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**DISTRICT I/IV**

April 1, 2019

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You are hereby notified that the Court has entered the following opinion and order:

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2017AP1689-CR                      State of Wisconsin v. Victor Eugene Gray (L.C. # 2014CF385)

Before Lundsten, P.J., Kloppenburg and Fitzpatrick, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Victor Eugene Gray appeals his judgment of conviction and an order denying his postconviction motion. Gray asserts on appeal that the circuit court failed to “independently determine” whether a statement he made during a police interview was admissible at the time of his trial, and that he was prejudiced by the admission of that statement. Based upon our review

of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We summarily affirm. *See* WIS. STAT. RULE 809.21 (2013-14).<sup>1</sup>

Gray was convicted after a jury trial of one count of first-degree reckless homicide and one count of possession of a firearm by a felon. *See* WIS. STAT. §§ 940.02(1), 941.29(2). Gray testified on direct examination at the trial about what happened on the evening of the homicide. The State impeached Gray's testimony on cross-examination with a prior inconsistent statement he made during a police interview conducted on January 24, 2014, the date of his arrest. Portions of the video recording of Gray's prior statement were admitted into evidence and played for the jury without objection from defense counsel.

Gray argues on appeal that his conviction should be reversed, and the case remanded for further proceedings, because the circuit court failed to make an independent determination of whether his statement to police was admissible at the time of his trial. He argues that WIS. STAT. § 971.31(3) requires a circuit court to determine the admissibility of any statement made by the defendant that is offered by the State as evidence.

WISCONSIN STAT. § 971.31(3) states:

The admissibility of any statement of the defendant shall be determined at the trial by the court in an evidentiary hearing out of the presence of the jury, unless the defendant, by motion, challenges the admissibility of such statement before trial.

Gray asserts that WIS. STAT. § 971.31(3) requires a circuit court to hold an evidentiary hearing as to the admissibility of any statement of a defendant, regardless of whether the defendant challenged the statement. The State counters that Gray's position is not supported by

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

applicable case law. Rather, the State argues that a well-established body of case law makes clear that a defendant must challenge a statement by objection or motion in order to trigger the obligation for a hearing under § 971.31(3). *See, e.g., Upchurch v. State*, 64 Wis. 2d 553, 557, 219 N.W.2d 363 (1974) (Sec. 971.31(3) “expressly mandatorily requires a hearing at trial on the admissibility of a *challenged statement* of a defendant” (emphasis added)); *see also State v. Monje*, 109 Wis. 2d 138, 149, 325 N.W.2d 695 (1982) (“unless the defendant challenges the voluntariness of statements he made or that he was not advised of his *Miranda* rights, the [circuit] court is under no obligation to hold an evidentiary hearing outside of the presence of the jury”).

Gray cites *Upchurch* for its interpretation of *State ex rel. Goodchild v. Burke*, 27 Wis. 2d 244, 133 N.W.2d 753 (1965), as follows: “In *Goodchild*, this court said a defendant can waive an objection to the admissibility of an allegedly inculpatory statement or admission by failing to object to its admission, but such inaction must constitute deliberate trial strategy on the part of the defendant.” *Upchurch*, 64 Wis. 2d at 560. We question the applicability of such an interpretation in the context of this case, which involves the statutory requirement for an evidentiary hearing under WIS. STAT. § 971.31(3). In contrast, the defendant’s argument in *Goodchild* was made on constitutional, rather than statutory, grounds. *See Goodchild*, 27 Wis. 2d at 258-265. However, even if we assume, without deciding the issue, that Gray is correct in his assertion that *Upchurch* applies in this context—and that there must be a deliberate trial strategy for defense counsel’s inaction in order for a failure to object to be considered a waiver of any challenge to the admissibility of a statement—the record reflects that such a strategy was present in this case.

After Gray's trial testimony was complete, the circuit court made a record about sidebar conferences it had conducted with the attorneys earlier in the trial, before portions of the recording of Gray's January 24, 2014 interview were admitted into evidence. The court stated, "We worked out who was going to play what portions at what time and there was really no objection from either side." The State asserted on the record that there was "a discussion about whether there [were] in fact any voluntariness issues" with the statement. Defense counsel confirmed on the record that he did not have any challenge to the voluntariness of Gray's statement in the portions of the interview played, and that it was "appropriate rebuttal." The court stated that it had ruled the statement admissible as "legitimate cross-examination because the defendant did in fact testify significantly differently than he did in his statement[.]" The court further stated that the statement "was clearly part of the defense strategy here." Gray fails to persuade us otherwise, and we are satisfied that it was a reasonable strategy for counsel to abstain from an objection that he believed would be overruled.

It is undisputed that Gray never objected to the admissibility of his prior statement made to police. His counsel confirmed on the record that he had no issues as to the voluntariness of the statement, and explained reasons why he believed the statement was "appropriate," evidencing a deliberate trial strategy. The record is void of any challenge to the statement from Gray before or during the trial. We cannot conclude under these circumstances that the circuit court was required under WIS. STAT. § 971.31(3) to hold an evidentiary hearing on the statement's admissibility.

IT IS ORDERED that the judgment and order are summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*