COURT OF APPEALS
DECISION
DATED AND FILED

August 31, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2548-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVID J. PIZZINI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Affirmed.*

Before Vergeront, Roggensack, Deininger, JJ.

¶1 VERGERONT, J. David Pizzini appeals a judgment of conviction for conspiring to deliver more than one thousand grams of cocaine within one thousand feet of a public park contrary to WIS. STAT. §§ 961.16(2)(b)1; 961.41(1)(cm)5; 961.41 (1x); 961.49(1)(b)1 and (2)(a) (1995-96).

¶2 Pizzini contends: (1) the trial court erred by admitting evidence of his prior statements and allowing rebuttal testimony to impeach them in violation of his Fifth Amendment right to counsel; (2) the rule excluding statements after invoking the Sixth Amendment right to counsel should be modified so that it applies to those who are the target of an investigation and subsequently arrested; (3) the trial court erred when it did not conduct an inquiry before ruling Pizzini would not be permitted to call a witness based on the witness's Fifth Amendment right against self-incrimination; and (4) the trial court erred by denying the motion for mistrial after introduction of evidence in violation of a pretrial order. We reject each of Pizzini's claims and affirm the judgment of conviction.

DISCUSSION

Custodial Statements

¶3 On December 1, 1996, Pizzini was taken into custody when police officers converged upon him and a police informant, Richard Skaff, just after Pizzini accepted a bag containing money from Skaff. The officers found a "brick" of cocaine in the trunk of Skaff's car which, Skaff later testified at trial, Pizzini gave him. The theory of defense was that Pizzini was guilty of providing illegal tip boards to Skaff and to Thomas Brieske[1] for sports gambling, but did not deliver cocaine to Skaff on December 1 or conspire with Brieske to do so.

¶4 Upon arrest, Pizzini was taken to the police station, and he requested an attorney. Special Agent Matthews with the Department of Justice, Division of

[1] Thomas Brieske was originally charged as a co-defendant with Pizzini, but that trial ended in a mistrial. Pizzini was the only defendant in the subsequent trial that resulted in the judgment of conviction he now appeals.

Narcotics Enforcement, questioned Pizzini "off and on" over two hours while Pizzini awaited his attorney.

¶5 In a pretrial motion, Pizzini asked the court to suppress statements he made to Agent Matthews after he invoked the right to counsel. The State conceded that because the statements were made after Pizzini invoked his right to counsel, they could not be used in the State's case-in-chief. Therefore, the issue at the pretrial hearing was whether the statements were voluntary, thus enabling the State to use the statements to impeach Pizzini if he testified at trial.

¶6 Agent Matthews was the only witness at the hearing, and he testified as follows. He spoke to Pizzini several times over a two-hour period. He encouraged Pizzini to cooperate with the police and to contact his attorney, "believing that perhaps his attorney may encourage him to cooperate." Pizzini made several calls trying to reach his attorney. His attorney arrived after Pizzini had been in custody about four hours. Agent Matthews told Pizzini that any "cooperation would certainly be made known to the Court and would be considered at sentencing," but also told Pizzini he would be charged regardless of his cooperation. Agent Matthews described his discussion with Pizzini as "congenial," but said no cooperation agreement was reached. Agent Matthews made no promises or threats. Pizzini stated two reasons for not cooperating—"that we didn't even know how big this guy was," and if he cooperated "his life and his family's life would be worth nothing…." The questioning took place in an office of the La Crosse County Police Department large enough to hold six desks, and Pizzini was unshackled during this time.

¶7 The trial court ruled that Pizzini's statements to Agent Matthews were voluntary. The court stated that any pressures Pizzini felt were "self-

imposed" or "situationally imposed," he was not threatened, no promises were made, and the conversations were "general in nature as they relate to Mr. Pizzini cooperating with law enforcement and not specific in terms of attempting to elicit the response from Mr. Pizzini concerning his involvement in the offense." Therefore, the court ruled, Pizzini's statements to Agent Matthews could be used by the State on rebuttal for impeachment purposes if Pizzini testified.

¶8 During trial, Pizzini testified on cross-examination that he did not remember that police told him he was being charged with delivery of cocaine, did not recall if Agent Matthews asked him about the source for the kilogram of cocaine, and, although he might have said "you don't know how big these guys are," he did not put the statement "into any context." On redirect, he said he was referring to "the people in Minneapolis" who provided tip boards. Also, on cross-examination Pizzini volunteered that Agent Matthews threatened him with thirty years in prison, threatened to arrest his wife, "put her in prison for ten years and she would have our baby on the floor of a women's prison … [and] threaten[ed] to put our daughter in a foster home the next day if I did not cooperate. He did not say for what." He was "yelling and screaming at me and threatening me." Pizzini also testified that the questioning took place in a little room with a table and one or two chairs, and he was handcuffed behind his back.

