COURT OF APPEALS
DECISION
DATED AND FILED

August 2, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP571-CR **Cir. Ct. No. 2008CT228**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL E. KRUEGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Oneida County: MARK MANGERSON, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Daniel Krueger appeals a judgment of conviction for operating with a prohibited alcohol concentration as a fourth offense and an

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

order denying his motion for postconviction relief. Krueger argues that the circuit court erred by failing to grant him a mistrial because he was prejudiced by the State's discovery violation. He also argues that he did not knowingly, voluntarily, and intelligently waive his right not to testify. We affirm.

BACKGROUND

¶2 Following a motor vehicle accident, the State charged Krueger with operating while intoxicated and operating with a prohibited alcohol concentration, both as fourth offenses. Krueger filed a discovery demand pursuant to WIS. STAT. § 971.23, requesting the State provide him with a copy of any statements Krueger made concerning the alleged crime. The State responded, providing Krueger with, among other items, a copy of deputy Chad Wanta's police report.

¶3 A jury trial was held on July 22, 2009. Krueger's theory of defense was that he was not intoxicated at the time of the accident and he drank a significant amount of alcohol during the time period between the accident and emergency personnel's arrival.

¶4 At trial, the State first called Mary Dawn Bauer. Bauer testified that on October 25, 2008 at around 11:30 p.m., she heard "screeching tires and a big crash." Nervous because her husband was not home, she called 911 less than one minute after hearing the sound.

¶5 Sergeant Bryan Wege testified that he responded to the 911 call. When he arrived at the accident scene, he observed accident debris but no vehicle. Approximately five minutes after his arrival, dispatch notified Wege that the emergency medical technicians responding to the accident located the individuals involved at an address approximately one quarter mile down the road. When

Wege arrived at the EMTs' location, Krueger told Wege he was the driver. Wege observed Krueger's eyes were glassy and bloodshot and his breath smelled like alcohol. He asked Krueger if he had been drinking, and Krueger said yes. Wege asked Krueger if he had been drinking since the accident, and Krueger said one beer. Wege asked him about the beer's size, and Krueger pointed to a can on the ground. Wege observed the beer can was one quarter full. Krueger did not indicate he had been drinking anything else. Wege admitted that he did not write a police report and was relying on his memory and deputy Chad Wanta's police report. Finally, Wege testified that according to the 911 dispatch record card, Bauer's call was received by dispatch at 11:35 p.m. and the EMTs arrived at the scene at 11:43 p.m.—eight minutes later. The record card was admitted into evidence.

¶6 Wanta testified that he also responded to the 911 call. When he arrived at the accident scene, he observed accident debris including: a cracked driver's side or passenger window, various personal items, and a can of beer with a small amount of liquid inside. While sorting through the debris in an attempt to locate identifying information, Wege informed Wanta that the individuals involved were located at a residence west of Wanta's location. When Wanta responded to the address, he observed Krueger speaking with Wege.

¶7 Upon his arrival, Wanta testified that he took over the investigation. Krueger informed Wanta that he was driving and lost control when he swerved to avoid hitting a deer. Krueger admitted drinking before the accident and quantified the amount as four to five beers in approximately a four-to-five-hour period. Krueger also advised he had consumed alcohol after the accident. Specifically, Krueger "turned around and pointed to a can that was sitting on a ledge near the vehicle or the truck and he stated something to the effect of just that, just that

one." Wege advised Wanta the can was "approximately three quarters full or empty. One of the two."

¶8 A few questions later, the following exchange occurred:

> [State]: In regard to the field sobriety tests, was [Krueger] willing to submit to them?
>
> [Wanta]: Mr. Krueger stated at first that he did not think he should do any field sobriety testing, and he indicated to me that he felt he was intoxicated.
>
> [Defense]: Objection. Side bar, please.

¶9 The court held a side bar and subsequently excused the jury. Krueger's trial counsel argued Krueger's admission that he was intoxicated was not included in the discovery provided by the State. The State read the court the portion of the police report regarding field sobriety tests, and the admission was not included in the report. The State argued that Krueger was not prejudiced by the statement because it was not inconsistent with Krueger's defense that he drank a large quantity of alcohol after the accident.

¶10 Krueger moved for a mistrial. The court took the motion under advisement. Wanta then produced a final copy of his police report, containing Krueger's admission. Neither defense nor the State had a copy of the final police report.[2]

¶11 The relevant portion of the draft and final reports differ in that the final report contains two additional admissions attributed to Krueger. Specifically, the following italicized language was added to the final police report:

[2] The copies the State and Krueger possessed were stamped "draft" in the upper right corner. Wanta's copy was not stamped draft.

