COURT OF APPEALS
DECISION
DATED AND FILED

February 21, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP446-CR **Cir. Ct. No. 2002CF2495**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed*.

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

¶1 KESSLER, J. Christopher Anderson appeals from a judgment of conviction for operating a vehicle without the owner's consent entered after a jury found him guilty. Anderson argues that his Constitutional rights were violated

when the State cross-examined him about his post-arrest, pre-***Miranda***[1] silence and commented on that silence during closing argument. He also argues that this error was not harmless. We conclude that the trial court did not erroneously exercise its discretion in allowing the State's cross-examination and closing argument because the comments were legally permissible. Therefore, we affirm the judgment.

BACKGROUND

¶2 On May 6, 2002, police officer Kurt Lacina and his partner were on routine patrol when they observed a maroon Park Avenue Buick being driven toward them on a Milwaukee street. Lacina's partner, who was driving the squad car, recognized the vehicle and its license plate from a "hot sheet" of stolen vehicles. As the Buick drove in the officers' direction Lacina observed two men in the stolen car. He said he was able to see the driver's face and that the driver was wearing a tan shirt. He said his view of the passenger was more limited, and that he was only able to see that the passenger was wearing a black t-shirt and was a black male.

¶3 Lacina testified they turned the squad car around and followed the Buick. For a brief time, the Buick was out of the officers' sight. Lacina said that when they next saw the Buick, the vehicle was parked on the wrong side of the street, the motor was running, both the passenger door and the driver door were open and the vehicle was abandoned. Lacina testified they saw only one man hurriedly walking away. Lacina chased the man, later identified as Anderson, and

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

stopped him. The other occupant of the Buick was not in sight and was not apprehended.

¶4 Lacina said that as he led Anderson to the squad car he did not ask Anderson any questions. However, Anderson spoke to Lacina. Lacina testified: "When we approached the squad he was saying: Man, I need to talk to you." Lacina explained: "He said that if his [parole officer] catches him in the vehicle she's going to revoke him. He said he wanted to work something out, he'd give us three heroin houses to let him go."

¶5 Anderson was charged with one count of operating a motor vehicle without the owner's consent.[2] It is undisputed that Anderson was never given a ***Miranda*** warning with respect to this case, either before or after his arrest.

¶6 The case proceeded to trial. Anderson took the stand and offered his version of events. He admitted that he was in the vehicle, but testified that he was the front-seat passenger, not the driver. He said he knew the driver, a man he called Leon Hollyfield, and that Hollyfield often did favors for people in exchange for cash. Anderson said he got in Hollyfield's car and asked him for a ride to a tire station, bringing with him tires that needed to be repaired. Anderson said that shortly after they started driving, they passed a police car and Anderson told Hollyfield that they were in trouble. Anderson said he then told Hollyfield that the squad car had turned around. Hollyfield then stopped the car and immediately jumped out and ran, so Anderson did the same.

[2] Anderson was also charged with operating after revocation. That charge was ultimately dismissed and is not at issue in this appeal and will not be addressed.

¶7 Anderson admitted that he walked away from the officer. He said that he and the officer then had an exchange about who was driving the car:

> [Lacina] ran up behind me and then he grabbed me. And he was like you left your stolen car. And I said no, I didn't leave no stolen car. He said don't lie to me. I seen you get out the car. I said no, you didn't see me get out of the car. And then he was walking me back. And then he was, like, my partner seen you. He said yeah, my partner seen you driving the car. I said no, your partner didn't see me driving the car. Then I was like look, man. Because I was nervous, you know. And I was like look, I don't need this right now, you know what I'm saying. And I'll try to negotiate with him.

Anderson denied that he had ever driven the car.