¶9 After Pizzini testified, defense counsel asked the court to preclude rebuttal testimony from Agent Matthews on Pizzini's custodial statements because, based on Pizzini's trial testimony, they were involuntary and his testimony was not inconsistent with Matthews's pretrial testimony. The court denied the motion, stating that it had already made the finding on voluntariness, and the time for offering evidence on that issue was at the pretrial hearing.

¶10 On appeal, Pizzini asserts the statements made to Agent Matthews were not voluntary and should, therefore, be excluded from evidence.

¶11 An individual has a Fifth Amendment right to have counsel present during a custodial interrogation. *See* ***Miranda v. Arizona***, 384 U.S. 436, 474 (1966). Once the right to counsel is invoked, all police initiated questioning must stop, unless the individual initiates further communication with the police. *See* ***State v. Franklin***, 228 Wis. 2d 408, 412, 596 N.W.2d 855 (Ct. App. 1999). As we have already noted, the State conceded that Pizzini's statements to Agent Matthews were made after he invoked his right to counsel. Statements obtained in violation of ***Miranda*** are involuntary and inadmissible at trial for any purpose. *See* ***id.*** However, voluntary statements, even though obtained in violation of ***Miranda***, are admissible if a defendant testifies at trial as rebuttal to impeach a defendant's inconsistent statements. *See* ***id.***

¶12 To determine if a statement is voluntary, the court balances the defendant's personal characteristics against police-imposed pressures by making an inquiry into how the statement was obtained. *See* ***State v. Clappes***, 136 Wis. 2d 222, 236, 401 N.W.2d 759 (1987). A defendant's personal characteristics may include age, level of education, intelligence, physical and emotional condition, and prior experience with the police; police pressures may include length of the interrogation, general conditions of custody, use of threats, excessive physical or psychological pressures, strategies used to compel a response, and whether the individual was informed of his right to counsel against self-incrimination. *See* ***id.*** at 236-37.

¶13 Whether a statement meets the constitutional standard of voluntariness is a question of law, which we review de novo. *See* ***State v. Turner***,

136 Wis. 2d 333, 344, 401 N.W.2d 827 (1987). However, we accept the trial court's findings of fact unless they are clearly erroneous. *See* ***State v. Shaffer***, 96 Wis. 2d 531, 544, 292 N.W.2d 370 (Ct. App.1980).

¶14 Based on the evidence presented at the pretrial hearing, the court correctly concluded Pizzini's statements were voluntary, and Pizzini does not appear to argue otherwise. Rather, his argument is that the court should have reconsidered this ruling and reached a different conclusion after Pizzini's testimony at trial. However, he does not develop an argument in support of the position that the trial court erred in not revisiting the motion during trial. He presents no reason why he could not have testified at the pretrial hearing, held at his request on his motion, allowing the court to take his testimony into account in the pretrial ruling. We conclude the trial court did not err in denying the motion to reconsider its pretrial ruling.

¶15 Pizzini also asserts that his trial testimony was not inconsistent with Agent Matthews's pretrial testimony and Agent Matthews therefore should not have been allowed to testify in rebuttal. We disagree. There were inconsistencies in the following areas: whether Pizzini was restrained during custody, how large the interrogation room was, whether he or his family was threatened by Agent Matthews, whether the interrogation was conducted in a forceful manner, whether Pizzini was informed he was under arrest for delivery of cocaine, and whether Pizzini had been asked to name the source of the cocaine that was found.

¶16 We conclude the trial court correctly determined, based on the pretrial testimony, that Pizzini's custodial statements were voluntary. It also correctly determined Pizzini's trial testimony was inconsistent with Agent Matthews's pretrial testimony regarding Pizzini's custodial statements and the

circumstances of the custodial questioning. Therefore, the court properly allowed Agent Matthews to testify in rebuttal, and his testimony was within the proper scope of rebuttal.

Sixth Amendment Right to Counsel

¶17 An individual charged with a crime has a Sixth Amendment right to counsel at every "critical stage" of the proceedings. ***State v. Hornung***, 229 Wis. 2d 469, 476, 600 N.W.2d 264 (Ct. App. 1999). The Wisconsin Supreme Court has defined the first "critical stage" to be the point at which a warrant is issued or a complaint is filed. *See* ***Jones v. State***, 63 Wis. 2d 97, 104, 216 N.W.2d 224 (1974). A defendant must invoke the right to counsel; the state is then prohibited from initiating contact or questioning the defendant about the charged crime. *See* ***Hornung***, 229 Wis. 2d at 476.

