COURT OF APPEALS
DECISION
DATED AND FILED

December 9, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP742-CR **Cir. Ct. No. 2008CF1834**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARLON M. ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MARTIN J. DONALD, Judge. *Affirmed.*

Before Vergeront, P.J., Sherman and Blanchard, JJ.

¶1 VERGERONT, P.J. Marlon Anderson appeals the judgment of conviction entered upon a jury verdict finding him guilty of first degree recklessly

endangering safety while using a dangerous weapon in violation of WIS. STAT. §§ 941.30(1) and 939.63 (2007-08).[1] He contends the circuit court erred in allowing the State to introduce for impeachment purposes portions of his videotaped police interview obtained in violation of ***Miranda v. Arizona***, 384 U.S. 436, 444, 447 (1966). He asserts the statements were not admissible because they were not inconsistent with his trial testimony. We conclude that certain statements were inconsistent and properly admitted. For the reasons we explain below, we conclude that any error in admitting consistent statements was harmless. Accordingly, we affirm the judgment of conviction.

BACKGROUND

¶2 The information charged Anderson with attempted first-degree intentional homicide while armed. The charge arose out of an altercation during which Anderson stabbed Johnnie Premetz, Jr., in the chest. The testimony at trial established that Anderson's acquaintance, Jessie Wroczynski, drove Anderson and Premetz to Arnold Ness's trailer to facilitate Anderson collecting on a debt Premetz owed him. Shortly after they arrived, Anderson and Premetz began arguing over drugs or money. The argument became heated, and eventually Anderson retrieved Wroczynski's knife from his car. Although the witnesses present differing accounts of the events, it is undisputed that Anderson stabbed Premetz. Shortly after the incident Anderson and Wroczynski were apprehended and arrested.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶3 Upon arrest, Anderson was taken into custody. City of Cudahy Police Detective Glen Haase conducted a videotaped interview.[2] Apparently the officer advised Anderson of his ***Miranda*** rights but did not obtain a waiver before questioning him. When Anderson moved to suppress this interview prior to trial on the ground of a ***Miranda*** violation, the State agreed there was a ***Miranda*** violation and that it would not introduce any part of the interview in its case-in-chief. Anderson conceded that his statements to the police were made voluntarily. The State indicated that, if Anderson testified at trial, the State would seek to impeach him with any inconsistencies between the statements he made to the police and his trial testimony.

¶4 At trial, Anderson claimed that he had stabbed Premetz in self-defense. Anderson testified that he swung the knife at Premetz in an attempt to scare him because he was afraid that Premetz and Ness were going to attack him. After hearing Anderson's testimony, the State requested that it be allowed to use portions of Anderson's videotaped interview for impeachment purposes. The State argued that certain portions were inconsistent with Anderson's trial testimony because they either contradicted his trial testimony or contained omissions as compared to his trial testimony. Anderson's attorney disagreed. He contended that the portions the State sought to introduce were consistent with Anderson's testimony and therefore were inadmissible. The circuit court concluded that the interview contained omissions and statements that were

[2] The videotaped interview is not part of the appellate record. When we discuss it, we are referring to portions of the trial transcript where parts of the interview, showed to the jury, are transcribed.

contradictory to Anderson's trial testimony and both could be used to impeach Anderson. The State played several excerpts from the videotape of the interview.

¶5 The jury found Anderson guilty of the lesser-included offense of first-degree recklessly endangering safety while using a dangerous weapon.

DISCUSSION

¶6 Anderson argues on appeal that the excerpts of the interview played to the jury were consistent with his trial testimony and therefore the circuit court erred in allowing the State to introduce them for impeachment purposes. The State responds that material omissions in Anderson's statements to the police constitute inconsistencies, and the excerpts played contained omissions as well as statements that contradicted his trial testimony. Any consistent statements that were played, the State contends, were harmless error. Anderson has not filed a reply brief.

¶7 Before discussing the parties' positions in more detail, we provide the constitutional law that is the background to their dispute.

