COURT OF APPEALS
DECISION
DATED AND FILED

November 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP956-CR **Cir. Ct. No. 2009CT30**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FRANK PLUM,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Taylor County: JAY R. TLUSTY, Judge. *Affirmed*.

¶1 CANE, THOMAS, Reserve Judge.[1] Frank Plum appeals a judgment of conviction for operating while intoxicated, third offense. He asserts

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

the circuit court erred by failing to grant a mistrial after the State improperly commented on his pre-***Miranda***[2] silence at trial. We conclude that any error was harmless and affirm.

BACKGROUND

¶2 At trial, Damian Plaski, a citizen-witness, testified that, at approximately 12:00 p.m. on April 9, 2009, he was traveling northbound on a two-lane highway when he observed a red van traveling behind him that was "all over the road." The van crossed the centerline, crossed back into its lane, and then moved onto the shoulder. Plaski slowed down and the red van proceeded to pass his vehicle.

¶3 Plaski testified the van "passed me like any other vehicle would but, then, when he came back over to get back into the lane he went off into the shoulder." Plaski, now traveling behind the van, observed it "veer[] into the shoulder and, then, back into the lane, and, then, maybe tires over the centerline a little bit and, then, back into the lane." Plaski reported the van did this a couple of times and stated that, as they entered the Village of Stetsonville, the van came within inches of sideswiping some of the vehicles parked along the road.

¶4 Once north of Stetsonville, Plaski observed the van go "directly in the oncoming traffic lane as a semi was approaching." Plaski testified the van missed hitting the semi-trailer truck by twenty or thirty feet. Plaski called the police and reported "a guy that probably shouldn't be driving a vehicle." Plaski continued following the vehicle until police arrived.

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

¶5 Edward Turk, a passenger in Plaski's vehicle, also observed the van cross the centerline multiple times. Turk testified that at some points the entire vehicle "was pretty much over the centerline." Turk also elaborated that, when the van was in the shoulder, it was actually "almost in the ditch; the whole vehicle was almost there and, then, he yanked over. Plenty of times, it almost looked like he lost control of the vehicle." Plaski and Turk followed the vehicle for approximately eight miles.

¶6 Officer Nathaniel Schweitzer testified that, on April 9, he was dispatched to respond to a reckless driver complaint. Schweitzer located the van and pulled up behind it. He immediately observed the van cross the centerline. Schweitzer then stopped the vehicle. When the van pulled over, its front right tire struck the curb.

¶7 Schweitzer subsequently identified Plum as the driver. Schweitzer, who had interacted with Plum on other occasions, observed Plum's speech was "very lethargic and slurred." Schweitzer explained that Plum had "spoke[n] just fine" in the past, but at that moment, his speech was "noticeably different. It was almost hard to tell some of the things he was saying …."

¶8 Schweitzer said he could not smell any alcohol on Plum and asked him if he was taking any medication. According to Schweitzer, Plum responded that "he takes his medication as his doctor prescribed." Schweitzer explained, "I know I re-asked him many times and that's the only answer he gave me which indicated to me that he had taken some medication that day, but I was unaware of what or when or how much."

¶9 The State then asked, "He didn't tell you what it was?" And, Schweitzer responded, "No. He refused to answer any of those questions." Plum

objected, and outside the presence of the jury, moved for a mistrial. Plum argued Schweitzer had improperly commented on his silence. The court denied Plum's motion, reasoning Plum was not in custody when the questions were asked.

¶10 Schweitzer then described Plum's performance on the field sobriety tests. His observations led him to believe Plum was impaired, and he placed him under arrest for operating while intoxicated. Schweitzer took Plum to the hospital for a blood draw.

¶11 Laura Liddicoat, a supervisor at the Wisconsin State Laboratory of Hygiene, testified Plum's blood was subjected to an alcohol test and a comprehensive drug screen. Three drugs were detected in Plum's blood: morphine, hydrocodone, and lorazepam. The amount detected of each drug fell within the therapeutic range. Liddicoat explained, however, that because individuals have different tolerance levels, the mere fact that the amount detected falls in a therapeutic range does not necessarily indicate whether an individual was or was not impaired.

¶12 Liddicoat reported the three drugs affect driving, especially when taken in combination. She explained lorazepam is a depressant that works to slow down the brain. It can cause balance issues and slurred speech, and it can cause problems with attentiveness and decision-making abilities. Although morphine and hydrocodone are not depressants, they are instead classified as narcotic analgesics, Liddicoat explained that because they "act[] with the brain to stop pain, they also do cause sedation and a slowing of the brain." Taking all three causes a "multiplicative effect" on an individual.

¶13 Liddicoat testified individuals impaired by the combination of these drugs would "not [be] able to maintain the position in their lane of traffic. They

weave within their lane of traffic or stay[] possibly outside their lane of traffic …. They also might have difficulty with traffic signals or doing the right maneuver with other traffic around." Finally, Liddicoat opined that, based on her review of the police report, which described Plum's driving and Schweitzer's interactions with him, Plum was impaired and could not safely operate a motor vehicle. The jury found Plum guilty of operating while intoxicated.

DISCUSSION

¶14 On appeal, Plum asserts the circuit court erred by failing to grant a mistrial after the State improperly elicited testimony on his pre-***Miranda*** silence and then commented on that silence in closing arguments. He contends any error was not harmless.

