COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3497-CR **Cir. Ct. No. 01CF315**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAMON C. HALL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MARTIN J. DONALD, Judge. *Affirmed.*

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

¶1 PER CURIAM. Ramon C. Hall appeals from a judgment of conviction entered after he pled guilty to one count of armed robbery while concealing identity, party to a crime, contrary to WIS. STAT. §§ 943.32(2),

939.641 and 939.05 (1999-2000),[1] one count of possession of a short-barreled shotgun, contrary to WIS. STAT. § 941.28(2), and one count of possession of a firearm by a felon, contrary to WIS. STAT. § 941.29(2). Hall contends that the trial court erred in failing to suppress his statements to police because the police failed to scrupulously honor his invocation of his right to remain silent. We disagree and affirm.

I. BACKGROUND.

¶2 On January 13, 2001, an armed robbery occurred at a Kohl's Food store on North Teutonia Avenue in Milwaukee. An employee, who worked as a cashier on the evening in question, informed police that she observed two masked males approach the cashier's office where she was working. One individual was armed with a shotgun and the other with a handgun. These men pointed their weapons at the cashier, ordered her to leave the office, and robbed the office of a "hand full of money."

¶3 The cashier later identified Marcus Childs as one of the robbers, who, in turn, informed police that his accomplices were Jamal Davis, the get-away driver, and Ramon Hall, the other gunman. On January 14, 2001, all three suspects were interviewed by police. Detective Zens, a detective with the Milwaukee Police Department Robbery Unit, interviewed Hall. Detective Zens immediately advised Hall of his constitutional ***Miranda*** rights.[2] Although Hall did

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

[2] In ***Miranda v. Arizona***, 384 U.S. 436 (1966), the Supreme Court established that the state may not use a suspect's statements stemming from custodial interrogation unless the state demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. Among those safeguards are the now-familiar ***Miranda*** warnings.

not request an attorney, he signed a form indicating that he did not wish to make a statement. The detective then terminated the interview with Hall and began interviewing his co-defendants.

¶4 Davis and Childs made complete statements to police outlining the crime in question. Their statements indicated that Hall had torn the inside of his jacket in order to fit a shotgun into the lining. After receiving this information, Detective Zens returned to the interview room where Hall was located in order to corroborate the statements by examining the lining of Hall's jacket. When the detective returned, he requested Hall's jacket for inventory as evidence. At this time he also commented that a torn jacket lining would be consistent with Davis's and Childs's statements. He then took the jacket, showed Hall the torn lining, and began to exit the interview room. Hall then informed the detective that he wanted to make a statement. At this point, Detective Zens advised Hall of his ***Miranda*** rights for a second time and Hall gave a complete statement concerning his involvement in the crime.

¶5 On March 29, 2001, Hall filed a motion to suppress his statements made to Detective Zens. The trial court denied the motion. On June 11, 2001, Hall entered a guilty plea to all three charges.

II. ANALYSIS.

¶6 The Fifth Amendment to the United States Constitution provides, "No person ... shall be compelled in any criminal case to be a witness against himself."[3] '"The critical safeguard of the right to silence is the right to terminate

[3] The Fifth Amendment privilege against self-incrimination is applied to the states by the Fourteenth Amendment. *See* ***Malloy v. Hogan***, 378 U.S. 1 (1964).

questioning by invocation of the right to silence."' ***State v. Badker***, 2001 WI App 27, ¶11, 240 Wis. 2d 460, 623 N.W.2d 142 (quoting ***State v. Hartwig***, 123 Wis. 2d 278, 284, 366 N.W.2d 866 (1985)). In determining whether police conduct constitutes the functional equivalent of interrogation, each case must be considered upon its own facts. ***State v. Bond***, 2000 WI App 118, ¶15, 237 Wis. 2d 633, 614 N.W.2d 552.

