**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

February 7, 1996



**No. 95-0963-CR**

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

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**KERRY TUCKER,**

**Defendant-Appellant.**

APPEAL from a judgment and an order of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed.*

NETTESHEIM, J. Kerry Tucker appeals from a judgment reciting convictions for endangering safety by use of a dangerous weapon, endangering safety by intoxicated use of a dangerous weapon, resisting an officer and disorderly conduct pursuant to §§ 941.20(1)(a), 941.20(1)(b), 946.41(1) and 947.01, STATS., respectively. The conviction followed a jury trial. Tucker

also appeals from an order denying postconviction relief. We affirm the judgment and the order.

## *FACTS*

Although the sufficiency of the evidence is not at issue, we briefly state the facts which support the jury's guilty verdicts. At about three o'clock on the morning of May 15, 1993, Deputy William Mortlock of the Walworth County Sheriff's Department was dispatched to the Lake Ivanhoe subdivision in response to a citizen complaint of shots being fired. As he searched the area, Mortlock observed a person later identified as Tucker yelling into a squad car occupied by a Town of Bloomfield police officer.

As Mortlock neared Tucker, he observed a strong odor of intoxicants on Tucker's person. In response to Mortlock's questioning, Tucker denied that he had fired any shots and he gave Mortlock permission to search two nearby vehicles which Tucker identified as his. The search of the first vehicle produced nothing unusual. The second vehicle was locked. Mortlock asked Tucker to unlock the vehicle, and Tucker responded that he would have to get the keys. Tucker then entered a nearby residence through the front door while Mortlock positioned himself at the screen door.

Tucker then reappeared in a hallway. At this time, Mortlock observed Tucker holding a knife. Mortlock drew his weapon. He instructed Tucker to drop the knife. Tucker, however, continued to advance toward Mortlock with the knife. He also raised the knife from a downward to an upward pointing position. Again Mortlock told Tucker to drop the knife, and

again Tucker continued his advance toward Mortlock with the knife. Mortlock then gave Tucker a final warning, telling him that if he did not drop the knife, Mortlock would shoot him. Tucker dropped the knife in response. Mortlock and other officers then subdued Tucker.

Mortlock then left Tucker in the custody of the other officers and entered the residence. There he encountered a woman named Barbara Marshall. She stated that Tucker was shooting prior to the officer's arrival. Marshall told Mortlock that the gun was in an upstairs bedroom, and she led Mortlock to the room where Mortlock discovered a handgun and ammunition.

When Mortlock exited the residence, he observed Tucker struggling with two other officers. Tucker was yelling and screaming profanities at the officers and trying to lift his feet against a squad car to push away from the officers. Mortlock sprayed Tucker with a mace-like substance in the course of subduing him.

Tucker was then transported to a nearby hospital. During the transport and at the hospital, Tucker was advised of his ***Miranda*** rights. In response to questioning, he variously denied and admitted involvement in the shooting. An analysis of Tucker's blood sample taken at the hospital produced a blood alcohol concentration of .206%.

Tucker raises a host of appellate issues. We will recite additional facts as they become relevant to the particular discussion. However, we make a preliminary observation about the structure of Tucker's appellate arguments. In

the introductory portions of his brief-in-chief which address the facts and the procedural history of this case, Tucker strays into argument without citation to supporting legal authority. We stress that our decision covers only those issues which we are able to discern in the *argument* portion of Tucker's brief.

***PRIOR INCONSISTENT STATEMENT***

Tucker argues that the trial court improperly precluded him from introducing a prior inconsistent statement by Mortlock through his cross-examination of Ray McKee, another police officer who was present during the event.

During his testimony, Mortlock denied that Tucker had said that he needed a knife to open the door of the locked car. On cross-examination of McKee, Tucker's counsel asked whether McKee had reviewed his written report before testifying. McKee replied, "I haven't seen it for months." Tucker's counsel then asked McKee whether Mortlock had told McKee that Tucker said he needed a screwdriver to open the locked vehicle. The State objected on hearsay grounds. The trial court sustained the objection.[1] Tucker appeals this ruling, contending that the evidence was admissible as a prior inconsistent statement by Mortlock.

We reject Tucker's challenge on three separate grounds. First, we hold that the issue is waived because Tucker did not proffer his prior

[1] In a follow-up question, Tucker's counsel asked McKee whether he had any reason to believe that Tucker went into the home to get something other than a key to open the locked vehicle. The State objected to the form of the question. Again, the trial court sustained the objection.

inconsistent statement argument in the trial court. On its face, the question called for McKee to testify to the statement of another—clearly raising a possible hearsay problem. When the trial court sustained the objection, Tucker never alerted the trial court that the evidence might be admissible as a prior inconsistent statement by Mortlock. Had Tucker done so, and pointed out to the trial court that a prior inconsistent statement is not hearsay, *see* § 908.01(4)(a)1, STATS., nor an exception to the hearsay rule, *see* §§ 908.03, 908.04, 908.045, STATS., the State might very well have withdrawn its objection or the trial court might have changed its ruling.