¶18 Pizzini acknowledges that no arrest warrant was issued and no complaint was filed before he was questioned on December 1, 1996. However, he asserts, we should review "the bright line rule" on when the right to counsel attaches and should modify it such that the right attaches to a person who is the subject of a police investigation and is subsequently arrested. Pizzini contends the facts of his case are substantially different from those in the existing case law because, by the time he was interviewed by Agent Matthews, the matter had moved out of the investigatory stage and into the accusatorial stage, even though a warrant had not been issued nor a complaint filed. Existing case law does not discuss the Sixth Amendment right to counsel under these circumstances, he contends.

¶19 We conclude that, under existing case law, the right to counsel did not attach at the time Pizzini was questioned. Pizzini must address his arguments

for a modification of the case law to the Wisconsin Supreme Court. The Court of Appeals is bound by decisions of the supreme court, and may not overrule, modify or withdraw language from published opinions of the Court of Appeals. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 188, 560 N.W.2d 246 (1997).

Witness's right against self-incrimination

¶20 During trial, defense counsel informed the court that Matthew Skaff, son of Richard Skaff, had "some concerns as to whether or not he may have some potential criminal exposure if he testifies." Matthew then spoke with an attorney, Peder Arneson, who was in the courtroom as a spectator, about concerns of self-incrimination if he testified as a witness. Arneson advised the court that Matthew's testimony could be potentially incriminating and that he wished to assert his Fifth Amendment right to not testify. The court recessed to allow the parties time to discuss Matthew's proposed testimony. After the recess, Arneson appeared before the court, and, referring to Matthew as "my client," informed the court that Matthew would invoke the privilege against self-incrimination.

¶21 The court agreed it was not appropriate to call Matthew as a witness. Defense counsel asked the court if he could pose questions of non-criminal activity to Skaff. The court responded, "[d]oes it have anything to do with the case?" Defense answered, "[w]ell, I can ask him if he drove to Minneapolis with his dad." The court stated that was not an issue in the case. Defense then asked the judge if he could question the witness about "familiarity with the car," at which Skaff's attorney responded he would instruct his client to "plead the Fifth." The court stated, "Okay. He won't be allowed to be called, then."

¶22 Defense counsel then made an offer of proof that Matthew would testify as follows: he traveled with his father to Minneapolis on Wednesday,

November 27; his father left the family one day during the trip and purchased cocaine; the following morning he asked his father for cocaine, and his father opened the trunk of the car and showed him a brick-shaped package of cocaine and told him when they reached home he (his father) would "cut it up for [him]"; they then drove to his father's home, where Matthew was told he should leave the house right away, which he did; Matthew does not know what happened to the cocaine after that point. The trial court acknowledged the offer of proof and stated "Obviously that testimony will not be coming in as … Matthew Skaff has a right to claim the Fifth."

¶23 A witness may invoke his Fifth Amendment right against self-incrimination whenever a "real and appreciable apprehension that the information requested could be used against him in a criminal proceeding." *See* ***State v. Marks***, 194 Wis. 2d 79, 89, 533 N.W.2d 730 (1995). The trial court is responsible for making specific inquiry into the witness's claim of self-incrimination. ***Id.*** at 96. However, specific inquiry is not necessary if it is evident from the implication of the questions that "injurious disclosure could result." ***Id.*** at 97. The trial court must be "clear" that the witness's fear of incrimination is not unfounded. ***Id***. The court must favor that fear of incrimination over the conflicting right to compulsory process. *See* ***State v. Seibert***, 141 Wis. 2d 753, 760, 416 N.W.2d 900 (Ct. App. 1987). A trial court's finding that a witness had a valid reason to claim the Fifth Amendment privilege will not be overturned unless it is "against the great weight and clear preponderance of the evidence." ***Id***.

¶24 Pizzini asserts the trial court erred in ruling Matthew would not be required to testify because: (1) the right was invoked through an attorney who said Matthew was not his client, (2) the court failed to conduct a proper inquiry into whether a valid reason existed for invoking the Fifth Amendment privilege,

and (3) the questions that would have been posed to Matthew were of a non-criminal nature, and therefore, not incriminating. We conclude there was no trial court error on any of these grounds.

¶25 First, the record shows that although Arneson was present as a spectator when the issue of Matthew's testimony first arose, after the recess Arneson referred to Matthew as "my client" and informed the court of his client's intention to "plead the Fifth." There is no basis in the record for concluding that Arneson did not confer with Matthew during the recess and was not acting as Matthew's attorney, as he stated. As Matthew's attorney, Arneson may assert the Fifth Amendment privilege on behalf of his client. *See* ***State v. Whitaker***, 167 Wis. 2d 247, 264-65, 481 N.W.2d 649 (Ct. App. 1992).

¶26 Second, although the court may not have elicited information on the specifics of the proposed testimony initially, the offer of proof supplied that, and the court repeated its ruling after the offer of proof.

