COURT OF APPEALS DECISION DATED AND FILED

May 2, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP2503-CR

Cir. Ct. No. 2010CT519

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL F. HYZY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: DAVID M. REDDY, Judge. *Affirmed*.

¶1 GUNDRUM, J.[1] Michael F. Hyzy appeals from a judgment of conviction for causing injury to another while operating a motor vehicle under the

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

influence of an intoxicant (OWI) contrary to WIS. STAT. § 346.63(2)(a)1. and from an order denying his motion for postconviction relief. Hyzy's arguments on appeal all rest on whether the roadways in the "gated community"[2] of Abbey Springs are "held out to the public for use of their motor vehicles" under WIS. STAT. § 346.61. Because we conclude that they are, and because the evidence at trial was sufficient for a jury to so conclude, we affirm.

¶2 *Background*: Shortly after 11:00 p.m. on May 22, 2010, Hyzy drove off a roadway in the gated community of Abbey Springs in the village of Fontana and crashed a golf cart into a tree. Just before the crash, Michael O'Brien and his family were driving on Briarwood Drive in Abbey Springs after visiting O'Brien's sister, Carol Cox. O'Brien observed a swaying golf cart, with two people on board, going down the hilly road "very, very" fast. O'Brien then lost sight of the golf cart and seconds later heard a "crash, boom." He went to the scene and found Hyzy slumped over the golf cart's steering wheel, unconscious and bleeding. O'Brien called 911 and his wife called Cox. Cox arrived at the scene and saw Hyzy wrapped around the steering column of the golf cart and Ethan Rudolph about fifteen feet away in the grass.

¶3 Village of Fontana Police Officer Jeff Cates was dispatched to the accident. Upon arrival, he observed two empty beer cans lying near the severely damaged golf cart. Making contact with Hyzy, Cates noticed clear signs that Hyzy was impaired by alcohol. Cates observed Rudolph near the golf cart and

[2] *See* ***State v. Tecza***, 2008 WI 79, ¶14, 312 Wis. 2d 395, 751 N.W.2d 896 (where, because "gated community" is not defined in the Wisconsin Statutes or previous case law, the court refers to and discusses the definitions of "gated community" from other professional literature).

that he was injured and in pain. A subsequent blood test revealed Hyzy's blood alcohol concentration to be 0.206 grams per 100 milliliters of blood.

¶4 The State charged Hyzy with OWI causing injury and operating with a prohibited alcohol concentration (PAC) causing injury. *See* WIS. STAT. § 346.63(2)(a)1. and 2. A jury trial was held. Hyzy was found guilty on both counts. The court entered judgment on the OWI verdict.[3] Hyzy filed for postconviction relief, which was denied after a hearing. Hyzy appeals.

¶5 *Facts, Law and Discussion*: In addition to being applicable upon highways, pursuant to WIS. STAT. § 346.61, Wisconsin's drunken and reckless driving laws are also applicable upon all premises "held out to the public for use of their motor vehicles." ***Id.***

¶6 Focusing on WIS. STAT. § 346.61, Hyzy first argues that the evidence at trial was insufficient to prove the roadways of Abbey Springs are "held out to the public for use of their motor vehicles." We accord strong deference to the jury when the sufficiency of the evidence is challenged. ***State v. Hayes***, 2004 WI 80, ¶57, 273 Wis. 2d 1, 681 N.W.2d 203. When reviewing a jury's findings of fact, our task is to locate facts in the record supporting the jury's verdict. ***Id.*** After construing the evidence in the conviction's favor as we must, we then consider whether the evidence is "so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably,

[3] Hyzy was found guilty by a jury of OWI causing injury and PAC causing injury in violation of WIS. STAT. § 346.63(2)(a)1. and 2. A defendant may be charged and prosecuted for both OWI and PAC, but may not be convicted of both if the charges arise out of the same incident. Sec. 346.63(1)(c). Accordingly, a judgment of conviction was entered only on the OWI verdict.

could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt," we must uphold the jury's verdict. ***Id.*** at 507.

¶7 With this standard of review in mind, we examine the facts in the record supporting the jury's verdict that Hyzy violated WIS. STAT. § 346.61 while operating a motor vehicle on premises "held out to the public for use of their motor vehicles."

¶8 Cates, a village of Fontana police officer, was dispatched to the scene of Hyzy's golf cart accident in Abbey Springs, a community Cates had previously been to in his professional capacity. Cates also returned a few days after the accident to take additional photos of the scene.

