**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**December 23, 2014**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2014AP366-CR** **Cir. Ct. No. 2011CF46**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DEAN J. KOENIG,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Manitowoc County: GARY L. BENDIX, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Dean J. Koenig appeals from a judgment of conviction and an order denying his motion for postconviction relief. He argues that he is entitled to a new trial because the circuit court erred when it denied his motion to suppress his statements to police, erroneously admitted the expert

testimony of two state witnesses, and inadvertently informed the jury of a prior conviction when reading the unredacted information during instructions. He also argues that his trial counsel was ineffective. We reject Koenig's claims and affirm the judgment and order.

¶2 On April 3, 2010, at approximately 9:40 pm, police responded to a report of a vehicle-bicycle crash in the Township of Meeme. There, they discovered the body of a bicyclist, Wayne Scharenbroch, who was already dead. From the evidence at the scene, it appeared that the vehicle involved in the collision was red in color.

¶3 About an hour later, Manitowoc county dispatch notified the responding units that an individual had called to report a car-deer crash earlier that night in the same area. Police subsequently went to the home of the caller, Dean Koenig.

¶4 Koenig took police into his garage and showed them his damaged truck, which was red in color. He told them that he hit a deer and did not stop. He also told them that he had been working that evening at the bar he owns, that he had two beers before coming home, and that he had another beer or two after he got home.

¶5 When one of the officers asked Koenig if he thought "all these cops would be here if this was a car deer accident," Koenig replied by asking "[w]hat did I hit?" The officer then asked, "What do you think you hit? You know it wasn't a deer … so what do you think you hit?" Koenig responded, "I have no idea …. I couldn't tell you …. I'm sure it wasn't a deer." When the officer then said "so you hit something that wasn't a deer," Koenig said that he thought it was

a deer and that the reason he said it was not a deer was because the officer had asked him if he thought there would be five officers there if it was a deer.

¶6 When police were done questioning Koenig, they conducted field sobriety tests, which revealed several indicia of intoxication. They then placed Koenig under arrest and transported him to a hospital for a blood draw.

¶7 The State eventually charged Koenig with (1) homicide by operating a vehicle under the influence of an intoxicant, (2) homicide by operating a vehicle with a prohibited alcohol content, and (3) hit-and-run resulting in death. The complaint alleged that Koenig's vehicle struck and killed Scharenbroch and that Koenig's blood alcohol level was 0.119 percent.

¶8 After extensive litigation relating to Koenig's statements to police and the expert witnesses, the matter proceeded to trial. Ultimately, the jury returned with a split verdict, finding Koenig guilty of count one, homicide by operating a vehicle under the influence of an intoxicant, and not guilty of the other two counts.

¶9 Koenig subsequently filed both a motion for a new trial and a motion for postconviction relief. The motions were premised, in part, on the circuit court inadvertently informing the jury that Koenig had a prior conviction for operating while intoxicated (OWI) when reading the unredacted information and counsel's failure to object to the same. The circuit court denied the motions. This appeal follows.

¶10 On appeal, Koenig first contends that the circuit court erred when it denied his motion to suppress his statements to police. Koenig maintains that the

statements should have been suppressed because he was in custody and was not given ***Miranda***[1] warnings.

¶11 The warnings prescribed by ***Miranda*** are required only when a suspect is in custody. *See* ***State v. Morgan***, 2002 WI App 124, ¶10, 254 Wis. 2d 602, 648 N.W.2d 23. A suspect is in custody for ***Miranda*** purposes when his or her "freedom of action is curtailed to a 'degree associated with formal arrest.'" ***Berkemer v. McCarty***, 468 U.S. 420, 440 (1984) (citation omitted).

¶12 In determining whether a suspect is in custody for ***Miranda*** purposes, courts must consider the totality of the circumstances. ***Morgan***, 254 Wis. 2d 602, ¶12. Relevant factors include the suspect's freedom to leave the scene; "the purpose, place, and length of the interrogation; and the degree of restraint." ***Id.*** When considering the degree of restraint, courts consider "whether the suspect is handcuffed, whether a weapon is drawn, whether a frisk is performed, the manner in which the suspect is restrained, whether the suspect is moved to another location, whether questioning took place in a police vehicle, and the number of officers involved." ***Id.***

¶13 "The test for custody is an objective one." ***State v. Goetz***, 2001 WI App 294, ¶11, 249 Wis. 2d 380, 638 N.W.2d 386. Courts ask "whether a reasonable person in the suspect's position would have considered himself or herself to be in custody." ***Id.***

¶14 In reviewing a decision denying a motion to suppress evidence, this court upholds the circuit court's findings of fact unless they are clearly erroneous.

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

***State v. Mosher***, 221 Wis. 2d 203, 211, 584 N.W.2d 553 (Ct. App. 1998). However, whether a person is in custody for ***Miranda*** purposes presents a question of law, which we review de novo. ***Mosher***, 221 Wis. 2d at 211.

¶15 Based on the testimony of the officers at the suppression hearing and the circuit court's findings of fact, we conclude that Koenig was not in custody at the time he made the challenged statements. As noted, Koenig was questioned at his home after calling police to report a car-deer crash. He was not handcuffed, no weapons were drawn, he was not frisked, and his movements were not restrained. The officers did not deny any requests by Koenig. In all, the questioning lasted less than ten minutes. Although the officers would not have let Koenig leave the premises had he attempted to do so, they did not communicate that fact to him.

¶16 In the end, the only factor weighing in favor of Koenig's position was the presence of five officers during questioning.[2] That factor alone, however, would not lead a reasonable person in Koenig's position to have considered himself or herself to be in custody. Accordingly, we are satisfied that the circuit court properly denied Koenig's motion to suppress his statements to police.

