

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 4, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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Appeal No. 2005AP3162-CR

Cir. Ct. No. 2003CF447

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICARDO L. GABINO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Ricardo L. Gabino has appealed from a judgment convicting him after a jury trial of two counts of hit and run involving great bodily harm and two counts of causing great bodily harm by intoxicated use of a motor

vehicle.¹ He has also appealed from an order denying his motion for postconviction relief. We affirm the judgment and order.

¶2 Gabino's convictions arise out of an accident that occurred on August 24, 2003, in which a motorcycle carrying two people was struck by a reddish-colored pickup truck, which then fled the scene. The truck was located shortly after the accident in the town of Lyons, approximately one-and-a-half to two miles from the scene of the accident. Gabino was in the truck when the police arrived, being detained by citizens gathered around the vehicle. He was subsequently handcuffed, arrested for hit and run, and placed in the back of a locked squad car.

¶3 On appeal, Gabino argues that the trial court erred by denying his motion to suppress statements made by him at the scene of his arrest and at the hospital where he was taken for a blood test. He contends that the police violated his right to be free from compelled self-incrimination by interrogating him at the scene of his arrest without first advising him of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). He contends that the police violated his rights at the hospital by interrogating him after he invoked his right to remain silent.

¶4 An evidentiary hearing was held on Gabino's motion to suppress. At the conclusion of the hearing the trial court made detailed and thorough

¹ Gabino was charged with two counts each of causing great bodily harm by operating a motor vehicle while intoxicated, causing great bodily harm by operating a motor vehicle with a prohibited blood alcohol concentration, and hit and run involving great bodily harm. The jury found him guilty of all of the charges. However, he was sentenced for only the two counts of hit and run involving great bodily harm and the two counts of causing great bodily harm by intoxicated use of a motor vehicle, not for the two counts of causing great bodily harm by operating a motor vehicle with a prohibited blood alcohol concentration. See WIS. STAT. § 940.25(1m)(b)(2005-06).

findings of fact and conclusions of law. It found that the arresting officers smelled a strong odor of intoxicants on Gabino when they handcuffed and arrested him for the hit and run. It found that after Gabino was placed in the squad car, Deputy Gerald Post, Jr., opened the door and introduced himself, and that Gabino stated that he would talk to Post, but not to the other officer, because he recognized Post as a jail chaplain.² The trial court found that Post then advised Gabino that he was “assigned to investigate the possibilities of an alcohol-related offense regarding the accident that he was involved in.” The trial court found that Gabino replied that he “only had three beers,” and that Post then stated that he “was going to have to make a determination in deciding whether or not he was going to be arrested for operating while intoxicated.” The trial court found that Gabino again stated that he only had three beers and was not intoxicated. The trial court specifically found that Post had not asked Gabino any questions up to that point.

¶5 The trial court found that Post subsequently asked Gabino questions, including asking him whether he had been drinking after the accident, whether he was aware that he had struck another vehicle, and whether he was the driver at the time of the accident. Post indicated that Gabino replied that he had not been drinking after the accident, that he had three beers a half hour before the accident, that he was aware that he struck another vehicle, and that he was the driver of the vehicle and was alone at the time of the accident.

¶6 The trial court found that after performing field sobriety tests, Post took Gabino to the hospital, where a blood sample was taken. The trial court

² In his testimony, Post indicated that he had previously led a bible study in the jail. This is apparently what Gabino was referring to.

found that at the hospital, Post gave Gabino his *Miranda* warnings, using the pre-interrogation warning section of an alcohol influence report form. The trial court found that when Post asked Gabino to answer the questions on the form, Gabino replied that he did not want to answer “those” questions. The trial court found that Gabino continued to talk to Post about other matters, like drug dealing in the area, and that Post then turned the subject back to the accident, using an interrogation technique to elicit Gabino’s agreement or disagreement with statements regarding the accident. The trial court found that a number of incriminatory statements were made by Gabino in response to Post’s comments. Those statements included an admission that he hit a motorcycle while traveling on Highway 36 and that, after doing so, he went off the road and through a soybean field, where he came to a stop before driving away. Gabino also stated that he was alone when the accident took place.

