶11 In this case, Gumieny testified on direct examination that he drank a large amount of whiskey from his mother's bottle of Southern Comfort. On cross-examination the prosecutor questioned him regarding his failure to call his mother as a witness because his mother would presumably have noticed the large amount of liquor missing from her bottle. This question was reasonably related to

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Gumieny's testimony on direct examination and therefore did not violate Gumieny's privilege against self-incrimination. *See* ***Neely***, 97 Wis. 2d 38. Further, the evidence was relevant to question the plausibility of Gumieny's story that he did not drive his van with a prohibited alcohol concentration, but rather drank the liquor after returning home.

¶12 Gumieny also argues that the State's reference to his failure to call his mother as a witness improperly directed the jury to disbelieve Gumieny simply because he failed to call this witness. Gumieny argues the "Wisconsin Supreme Court has cautioned trial courts on the danger of allowing a jury to draw a negative inference against a party by its failure to call a witness." However, in making this argument, Gumieny cites cases regarding the absent material witness instruction.[2] Gumieny's argument lacks merit. The trial court never gave an absent material witness instruction in this case and in fact instructed the jury "[t]he defense does not have to call any witnesses, but they can chose to do so."

¶13 Finally, Gumieny argues the trial court erred by allowing the State to question him concerning his post-arrest failure to contact police with his version of events. Gumieny contends the State's questioning violated his Fifth Amendment right to silence.

¶14 Generally, the State may not comment upon a defendant's post-accusatory choice to remain silent. *See* ***Miranda v. Arizona***, 384 U.S. 436, 468 n.37 (1966); ***Griffin v. California***, 380 U.S. 609, 615 (1965). Implicit in ***Miranda***

[2] *See, e.g.*, ***Ballard v. Lumbermens Mut. Cas. Co.***, 33 Wis. 2d 601, 615-16, 148 N.W.2d 65 (1967) (noting the absent material witness instruction should be "narrowly construed to be applicable only to those cases where the failure to call a witness leads to a reasonable conclusion that the party is unwilling to allow the jury to have the full truth").

warnings is the "assurance that silence will carry no penalty." ***Doyle v. Ohio***, 426 U.S. 610, 618 (1976). However, if a defendant testifies at trial, the State may make impeachment use of the defendant's pre-***Miranda*** silence, even if the silence occurred after the defendant's arrest and in response to police action. *See* ***Jenkins v. Anderson***, 447 U.S. 231, 239 (1980) ("Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted.").[3] In addition, where a defendant voluntarily speaks after receiving ***Miranda*** warnings, the defendant may be impeached at trial regarding prior inconsistent statements. ***Anderson v. Charles***, 447 U.S. 404, 408 (1980).

¶15 In this case, the State sought to impeach Gumieny's testimony that he only drank half a bottle of beer before driving and then drank approximately fourteen shots after arriving home. The State first questioned Gumieny about his pre-***Miranda*** statements to police officers that other individuals had driven him home. The State also asked Gumieny if he told these officers that he drank after arriving home. Though Gumieny stated he did not remember if he had told the officers about the Southern Comfort, the officers' testimony indicated that he had not. The State then asked Gumieny if he had at any time after being jailed attempted to contact the police to tell them about the Southern Comfort.

[3] *See also* ***Fletcher v. Weir***, 455 U.S. 603, 607 (1982) ("In the absence of the sort of affirmative assurances embodied in the ***Miranda*** warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand."); ***State v. Adams***, 221 Wis. 2d 1, 8, 584 N.W.2d 695 (Ct. App. 1998) ("[W]hen a defendant elects to testify, references by the State during cross-examination, on redirect and in closing arguments to the defendant's pre-***Miranda*** silence do not violate the defendant's right to remain silent."); ***State v. Sorenson***, 143 Wis. 2d 226, 258, 421 N.W.2d 77 (1988) ("We adopt the analysis used by the United States Supreme Court in ***Jenkins*** [***v. Anderson***, 447 U.S. 231, 239 (1980)] and ***Fletcher***, allowing probative comment on a defendant's pre-***Miranda*** silence when the defendant elects to testify on his or her own behalf.").

¶16 The first line of questioning merely sought to impeach Gumieny regarding statements he made to the police before receiving ***Miranda*** warnings. This line of questioning did not violate Gumieny's constitutional rights. *See* ***Jenkins***, 447 U.S. at 238; ***Fletcher***, 455 U.S. at 606-07; ***Adams***, 221 Wis. 2d at 8; ***Sorenson***, 143 Wis. 2d at 258. However, the question regarding why Gumieny did not attempt to contact police after being jailed refers to post-***Miranda*** silence. The State contends this question was proper because Gumieny waived his right to silence by speaking to police after receiving ***Miranda*** warnings. However, neither the State nor Gumieny indicates when Gumieny received ***Miranda*** warnings. Our review of the record indicates that, while at the hospital, Thorpe read Gumieny the pre-interrogation warning from the Alcoholic Influence Report form and Gumieny then declined to answer questions. If this is when Gumieny first received his ***Miranda*** warnings, then he did in fact invoke his right to silence and the State's use of that silence to impeach him violated his constitutional rights. *See* ***Doyle***, 426 U.S. at 618. However, even if the State's question violated Gumieny's constitutional rights, the violation was harmless error.

¶17 "A constitutional error is harmless beyond a reasonable doubt if there is no reasonable possibility that the error might have contributed to the conviction." ***State v. Fencl***, 109 Wis. 2d 224, 238, 325 N.W.2d 703 (1982). To determine whether the constitutional error was harmless we consider the following factors: "(1) the frequency of the error; (2) the nature of the state's evidence against the defendant; and (3) the nature of the defense. … The unconstitutional references … cannot be viewed in a vacuum but, rather, must be examined within the entire context of the trial." ***Id.***

¶18 In this case, the State asked Gumieny one question about his post-***Miranda*** silence. Further, the impermissible question elicited the same

information as the permissible question about Gumieny's pre-***Miranda*** silence. Both questions showed that Gumieny told the police that three different people had driven him home and yet failed to tell the police he drank after arriving home. In addition, the State had the testimony of the police officers that Gumieny claimed other people drove him home and yet failed to say he had anything more than one beer to drink after arriving home. Further, Gumieny's sister testified that Gumieny arrived home intoxicated. Even without the single inadmissible comment, the State had a strong case. Therefore we conclude the impermissible comment did not affect the outcome of the trial.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.