COURT OF APPEALS
DECISION
DATED AND FILED

May 21, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3059-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RONALD S. GREENE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Monroe County: MICHAEL J. McALPINE, Judge. *Affirmed.*

DEININGER, J.[1] Ronald Greene appeals a judgment convicting him of operating a motor vehicle after revocation (OAR), as a third offense, in violation of § 343.44(1), STATS. Greene claims the trial court erred in denying his motion for a continuance in order to secure the live testimony of two absent

[1] This case is decided by a single judge pursuant to § 752.31(2)(c), STATS.

defense witnesses, and in denying a mistrial after a prosecution witness commented that Greene had "refused to talk to me in reference to this case." In lieu of granting a continuance, the trial court granted Greene's alternative request that the former testimony of the two witnesses be received at trial. In ruling on the motion for mistrial, the trial court concluded a mistrial was not warranted because it had struck the statement from the record and instructed the jury to disregard the statement. We conclude the court committed no error in either ruling, and we therefore affirm the judgment.

BACKGROUND

On the night of September 20, 1994, a police officer observed a car turning left in front of his squad car. He testified at trial that he visually identified the driver of the car as Greene, recognizing him from prior contacts. The officer had learned earlier that evening that Greene's drivers license was revoked. The officer notified dispatch that Greene was driving after revocation. Two defense witnesses had heard this communication over a police scanner. They testified that, since they were both acquainted with Greene, they turned up the scanner and heard a police officer say: "If it's who I think it is, he's driving after revocation." The officer pursued the car and came upon it, unattended, in a parking lot. The officer later mailed a citation for OAR to Mr. Greene's attorney.

A previous jury had found Greene guilty of OAR, but the trial court granted Greene a new trial on the charge. On the morning of the second trial, Greene's attorney sought a continuance to obtain the presence of the two defense witnesses for trial.[2] Counsel informed the court that the two witnesses now

[2] Defense counsel told the trial court that he had "filed a motion for continuance," but no written motion is contained in the record.

resided out of state and that he had just located their present residences during the previous week. He indicated that although neither witness could testify that day, one of the two witnesses might be available to testify in person at a later date. The prosecutor objected to a continuance. Additional statements made by Greene and his counsel with regard to the requested continuance are presented in the analysis which follows below.

The trial court denied Greene's request for a continuance. Instead, the court determined that both of Greene's witnesses were unavailable to testify at trial despite defense counsel's attempt to make them available for trial. The court stated:

> The fact of the matter is, it's a criminal traffic case and we have two witnesses who testified back on June 29 of 1995. They no longer reside in the state of Wisconsin and it seems to me under the circumstances the proper procedure is to use the testimony from the prior hearing. And that's what we will do, because I believe that the trial needs to move forward.

The police officer was thus the only witness to testify in person at Greene's trial. During his cross-examination of the officer, Greene's attorney asked whether the officer knew Greene's address at the time of the offense. The officer responded as follows: "Ronald Greene refused to talk to me in reference to this case." Greene's attorney then requested to approach the bench, and after a side-bar conference with counsel, the trial court instructed the jury to "disregard entirely the last answer that was given." Subsequently, Greene's attorney moved for a mistrial, contending that the officer's statement impermissibly referred to Greene's silence. The trial court denied the motion, stating:

> I do believe that the comment made to the jury almost immediately after the answer was given that the testimony was stricken as well as the instruction that you give to the jury to remind them that all stricken testimony should be disregarded by them will be sufficient to curb any prejudice

> there would have been as a result of any comment. So accordingly, I am going to deny the motion for mistrial.

The jury found Greene guilty of OAR. Greene appeals the judgment of conviction.

ANALYSIS

The decision to grant or deny a continuance is a matter within the discretion of the trial court. ***State v. Fink,*** 195 Wis.2d 330, 338, 536 N.W.2d 401, 404 (Ct. App. 1995). We will reverse the denial of a continuance motion only upon a clear showing that the trial court erred in the exercise of its discretion. ***State v. O'Connell,*** 179 Wis.2d 598, 616, 508 N.W.2d 23, 30 (Ct. App. 1993). When reviewing a trial court's discretionary decision, we "determine whether the court examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process." ***State v. Foy,*** 206 Wis.2d 629, 644, 557 N.W.2d 494, 499 (Ct. App. 1996). Greene argues, however, that the trial court's ruling denied his constitutional right to present a defense. To the extent that the trial court's ruling implicates a "constitutional fact," this court reviews the issue de novo. ***In re Michael R.B.,*** 175 Wis.2d 713, 720, 499 N.W.2d 641, 644 (1993).