¶7 Based upon its findings of fact, the trial court denied Gabino’s motion to suppress the statements made by him in response to Post’s initial statements that he was assigned to investigate the possibility of an alcohol-related offense and to determine whether to arrest Gabino for operating while intoxicated. The trial court found that these statements by Post did not constitute interrogation, and that Gabino’s spontaneous replies that he had had only three beers and was not intoxicated were therefore admissible.

¶8 Although the trial court admitted Gabino’s initial statements to Post, it suppressed the other statements made by him in the squad car, including his statements that he was aware he had hit another vehicle, that he was the driver at the time of the accident, and that he had not been drinking after the accident. The trial court concluded that these non-*Mirandized* statements were made in response to questions posed by Post and therefore constituted custodial interrogation. At

the suppression hearing, the State conceded that the trial court's conclusions as to these particular statements was correct.

¶9 The trial court denied Gabino's motion to suppress the statements made by him at the hospital, including his admission that he hit a motorcycle while traveling on Highway 36 and was alone at the time. In doing so, the trial court concluded that Gabino did not unequivocally invoke his right to remain silent after he received the *Miranda* warnings.

¶10 At trial, the statements made by Gabino at the hospital were introduced into evidence in the State's case-in-chief. Subsequently, Gabino took the stand in his own defense, testifying that he was a passenger in the truck at the time of the accident and only started driving the truck after the driver leapt out in Lyons. In its rebuttal case, the State presented all of the statements made by Gabino in the squad car, including the statements that had been suppressed.

¶11 On appeal, Gabino contends that his initial statements to Post should have been suppressed because they were not preceded by *Miranda* warnings and were made in response to statements by Post that were the functional equivalent of interrogation. We disagree.

¶12 *Miranda* warnings need be given only when an individual is subjected to custodial interrogation. *State v. Fischer*, 2003 WI App 5, ¶22, 259 Wis. 2d 799, 656 N.W.2d 503. Interrogation includes the express questioning of a suspect, and conduct or words that are the functional equivalent of express questioning. *Id.*, ¶24. The functional equivalent of express questioning is "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." *Id.*, ¶25, quoting *State v. Cunningham*,

144 Wis. 2d 272, 278, 423 N.W.2d 862 (1988). “[I]f an objective observer (with the same knowledge of the suspect as the police officer) could, on the sole basis of hearing the officer’s remarks or observing the officer’s conduct, conclude that the officer’s conduct or words would be likely to elicit an incriminating response, that is, could reasonably have had the force of a question on the suspect, then the conduct or words constitutes interrogation.” *Fischer*, 259 Wis. 2d 799, ¶27.

¶13 On appeal of a trial court order denying a suppression motion alleging functional interrogation, the findings of evidentiary and historical fact made by the trial court will not be disturbed unless they are clearly erroneous. *Id.*, ¶28. However, the determination of whether the facts satisfy the legal standard for functional interrogation is a question of law that we review independently of the trial court. *Id.*

¶14 Based upon the testimony at the suppression hearing, we agree with the trial court that Post’s statements that he was assigned to investigate the possibility of an alcohol-related offense and to determine whether to arrest Gabino for operating while intoxicated did not constitute interrogation, or the functional equivalent of interrogation. Post’s statements concerning the nature of his investigation merely explained what he was investigating. An objective observer, even knowing that Gabino recognized Post and expressed a willingness to talk to him, could not conclude that Post’s comments had the force of a question or were likely to elicit an incriminatory response. Gabino’s spontaneous statements that he had had only three beers and was not intoxicated were therefore admissible.

¶15 In any event, as contended by the State, no error occurred because neither Gabino’s initial statements to Post in the squad car, nor the squad car statements that were suppressed by the trial court, were used in the State’s case-in-

chief. Statements made by a defendant during custodial interrogation conducted prior to receiving *Miranda* warnings are inadmissible in the State's case-in-chief. *State v. Knapp*, 2003 WI 121, ¶114, 265 Wis. 2d 278, 666 N.W.2d 881, *vacated and remanded by* 542 U.S. 952 (2004), *reinstated in material part by* 2005 WI 127, ¶2 n.3, 285 Wis. 2d 86, 700 N.W.2d 899. However, the State may use such statements for the limited purpose of impeachment and rebuttal as long as the statements were voluntarily given. *Id.*

¶16 Gabino does not contend that any of the statements made by him in the squad car at the time of his arrest were involuntary. Moreover, at trial he took the stand and testified that he was not driving his truck when it hit the motorcycle. He also testified that he had five beers before getting in the truck and drank a sixth beer while in it. Because his statements to Post in the squad car were inconsistent with this testimony, those statements were admissible to rebut and impeach his testimony.