> KRUEGER advised that prior to our arrival, but after the accident, he had consumed more beer. Sergeant Wege pointed out a can of beer, which was outside near the vehicle in the driveway. *KRUEGER said that since the crash, he had only consumed what was missing from the can in the driveway, which Sergeant Wege told me was approximately ¾ empty.* I asked KRUEGER if he would submit to field sobriety tests. KRUEGER said he did not know if he should perform any tests *and commented that he knew he was intoxicated*. I advised KRUEGER that if he only drank four to five beers within four to five hours, he might not be over the legal limit or be impaired.

(Emphasis added.)

¶12 The court refused to allow the additional information into evidence and instructed Wanta to testify accordingly. Specifically, the court instructed Wanta that he could not testify that "Mr. Krueger told you that the three quarters of the can of beer that was on the scene was all that he had consumed since the accident." No one reminded the court that Wanta had already testified to that information. As for the intoxication statement attributed to Krueger, the court ordered the testimony stricken.

¶13 When the jury returned, the court instructed: "Ladies and gentlemen, before we took our break, there was a comment by this officer restating something he said the defendant related concerning intoxication. I have found that to be inadmissible. I'm striking it from the record and you are not to consider it in reaching your verdicts."

¶14 Prior to Krueger's testimony, the court never engaged Krueger in a colloquy regarding his right not to testify. Krueger testified he was driving and swerved to avoid a deer. He explained that after the accident, he found his girlfriend, who was a passenger, unconscious and lying next to the vehicle. He thought she was dead, but she then woke up and the two of them climbed back

into the truck and drove home. He sat with her outside, making sure she was okay and removing pieces of glass from her hair. Then, he went inside for five to ten minutes and drank two beers and six to eight shots of vodka. Taking a third beer, he went back outside and sat with his girlfriend. According to Krueger, the EMTs arrived ten minutes after he went back outside. Krueger testified he told Wanta he drank beer and vodka after the accident.

¶15 During closing arguments, the State argued, in part, that Krueger's testimony was incredible, reasoning Krueger did not have enough time to do everything he said occurred between the accident and the arrival of emergency personnel. In response, Krueger argued the time between the accident and the EMTs' arrival was longer than the State's asserted eight minutes, and more appropriately fourteen to fifteen minutes.

¶16 After excusing the jury for deliberations, the court denied Krueger's earlier motion for a mistrial. The jury found Krueger guilty of operating while intoxicated and operating with a prohibited alcohol concentration. The court entered judgment on the operating with a prohibited alcohol concentration charge.

¶17 Krueger filed a postconviction motion, alleging the court erred by not granting a new trial for the State's discovery violation and by not granting a mistrial. He also asserted he did not knowingly, voluntarily, and intelligently waive his right not to testify. In support, Krueger attached an affidavit indicating he was unaware that he had the right not to testify and his attorney never advised him of his right.

¶18 At the motion hearing, Krueger testified according to his affidavit. The State then attempted to call Krueger's trial attorney. Krueger refused to allow his attorney to testify, asserting attorney-client privilege.

¶19 The court denied Krueger's postconviction motion. In a written decision, the court reasoned that the undisclosed information did not harm Krueger and "reinforced [Krueger's] claim that he drank after driving." The court also noted that it cured any harm by telling the jury to disregard the undisclosed testimony. As for the waiver of his right not to testify, the court found Krueger's testimony "self-serving and not credible." Additionally, the court found that "based on the Defendant's invocation of the attorney-client privilege, the Court can infer that [trial counsel] would have probably testified contrary to the Defendant's position."

DISCUSSION

¶20 On appeal, Krueger argues the court erred by: (1) not granting a new trial for the State's discovery violation; (2) not granting a mistrial; and (3) not granting a new trial for Krueger's unknowing waiver of his right not to testify.

I. Discovery violation

¶21 WISCONSIN STAT. § 971.23(1)(b) provides in pertinent part: "Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant …. A written summary of all oral statements of the defendant which the district attorney plans to use in the course of the trial."

¶22 When reviewing an alleged discovery violation, we must first determine whether the State actually violated the discovery statute. ***State v. DeLao***, 2002 WI 49, ¶14, 252 Wis. 2d 289, 643 N.W.2d 480. "If this court concludes that the State violated its statutory discovery obligation, this court must then determine whether the State has shown good cause for the violation and, if not, whether the defendant was prejudiced by the evidence or testimony." ***State v.***

Harris, 2008 WI 15, ¶15, 307 Wis. 2d 555, 745 N.W.2d 397. Each of these steps presents a question of law that we review independently. ***Id.***

¶23 The State concedes that it violated the discovery statute because the statements in Wanta's final report were incriminating and any reasonable prosecutor would have planned on using them at trial. *See* ***DeLao***, 252 Wis. 2d 289, ¶33. Additionally, the State, noting good faith alone is not sufficient to establish good cause, *see* ***id.***, ¶53, concedes it did not have good cause for the discovery violation. We therefore focus our inquiry on whether Krueger was prejudiced by the introduction of the undisclosed evidence.

