COURT OF APPEALS
DECISION
DATED AND FILED

August 18, 1998

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. 97-1617-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GUSTAVO ESPINO,

DEFENDANT-APPELLANT.

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

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Gustavo Espino appeals from a judgment of conviction, following a jury trial, for first-degree intentional homicide, party to a crime. Espino claims that the trial court erred: (1) in denying his motion to suppress his statements to the police; (2) in dismissing a prospective juror for cause; and (3) in instructing the jury on the "natural and probable consequences"

theory of party to a crime liability without specification of any identifiable crime which he allegedly conspired to commit. We affirm.

I. BACKGROUND

On April 10, 1990, a criminal complaint was issued charging Espino with the first-degree intentional homicide of Luiz Mendez, who had been killed on March 22 of that year. The complaint alleged that the murder resulted from a transaction in which Espino was tricked into purchasing baking flour rather than cocaine.

Six years later, Dallas police took Espino into custody in Texas on a fugitive warrant. After Milwaukee Police Detectives Moises Gomez and Thomas Fischer arrived in Dallas, they interviewed Espino at the Dallas police headquarters. Three days later, Detective Gomez interviewed him again, after their return to Milwaukee. At each interrogation, Espino made statements to the police concerning his involvement in the crime. A ***Miranda-Goodchild***[1] hearing was held on Espino's motion to suppress the statements. The trial court ruled that the statements were admissible.

During the jury selection, one prospective juror indicated that she knew two of the witnesses scheduled to testify. In chambers, the prosecutor questioned her regarding her ability to be impartial:

> Q: …Would you be inclined to believe Francisco Espino more than perhaps someone else because you do know him?
>
> A: Perhaps.

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[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis.2d 244, 133 N.W.2d 753 (1965).

The prosecutor, at the close of this exchange, moved to strike the juror for cause. Over Espino's objection, the trial court granted the motion.

At the close of the evidence, the prosecutor requested a jury instruction on the "natural and probable consequences" theory of liability for the homicide, stemming from "party to a crime" liability under § 939.05, STATS., for an unspecified "precursor" crime. The trial court gave the instruction, rejecting Espino's argument that the jury would be forced to guess at the nature of the underlying crime.

Espino was found guilty by the jury and sentenced to life imprisonment, with parole eligibility in December of 2047.

II. ANALYSIS

A. Espino's Statements

Espino claims that the trial court erred in denying his suppression motion because the police continued to question him after he allegedly invoked his right to remain silent. In the alternative, he claims that the police failed to honor his request to answer only certain questions. We reject his claims.

On review of an order denying a motion to suppress, we are bound by the trial court's findings of historical fact unless they are contrary to the great weight and clear preponderance of the evidence. *See* ***State v. Kramar***, 149 Wis.2d 767, 784, 440 N.W.2d 317, 324 (1989). Whether a defendant's ***Miranda*** rights were violated is a constitutional fact which we determine *de novo. See* ***State v. Ross***, 203 Wis.2d 66, 79, 552 N.W.2d 428, 433 (Ct. App. 1996).

The right to remain silent includes two distinct protections: the right to remain silent, and the right to end questioning. *See **id.*** at 73-74, 552 N.W.2d at 431. "'Through the exercise of [a suspect's] option to terminate questioning he [or she] can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation.'" ***Id.*** at 74, 552 N.W.2d at 431 (citation omitted; alterations in ***Ross***). Consequently, "the admissibility of statements obtained after the person in custody has decided to remain silent depends under ***Miranda*** on whether his [or her] 'right to cut off questioning' was 'scrupulously honored.'" ***Id.*** (internal quotation marks and quoted sources omitted; alteration in ***Ross***). "The key question thus becomes whether the suspect, after being informed of the ***Miranda*** rights, invoke[d] any of those rights during police questioning." ***Id.***

Controlling the determination of whether a suspect invoked his or her right to silence is the "clear articulation rule" of ***Davis v. United States***, 512 U.S. 452 (1994). *See* ***Ross***, 203 Wis.2d at 75-76, 552 N.W.2d at 432. In ***Davis***, the Supreme Court announced that a suspect must exercise his or her right to be assisted by counsel in a manner that makes clear the intention to do so; i.e., "the suspect must unambiguously request counsel." *See **id.***, 512 U.S. at 459. In ***Ross***, we held that the "clear articulation rule" also applies to the invocation of the right to remain silent. *See **id.***, 203 Wis.2d at 78, 522 N.W.2d at 432-433. Crafting a "bright-line rule," we noted that a suspect "must articulate his or her desire to remain silent or cut off questioning sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be an invocation of the right to remain silent." ***Id.*** at 78, 522 N.W.2d at 433 (internal quotation marks and quoted source omitted). Moreover, "[i]f the suspect does not unambiguously invoke his or her right to remain silent, the police need not cease their questioning of the suspect." ***Id.***