¶17 Gabino's next argument on appeal is that the trial court erred by admitting the statements made by him at the hospital. He contends that he unequivocally invoked his right to remain silent after receiving the *Miranda* warnings, and that the police did not scrupulously honor his invocation of his rights.

¶18 We find it unnecessary to resolve this issue because, even assuming *arguendo* that the admission of Gabino's statements at the hospital was error, we agree with the State that the error was harmless. The test for harmless error is whether it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *State v. Shomberg*, 2006 WI 9, ¶18, 288 Wis. 2d 1, 709 N.W.2d 370, *reconsideration denied*, 2006 WI 108, 292 Wis. 2d

416, 718 N.W.2d 728. If it is clear beyond a reasonable doubt that a rational jury would have reached the same verdict absent the error, then the error did not contribute to the verdict and the error is harmless. *Id.*

¶19 As detailed in the State’s respondent’s brief, the evidence against Gabino was overwhelming. It was undisputed that Gabino owned the truck that struck the motorcycle, that the truck was located within a few miles of the scene of the accident shortly after it occurred, and that Gabino was alone in the truck when apprehended by the police.

¶20 At trial, Gabino testified that he had been driving around Lake Geneva with a friend named Jaime, whose last name Gabino did not know. Gabino testified that Jaime was driving the truck when they left Lake Geneva after buying beer. He testified that he did not see the collision because he was bending down to change the CD’s in the car stereo and the sun was in his face. He testified that he heard the collision, but continued to lean down as the truck drove through a field. He testified that because Jaime did not have a driver’s license, he told Jaime that he would “take the strike,” even though he would get a ticket for leaving the scene and his probation would be revoked. He testified that Jaime slowed down as they got to Lyons, and Jaime got out on Mill Street, without coming to a full stop. Gabino testified that he slid over to the driver’s seat and hit the gas, driving in such a way as to call police attention to himself, and away from Jaime.

¶21 In contrast to Gabino’s testimony, multiple witnesses testified that only one person was in the truck before and after the collision. Kathleen Gappa testified that she was the second in a group of five motorcycles traveling together on Highway 36, and that she was passed by a red pickup truck, which cut in front of her, forcing her to brake to avoid a collision. Gappa further testified that as she

came out of the curve after being passed by the truck, she could not see the motorcyclists on the motorcycle ahead of her. However, she saw the truck riding on the shoulder of the road and into a soybean field, and then back onto the highway, where it sped off. She testified that the truck was severely damaged and smoking.

¶22 Gappa's testimony that there was only one person in the truck as it passed her was corroborated by the testimony of her husband and another witness, who were driving the two motorcycles behind her and were also passed by the red truck. The latter witness further testified that she "kept [her] eyes glued on the pickup truck" as it drove through the soybean field, and there was one person in it. The motorcyclists' testimony was also corroborated by the testimony of Christopher Michalski, who testified that he came upon the accident after it occurred, and saw a truck that was damaged on the front end pulling out of a field onto the highway. He testified that he saw only one person, the driver, in the truck.

¶23 The testimony of these witnesses indicating that they saw only one person in the truck was also corroborated by the testimony of Barbara Popp, another driver who had been passed by the red truck before it reached the motorcyclists. Popp testified that when she came upon the accident, she saw the damaged red truck driving through the field and back onto the highway, and decided to follow it. She testified that she followed it as it drove into the village of Lyons, where it turned off Highway 36 onto the main road of the town. Popp testified that she never saw anyone exit the truck and that the only time she saw it stop was when it exited the field. She estimated that after the collision, the truck was out of her sight only for about ten seconds as it went over a hill just before Lyons.

