

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 5, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 99-0219-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TODD A. MURDOCK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Shawano County:
DONN H. DAHLKE, Judge. *Affirmed.*

¶1 HOOVER, P.J. Todd Murdock appeals his conviction for obstructing an officer, following a jury trial. He contends that the trial court erred by permitting the State to inquire into and comment on his invocation of his right to remain silent. The State concedes error, but contends that it was harmless and that the conviction should therefore be affirmed. Because the State's references to Murdock's invocation of his right to remain silent were limited and the evidence

identifying Murdock was compelling, this court determines that the error was harmless. Accordingly, the judgment is affirmed.

¶2 Murdock was charged with obstructing a game warden for driving away when the warden told him to stop. Warden James Horne had “staked out” several duck carcasses that a citizen had discovered hidden in the grass. Horne was attempting to determine who had left the ducks by observing who would pick them up. After he observed a truck stop on the road next to where the ducks were, Horne approached the vehicle from the driver’s blind spot. When he was two feet from the driver, Horne knocked on the window and yelled, “[g]ame warden, you are under arrest.” The driver looked directly at Horne and began to drive away. Horne observed the driver and was able to identify him as Todd Murdock, whom he had known for several years. Horne ordered the vehicle to stop, but Murdock left the scene. Horne observed Murdock look back and twice made eye contact with him. Horne was unable to pursue the truck on foot.

¶3 In addition to recognizing Murdock, Horne was also able to observe that Murdock’s truck was white. Horne correctly identified the truck’s manufacturer,¹ and he recognized Murdock’s topper as similar to one he had on his own vehicle. A resident of the area where Murdock retrieved the ducks testified that Murdock had requested permission the previous evening to hunt ducks on the very land on which the ducks were found.

¶4 Several days later, warden Michael Young went to Murdock’s residence and found Murdock and a young boy in the garage. When Young asked

¹ Horne testified: “a white pickup truck, a GMC or Chevy-type”

Murdock a question, Murdock told Young that he did not wish to speak to him and asked him to leave. Young then turned to the boy, whom Young assumed was Murdock's son, and asked him if he was with Murdock. At that point, Murdock told the boy to go into the house.

¶5 Murdock moved to suppress any reference to his refusal to talk to Young and any statements made thereafter, presumably being the directive to his son to go into the house. He claims his statements to Young were an invocation of his right to remain silent. The circuit court ruled that the statements to Young and to the boy were admissible to show what Murdock did; to give context to the facts.

¶6 Murdock's statements were introduced at trial. The claimed offensive evidence is the following exchange:

Q But did you tell [Murdock] that you were there to talk to him?

A Yes, I did.

Q What did he tell you?

A He stated he didn't want to talk.

....

Q Did he say anything else?

A Later after I tried to get him to talk with me, he told me to leave his property, get out of his garage, I believe is what he stated.

Q Was there anyone else who was in the garage when you tried to talk with him?

A I believe one of his sons. They were putting some things up into the attic thing in the garage.

Q Did you ask the son anything?

A I asked, I said, were you with him? At that time, Mr. Murdock stated, you don't have to say anything. I believe I said, well, you were with him then, and I told him, and he told his son to go into the house.

Q Who told his son to go into the house?

A Mr. Murdock.

....

Q Did Mr. Murdock tell you anything else other than he didn't want to talk to you and told you to leave?

A No, he kept his head down like this, shaking it.

The prosecutor also commented briefly on this exchange in his closing argument.² The jury found Murdock guilty of obstructing an officer. This appeal ensued.

ANALYSIS

¶7 Initially, we examine the statements Murdock made directing his son to go into the house. The State argues that Murdock's statement to his son to "go into the house" was admissible because it did not constitute an invocation of Murdock's personal right to remain silent. This court agrees.

¶8 The right to remain silent is personal to the accused. *See State v. Hoffman*, 106 Wis.2d 185, 223, 316 N.W.2d 143, 163 (Ct. App. 1982). Directing someone else not to speak to law enforcement is not an invocation of the suspect's right to silence, but is merely a directive to another not to cooperate. Because Murdock attacks the admissibility of his statement to his son on grounds of a violation of Murdock's own right to remain silent, his position is without merit.³

² The prosecutor, in commenting on Horne's efforts to confirm Murdock's identity, stated: "He [then] sent [Young] over and said, go talk to Todd Murdock, see what he's got to say about this, and [Young] attempted to do that."

³ Alternatively, Murdock does not develop an argument to support his assertion that his directive to another not to respond to the warden's questions implicates his right to remain silent. This court will not address undeveloped arguments or develop them for an appellant. *See State v. Flynn*, 190 Wis.2d 31, 58, 527 N.W.2d 343, 354 (Ct. App. 1994). Nor does Murdock respond to the State's argument that the rights he asserts are personal and do not extend to protect him against admission of his statement to his son. Arguments not addressed are deemed conceded. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979).

