COURT OF APPEALS
DECISION
DATED AND FILED

September 3, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1112

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LAWRENCE C. PITCHER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marinette County: TIM A. DUKET, Judge. *Affirmed.*

HOOVER, J. Lawrence C. Pitcher appeals a conviction of aiding and abetting a group deer hunting offense in violation of §§ 29.405 and 29.996, STATS. He claims that the State elicited testimony that was subject to a suppression order and that the trial court erred when it refused to provide a substantive answer to a jury question. These positions are without merit. Because the statements in question were not subject to the suppression order and the trial

court's response to a question from the jury reflected a proper exercise of discretion. The judgment is therefore affirmed.

Pitcher agreed to provide Lloyd R. Olson, Jr., and Ogui Rivera with a deer tag for an antlerless deer should they shoot one. Olson confessed to the scheme after DNR wardens Randall Stark and Thomas Bahti stopped Olson's car to investigate a possible firearm transportation violation.[1] Stark, accompanied by warden Steven Daye, later attempted to speak with Pitcher regarding Olson's allegations. Daye stated that when he first saw Pitcher emerging from his residence, he acknowledged him by stating, "Hi, Larry." Pitcher responded by raising his finger toward Daye and saying, "Don't you ever call me by my first—fucking first name." Thereafter Stark attempted to interview Pitcher, who refused to talk to the warden. Stark nonetheless pursued his questioning, eventually eliciting an admission that Pitcher had indeed agreed to the illegal tagging.

Pitcher moved to suppress the statement he made to Stark. The court held that Pitcher invoked his Fifth Amendment right against self-incrimination when he advised the warden that he had nothing to say to him and therefore suppressed any statements made beyond that point.[2]

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[1] Rivera was in the vehicle, but Pitcher was not.

[2] In his reply brief, Pitcher takes issue with Daye's trial testimony, claiming that he was greeted by Daye after he had told Stark that he had nothing to say. Yet, at another hearing, the court denied Pitcher's motion to "exclude all evidence from the point of the stop" of the Olson/Rivera vehicle. It is not clear whether Pitcher believes that if the stop was illegal his statement to Daye should be suppressed, or if he is merely relying on his disagreement with Daye's chronology of events in claiming a violation of the suppression order. If it is the former, it is wholly undeveloped and thus cannot be responded to except to observe that Pitcher would not have standing to challenge the Olson/Rivera stop under the facts of this case. If the latter, Pitcher does not point to a reference in the record to support his assertion.

Pitcher first argues that both his constitutional rights and the suppression order were violated when Daye testified regarding Pitcher's use of profanity upon their meeting. This court disagrees. First, no constitutional rights were implicated. The statement attributed to Pitcher was in response to a greeting, not a question. *See* ***Martin v. State***, 87 Wis.2d 155, 165-66, 274 N.W.2d 609, 613 (1979). Secondly, the suppression order only applied to statements made *after* Pitcher invoked his Fifth Amendment privilege. Finally, Pitcher failed to object to the testimony and therefore failed to preserve the issue for appeal. *See* ***State v. Rogers***, 196 Wis.2d 817, 825-26, 539 N.W.2d 897, 900-01 (Ct. App. 1995).

Next, we conclude that the trial court properly exercised its discretion when it responded to the jury's inquiries. The jury submitted the following questions to the trial court during deliberations: "Why was Olson's car stopped"? and "Is the DNR allowed to stop a car w/o a reason"? Pitcher claims that the court should have explored a substantive answer with the jury. He does not explain, except to speculate that if the jury thought the stop was illegal, this would in turn create an inference adverse to the State. The trial court responded by advising the jury that the issues it raised were irrelevant.

The court's answer to the jury constituted a proper exercise of discretion. The jury was advised earlier that it was to decide the case based only upon the evidence admitted at trial. Yet, while conferring with the parties about an appropriate response, the court noted that there was no evidence in the record as to why the car was stopped. Moreover, the trace probative value perceived by Pitcher would have been eclipsed by concerns over jury confusion and the time involved in presenting evidence so remotely related to whether he had agreed to let others use his deer tag illegally. These concerns overwhelm any relevance the evidence concerning the vehicle stop may have had. *See* § 904.03, STATS.

By the Court.—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.