¶24 When evidence that should have been excluded under WIS. STAT. § 971.23 is admitted, a defendant will receive a new trial only if the improper evidentiary admission was prejudicial. ***Id.***, ¶60. An error is not prejudicial and harmless "if the beneficiary of the error proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" ***Harris***, 307 Wis. 2d 555, ¶42 (citation omitted). Our supreme court has also held that an error is harmless when "it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***Id.***, ¶43 (citation omitted).

¶25 We consider the following factors in analyzing whether an error was harmless:

> the frequency of the error, the importance of the erroneously admitted evidence, the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the erroneously admitted evidence duplicates untainted evidence, the nature of the defense, the nature of the State's case, and the overall strength of the State's case.

Id., ¶45.

¶26 At the outset, Krueger argues that, contrary to the circuit court's conclusion, both undisclosed statements from Wanta's report were disclosed to the jury. Krueger directs this court to an unobjected to portion of Wanta's testimony, which occurred prior to the court's exclusion of evidence from the final report. However, Krueger failed to object to Wanta's response, and thus the admittance of this statement was not properly preserved for appeal. *See* WIS. STAT. § 901.03(1)(a); ***State v. Hoffman***, 106 Wis. 2d 185, 218, 316 N.W.2d 143 (Ct. App. 1982). We also note that Wege testified, without objection, to the same information.

¶27 Krueger next contends he was prejudiced by the introduction of the statement that he felt intoxicated when asked to perform the field sobriety tests. He argues the statement was inconsistent with his defense theory that he was drinking after the accident but before the police arrived. Krueger notes that an "expert testified that it takes approximately one hour before an individual reaches his peak alcohol concentration." He theorizes that "in applying the expert's opinion to Krueger's version of facts, he was still in the absorption phase and likely not intoxicated [when] he made the statement. Thus, the statement that Krueger was intoxicated at the time he was requested to perform field sobriety tests undermined his theory of defense."

¶28 We conclude the State's untimely disclosure of Krueger's alleged statement was harmless; consequently, the court did not err by failing to grant a new trial. First, the expert testified that it takes approximately one hour after an individual's last drink for the individual to reach his or her peak alcohol concentration—nothing in the expert's testimony suggests an individual cannot feel the effects of alcohol until he or she reaches a peak alcohol concentration.

Thus, Wanta's testimony that Krueger felt intoxicated prior to performing the field sobriety tests was not inconsistent with Krueger's theory of defense.

¶29 Second, the circuit court appropriately mitigated the State's untimely disclosure by prohibiting the testimony, striking the statement, and ordering the jury to disregard Wanta's reference to Krueger's statement about intoxication. Krueger argues that the curative instruction was insufficient because "it did not advise the jury precisely what statement they were to ignore." We disagree. The court instructed the jury to disregard "a comment by this officer restating something he said the defendant related concerning intoxication." The curative instruction sufficiently informed the jury what statement it was to disregard. *See* ***State v. Hagen***, 181 Wis. 2d 934, 948, 512 N.W.2d 180 (Ct. App. 1994) (jury presumed to follow curative instruction).

¶30 Finally, the State had strong evidence supporting its case. A neighbor testified she called 911 immediately after hearing a crash, the 911 log indicates both that the call was received at 11:35 p.m. and the EMTs arrived eight minutes later. Wanta found a can of beer at the scene of the accident. Krueger admitted he was driving, and the tests for Krueger's blood alcohol concentration, which were taken at 12:50 a.m. and 1:40 a.m., indicated results of .168 and .148, respectively.

¶31 Krueger also argues that because the discovery violation occurred during trial, that pursuant to ***DeLao***, 252 Wis. 2d 289, ¶63, he is entitled to a new trial. We disagree. The court in ***DeLao*** granted a new trial because the discovery violation, which occurred during trial, completely undermined the defendant's theory of defense and was prejudicial. DeLao was not granted a new trial merely because the disclosure occurred in the midst of trial. Moreover, our supreme court

has determined that a discovery violation, occurring during trial, can be a harmless error. *See* ***Harris***, 307 Wis. 2d 555, ¶¶3, 16 (holding the State's untimely discovery disclosures, one on the morning of trial and one during the lunch break, were harmless).