¶24 The truck's entry into Lyons was also the subject of testimony by Thomas Robers. He testified that he was riding his motorcycle on Mill Street in Lyons when he saw a damaged and smoking truck turn off Highway 36 onto Mill Street. In contrast to Gabino's testimony, Robers testified that he did not see the truck stop at the intersection of Highway 36 and Mill Street. He testified that he followed the truck through town until it eventually came to a stop. Gabino was the only person in the truck, which was damaged and leaking fluid, and had soybean stalks hanging from it.

¶25 Testimony indicated that before the police arrived, Gabino told Robers and another witness that he had struck a tree. Robers also indicated that Gabino attempted to get on his motorcycle, but Robers pushed him off. Robers testified that when they heard sirens, Gabino started to run, but Robers pursued Gabino and told him to get back in the truck, which he did.

¶26 Based upon this testimony, it is clear beyond a reasonable doubt that a rational jury would have reached the same verdict absent the admission of Gabino's statements at the hospital. The evidence that Gabino was the driver of the truck that struck the motorcycle was overwhelming. Gabino's testimony that another man was driving and exited the truck before it stopped in Lyons was utterly implausible based upon the State's evidence that the truck was in nearly constant view by different witnesses both before and after the accident, and none of the witnesses saw more than one person in the truck or saw anyone except Gabino exit it. Consequently, even assuming *arguendo* that the statements made by Gabino at the hospital were erroneously admitted, the error was harmless.

¶27 In a related argument, Gabino contends that if this court determines that the trial court should have suppressed all of Gabino's statements to the police,

then the case must be remanded to the trial court for a hearing to determine whether the error impelled Gabino to testify. He relies upon *State v. Anson*, 2005 WI 96, ¶14, 282 Wis. 2d 629, 698 N.W.2d 776, for the proposition that, when a defendant's statements are erroneously admitted, the trial court must consider whether the defendant testified in order to overcome the impact of statements illegally obtained and improperly introduced. He also relies on the language in *Anson* holding that even if the court concludes that the defendant would have taken the stand, it must determine whether the defendant would have repeated the damaging testimonial admissions if the prosecutor had not already presented his confessions to the jury. *Id.*

¶28 Based upon the evidence in the record, it is clear beyond a reasonable doubt that Gabino took the stand to rebut the State's overwhelming evidence that he was intoxicated and the sole occupant of the truck when it struck the motorcycle, not to overcome the impact of his statements at the hospital. Moreover, when he testified, he did not repeat the damaging statements made by him at the hospital, in which he had conceded that he hit a motorcycle and was alone in the vehicle when the accident occurred. Instead, he completely contradicted that statement, claiming that he was not alone and was not the driver at the time of the accident. Because it is clear that Gabino offered this testimony to rebut the testimony of the State's witnesses, and that the State's use of his statements at the hospital in its case-in-chief did not force him to repeat his damaging admissions at the hospital, remand for a hearing under *Anson* is unnecessary.

¶29 Gabino's final argument is that his right to a jury trial was violated because he did not validly waive his right to have the jury determine all the elements of the crimes. Specifically, he objects that at trial, defense counsel and

the prosecutor stipulated that the two injured motorcyclists suffered great bodily harm, and that the two blood samples taken from him showed blood alcohol concentrations of .186 and .169. Counsel also agreed that the trial court could instruct the jury about the two stipulations using WIS JI—CRIMINAL 162, instructing the jurors that they must accept the stipulated facts as conclusively true. Gabino contends that the stipulated facts pertained to elements of the charged crimes, and he did not personally waive his right to have the jury determine all the elements, entitling him to a new trial.

¶30 As conceded by Gabino, his argument is foreclosed by *State v. Benoit*, 229 Wis. 2d 630, 600 N.W.2d 193 (Ct. App. 1999). In *Benoit*, 229 Wis. 2d at 638-40, this court held that a defendant does not waive his right to a jury trial when he stipulates to an element of the charged offense and the trial court instructs the jury on all the elements of the crime, while also instructing the jury that the stipulated element is considered proven.

¶31 Gabino acknowledges that for purposes of deciding this case, the facts are indistinguishable from *Benoit*. Although he contends that *Benoit* was wrongly decided, he also acknowledges that this court is bound by its prior decision. Based upon Gabino's concessions and because we are bound by prior published decisions of the court of appeals, *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997), we reject Gabino's claim that he is entitled to new trial.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2005-06).