¶9 O'Brien, the witness who found Hyzy and called 911, has been going to Abbey Springs to visit family since he was a child. He confirmed that, in his experience, the public is allowed to drive on the roadways of Abbey Springs to visit people there. He explained, "[Y]ou have to get permission, ah, when you arrive at the guardhouse. [A] guard comes out and, you know: Who are you here to see? I am here to visit my father. And I gave them the unit number and he said: Okay. And let me through."

¶10 Cox, who has a residence in Abbey Springs, confirmed that there are paved, named roads in Abbey Springs and that the public "drive[s] in and out of there, on the road[s]," for example to deliver mail, the newspaper or to visit an owner.

¶11 Construing this evidence in the conviction's favor, it is not so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *See* ***Poellinger***, 153 Wis. 2d at 501. The jury could reasonably conclude that the roadways of Abbey Springs are held out to the public for use of their motor vehicles, given that it heard that a village-employed police officer responded to this traffic accident and given that both O'Brien and Cox testified to the easy access the public has to Abbey Springs. Accordingly, we uphold the jury's verdict because we conclude that the jury could have drawn the appropriate inferences from the evidence adduced at trial to find the streets of Abbey Springs are "held out to the public for use of their motor vehicles" and, with that, the requisite guilt. *See* ***id.*** at 507.

¶12 Hyzy next argues that Abbey Springs, in fact, is not held out to the public for use of their motor vehicles. Because this issue involves the application of WIS. STAT. § 346.61 to a set of undisputed facts, it is a question of law we review de novo. ***City of La Crosse v. Richling***, 178 Wis. 2d 856, 858, 505 N.W.2d 448 (Ct. App. 1993). Along with the above undisputed facts produced at trial on this issue, we look to the record as a whole, including the undisputed facts provided at the postconviction hearing.

¶13 At the postconviction hearing, the executive director of operations for Abbey Springs, Jerry Mortier, testified that Abbey Springs is a condominium association made up of approximately 583 units: condominiums, homes and lots. It has two clubhouses and a golf course. Mortier explained that to enter Abbey Springs, one either enters through the north or south gatehouse entry which is usually staffed by a security guard. Abbey Springs adopted policies whereby members have car decals "for the ease of our unit owners to get through the gate"

and guests are supposed to have passes. If persons who are not members or guests approach the gate "trying to get to the golf course, or to the rec center or they would like to look at real estate, we'll direct them where they need to go." Mortier acknowledged that if someone approaches the gatehouse without a decal or pass, "we try to slow them down to ask them what they're doing and stop them, if we can. But it doesn't happen all of the time." And he acknowledged that if a person without a pass simply drives past the gatehouse without stopping, he or she will not be followed or stopped. In that regard, Mortier explained that Abbey Springs is "not unwelcoming" and its guards will not "chase people down or confront people." Indeed, Mortier testified that if something comes up which causes the guard to leave the gate, the gate is then just left open.

¶14 Mortier explained that several amenities and facilities of Abbey Springs are "open to the public," such as the fitness area, the golf course and the golf course clubhouse. The golf course clubhouse, in fact, is open not only for golfers' use, but is also utilized by the public for wedding receptions. The high school also uses the facility and "after prom" has been held there.

¶15 Mortier further testified that service and delivery persons are allowed into Abbey Springs, that the Village of Fontana Police Department patrols the roads of Abbey Springs and that the village of Fontana, not the Abbey Springs association, plows the roads in Abbey Springs.

¶16 In analyzing this case, we are keenly guided by ***State v. Tecza***, 2008 WI 79, 312 Wis. 2d 395, 751 N.W.2d 896. Tecza, like Hyzy, was charged with OWI in a gated community. *See* ***id.***, ¶¶2, 14. In ***Tecza***, as in this case, we examined whether the roadways within a gated community were "held out to the public for use of their motor vehicles." *See* ***id.***, ¶11.

¶17 The gated community in ***Tecza***, Geneva National Community, had a staffed security station with gates. ***Id.***, ¶¶1, 6. To use the main entrance, a driver needed a vehicle sticker or to stop and get a pass from the private security guard. ***Id.***, ¶6. There was access for nonresidents, including service and delivery persons. ***Id.***, ¶7. All that was necessary for entrance was to stop at the security station, state the purpose of the visit and obtain a pass. ***Id.*** The public was also admitted to show and view houses for sale, watch fireworks, play golf, attend weddings, and to just look around. ***Id.***

¶18 After discerning the ease with which the public could access the gated community of Geneva National, we held, "The roadways of Geneva National Community were 'held out to the public for use of their motor vehicles' because on any given day any licensed driver could enter the Community unchallenged; therefore, the drunken driving law of the State applies as provided in WIS. STAT. § 346.61." *See* ***Tecza***, 312 Wis. 2d 395, ¶22.

