COURT OF APPEALS
DECISION
DATED AND FILED

September 28, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

Nos. 00-0983-FT and 00-0984-FT

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

COUNTY OF ROCK,

PLAINTIFF-RESPONDENT,

v.

JAMES M. GOLDHAGEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: EDWIN C. DAHLBERG, Judge. *Affirmed.*

¶1 ROGGENSACK, J.[1] James M. Goldhagen appeals his convictions for operating a motor vehicle while intoxicated (OMVWI) and illegal passing. He claims that the circuit court erroneously exercised its discretion in allowing the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

county to introduce evidence that he had refused to answer the questions of police officers subsequent to being given ***Miranda***[2] warnings. Although we agree that the circuit court erred in admitting testimony about his refusal, we conclude that the error was harmless; therefore, we affirm the judgment of the circuit court.

BACKGROUND

¶2 At 7:45 p.m. on June 14, 1999, Rock County Sheriff's Deputy Jason Laufenberg saw a white panel van pass a semi in a no-passing zone, forcing an oncoming car off the road in the process. Laufenberg activated the squad's emergency lights and siren and pursued the van. He observed the van swerve across the center line twice before he caught up with it and stopped it. When he spoke with Goldhagen, the van's driver, Laufenberg noticed the odor of intoxicants. Laufenberg testified that Goldhagen said he had not been drinking, but Goldhagen failed three field sobriety tests. Based on Goldhagen's driving and his performance on the field sobriety tests, Laufenberg arrested him and took him to the Rock County Jail. Goldhagen agreed to a breathalyzer test, which registered an alcohol content of 0.13. After the breath test, another deputy read Goldhagen the ***Miranda*** warnings. Thereafter, Goldhagen refused to answer any questions.

¶3 Goldhagen was charged with OMVWI, driving with a prohibited alcohol content (PAC),[3] both as a first offender, and with illegal passing.[4] Before

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

[3] WIS. STAT. 346.63 **Operating under influence of intoxicant or other drug.**

(1) No person may drive or operate a motor vehicle while:

(a) Under the influence of an intoxicant … to a degree which renders him or her incapable of safely driving … or

(b) The person has a prohibited alcohol concentration.

trial, he moved to exclude evidence that he had refused to answer questions after being read the ***Miranda*** warnings. The circuit court denied the motion. At trial, the prosecutor twice elicited testimony from Laufenberg that Goldhagen had declined to answer questions. Goldhagen's attorney elicited similar testimony from him, then the following exchange took place between the prosecutor and Goldhagen:

> Q: … Were you advised that you had the right to remain silent, anything you said could and would be used against you; correct?
>
> A: Yes.
>
> Q: And did the deputy then ask if you were willing—asked you if you were willing to answer some questions about the incident; is that correct?
>
> A: Yes.
>
> Q: And you refused to answer any questions regarding this incident?
>
> A: I said I would take my right to remain silent, yes.
>
> Q: That was on advice of your friend, Paul Merkle, who is a public defender?
>
> A: Yes.
>
> Q: And you felt that you should do this, you should invoke your right to counsel (sic), even if you had done nothing wrong?

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[4] WIS. STAT. §346.09(1) **Limitations on overtaking on left or driving on left side of roadway.**

> **(1)** Upon any roadway where traffic is permitted to move in both directions simultaneously, the operator of a vehicle shall not drive to the left side of the center of the roadway in overtaking and passing another vehicle proceeding in the same direction unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be done in safety.

At this point, Goldhagen's attorney objected, and the circuit court sustained the objection. A few minutes later, the prosecutor asked Goldhagen, "Sir, if you weren't intoxicated at the time you were driving why did you refuse to answer questions?" The circuit court sustained the resulting objection. The prosecutor did not refer to Goldhagen's silence again. Goldhagen was convicted of OMVWI and unlawful passing, but acquitted of driving with a prohibited alcohol content.

DISCUSSION

Standard of Review.

¶4 The admission or exclusion of evidence lies within the sound discretion of the circuit court. *See* ***Ansani v. Cascade Mountain, Inc***., 223 Wis. 2d 39, 45, 588 N.W.2d 321, 324 (Ct. App. 1998). When we review a discretionary decision, we examine the record to determine if the circuit court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. *See* ***id.*** at 45-46, 588 N.W.2d at 324.

Admission of Evidence.

¶5 Goldhagen contends that the circuit court erred in admitting testimony that he declined to answer questions from police officers after being read the ***Miranda*** warnings.[5] We agree.

[5] ***Miranda*** warnings are not applicable for a motor vehicle violation when the eventual prosecution is a civil forfeiture proceeding. *See* ***Village of Menomonee Falls v. Kunz***, 126 Wis. 2d 143, 146, 376 N.W.2d 359, 361 (Ct. App. 1985). Goldhagen was charged with first offenses, which are civil offenses. *See* WIS. STAT. § 346.63(1). Therefore, the police had no obligation to give him a ***Miranda*** warning.

