COURT OF APPEALS
DECISION
DATED AND FILED

November 23, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP158-CR **Cir. Ct. No. 2008CF1371**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FRANCISCO L. MENDEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: CHAD G. KERKMAN, Judge. *Affirmed*.

Before Neubauer, P.J., Reilly, J., and Neal Nettesheim, Reserve Judge.

¶1 PER CURIAM. Francisco L. Mendez has appealed from a judgment convicting him of operating a motor vehicle while intoxicated, fifth or

sixth offense (OWI).[1] Mendez contends that he is entitled to a new trial because unrecorded statements made by him at the hospital, where he was taken for a blood draw after his arrest, were improperly admitted at trial. He further contends that the trial court erred by refusing to instruct the jury in accordance with WIS. STAT. § 972.115(2)(a) (2009-10).[2] We conclude that any error was harmless and affirm the judgment.

¶2 Prior to Mendez' jury trial,[3] the trial court held a ***Miranda***/***Goodchild***[4] hearing. The arresting officer, Keith Dumesic, testified that he stopped Mendez for speeding on November 29, 2008. Dumesic testified that when he approached Mendez, he immediately detected an odor of intoxicants. He testified that Mendez spoke very slowly and stated that he was surprised how quickly the officer had caught him. Dumesic testified that because he suspected that Mendez was operating while intoxicated, he asked Mendez to step out of his

[1] Mendez was also convicted of misdemeanor bail jumping and operating a motor vehicle after revocation. In addition, the jury found him guilty of operating a motor vehicle with a prohibited blood alcohol concentration. The trial court entered judgment on the OWI charge, and dismissed the charge of operating a motor vehicle with a prohibited blood alcohol concentration as duplicative.

[2] All references to the Wisconsin Statutes are to the 2009-10 version.

[3] Mendez' first trial ended in a mistrial. In this decision, all references to Mendez' trial are to the second trial.

[4] A trial court holds a ***Miranda/Goodchild*** hearing to determine whether the defendant was properly informed of his rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966), prior to custodial questioning, and whether the defendant's statements to the police were voluntary under ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

vehicle to perform field sobriety tests. Dumesic testified that Mendez then walked up to the sidewalk, responding, "No way, my friend. I can't do any of that shit. I've had too many shots."

¶3 Dumesic testified that at this time he placed Mendez under arrest for OWI, handcuffed him, and transported him in the squad car to the hospital for a blood draw. Dumesic testified that after Mendez' blood was drawn, he read Mendez his ***Miranda*** warnings. Mendez waived his rights and answered questions asked by Dumesic as set forth in an Alcohol/Drug Influence Report that was admitted into evidence. In response to Dumesic's questioning, Mendez stated that he did not know when he began drinking and that he had been drinking shots of whiskey.

¶4 At trial, Dumesic essentially reiterated the testimony given by him at the ***Miranda***/***Goodchild*** hearing. He testified that he stopped Mendez for speeding, that he detected an odor of intoxicants as soon as he approached Mendez, and that Mendez' speech was slightly slurred. Dumesic testified that when he asked Mendez to conduct field sobriety tests, Mendez replied "words to the effect of, 'I've had too many shots. I can't do any of that shit. None of it.'"

¶5 Dumesic testified that he then arrested Mendez for OWI and transported him to Kenosha Memorial Hospital for a blood draw. He testified that while at the hospital, he read Mendez the ***Miranda*** warnings on the Alcohol/Drug

Influence Report, and Mendez agreed to talk to him. Dumesic testified that in response to his questions, Mendez told him that he had been drinking shots of whiskey, and when asked what time he started, had answered, "[w]ho knows?" The State also presented evidence that Mendez' blood alcohol concentration was 0.153 g/100 ml.

