COURT OF APPEALS
DECISION
DATED AND FILED

April 24, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1842-CR **Cir. Ct. No. 00-CF-466**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES A. CUNDY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: BARBARA H. KEY, Judge. *Affirmed.*

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. James A. Cundy appeals from a judgment of conviction of arson and from an order denying his postconviction motion for a new trial. He seeks a new trial in the interests of justice on the ground that a

police officer improperly commented on the veracity of witnesses and on one witness's invocation of her ***Miranda***[1] rights. We conclude that if error occurred, it was harmless error in light of the theory of defense. We affirm the judgment and order.

¶2 It is undisputed that Cundy was responsible for the fire that occurred on a Sunday morning in the basement of the home he and his wife were renting. The issue was whether Cundy deliberately started the fire. At the scene Cundy told a police officer and fire captain that he left a cigarette in a metal container atop a cardboard box. When officers indicated that it was unlikely that the fire had started in that fashion, Cundy suggested that he might have knocked over the container with the cigarette. Because of his changing stories, Cundy was placed under arrest.

¶3 At the police station, Cundy was interviewed by Officer Dennis Gitter. Gitter also interviewed Anna Veeser, a friend of Cundy's who had arrived at the scene of the fire with Cundy. During the interview Cundy repeated his version of how the fire started accidentally. Eventually he admitted that he had set the fire because he was angry with the landlord over being evicted from the home. Cundy indicated that neither his wife nor Veeser knew anything about the setting of the fire.

¶4 Under WIS. STAT. § 752.35 (1999-2000),[2] this court may reverse a judgment when it appears from the record that the real controversy has not been

[1] ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966).

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

fully tried or that it is probable that justice has miscarried. ***State v. Wenger***, 225 Wis. 2d 495, 511, 593 N.W.2d 467 (Ct. App. 1999). One situation which might suggest that the real controversy has not been fully tried is when a jury had before it evidence improperly admitted and which clouded a crucial issue. ***State v. Smith***, 153 Wis. 2d 739, 742, 451 N.W.2d 794 (Ct. App. 1989).

¶5 Cundy's claim is that portions of Gitter's trial testimony were improper and clouded crucial issues of credibility. Cundy first points to Gitter's commentary on the truthfulness of Cundy's confession:

> PROSECUTOR: During the course of your contact with Mr. Cundy and discussing things with him and looking at him and talking with him, did you get the feeling that he was just telling you that he purposely set the fire because he was mad at this landlord just so that you would leave him alone?
>
> GITTER: No. People don't admit to something they didn't do when they're looking at prison time. It just didn't make any sense. He made his admission. It's classic deception is what it is.

¶6 When asked about his interview with Veeser, Gitter indicated that originally she made a brief statement but then asked for an attorney and would not speak to him further. When asked if he just let Veeser go after Cundy confessed, Gitter responded:

> Yes. She did obstruct our investigation somewhat. There's still some answers—I don't think she still was totally honest with us of her involvement in this case. But at that point there was no probable cause, I believe, to arrest her for the obstruction. It just wasn't serious enough at that point.

¶7 Gitter was asked if he had received information contrary to Cundy's accidental version. He explained that he had spoken with the fire captain. He

added the comment that the fire captain is "in my opinion, a very good arson investigator."

¶8 Cundy argues that Gitter's comments invaded the province of the jury to determine the credibility of witnesses. He claims that Gitter violated the rule stated in ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984), which prohibits one witness from commenting on the truthfulness of another witness's statement or testimony.

¶9 At a minimum we agree with Cundy's assessment that Gitter's answers were in part nonresponsive and constituted "gratuitous" commentary. "As a witness, the officer was neither obliged nor permitted to do more than answer questions asked. In fact, nonresponsive statements by a witness are not encouraged, and may be stricken from the record." ***Bowers v. State***, 53 Wis. 2d 441, 444-45, 192 N.W.2d 861 (1972) (footnote omitted).

¶10 We assume without deciding that Gitter's "loose lips" created error in the trial.[3] Although in determining whether to grant a new trial because the real controversy was not fully tried we need not determine if there exists a probability of a different result on retrial, we should be convinced that the error was not harmless and that it actually clouded a crucial issue in the case. *See* ***Wenger***, 225

[3] We need not decide whether the error was because Gitter's testimony was nonresponsive, whether it violated the rule announced in ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984), or if it was improper to comment on another witness's invocation of her ***Miranda*** rights. We note, however, that Cundy's reliance on ***State v. Samuel***, 2001 WI App 25, 240 Wis. 2d 756, 623 N.W.2d 565, *review granted*, 2001 WI 43, 242 Wis. 2d 543, 629 N.W.2d 783 (Wis. April 5, 2001) (No. 99-2587-CR), is misplaced. ***Samuel*** applies to cases where coercion is the basis for objecting to a witness's statement and has no application here to the question of whether one witness may comment on another's invocation of ***Miranda*** rights.

Wis. 2d at 511-12; ***State v. Boshcka***, 178 Wis. 2d 628, 638 n.2, 496 N.W.2d 627 (Ct. App. 1992). "The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction." ***State v. Sullivan***, 216 Wis. 2d 768, 792, 576 N.W.2d 30 (1998).

¶11 Cundy's theory of defense was that his initial claim of accident was truthful and his subsequent admission to intentionally starting the fire was coerced by police interrogation tactics. Defense counsel's opening and closing argument suggested that the investigators immediately and myopically focused on Cundy as the intentional source of the fire. Counsel characterized Cundy's explanation for the fire as "falling on deaf ears." Cundy argued that it was Gitter's intent to keep him in the interrogation room until he confessed. Gitter's testimony that Cundy would not have made the admission unless true aligns with the theory that Gitter would not believe Cundy until he heard what Gitter believed to be the truth. The same is true of Gitter's comment that he believed Veeser had not been forthright with information. It suggested that Gitter would not be satisfied unless Veeser implicated Cundy. Also, the defense used the information about Veeser's invocation of her ***Miranda*** rights to illustrate that Gitter was obligated to stop talking with Veeser but continued to pursue Cundy because he had not invoked his right to an attorney. Overall, the objectionable testimony could have aided the theory of defense by demonstrating Gitter's self-righteous and overbearing pursuit of what may have been only his version of the truth.[4] It was harmless error.

¶12 Finally, Gitter's bolstering of the fire captain's arson investigation skills was harmless error. In light of the theory of defense that investigators made

[4] This may be why defense counsel did not object to Gitter's nonresponsive answers.

up their minds immediately and based solely on Cundy's changing versions of what happened with his cigarette, the fire captain's qualifications were not at issue. Moreover, Gitter's comment with respect to the fire captain was isolated and not revisited by either the prosecution or defense.

¶13 We conclude that the credibility battle was fought fairly. Granting a new trial under WIS. STAT. § 752.35 is not justified.

By the Court.—Judgment and order affirmed.

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