COURT OF APPEALS
DECISION
DATED AND FILED

June 19, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 01-0102-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PHA VUE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: LARRY JESKE, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Pha Vue appeals his judgment of conviction for two counts of attempted first-degree intentional homicide, contrary to WIS. STAT.

§§ 940.01(1), 939.32, and 939.625(1)(a).[1] Vue argues the trial court erred as a matter of law by: (1) determining that Vue's statement was admissible even though it was taken after he had invoked his constitutional right to remain silent; (2) denying Vue's motion for a mistrial based upon a witness's improper comment regarding Vue's Fifth Amendment right to remain silent; and (3) deciding Vue's initial stop was legal. We disagree and affirm the conviction.

BACKGROUND

¶2 On September 10, 1998, Wausau West High School liaison officer, Brian Hilts, was informed that two males were walking back and forth in front of the school. Hilts approached the two males, asked them to identify themselves, and asked them what they were doing in the area. One of the males identified himself as Pha Vue. Hilts recognized Vue's name because the Brown County Sheriff's Department had issued a warrant for Vue for attempted murder. Hilts then arrested Vue.

¶3 Vue was eventually transferred to the Brown County jail. While being transported, Vue refused to answer any questions posed by investigator Ronald Smith.

¶4 On September 28, 1998, Vue was transported from the Brown County jail to the Green Bay Police Department to be fingerprinted and photographed. While waiting for the pictures to be developed, Smith told Vue that he did not want to ask him any questions. Vue was there only for the photo and ID processing.

[1] All statutory references are to the 1997-98 edition unless otherwise noted.

¶5 Vue then asked Smith about the length of time he was facing if convicted. Smith stated that it was "something like 90 to 100 years." Vue then stated, "That's if you have any witnesses, right?" Vue had not been given his ***Miranda***[2] warning. At trial, Vue argued that the statement was inadmissible. The court determined that the statement was admissible.

¶6 Additionally, while testifying, the State asked Smith why his initial contact with Vue ceased. Smith stated that Vue "would not talk to us." Vue moved for a mistrial claiming that his Fifth Amendment right to remain silent was being used against him. The trial court denied the motion.

¶7 Vue also challenged the legality of Hilts' stop outside the high school. Vue moved to items obtained as a result of the stop and subsequent arrest. The trial court also denied this motion. Vue was subsequently found guilty on both counts of attempted first-degree intentional homicide. This appeal followed.

DISCUSSION

I. Admissibility of Voluntary Statement

¶8 Vue argues that the trial court erred as a matter of law by deciding that his statement to Smith was admissible. He contends that the statement was taken after he invoked his constitutional right to remain silent and to counsel, pursuant to his Fifth, Sixth, and Fourteenth Amendment rights. He further contends that the police initiated the contact.

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

¶9 This issue involves the application of facts to federal and state constitutional principles, which we review independently of the trial court. ***State v. Lee***, 175 Wis. 2d 348, 354, 499 N.W.2d 250 (Ct. App. 1993). "However, historical factual determinations made by the trial court will be affirmed unless clearly erroneous." ***Id.***

A. Self-Incrimination

¶10 Vue first argues that the statement was obtained in violation of his Fifth Amendment privilege against self-incrimination. He contends that he had invoked his right to remain silent and that the police initiated the contact.

¶11 In ***Miranda v. Arizona***, 384 U.S. 436, 479 (1966), the United States Supreme Court held that for an admission or confession to be admissible under the Fifth Amendment privilege against self-incrimination, the defendant must be informed of various rights before questioning. These rights include the right to remain silent. If the defendant indicates at any time prior to or during questioning that he or she desires to remain silent, the police must scrupulously honor this request and the interrogation must cease. ***Id.***

¶12 It is undisputed that Vue invoked his right to remain silent. However, the State argues that Vue's statement was not a product of interrogation. It further argues that ***Miranda*** was not violated simply because the statement was obtained as a result of police contact.

¶13 We conclude that Vue's statement was a spontaneous, volunteered statement. Vue's statement was not given as an answer to a question by the police. Smith had specifically told Vue that he did not want to ask him any questions. Smith told Vue that he was there only for the photo and ID processing.

Vue asked Smith about the length of time he was facing. Smith told him. Vue's statement was in response to Smith's answer. This statement is admissible under ***Miranda*** for two reasons.

¶14 First, as ***Miranda*** points out, "[v]olunteered statements of any kind are not barred by the Fifth Amendment." ***Id.*** at 478. As stated above, Vue volunteered the statement.

