COURT OF APPEALS DECISION DATED AND FILED

December 9, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP642-CR **Cir. Ct. No. 2005CF2520**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY E. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 BRENNAN, J. Jeffrey E. Johnson appeals from a judgment entered after he was convicted of possession of a firearm by a felon, contrary to

WIS. STAT. § 941.29(1) (2005-06)[1] and from an order denying his motion for postconviction relief on the grounds of: (1) constitutional error; and (2) ineffective assistance of counsel. On the first claimed error, Johnson contends his Fifth Amendment protection against self-incrimination was violated when the trial court permitted reference to Johnson's pre-arrest silence. On the second claimed error, Johnson contends that his trial counsel provided ineffective assistance by failing to: (1) object to the admission of DNA evidence from a warrantless blood draw; (2) object to admission of evidence that the gun was stolen; and (3) cite case law in support of his motion to exclude the testimony on his pre-arrest silence.

¶2 We conclude that Johnson's Fifth Amendment rights were not triggered because the questions by police at the scene were of a general investigatory, not accusatory nature. Additionally, his refusal to explain the shooting and his admonition to his mother not to talk did not constitute "silence" but were affirmative acts. We further conclude that Johnson failed to establish any prejudice resulted from his claims of ineffective assistance as the DNA evidence would have come in even if defense counsel had objected. As to the "stolen gun" evidence, its admission was harmless. Because we have ruled that the State's reference to Johnson's pre-arrest silence was permissible, the failure to submit case law supporting his position on this point was not deficient. For all of these reasons, we affirm the judgment of conviction and denial of the postconviction motion.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

BACKGROUND

¶3 The Wauwatosa police responded to a report of a shooting in the City of Wauwatosa on April 29, 2005. Wauwatosa Police Officer Timothy Warren, who was first on the scene, testified that he did not know if someone had been shot. He saw a woman, whom he later learned was Tammy Rowland, walking down the driveway within a minute of his arrival. He testified about his interaction with Rowland:

> I asked her if someone had been shot and she said, Yeah, someone's been shot in the hand and I then asked her, Where is the shooter? And she said, "He's in the house" and at that point my conversation with her ceased, because I was attempting to watch the house more than I was attempting to talk to her from a safety standpoint.[2]

Footnote added.

¶4 Officer Warren indicated that he then saw Johnson and his mother come down the driveway. He did not see whether they came out the front or side door of the duplex. Johnson's hand was wrapped in a towel and there was blood on it. Officer Warren told Johnson to sit down. Officer Warren then testified about what happened next:

> I asked Mr. Johnson, I asked him who shot him and he didn't say anything to me. I asked him, again, several times, who shot him and where the gun was.
>
> At one point he said, "I don't know" and he was standing next to his mother and I recall him saying to her, because she was having a little bit of a conversation with me, because she requested help. She said, "Could you

[2] Quote marks are cited as in original.

> please get help for my son. He's been shot." So, I was having a little bit of conversation with her and there came a point in time where the defendant said to her, "Don't say anything mama."

¶5 Johnson was subsequently turned over to the Wauwatosa Fire Department and Officer Joseph Lewandowski for medical treatment. The police then entered the home to check for suspects or evidence. They observed blood on the stairwell wall going down to the basement, a magazine from a firearm, an empty .380 caliber bullet casing and a bullet hole in the carpet, all in the basement. When they could not find a gun in the house, the police followed the blood trail from the basement outside the residence, along the driveway to an area where a car was backed up to the garage. They saw blood in the area around the car and on the front of the car. Officer Warren testified that blood was splattered and seemed to point to a neighbor's yard. He found a gun amongst vegetation in a neighboring yard, twenty-five feet from the driveway. There was no magazine in the gun. The gun appeared to have blood on it, so the officer used gloves to pick it up, saying that he intended to send it to the lab for potential DNA analysis.

