COURT OF APPEALS
DECISION
DATED AND FILED

September 13, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-1020-FT

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

CITY OF STEVENS POINT,

PLAINTIFF-RESPONDENT,

V.

MICHAEL C. WIRTZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Portage County: THOMAS T. FLUGAUR, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Michael C. Wirtz appeals from a jury verdict finding him guilty under WIS. STAT. § 346.63(1)(a) for operating a motor vehicle while under the influence of an intoxicant. Wirtz contends on appeal that the trial

[1] This is an expedited appeal under WIS. STAT. Rule 809.17 (1999-2000), decided by one judge pursuant to WIS. STAT. § 752.31(2)(c). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

court erred in refusing to grant his motion for a mistrial after the prosecutor for the City of Stevens Point (City) elicited testimony from the arresting officer that Wirtz refused to answer questions after he was read his ***Miranda*** rights. For the following reasons, we affirm.

Background

¶2 On August 25, 2000, Wirtz was arrested and subsequently charged with operating a motor vehicle while under the influence of an intoxicant and with a prohibited alcohol concentration, contrary to WIS. STAT. § 346.63(1)(a) and (b) respectively. A jury trial ensued.

¶3 At the trial, Officer Ben Uitenbroek testified that he is employed by the Stevens Point Police Department. At the time of trial, Officer Uitenbroek had been employed as a police officer for approximately two years, having previously received four hundred hours of law enforcement credit. Officer Uitenbroek testified that in the course of duty he has seen well over a hundred incidents of underage drinking and has been involved in forty to fifty operating while intoxicated cases.

¶4 Officer Uitenbroek testified that on August 25, 2000, at approximately 1:00 a.m., he was driving on Stanley Street, a four-lane road, when he observed a white Corvette convertible swerve between the two eastbound lanes. Officer Uitenbroek followed the vehicle for several blocks, noting that it swerved between the two eastbound lanes approximately four times. The vehicle then crossed the centerline, by at least a tire width, into the nearest westbound lane.

¶5 At that point, Officer Uitenbroek activated his warning lights in an attempt to stop the vehicle. When it did not stop, the officer activated his siren as

well. After the vehicle pulled over, Officer Uitenbroek approached the driver and identified Wirtz by his driver's license. Officer Uitenbroek testified that Wirtz's breath smelled of alcohol and he spoke with slow, slurred speech. Additionally, Wirtz's eyes were pink and bloodshot.

¶6 Based on the odor of alcohol, Officer Uitenbroek asked Wirtz if he had been drinking. Wirtz responded that he had drunk two to three beers. Officer Uitenbroek asked Wirtz to exit the vehicle to perform several field sobriety tests. When he exited the vehicle, Wirtz leaned on the door for balance.

¶7 Officer Uitenbroek explained to the jury that field sobriety testing is composed of divided-attention tests, and is utilized by officers to determine a person's ability to operate a motor vehicle. Officer Uitenbroek testified that through his training he has learned that when people consume alcoholic beverages, their coordination and their ability to perform divided-attention tests can become impaired.

¶8 Officer Uitenbroek indicated that when asked to recite the alphabet, Wirtz paused midway through, missed several letters, and finished with a slur. Officer Uitenbroek asked Wirtz to stand on one leg while raising the other six inches off the ground and, while keeping his hands at his sides, count to thirty. Wirtz held his foot only an inch from the ground and had to put it down after counting to six. He then began counting again while holding his arms out to the side for balance. Finally, Officer Uitenbroek asked Wirtz to walk nine steps heel-to-toe in a straight line with his hands at his sides, pivot on one foot and walk nine steps back heel-to-toe. Wirtz stepped off the line, turned with both feet instead of a pivot, and held his arms out to keep his balance.

¶9 Based on his training, Officer Uitenbroek concluded that Wirtz was driving under the influence of an intoxicant. Wirtz was arrested at that time. After the arrest, Officer Uitenbroek conducted a routine search of the vehicle. In the search, he recovered a wine bottle with some fluid still in it and two wine glasses. Wirtz was then transported to the police station, where he was asked to submit to a chemical test of his breath.

