COURT OF APPEALS
DECISION
DATED AND FILED

September 16, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0884-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KHOUNMY LANOI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MICHAEL P. SULLIVAN and KITTY K. BRENNAN, Judges.[1] *Affirmed.*

CURLEY, J. Khounmy Lanoi appeals from a judgment of conviction entered after a jury found him guilty of battery, contrary to § 940.19(1),

[1] The Honorable Michael P. Sullivan presided over the trial and issued the judgment of conviction. The Honorable Kitty Brennan presided over the postconviction hearing and issued the order denying the postconviction motion.

STATS., and from an order denying his motion for postconviction relief. Lanoi argues: (1) he was denied his right to remain silent by the State's use of testimony, and comments during closing argument, regarding his pre-***Miranda*** silence; (2) he was denied effective assistance of counsel by his counsel's failure to object to the testimony and closing argument regarding his silence, and by his counsel's failure before trial to request transcripts of the opening and closing arguments; and, (3) he was denied a meaningful appeal because the record contains no transcript of the prosecution and defense closing arguments. We reject his arguments and affirm the judgment and order.

I. BACKGROUND.

On January 26, 1996, Lanoi was driving a truck in which K.T. was a passenger. During an argument, K.T. took the car keys out of the ignition and threw them out of the window, causing the truck to slow down and stop. Timothy Krieg and Jenell Stich were plowing snow from a driveway in the area where the truck stopped. Stitch saw Lanoi punch K.T., and Krieg ran to the truck and told Lanoi he was going to call the police. While they were waiting for the police to arrive, Lanoi removed a knife from his pocket, held it out to Krieg and said, "See what she had?" Krieg told Lanoi to put the knife away and Lanoi put it back in his pocket.

Two police officers arrived at the scene. The officers saw that K.T. was bleeding from her finger and her mouth, and observed that her lip was swollen. The officers asked Lanoi what happened, but he only said to the officers, "Ask her." The officers then questioned K.T. She said that Lanoi pointed a knife at her in the truck which caused her to become afraid and throw the keys out of the window. She also said that, after the truck stopped, Lanoi punched her in the face.

Lanoi was arrested and charged with one count of battery and one count of endangering safety by use of a dangerous weapon. At trial, Lanoi testified that K.T. pulled a knife out and pointed it at him, but that he was able to get the knife away from her and put it in his pocket. Lanoi also denied either punching K.T. or pointing a knife at her. The responding officers testified during the State's case-in-chief that Lanoi declined to speak to them upon their arrival. The jury found Lanoi guilty of battery, but not guilty of endangering safety by use of a dangerous weapon. Lanoi filed a motion for postconviction relief. After a ***Machner***[2] hearing, the trial court denied the motion. Lanoi now appeals.

II. ANALYSIS.

A. Fifth Amendment Issues

Lanoi claims that his constitutional right to remain silent was violated by the State's use of testimony, and comments during closing argument, regarding his silence upon the officers' arrival.

1. Standard of Review

Whether Lanoi's right to remain silent was violated is a question involving the application of constitutional principles to undisputed facts which we review *de novo*. *See* ***State v. Pheil***, 152 Wis.2d 523, 530, 449 N.W.2d 858, 861 (Ct. App. 1989). Once a defendant elects to testify, references by the State during cross-examination, on redirect and in closing argument to the defendant's pre-***Miranda*** silence do not violate the defendant's right to remain silent. *See* ***State v. Brecht***, 143 Wis.2d 297, 314, 421 N.W.2d 96, 103 (1988), citing ***State v.***

[2] *See* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979)

Sorenson, 143 Wis.2d 226, 258, 421 N.W.2d 77, 90 (1988). *See also* ***Jenkins v. Anderson***, 447 U.S. 231, 238 (1980) (use of pre-arrest silence to impeach defendant does not violate Fifth Amendment), *and* ***Fletcher v. Weir***, 455 U.S. 603, 607 (1982) (use of post-arrest, pre-***Miranda*** silence to impeach testifying defendant does not violate due process).