¶6 After Johnson's arrest, the Wauwatosa Police Department received an April 30, 2005 teletype from Alabama saying that the gun recovered in this case had been previously stolen from an individual in Alabama and the Alabama police requested the return of the gun. Wauwatosa Police Lieutenant Greg Jochem testified at trial that he authorized the return of the gun and clip to Alabama on or after the date of the teletype, conceding that that was probably a mistake.

¶7 Johnson was conveyed to the hospital for treatment of his wound. A Wauwatosa police officer provided a blood kit to the nursing personnel who then obtained two vials of blood from Johnson and turned it over to the Wauwatosa police officer who put it in a department evidence locker to be sent off for testing.

The forensic scientist from the State Crime Lab testified that the blood swabs from the gun matched the blood standard from Johnson.

¶8 Johnson's mother testified at trial that she heard a loud "pop" from the basement and that Johnson yelled to her to call the paramedics because, "I've been shot." She saw his hand bleeding. After the shooting, she saw Rowland come from the basement into the hallway of her house. She said Tammy went outside and had contact with the police and she (Johnson's mother) never saw any gun.

¶9 Rowland testified at trial that she was talking to Johnson in the basement and he pulled out a gun and began playing with it. The clip hit the floor. She told him to put it away but he did not comply with her request. She stood up to leave, turned her back to him and then the gun went off. She then saw that his hand was bleeding. His mother called 911. She then went out of the house down the driveway, was searched by police and told them what happened.

¶10 Johnson did not testify. The court took judicial notice of his 1986 felony theft conviction and instructed the jury to accept that fact as proven.

¶11 In his opening statement, the prosecutor told the jury they would hear that when asked by police what happened, Johnson refused to tell them and told other witnesses not to say anything. The prosecutor also told the jury that the gun belonged to somebody in another state and there was no allegation that Johnson was involved in obtaining it from that person. He told the jury that the gun was returned to the owner by police. In his closing argument, the prosecutor emphasized that Johnson clearly handled the gun because the DNA analysis showed that the blood on the gun was his. The prosecutor also reminded the jury that the Wauwatosa Police Department sent the gun back to its rightful owner

based on the teletype. The teletype was given to the jury with the exhibits during deliberations.

¶12 The jury asked two questions during deliberations regarding the location of the gun casings and whether the blood splatter was found on the hood of the car. The court told them to rely on their collective memories. Later the court told the parties the jury indicated they thought they were a "hung jury." The court noted that they had only been deliberating for four hours and had worked through lunch. Johnson's trial counsel requested the ***Allen***[3] supplemental jury instruction, which the court gave. Approximately one hour and fifteen minutes later, the jury reached a verdict. Johnson, through appellate counsel, filed a postconviction motion for a new trial, asserting claims of trial court error and ineffective assistance of counsel and requesting a ***Machner***[4] hearing. The trial court denied the motion after briefing from counsel. Johnson filed a timely notice of appeal from both the judgment of conviction and the order denying his postconviction motion.

DISCUSSION

A. Standard of Review: Fifth Amendment Issue.

¶13 Whether the prosecutor's reference to Johnson's refusal to speak and admonition to his mother not to speak violates Johnson's right to remain silent under the Fifth Amendment, is a question of law, which we review *de novo*. *See* ***State v. Adams***, 221 Wis. 2d 1, 6, 584 N.W.2d 695 (Ct. App. 1998). The Fifth

[3] *See* ***Allen v. United States***, 164 US. 492 (1896).

[4] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Amendment protects a person from compelled self-incrimination even prior to arrest or custodial interrogation generally. ***State v. Fencl***, 109 Wis. 2d 224, 235-37, 325 N.W.2d 703 (1982). However, there are pre-arrest circumstances in which the Fifth Amendment does not apply. The court in ***Adams***, noted that "absent circumstances that might *compel* a reasonable person to speak and incriminate himself or herself, the privilege does not arise." ***Id.***, 221 Wis. 2d at 9 (citation omitted, emphasis in ***Adams***). In other words, brief questioning without restraint at the scene of a crime for the purpose of investigating rather than accusing, may not violate the Fifth Amendment. *See* ***State v. Leprich***, 160 Wis. 2d 472, 477-78, 465 N.W.2d 844 (Ct. App. 1991). The issue here then turns on the nature of the questioning. Was it investigative or accusatory in nature?