¶10 At this point in the trial, the prosecutor asked Officer Uitenbroek whether Wirtz was given a ***Miranda*** warning, to which Officer Uitenbroek responded, "That is correct." The following colloquy took place:

> Q. And otherwise, you intended to ask him a series of questions; is that correct?
>
> A. Yes.
>
> Q. And did he agree to discuss this or at least answer your questions, sir?
>
> MR. SCHMIDT: Objection.
>
> MR. MOLEPSKE:
>
> Q. Well, did he answer any of the questions?
>
> A. No, he did not.

Wirtz made an oral motion for a mistrial, which was denied by the court.

¶11 Officer Patrick Stanislawski then took the stand and testified that on the night in question, he was called to assist Officer Uitenbroek as backup. Officer Stanislawski testified that he is certified in the operation of the Intoximeter. As part of his duties, Officer Stanislawski assists other officers in giving the Intoximeter test to individuals arrested for driving under the influence.

¶12 After explaining to the jury how the Intoximeter test is conducted, Officer Stanislawski testified that he used the Intoximeter to take a chemical analysis of Wirtz's breath on two occasions. The first test revealed a blood alcohol concentration of .107 and the second test revealed a concentration of .103. On cross-examination, Officer Stanislawski testified that the Intoximeter has a .005 margin of error.

¶13 Wirtz then testified as an adverse witness. Wirtz stated that he awoke at 12:30 a.m. the preceding day and worked until 5:00 p.m. Wirtz then went to a supper club around 8:00 p.m. where he consumed two glasses of wine. He then proceeded to Partner's Pub where he consumed three beers. Wirtz admitted swerving between the two eastbound lanes on Stanley Street but testified it was because his girlfriend, who was a passenger in the car, tried to kiss him while he was driving.

¶14 The jury found Wirtz guilty under WIS. STAT. § 346.63(1)(a) for operating a motor vehicle while under the influence of an intoxicant and under § 346.63(1)(b) for operating a motor vehicle with a prohibited alcohol concentration. The trial court dismissed the citation for operating a motor vehicle with a prohibited alcohol concentration. This appeal ensued.

Discussion

¶15 The sole issue we address on appeal is whether the trial court erred when it refused to grant Wirtz's motion for a mistrial.

¶16 Wirtz contends the trial court erred in refusing to grant his motion for a mistrial. He claims the prosecution improperly elicited testimony from Officer Uitenbroek that Wirtz refused to answer questions after he was read his

Miranda rights. Specifically, Wirtz suggests that the evidence of intoxication was so weak that Officer Uitenbroek's prejudicial testimony denied him a fair trial.

¶17 In ***Doyle v. Ohio***, 426 U.S. 610, 618 (1976), the United States Supreme Court held that it is fundamentally unfair and a deprivation of due process to implicitly assure an arrestee that his silence will not be used against him and then use evidence of that silence to impeach an explanation subsequently offered at trial. The source of the unfairness is the implied promise contained in the ***Miranda*** warnings "that silence will carry no penalty." ***Id.*** Subsequent decisions by the Court have reaffirmed the critical importance of the implied promise inherent in a ***Miranda*** warning that an arrestee's silence will not be used to impeach him at trial. *See*, *e.g.*, ***Wainwright v. Greenfield***, 474 U.S. 284, 290-92 (1986); ***Fletcher v. Weir***, 455 U.S. 603, 606 (1982); ***Anderson v. Charles***, 447 U.S. 404, 407-08 (1980).

¶18 Similarly, the Wisconsin Supreme Court has held that prosecutorial use of a defendant's silence at trial in an attempt to infer guilt is "a direct violation of the defendant's right to remain silent guaranteed by the state constitution and the fourteenth amendment of the federal constitution." ***Reichhoff v. State***, 76 Wis. 2d 375, 378, 251 N.W.2d 470 (1977) (footnote omitted). As in the case at bar, the prosecutor in ***Reichhoff*** elicited testimony not from the defendant himself but from two police officers that defendant had remained silent after his arrest. ***Id.*** at 377 & nn.1-2.

