

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 19, 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. 99-0286-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

VICTORIA M. WEBSTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
ROBERT DE CHAMBEAU, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

PER CURIAM. Victoria Webster appeals her conviction for possession of 500 grams of marijuana with intent to deliver, as a repeat offender. She pled no contest to the charge. Webster confessed at the scene to police that she had sold drugs. At a pretrial suppression hearing, however, Webster sought to prove that police at the crime scene had ignored her request for a lawyer. At that

hearing, the trial court struck the testimony of defense witness Darryl Bunch, who stated he heard Webster ask the police for a lawyer. The trial court struck Bunch's testimony after he invoked the Fifth Amendment during cross-examination. The trial court found that Webster had asked for a lawyer but that the police had not heard her request. On appeal, Webster argues that the trial court wrongly struck Bunch's testimony and that his testimony required suppression of her confession. We reject Webster's arguments and affirm her conviction.

Police interrogators must immediately stop all questioning if a suspect asks for a lawyer. See *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). We uphold all trial court findings on historical facts unless clearly erroneous. See *State v. Turner*, 136 Wis.2d 333, 343-44, 401 N.W.2d 827, 832 (1987). If a witness gives some testimony and then invokes the Fifth Amendment on the witness stand, trial courts have discretion to strike all of the witness's testimony up to that point. See *State v. Robinson*, 145 Wis.2d 273, 285-86, 426 N.W.2d 606, 612 (Ct. App. 1988). Trial courts should use this power with care, however, and under appropriate circumstances, they may strike only part or even none of that witness's testimony. See *State v. Monsoor*, 56 Wis.2d 689, 699-702, 203 N.W.2d 20, 25-27 (1973); see also *Lawson v. Murray*, 837 F.2d 653, 656 (4th Cir. 1988).

Here, we agree with the State that the trial court committed only a harmless error if it wrongly struck Bunch's testimony. Trial court error is harmless if a defendant's substantial rights are not affected. See *State v. Kourtidas*, 206 Wis.2d 574, 586, 557 N.W.2d 858, 863 (Ct. App. 1996). Here, two other witnesses and Webster herself testified that Webster asked for a lawyer. The trial court found that Webster had asked for a lawyer but that the police never heard her request. The trial court found that Webster may have made her request to a lay person, not the police, and that the police were too busy at the crime scene

to notice her request. Bunch offered nothing to refute this finding. Bunch testified in harmony with other defense witnesses that he heard Webster ask for a lawyer. Bunch never testified, however, that he saw the police demonstrate awareness of her request or respond to it in any way. The lack of police awareness was the linchpin of the trial court's refusal to suppress her confession. As a result, Webster's claim for suppression of the confession would have been no stronger had Bunch's testimony not been stricken.

By the Court.—Judgment affirmed.

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