¶7 For purposes of determining whether a defendant has been subjected to an interrogation requiring the administration of *Miranda* warnings, an interrogation occurs when a person is subjected to either express questioning or its functional equivalent. *See* ***State v. Armstrong***, 223 Wis. 2d 331, 356-57, 588 N.W.2d 606 (1999). Thus, the term "interrogation" refers to: either (1) express questioning; or (2) any words or actions on the part of the police, other than those normally attendant to arrest and custody, that the police should know are reasonably likely to elicit an incriminating response from the suspect. *See* ***Bond***, 2000 WI App 118 at ¶16. Finally, "incriminating response" means any response – whether inculpatory or exculpatory – that the prosecution may seek to introduce at trial. ***State v. Cunningham***, 144 Wis. 2d 272, 279, 423 N.W.2d 862 (1988).

¶8 "Determining whether an 'interrogation' has taken place focuses on the perception of the accused, not the intent of the police officer." ***Badker***, 2001 WI App 27 at ¶13. "This focus reflects the fact that the ***Miranda*** safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police." ***Cunningham***, 144 Wis. 2d at 279. Factors to consider include: (1) the length of conversation between the officer and the suspect in determining whether the police officer should have known that his words would

elicit an incriminating response; and (2) the emotional state of the suspect in determining the suspect's susceptibility. ***Id.*** at 281.

¶9 Issues concerning a criminal defendant's right to remain silent involve questions of historic fact applied to a constitutional standard. *See* ***Badker***, 2001 WI App 27 at ¶8. We will uphold the trial court's findings of evidentiary or historical facts unless they are clearly erroneous. ***Id.*** However, the determination of whether the facts of the case satisfy the legal standard is a question of law that we review *de novo*. ***Id.***

¶10 Hall contends that the detective's remark was the functional equivalent of interrogation and, therefore, his incriminating response should have been suppressed. We disagree and conclude that the instant factual situation is more analogous to the facts presented in ***Rhode Island v. Innis***, 446 U.S. 291 (1980), and ***State v. Cunningham***, cases in which it was determined that the defendant was not subject to the functional equivalent of interrogation.

¶11 In ***Innis***, the defendant had been arrested for kidnapping, robbery, and murder, had been advised of his ***Miranda*** rights three times, and had invoked his right to counsel. *See* ***Innis***, 446 U.S. at 294. While being transported in the back seat of a squad car, Innis overheard two officers in the front seat discussing the possibility that a little girl from a school for handicapped children near the scene of the crime might find the gun the murderer had hidden and kill herself. *See* ***id.*** at 294-95. Innis interrupted the officer's conversation and revealed the location of the gun. *See* ***id.*** at 295.

¶12 In addressing the meaning of "interrogation" under ***Miranda***, the Supreme Court distinguished between "subtle compulsion" and "interrogation."

See ***id.*** at 303. In concluding that Innis had not been "interrogated," the Supreme Court explained:

> [I]t cannot be fairly concluded that the respondent was subjected to the "functional equivalent" of questioning. It cannot be said, in short, that [the officers] should have known that their conversation was reasonably likely to elicit an incriminating response from the respondent. There is nothing in the record to suggest that the officers were aware that the respondent was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children. Nor is there anything in the record to suggest that the police knew that the respondent was unusually disoriented or upset at the time of his arrest.
>
> The case thus boils down to whether, in the context of a brief conversation, the officers should have known that the respondent would suddenly be moved to make a self-incriminating response. Given the fact that the entire conversation appears to have consisted of no more than a few off hand remarks, we cannot say that the officers should have known that it was reasonably likely that Innis would so respond. This is not a case where the police carried on a lengthy harangue in the presence of the suspect. Nor does the record support the respondent's contention that, under the circumstances, the officers' comments were particularly "evocative." It is our view, therefore, that the respondent was not subjected by the police to words or actions that the police should have known were reasonably likely to elicit an incriminating response from him.

Id. at 302-03 (footnote omitted).

¶13 Furthermore, in ***Cunningham***, our supreme court addressed the issue of whether confronting a defendant with physical evidence of a crime is the functional equivalent of interrogation so that subsequent statements of the defendant must be suppressed if made prior to receiving a ***Miranda*** warning. ***Cunningham***, 144 Wis. 2d at 273. In ***Cunningham***, three officers executed a search of the defendant's apartment for cocaine. ***Id.*** at 274-75. After a struggle, the officers subdued Cunningham, handcuffed him, and placed him under arrest

for resisting an officer, but failed to read him any ***Miranda*** warnings. ***Id.*** at 275. After Cunningham was placed under arrest, two officers conducted a search of the bedroom for cocaine, where they then found a loaded revolver between the mattress and box spring. ***Id.*** One officer unloaded the revolver and showed it to the defendant, advising him where it had been found and saying, "This was apparently what Mr. Cunningham was running into the bedroom for." ***Id.*** Upon seeing the revolver and hearing the officer's comment, Cunningham stated something to the effect that it was his bedroom and that he had a right to have a gun. ***Id.*** These statements were later used in support of his conviction for being a convicted felon in possession of a firearm. *See* ***id.*** at 273.