¶15 Here, the circuit court reasoned that because Plum was not in custody the officer was permitted to comment on his refusal to answer questions. However, "[t]he protection from reference to silence arises from the Fifth Amendment guarantee against self-incrimination." ***State v. Fencl***, 109 Wis. 2d 224, 236, 325 N.W.2d 703 (1982). "[A] person is entitled to the protection of the Fifth Amendment even prior to arrest or a custodial interrogation."[3] ***Id.*** at 237.

¶16 We first determine whether the State improperly referenced Plum's pre-***Miranda*** silence. To determine whether there has been an improper comment on a defendant's right to remain silent, we must determine "whether the language

[3] We acknowledge that, in limited situations, the State may reference a defendant's choice to remain silent. *See, e.g.*, ***State v. Mayo***, 2007 WI 78, ¶52, 301 Wis. 2d 642, 734 N.W.2d 115 ("Once the defendant testifies, his or her pre-***Miranda*** silence may be used by the prosecutor."). In this case, however, both parties agree that the State could not comment on Plum's right to remain silent.

used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the defendant's right to remain silent." ***State v. Nielsen***, 2001 WI App 192, ¶32, 247 Wis. 2d 466, 634 N.W.2d 325. We "must look at the context in which the statement was made in order to determine the manifest intention which prompted it and its natural and necessary impact on the jury." ***Id.***

¶17 Plum first contends the State improperly commented on his pre-***Miranda*** silence when Schweitzer testified Plum "refused to answer … questions" concerning the type or amount of medication he consumed. The State argues the comment was not an improper reference to silence because Plum had agreed to answer earlier questions. We agree with Plum that Schweitzer's testimony that he refused to answer questions was a comment on Plum's right to remain silent and was therefore improper. *See* ***Fencl***, 109 Wis. 2d at 238. However, an improper reference to a defendant's choice to remain silent is constitutional error that is subject to a harmless error analysis. ***Id.***

¶18 Plum next asserts the State improperly commented on his refusal to reveal the type or amount of medication he had consumed when the State, during closing argument, asserted:

> But you never heard any evidence, not any evidence of any physical impairment, some medical condition. And your job here is to decide the evidence of what came into this trial. Not what it could be, not what it should be, not what we want it to be, but what came into this trial.

The State also contended, "You did not hear one piece of evidence that the drugs in this Defendant's system were prescribed to him, not one. Go through your notes. Feel free. It ain't there."

¶19 The State asserts that these comments were not in reference to Plum's refusal to reveal the type or amount of medication he consumed. Rather, it argues these comments were a proper response to statements Plum's counsel made during voir dire and in his opening statement. There, Plum informed the jury that the evidence would show he suffered from a medical condition and had been prescribed medication to treat that condition. In his reply brief, Plum concedes that "defense counsel seemed to promise evidence which he did not produce …."

¶20 We conclude the State did not improperly reference Plum's refusal to reveal the type or amount of medication he had consumed in its closing argument. *See* ***State v. Werlein***, 136 Wis. 2d 445, 456, 401 N.W.2d 848 (Ct. App. 1987) ("Questions about the absence of facts in the record need not be taken as a comment on a defendant's failure to testify."). The comments here did not reference Plum's refusal to answer questions. Instead, taken in context, the comments were a directed response to Plum's earlier statements to the jury that the evidence would reveal he suffered from a medical condition and was prescribed medication to treat the condition. *See* ***id.*** at 457. Such evidence, if it existed, could have been introduced from sources other than Plum's testimony.

¶21 Because we conclude the State's closing argument did not improperly reference Plum's pre-***Miranda*** silence, we only need to determine whether Schweitzer's testimony regarding Plum's refusal to answer questions constituted harmless error. 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. Mayo***, 2007 WI 78, ¶47, 301 Wis. 2d 642, 734 N.W.2d 115 (citations omitted). 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.*** (citation omitted).

¶22 We consider the following factors when determining whether an evidentiary error is harmless:

> 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.

Id., ¶48.

¶23 We conclude Schweitzer's reference to Plum's pre-***Miranda*** silence was harmless. The improper reference occurred only once. After Schweitzer testified that Plum had refused to tell him the type or the amount of the medication he had taken, the State immediately moved on to questions regarding field sobriety. Plum did not even object to the testimony until after the State had asked two field sobriety questions.

¶24 Moreover, based on the nature of Plum's defense, he was not harmed by the State's reference to his refusal to reveal the type or amount of medication. Plum argued to the jury during opening statements he had consumed these drugs for medical reasons but was not impaired because the detected amount fell within the therapeutic range.

¶25 Finally, the evidence supporting the State's case was overwhelming. Plum was followed for approximately eight miles by two citizen witnesses who observed him swerving back and forth across both lanes of traffic. At one point, Plum came within twenty to thirty feet of striking an oncoming semi-trailer truck. Schweitzer, responding to the reckless driver complaint, observed Plum cross the centerline and then hit the curb. Schweitzer described Plum's usual speech as normal, but had a difficult time understanding Plum's slurred and lethargic speech.

Plum then exhibited signs of impairment on the field sobriety tests. Liddicoat testified Plum had morphine, hydrocodone, and lorazepam in his system. She explained that, although the amounts detected of each drug fell within the therapeutic range, an individual can still be impaired. Liddicoat reported that, when combined, the drugs have a magnified effect and can affect driving.

By the Court.—Judgment affirmed.

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