¶15 Second, ***Miranda*** does not apply to all statements resulting from police contact, but only those "statements resulting from a custodial interrogation of a defendant." ***State v. Buck***, 210 Wis. 2d 115, 123, 565 N.W.2d 168 (Ct. App. 1997). Here, the defendant was in custody when he made the statement at issue, but there was no interrogation by the police. Nor were there "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." ***Rhode Island v. Innis***, 446 U.S. 291, 301-02 (1980).

¶16 We conclude that answering Investigator Smith's contact with Vue is not the type that would be expected to elicit an incriminating response. Because the statement was volunteered and not made in response to interrogation, there is no basis for Vue's argument that the statement violates his Fifth Amendment right to remain silent.

B. Right to Counsel

¶17 Next, Vue argues that the statement was obtained in violation of his Sixth Amendment right to counsel. He contends that the Sixth Amendment requires suppression of the statement because his right to counsel attached when the complaint was filed.

¶18 There is no dispute that when Vue made his statement, he not only had a right to counsel, he had already obtained counsel, so that any police "question[ing] about the crimes charged in the absence of an attorney" would have been impermissible. ***State v. Dagnall***, 2000 WI 82, ¶53, 236 Wis. 2d 339, 612 N.W.2d 680. Here, according to the facts, Vue's statement was not the product of police questioning about the crime. Rather, it was a spontaneous, volunteered statement.

¶19 In ***Maine v. Moulton***, 474 U.S. 156, 176 (1985), the United States Supreme Court stated that the "Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached." To establish a violation of the right to counsel, Vue "must demonstrate that the police … took some action beyond merely listening, that was designed deliberately to elicit incriminating remarks." ***Kuhlmann v. Wilson***, 477 U.S. 436, 459 (1986).

¶20 This is not the situation here. Smith did not elicit the incriminating statement. He expressly told Vue that he did not want to talk to him about the case and that he did not want to ask him any questions. Our supreme court has expressly recognized that there is no violation of a defendant's Sixth Amendment right to counsel under similar circumstances. ***Dagnall***, 236 Wis. 2d at ¶54.

¶21 In ***Dagnall***, the court described the facts in ***Patterson v. Illinois***, 487 U.S. 285 (1988):

> Patterson had been arrested on charges of battery and mob action. After receiving ***Miranda*** warnings, he answered questions about the charges but denied knowledge of a gang slaying that had occurred the same day. Witnesses accused Patterson of involvement in the slaying, however, and police held him in custody. Two days later he was

> indicted for the murder. When an officer informed Patterson of the indictment, Patterson asked which of his fellow gang members had been charged. Upon learning that the charges had omitted one particular gang member, Patterson asked: "[W]hy wasn't he indicted, he did everything." Patterson also began to explain that there was a witness who would support his account of the crime.

Dagnall, 236 Wis. 2d at ¶43 (citations omitted). According to the ***Dagnall*** court, the unguarded outbursts in ***Patterson*** did not violate the defendant's Sixth Amendment rights. ***Dagnall***, 236 Wis. 2d at ¶64.

¶22 Vue's statement is analogous to the statement made in ***Patterson***. Both were spontaneously made after a law enforcement officer had answered a question the defendant had about the charges against him. Just as the statement made in ***Patterson*** was not obtained in violation of the Sixth amendment, Vue's statement was not obtained in violation of that right.

¶23 Vue cites ***State v. Hornung***, 229 Wis. 2d 469, 600 N.W.2d 264 (Ct. App. 1999), to argue that the police may not initiate any "contact" with a defendant about a charged crime, without violating the defendant's Sixth Amendment right to counsel with respect to that crime. Therefore, Vue argues, because his statement was the product of police-initiated contact, it could not be used without violating his right to counsel.

¶24 The attachment of the Sixth Amendment right to counsel, coupled with a criminal defendant's assertion of this right, "prohibits the government from initiating any contact or interrogation concerning the charged crime, and any subsequent waivers by a defendant during police-initiated contact or interrogation are deemed invalid." ***Id.*** at 476. Vue interprets this passage too broadly. Under Vue's reasoning, police can have no contact with a defendant whatsoever.

¶25 The "contact" we discussed in ***Hornung*** was contact for the purpose of questioning, or otherwise eliciting a statement from the defendant. "The authorities … may not initiate contact for questioning about the charges." ***Dagnall***, 236 Wis. 2d at ¶54. Here, Smith did not have contact with Vue for the purpose of questioning or otherwise eliciting a statement from him. Rather, the contact was for photo and ID processing. Therefore, there was no violation of Vue's Sixth Amendment right to counsel.

II. Right to Remain Silent

¶26 Vue argues that the trial court erred as a matter of law by denying his motion for a mistrial based upon the improper comment during trial regarding Vue's Fifth Amendment right to remain silent. Vue contends that the State asked Investigator Smith a question designed to elicit an improper comment on Vue's absolute right to silence.