¶8 On cross-examination, the State asked Anderson about his claim that he was not driving the vehicle:

> [STATE]: So since June of last year, you have known that the state alleges that you have never said anything about being a passenger. That you never said anything about tires and going someplace. That you never gave the name Leon somebody or other. You knew that from June of last year, right?
>
> [ANDERSON]: Sir, I was never interviewed by any detectives regarding this situation. There was no one to tell it to.
>
> [STATE]: Do you understand my question.
>
> [ANDERSON]: You asking me did I tell anybody this?
>
> [STATE]: No. My question was did you know that that was the state's information.
>
> [ANDERSON]: Yeah. Yeah. Okay. Yeah.
>
> [STATE]: Now I want to know, what did you do to correct the state? I see what you're doing today to help yourself. But when did you try to provide this information before?
>
> [TRIAL COUNSEL]: I'll object to this. I want to be heard.

A sidebar conference was held. The discussion was later summarized outside the jury's presence. Trial counsel objected on grounds that the State's questions implied that it was Anderson's responsibility to speak up, and that the State's implication was an impermissible comment on Anderson's decision to exercise his Fifth Amendment right to remain silent. Trial counsel moved for a mistrial.

¶9 The State's position was that when Anderson took the stand, "he then opened the door to questions about whether or not he was tailoring or fabricating or whether … [the testimony presented was] presented to the jury in a self-serving manner inconsistent with the reality that was true on the day."

¶10 The trial court denied the motion for mistrial and also allowed the State to continue with its line of questioning. The trial court reasoned that Anderson had

> opened the door not only when he took the stand but with his story here. I think the state has a right to probe his story, has the right to probe the credibility of this witness. And the feasibility of his story and the fact … [that] he's adding to a statement he made while being walked back by the police[.]
>
> And he knows he's in trouble, but the key point that he's a passenger … was never heard before. So the objection was overruled at sidebar with the admonition to the district attorney not to go into any attorney/client privilege or any comment upon his right to remain silent while being represented by counsel.

¶11 The State continued its cross-examination of Anderson, asking him what efforts he had made to get information to the State that Anderson had not been driving. Anderson testified that he told his parole agent, and that he told officers questioning him on an unrelated matter. He also testified about his actions when the car was pulled over, and gave a physical description of Hollyfield.

¶12 In the State's closing, the prosecutor argued that Anderson's story that he was the passenger was incredible:

> Only now after all these months and after time to read all the reports and know what we do know and know what we don't know, that we don't know the name of the person who was in the car.
>
> You can say a lot of things about that person if you don't have to even identify them until it's time to get on the stand….
>
> ….
>
> He has that strong and direct interest in the outcome. He's therefore the person less likely to tell you the truth. He's therefore the person most likely to tell you a lie. And lies again are told because they avoid consequences. He had a chance to tell this story before. And I don't mean to suggest that he ever had any duty to tell it. But one of the things that you look at in your common experience is if you are accused of something and you get a chance to talk or you take it upon yourself to talk, you talk about what's important.
>
> He claims the officers said you're the driver and I'm arresting you as the driver. And what does he say? Well, don't tell anybody because it will get me in trouble. He didn't say no, I wasn't the driver. Even he doesn't claim he says he wasn't the driver. What he chose to announce is I can get in trouble. I have problems. I have people that will take that the wrong way.
>
> He chose to say something different. He chose to trade something. I will trade you whatever assistance I can give you on drug investigations, on heroin houses, in exchange for letting me go on there.

¶13 The jury found Anderson guilty and he was convicted. The trial court sentenced Anderson to two years of initial confinement and two years of extended supervision. This appeal followed.

DISCUSSION

¶14 At issue is whether the trial court erroneously exercised its discretion when it allowed the State's cross-examination and comments at closing argument. When reviewing a trial court's evidentiary rulings, we consider whether the trial court exercised its discretion in accordance with the facts in the record and accepted legal standards. ***State v. Sorenson***, 143 Wis. 2d 226, 240, 421 N.W.2d 77 (1988). If the trial court had a reasonable basis for its rulings, then this court will not find an erroneous exercise of discretion. ***Id.***

¶15 We conclude that the trial court did not erroneously exercise its discretion in allowing the State to impeach Anderson by asking him whether he had ever told anyone that he was not driving the car, and by commenting on Anderson's failure to tell the police that another man was driving. Therefore, we affirm the judgment.

