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DISTRICT II

July 5, 2023

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

2021AP294-CR State of Wisconsin v. Cedric A. Gray (L.C. #2018CF401)

Before Gundrum, P.J., Neubauer and Grogan, 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).

Cedric A. Gray appeals from a judgment of conviction entered after a jury found him guilty of one count of first-degree intentional homicide and one count of being a felon in possession of a firearm. Gray argues that the circuit court erred in refusing to suppress statements he made during a police interrogation after he invoked his constitutional right to remain silent.[1] Based upon our review of the briefs and record, we conclude at conference that

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[1] "Both the United States and Wisconsin Constitutions protect persons from state compelled self-incrimination." ***State v. Hall***, 207 Wis. 2d 54, 67, 557 N.W.2d 778 (1997); *see also* U.S. CONST. amend. V; WIS. CONST. art. I, § 8.

this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[2] Because the circuit court correctly concluded that Gray did not unequivocally invoke his right to remain silent, we affirm.

Police arrested Gray in March 2018 in connection with a fatal shooting that occurred in Racine. On March 27, while Gray was in police custody, Investigator Nicholas Groth and Detective David Rybarik questioned him about the shooting.[3] According to a transcript made from the audio recording of the interview, the officers informed Gray at the outset of his ***Miranda***[4] rights, including his right "to stop answering [questions] at any time" and "to stop answering … until you talk to a lawyer." Gray signed a written waiver of his rights and recited a paragraph printed on the waiver stating that he understood his rights and was willing to answer questions. After Gray read from the waiver, Groth told him that "if we start getting into this and you don't want to talk to us at some point and you want to stop, all you gotta do is tell us you want to stop or you want a lawyer, and we'll be done." Gray confirmed to the officers that he understood.

During questioning, Gray initially denied being in Racine on the day of the shooting but later reversed course and told the officers he met his cousin, Michael Lyons, on the night of the shooting near the Taylor Mart in Racine after Lyons asked him "to bring him some weed." Gray also denied owning or wearing "a brown, puffy coat," knowing about Lyons being involved in a

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[2] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

[3] A written transcript of the interrogation incorrectly identifies Detective Nick Stukula as having been present. Investigator Groth testified at the suppression hearing that he conducted the interrogation with Detective Rybarik, not Detective Stukula.

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

fight near the time he met with Gray, or witnessing a car crash or hearing gun shots when he met Lyons.

The officers then showed Gray photographs taken from a surveillance video at the time of the shooting that showed Gray wearing a brown coat and holding a firearm. Gray continued to deny that he was holding a firearm in the photographs, and he told the officers that Lyons had told him that a woman who lived near where the shooting occurred "had [Lyons] set up to get jumped." Gray then told the officers that after he arrived and met Lyons, the victim arrived and "tried to hit [Gray] with his car," after which "[h]e"—Lyons—"did it to protect me." Detective Rybarik then asked what Lyons did and the following exchange occurred:

> MR. GRAY: If you say that somebody got messed up, you (inaudible).
>
> DETECTIVE RYBARIK: I wasn't there. You were there.
>
> MR. GRAY: Well, I'm—I'm just done with the conversation.
>
> DETECTIVE [GROTH]: Cedric, what you have to think about now is what is going to be the best thing that can help you out in this situation.
>
> MR. GRAY: Okay. And—
>
> DETECTIVE [GROTH]: Okay? And—hear me out. Okay. Hear me out. The best thing that I can tell you is is you have to be upfront with everything. Okay? Again, we—we basically see and know what happened out there.
>
> This is your chance to say dude, it—this is what happened. This is not where this is. And this is where this is. This is what I did with that. I'm sorry. I messed up. I fucked up. And I'm sorry.
>
> ….
>
> MR. GRAY: Listen. Listen.
>
> DETECTIVE RYBARIK: And then you're talking about—

> MR. GRAY: Listen, man. Look. I really don't want this on the record.

After the officers told Gray that they could not turn off the recording, Gray made further statements concerning events that led up to the shooting and ultimately admitted that he, not Lyons, shot the victim.

Before trial, Gray moved to suppress all of the statements he made after saying he "really [didn't] want this on the record." Based on its review and "copious notes" of the audio recording of the interrogation, the circuit court denied Gray's motion. The court concluded that "the totality of the circumstances" showed that Gray's statements during the interrogation were made "freely, knowingly and voluntarily without ever making a clear statement of his expression to remain silent." As support for this conclusion, the court relied on the fact that Gray continued speaking with the officers after telling them he was "done with this conversation" and "seem[ed] to be more concerned about the fact that" he may have been set up.