¶19 We are cognizant of the fact that this case differs from those cited above in that it is a civil forfeiture action and not a criminal case. Accordingly, a ***Miranda*** warning was not required. *See* ***Village of Menomonee Falls v. Kunz***, 126 Wis. 2d 143, 146-48, 376 N.W.2d 359 (Ct. App. 1985). Nonetheless, the crux

of ***Doyle*** and its progeny was the fact that the arrestee's silence was *induced* by the ***Miranda*** warning, which implicitly promises an arrestee that such silence will not be used against him later at trial. *See* ***Doyle***, 426 U.S. at 617 ("Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights."); ***Fletcher***, 455 U.S. at 606 ("[W]e have consistently explained *Doyle* as a case where the government had induced silence by implicitly assuring the defendant that his silence would not be used against him.").

¶20 Accordingly, for purposes of this appeal we will presume, without deciding, that the prosecution's questioning of Officer Uitenbroek regarding Wirtz's failure to answer questions after receiving the ***Miranda*** warning was a violation of Wirtz's right to due process. Nevertheless, we conclude that the error was harmless.

¶21 Evidentiary errors are subject to the harmless error analysis, even when those errors implicate constitutional rights. *See* ***McLemore v. State***, 87 Wis. 2d 739, 757, 275 N.W.2d 692 (1979); ***Reichhoff***, 76 Wis. 2d at 381. In assessing the effect of the type of constitutional error that occurred in this case, a reviewing court must consider the impact of its repetition, the nature of the state's evidence, and the nature of the defense. ***McLemore***, 87 Wis. 2d at 757.

¶22 In deciding the effect of a constitutional error, this court must ask whether "there is a 'reasonable possibility' that the constitutional error 'might have contributed to the conviction.'" ***State v. Billings***, 110 Wis. 2d 661, 668, 329 N.W.2d 192 (1983). Alternatively stated, we must "'be sure that the error did not affect the result or had only a slight effect.'" ***State v. Harris***, 199 Wis. 2d 227, 255, 544 N.W.2d 545 (1996) (quoting ***State v. Dyess***, 124 Wis. 2d 525, 540, 370 N.W.2d 222 (1985)).

¶23 In reversing the defendant's conviction and remanding for a new trial, the ***Reichhoff*** court specifically noted that the case before it was "not a case where the prosecution casually asked one witness, on one occasion" whether the defendant professed innocence at the time of arrest or whether he remained silent. ***Reichhoff***, 76 Wis. 2d at 381. Rather, in that case, the prosecutor asked multiple questions of several witnesses regarding defendant's silence and commented about it at length in his closing statement. ***Id.***

¶24 Such is not the case here. The prosecutor elicited one statement from Officer Uitenbroek, and no other witnesses, that Wirtz remained silent after receiving his ***Miranda*** warning. No further comments were made about Wirtz's silence either at that time or in the prosecutor's closing argument. Additionally, as discussed at length above, the City's evidence against Wirtz was substantial. Officer Uitenbroek testified that Wirtz smelled of alcohol, his eyes were bloodshot, and his speech was slurred. Wirtz had to hold onto the door of his vehicle to exit it, he failed three field sobriety tests, and a chemical breath test revealed a blood alcohol concentration of 0.1.[2] A search of Wirtz's vehicle revealed an almost empty wine bottle with two glasses. Finally, Wirtz himself testified that he drank approximately five alcoholic beverages prior to his encounter with Officer Uitenbroek.

¶25 In light of the quantum and nature of the other evidence presented at trial indicative of Wirtz's intoxication at the time of his arrest, we are convinced

[2] *See* WIS. STAT. § 885.235(1g)(c), relating to chemical tests for intoxication ("The fact that the analysis shows that the person had an alcohol concentration of 0.1 or more is prima facie evidence that he or she was under the influence of an intoxicant and is prima facie evidence that he or she had an alcohol concentration of 0.1 or more.").

that the jury would have found Wirtz guilty of the violations charged even without the prosecution's impermissible question. Accordingly, we affirm.

By the Court.—Judgment affirmed.

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