(continued)

¶6 Only relevant evidence is admissible. *See* WIS. STAT. § 904.02. Relevant evidence is that evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01. Goldhagen objected to admission of evidence of his refusal to answer the officers' questions, on relevance grounds. However, the prosecutor never explained why the evidence was relevant, and neither did the circuit court. The record reveals no explanation of how evidence of Goldhagen's refusal to answer questions after being given ***Miranda*** warnings would make any fact of consequence more or less probable, and we can see none. Therefore, we conclude that admission of the testimony was error.

¶7 However, our analysis does not end there. Evidentiary errors are subject to a harmless error analysis. *See* ***McLemore v. State***, 87 Wis. 2d 739, 757, 275 N.W.2d 692, 701 (1979). Generally, an error is harmless if there is no reasonable possibility that it contributed to the conviction. *See* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222, 231-32 (1985). A reasonable possibility is one that is sufficient to undermine confidence in the outcome of the proceeding.

Because the police did give him a ***Miranda*** warning, however, Goldhagen contends that the doctrine of equitable estoppel should have prevented the County from introducing evidence of his refusal to answer questions from police officers. Equitable estoppel requires "(1) Action or nonaction which induces (2) reliance by another (3) to his detriment." ***Kellogg v. Village of Viola***, 67 Wis. 2d 345, 350, 227 N.W.2d 55, 58 (1975). Although Goldhagen objected to the admissibility of the testimony, he did not do so on grounds of equitable estoppel. "In order to preserve the right to appeal on a question of admissibility of evidence, a defendant must apprise the trial court of the specific grounds upon which the objection is based." ***State v. Tutlewski***, 231 Wis. 2d 379, 384, 605 N.W.2d 561, 563 (Ct. App. 1999), *review denied*, 231 Wis. 2d 374, 607 N.W.2d 291 (1999). "To be sufficiently specific, an objection must reasonably advise the court of the basis for the objection." ***Id.*** Arguments that are raised for the first time on appeal by an appellant may be deemed waived by this court. *See* ***State v. Bollig***, 222 Wis. 2d 558, 564, 587 N.W.2d 908, 910 (Ct. App. 1998). However, because we agree that the testimony should not have been admitted, though under a different theory, we do not address either the County's waiver argument or Goldhagen's equitable estoppel argument.

See ***State v. Patricia A.M.***, 176 Wis. 2d 542, 556, 500 N.W.2d 289, 295 (1993). The burden of proof is on the beneficiary of the error to establish that the error was not prejudicial. *See* ***Dyess***, 124 Wis. 2d at 547 n.11, 370 N.W.2d at 232 n.11.

¶8 We conclude that the County has established that the error was not prejudicial. At trial, Deputy Laufenberg testified that he believed that Goldhagen was intoxicated because of his driving and his performance on the field sobriety tests. Laufenberg testified that he saw Goldhagen's van force another vehicle off the road while overtaking a semi in a no-passing zone and that the van crossed the center line twice more before Laufenberg stopped Goldhagen. He testified that he noticed the smell of alcohol from inside the van, although Goldhagen denied that he had been drinking. Laufenberg testified that Goldhagen failed three field sobriety tests. Before attempting the one-legged stand test, Goldhagen told Laufenberg that he could not do the one-legged stand even if he was sober. Additionally, another police officer testified that Goldhagen scored 0.13 on the Intoxilyzer, which is above the legal limits for intoxication. Finally, Goldhagen's trial testimony was that he had consumed five mixed drinks and a shot of peppermint schnapps in the two hours before he was stopped, which was inconsistent with his assertion to Laufenberg that he had had nothing to drink.

¶9 The testimony that the County elicited from Laufenberg and Goldhagen regarding Goldhagen's silence was limited to the facts that Goldhagen had received a ***Miranda*** warning and subsequently refused to answer police questions. The prosecutor's further questions about Goldhagen's motivation for remaining silent were potentially more prejudicial, but Goldhagen's counsel promptly objected, and the circuit court sustained the objections. The prosecutor's opening and closing statements did not mention that Goldhagen had declined to answer questions; instead, they focused on Goldhagen's driving, his performance

on the field sobriety tests, the inconsistencies in his testimony, and the results of the breath test. The jury returned its verdicts in one hour.

¶10 Because the evidence that Goldhagen drove under the influence of alcohol and illegally passed another vehicle was overwhelming, we conclude that there is not a reasonable possibility that the admission of his refusal to answer the officers' questions after receiving a ***Miranda*** warning contributed to his conviction. Therefore, we conclude that the error was harmless. Accordingly, we affirm Goldhagen's conviction.

CONCLUSION

¶11 Although we agree that the circuit court erred in admitting testimony about Goldhagen's refusal to answer police questions, we nonetheless conclude that the error was harmless and therefore affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.