COURT OF APPEALS
DECISION
DATED AND FILED

September 27, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2054-CR **Cir. Ct. No. 2008CF140**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRADLEY W. SEXTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Shawano County: JAMES R. HABECK, Judge. *Affirmed*.

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Bradley Sexton appeals a judgment of conviction for operating while intoxicated, sixth offense, and operating after revocation. He also appeals an order denying postconviction relief. Sexton asserts the circuit court erred by refusing to grant a mistrial after a prospective juror revealed

Sexton's custodial status to the jury panel and the court failed to give a curative instruction. Sexton also contends the court should have granted a mistrial because the State shifted the burden of proof by improperly commenting on Sexton's failure to tell police he was not the driver. We affirm.

BACKGROUND

¶2 On April 26, 2008, at approximately 2:30 a.m., Mark Harger called police to report a stranger's vehicle parked on his lawn with its lights on. Lieutenant Ty Raddant responded and found the vehicle, which was running, with Sexton sleeping in the driver's seat. Sexton's blood alcohol concentration was .276. The State charged him with operating while intoxicated, operating with a prohibited alcohol concentration, and operating after revocation.

¶3 Prior to trial, Sexton, through his attorney, stipulated to the blood alcohol concentration result. Sexton explained his defense was that he did not operate the vehicle on a public highway and the actual driver, Tyler Polum, left the scene before Raddant's arrival.

¶4 On the morning of trial, Sexton, who was dressed in civilian clothes, was escorted to the courthouse and into the courtroom by a uniformed officer. At the beginning of voir dire, the court asked the prospective jurors whether anyone had observed Sexton earlier that morning. Several jurors indicated they had observed Sexton, and the court conducted individual voir dire regarding their observations. Of the jurors who had observed Sexton, only some saw him with the officer. None of the prospective jurors thought anything of the encounter except Cheryl Rew. Rew indicated when she saw a uniformed officer walking behind Sexton, she thought Sexton was someone who was going to be in court, that he may have come from the jail, and he was probably in jail for whatever reason he

was going to be in court. The trial court denied Sexton's motion to strike Rew for cause.

¶5 Group voir dire resumed, and the State asked whether anyone thought Sexton was guilty just because he "is sitting right here and is in this courtroom." Juror Rew responded, "Only because I saw him walk in with the officer, so I assumed that he probably had been in jail."

¶6 The court removed Rew from the panel for cause. Sexton moved for a mistrial, arguing Rew's comment caused the panel to learn of her perception that Sexton was in jail pending trial. The court denied Sexton's request, concluding there was no reason to believe the remaining jurors would not be fair and impartial.

¶7 During the State's opening statement, the jury learned that Raddant would testify that Sexton never mentioned there was another driver. Sexton objected. Outside the presence of the jury, Sexton moved for a mistrial, arguing Sexton had no obligation to come forward and say there was another driver and it was improper for the State to comment on Sexton's silence. The court denied Sexton's motion for mistrial.

¶8 During trial, Sexton called Polum in his defense. Polum, however, claimed he did not remember where he was on April 26 and had no memory of being with Sexton. Polum was presented with and read a statement he had allegedly written and denied seeing the document before or signing it. State public defender investigator Terry Young testified he interviewed Polum and Polum provided the statement, admitting he was the driver. Young read the statement to the jury. On rebuttal, the State presented evidence that prior to the date of

Polum's alleged statement, Polum and Sexton had been in the same "pod" together at the Shawano County Jail.

¶9 During its closing argument, the State argued Sexton never told Raddant about another driver and did not start making this assertion until almost a month after the incident. Sexton objected. Outside the presence of the jury, Sexton again moved for a mistrial. The court denied Sexton's motion, reasoning the State did not argue Sexton had an obligation to tell the police he was not the driver—instead, the State was commenting on the logic of Sexton's defense. The jury found Sexton guilty of all charges.

DISCUSSION

¶10 Sexton raises two arguments on appeal. First, he asserts that, because the court neglected to give a curative instruction after Rew revealed to the panel she believed Sexton was in custody, the court subsequently erred by failing to grant Sexton's motion for a mistrial. Second, Sexton contends the court erred by failing to grant a mistrial after the State shifted the burden of proof by improperly commenting on Sexton's failure to inform Raddant he was not the driver.

¶11 The decision whether to grant a mistrial lies within the discretion of the circuit court. ***State v. Doss***, 2008 WI 93, ¶69, 312 Wis. 2d 570, 754 N.W.2d 150. The circuit court "must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial." ***Id.*** (citations omitted). We will reverse "only on a clear showing of an erroneous use of discretion by the circuit court." ***Id.*** (citations omitted).