¶27 The decision whether to grant a mistrial is vested within the sound discretion of the trial court. ***Wheeler v. State***, 87 Wis. 2d 626, 630, 275 N.W.2d 651 (1979). "In making its determination, the trial court must decide, in light of all the facts and circumstances, whether the claimed error is sufficiently prejudicial to warrant a mistrial." ***State v. Nienhardt***, 196 Wis. 2d 161, 166, 537 N.W.2d 123 (Ct. App. 1995). The denial of a motion for a mistrial will be reversed only on a clear showing of an erroneous exercise of discretion by the trial court. ***State v. Pankow***, 144 Wis. 2d 23, 47, 422 N.W.2d 913 (Ct. App. 1988).

¶28 A motion for a mistrial is not warranted unless, in light of the entire proceeding, the basis for the mistrial motion is sufficiently prejudicial to warrant a new trial. ***State v. Bunch***, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995). However, not all errors warrant a mistrial and "the law prefers less drastic

alternatives, if available and practical." ***Id.*** at 512. A mistrial is appropriate only when a "manifest necessity" exists for the termination of the trial. ***Id.*** at 507.

¶29 When the State asked Smith why he had stopped talking to Vue, Smith stated, "He would not talk to us." When this testimony was elicited, Vue's counsel immediately objected and the jury was excused. Vue immediately moved for a mistrial. The trial court denied the motion. However, the trial court gave a curative instruction, a modified version of WIS JI—CRIMINAL 315:

> The defendant in a criminal case has an absolute constitutional right not to testify. The defendant's decision not to testify must not be considered by you in any way and must not influence your verdict in any manner.
>
> The defendant also has an absolute constitutional right not to make a statement to police. The defendant does not have to cooperate with law enforcement officers in any way or make any statements. If any such evidence has been presented, you are to disregard it. Such evidence, must not be considered by you in any way and must not influence your verdict in any manner.

¶30 Here, the trial court did not erroneously exercise its discretion by concluding that the testimony was not sufficiently prejudicial to warrant a new trial. Smith's objectionable testimony consisted of six words in a four-day trial. That fact that Vue would not talk with police was never again mentioned in the course of the trial other than by the curative instruction. The State never attempted to use that fact against Vue and never suggested that Vue's refusal to talk should somehow be viewed as indicative of Vue's guilt.

¶31 The objectionable testimony is insignificant when viewed in light of the other evidence presented by the State. The attempted murder charges in this case were based on Vue's shooting of two victims. Eyewitnesses identified Vue as the person who fired the shots. Another witness testified that after the shooting,

Vue stated that he had shot two people, but did not know if they were dead. The State produced evidence at trial that overcomes any possible prejudice of the objectionable testimony.

¶32 More importantly, the trial court obviated any potential prejudice by choosing a less drastic alternative to a mistrial and giving a curative instruction. "[P]ossible prejudice to a defendant is presumptively erased from the jury's collective mind when admonitory instructions have been properly given by the court." ***Roehl v. State***, 77 Wis. 2d 398, 413, 253 N.W.2d 210 (1977).

¶33 Therefore, we conclude that a mistrial was not warranted. The trial court did not erroneously exercise its discretion.

III. Unlawful Stop

¶34 Last, Vue argues that Hilts unlawfully stopped him outside Wausau West High School. He contends that Hilts did not have reasonable suspicion of criminal activity necessary to render the stop lawful.

¶35 To justify a warrantless stop of a defendant, an officer is required to have a reasonable suspicion based upon specific and articulable facts which, taken together with rational inferences from those facts, reasonably warranted the intrusion. ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). It is a common sense question that strikes a balance between law enforcement and the interests of society to be free from unreasonable intrusions. ***State v. Jackson***, 147 Wis. 2d 824, 831, 434 N.W.2d 386 (1989). Whether the facts satisfy constitutional guarantees is a question of law we review independently. ***State v. Andrews***, 201 Wis. 2d 383, 388, 549 N.W.2d 210 (1996).

¶36 A ***Terry*** stop is a form of seizure under the Fourth Amendment. ***Terry v. Ohio***, 392 U.S. 1, 16; ***State v. Goebel***, 103 Wis. 2d 203, 208, 307 N.W.2d 915 (1981). The test to determine when police questioning triggers Fourth Amendment scrutiny is whether, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was free to leave. ***United States v. Mendenhall***, 446 U.S. 544, 554 (1980). The circumstances include physical contact, the threatening presence of several officers, the display of weapons, and the use of language or tone indicating that compliance might be compelled. ***Id.***

¶37 There is nothing in the Constitution which prevents police officers from addressing questions to anyone on the street. The United States Supreme Court has established that

> law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.