¶8 The Fifth Amendment to the United States Constitution protects against compelled self-incrimination. U.S. CONST. amend. V. This protection applies to states through the Due Process Clause of the Fourteenth Amendment. *See* U.S. CONST. amend. XIV, § 1; ***Dickerson v. United States***, 530 U.S. 428, 434 (2000). To safeguard this Fifth Amendment right, law enforcement officers must administer ***Miranda*** warnings at the outset of a "custodial interrogation." *See* ***State v. Armstrong***, 223 Wis. 2d 331, 351-52, 588 N.W.2d 606 (1999); *see also* ***Miranda***, 384 U.S. at 444. Failure to give the prescribed warnings and obtain a

waiver of rights before custodial questioning generally requires exclusion of the statements obtained. ***Missouri v. Seibert***, 542 U.S. 600, 608 (2004).

¶9 Thus, as both parties here recognize, statements obtained without ***Miranda*** warnings may not be used as evidence in the prosecution's case-in-chief. ***United States v. Patane***, 542 U.S. 630, 640 (2004) (quoting ***Dickerson***, 530 U.S. at 443-44). However, if a statement obtained in violation of ***Miranda*** is made voluntarily, it can be used to impeach a defendant's testimony at trial. ***Patane***, 542 U.S. at 639 (citations omitted); ***Harris v. New York***, 401 U.S. 222, 225 (1971). *See also* ***State v. Mendoza***, 96 Wis. 2d 106, 118, 291 N.W.2d 478 (1980).

¶10 The rationale behind permitting voluntary statements obtained in violation of ***Miranda*** to be used for impeachment purposes is that suppression in this situation is not warranted by the goal of deterrence. ***Harris***, 401 U.S. at 225; *see also* ***Patane***, 542 U.S. at 639-40. The deterrent effect is speculative in this context and the goal of deterrence is adequately served by suppression in the prosecutor's case-in-chief. *See* ***id.*** In addition, because the statement is voluntary, suppression for impeachment purposes is not warranted to assure that evidence is trustworthy. *See* ***id.*** Thus, if a defendant chooses to testify, which he or she has a right not to do, the prosecutor may use the "traditional truth-testing devices of the adversary process" to impeach the defendant's credibility through use of prior conflicting statements, as long as they are voluntary. *See* ***Harris***, 401 U.S. at 225-26. *See also* ***Mendoza***, 96 Wis. 2d at 118 (voluntary statements taken in violation of ***Miranda*** "may be used to impeach the defendant's credibility if the defendant testifies to matters contrary to what is in the excluded statement.")

¶11 While acknowledging this constitutional background, both parties appear to view their dispute as raising an evidentiary issue, not a constitutional

issue. For purposes of resolving this appeal, we accept this characterization of the issue. The parties agree we should review the circuit court's ruling as we generally review evidentiary rulings: "to determine whether the circuit court properly exercised its discretion in accordance with the facts and accepted legal standards." ***State v. Tucker***, 2003 WI 12, ¶28, 259 Wis. 2d 484, 657 N.W.2d 374 (citation omitted).

¶12 In arguing that his statements were erroneously admitted because they are not "contrary" to his trial testimony or "inconsistent" with it, Anderson does not attempt to define the scope of these terms. He refers us to WIS. STAT. § 908.01(4)(a)1., which provides that a prior statement by a witness is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is … [i]nconsistent with the declarant's testimony …." However, Anderson does not refer us to any cases that apply this provision.

¶13 The State, citing cases from other jurisdictions, argues that a prior statement is inconsistent with trial testimony if it omits a material fact, *see* ***People v. Sholl***, 556 N.W.2d 851, 854 (Mich. 1996), or, using different phrasing for the same concept, a fact that would naturally have been asserted in the circumstances. *See* ***Commonwealth v. Rivera***, 682 N.E.2d 636, 642 (Mass. 1997). The State also argues that an inconsistency for impeachment purposes does not require a directly contradictory statement but includes a statement that "tends" to disprove or contradict trial testimony and any inference from it. ***People v. Boyd***, 222 Cal. App. 3d 541, 566 (Cal. Ct. App. 1990).