We acknowledge that ordinarily a party proffering evidence is not required, on a threshold basis, to demonstrate why the evidence is admissible. Rather, the admissibility of proffered evidence is placed at issue by the opposing party registering an objection. Under the facts of this case, however, the question facially called for a hearsay answer. Under such circumstances, we conclude that it was Tucker's obligation to alert the trial court that the answer sought was an admissible, nonhearsay, prior inconsistent statement. We hold that Tucker has waived this issue.

Second, even if we are wrong in the foregoing waiver analysis, waiver exists on a further front—Tucker's failure to make an offer of proof. Following the trial court's ruling, Tucker never made an offer of proof as to what Mortlock's answer to the question would have been. He could easily have done so by: (1) stating the answer which he expected McKee would give, (2) asking Mckee to answer the question as an offer of proof, or (3) submitting

McKee's written report if it truly contained the inconsistent statement which the questions suggested.

Before we as an appellate court may find error in a trial court's ruling excluding evidence, the party suffering the adverse ruling must make an offer of proof revealing the substance of the rejected evidence unless such is apparent from the questions asked. Section 901.03(1)(b), STATS.; *see also* ***State v. Echols***, 175 Wis.2d 653, 679, 499 N.W.2d 631, 639, *cert. denied*, 114 S. Ct. 246 (1993). An offer of proof need not be syllogistically perfect, but it ought to enable a reviewing court to act with reasonable confidence that the evidentiary hypothesis can be sustained and is not merely an enthusiastic advocate's overstated assumption. ***State v. Padilla***, 110 Wis.2d 414, 430, 329 N.W.2d 263, 271-72 (Ct. App. 1982).[2]

Here, while the question assumed that Mortlock *may have* told McKee that Tucker needed a screwdriver to open the locked vehicle, we cannot say that such represented anything more than trial counsel's *hope* that such a favorable answer would be forthcoming. Before we would reverse a conviction and remand for a new trial, we must be given some degree of assurance that evidence favorable to Tucker would be forthcoming. We have not been given that assurance in this case.

Third, assuming that waiver did not occur and that the trial court ruling was wrong, we hold that any error was harmless. Assuming that Tucker

[2] An offer of proof can also sometimes serve another salutary purpose—prompting the trial court to rethink its ruling.

needed some type of device (be it a screwdriver or a knife) to gain entry to the locked vehicle, the gravamen of the endangering safety charges lay not in his reason for possessing the knife, *but rather in the manner in which he brandished it after obtaining possession.* The rejected evidence would not have materially impacted on either the evidence which formed the basis for the convictions or on Mortlock's credibility. Assuming that the trial court erred, such did not affect any of Tucker's substantial rights. As such, the error was harmless. *See* § 805.18(2), STATS.

***EVIDENCE OF TUCKER'S PRIOR COMPLAINT***

By a pretrial motion in limine ruling, the trial court granted the State's request to bar Tucker from presenting evidence that he had previously filed a complaint through the NAACP against the Walworth County Sheriff's Department as a result of the events in this case. The trial court ruled that the evidence was irrelevant pursuant to §§ 904.01 and 904.02, STATS.

A motion in limine ruling is an evidentiary ruling. Such rulings are addressed to the trial court's discretion and we will not upset such a ruling if it has a reasonable basis and was made in accordance with accepted legal standards and the facts of record. ***State v. Pharr***, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983).

Tucker contends that evidence about his complaint against the sheriff's department would have "demonstrate[d] that the police had a grudge against the defendant for filing a complaint against them." However, the events leading to the charges in this case occurred *before* Tucker filed his complaint.

The nature of, and motives for, the officers' actions could not possibly have been influenced by Tucker's later action. Tucker was entitled to fully explore those actions and motives at the trial, and he did so.

The trial court chose to limit the evidence to the facts bearing on the events alleged in the complaint, not on later collateral action taken by the participants which risked taking the jury into prejudicial, confusing and irrelevant matters. Such evidence would have little or no "tendency to make the existence of any fact *that is of consequence to the determination of the action* more probable or less probable." Section 904.01, STATS. (emphasis added). We affirm the court's ruling.

***PRIOR CONDUCT OF A STATE'S WITNESS***

Also by a pretrial ruling, the trial court granted the State's further motion in limine to bar evidence that a State's witness, Thomas Hogan, had himself been issued a municipal ordinance citation for discharging a firearm the day before the events pertaining to this case. Tucker contends that evidence about this incident would have revealed bias or prejudice on the part of Hogan as a witness in this case.