¶16 Whether a prosecutor may comment on a defendant's silence is based on "when and under what circumstances the remarks [are] made." ***Id.*** at 255. The United States Supreme Court has held that the Constitution does not prohibit referencing, for impeachment purposes, a defendant's silence prior to arrest, or a defendant's post-arrest silence if no ***Miranda*** warnings are given. ***Brecht v. Abrahamson***, 507 U.S. 619, 628 (1993) (citing ***Jenkins v. Anderson***, 447 U.S. 231, 238-39 (1980) and ***Fletcher v. Weir***, 455 U.S. 603, 606-07 … (1982) (*per curiam*)). "Such silence is probative and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty." ***Id.***

¶17 Wisconsin has "adopt[ed] the analysis used by the United States Supreme Court in *Jenkins* and *Fletcher*, allowing probative comment on a

defendant's pre-*Miranda* silence when the defendant elects to testify on his or her own behalf." ***Sorenson***, 143 Wis. 2d at 258. ***Sorenson*** explained:

> A contrary position would allow defendants, who have not been induced by government action to remain silent, to wrongfully manipulate the rules of evidence, and cripple the state's ability to address all the evidence presented by the defendant at trial. Moreover, once a defendant elects to take the stand, any comment by the prosecution regarding defendant's pre-*Miranda* silence may be explored and explained by defendant's own counsel on redirect. This protection more than adequately shields against any potentially misleading inference which might be drawn from the prosecution's references.

Id.

¶18 Here, Anderson recognizes that the law allows "the prosecutor to cross-examine the defendant about, and to comment upon, the defendant's post-arrest, pre-*Miranda* silence." However, he contends that "no Wisconsin case holds that the prosecutor may comment upon the defendant's silence during the pendency of [the] criminal case." Anderson argues that the trial court should not have allowed the prosecutor to comment on his period of silence that began when he was charged. He explains:

> Here, since Anderson was apparently *never* given the *Miranda* warning, all of his silence is "pre-*Miranda*." However, it is important to understand that the holding in *Sorenson* applied only to that narrow time frame described as the "post-arrest, pre-*Miranda*" period. *Sorenson* is silent concerning whether it is appropriate to comment, as the prosecutor did in this case, upon Anderson's silence once the charges were filed.

¶19 We are not persuaded by Anderson's attempts to distinguish ***Sorenson***. He has not directed us to any federal or Wisconsin case law that creates a distinction between post-arrest, pre-***Miranda***, pre-charging silence and post-arrest, pre-***Miranda***, post-charging silence, and we have found none. On the

contrary, ***Brecht*** explicitly stated that impeachment is permissible "after arrest if no Miranda warnings are given[,]" ***Brecht***, 507 U.S. at 628, and it did not address whether there is any difference between pre-charging and post-charging silence. We are not convinced that this is a recognized distinction, and we are not empowered to create such law on our own. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) ("The supreme court, 'unlike the court of appeals, has been designated by the constitution and the legislature as a law-declaring court.'") (citation omitted).

¶20 Applying ***Brecht*** and Wisconsin case law here, we affirm the trial court's exercise of discretion allowing the State's questions and comments. It is undisputed that the defendant never received ***Miranda*** warnings, so it was permissible to comment on his post-arrest, pre-***Miranda*** silence. *See* ***Brecht***, 507 U.S. at 628. Anderson does not argue that the specific questions and comments were improper impeachment.[3] Thus, it was appropriate to allow the State to impeach Anderson's testimony with his pre-***Miranda*** silence.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[3] In his argument summary at the beginning of his brief, Anderson states: "[T]he prosecutor suggest[ed] in closing argument that Anderson abused the Rules of Criminal Procedure by waiting until he saw the police reports before [he] told anyone his version of the facts. These comments violated Anderson's due process rights." This concern was never again mentioned or explained in Anderson's brief. To the extent Anderson is suggesting that even if impeachment would have been proper, the prosecutor did it improperly, we reject this argument because it is undeveloped. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we decline to review issues that are inadequately developed).