COURT OF APPEALS
DECISION
DATED AND FILED

July 28, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2921-CR **Cir. Ct. No. 2013CT125**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID D. HARTL, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Chippewa County: JAMES M. ISAACSON, Judge. *Affirmed*.

¶1 HRUZ, J.[1] David Hartl, pro se, appeals a judgment convicting him of operating a motor vehicle while intoxicated, as a second offense.[2] In addition, he appeals the order denying his postconviction motion. We affirm.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

BACKGROUND

¶2 At Hartl's jury trial, Village of Lake Hallie police officer Daniel Sokup testified that he arrested Hartl for operating while intoxicated after initiating a traffic stop at approximately 4:30 a.m. Sokup testified he observed Hartl had "thick, slurred speech and bloodshot eyes and smelled of intoxicants."

¶3 As relevant to this appeal, during Sokup's direct examination, the State began to discuss an "Alcohol Influence Report." Hartl objected, arguing outside the presence of the jury that it was improper for the State to introduce evidence of Hartl's refusal to answer questions after being given ***Miranda***[3] warnings. The State explained the Alcohol Influence Report was a standard form used in investigations, and included information about defendants' clothing, attitude, speech and more. The prosecutor stated:

> [S]o he can testify to the information there. I was going to get to the point where I asked [Sokup] whether [Hartl] was Mirandized or not, and at that point, the officer would testify that [Hartl] refused – he lawyered up. He said he wanted an attorney or didn't want to answer the questions.

Hartl asserted such questioning was cumulative, irrelevant, and a violation of his Fifth Amendment right to remain silent. The circuit court overruled Hartl's objection, and Sokup confirmed that Hartl had "exercised his constitutional right to not answer any more questions[.]"

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[2] Hartl was charged with, and found guilty of, OWI and operating with a prohibited alcohol concentration, both as second offenses. Pursuant to WIS. STAT. § 346.63(1)(c), Hartl was only sentenced on the OWI-second offense.

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

¶4 Prior to Hartl's jury trial, he had moved to exclude evidence of an anonymous 911 call reporting a suspected drunk driver. It was this call, combined with Sokup's corroboration of some of its details and his observation of a speeding vehicle similar to the one identified in the call, which prompted Sokup to initiate his stop of Hartl. The record is unclear whether the circuit court agreed with the merits of Hartl's motion regarding the 911 call. It does appear the court seemed unwilling to allow any testimony from Sokup regarding what the anonymous, nontestifying 911 caller told him about Hartl's state of intoxication. What is clear for purposes of this appeal, however, is that the parties stipulated that Sokup was not to mention the 911 call when testifying about the facts that led to the traffic stop.

¶5 Despite having obtained the foregoing stipulation, on cross-examination, Hartl's counsel asked Sokup:

> Q. At this point [referring to the initial contact], what are you talking about [with Hartl]?
>
> A. I am talking about the reason for my stop.
>
> Q. And what specifically did you say to him?
>
> A. I don't know if I'm supposed to say. We had a conversation about this earlier.
>
> Q. What specifically, what words did you say?
>
> A. I told him that I stopped him because I got an anonymous call there was an intoxicated driver.
>
> [Defense counsel]: Objection.
>
> The Court: You asked the question, Mr. Waters. Overrule the objection.

¶6 Hartl was ultimately found guilty of OWI and PAC, both as second offenses.[4] Represented by new counsel, Hartl moved for postconviction relief. Hartl asserted the circuit court improperly permitted the State to introduce evidence that he had exercised his constitutional right to remain silent in response to post-***Miranda*** warning questioning by police. In addition, he alleged he received ineffective assistance of counsel when his attorney elicited prejudicial testimony that had been ruled inadmissible following his own pretrial motion. The court denied the postconviction motion. It concluded that, while erroneous, the State's questioning about Hartl's silence was harmless, and that Hartl had not shown a reasonable probability that but for his defense counsel's failure to adhere to a stipulation that was to Hartl's benefit, the result of the trial would have been different. Hartl now appeals.[5]

DISCUSSION

¶7 Hartl renews the arguments raised in his postconviction motion, contending: (1) his constitutional right to remain silent was violated when the State introduced evidence that he invoked his right; and (2) he received constitutionally ineffective assistance from counsel during his trial.