The confrontation and compulsory process clauses of Article I, section 7 of the Wisconsin Constitution and the Sixth Amendment of the United States Constitution grant criminal defendants the constitutional right to present a defense. ***State v. Pulizzano,*** 155 Wis.2d 633, 645, 456 N.W.2d 325, 330 (1990). The rights of confrontation and compulsory process are:

> fundamental and essential to achieving the constitutional objective of a fair trial. The two rights have been appropriately described as opposite sides of the same coin and together, they grant defendants a constitutional right to present evidence. The former grants defendants the right to "effective" cross-examination of witnesses whose

> testimony is adverse, while the latter grants defendants the right to admit favorable testimony.

Id. at 645-46, 456 N.W.2d at 330 (citations omitted). Although the trial court denied Greene's request for a continuance, it permitted the favorable testimony of his absent witnesses to be read to the jury from the transcript of the first trial. *See* §§ 908.04 and 908.045, STATS.[3] Thus, Greene was able to present the substance of the evidence he wanted to present in his defense. He argues, however, that the trial court's ruling inhibited the jury's ability to weigh his witnesses' demeanor, appearance, conduct and intelligence on the witness stand.

We conclude that Greene may not now complain of the trial court's decision to permit the use of the former testimony in lieu of granting a continuance. *See* ***State v. Gove,*** 148 Wis.2d 936, 938, 437 N.W.2d 218, 218 (1989) (defendant who actively contributes to trial court action cannot claim the action was error on appeal). Before the trial court had ruled on Greene's request for a continuance, his attorney proposed the use of the former testimony as an alternative, stating: "I guess, if the Court does want to go ahead with the trial today, we would accept going—proceeding with the testimony from last time from both witnesses." The State opposed the continuance but acceded to the use of the former testimony. After denying the continuance and permitting the use of the former testimony, the court questioned Greene himself regarding the procedure:

> THE COURT: Mr. Greene, the two attorneys, your attorney … and [the prosecutor], have discussed taking the transcript of the prior hearing … and reading then selected

[3] The former testimony of a declarant who is now "unavailable" may be admitted "at the instance of or against a party with an opportunity to develop the testimony by direct, cross-, or redirect examination, with motive and interest similar to those of the party against whom now offered." Section 908.045(1), STATS. A declarant is "unavailable" if he or she is "absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means." Section 908.04(1)(e), STATS.

> portions of the transcript. Do you wish to have that happen?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Your attorney has indicated he believes that it is appropriate to proceed. And, do you concur in your attorney's decision?
>
> THE DEFENDANT: Yes.

We will not permit Greene "to assume a certain position in the course of litigation which may be advantageous, and then after the court maintains that position, argue on appeal that the action was error." ***Gove,*** 148 Wis.2d at 944, 437 N.W.2d at 221. However, even if we were to conclude that Greene should not be precluded from asserting his first claim of error, we would find little merit in his argument. A defendant's fundamental right to present witnesses and evidence is not absolute. ***State v. Maday,*** 179 Wis.2d 346, 354, 507 N.W.2d 365, 369 (Ct. App. 1993). In order to obtain a continuance on account of the absence of witnesses, a criminal defendant must show that: (1) the testimony of the absent witnesses is material; (2) the defendant has not been guilty of any neglect in endeavoring to procure the attendance of the witnesses; and (3) there is a reasonable expectation that the defendant will be able to locate the witnesses in the future. ***Elam v. State,*** 50 Wis.2d 383, 390, 184 N.W.2d 176, 180 (1971).

In ***Elam***, defendant's counsel advised the court that he had issued subpoenas for the two alibi witnesses the previous day, and that the sheriff was unable to serve them. ***Id.*** at 386, 184 N.W.2d at 178. He asked for a continuance to enable him to locate the witnesses, but the trial court denied that request. ***Id.*** The trial proceeded and the State called an eyewitness who identified the defendant as one of the participants in the burglary. ***Id.*** The defendant did not put in any case after the State rested. ***Id.*** The supreme court upheld the trial court's denial of the defendant's request for a continuance to secure the presence of his

absent alibi witnesses. In reaching this conclusion, the court stated that the second element necessary to justify a continuance to secure absent witnesses was "clearly lacking":

> 'It must affirmatively appear that [the] accused exercised due diligence in procuring process for witnesses to appear at the trial and delay showing lack of diligence may preclude his securing a continuance because of their absence....
>
> Due diligence requires that [the] accused should have subpoenas issued in ample time to procure service ….
>
> …[D]iligence is not shown where [the] accused waits to secure issuance of process for absent witnesses until the day the case is called for trial ... or until an unreasonably short time before the trial is scheduled to begin, …[.]'

