STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0519

State of Minnesota,
Respondent,

vs.

Scott M. Hofius,
Appellant.

Filed May 5, 2009
Reversed and remanded
Bjorkman, Judge

Steele County District Court
File No. K8-05-607

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Douglas L. Ruth, Steele County Attorney, Daniel A. McIntosh, Assistant County Attorney, 303 South Cedar, Owatonna, MN 55060 (for respondent)

Jeremy L. Johnson, Special Assistant State Public Defender, Gray Plant Mooty Mooty & Bennett, P.A., 500 IDS Center, 80 South 8th Street, Minneapolis, MN 55402 (for appellant)

Considered and decided by Shumaker, Presiding Judge; Bjorkman, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

BJORKMAN, Judge

Appellant challenges his three controlled-substance convictions, arguing that the district court erred by permitting questioning regarding his unwarned custodial statements after it ruled the statements were inadmissible. Because the district court erred by admitting the statements when appellant did not testify and the state has not demonstrated that the error was harmless beyond a reasonable doubt, we reverse and remand for a new trial.

FACTS

On February 17, 2005, Officer Charles Eichten of the Owatonna Police Department observed a vehicle with expired license-plate tabs. Eichten ran a check on the license plate and learned that the driver's license of the vehicle's registered owner, appellant Scott Hofius, was revoked. Eichten stopped the vehicle, and the driver identified himself as Hofius. Hofius acknowledged that the vehicle was his and that he knew his tabs were expired and his license was revoked. Eichten arrested Hofius but permitted him to remove his coat and leave it in his own vehicle before being placed in the back of the squad car.

Hofius expressed concern for his dog that had been in the vehicle with him. Eichten assisted Hofius in contacting a friend to retrieve the dog. When the friend arrived, Hofius requested that the friend take the coat as well. Eichten searched the coat. In one pocket, he found an Altoids tin, which held a pipe and a substance later confirmed to be marijuana; in another pocket, he found a leather pouch, which held a pipe that

contained a white residue later determined to be methamphetamine. Eichten did not advise Hofius of his *Miranda* rights but asked him about the contents of the tin. He told Eichten that the tin contained marijuana and that he smoked the marijuana in the pipe.

Hofius was charged with fifth-degree possession of a controlled substance, possession of marijuana in a motor vehicle, and possession of drug paraphernalia. Hofius moved to exclude his statements to Eichten regarding the tin and the marijuana. The district court ruled that the statements had been obtained in violation of *Miranda* and that the state was precluded from using the statements in its case in chief.

Hofius did not testify at trial. However, after defense counsel cross-examined Eichten, the state sought permission to ask Eichten about Hofius's pre-*Miranda* statements. The state argued that the testimony was appropriate rebuttal because defense counsel told the jury during opening statements that it would "not hear any evidence of Mr. Hofius admitting to the officer that he knew the alleged controlled substances were in his coat," and then asked Eichten during cross-examination whether he had asked Hofius if the coat was his or if anyone else had possessed the coat. The district court granted the state's request. The prosecutor asked Eichten two questions about the statements:

> PROSECUTOR: Officer Eichten, did you ask the defendant if the marijuana pipe was his?
> EICHTEN: Yeah, I asked him about the tin and the marijuana, yes.
> PROSECUTOR: What was his response?
> EICHTEN: He informed me that the substance in the—the Altoid's tin was indeed marijuana and he also—
> PROSECUTOR: That's fine.

The jury convicted Hofius of all three offenses. This appeal follows.

D E C I S I O N

"Statements made during a custodial interrogation cannot be admitted into evidence unless the suspect is given the *Miranda* warning and [voluntarily and] intelligently waives the right against self-incrimination." *State v. Caldwell*, 639 N.W.2d 64, 67 (Minn. App. 2002) (citing *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966)), *review denied* (Minn. Mar. 27, 2002). When a *Miranda* warning is not given, the statements are inadmissible in the state's "direct case, or otherwise, as substantive evidence of guilt."[1] *United States v. Havens*, 446 U.S. 620, 628, 100 S. Ct. 1912, 1917 (1980). But the United States Supreme Court has "carved out exceptions to the exclusionary rule . . . where the introduction of reliable and probative evidence would significantly further the truth-seeking function of a criminal trial and the likelihood that admissibility of such evidence would encourage police misconduct is but a 'speculative possibility.'" *James v. Illinois*, 493 U.S. 307, 311, 110 S. Ct. 648, 651 (1990) (quoting *Harris v. New York*, 401 U.S. 222, 225, 91 S. Ct. 643, 645 (1971)) (addressing Fourth Amendment violations). One such exception permits the state to introduce a statement obtained in violation of *Miranda* for the limited purpose of impeaching the credibility of the defendant's testimony. *Harris*, 401 U.S. at 226, 91 S. Ct. at 646.

Hofius acknowledges that there are exceptions to the exclusionary rule but argues that an illegally obtained statement is not admissible when, as here, the defendant does not testify. We agree.

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[1] The state conceded in the district court that Hofius's statements were obtained in violation of *Miranda*.