In its case-in-chief, however, the State may not elicit testimony concerning a defendant's pre-***Miranda*** silence. *See* ***U.S. ex rel. Savory v. Lane***, 832 F.2d 1011, 1017-1018 (7th Cir. 1987), ***Coppola v. Powell***, 878 F.2d 1562, 1568 (1st Cir. 1989), *cert. denied*, 493 U.S. 969 (1989); *see also* ***U.S. v. Caro***, 637 F.2d 869, 876 (2d Cir. 1981) (assuming that prosecution's reference to defendant's pre-***Miranda*** silence in its case-in-chief was error, but finding the error harmless). Of course, a defendant's right to remain silent is only implicated during circumstances which might compel a reasonable person to speak and incriminate himself or herself. *See* ***Brecht***, 143 Wis.2d at 312, 421 N.W.2d at 102. If a defendant was silent in circumstances which did not trigger his or her right against compelled self-incrimination, the prosecution is free to comment on, or elicit testimony of, that silence. *See* ***id***.

2. Testimony During State's Case-in-Chief

First, Lanoi claims that his right to remain silent was violated by the State's eliciting testimony from two responding officers regarding his pre-***Miranda*** silence. At trial, during the State's case in chief, the prosecutor asked one of the responding officers what, if anything, she did when she arrived at the scene. The officer testified:

> I approached the truck with the victim and the suspect and I asked the suspect what happened. Numerous times I asked him and he refused to say anything. He would not make a statement. He says, "ask her," and then nothing.

Later, also during the State's case-in-chief, the prosecutor asked the other responding officer whether he discovered anything relative to the knife. The officer testified:

> When my partner tried to interview the defendant, he did not want to make any statements. At which time he was in the passenger side of the vehicle, and she found the knife laying, I believe, which was on the ground at that location.

Lanoi's right against self-incrimination was triggered by his encounter with the two responding officers. The officers, who were responding to a report of a battery, approached Lanoi, who they referred to as "the suspect," and repeatedly questioned him about what had happened. A reasonable person in Lanoi's position certainly might believe he or she was a suspect and might be compelled to respond to repeated questioning by police officers. Therefore, Lanoi had a right to remain silent during the officer's questioning. *See* ***Brecht***, 143 Wis.2d at 312, 421 N.W.2d at 102. Because Lanoi had a right to remain silent, the State's elicitation of testimony concerning his silence during its case-in-chief, before he elected to testify, was error. *See* ***Lane***, 832 F.2d at 1017-1018, ***Powell***, 878 F.2d at 1568, *and* ***Caro***, 637 F.2d at 876.

We conclude, however, that that error was harmless under the test enunciated in ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985). According to ***Dyess,*** an error is harmless if this court concludes that there is no "reasonable possibility" that the error "contributed to the conviction." ***Id***. During cross-examination of the second testifying officer, Lanoi's counsel asked the officer "You testified that the defendant did not want to make any statements to you, is that right?" The officer responded, "My partner attempted to ask him

questions and he did not make any statements." At this point the trial court intervened and stated:

> I'll instruct the jurors he had a right not to make any statements. There is no issue on that. He had a right not to say anything. It is his constitutional right to say nothing, and no inference is to be drawn from that.

We presume that the jury followed the court's instruction and did not draw any inference from Lanoi's silence. *See* ***State v. Chambers***, 173 Wis.2d 237, 259, 496 N.W.2d 191, 199 (Ct. App. 1992). The trial court, at the ***Machner*** hearing, found that the jury disbelieved both Lanoi and K.T.'s testimony and relied on the citizen eyewitness's testimony as a tiebreaker rather than relying on Lanoi's silence. After reviewing the record, we agree with the trial court's finding.[3] Therefore, due to the relative insignificance of the officers' testimony concerning Lanoi's silence, and the fact that a curative instruction was given, we conclude that the reference in the State's case-in-chief to Lanoi's pre-***Miranda*** silence was harmless error.

3. Prosecutor's Closing Argument

Lanoi also claims that his right to remain silent was violated when the prosecution commented during closing argument on his silence. At the ***Machner*** hearing, Lanoi's trial counsel claimed that the prosecution, during its closing argument, commented "about four times" on Lanoi's silence. Although transcripts of the closing arguments were not available during the ***Machner***

[3] The record reveals that both Lanoi and K.T. gave incredible or contradicted testimony, which supports the trial court's finding that the jury disbelieved their testimony. The split verdict, finding Lanoi guilty of battery but not guilty of endangering safety with a dangerous weapon, also supports the trial court's finding since the citizen eyewitness saw Lanoi hit K.T., but did not see Lanoi use a knife.

hearing, the trial court accepted the defense's version of events and made a finding that the prosecutor commented four times during closing argument on Lanoi's silence. Even so, the court denied Lanoi's motion for postconviction relief, finding that he had not been prejudiced by the State's conduct, especially in light of the trial court's curative instruction. Lanoi claims that the court erred by making this finding.