¶9 Turning to the remaining issue, Murdock contends that he invoked his right to remain silent when Young attempted to question him, and the circuit court erred by admitting his statements into evidence. Anticipating the State's argument, he further asserts that the error was not harmless beyond a reasonable doubt. Murdock argues that the principal issue at trial was the truck driver's identity. He claims there were only two items of identification evidence: Horne's testimony and the inference of guilt the jury would draw from Murdock's refusal to talk to Young. Because, Murdock contends, Horne was not in a position to make a reliable observation, the inference of guilt arising from the garage incident becomes especially significant.

¶10 The State candidly concedes that the circuit court erred by admitting Murdock's refusal to talk to the warden and his request that the warden leave. The State does indeed contend, however, that the error was harmless. It asserts that there is no reasonable possibility that the error might have contributed to the conviction because, under *State v. Fencil*, 109 Wis.2d 224, 238-39, 325 N.W.2d 703, 711 (1982), "the references to [Murdock's] silence did not have a sufficient impact upon the jury to adversely affect its ability to fairly evaluate his defenses."

¶11 A federal constitutional error is harmless only if the court is "able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). In order to declare such a belief, this court must determine that there is no "reasonable possibility" that the error "might have contributed to the conviction." *Id.* at 23. The burden of proving no prejudice is on the beneficiary of the error, here the State. *State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222, 232 (1985). The State's burden, then, is to establish that there is no reasonable possibility that the error contributed to the conviction. *Id.* at 543, 370 N.W.2d at 231-32.

¶12 The relevant factors considered when determining whether a constitutional error is harmless include the frequency of the error, the nature of the State's evidence against the defendant and the nature of the defense. *Fencl*, 109 Wis.2d at 238, 325 N.W.2d at 711. Applying the first of these factors, the references to Murdock's invocation of his right to remain silent were infrequent. The State did not dwell on the exchange in the garage and only mentioned it briefly during closing, focusing instead on the other identity evidence.

¶13 The two remaining factors, the nature of the defense and the strength of the State's case, are intertwined.⁴ Murdock established that "the observations of the warden took place on a rural road after dark, without artificial illumination" outside or inside of the truck. Nevertheless, Horne testified that he had known Murdock for several years and that when he went up to the door of the white truck, he saw Murdock seated in the driver's seat. When Horne knocked on the window

⁴ Review of these two factors is made difficult by the parties' failure to include substantial portions of the trial transcript in the appellate record. The record is missing Horne's testimony as well as that of the civilian witnesses; it includes only Young's testimony, who contacted Murdock at his home, and the prosecutor's closing argument. This court nonetheless concludes that the record is adequate to decide whether the error was harmless.

The State bases its harmless error analysis on the testimony it referred to in closing argument. This court presumes the State's argument was reasoned from the evidence because the record discloses that Murdock did not object during the State's closing argument. *See State v. Neuser*, 191 Wis.2d 131, 136, 528 N.W.2d 49, 51 (Ct. App. 1995) (Although the State is given wide latitude in closing argument, "[t]he line between permissible and impermissible argument is drawn where the prosecutor goes beyond reasoning from the evidence and suggests that the jury should arrive at a verdict by considering factors other than the evidence."). In addition, Murdock has not objected on appeal to the State's use of its closing argument as evidence of what actually transpired at trial. *See Charolais*, 90 Wis.2d at 109, 279 N.W.2d at 499 (unrefuted assertions are taken as true). Therefore, this court will consider the evidence referred to by the State in its closing as evidence contained in and supported by the record.

Similarly, Murdock's brief refers to facts not contained in the limited record. The State failed to object, and this court will also consider those facts as evidence supported by the record. *See id.* Both parties are reminded that each is responsible for ensuring this court is provided a record adequate to decide the appeal. *See* RULE 809.15, STATS.

and told Murdock that he was under arrest, Murdock turned and looked directly at Horne before accelerating and fleeing. As Horne chased the truck, he could see Murdock look at him in the mirror. Although Horne misidentified the specific make of the truck, it was from the same manufacturer and he was able to correctly identify the topper on Murdock's vehicle. Finally, the State produced evidence that Murdock had asked permission the day before to hunt on the very land where the ducks were found.

¶14 Murdock claims Horne misidentified Murdock as the driver and tacitly characterizes the other evidence that supports Horne's identification as coincidences. We reject this contention because cumulatively, the evidence is compelling that Murdock was indeed driving the truck.

¶15 The State's substantial evidence identifying Murdock as the driver, as well as the prosecution's limited references to Murdock's invocation of his right to remain silent, leads this court to conclude that there is no reasonable possibility that the error contributed to the conviction. Accordingly, the judgment is affirmed.

By the Court.—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.