The Supreme Court has repeatedly limited application of the impeachment exception to those instances when a defendant testifies. *Harris* itself, which established the impeachment exception, reasoned that the exception was necessary because "[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense." *Id.* In *Brooks v. Tennessee*, the Court again stated that it is "a defendant's choice to take the stand" that may "open the door to otherwise inadmissible evidence . . . including, [after *Harris*], the use of some confessions for impeachment purposes that would be excluded from the State's case in chief because of constitutional defects." 406 U.S. 605, 609, 92 S. Ct. 1891, 1893 (1972) (quotation omitted). And in *James*, the Court declined to "[e]xpand[] the class of impeachable witnesses from the defendant alone to all defense witnesses" because such an expansion would "frustrate rather than further the purposes underlying the exclusionary rule." 493 U.S. at 313-14, 110 S. Ct. at 652. The Court expressed concern that expansion of the impeachment exception could have a chilling effect on the ability to present a defense while at the same time weakening the exclusionary rule's deterrent effect on police misconduct. *See id.* at 314-18, 110 S. Ct. at 653-55 (observing that "expanding the impeachment exception . . . would significantly enhance the expected value to the prosecution of illegally obtained evidence").

This line of cases consistently predicates the admission of statements obtained in violation of *Miranda* on the defendant's decision to testify. We find no authority for admitting a statement obtained in violation of *Miranda* unless the defendant testifies. Because admission of Hofius's statements does not further the anti-perjury purpose articulated in *Harris* and implicates the concerns about expanding the impeachment

exception articulated in *James*, we conclude that the district court erred by admitting Hofius's statements.

Our determination of error does not end our analysis. "A constitutional error does not mandate reversal and a new trial if . . . the error was harmless beyond a reasonable doubt." *State v. Caulfield*, 722 N.W.2d 304, 314 (Minn. 2006) (citing *State v. Juarez*, 572 N.W.2d 286, 291 (Minn. 1997)). "When determining whether a jury verdict was surely unattributable to an erroneous admission of evidence, the reviewing court considers the manner in which the evidence was presented, whether it was highly persuasive, whether it was used in closing argument, and whether it was effectively countered by the defendant." *State v. Al-Naseer*, 690 N.W.2d 744, 748 (Minn. 2005). Evidence of guilt is also an important factor, but "the court cannot focus on the evidence of guilt alone." *Id.*

Analysis of the first *Al-Naseer* factor, the manner in which the evidence was presented, indicates the error was not harmless beyond a reasonable doubt. The prosecutor did not question Eichten about whether he discussed the ownership and possession of the jacket with Hofius. Rather, the prosecutor directly asked Eichten for the suppressed statement. This suggests intent for the evidence to impact the verdict. *See Caulfield*, 722 N.W.2d at 314 ("Where the evidence was aimed at having an impact on the verdict, we cannot say that the verdict was surely unattributable to the error." (quotation omitted)). Also, testimony regarding Hofius's statement was one of the last things the jury heard from Eichten, who was the only witness in the one day in which evidence was presented to testify about the events of February 17, 2005. *See id.*

(observing that "trial was a very short affair," so there was "no chance that the [erroneously admitted evidence] was lost among a plethora of other evidence"). This factor suggests that the error was not harmless.

Likewise, consideration of the second factor favors a determination that the error was not harmless. This case hinged on the issue of whether Hofius knew the controlled substances were in his coat. Although the state argued that circumstantial evidence established knowledge, Hofius's own statement that he knew there was marijuana in the tin carries particular weight. *See State v. Farrah*, 735 N.W.2d 336, 343-44 (Minn. 2007) (reversing conviction after erroneous admission of defendant's custodial statement, in part because the statement contained the defendant's admission to relevant facts).

The third *Al-Naseer* factor also supports reversal of the convictions. The prosecutor repeatedly referenced the statement in closing argument, at least once for each charge presented to the jury. The prosecutor characterized the statement as direct evidence of knowledge and as an admission from Hofius that the marijuana was his. It is difficult to conceive of how the admission of Hofius's suppressed statements could be considered harmless error in light of the state's closing argument.

Finally, our review of the record demonstrates that defense counsel was not able to counter the evidence effectively. In a recross-examination, counsel asked, "And so Mr. Hofius was honest with you that—that there was marijuana in the tin?" She also verified that Hofius "never admitted that he knew that there was methamphetamine in the leather pouch." During closing argument, defense counsel characterized the statements in question as simply a declaration by Hofius, when confronted with the contents of the

tin, that he recognized it as marijuana. But the prosecutor responded that it was "[t]he State's recollection" that Hofius had said "that it was his," not "that he recognized it as being marijuana." None of defense counsel's efforts likely mitigated the effect of the error.

We observe that the jury was presented with substantial evidence of Hofius's guilt. Eichten testified that Hofius was wearing the coat containing the tin when he stopped Hofius. During closing, the prosecutor emphasized this testimony and asserted that "[t]he key to this case is the Defendant's obsession with getting that coat away from the officer. It [implies] knowledge." Hofius's initial possession of the coat and subsequent desire to rid himself of it once engaged by a police officer substantially support the verdict. But even this strong evidence of guilt cannot itself render constitutional error harmless. *See Caulfield*, 722 N.W.2d at 317 ("[W]e do not have a single case where we have held that the admission of direct and persuasive evidence on an element of the crime is harmless because other less direct and less persuasive or largely circumstantial evidence is strong."). Eichten's observations, while they may be sufficient to support a finding of guilt, are of lesser persuasive quality than Hofius's own statements.

We conclude that the erroneous admission of Hofius's unwarned custodial statements "reasonably could have impacted upon the jury's decision." *Juarez*, 572 N.W.2d at 292. Because the state has not demonstrated that the error was harmless beyond a reasonable doubt, we reverse Hofius's convictions and remand for a new trial.

Reversed and remanded.