I. The violation of Hartl's right to remain silent was harmless error

¶8 A criminal defendant's right to remain silent is protected by the Fifth Amendment to the United States Constitution and by article I, section 8 of the

[4] Hartl was sentenced to ten days in jail and was assessed $1,140.60 in costs, fines, and surcharges, based on the OWI verdict.

[5] Hartl's appointed postconviction counsel was permitted to withdraw from representation; Hartl appeals pro se.

Wisconsin Constitution. ***State v. Pheil***, 152 Wis. 2d 523, 530, 449 N.W.2d 858 (Ct. App. 1989). It has long "been held improper for the State to comment upon a defendant's choice to remain silent at or before trial." ***State v. Nielsen***, 2001 WI App 192, ¶30, 247 Wis. 2d 466, 634 N.W.2d 325. We review de novo the application of constitutional principles to undisputed facts to determine whether a defendant's right to remain silent was violated. ***Id.***, ¶32.

¶9 The State concedes the line of questioning at issue constituted error, but it argues such error was harmless in the context of the rest of the trial. *See* ***Chapman v. California***, 386 U.S. 18, 24 (1967) (Constitutional error considered harmless if the court is "able to declare a belief that it was harmless beyond a reasonable doubt."); ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985) (To find error harmless, court must find there is no "reasonable possibility" that the error "contributed to the conviction."). Relevant factors we consider when determining whether a constitutional error is harmless include: (1) the frequency of the error; (2) the importance of the erroneously admitted evidence; (3) the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence; (4) whether the erroneously admitted evidence duplicates untainted evidence; (5) the nature of the defense; (6) the nature of the State's case; and (7) the overall strength of the State's case. ***State v. Nelson***, 2014 WI 70, ¶45, 355 Wis. 2d 722, 849 N.W.2d 317.

¶10 The State reasons that, in light of the proceedings as a whole, the "one isolated instance" of reference to Hartl's invocation of his rights was not "sufficiently prejudicial to warrant a new trial." The State asserts its case against Hartl was:

> very strong. [Hartl] did not dispute he was the driver or that … he was operating his vehicle on a highway. The

> blood test was a .170. Expert testimony showed the analytical equipment was functioning properly and was operated by a person trained to do so. While the defense was that the test result was in error, no evidence was presented that this test result was erroneous …. The jury had no reason to doubt the accuracy of the blood test.

¶11 Hartl did not file a reply brief,[6] and he did not preemptively address harmless error in his brief-in-chief. Given the State's argument, the nature and strength of the State's evidence against him, the nature of the defense, and Hartl's failure to attempt any rebuttal of the State's harmless error argument, we conclude there is no reasonable possibility the State's singular reference to Hartl's invocation of his right to remain silent contributed to his conviction.

II. Hartl did not receive constitutionally ineffective assistance of counsel

¶12 Next, Hartl argues he was denied the effective assistance of counsel when his attorney elicited evidence of an anonymous 911 caller's report of an intoxicated driver, despite counsel's having successfully obtained a stipulation prohibiting the introduction of such evidence. On cross-examination, Hartl's counsel caused Sokup to describe what he told Hartl was the reason for the stop—namely, "I told him that I stopped him because I got an anonymous call there was an intoxicated driver." Hartl argues such "error was not the result of a deliberate strategic decision[,]" and that he was prejudiced by this error.

¶13 To establish constitutionally ineffective assistance of counsel, a defendant must show that there was both deficient representation and that, as a

[6] Hartl submitted a letter indicating that a reply brief would not be filed, wherein he stated he was forgoing a reply brief "because I feel strong and confident that all the issues I raised for my defense are in My Brief of Appellant that also shows where hearsay and prejudice is [sic] present and ask you to please carefully review this." We have carefully reviewed Hartl's brief-in-chief, and nowhere in it does he make any argument responsive to the State's argument of harmless error on this issue.

result, he or she suffered prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Establishing deficient representation requires a defendant to show specific acts or omissions by counsel that fell "outside the wide range of professionally competent assistance." ***Nielsen***, 247 Wis. 2d 466, ¶12 (quoting ***Strickland***, 466 U.S. at 690). To prove prejudice, a defendant must show there is a reasonable probability that but for counsel's unprofessional error, the result of the proceeding would have been different. ***Id.***, ¶13. We will uphold the circuit court's findings of fact unless clearly erroneous, but we review de novo whether the defendant has proven the ***Strickland*** prongs. ***Id.***, ¶14. If we conclude a defendant has not proven one prong, we need not address the other. ***Id.***, ¶12.