¶12 Sexton first argues the court's failure to give a curative instruction after a prospective juror revealed to the panel she believed Sexton was in custody warranted a mistrial. Sexton relies on ***State v. Knighten***, 212 Wis. 2d 833, 569 N.W.2d 770 (Ct. App. 1997), for the proposition that when a defendant's custodial status is revealed to a jury panel, a circuit court is obligated to either give a cautionary instruction or grant a mistrial.

¶13 ***Knighten***, however, does not stand for the proposition that a court must grant a mistrial if it fails to give a cautionary instruction. In ***Knighten***, a prospective juror revealed to the panel that she had observed Knighten in shackles before trial. ***Id.*** at 842-43. Knighten moved for a mistrial, which the court denied. ***Id.*** at 844. We upheld the denial of the mistrial because the court's cautionary instruction, combined with the jurors learning from a proper source during trial that Knighten was in custody and shackled, prevented the error from being prejudicial. ***Id.*** at 844-45.

¶14 Here, Sexton did not ask the court to give a cautionary instruction. Contrary to Sexton's assertion, a circuit court does not have a duty to sua sponte give a particular instruction in the absence of a timely and specific request for one. *See* ***Bergeron v. State***, 85 Wis. 2d 595, 604, 271 N.W.2d 386 (1978). Moreover, the State contends that, similar to ***Knighten***, the jurors ultimately learned from a proper source during trial that Sexton was in custody. Sexton has failed to respond to this argument; therefore, it is deemed conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). We conclude the court did not err by failing to grant a mistrial.

¶15 Sexton next argues the court erred by failing to grant a mistrial after the State's improper comments on Sexton's silence shifted the burden of proof.

Specifically, Sexton contends the State's comments regarding Sexton's failure to inform Raddant he was not the driver violated Sexton's constitutional rights and shifted the burden of proof. The State responds, "To the extent the jury could have interpreted the prosecutor's arguments to shift the burden of proof to Sexton or to suggest he had an obligation to tell police his exculpatory story at the time of the incident, any such perception would have been corrected by the jury instructions."

¶16 We agree. Assuming the prosecutor's comments about Sexton's failure to advise Raddant that Polum was the driver were improper, any error was corrected by the jury instructions. Here, the circuit court instructed the jury on the presumption of innocence and that the State bore the burden of proving every element beyond a reasonable doubt. The court also instructed the jury that remarks by counsel and closing arguments were not evidence, and that Sexton had an absolute right not to testify. Jurors are presumed to follow jury instructions. ***State v. LaCount***, 2008 WI 59, ¶23, 310 Wis. 2d 85, 750 N.W.2d 780. Further, Sexton has failed to respond to this argument; therefore, it is deemed conceded. *See* ***Charolais***, 90 Wis. 2d at 109.

¶17 Finally, to the extent the comments were impermissibly based on Sexton's pre-***Miranda***[1] or post-***Miranda*** silence, we conclude any error was harmless. *See* ***State v. Sorenson***, 143 Wis. 2d 226, 263, 421 N.W.2d 77 (1988) (impermissible comments on silence were subject to harmless error rule). An error is harmless "if the beneficiary of the error proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" ***State v.***

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

Harris, 2008 WI 15, ¶42, 307 Wis. 2d 555, 745 N.W.2d 397 (quoting ***Chapman v. California***, 386 U.S. 18, 24 (1967)). Our supreme court has also held that 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.'" ***Id.***, ¶43 (quoting ***State v. Harvey***, 2002 WI 93, ¶46, 254 Wis. 2d 442, 647 N.W.2d 189).

¶18 The evidence supporting Sexton's convictions was overwhelming. Harger testified his dog's barking woke him up at approximately 2:30 a.m. Harger explained his dog starts barking whenever someone pulls into the driveway. Within minutes of his dog barking, he went to his patio door, where he observed a vehicle in his yard. When the vehicle did not leave, Harger called the police. Raddant found Sexton, who was the sole occupant of the vehicle, sleeping in the driver's seat. The vehicle was running, and Sexton's blood alcohol concentration was .276. Although Sexton's defense was that Polum drove to Harger's house and, following a disagreement, left Sexton and the vehicle in Harger's driveway, Polum testified he did not remember being with Sexton and denied giving a statement admitting he was the driver. Moreover, the jury learned Polum's alleged statement surfaced after Sexton and Polum resided together at the Shawano County Jail. We conclude that, in light of the evidence introduced at trial, the court did not err by failing to grant a new trial.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2009-10.).