¶27 Third, we conclude that the trial court's decision to allow Matthew to claim the privilege is not against the great weight and clear preponderance of the evidence. Testimony that he asked his father for cocaine and his father showed him a "brick" and said he would give him some would be incriminating for Matthew. On appeal, Pizzini attempts to separate questions about Matthew's familiarity with his father's car and the trip to Minneapolis from information incriminating Matthew. He argues that Matthew's testimony could establish a location in the car in which Skaff hid the cocaine prior to meeting Pizzini. However, Matthew's knowledge about the "hiding place" could implicate his knowledge of his father's activities with cocaine. Moreover, his testimony was unnecessary if Pizzini wanted only to show a physical description of the car: a

photograph would have sufficed. The evidence that Skaff was absent for a time during the trip to Minneapolis may not incriminate Matthew, but it has little probative value without the other details in the offer of proof, which are incriminating. In short, given that the court is to favor a witness's fear of incrimination over the defendant's right to present witnesses, *see* ***Seibert***, 141 Wis. 2d at 760, we are satisfied the court's ruling should be sustained.

Request for Mistrial

¶28 Prior to the first trial with Brieske as a co-defendant,[2] Brieske moved to exclude testimony regarding prior drug deals with Skaff, and Pizzini joined in the motion. The prior drug deals specifically referred to were between Skaff and Brieske. The court granted the motion on the ground that such evidence would be unduly prejudicial, and the prejudice would outweigh any probative value because the charges related only to the delivery on December 1, 1996.

¶29 Before the second trial, Pizzini again moved to exclude testimony regarding prior drug transactions. The focus of this motion was on transactions between Skaff and Pizzini, although prior transactions between Skaff and Brieske were also mentioned. At the hearing on the motion, defense counsel described the motion as the same the trial court earlier ruled on and asked if the ruling remained the same. The court said it did.

¶30 At trial, there was evidence that Skaff had been arrested for possessing seventeen ounces of cocaine on November 14, 1996, and had entered into an agreement with the police whereby he agreed to attempt to buy one

[2] *See* footnote 1.

kilogram of cocaine from Brieske and Pizzini. In recounting his contacts with Brieske after his arrest, Skaff stated that Brieske gave him $2,800 "from a previous buy." Defense counsel objected, and outside the presence of the jury, moved for a mistrial on the ground of a violation of the pretrial order. The court denied the motion, explaining the jury could logically infer Skaff had previous drug dealings from the evidence of his arrest for possession of seventeen ounces of cocaine. The trial court determined a curative instruction would be appropriate, but would not "necessarily have to do it now," and did not intend to provide the instruction at that time. Defense counsel asked for a curative instruction to be given as soon as questioning resumed. However, the court did not do so, defense counsel did not later ask that a curative instruction be given, and none was given.

¶31 Pizzini contends Skaff's testimony was unduly prejudicial to him, the trial court's decision not to grant a mistrial was an erroneous exercise of discretion, and the prejudicial effect of the testimony was not erased because the trial court did not give a curative instruction.

¶32 A trial court's decision to grant or deny a mistrial is discretionary. *See* ***State v. Adams***, 223 Wis. 2d 60, 83, 588 N.W.2d 336 (Ct. App. 1998). In determining whether to grant or deny a motion for mistrial, the trial court "must consider the entire proceeding and determine whether the claimed error is sufficiently prejudicial to warrant a new trial." ***Id.*** A "manifest necessity" must exist before a trial is terminated. *See* ***State v. Givens***, 217 Wis. 2d 180, 191, 580 N.W.2d 340 (Ct. App. 1998). We reverse a trial court's denial of a motion for mistrial only on a "clear showing" of erroneous exercise of discretion." ***Adams***, 223 Wis. 2d at 83. The test is whether, under all the facts and circumstances, giving deference to the trial court's firsthand knowledge, it was reasonable to deny

the mistrial under the "manifest necessary" standard. *See* ***State v. Reid***, 166 Wis. 2d 139, 145-56, 479 N.W.2d 572 (Ct. App. 1991).

¶33 We conclude the trial court properly exercised its discretion in denying the motion for a mistrial. Skaff's testimony concerned a prior drug deal with Brieske, not Pizzini. We are not persuaded this testimony prejudiced Pizzini.

¶34 We also do not agree that the trial court's failure to provide a curative instruction means Pizzini did not receive a fair trial. First, as we have just stated, Pizzini has not shown he was prejudiced by Skaff's testimony. Second, defense counsel did not again request the curative instruction even though the court indicated it would consider giving one at a later time. Therefore, he has waived the right to appeal the trial court's failure to give this instruction at a later time. *See* ***Coleman v. State***, 64 Wis. 2d 124, 128-29, 218 N.W.2d 744 (1974) (when trial court denies a request but indicates movant may renew at a later time, failure to do so constitutes waiver).

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.