¶14 The courts have found that the following police questions at the scene were investigative in nature: (1) about who was driving, *see* ***State v. Esser***, 166 Wis. 2d 897, 900-02, 480 N.W.2d 541 (Ct. App. 1992); (2) about the circumstances of a domestic violence as to who was the aggressor, *see* ***Leprich***, 160 Wis. 2d at 477-78; (3) about a shooting to determine who shot the victim, *see* ***Britton v. State***, 44 Wis. 2d 109, 113-16, 170 N.W.2d 785 (1969); and (4) about warrantless entry into a home at the scene of a child abuse call, *see* ***State v. Boggess***, 110 Wis. 2d 309, 311-12, 317-18, 328 N.W.2d 878 (Ct. App. 1982) (police officer asked parents upon seeing child with part of lip missing, "[W]hat happened?" and "How did he get hurt?"), *aff'd*, 115 Wis. 2d 443, 340 N.W.2d 516 (1983).

¶15 Here the police were called to a shooting, but did not know if someone had actually been shot until they arrived at the scene. Officer Warren was the first on the scene and he first encountered a woman who said someone had been shot and the shooter was in the house. The police at this time did not have

enough information to know whether she told them the truth or not. They did not know if she was the shooter trying to mislead them or if there was another person inside who was the actual shooter. They did not know who was in the house. They next observed Johnson walk out of the house with his hand wrapped in a bloody towel. At this point they could reasonably have thought he was the victim. They simply did not have enough information to sort it out at that point. Officer Warren testified that at this point, he:

> asked Mr. Johnson, I asked him who shot him and he didn't say anything to me. I asked him, again, several times, who shot him and where the gun was.
>
> At one point he said, "I don't know" and he was standing next to his mother and I recall him saying to her, because she was having a little bit of a conversation with me, because she requested help. She said, "Could you please get help for my son. He's been shot." So, I was having a little bit of conversation with her and there came a point in time where the defendant said to her, "Don't say anything mama."

¶16 This transcript portion recounts the point in time where Johnson refuses to answer and tells his mother not to speak. His response to Officer Warren's questions is irrelevant to the issue of whether Officer Warren's questions were investigatory or accusatory. In context, it is clear that Officer Warren was simply trying to investigate the report of the shooting. His questions were of a routine on-the-scene investigative nature. The prosecutor's reference at trial to Johnson's answers to these questions does not implicate the Fifth Amendment's protection.

¶17 Similarly, Johnson's argument in his postconviction motion on this point fails. The trial court's statement in its postconviction order that its decision was based on the fact that Johnson was not in custody does not compel reversal. We review the record to determine whether anything in the record supports the

trial court's decision. Here, the postconviction court found no error in the admission of the testimony as to Johnson's pre-arrest refusal to speak. The case law referenced above (***Britton***, ***Boggess***) supports the trial court's decision. Accordingly, we hold that the trial court did not err in permitting the prosecutor's comments on pre-arrest silence.

B. Ineffective Assistance Claims.

¶18 Johnson claims that his trial counsel was ineffective in three ways: (1) he failed to object to the admission of DNA evidence on the ground that the blood draw was taken in violation of the Fourth Amendment; (2) he failed to object when the State referenced the stolen gun; and (3) he failed to cite authority on the pre-arrest silence argument. It is the defendant's burden to establish that: (1) counsel's performance was deficient; and (2) counsel's deficiencies prejudiced his case. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. ***Id.*** at 697.