Again, we bear in mind our discretionary standard of review and the limited circumstances under which we may reverse such a ruling. *See* ***Pharr***, 115 Wis.2d at 342, 340 N.W.2d at 501.

Hogan was the person who initially heard the shots and who phoned in the complaint to the Town of Bloomfield Police Department. The

day before this incident, he and another were shooting at birds and were cited under a local ordinance for discharging a firearm within municipal limits. Tucker contended that the issuance of the citation was relevant to show a continuing dispute between the families living on the block, including Tucker and Hogan. In addition, Tucker argues that evidence showed that Hogan received a concession in exchange for his testimony.

We observe, however, that the only evidence which the trial court barred was that relating to the issuance of the citation. Otherwise, the court permitted Tucker to fully explore the relationship between Hogan and Tucker and the events surrounding Hogan's discharge of a firearm. None of this evidence suggested that Hogan received a municipal citation, rather than a criminal charge, in exchange for his testimony in this case. We affirm the trial court's discretionary determination.

## *INEFFECTIVE ASSISTANCE OF COUNSEL*

Tucker was successively represented by three different attorneys at the trial level. He alleges that all three rendered ineffective assistance of counsel. We will not recite in detail the test for ineffective assistance of counsel. Suffice it to say that Tucker must establish that counsel was both ineffective and that such failing was prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668 (1984); ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

### *A. Motion to Suppress the Gun*

Tucker first argues that his counsel was ineffective for failing to bring a pretrial motion to suppress evidence of the gun found by Mortlock in

the bedroom of the residence. However, Tucker's argument on this issue rests principally on Marshall's testimony *at the trial* that her consent to the search was the result of Mortlock's threat to ransack the residence if she did not consent to the search. However, the testimony of trial counsel at the ***Machner*** hearing was that Marshall *never* made such a representation prior to the trial. Instead, Marshall represented to trial counsel that she had consented to the search—a version in keeping with that reported by Mortlock. The trial court found this testimony credible.

A lawyer's performance must be based on the information which the lawyer then knew, or reasonably should be held to have known, at the time of the challenged performance. Tucker's argument expands the data base for this inquiry to different and contrary testimony presented at the trial. As the trial court aptly noted, a lawyer's performance is not measured from this perspective.

*B. Motion Challenging Tucker's Detention or Arrest*

Next, Tucker contends that trial counsel was ineffective for failing to challenge his initial detention or arrest. From his framing of the issue, it appears that Tucker believes that his formal arrest was preceded by some kind of lesser form of custody, perhaps akin to a temporary detention. However, we agree with the trial court that no such lesser form of custody preceded Tucker's arrest. Prior to Tucker brandishing the weapon, Tucker was not detained. To the contrary, the evidence showed that when the officers approached the area, it was Tucker who engaged them—not vice versa.

As to a possible motion challenging probable cause to arrest, trial counsel testified that such a motion would have been futile. The trial court agreed and so do we. The evidence overwhelmingly bears out why. Mortlock had previously detected the odor of intoxicants on Tucker's person. Tucker came out of the residence possessing a knife, advancing toward Mortlock. Mortlock told Tucker to drop the weapon. Tucker refused this instruction and, instead, raised the knife from a downward pointing position to an upward position and continued his advance toward Mortlock. Mortlock followed with another warning, which Tucker again ignored, still continuing his advance. Only after Mortlock issued a third warning coupled with a threat to shoot Tucker did Tucker drop the knife. A motion challenging the grounds for Tucker's arrest in the face of these facts would have been futile and frivolous.

*C. **Miranda/Goodchild** Hearing*

Next, Tucker contends that his trial counsel was ineffective for failing to challenge the admissibility of certain statements he made to McKee. However, as he develops this argument, Tucker seems more to contend that the trial court was under a sua sponte duty to conduct such a hearing rather than that his counsel was ineffective for failing to bring a motion challenging the admissibility of his statements. In either event, we reject both cloudy arguments.

First, Tucker cites to no law (and we know of none) which holds that a trial court is under a sua sponte duty to conduct a ***Miranda/Goodchild*** hearing on its own motion.[3] Second, any such motion would have been futile

[3] Tucker seems to concede this point on appeal when he states, "If the defendant

because the information known to trial counsel established that Tucker's statements were made *after* he had been advised of his ***Miranda*** rights by McKee. Moreover, we see nothing in the record which demonstrates that Tucker's statements were otherwise involuntary.

*D. Motion For Continuance or Mistrial*

Next, Tucker contends that his trial counsel was ineffective for failing to move for a continuance or a mistrial when some police reports were belatedly produced during the trial. Trial counsel had previously filed a discovery demand and certain materials were produced by the State. However, these materials did not include the reports produced midtrial.

We first observe that the trial court distinctly recalled that trial counsel *did* ask for a continuance, although that request was not memorialized on the record.