We disagree. While it is error for the State to comment on a defendant's silence before the defendant elects to testify, after the defendant takes the stand, the State may freely impeach the defendant with his or her pre-***Miranda*** silence. *See* ***Brecht***, 143 Wis.2d at 314, 421 N.W.2d at 102-03. Thus, since Lanoi chose to testify at trial, the prosecution was entitled to comment on Lanoi's pre-***Miranda*** silence during its closing argument. *See* ***id***. Therefore, even assuming, as the trial court did, that the prosecution did comment four times during closing argument on Lanoi's pre-***Miranda*** silence, Lanoi's rights were not violated.

B. Right to a Meaningful Appeal

Lanoi also claims that his right to a meaningful appeal has been violated because the record fails to contain a transcript of the prosecution and defense closing arguments. An adequate record is necessary for review of issues raised on appeal, and in some cases, lack of a verbatim transcript may amount to a denial of the right of appeal. *See* ***State v. Perry***, 128 Wis.2d 297, 300, 381 N.W.2d 609, 610-11 (Ct. App. 1985). However, "[a]n appellant will not be entitled to a new trial in every case where the transcript is incomplete or erroneous." ***Id***. at 307, 381 N.W.2d at 613. Defendants will only be entitled to a new trial when they have "shown a 'colorable need' for a full, accurate transcript

… and where it appears that attempts to reconstruct the record will prove futile." ***Id***.

In this case, the trial court's attempt to reconstruct the record during the ***Machner*** hearing was successful, rather than futile, since the court explicitly accepted Lanoi's claim that the prosecutor had commented four times during closing argument on his silence. Since Lanoi's version of the prosecution's closing argument was accepted by the trial court, he has no "colorable need" for a verbatim transcript of the closing arguments. Therefore, we conclude that Lanoi has not been denied his right to a meaningful appeal.

C. Ineffective Assistance of Counsel Claim

Lanoi also claims that he was denied effective assistance of counsel. Lanoi argues that his trial counsel was ineffective by: (1) failing to request that the closing arguments be transcribed; (2) failing to object to testimony from the responding officers relating to Lanoi's silence; and (3) failing to move for a mistrial based on the alleged violation of Lanoi's Fifth Amendment right to remain silent.

In order to prove ineffective assistance of counsel, defendants must show that their counsel's performance was deficient, and that they were prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984), ***State v. Pitsch***, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). To prove deficiency, a defendant must show specific acts or omissions of counsel which were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. Courts "strongly presume" counsel to have rendered adequate assistance. ***Id***. To prove prejudice, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of

the proceeding would have been different." ***Id***. at 694, ***Pitsch***, 124 Wis.2d at 642, 369 N.W.2d at 719. A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." ***Strickland,*** 466 U.S. at 694, ***Pitsch*** 124 Wis.2d at 642, 369 N.W.2d at 719. On appeal, the trial court's findings of fact will be upheld unless they are clearly erroneous. ***Pitsch***, 124 Wis.2d at 634, 369 N.W.2d at 714. But whether the defendant has established either deficiency or prejudice is a question of law which we review *de novo*. ***Id***. at 634, 369 N.W.2d at 715.

The trial court found that Lanoi failed to show either deficiency or prejudice. We agree with the trial court's finding that Lanoi has not shown prejudice. Lanoi's counsel's failure to request transcription of the closing arguments was not prejudicial since the trial court, and this court, accepted the defense version of the prosecution's closing argument. Lanoi's counsel's failure to object to the officer's testimony concerning Lanoi's silence was not prejudicial since the trial court gave a curative instruction, and the testimony, as the trial court noted was "a very, very minor point" in the trial. Finally, Lanoi's counsel's failure to move for a mistrial was not prejudicial since Lanoi has failed to show a reasonable probability that a mistrial would have been granted. In sum, Lanoi has failed to show that, had his counsel acted differently, there was a reasonable probability that the outcome of his trial would have been different. Since we conclude that Lanoi has failed to prove prejudice, we need not examine whether he has established deficient performance. *See* ***Strickland***, 466 U.S. at 697.

By the Court.—Judgment and order affirmed.

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