COURT OF APPEALS
DECISION
DATED AND FILED

October 12, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1236-CR **Cir. Ct. No. 2014CF81**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC L. HILL,

DEFENDANT-APPELLANT.

APPEAL from judgment of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Eric L. Hill appeals a judgment of conviction entered after a jury found him guilty of first-degree intentional homicide by use of a dangerous weapon and attempted armed robbery. He contends the circuit court erred when it admitted his custodial confession because, he says, the confession

followed his invocation of his right to counsel. Because we conclude that Hill did not unambiguously invoke his right to counsel, that he waived any right to counsel he may have invoked, and that any error in admitting his confession is harmless beyond a reasonable doubt, we affirm.

BACKGROUND

¶2 On December 31, 2013, police found a shooting victim, Fernando Antonio Winters, lying in a Milwaukee city street. Before he died, he told police that the shooter was a man Winters "had never seen before" who tried to rob him. Following an investigation, police arrested Hill and his son, Deonte Hill.[1]

¶3 On January 7, 2014, police conducted two recorded custodial interviews with Hill. At the outset of the first interview, police advised Hill of his rights to counsel and to remain silent. Hill agreed to talk to police but denied he was involved in shooting Winters. At the outset of the second interview, police again advised Hill of his rights, and again he agreed to talk. As the interview progressed, Hill asked to "speak with [police] off the record." He said he "d[id] not want to make a statement until a lawyer was present," but he wanted to "clarify some things ... without exactly making a statement, without a lawyer present. Is that okay?" After further discussion, Hill told police that he had decided to give a statement without a lawyer. He then confessed that he attempted to commit an armed robbery after watching an acquaintance, Debbie Williams, give a man some money. Hill went on to describe shooting the man

[1] To avoid confusion, we refer to appellant Eric L. Hill by his surname, and we refer to his son as "Deonte" throughout the remainder of this opinion.

when he lunged for Hill's gun. The State charged Hill with first-degree intentional homicide and attempted armed robbery.

¶4 Hill moved to suppress his custodial confession on the ground that he had invoked a limited right to counsel that the officers failed to honor. He and the State agreed that the circuit court could resolve the suppression motion based on the recorded interrogation sessions and the parties' legal arguments. The circuit court considered the submissions and arguments and denied the motion.

¶5 The matter proceeded to trial. The evidence included Hill's confession. The jury found Hill guilty as charged. He appeals, challenging only the circuit court's order denying his suppression motion.

DISCUSSION

¶6 When we review a circuit court's decision resolving a motion to suppress custodial statements, we accept the circuit court's findings of historical fact unless they are clearly erroneous. *See* ***State v. Ward***, 2009 WI 60, ¶17, 318 Wis. 2d 301, 767 N.W.2d 236. We review the application of constitutional principles to those facts *de novo*. *See* ***id.*** Here, the facts surrounding Hill's custodial statements are undisputed. We turn to the law.

¶7 The privilege against self-incrimination guaranteed under the Fifth Amendment to the United States Constitution requires that, before questioning a suspect in custody, police must inform the suspect of, *inter alia*, the right to remain silent, the right to have an attorney present during questioning, and the right to have an attorney appointed if the person cannot afford one. ***Miranda v. Arizona***, 384 U.S. 436, 478-79 (1966). Pursuant to ***Miranda***, the prosecution may not use statements obtained through custodial interrogation absent proof of

"'procedural safeguards effective to secure the privilege against self-incrimination.'" ***State v. Harris***, 199 Wis. 2d 227, 238, 544 N.W.2d 545 (1996), (citing ***Miranda***, 384 U.S. at 444).

¶8 In this case, Hill concedes that at the start of both his first and second custodial interviews, he waived his ***Miranda*** rights and agreed to answer questions. Hill asserts, however, that he invoked his right to counsel while the second interview was underway.

¶9 When a suspect in custody has waived the ***Miranda*** rights and given a statement, the suspect retains the right to terminate further questioning, but to do so, the suspect must unequivocally invoke either the right to counsel or the right to remain silent. *See* ***State v. Cummings***, 2014 WI 88, ¶¶47-50, 357 Wis. 2d 1, 850 N.W.2d 915. If "a suspect makes ... an ambiguous or equivocal statement, 'police are not required to end the interrogation ... or ask questions to clarify whether the accused wants to invoke his or her ***Miranda*** rights.'" ***Cummings***, 357 Wis. 2d 1, ¶51 (citation omitted, first set of ellipses added). We decide as a matter of law whether a suspect's statements are equivocal. *See* ***State v. Markwardt,*** 2007 WI App 242, ¶36, 306 Wis. 2d 420, 742 N.W.2d 546.

¶10 Hill points to the following exchange as proof that he unequivocally invoked his right to counsel during the course of the second interview:

Hill:	If I can, can I um speak with you guys off the record? Voluntarily?
Detective:	What do you mean?
Hill:	Off the record. Just off the record. No tape, nothing. For a minute. In other words, what I'm trying to say is I got something to say to you guys.
Detective:	Uh huh.

Hill:	But, I do not want to make a statement until a lawyer is present, so I can sorta figure out where I am in this. I don't want to take you guys around the block with it. You already know what you know. You know what I mean?
Detective:	Uh huh.
Hill:	So if I could just talk to you guys off the record, momentarily, I could clarify some things for you guys without exactly making a statement, without a lawyer present. Is that ok?

¶11 According to Hill, the foregoing constituted the "limited invocation of the right to counsel" recognized in ***Connecticut v. Barrett***, 479 U.S. 523, 530 (1987). In that case, a suspect in custody told police he would not give a written statement without an attorney but that he had '"no problem' talking about the incident." *See* ***id.*** at 525-26. The Supreme Court held that the suspect's subsequent oral statements were admissible, *see* ***id.*** at 527-28, but any written statements would have been inadmissible because they would have fallen within the scope of the suspect's clear limited invocation of his Fifth Amendment rights. *See* ***id.*** at 529.

¶12 Hill equates his exchange with police to an invocation of the limited right to counsel discussed in ***Barrett***. Hill tells us "off the record" has a clear meaning: "an 'off the record' conversation is one that isn't recorded." According to Hill, his exchange with police was thus unambiguous: he wanted to have a conversation with the officers that was not recorded, but he wanted a lawyer before he had a recorded conversation with the officers. Under ***Barrett***, he claims, his recorded statement should be suppressed.

¶13 We cannot agree. Unlike the suspect's remarks in ***Barrett***, Hill's remarks were not clear. Assuming without deciding that Hill unambiguously

asked to have a conversation that was not recorded, Hill also told police that he wanted to "speak" and to "talk" without a lawyer but wanted to do so "without making a statement." As the State accurately points out, talking aloud constitutes making a statement. *See Statement*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabr. 1993) (defining "statement" as including the "process of stating, reciting or presenting orally"). Hill did not explain, and his words did not convey, how the police could accommodate his request to "talk" without making a statement. His appellate briefs offer no clarification.

¶14 Accordingly, unlike the defendant in ***Barrett,*** Hill failed to effect a limited invocation of his Fifth Amendment rights. Rather, Hill's comments were ambiguous and any invocation of his right to counsel was, at best, equivocal. We note that a sister jurisdiction reached a similar conclusion in circumstances where a defendant told police he was willing to "answer questions" but not "give a statement" without an attorney. *See* ***State v. Gerald***, 549 A.2d 792, 831-32 (N.J. 1988), *superseded on other grounds by constitutional amendment*, N.J. CONST. art. 1, ¶12. The ***Gerald*** court held that these conflicting requests were "equivocal at best" and not a clear invocation of the right to counsel. *See* ***id.*** at 831.

¶15 Because Hill did not offer an unambiguous and unequivocal invocation of his Fifth Amendment rights during his custodial interrogation, police had neither an obligation to stop questioning him nor a duty to clarify his wishes. *See* ***Cummings***, 357 Wis. 2d 1, ¶51. The circuit court thus properly declined to suppress Hill's interview with police following his cryptic offer to talk off the record without making a statement. *See* ***id.***

¶16 For the sake of completeness, we also consider the State's alternative contention: assuming *arguendo* that Hill effected a limited invocation of his right

to counsel, he subsequently waived that right. The circuit court concluded that he did, and we agree.

¶17 A suspect in custody who has invoked the right to counsel can waive that right by: (1) initiating further communication, exchanges, or conversations with the police, if (2) the suspect's waiver was knowing, voluntary, and intelligent. *See* ***State v. Hambly***, 2008 WI 10, ¶¶69-70, 307 Wis. 2d 98, 745 N.W.2d 48. Our standard of review again requires us to uphold the circuit court's findings of historical fact unless they are clearly erroneous but to independently apply the facts to the legal and constitutional principles. *See* ***id.***, ¶71. Again, the facts are not disputed, so we move directly to the law.

¶18 We first consider whether Hill initiated further communication with the police. Our supreme court has not yet decided which of two tests to apply when considering this question. *See* ***id.***, ¶¶73-75. The ***Hambly*** court explained that, under one test, the suspect's inquiries or statements must '"evince a willingness and a desire for a generalized discussion about the investigation,'" and under the other test, the suspect's inquiries or statements must relate to '"the subject matter of the criminal investigation.'" ***Id.***, ¶¶73-74 (citations and emphasis omitted). Here, as in ***Hambly***, Hill's inquiries satisfied both tests.

¶19 After the police told Hill he could not "clarify some things" in a statement "off the record," Hill asked "why?" One of the interrogating officers began formulating an answer, but before the officer could complete a sentence, Hill interrupted, stating "I want to talk to you guys about some things." Questions and comments of this kind "'initiate[]' further communication in the ordinary dictionary sense of that word.'" *See* ***id.***, ¶79 (citation and one set of quotation marks omitted). Of course, some initial comments may be "'so routine that they

cannot be fairly said to represent a desire ... to open up a more generalized discussion relating directly or indirectly to the investigation.'" *See* ***id.***, ¶80, (*citing* ***Oregon v. Bradshaw***, 462 U.S. 1039, 1045 (1983)). Here, however, Hill's words were more than an inquiry merely incidental to the custodial relationship, such as a request for water or to use a telephone. *See* ***Bradshaw***, 462 U.S. at 1045. Rather, his question and subsequent interjection plainly reflected that he wanted to continue discussing the investigation and its subject matter.

¶20 Thus, regardless of whether Hill offered a limited invocation of his Fifth Amendment rights when he said he wanted to talk without making a statement, he subsequently began an exchange with the officers and invited further conversation. The officers were entitled to respond. *See* ***Hambly***, 307 Wis. 2d 98, ¶¶79, 89. Hill continued the conversation, asking additional questions and offering remarks about the investigation and its potential effects on himself and his son. Hill then said that he would "give you guys a statement. I'm going to continue talking to you without a lawyer." We conclude that Hill, like the defendant in ***Hambly***, initiated further conversation with the police. *See* ***id.***, ¶89.

¶21 We turn to the second prong of the ***Hambly*** waiver analysis, namely, whether the defendant voluntarily, knowingly, and intelligently waived the right to counsel when the defendant initiated further conversation with the police. *See* ***id.***, ¶70. A ***Miranda*** waiver is knowing, intelligent, and voluntary when it is '"the product of a free and deliberate choice'" and is '"made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" ***Hambly***, 307 Wis. 2d 98, ¶91 (citations omitted). The question turns on the entirety of the facts and circumstances. *See* ***id.***

¶22 In this case, as we have seen, Hill twice received ***Miranda*** warnings and twice waived his right to counsel in response. Hill has never challenged the validity of those two waivers, implicitly acknowledging that he understood the rights guaranteed under ***Miranda*** and his options to waive or exercise those rights. Indeed, the record shows that Hill was an intelligent and educated man who was enrolled in a post-secondary school program and had been studying criminal justice for four semesters. Moreover, just before making the inculpatory statements he hopes to suppress, he told police: "I'm going to continue talking to you, without a lawyer. It's my decision. It's not being forced. You guys have been more than reasonable in this situation." The totality of the circumstances shows that Hill's third waiver of the right to counsel was voluntary, knowing, and intelligent.

¶23 Finally, the State asks us to conclude that any error in admitting Hill's inculpatory statements at trial was harmless. "An 'error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***State v. Tucker***, 2003 WI 12, ¶26, 259 Wis. 2d 484, 657 N.W.2d 374 (citations and one set of quotation marks omitted). We agree with the State that, if the circuit court erroneously admitted Hill's confession, the error was harmless.

¶24 Hill contends that admitting his confession at trial was not harmless error because, absent his confession, the State's case depended on the testimony of Deonte and Williams, witnesses that Hill deems incredible. He points out that both those witnesses had criminal records and a history of substance abuse. The State's case was not limited, however, to testimony from Deonte and Williams. The State also presented evidence caught on videotape, the testimony of third-party bystanders, and the victim's dying declaration, all of which corroborated the

version of events Deonte and Williams described. Hill's assessment of the State's case also fails to take into account the information Hill gave police during the portion of his interrogation that he does not challenge and that preceded his mention of a lawyer. *See* ***State v. Roberson***, 2006 WI 80, ¶33, 292 Wis. 2d 280, 717 N.W.2d 111 (exclusionary rule '"does not reach backward to taint information that was in official hands prior to any illegality'") (citation and emphasis omitted).

¶25 Hill does not dispute the accuracy of the State's summary of the evidence presented at trial in addition to his confession. We reproduce that summary here:

> Hill's son, Deonte, testified for the prosecution that he and Hill, who was wearing a black coat, went to the motel where [Williams] was staying, because [Williams] owed [Deonte] money. They drove [Williams] to an ATM in his Mercedes so she could withdraw some cash, then returned to the motel. At the motel, [Williams] interacted with a man.
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> Although Hill was driving when they left the motel, he stopped and asked Deonte to get behind the wheel. Hill went into the back seat where there was a fully loaded automatic pistol. Hill asked Deonte to turn off Appleton Avenue a block or two from [William]'s motel. When Deonte pulled over, Hill got out, saying he was going to rob the man. Thirty seconds later, Deonte saw someone get up off the ground in the middle of the street. Hill ran back to the car with the gun in his hand. Hill told Deonte that when [Hill] tried to rob the man, the man swung at him, so [Hill] shot the man.
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> ....
>
> Williams testified that she owed Deonte money for cocaine she bought from him. She also owed money to a man named Tony. Both creditors were demanding payment....
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> Deonte came with Hill, in a four door Mercedes, to the motel where [Williams] was staying. [Williams] rode with these men to an ATM where she withdrew $100. Back at the motel, [Williams] gave Tony $50 while they

were standing only a few feet from Hill and Deonte's car. Tony walked out of the parking lot going north on Appleton. After [Williams] paid Deonte the money she owed him, he and Hill drove off.

The owner of a business on Appleton Avenue testified that he saw a heavy person, about five feet six inches tall, wearing a black jacket, shoot another person, then go right on Chapman Street. A passerby testified that he saw a heavy man wearing a hooded coat and carrying a gun shoot another man on Appleton.

Before [Tony] died on the way to the hospital, [he] managed to tell the police that he had been shot three or four times by a man who tried to rob him. Tony said the shooter got into a 1987 four door vehicle.

A surveillance camera video showed [Williams] getting into a car driven by Hill at her motel. Hill's car exited the parking lot at 6:49 p.m. and returned at 6:54. Tony walked into the parking lot at 6:55. Thirty seconds later [Williams] approached Hill's car and then approached Tony. She appeared to touch Tony.

Tony walked north on Appleton. Hill's car drove slowly past him. A surveillance camera at the business a couple blocks west on Appleton showed a large person in a dark hooded jacket walk past Tony, turn around, and pull something from his waistband. Tony lunged at this person, whose arm was outstretched. The person appeared to shoot Tony, and run off on Chapman [Street] with something that looked like a gun in his hand. The person got into a car and took off. The car appeared to be the same one shown in the motel video.

The evidence showed that Hill was about five feet eight inches tall, weighed about 265 to 285 pounds and was wearing a dark hooded coat on the day of the shooting. Deonte weighed about 180 pounds.

A few days after the shooting the police stopped a four door Mercedes similar to the vehicle in the videos. Hill and Deonte were in the car.

[Williams] testified that the car appearing in the surveillance camera videos looked like Deonte's. She identified the person shown getting out of the car and walking down the street and back as Hill.

....

> Hill stated [in the portion of his custodial interrogation that he does not challenge] that he and Deonte drove to a motel in a Mercedes to get money owed to Deonte by [Williams]. Hill said he was wearing a black coat. Hill stated that [Williams] got into the car, they went to an ATM and went back to the motel where [Williams] gave Deonte his money.

¶26 The foregoing evidence conclusively showed that Hill shot and killed the victim. Assuming, as Hill does, that the circuit court erroneously allowed the jury to hear him confess to the crime, any such error was harmless beyond a reasonable doubt. *See* ***Tucker***, 259 Wis. 2d 484, ¶26 (when properly admitted evidence of guilt is overwhelming, erroneous admission of other evidence may be harmless). For all of these reasons, we affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).