¶14 In determining that the police officer's words and conduct in showing the defendant the revolver were not the functional equivalent of express questioning, our supreme court stated:

> The defendant urges this court to hold that whenever an officer confronts a suspect with incriminating physical evidence, or verbally summarizes the state's case against the suspect, the officer engages in the functional equivalent of express questioning. The ***Innis*** decision does not adopt this per se rule.
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> We hold that under the circumstances in this case, the officer's words and conduct in presenting the revolver to the defendant are not interrogation under the ***Innis*** test. We conclude that an objective observer (knowing what the officer knew about the defendant) would not, on the sole basis of hearing the officer's words and observing the officer's conduct, conclude that the officer's conduct or words would be likely to elicit an incriminating response. The officer's conduct and words lasted a very short time. There was no indication that the defendant was unusually susceptible to the officer's words and conduct in displaying the gun.

Id. at 282.

¶15 Similarly, we hold that under the circumstances, Detective Zens' confrontation of Hall with incriminating physical evidence was not the functional equivalent of express questioning. First, both parties agree that the detective's words and conduct lasted a very brief time. Second, there is no evidence in the record that Hall was unusually disorientated or upset at the time of the detective's comment. Third, and finally, based on the trial court's findings, we cannot conclude that the detective should have known that his comment was reasonably likely to elicit an incriminating response from Hall.

¶16 Hall argues that Detective Zens' comment upon returning to the room and retrieving the jacket was directed at him and intended to elicit a response. However, at trial, Detective Zens testified that the only reason he returned to the interview room was to retrieve Hall's jacket for physical corroboration of the co-defendants' statements. He further testified that upon verifying the torn jacket liner, he openly commented *to himself* regarding the nature of the evidence. Conversely, on cross-examination, defense counsel repeatedly asked questions implying that Detective Zens was not merely talking to himself, but was actually seeking to elicit a response from Hall. In denying Hall's motion to suppress, the trial court made the following findings regarding the nature of Detective Zens' conduct:

> The issue that this Court must rule on is that when Detective Zens then honored the request [to remain silent] and left the Defendant for approximately an hour and a half and then returned, it is the Detective's testimony that when he returned to the interrogation room that he was returning with the purpose of retrieving a jacket belonging to the defendant.
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> He stated he had remarked or made a statement, and Detective Zens' testimony is that he essentially made the statement to himself, in essence, kind of musing out loud that the jacket was consistent with what … the co[-] defendants had said. And what he was referring to in that

> statement is that the jacket consisted of a tear or hole where allegedly this Defendant had made room for a sawed-off shotgun.
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> ….
>
> I just can't ignore the statements of Detective Zens, or at least his musings because they do factor in, but I have to find that those statements – when taken under the totality of the circumstances – were nothing more than trying to explain or at least come to some understanding with the Defendant as to why the Detective was coming back and requesting the jacket….

¶17 When the trial judge acts as the finder of fact and there is conflicting testimony, the trial judge is the ultimate arbiter of the witness' credibility. *See* WIS. STAT. § 805.17(2). When more than one reasonable inference can be drawn from the credible evidence, "the reviewing court must accept the inference drawn by the trier of fact." ***Bank of Sun Prairie v. Opstein****,* 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979). Thus, because the trial court's findings of fact regarding the nature of the Detective Zens' words and conduct are not clearly erroneous, we conclude that, from the perception of the accused, the detective's actions were not intended to elicit an incriminating response.

¶18 Therefore, we conclude that Detective Zens did not violate Hall's right to remain silent because the detective did not engage in the functional equivalent of interrogation. Accordingly, we affirm the trial court's admission of Hall's incriminating statement.

By the Court.—Judgment affirmed.

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