More importantly, trial counsel testified that the belatedly produced reports did not contain any new information. The trial court adopted this testimony and Tucker's appellate briefs do not dispute this finding.[4] Instead, Tucker's appellate argument seems to be that because the materials were belatedly produced, counsel was ineffective per se for failing to seek a continuance or a mistrial. That is not the law.

(..continued)
chooses not to object to admissions of a statement, *the better practice* should be for the trial court to take an affirmative waiver from defendant and counsel." (Emphasis added.)

[4] It also appears that Tucker's legal expert who testified at the ***Machner*** hearing shared this conclusion.

*E. Tucker's Conduct at the Hospital*

Next, Tucker contends that his trial counsel was ineffective for failing to object to certain testimony about his unruly behavior at the hospital. He contends that this evidence was inadmissible because the disorderly conduct charge pertained only to Tucker's behavior at the scene of the residence—not at the hospital. However, this issue was never raised in the trial court. We deem it waived.

Alternatively, addressing the issue on the merits, we find no error. The evidence was part of the entire sequence of events under inquiry. The evidence was certainly relevant on the question of Tucker's alleged intoxication, an element of one of the endangering safety charges.

Moreover, we have examined the final arguments presented to the jury. The prosecutor carefully limited the disorderly conduct charge to the events at the residence. In fact, she did not even allude to the events at the hospital when speaking to the jury about this charge. Thus, the jury was properly schooled that Tucker's actions at the residence were the basis for the charge.

This does not mean, however, that the other conduct by Tucker was off limits as to this inquiry. If Tucker's conduct at the hospital assisted the jury in determining whether he was disorderly *at the residence*, the jury was entitled to consider such evidence. The important inquiry here is whether the jury properly understood the situs of Tucker's alleged disorderly conduct.

Based on our examination of the final argument, we are satisfied that the jury was properly directed on this matter.

*F. Failure to Object to Portions of Expert Testimony*

Next, Tucker contends that his trial counsel was ineffective for failing to object to certain testimony by Monty Lutz, the State's firearms expert. This testimony impeached the conclusions of an expert hired by the defense, but who did not testify. Prior to testifying, Lutz had been provided a report filed by the defense expert.

Trial counsel testified at the ***Machner*** hearing that he did not object because this allowed him to get the substance of the defense expert's conclusions before the jury via Lutz's testimony. This was a matter of tactics and strategy. The supreme court has stated that it disapproves of postconviction counsel second-guessing trial counsel's considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel. ***State v. Felton***, 110 Wis.2d 485, 502, 329 N.W.2d 161, 169 (1983). Trial counsel is free, after considered judgment, to select a particular tactic among available alternatives. *See* ***id***. The tactic selected need not be the one that in hindsight looks best to a reviewing court or postconviction counsel. ***Id***. In this instance, we respect counsel's tactical decision as to the manner by which the conclusions or findings of the defense expert were conveyed to the jury.

***PROSECUTOR'S FINAL ARGUMENT***

Next, Tucker contends that the prosecutor made an improper final argument.[5] Specifically, Tucker contends that the prosecutor blurred the distinction between the crimes of resisting an officer and disorderly conduct. Without citation to the record, Tucker contends that "the jury was in effect told that if they found the defendant guilty of disorderly conduct then they also had to find him guilty of resisting, and vice versa."

If an act forms the basis for a crime under more than one statutory provision, the State may proceed under any or all such provisions. Section 939.65, STATS. Thus, if it is Tucker's contention that the two crimes improperly overlapped, we reject that argument.

However, we also observe that the prosecutor told the jury that Tucker crossed the line between disorderly conduct and resisting when he began resisting the officers. The prosecutor told the jury that Tucker had been disorderly by shooting the gun, yelling and screaming at the officers at four o'clock in the morning and by waking the neighbors, and that Tucker did not resist an officer until he was actually arrested. Thus, we conclude that the jury was properly focused when considering these two charges. We also observe that the trial court instructed the jury that it was to consider each charge separately and that each count charged a separate count.

[5] Tucker also raises this issue as part of his ineffective assistance of counsel argument. Because we conclude that the argument was not improper, we also conclude that trial counsel was not ineffective for failing to object.

Based on our examination of the entire record, we conclude that the prosecutor did not make an improper argument. As such, trial counsel was not ineffective for failing to object to portions of the prosecutor's final argument.

### *MARSHALL AS A STATE'S WITNESS*

Next, Tucker contends that the State's calling of Marshall as a witness was improper because it allowed the State an opportunity to introduce Marshall's prior inconsistent statements. This issue is waived. Tucker did not raise this issue in the trial court. Therefore, we have no trial court ruling to review.

### *CONCLUSION*

We reject all of Tucker's appellate arguments, including his further request for a new trial in the interests of justice. We affirm the judgment and the postconviction order.

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

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