¶14 Because Anderson does not make an argument on the meaning of "inconsistent statement" in his main brief and does not file a reply brief, we have

no argument that counters the State's position. We also observe that the description of a prior inconsistent statement in ***State v. Richards***, 21 Wis. 2d 622, 633-34, 124 N.W.2d 684 (1963), supports the State's position that an omission may create an inconsistency. In ***Richards***, in the context of deciding when a criminal defendant may inspect statements made to authorities by witnesses who testify for the State at trial, the court stated that such a statement could be used at trial to impeach the witness if the court "determines that there are such inconsistencies between the testimony and the statements, or such variance between them (including omissions) as would tend to substantially impeach the witness' testimony." ***Id.*** In the absence of an argument to the contrary from Anderson, we accept the State's position that an "inconsistent statement" for impeachment purposes includes statements that contain material omissions and statements that tend to disprove or contradict trial testimony and any inference from it.

¶15 We turn now to the portions of the interview the State introduced to impeach Anderson's trial testimony. We conclude the following four statements were properly admitted as inconsistent statements.

¶16 First, Anderson testified at trial that Premetz told Ness to get him a bat so that he could "smash [Anderson's] fucking head," then Ness ran toward the trailer and returned with his hand behind his back. Anderson testified that he thought Ness was going to attack him with whatever he had behind his back. Similarly, in the interview with Detective Haase, Anderson stated that Premetz asked Ness to get him a bat. He said that Ness was "ready to fucking take off to go run in the fucking house." However, Anderson never claimed in the interview that Ness had been in the house or had returned with his hand behind his back. The State argues that this omission creates an inconsistency with Anderson's trial

testimony. We conclude this is a reasonable application of the correct law to the relevant facts.[3] In these circumstances, if Anderson believed he had acted in self-defense, it would have been natural for him to indicate to the police why he felt the need to defend himself. His failure to tell the police that, after Premetz told Ness to get him a bat, Ness ran to the house and returned with his hand behind his back, is a material omission and reasonably viewed as a statement that these actions did not occur. Therefore, it is reasonable to view Anderson's trial testimony describing these actions as inconsistent with his prior statement.

¶17 Second, at trial Anderson testified that Premetz jumped at him and threw a punch, which Anderson ducked, and then Anderson "took a swipe at him" with the knife. In the interview, Anderson said, "[Premetz] came rushing at me like he was getting ready to fucking punch me." He did not tell Detective Haase that Premetz threw a punch before Anderson "took a swipe at him." We agree with the State that this is a material omission and the circuit court could reasonably view this omission as inconsistent with Anderson's trial testimony.

¶18 Third, Anderson testified at trial that he had stabbed Premetz while trying to scare him, believing that Premetz had not been badly cut. In the interview Anderson said he "didn't stab Johnnie Premetz in the chest" and he didn't know who had. It is reasonable to view this prior statement as inconsistent with Anderson's trial testimony.

¶19 Fourth, Anderson testified at trial that he "took a swipe at" Premetz. In the interview Anderson made "a roundhouse kind of move" when

[3] The circuit court did not expressly rule on each proposed excerpt offered by the State. However, it plainly concluded that each excerpt identified by the State was admissible.

demonstrating how he had used the knife. Anderson asserts these are not inconsistent, while the State argues that, "to the extent that Anderson's demonstrations … have varied with respect to how … he swung or thrust the knife at Premetz, … such variations" can be used to impeach Anderson's credibility. It is not clear from the trial transcript that Anderson's demonstration in the interview of how he used the knife is contrary to his trial testimony that he "took a swipe at" Premetz. In both his taped statement and his trial testimony, Anderson admits that he used the knife, but claims to have done so in a manner other than a forward stabbing motion. Without the videotape of the interview in the appellate record, we are unable to view Anderson's demonstration. This deficiency in the record works against Anderson. As the appellant, it is his responsibility to ensure that the record is complete, and "when an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling." ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993). Therefore, we conclude the circuit court did not erroneously exercise its discretion in admitting this portion of the interview.[4]

¶20 Anderson argues and the State concedes that other introduced portions of the interview were consistent with his trial testimony and therefore