Id. at 390-91, 184 N.W.2d at 181 (quoting 22A C.J.S. *Criminal Law,* pp. 183-84, § 503b(2)). The ***Elam*** court noted that the trial court gave defendant notice of the trial date six weeks prior to trial. ***Id.*** at 391, 184 N.W.2d at 181. Given this length of time, it concluded that defendant failed to exercise due diligence by waiting until the day before trial to subpoena his witnesses. ***Id.***

In this case, the trial court concluded that Greene's trial counsel had demonstrated "diligence" in attempting to have the witnesses available for trial for the purpose of admitting their former testimony under § 908.045(1), STATS. *See* n.3, above, quoting § 908.04(1)(e), STATS. Nonetheless, we question whether Greene could be deemed on this record to have established the "due diligence" that is a prerequisite for obtaining a continuance. Even though they were aware of the trial date for at least a month, it appears that neither Greene nor his counsel began in earnest to seek out the present whereabouts of the two witnesses until the week before trial. Moreover, although Greene's counsel apparently became aware of the witnesses' absence from the state during the week before trial, there is no record that a request for a continuance was presented to the court until the morning

of trial. We conclude, therefore, that even if we were to entertain his first claim of error, Greene would have difficulty establishing that he had met the requirements for obtaining a continuance under ***Elam.***

Whether to declare a mistrial is committed to the trial court's sound discretion. ***State v. Knighten,*** 212 Wis.2d 833, 844, 569 N.W.2d 770, 774 (Ct. App. 1997). We will reverse a trial court's denial of a mistrial motion only upon a clear showing that the trial court erred in the exercise of its discretion. ***Id.*** "When a decision is within the trial court's discretion, we review it to determine whether the court examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process." ***Foy,*** 206 Wis.2d at 644, 557 N.W.2d at 499.

Greene argues that the trial court erred in denying his motion for mistrial because a state witness referred to his pre-***Miranda***[4] and pre-arrest silence at trial, in violation of his Fifth Amendment privilege against self-incrimination. Thus, Greene maintains the police officer's answer to his attorney's question on cross-examination constituted constitutional error. Whether Greene was denied his right to remain silent on the present facts is a question involving the application of constitutional principles to undisputed facts, and it is therefore a question which we decide de novo. ***State v. Pheil,*** 152 Wis.2d 523, 529-30, 449 N.W.2d 858, 860-61 (Ct. App. 1989).

We also reject Greene's second claim of error. The constitutional "right to remain silent" arises from judicial interpretation of the Fifth Amendment

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

to the United States Constitution.[5] ***State v. Zanelli,*** 212 Wis.2d 358, 369-70, 569 N.W.2d 301, 306 (Ct. App. 1997). We agree with Greene that he is entitled to exercise his right to remain silent even before he is arrested and given ***Miranda*** warnings, and that "the state's reference to [Greene's] prearrest, pre-***Miranda*** silence" may constitute constitutional error. ***State v. Fencl,*** 109 Wis.2d 224, 237-38, 325 N.W.2d 703, 711 (1982). However, we disagree that the brief and singular reference to Greene's refusal to talk to police about the charged offense, coming as did in response to a defense question, violated Greene's Fifth Amendment rights.

The United States Supreme Court has rejected a claim of error on facts very similar to those before us. In ***Greer v. Miller,*** 483 U.S. 756 (1987), the prosecutor asked the defendant during cross-examination, "[w]hy didn't you tell this story to anybody when you got arrested?" ***Id.*** at 759. Defense counsel objected immediately to this question and requested to approach the bench. ***Id.*** Defense counsel then requested a mistrial on the ground that the question violated defendant's right to remain silent. ***Id.*** The trial judge denied the motion, but immediately sustained the objection and instructed the jury to "ignore [the] question, for the time being." ***Id.*** The prosecutor never mentioned the issue again. ***Id.*** In addition, the judge specifically instructed the jury to "disregard questions ... to which objections were sustained." ***Id.*** On these facts, the United States Supreme Court held no Fifth Amendment violation had occurred. ***Id.*** at 764-66.

[5] The interpretation of the right to remain silent under Article I, section 8 of the Wisconsin Constitution parallels the federal analysis of this right under the Fifth Amendment. ***State v. Sorenson***, 143 Wis.2d 226, 259, 421 N.W.2d 77, 90 (1988).

In the present case, the improper comment came from a state witness during defense counsel's cross-examination. Thus, it is not a case where a prosecutor attempted to elicit forbidden testimony regarding a defendant's silence. Indeed, Greene cites no instance of the prosecutor making any reference to the matter throughout the entire trial. Any prejudicial effect that may have resulted from the officer's testimony was cured by the court's prompt striking of the response and its instruction to the jury to disregard the response. We must assume the jury followed this instruction. ***Knighten,*** 212 Wis.2d at 845, 569 N.W.2d at 775. Given the trial court's prompt and proper response to Greene's objection, and the isolated nature of the reference to Greene's silence, the trial court did not err in denying Greene's motion for mistrial. *See* ***Greer,*** 483 U.S. at 764-66.

By the Court.—Judgment affirmed.

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