COURT OF APPEALS
DECISION
DATED AND FILED

January 12, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1997-CR **Cir. Ct. No. 2012CF98**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK W. NORDRUM,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed*.

Before Lundsten, Sherman, and Blanchard, JJ.

¶1 PER CURIAM. A jury found Mark W. Nordrum guilty of one count of causing great bodily harm by operation of a vehicle while under the influence of an intoxicant; one count of causing bodily harm by operation of a vehicle while under the influence of an intoxicant; one count of causing great

bodily harm by the negligent operation of a vehicle; and one count of causing bodily harm by the negligent operation of a vehicle. *See* WIS. STAT. §§ 940.25(1)(a); 346.63(2)(a)1. and 346.65(3m); 346.62(4) and 346.65(5); and 346.62(3) and 346.65(3) (2015-16).[1] The court imposed a sentence totaling seven years and six months of initial confinement and four years of extended supervision. The court denied Nordrum's postconviction motion. Nordrum appeals and we affirm.

Facts

¶2 Nordrum and Eric Johnson went bar-hopping on July 27, 2012. In the early morning hours of July 28, Johnson's truck crossed the center line of State Highway 56 and collided head-on with a car driven by D.E. Both D.E. and her son, N.F., were injured in the crash, with N.F. suffering significant injuries. The only factual issue at trial was who was driving the truck—Nordrum or Johnson. Each man claimed the other was driving.

¶3 After the crash, the truck ended up in the front yard of a group home. Demetrius Smith, a resident of the home, testified that the crash awakened Smith and Smith woke up a staff member, James Satterwhite. Together they went outside. Smith testified that as they got outside, he saw someone get out of the driver's side of the truck. That person later ran away from the scene through a corn field. Smith identified Nordrum as the person he saw exit the truck and later flee. Smith estimated that he and Satterwhite were outside between fifteen to twenty seconds after he heard the crash.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶4 Satterwhite testified that Smith woke him up and told him there had been an accident. Within ten seconds, Satterwhite and Smith went outside. Satterwhite saw the driver-side door swing open and a person, identified as Nordrum, fell to the ground. Nordrum was disoriented and confused and asked Satterwhite where he was. Satterwhite testified that Nordrum was not bleeding. Nordrum told Satterwhite there was another person in the truck and Satterwhite then saw Johnson "stuck in between the dashboard, the passenger door, and the seat." Johnson's feet were "in the middle … under the radio area." Satterwhite opened the passenger door, and pulled Johnson out of the truck. After a time, Nordrum said to Johnson, "Come on. Let's go." and Nordrum tried to start the truck. The truck did not start. Satterwhite testified that, after he could hear the emergency vehicles approaching, he saw Nordrum put on a shirt, say something to Johnson, and then Nordrum "just took off running into the corn" field.

¶5 Eric Johnson testified that Nordrum was driving the truck at the time of the crash. Johnson admitted that he told police at the scene both that Nordrum was driving and that he did not know who was driving. He also testified that he had driven the truck at all times earlier in the evening. Frequently, when asked specific questions about the crash, Johnson testified that he could not remember. After the crash, one of Johnson's sandals was found in the middle of the truck and the other was near the brake pedal. Johnson thought he hit his head on the windshield because his "nose was broke or bleeding real bad." Photographs of the truck showed the passenger side windshield was "spider-webbed." Johnson had been wearing a Milwaukee Brewers jersey and photographs of the bloodstained shirt were introduced into evidence. After the crash, Johnson was taken to a hospital where blood was drawn for a blood alcohol test. Johnson testified that he had a brief phone conversation with Nordrum later that morning. Johnson told

Nordrum that he had "wrecked my truck" and Nordrum replied that he was not driving.

¶6 Both D.E. and N.F. testified about the crash. D.E. testified that the accident occurred in her lane of traffic and she estimated her speed at fifty miles per hour. The first officer to respond to the crash, Ryan Williams, testified that Johnson was standing near the passenger side of the truck when he arrived on the scene. Williams observed facial injuries and blood and he believed Johnson was intoxicated. Another officer, Brian James, testified that a canine-assisted search for Nordrum was unsuccessful. Nordrum was not arrested until two days later, in Minnesota.

¶7 The bartender at the last bar frequented by Nordrum and Johnson testified that he believed that both men were very intoxicated. Each drank a shot at the bar and then left. Neither the bartender nor a patron who testified saw which man was driving the truck when they left the bar.