¶17 Koenig next contends that the circuit court erroneously admitted the expert testimony of two state witnesses: Daniel McManaway and Jeremy VerGowe. Koenig submits that their testimony was inadmissible under the amended version of WIS. STAT. § 907.02 (2011-12),[3] which adopted the standards

[2] Koenig also asserts that the main garage door remained closed during questioning and that police blocked his physical movement or path of exit. The record does not support these assertions. Moreover, the circuit court found, based on the officers' testimony, that Koenig's movement was not blocked or restricted. Koenig does not argue that that finding is clearly erroneous.

[3] All references to the Wisconsin Statutes are to the 2011-12 version.

for expert testimony of the Federal Rules of Evidence as interpreted in ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993), and its progeny.

¶18 Contrary to Koenig's assertion, the amended version of WIS. STAT. § 907.02 does not apply to his case. That standard applies only to actions commenced on or after February 1, 2011. *See* 2011 Wis. Act 2, § 45(5); ***State v. Alger***, 2013 WI App 148, ¶11, 352 Wis. 2d 145, 841 N.W.2d 329. Here, Koenig's case was commenced on January 31, 2011, with the filing of the criminal complaint. *See* WIS. STAT. § 968.02(2) (filing of the criminal complaint "commences the action."). Thus, the pre-***Daubert*** standard for expert witnesses applied.[4]

¶19 Under the pre-***Daubert*** standard for expert witnesses, "[e]xpert testimony is admissible if the witness is qualified as an expert and has specialized knowledge that is relevant because it will assist the trier of fact in understanding the evidence or determining a fact at issue." ***Spanbauer v. DOT***, 2009 WI App 83, ¶5, 320 Wis. 2d 242, 769 N.W.2d 137. The admissibility of such evidence is left to the sound discretion of the circuit court. ***Id.***

[4] Prior to trial, Koenig conceded that the pre-***Daubert*** standard for expert witnesses applied. He has now changed positions, arguing that the "plain language" of 2011 Wis. Act 2, §45(5) shows that it applies only to civil actions. Putting aside issues of forfeiture and estoppel, the problem with this argument is that the "civil actions" language on which Koenig relies appears only in the title of § 45(5). A title is not a part of the statute. *See* WIS. STAT. § 990.001(6). The "plain language" of 2011 Wis. Act 2, §45(5) provides that the "renumbering and amendment of [WIS. STAT. §§] 907.01 and 907.02 of the statutes first apply to actions or special proceedings that are commenced on the effective date of this subsection." That language makes no distinction between civil and criminal actions.

¶20 Here, we conclude that the circuit court properly admitted the expert testimony of the two state witnesses under the pre-***Daubert*** standard.[5] Both McManaway and VerGowe were qualified as experts and had specialized knowledge that was relevant to the case at hand. McManaway was a chemist at the State Laboratory of Hygiene with experience offering expert testimony about blood alcohol level and the absorption and elimination of alcohol. His opinion about Koenig's blood alcohol level at the time of the collision was relevant to determining a fact of issue. Meanwhile, VerGowe was a state patrol trooper who was accredited as a crash reconstruction specialist and had received advanced training in vehicle/bicycle collision investigations. His observations at the scene of the collision and the conclusions he drew from them assisted the jury in understanding what happened.

¶21 Koenig next contends that the circuit court violated his right to a fair trial when it inadvertently informed the jury that he had a prior OWI conviction when it read the unredacted information during instructions. The court had barred any mention of the conviction based upon Koenig's pretrial stipulation to it.

¶22 We agree with Koenig that the circuit court erred when it read the unredacted information to the jury. However, we are not persuaded that the error entitles him to a new trial. That is because the court subsequently instructed the jury that they were "not to consider [the information] as evidence against the defendant in any way" and that "[i]t does not raise any inference of guilt." We

[5] In a single paragraph in his appellant's brief, Koenig argues that applying the pre-***Daubert*** standard to his case violates his rights to equal protection and due process. Because this argument is underdeveloped, we reject it. *See* ***Cemetery Servs., Inc. v. Department of Regulation & Licensing***, 221 Wis. 2d 817, 831, 586 N.W.2d 191 (Ct. App. 1998).

presume the jury follows the court's instructions. *See* ***State v. Delgado***, 2002 WI App 38, ¶17, 250 Wis. 2d 689, 641 N.W.2d 490. Accordingly, we conclude that the court's error was harmless.[6]

¶23 Finally, Koenig contends that his trial counsel was ineffective. Specifically, he faults counsel for (1) failing to argue that the ***Daubert*** standard applied and (2) failing to object to the circuit court's reading of the unredacted information.

¶24 To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's representation was deficient and that he or she suffered prejudice as a result of the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court need not address both prongs of the analysis if the defendant makes an insufficient showing on either one. ***Id.*** at 697.

¶25 Given our determination that the pre-***Daubert*** standard applied to Koenig's case, trial counsel's failure to argue that the ***Daubert*** standard applied does not constitute deficient performance. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel's failure to raise a legal challenge is not deficient if the challenge would have been rejected). Likewise, given our conclusion that the circuit court's reading of the unredacted information was harmless, Koenig cannot show that he was prejudiced by counsel's failure to object.

[6] In an effort to show that the error was not harmless, Koenig asked the circuit court to allow testimony on this issue from the jurors. The circuit court properly denied the request, as jurors are not permitted to testify about whether extraneous information affected their deliberations. *See* ***Castaneda v. Pederson***, 185 Wis. 2d 199, 217, 518 N.W.2d 246 (1994).

¶26 For these reasons, we affirm the judgment and order of the circuit court.

*By the Court.*—Judgment and order affirmed.

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