¶19 To satisfy the prejudice prong, appellant must demonstrate that counsel's deficient performance was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.*** at 687. In other words, there must be a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

¶20 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). "The trial court's determinations of what the attorney did, or

did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous." ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). "However, the ultimate conclusion, however, of whether the attorney's conduct resulted in a violation of defendant's right to effective assistance of counsel is a question of law; [for which], no deference to the trial court's decision is required." ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987).

1. Blood Draw.

¶21 Johnson's first claim is that his trial counsel provided ineffective assistance when he failed to challenge the warrantless blood draw. The State responds that any motion to suppress would have been denied or even if granted, the State could have simply obtained a warrant and taken a new blood draw. Thus, the State argues there is no prejudice to Johnson from the warrantless blood draw and DNA analysis. The trial result would have been the same. We find that there is no prejudice to Johnson on the grounds of inevitable discovery.

¶22 In this case even if defense counsel had filed a motion to suppress the blood draw and even if it had been granted, the State could still have obtained the evidence. Because the defendant's blood could not dissipate, a warrant or court order could have been obtained at any stage of these proceedings. Once obtained, the blood could then have been analyzed for the defendant's DNA and compared to the blood on the gun. This new blood draw evidence, which is different from the suppressed blood draw evidence, would have been admitted and the result of the trial the same. Accordingly, under the inevitable discovery rule, *see* ***Nix v. Williams***, 467 U.S. 431 (1984), we find that trial defense counsel was

not ineffective and there was no prejudice to the defendant from admission of this blood draw.

2. The Stolen Gun Evidence.

¶23 Johnson next argues that trial counsel provided ineffective assistance by failing to object when the State referred to the fact that the gun involved here had been stolen. Johnson argues that the evidence of the stolen nature of the gun was irrelevant and prejudicial. The State argues that even if the stolen gun evidence was irrelevant, the inclusion of this evidence did not prejudice the outcome for Johnson.

¶24 The prosecutor in his opening statement referred to the gun but stated that there was "no allegation that the defendant was involved in obtaining it (the gun)." The trial court interpreted this to mean that the State was not claiming that Johnson stole the gun. Johnson in his appellate argument maintains that the use of the word "allegation" made it sound like Johnson was charged with stealing the gun or that the only reason he was not charged with stealing it was because the State did not have enough evidence to prove that. The prosecutor's explicit statement to the jury refutes Johnson's contentions. The rest of his argument is speculation as to what the jury might have thought.

¶25 The police lieutenant who authorized the return of the gun back to its rightful owner in Alabama testified that he had no information that Johnson was involved in the stealing of the gun. The actual teletype from Alabama was admitted into the record. In closing, the prosecutor referred to the fact that the gun was returned to "its rightful owner" which Johnson argues was a reminder to the jury that perhaps he stole the gun. We are not persuaded that the prosecutor's comment would prompt the response Johnson suggested particularly because the

words of the prosecutor do not express any comment or hint that Johnson stole the gun.

¶26 Johnson's argument, even if not requiring speculation, is unreasonable where, as here, there was no evidence offered that the gun was recently stolen. The origin was Alabama, a very long distance from Wisconsin and with no apparent connection to Johnson. Any inference of theft would be unreasonable based on the facts in this case and would be purely speculative. Based on the foregoing, we conclude that Johnson has not met his burden of showing that there was a reasonable probability that the outcome would have been different without the prosecutor's references or the officer's testimony about the stolen gun. Accordingly, we hold that the inclusion of this testimony was not prejudicial and, therefore reject his claim that his trial counsel provided ineffective assistance for failing to object to this evidence.

3. Failure to Cite Law on Pre-arrest Silence.

¶27 Because of our ruling that there was no Fifth Amendment violation in the admission of testimony about Johnson's refusal to answer police questions and his admonition to his mother not to speak, we hold there was no prejudice to Johnson for his lawyer's failure to cite legal authority to advance that position. Citation to legal authority would not have resulted in a ruling favorable to Johnson.

¶28 For all of the foregoing reasons, we affirm the judgment and order.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.