At the motion to suppress, Detective Gomez testified that, after he read Espino his rights and Espino told him he understood them, he questioned Espino about the homicide. Espino responded that he preferred not to answer any questions about the homicide until he returned to Milwaukee. Detective Gomez testified that he then asked Espino some questions about drug trafficking. After answering a few of those questions, Espino told him that he did not want to answer any questions until he returned to Milwaukee. The interview then ended.

Detective Gomez also testified about the subsequent interrogation in Milwaukee. Detective Gomez explained that after he had informed Espino of his ***Miranda*** rights, Espino made several ambiguous statements about his desire to tell his story at a later time and his desire to talk to an attorney when one was appointed. Detective Gomez explained:

> When [Espino] said that he—that he would tell the court and his attorney when one is appointed, I infer that to mean that he does not have an attorney, … And then when—I asked him a few more questions, and Mr. Espino stated that he does not want to answer this question until he talks to his appointed attorney. So now he's requesting—it's like he wants a lawyer.

Detective Gomez testified that he then terminated the interview because he interpreted Espino's second statement to be an invocation of his right to counsel.

In denying the motion to suppress, the trial court ruled:

> The defendant indicated, after some background information, that he wanted to wait and talk in Milwaukee. There were further questions about some other areas, and when the defendant again indicated that he wanted to wait, the detectives terminated the interview….
>
> Back in Milwaukee on January 25th, the defendant was interviewed this time only by Gomez. He was again advised of his rights in English and Spanish, and I'm satisfied that he continued to understand his rights, and he proceeded to make additional statements.

> At some point during that interview the defendant indicated that he would tell the Court and an attorney when one was appointed about certain things. The interview continued. And the second time when the defendant made some reference to the future appointment of an attorney, the interview was terminated. Again, I don't know if the detectives were absolutely required to terminate it at that point, but it was certainly a reasonable decision on their part.
>
> I'm satisfied that the various times that the defendant indicated a reluctant — a reluctance to answer certain questions or certain areas of questioning did not ever rise near the level that would have required that the interview be terminated. I'm satisfied that the initial reference to an attorney was not even an ambiguous request for an attorney ….
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> I have no doubt that the interview was reasonably aggressive, as it should have been. I don't consider that detectives are required to simply pursue it as though it were a direct examination in court. I don't believe that the statements made by the defendant to the effect that he wanted to answer things later or didn't want to answer certain questions ever came close to the level of requiring that the interview be terminated or that the detective not attempt to work his way back to the original area. I don't think that's impermissible at all.
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> … I'm satisfied, first with respect to the *Miranda* issues, that the defendant was advised of his rights as required by the *Miranda* decision, and that he understood those rights and knowingly and voluntarily waived them to the extent that he did from time to time choose to answer certain questions. He exhibited a clear ability to avoid saying things at one point that he later said, and clearly understood, and exercised those rights, and to the extent that he waived them, he waived his rights to make statements or to have an attorney present for the statements.
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> With respect to voluntariness, I'm satisfied that the statements made were the product of the defendant's free will and were not coerced or forced from — forced from him, and were not the result of any improper or unlawful police pressure.

The trial court was correct. Espino's expressed preference to delay answering questions about the homicide did not rise to the level of declining to answer all of the questions. No reasonable officer in the position of Detective

Gomez would have interpreted these statements as an unambiguous invocation of either the right to remain silent or the right to counsel. Clearly, Espino did not unequivocally or unambiguously invoke his right to remain silent. Absent a clear and unambiguous invocation of the right to remain silent, Detective Gomez was not required to terminate the questioning. *See* ***Ross**,* 203 Wis.2d at 78, 552 N.W.2d at 433. Accordingly, we conclude that the trial court correctly ruled that the statements were admissible.

B. Dismissal of Prospective Juror

Espino next argues that the trial court erred by dismissing a prospective juror who knew two of the witnesses. Espino claims that there was insufficient cause to remove the juror under § 805.08(1), STATS. He also contends that, under ***State v. Ramos***, 211 Wis.2d 12, 564 N.W.2d 328 (1997), the court's error denied him due process by effectively giving the State an additional peremptory challenge. We are not persuaded.