¶19 Hyzy attempts to distinguish the gated community of Abbey Springs from the gated community of Geneva National and, thus, to distinguish his case from ***Tecza***. He argues that there is no factual basis from the evidence to support an inference like the inference we drew in ***Tecza***, that "on any given day any licensed driver could enter [the gated community in ***Tecza***] unchallenged." *See* ***id.***, ¶¶19, 22. We disagree.

¶20 Like the gated community in ***Tecza***, for entrance into Abbey Springs, a driver is supposed to have a sticker on his or her vehicle or stop and get a pass from the security guard. *See* ***id.***, ¶6. Nevertheless, like the gated community in ***Tecza***, Abbey Springs permits the public unimpeded access in order that the residents can pursue their leisure activities and depend on other members

of the public to fulfill their daily needs. *See* ***id.***, ¶20. For example, like the gated community in ***Tecza***, Abbey Springs allows access to nonresidents such as delivery and repair persons, requiring only that they stop at the security gate, state the purpose for the visit and obtain a pass. *See* ***id.***, ¶7. And, if persons who are neither members nor guests approach the gate in order to access the golf course or rec center, or in order to look at real estate, the guard will not turn them away, but will "direct them where they need to go." Further, if a person drives by a guard at the gatehouse without stopping and without showing a decal or pass, that person will not be followed to inquire as to his or her purpose for visiting Abbey Springs. After all, Mortier explained, Abbey Springs is "not unwelcoming."

¶21 Like the gated community in ***Tecza***, Abbey Springs rolls out a wide welcome mat, allowing the public in to play golf, attend weddings, use its fitness center, and participate in high school activities like a postprom party. *See* ***id.*** Just as the facts demonstrated in ***Tecza***, the facts here likewise demonstrate that a purpose of the security station at Abbey Springs is to *facilitate entry* into Abbey Springs for those without decals or passes. *See* ***id.***

¶22 Furthermore, Abbey Springs, like the gated community in ***Tecza***, holds its roadways out for use by the public by permitting the municipal police department to patrol the roadways. *See* ***id.***, ¶21. As we held in ***Tecza***, a police presence on the roadways of a gated community is "an indication of an explicit intent to hold the roadways out to the public for the use of their vehicles." *See* ***id.***

¶23 From these facts, it is clear that on any given day any driver can enter Abbey Springs unchallenged. As a result, the roadways of Abbey Springs are "held out to the public for use of their motor vehicles." *See* ***id.***, ¶¶19, 22.

¶24 Lastly, Hyzy contends his trial attorney was ineffective for not filing a pretrial motion raising the argument that "Abbey Springs is not 'held out to the public' for purposes of WIS. STAT. § 346.61." The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient and (2) a demonstration that the deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, Hyzy must establish that his counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *See* ***Strickland***, 466 U.S. at 687. Hyzy must overcome a strong presumption that his counsel acted reasonably within professional norms. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To satisfy the prejudice prong, Hyzy must show that counsel's errors were serious enough to render the resulting conviction unreliable. *See* ***Strickland***, 466 U.S. at 687. We need not address both components of the test if Hyzy fails to make a sufficient showing on one of them. *See* ***id.*** at 697.

¶25 It is evident from our above conclusions that, because of the substantial similarities between this case and ***Tecza***, a pretrial motion arguing that Abbey Springs is not "held out to the public for use of their motor vehicles" would have been meritless. Trial counsel's failure to bring a meritless motion does not constitute deficient performance. *See* ***State v. Swinson***, 2003 WI App 45, ¶59, 261 Wis. 2d 633, 660 N.W.2d 12. Because Hyzy's trial counsel was not deficient, we need not address the prejudice prong. *See* ***id.***

¶26 *Conclusion*: We conclude that the roadways of Abbey Springs were "held out to the public for use of their motor vehicles" because on any given day any driver could enter Abbey Springs. *See* ***Tecza***, 312 Wis. 2d 395, ¶22. Therefore, Wisconsin's drunken driving law applies to Hyzy in this case. *See* ***id.***

By the Court.—Judgment and order affirmed.

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