[4] In addition to arguing that the above four portions of the interview were properly admitted, the State asserts that any differences between Anderson's demeanor in other introduced excerpts and his demeanor at trial are inconsistencies that may be properly used to impeach Anderson's credibility. This is apparently a response to Anderson's argument that the admission of consistent statements was not harmless error because of his demeanor in the interview. We address that argument of Anderson's in the harmless error discussion. We do not separately address the State's demeanor-as-inconsistent-statement argument because the State does not specifically identify the inconsistent demeanors and does not provide authority or a developed argument for treating demeanor as testimony that may be impeached by an inconsistent statement.

improperly admitted. We accept the State's concession without further analysis for purposes of this opinion and examine whether this error was harmless.

¶21 An error is harmless when it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. ***State v. Gordon***, 2003 WI 69, ¶36, 262 Wis. 2d 380, 663 N.W.2d 765 (citation omitted). The burden of establishing harmless error is on the beneficiary of the error, here, the State. ***State v. Anderson***, 2006 WI 77, ¶27, 291 Wis. 2d 673, 717 N.W.2d 74. Factors to consider in assessing whether an error is harmless include "the frequency of the error, the importance of the erroneously admitted evidence, the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the erroneously admitted evidence duplicates untainted evidence, the nature of the defense, the nature of the State's case, and the overall strength of the State's case." ***State v. Hale***, 2005 WI 7, ¶61, 277 Wis. 2d 593, 691 N.W.2d 637 (citations omitted).

¶22 The salient—and unusual—fact about the erroneously admitted evidence here is that it is *consistent* with Anderson's trial testimony. This consistency would bolster Anderson's credibility and he would benefit by the jury hearing his trial version of events being repeated in a statement made before trial.

¶23 Anderson nonetheless claims that his demeanor during the interview differed substantially from his demeanor on the witness stand. As we understand this argument, he is referring to the expletives he used in the consistent statements. Some of these expletives were the words of others, which he was recounting, and it is not clear how this would adversely affect the jury's view of him. To the extent that he himself used expletives in the erroneously admitted statements, he also did so in some of the statements we have concluded were properly admitted.

¶24 In addition, the State's case, considered without the erroneously admitted portions of the interview, was strong. The elements of first-degree recklessly endangering safety as applied to this case are: (1) Anderson "endanger[ed] the safety" of Premetz; (2) he did so by "criminally reckless conduct," which is conduct that created an unreasonable and substantial risk of death or great bodily harm; and (3) the circumstances of his conduct showed "utter disregard for human life." *See* WIS JI—CRIMINAL 1345. Anderson admitted at trial that he stabbed Premetz, and it was undisputed that this stabbing punctured one of Premetz's lungs. Even if one believes Anderson's testimony that Premetz had tried to punch him just him before the stabbing, rather than as Premetz was walking away from the confrontation as Premetz and Wroczynski testified, the stabbing "creates an unreasonable and substantial risk of death or great bodily harm" and shows an "utter disregard for human life."

¶25 As for Anderson's defense of self-defense, this requires that the person "*reasonably* believed that an interference with [his] person involved the danger of imminent death or great bodily harm and *reasonably* believed that it was necessary to use force which was intended or likely to cause death or great bodily harm to prevent or terminate that interference." ***State v. Head***, 2002 WI 99, ¶66, 255 Wis. 2d 194, 648 N.W.2d 413 (emphasis in original); *see also* WIS JI—CRIMINAL 805. Without the erroneously admitted evidence, a reasonable jury would not find that Anderson had a reasonable belief that he was in danger of imminent death or great bodily harm and reasonably believed it was necessary to stab Premetz to prevent or terminate that situation. Even accepting Anderson's version of events, he never claimed that either Premetz or Ness actually threatened him with a baseball bat, and the evidence showed he could have left in the car with Wroczynski.

¶26 We conclude beyond a reasonable doubt that the admission of the consistent portions of Anderson's taped statement for impeachment purposes was harmless error.

CONCLUSION

¶27 We conclude that the four identified statements were properly admitted for impeachment purposes and that the admission of consistent statements was harmless error. Accordingly, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.