Florida v. Royer, 460 U.S. 491, 501 (1983). Police officers are free to address questions to anyone on the streets because police officers, like all other citizens, enjoy the liberty to ask questions. ***Mendenhall***, 446 U.S. at 553. "As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification." ***Id.*** at 554. Moreover, even a show of authority intended to effect a stop does not constitute a seizure unless and until the subject actually submits to the officer's authority. ***California v. Hodari D.***, 499 U.S. 621, 626 (1991).

¶38 Police questioning that occurs when the person addressed is free to leave is a necessary tool for the effective enforcement of criminal laws. ***Id.*** "The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but `to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" ***Id.*** at 553-54 (citation omitted). Therefore, characterizing every street encounter between citizens and police officers as a stop, while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices. ***Id.*** at 554.

¶39 The only evidence regarding the circumstances surrounding Hilts' initial interaction with Vue before Vue's arrest was Hilts' testimony:

> Q And when you saw these individuals, what did you do?
>
> A I stopped them to identify them and find out what they were doing in the area.
>
> Q Did you exit your vehicle?
>
> A Yes I did.
>
> ….
>
> Q After you got out of your vehicle did you talk to them?
>
> A Yes, I did.
>
> Q What did you say?
>
> A I asked—I identified myself, I believe I showed them my badge, and I asked their names and asked why they were in the area.
>
> Q And what kind of response did you get?
>
> A One of the males identified himself as Pha Vue ….

¶40 None of the circumstances described in ***Mendenhall*** are present here. There was no evidence that any officer other than Hilts was present, that Hilts displayed a weapon, that Hilts ever physically touched Vue, or that Hilts

used language or tone of voice indicating compliance with his request of information might be compelled. The record only establishes that Hilts approached and questioned Vue. There was no investigative stop.

¶41 Vue cites WIS. STAT. § 968.24[3] arguing that the statute provides greater protection than the Fourth Amendment for citizens to be free from investigative stops. He contends that the statute requires reasonable suspicion of criminal activity before a police officer can stop an individual. However, our supreme court has stated that § 968.24 is "the 'statutory expression' of the constitutional requirements set down in the ***Terry*** decision." ***State v. Williamson***, 113 Wis. 2d 389, 399-400, 335 N.W.2d 814 (1983). The statute does not afford greater protection than the Fourth Amendment. Therefore, we conclude that there was not a stop for purposes of the Fourth Amendment and WIS. STAT. § 968.24.

¶42 Additionally, even if we concluded that Hilts' encounter with Vue was an investigative stop, Hilts possessed reasonable suspicion. Hilts testified about what prompted him to investigate Vue and his companion:

> I was leaving the [high school] building and I was actually driving on the drive in front of the building, and I was approached by Mrs. Keene, who is our commons supervisor. She flagged me down and came over to talk to me, told me that there were two males that had been walking back and forth in front of our building and kind of looking like they were looking for somebody or waiting for

[3] WISCONSIN STAT. § 968.24 reads as follows:

> After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

> somebody to come out. She felt that was suspicious activity.

It was approximately 2:30 p.m. when Hilts approached Vue. School let out at 3 p.m. When he approached Vue and his companion, Hilts stated that they "had quite baggy clothing on [and] baseball caps tilted to the side." Hilts also stated that they were dressed in a manner he associated "with gang members."

¶43 Hilts is a school liaison officer at Wausau West High School. School officials "have a responsibility to protect those students and their teachers from behavior that threatens their safety …." ***State v. Angelia D.B.***, 211 Wis. 2d 140, 157, 564 N.W.2d 682 (1997). A liaison officer is in the school "to assist school officials in maintaining a safe and proper educational environment." ***Id.*** at 158. At the same time, gang-related violence, often involving shooting of other persons to assert gang dominance over a particular area, has become a regular occurrence. *See* ***State v. Murillo***, 2001 WI App 11, ¶2, 240 Wis. 2d 666, 623 N.W.2d 187.

¶44 Against that backdrop, Hilts had reasonable suspicion to justify a seizure. He had a special obligation to insure the safety of the students at the high school. Vue and his companion had been walking back and forth in front of the school building as if they were looking for someone at a time shortly before school was to be let out. Hilts may not have had probable cause to believe Vue was breaking the law, but he did have reasonable suspicion. "Police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop." ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). Therefore, we conclude that Hilts possessed reasonable suspicion to justify a warrantless stop.

By the Court.—Judgment affirmed.

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