II. Mistrial

¶32 Krueger asserts the circuit court erred by failing to grant her motion for a mistrial based on the State's discovery violation. A mistrial is only granted if "in light of the whole proceeding, … the claimed error was sufficiently prejudicial to warrant a new trial." ***State v. Sigarroa***, 2004 WI App 16, ¶24, 269 Wis. 2d 234, 252, 674 N.W.2d 894. Because we concluded the error was harmless, the circuit court did not err by failing to grant a mistrial.

III. Waiver of right not to testify

¶33 Krueger contends he is entitled to a new trial because he did not knowingly, voluntarily, and intelligently waive his right not to testify. In support, Krueger argues the circuit court failed to engage him in an on-the-record colloquy regarding his waiver and, at the postconviction hearing, the State failed to meet its burden of proof, establishing his waiver was knowing, voluntary, and intelligent.

¶34 Whether Krueger knowingly, voluntarily, and intelligently waived his right not to testify presents a question of constitutional fact. ***State v. Denson***, 2011 WI 70, ¶48. A question of constitutional fact is a mixed question of law and fact to which we apply a two-step standard of review. ***Id.*** We review the circuit court's findings of historical fact under the clearly erroneous standard, and we review independently the application of those facts to constitutional principles. ***Id.***

¶35 A criminal defendant's waiver of his right not to testify must be knowing, voluntary, and intelligent. ***Id.***, ¶56. In ***Denson***, our supreme court determined that, while a better practice, "circuit courts are not required to conduct an on-the-record colloquy to determine whether a defendant is knowingly, voluntarily, and intelligently waiving his or her right *not* to testify." ***Id.***, ¶¶63, 80. Consequently, Krueger is not entitled to a new trial solely because the court failed to engage him in an on-the-record colloquy regarding his right not to testify.

¶36 Because a defendant must still knowingly, voluntarily, and intelligently waive his or her right not to testify, our supreme court determined that if a defendant properly raises the issue in a postconviction motion, the appropriate remedy is "an evidentiary hearing to determine whether the defendant knowingly, voluntarily, and intelligently waived his or her right not to testify." ***Id.***, ¶¶68-70. The defendant must first "make a prima facie showing that he or she did not know or understand that he or she had the right not to testify." ***Id.***, ¶70. "The burden then shifts to the State to demonstrate by clear and convincing evidence that the defendant knowingly, voluntarily, and intelligently waived his or her right not to testify." ***Id.*** In meeting its burden, "the State may utilize the entire record and may examine both the defendant and the *defendant's trial counsel* at the evidentiary hearing." ***Id.***, ¶70 (emphasis added).

¶37 In this case, the circuit court conducted an evidentiary hearing. The State called Krueger to the stand, and Krueger testified he thought he had to testify and that his trial counsel never discussed his right not to testify. The State then called Krueger's trial counsel. Krueger objected, arguing that because Krueger had not asserted an ineffective assistance of counsel claim, his trial counsel's testimony was barred by the attorney-client privilege. The court asked if Krueger was asserting the attorney-client privilege. Krueger's postconviction counsel

responded, "He's asserting the privilege." The court excused Krueger's trial counsel from giving testimony.

¶38 The court refused to conclude Krueger did not knowingly, voluntarily, and intelligently waive his right not to testify. The court reasoned it found Krueger's testimony not credible and

> very, very self-serving. He remembered what he wanted to remember. He was asserting some new defenses today. Apparently he thinks it's important that the officers released him from custody at 4:30 or 5 in the morning. His assertion is maybe he wasn't that intoxicated, I don't know, but I think under the facts and circumstances of this case … the court can properly infer that had [trial counsel] testified[,] he probably would have testified contrary to Mr. Krueger's position in the case.

¶39 Here, the State attempted to meet its burden of proof by calling Krueger's trial counsel. *See* ***id.***, ¶70. Krueger cannot hide behind the attorney-client privilege and prevent the State from meeting its postconviction burden. *See* ***State v. Simpson***, 200 Wis. 2d 798, 805, 548 N.W.2d 105 (Ct. App. 1996). The circuit court made appropriate factual findings based on credibility determinations and inferences. *See* ***In re Dejmal's Estate***, 95 Wis. 2d 141, 152, 289 N.W.2d 813 (1980) (credibility determinations are in the province of the trial court); *see also* ***State v. Ernst***, 2005 WI 107, ¶36, 283 Wis. 2d 300, 699 N.W.2d 92 (at a collateral attack hearing, if defendant refuses to testify, court is free to draw reasonable inferences that state satisfied its burden). Consequently, we affirm the circuit court's denial of Krueger's postconviction motion.

By the Court.—Judgment and order affirmed.

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