On appeal, Gray does not challenge any of the circuit court's factual findings. Instead, his argument focuses on the court's application of the legal standards governing the invocation of the right to remain silent to those facts. We review that issue de novo. *See* ***State v. Markwardt***, 2007 WI App 242, ¶30, 306 Wis. 2d 420, 742 N.W.2d 546.

"After a suspect has been taken into custody, given the ***Miranda*** warnings, and waived his ***Miranda*** rights, the right to remain silent still guarantees a suspect's 'right to cut off questioning' during a custodial interrogation." ***State v. Cummings***, 2014 WI 88, ¶47, 357 Wis. 2d 1, 850 N.W.2d 915 (quoting ***Markwardt***, 306 Wis. 2d 420, ¶24). To be effective, "a suspect must 'unequivocally' invoke the right to remain silent in order to 'cut off questioning.'" ***Cummings***, 357 Wis. 2d 1, ¶48 (quoting ***Berghuis v. Thompkins***, 560 U.S. 370, 386 (2010)).

Whether a suspect unequivocally invoked this right is an objective inquiry: if "reasonable competing inferences" can be drawn from the suspect's words, "then the 'suspect did not sufficiently invoke the right to remain silent.'" ***Cummings***, 357 Wis. 2d 1, ¶¶50-51 (quoting ***Markwardt***, 306 Wis. 2d 420, ¶36). We must examine not only Gray's words but also the context of the interrogation in which they were spoken. *See* ***Cummings***, 357 Wis. 2d 1, ¶¶54, 61-62. If a suspect's words are ambiguous or equivocal, "police are not required to end the interrogation … or ask questions to clarify whether the accused wants to invoke his or her ***Miranda*** rights." *See* ***Cummings***, 357 Wis. 2d 1, ¶51 (omission in original; citation omitted).

Gray focuses on a different statement on appeal, arguing that he unambiguously invoked his right to remain silent and cut off police questioning when he told the officers, "I'm just done with the conversation." He analogizes his case to ***State v. Wiegand***, No. 2011AP939-CR, unpublished slip op. ¶8 (WI App Feb. 7, 2012),[5] in which this court held that a suspect unambiguously invoked his right to remain silent when he said, "I don't want to say anything more," during an interrogation. The State disagrees and relies on ***Cummings***, 357 Wis. 2d 1, ¶¶60-66, in which our supreme court concluded that a suspect's statement, "See, I don't want to talk about, I don't want to talk about this. I don't know nothing about this," which was followed by four other statements, was not an unequivocal invocation of the right to remain silent because the suspect's statements made it unclear whether he intended to "cut off questioning entirely" or only as to specific subjects.

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[5] Though unpublished, ***State v. Wiegand***, No. 2011AP939-CR, unpublished slip op. (WI App Feb. 7, 2012) is "authored by a member of a three-judge panel" and thus may be cited for persuasive value under WIS. STAT. RULE 809.23(3)(b).

Our review of Gray's statements and the surrounding context leads us to conclude that more than one reasonable inference can be drawn regarding his intent, and thus he did not unequivocally invoke his right to remain silent. It is certainly reasonable to interpret Gray saying "I'm just done with the conversation" as expressing a desire that the officers stop questioning him. However, it is also reasonable to construe this statement as more narrowly focused on Lyons's involvement in the shooting. Gray told police he was "done with the conversation" immediately after he said that Lyons "did it to protect me because [the victim] almost hit me with his car," to which Detective Rybarik responded by asking him what Lyons did. The word "conversation" in Gray's statement could reasonably be construed as referring to the specific line of questioning concerning Lyons's involvement in the shooting and Gray's desire not to discuss that topic further. In addition, Gray made exculpatory statements before saying he was "done with the conversation." Specifically, Gray told the officers that he "didn't do nothing" when the victim tried to hit Gray with his car and that he "didn't have the gun" before saying he was "done with the conversation." As the ***Cummings*** court recognized, exculpatory statements of this sort are "incompatible with a desire to cut off questioning." ***Cummings***, 357 Wis. 2d 1, ¶64.

Likewise, the statement Gray challenged in the circuit court—"I really don't want this on the record"—was not an unequivocal invocation of the right to remain silent. This statement was also made in the course of discussion about Lyons's involvement and can reasonably be interpreted as reflecting Gray's desire not to have further statements about Lyons's involvement recorded, not that all questioning cease.

The existence of multiple reasonable inferences from Gray's statements and their surrounding context distinguishes this case from ***Wiegand*** and supports our conclusion that the circuit court did not err in denying Gray's suppression motion.

Therefore,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals