STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 14 AP 2921 CR

DAVID D. HARTL, Jr.,

Defendant-Appellant.

APPEAL FROM JUDGMENT OF CONVICTION AND
ORDER DENYING DEFENDANT'S
MOTION FOR POST-CONVICTION RELIEF
ENTERED 17 OCTOBER 2014,
IN CHIPPEWA COUNTY CIRCUIT COURT, BRANCH II,
THE HONOURABLE JAMES M. ISAACSON,
CIRCUIT COURT JUDGE, CHIPPEWA COUNTY, PRESIDING.

BRIEF & APPENDIX OF PLAINTIFF-RESPONDENT

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POSITION ON ORAL ARGUMENT & PUBLICATION

Oral Arguments and publication are not appropriate for this matter. The issues are not complex and the issues are controlled by established caselaw.

ARGUMENT

STANDARD OF REVIEW

The first claim of error by Mr. Hartl is that his right to remain silent was violated by the admission into evidence of his invocation of his right to remain silent. Whether Mr. Hartl's right to remain silent was violated is a question involving the application of constitutional principles to undisputed facts, which the appellate court reviews *de novo. See* ***State v. Pheil,*** 152 Wis.2d 523, 530, 449 N.W.2d 858, 861 (Ct.App.1989).

Mr. Hartl second issue claims that Attorney Waters provided ineffective assistance of counsel during his trial. A claim of ineffective assistance of counsel is reviewed under a mixed question of fact and law standard. ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990). The trial court's findings of fact will not be set aside unless they are clearly erroneous. Id. Whether the attorney's performance is deficient is a question of law which the appellate court reviews *de novo*. Id. at 128, 449 N.W.2d at 848[1].

[1] Mr. Hartl has included a third issue. He has included no argument in support of this issue and cites to no legal authority. Generally the appellate court will not consider

I. THE STATE CONCEDES THAT THE ADMISSION OF EVIDENCE RELATING TO MR. HARTL'S INVOCATION OF HIS RIGHT TO REMAIN SILENT WAS ERROR, BUT THIS ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

On direct examination of the arresting officer, the prosecutor discussed a form entitled "Alcohol Influence Report", which was marked as Exhibit 7. (R 70:84-89; App. 117-118). This form includes the ***Miranda*** warning and a series of questions. Exhibit 7 shows that Mr. Hartl refused to answer any questions. The officer testified that after being read the ***Miranda*** warning, Mr. Hartl exercised these rights. (R 70: 89; App. 118). The trial attorney made a timely objection which was overruled.

The state concedes that this line of questioning was error. However, this error was harmless beyond a reasonable doubt and the jury's verdict would have been the same. This court can be confident in the validity of this verdict.

If a defendant does not testify at trial, the state, in its case-in-chief, cannot present evidence to the jury that the defendant invoked his or her

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issues that are not adequately briefed or for which no authority is cited. ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 641 (WI. App. 1992). The state, however, addresses this issue in its response to the second issue.

right to counsel or to remain silent. ***State v. Brecht***, 143 Wis.2d 297, 310-311, 421 N.W.2d 96, 101 (1988).

> [T]his court has held that it is a violation of the right to remain silent for the State to present testimony in its case-in-chief on the defendant's election to remain silent during a custodial investigation, after arrest. [cite omitted].

Id.

However, this type of errors is subject to the harmless error rule. Id. at 317, 421 N.W.2d at 104. The Wisconsin Supreme Court states:

> Denial of a defendant's constitutional rights does not necessarily entitle him or her to a new trial. *Chapman v. California,* 386 U.S. 18, 22, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *State v. Kuntz,* 160 Wis.2d 722, 735–38, 467 N.W.2d 531 (1991). Rather, "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Delaware v. Van Arsdall,* 475 U.S. 673, 681, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). This is the doctrine of harmless error.

State v. Nelson, 2014 WI 70, ¶ 28, 355 Wis. 2d 722, 735, 849 N.W.2d 317, 323.

The state has the burden of proving that the error was harmless beyond a reasonable doubt. Id. at ¶ 44, 355 Wis. 2d at 742, 849 N.W.2d at 327. The appellate courts have set forth a non-exhaustive list to be considered as follows: 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. at ¶ 45, 355 Wis. 2d at 743, 849 N.W.2d at 327.

In the present case, reference to Mr. Hartl's invocation of his rights pursuant to ***Miranda*** was made only the one time. No reference to this evidence was made by the prosecutor in his closing argument or in his rebuttal argument. Mr. Hartl did not testify and the jury was informed that the burden of proof was on the state and not the defendant. (R 70: 231).

The case against Mr. Hartl was very strong. He did not dispute he was the driver or that the he was operating his vehicle on a highway. The blood test was a .170. (R 70: 91). Expert testimony showed the analytical equipment was functioning properly and was operated by a person trained to do so. (R 70: 191-196). While the defense was that the test result was in error, no evidence was presented that this test result was erroneous. The defense presented nothing

but speculation to attempt to undermine this solid evidence. The jury had no reason to doubt the accuracy of the blood test.

In viewing the proceedings as a whole, the record does not support a finding that this one isolated instance was sufficiently prejudicial to warrant a new trial. This court can be confident that this error is harmless beyond a reasonable doubt.

II. THE BURDEN OF PROOF IS UPON THE DEFENDANT TO PROVE THAT HIS TRIAL ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL AND THAT BECAUSE OF THIS DEFICIENT PERFORMANCE HE WAS PREJUDICED. BECAUSE THE EVIDENCE HIS TRIAL ATTORNEY ELICITED FROM THE OFFICER WAS ADMISSIBLE, MR. HARTL CANNOT MEET HIS BURDEN TO SHOW ACTUAL PREJUDICE.

On 25 February 2014, the day before trial, the defense attorneys, Sonia Anderson and Patrick Waters, filed a Motion in Limine wanting to exclude certain evidence. Prior to the start of the jury trial on 26 February 2014, the attorneys met with the judge to address this motion.

One of the requests was to exclude testimony by Dispatcher Brian Franks about an anonymous call received prior to Mr. Hartl’s arrest including the recording itself. The 911 recording was of an

anonymous tipster who reported that an intoxicated individual was leaving Heckle's in a blue Chevrolet Cavalier with license plate number 554-KJN. (R 1: 4). Officer Sokup of the Lake Hallie Police Department observed a blue Chevrolet Corsica leaving Heckle's and confirmed it had the same license plate number. Upon observing that the vehicle was speeding, the officer initiated a stop. Id.

The defense objected to the dispatcher's testimony as to the contents of this 911 call, and presumably the playing of the 911 call, on the grounds that it was hearsay and prejudicial. (R 70: 27-29, App. 115). Because the parties stipulated that the officer would testify the stop was for speeding, the judge never ruled on the merits of the objection. (R 70: 31-32, App. 116).

During the trial, on cross examination of the arresting officer, Attorney Waters asked the arresting officer, Daniel Sokup, what he said to Mr. Hartl as to why he stopped him. Despite the officer explaining that he thought he was not supposed to answer that question, Attorney Waters insisted he answer. Officer Sokup then testified that he had received an anonymous call of an intoxicated driver. (R 70: 137, App. 119).

Attorney Waters then objected, but the objection was overruled. Id.

Mr. Hartl claims Attorney Waters was ineffective for having forced Officer Sokup to answer a question, which, pursuant to the parties' stipulation, was not to be asked. Mr. Hartl argues that this error was prejudicial because it undermined the defense's theory of the case. The introduction of this testimony was contrary to the defense strategy that since no one observed any "bad" driving by Mr. Hartl, the blood test result must have been erroneous. (Appellant's Brief at page 7)& (R 70: 239-250).

The test for ineffective assistance of counsel has two prongs. ***State v. Byrge***, 225 Wis.2d 702, 719, 594 N.W.2d 388, 395 (Ct. App. 1999), *aff'd*, 2000 WI 101, 237 Wis.2d 197, 614 N.W.2d 477.

The two prongs are explained below:

> The test for deficient performance is whether counsel's representation fell below objective standards of reasonableness. See Strickland v. Washington, 466 U.S. 668, 688 (1984). In applying this test, we inquire whether, under the circumstances, counsel's acts or omissions were outside the wide range of professionally competent assistance. See id. at 690. Trial counsel is strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment. See id. at 689. We

> also must be careful to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. See id. at 689.
>
> As to prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. See Griffin, 220 Wis.2d at 391, 584 N.W.2d at 135.

Id. at 719, 594 N.W.2d at 394-395.

The court may consider the second prong of this test without deciding the first prong. This second prong requires the defendant to prove that the attorney's deficient performance caused actual prejudice. 153 Wis.2d at 128, 449 N.W.2d at 848. Attorney Waters' insistence that Officer Sokup answer his question eliciting this evidence was not prejudicial because this evidence was admissible.

Attorney Anderson argued that any testimony as to this recording and its contents was hearsay and not probative and therefore, not relevant. (R 70: 27; App. 115). She never provided any reason for why it was not relevant other than noting it might be relevant as to why the officer made the traffic stop. (R 70: 29, App. 115). She also argued that it was prejudicial,

however, never developed this argument. (R 70: 29, App. 115).

Evidence is probative and relevant if it tends to prove the existence of a fact of consequence to the determination of guilt or innocence. Sec. 904.01, Stats. Contrary to Mr. Hartl's argument, the issue is not whether the evidence harms his case, but rather whether the evidence "tends to influence the outcome of the case by 'improper means.'" ***State v. Payano***, 2009 WI 86, ¶ 87, 320 Wis. 2d 348, 403-404, 768 N.W.2d 832, 859.

> Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.

Id. at ¶ 89, 320 Wis. 2d at 404-405, 768 N.W.2d at 860.

The burden of showing unfair prejudice is on the party opposing the admission of the evidence. If the proponent of the evidence shows it is relevant, the evidence should be admitted. Id. at ¶ 80, n. 18, 320 Wis. 2d at 399, n. 18, 768 N.W.2d at 857, n 18.

This evidence was relevant for more than just explaining why Mr. Hartl was stopped. The parties'

agreement to stipulate that the stop was for speeding did not make this evidence less relevant. This evidence is highly probative and relevant as to whether Mr. Hartl's was intoxicated.

The jury would have heard that an unbiased third party had observed Mr. Hartl's behavior and concluded that he was intoxicated. This conclusion constitutes a lay opinion that would be admissible pursuant to sec. 907.01, Stats. See ***City of Milwaukee v. Bichel***, 35 Wis.2d 66, 69, 150 N.W.2d 419, 421 (1967). After having made this observation and forming this opinion, this person contacted the dispatcher and communicated this opinion. Based upon this opinion, the jury could reasonably find that Mr. Hartl was operating his motor vehicle while intoxicated at the time he was stopped.

Mr. Hartl points out that the trial strategy was to attack the validity of his blood test because no one had seen any bad driving by him. The nature of this defense strategy makes this evidence probative as it is directly counter to this defense. This evidence goes to the issue of whether it was more probable than not that Mr. Hartl was operating a motor vehicle while under the influence of an intoxicant, which is an element of the offense. Sec. 904.01, Stats.

Mr. Hartl also argues that this evidence is inadmissible hearsay. (Appellant's Brief at 1). While this evidence is hearsay, it is admissible pursuant to several hearsay exceptions.

In ***State v. Ballos***, 230 Wis. 2d 495, 602 N.W.2d 117 (WI App. 1999), the Court of Appeals identifies three hearsay exceptions that may be applicable to a 911 recording. The court points to the present sense exception, sec. 908.03(1), Stats., to the excited utterance exception, sec. 908.03(2), Stats., and to the statement of recent perception exception, sec. 908.045(2), Stats.

Given the circumstances of this 911 call, the exception in sec. 908.03(1), Stats., present sense impression, seems apropos. The caller identified Mr. Hartl's behavior and conduct of getting into his car and driving away contemporaneous to the caller's observation of this conduct. 230 Wis. 2d at 505, 602 N.W.2d at 122.

The caller may have also been disturbed and/or upset to see an intoxicated person driving off in a motor vehicle. Thus this evidence may have been admissible as an excited utterance. Sec. 908.03(2), Stats.

A statement of recent perception, pursuant to sec. 908.045(2), Stats., one of the exceptions for when a declarant is not available, also seems to be apropos. Since the declarant remained anonymous, the state cannot obtain his or her presence. This exception allows more time to elapse between the observations and the call. 230 Wis. 2d at 506-507, 602 N.W.2d at 123. The court further found that all of the foundational requirements for this exception were met within the context of a 911 call. Id. at 507, 602 N.W.2d at 123.

Nor would the admission of this 911 recording have violated Mr. Hartl's right to confrontation. A 911 recording is not testimonial as that term has been defined by the United States Supreme Court. ***United States v. Thomas***, 453 F.3d 838, 843 (7th Cir.2006). This holding is based upon the purpose of the call being primarily to obtain police assistance to address an emergency situation. Id. Because the 911 caller was attempting to alert law enforcement to the presence of a dangerous driver being on the highway, which was creating a risk of death or great bodily harm to other motorists, and was describing events

occurring or which had just occurred, the statements are deemed nontestimonial. Id. at 844.

In addressing the confrontation issue the Wisconsin Court of Appeals, in ***Ballos***, ruled that no confrontation rights had been violated. The court ruled the 911 calls at issue were trustworthy and reliable having been corroborated by police observations. 230 Wis. 2d at 509-510, 602 N.W.2d at 124.

The court further noted that the excited utterance exception to the hearsay rule was a firmly rooted exception to the rule. Id. at 510, 602 N.W.2d at 124. The court concluded that the defendant had offered nothing to suggest "'even the slightest taint of unreliability,' [cite omitted], that would require exclusion. The 911 evidence was admissible." Id. at 510, 602 N.W.2d at 125. Nor has Mr. Hartl provided any reason to find the 911 call in this case untrustworthy or unreliable.

The state should have been allowed to present this evidence in even greater detail than what was admitted. The prosecutor should have had the option of playing the 911 recording had he felt it was warranted. The limited admission through Officer Sokup's testimony was not error. Because this

evidence was probative and admissible, Mr. Hartl cannot meet his burden to prove prejudice[2].

If this evidence was admissible as the state believes the caselaw shows, the admission of this evidence could not be prejudicial. Even if this evidence may have undermined the defense's theory of the case, that does not make this admissible evidence prejudicial. Most, if not all, admissible evidence undermines the defense theory and is prejudicial to the defense. 2009 WI 86, ¶ 88, 320 Wis. 2d at 404, 768 N.W.2d at 859. Because this evidence was admissible, its admission was not unfairly prejudicial.

Assuming *arguendo* that this evidence was not admissible, Mr. Hartl cannot prove its admission was unfairly prejudicial. This evidence was mentioned once. The case against Mr. Hartl was very strong. In addition to the .170 blood test, he performed poorly on field sobriety tests. (R 70: 74-78). Mr. Hartl's slurred speech and demeanor was indicative of being under the influence of an intoxicant, which was

[2] In its decision denying Mr. Hartl's post-conviction motion, the trial court declined to revisit this issue, despite the state raising the issue in its response to Mr. Hartl's post-conviction motion. However, in order to fully determine if Mr. Hartl's defense suffered actual prejudice, this court needs to address this issue. The admissibility of this evidence is critical to determining whether Attorney Waters' alleged deficient performance was prejudicial.

confirmed by the blood test. Given the totality of the evidence, this alleged error should not undermine this court's confidence in the validity of the jury's verdict. 153 Wis.2d 129-130, 449 N.W.2d at 848-849. This court can be confident that the jury verdict is correct. Id.

CONCLUSION

WHEREFORE, THE STATE, for the reasons stated above, respectfully requests this court to deny Mr. Hartl the relief he has requested.

Dated this 10th day of April 2015.

Respectfully,

Roy La Barton Gay
Asst. District Attorney
Atty. # 1002794

CERTIFICATION

I certify that this Brief and Appendix conforms to the rules contained in sec. 809.19(8)(b) and 809.62(4), Stats., for a brief produced using the following font:

> Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on right and left margins with 1 inch margin on top and bottom. The length of this brief is 18 pages.

Dated this 10th day of April 2015.

_____
ROY LA BARTON GAY
Assistant District Attorney
Attorney # 1002794

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 10th day of April 2015.

_____
Roy La Barton Gay
Assistant District Attorney
Attorney # 1002794

APPENDIX