Whether a juror is biased and should be dismissed for cause is a determination committed to the sound discretion of the trial court. *See* ***Ramos***, 211 Wis.2d at 15, 564 N.W.2d at 330. "[A] discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981). We will not reverse a trial court's discretionary determination absent an erroneous exercise of discretion. *See* ***id.***

Section 805.08(1), STATS., provides, in part, that "[i]f a juror is not indifferent in the case, the juror *shall* be excused." Section 805.08(1), STATS. (emphasis added). "Bias may be either implied as a matter of law or actual in

fact." *See* ***State v. Louis***, 156 Wis.2d 470, 478, 457 N.W.2d 484, 487 (1990). Even the appearance of bias must be avoided. ***Id.*** at 478, 457 N.W.2d at 488. As the supreme court recently reiterated, "[trial courts] are also advised to err on the side of striking prospective jurors who appear to be biased." ***State v. Ferron***, No. 96-3425-CR, slip op. at 20 (Wis. June 26, 1998).

During *voir dire*, the trial court asked the prospective jurors if any of them recognized any of the individuals involved in the case. Juror Lopez raised her hand and stated that she had gone to school with two of the State's witnesses. The trial court then conducted an individual *voir dire* of Lopez in chambers. When the prosecutor asked Lopez whether she would be inclined to believe Francisco Espino, one of the State's witnesses, more than someone else, she replied, "Perhaps." The prosecutor then asked that she be removed for cause, and the court granted the request over Espino's objection. The trial court properly exercised discretion in striking the prospective juror for cause based on her response to the prosecutor's questions. At a minimum, her response created an appearance of bias. We conclude, therefore, that the trial court properly removed Lopez from the jury pool.

C. Jury Instructions

Finally, Espino contends that the trial court erred in instructing the jury on the natural and probable consequences theory of liability because it failed to identify an underlying crime, from which the homicide was a natural and probable consequence, that the defendant allegedly conspired to commit.[2] In

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[2] Section 939.05, STATS., provides, in relevant part:

> **(2)** A person is concerned in the commission of the crime if the person:

(continued)

response, the State contends that Espino waived this argument when he requested that the trial court not instruct the jury on any specific underlying crime. We agree with the State.

At the conclusion of the evidence, the prosecutor requested an instruction on the conspiracy theory of the party to a crime statute. The prosecutor stated that the precursor "crime," of which the homicide was a natural and probable result, was an "armed confrontation" to intimidate Mendez into returning the money. Espino objected to the instruction[3] in the following colloquy between his attorney and the court:

> The Court: What is the basis for objecting to the natural and probable consequence theory…
>
> [Espino's attorney]: The natural and probable consequences of what? Is it the natural and probable consequences of robbery, attempted robbery? … It allows so much area for guessing that … it impinges on the right of the jury to have an instruction where it knows what to do.

The trial court overruled the objection, stating that the instruction would be given and inquiring whether Espino preferred that the instruction include references to specific intended crimes. Espino requested that the instruction be submitted without any specification of intended crimes, and the court abided by

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> (a) Directly commits the crime; or
> (b) Intentionally aids and abets the commission of it; or
> (c) Is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it. Such a party is also concerned in the commission of any other crime which is committed in pursuance of the intended crime and which under the circumstances is a natural and probable consequence of the intended crime.

[3] We note that, in his appeal, Espino is objecting only to the absence of a list of precursor crimes from the jury instruction. He does not renew his objection, made in the trial court, to the introduction of the "natural and probable consequences" theory of liability.

his request. On appeal, Espino now claims that the trial court erred in omitting any reference to specific intended crimes. We conclude, however, that he waived this claim of error.

Where, as here, the defendant has selected a course of action for strategic purposes, he cannot later be heard to complain of error precipitated by those actions. *See* ***State v. Robles***, 157 Wis.2d 55, 60, 458 N.W.2d 818, 820 (Ct. App. 1990). This is particularly true when the court's alleged error was committed at the defendant's request. *See* ***id.*** at 55, 458 N.W.2d at 820-21. Accordingly, we need not address Espino's argument because his waiver precludes review. *See* ***State v. Kraemer***, 156 Wis.2d 761, 765-66, 457 N.W.2d 562, 564 (Ct. App. 1990).

By the Court.—Judgment affirmed.

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