¶6 On appeal, Mendez argues that the trial court erred when it admitted the statements made by him at the hospital because Dumesic's questioning of him was not recorded. Mendez also contends that the trial court erroneously refused his request to instruct the jury in accordance with WIS. STAT. § 972.115(2)(a). WISCONSIN STAT. § 968.073(2) provides:

> It is the policy of this state to make an audio or audio and visual recording of a custodial interrogation of a person suspected of committing a felony unless a condition under s. 972.115(2)(a)1. to 6. applies or good cause is shown for not making an audio or audio and visual recording of the interrogation.

¶7 WISCONSIN STAT. § 972.115(2)(a) further provides that if a statement made by a defendant during a custodial interrogation is admitted into evidence in a felony jury trial and if an audio or audio and visual recording of the interrogation is not available, upon request of the defendant the court shall instruct the jury that it is the policy of this state to make an audio or audio and visual recording of a custodial interrogation of a person suspected of committing a felony "and that the jury may consider the absence of an audio or audio and visual recording of the interrogation in evaluating the evidence relating to the

interrogation and the statement in the case." *See also* WIS JI—CRIMINAL 180. However, this provision does not apply if the state asserts and the trial court finds that one of the conditions listed in § 972.115(2)(a)1 through 6 applies or that good cause exists for not providing the instruction. Sec. 972.115(2)(a).

¶8 The trial court determined that the statements made by Mendez at the scene and prior to his arrest were admissible because they were freely, knowingly, and voluntarily given, a determination that is not challenged on appeal. The trial court further determined that the statements made by Mendez at the hospital were admissible and that good cause existed to deny Mendez' request for an instruction under WIS. STAT. § 972.115(2)(a). In finding good cause, the trial court determined that exigent circumstances warranted proceeding with the Alcohol/Drug Influence Report at the hospital.

¶9 We conclude that the admission of the statements made by Mendez at the hospital and the denial of his request for an instruction under WIS. STAT. § 972.115(2)(a), even if error, was harmless. The test for harmless error is whether it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. ***State v. Shomberg***, 2006 WI 9, ¶18, 288 Wis. 2d 1, 709 N.W.2d 370. If it is clear beyond a reasonable doubt that a rational jury would have reached the same verdict absent the error, then the error did not contribute to the verdict and the error is harmless. ***Id.*** Instructional errors are

subject to the harmless error rule. *See* ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189.

¶10 Mendez' admissions during the custodial interrogation at the hospital added nothing of import to the other evidence that was admitted at trial. As set forth above, when he was asked to perform field sobriety tests, Mendez volunteered that he could not perform the tests because he had had too many shots. His custodial statement that he had been drinking shots of whiskey was merely cumulative to his pre-arrest volunteered statement and was arguably much less colorful and powerful as evidence. In conjunction with the evidence that Mendez' blood alcohol concentration was 0.153 g/100 ml, his custodial statement that he had been drinking shots of whiskey was of only marginal value and added nothing significant to what the jury had already heard.

¶11 We further note that even though the trial court did not provide the jury with WIS JI—CRIMINAL 180, incorporating the language of WIS. STAT. § 972.115(2)(a) dealing with the evaluation of unrecorded custodial statements, it instructed the jurors that it was their duty to scrutinize and weigh the testimony and to determine the credibility and weight of the statements and evidence. The trial court specifically instructed the jurors that in evaluating each statement allegedly made by Mendez, it was for them to determine whether the statement

was actually made, whether it was accurately restated at trial, and whether the statement or any part of it ought to be believed.[5]

¶12 Based upon this record, including the evidence regarding Mendez' pre-arrest statements, the evidence regarding his blood alcohol level, and the instructions given by the trial court, it is clear beyond a reasonable doubt that a rational jury would have reached the same verdict regardless of whether the evidence of Mendez' custodial statements had been excluded or the instruction under WIS. STAT. § 972.115(2)(a) had been given. Consequently, no basis exists to disturb his judgment of conviction.

By the Court.—Judgment affirmed.

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

[5] Consistent with these instructions, Mendez' counsel challenged the credibility of Dumesic's testimony in his closing argument, pointing out that there was no audio or visual recording to substantiate his testimony.