¶14 Hartl argues he was prejudiced by his trial counsel's error because the defense strategy was "to show the Jury that there were no overt signs of intoxication … and to hope that the Jury would therefore disbelieve the results of the blood test." Hartl contends he did not appear to be impaired in the video of the traffic stop, and he further refers to his counsel's arguments to the jury that lab results are susceptible to error, and that the jury should consider whether the blood test matched what they saw depicted on the squad video. Hartl argues, "The fact that an anonymous citizen called the police to report an intoxicated driver directly contradicts the primary strategy of the defense. … The lack of poor driving or overt signs of intoxication was exactly the weakness the defense strategy sought to exploit."

¶15 In response, the State contends that "[Hartl's trial counsel's] insistence that Officer Sokup answer his question eliciting this evidence was not prejudicial because this evidence was admissible." The State further argues the circuit court never reached the merits of Hartl's motion in limine regarding the 911 call, but rather the parties stipulated to Sokup only testifying that the reason

for the stop was speeding. As explained above, *supra* ¶4, this assertion regarding the circuit court not reaching the merits of the motion is unclear, based on the record.

¶16 In any event, the State fails to explain—or cite to any authority in a similar context to explain—why the admissibility of the evidence overcomes the concerns regarding ineffective assistance of counsel as articulated in ***Strickland*** and its progeny. The State appears to concede Hartl's counsel performed deficiently with respect to the relevant portion of his cross-examination of Sokup. It would be difficult to conclude otherwise. Hartl's counsel had already succeeded in having evidence of the 911 call excluded from the trial. Nonetheless, he then compelled a witness to introduce, reluctantly, the fact of the 911 call in his testimony. Furthermore, that the evidence was arguably admissible has no bearing on whether it was prejudicial to Hartl for his own counsel to elicit testimony regarding a fact that otherwise would have been left unsaid to the jury at any point during the trial.

¶17 Despite the foregoing, we ultimately agree with the State that Hartl has not shown there is a reasonable probability the result of the proceeding would have been different but for his counsel's unprofessional error. Again, Hartl suffers from the absence of a reply brief. While Hartl discussed the prejudice prong in his brief-in-chief as described above, he focused only on how the revelation of the 911 call undermined his defense theory. He failed to explain how the detrimental admission of the limited evidence of the 911 call stands in relation to all of the other evidence against him presented to the jury.

¶18 In contrast, the State eventually offered a short, yet effective argument that "[g]iven the totality of the evidence, this alleged error should not

undermine this court's confidence in the validity of the jury's verdict." The State observes the 911 call was only mentioned a single time, during defense counsel's cross-examination of Sokup, and it was not referenced by the State in either its closing argument or its rebuttal argument. In addition, the State argues, the trial evidence showed Hartl performed poorly on his field sobriety tests and displayed a "demeanor … indicative of being under the influence of an intoxicant, which was confirmed by the blood test." Our independent review of the record supports this assessment. We observe the jury also heard Sokup testify to his observations of Hartl's "thick, slurred speech and bloodshot eyes and [that Hartl] smelled of intoxicants."

¶19 With respect to Hartl's purported defense theory, his counsel provided no tangible reason for the jury to disbelieve the lab's test results—other than, as Hartl describes again on appeal, because lab results are not infallible but are subject to human error. Such an argument, without case-specific evidence of mishandling or malfunctioning, is weak when measured against all the evidence of the case, including an uncontested test result showing a blood-alcohol concentration of .17 and expert testimony that the lab equipment was functioning properly and operated by a trained technician.

¶20 Accordingly, we conclude Hartl has failed to show there is a reasonable probability the result of his trial would have been different but for counsel's unprofessional error.

By the Court.—Judgment and order affirmed.

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