¶8 An analyst from the State Crime Laboratory testified that a stain on the driver-side air bag tested positive for blood but there was not enough blood to determine the source of the blood. Three bloodstains were identified on the passenger-side airbag. Nordrum was the source of one stain and Johnson was the source of the other two. Because the top of the airbag was not labeled when it was removed from the truck, the analyst was unable to place the bloodstains in their relative positions within the truck. Johnson's blood was also found on the passenger-side "A-frame."

¶9 Richard Hansen testified that he lived one and one-half or two miles from the scene of the accident. In the late morning of July 28, a man walked up to his house and said he had car trouble. The man asked to use the telephone and for

a ride into town. While Hansen was unable to identify Nordrum at trial, he had identified him on July 28 when shown Nordrum's picture by a sheriff's deputy. Hansen testified that he did not see any bruises or injuries on Nordrum's face. Further facts will be stated as necessary to address Nordrum's appellate issues.

Evidence of Smith's Prior Juvenile Adjudications

¶10 Nordrum first argues that his due process rights were violated when the State failed to disclose the number of Demetrius Smith's juvenile adjudications. Although the State was required to disclose Smith's juvenile record, we agree with the postconviction court and the State that Nordrum was not prejudiced under the facts of this case.

¶11 The credibility of a witness may be impeached by evidence that the witness has been adjudicated delinquent. WIS. STAT. § 906.09(1). Nordrum's demand for discovery included information about the criminal record of prosecution witnesses. *See* WIS. STAT. § 971.23(1)(f) ("Upon demand, the district attorney shall, within a reasonable time before trial, disclose … [t]he criminal record of a prosecution witness which is known to the district attorney."). The State should have disclosed the number of Smith's juvenile adjudications to Nordrum.

¶12 The dispositive inquiry, however, is whether Nordrum was prejudiced by the State's failure to disclose. Upon a WIS. STAT. § 971.23 disclosure violation, a defendant is not automatically entitled to a new trial. *See* ***State v. DeLao***, 2002 WI 49, ¶60, 252 Wis. 2d 289, 643 N.W.2d 480. A new trial is warranted only when the violation is prejudicial. *See* ***id.*** A discovery "violation is harmless when there is no 'reasonable possibility' that the violation contributed to the conviction. In other words, the error must be 'sufficient to undermine our

confidence in the outcome' of the trial." ***State v. Rice***, 2008 WI App 10, ¶19, 307 Wis. 2d 335, 743 N.W.2d 517 (quoting ***DeLao***, 252 Wis. 2d 289, ¶¶59 n.10, 146.)

¶13 Nordrum characterizes Smith's testimony as critical to the State's proof that Nordrum was driving the truck at the time of the accident. We disagree. As noted by the court in its postconviction decision, Smith "added little to the State's case." Smith testified that he heard the crash and woke Satterwhite. The rest of Smith's brief testimony—seeing Nordrum get out of the truck on the driver's side and seeing him run away through a corn field—was redundant to Satterwhite's testimony. Satterwhite testified in much greater detail about Nordrum, Johnson, and the accident scene. Satterwhite testified that Nordrum was confused, disoriented, and stumbling around. He testified that Nordrum was not bleeding and tried to drive away when he heard approaching emergency sirens. Satterwhite described Johnson's post-accident position in the truck and he testified that he pulled Johnson from the passenger side of the truck. Moreover, impeachment evidence such as Smith's juvenile adjudications is of minimal importance when the witness is a non-interested bystander to a car accident. *See* ***Rice***, 307 Wis. 2d 335, ¶24. There is no reasonable possibility that the jury would have viewed Smith's credibility differently had it known the number of his juvenile adjudications.[2] Any error was harmless.[3]

[2] The jury did know that Smith resided in a group home, suggesting possible involvement in the juvenile justice system.

[3] Nordrum also argues that the disclosure violation contributed to trial counsel's decision to not cross-examine Smith. Because Smith's direct testimony was of minimal importance, the lack of cross-examination was inconsequential.

Johnson's Prior Convictions

¶14 Nordrum's next argument is also rooted in WIS. STAT. § 906.09. At a pretrial hearing, Nordrum argued that Johnson had three prior convictions for purposes of § 906.09. The State urged the court to set the number at zero, or at most, one conviction. The State claimed that a 1998 conviction for possession of THC had been expunged. The State also argued that Johnson's 2003 convictions for misdemeanor battery and disorderly conduct should not be considered due to their age, but if they were, they should be deemed a single conviction because they arose from the same incident. The trial court ruled that, if asked, Johnson should testify that he had one prior conviction.

¶15 Whether to allow prior-conviction evidence for impeachment purposes under WIS. STAT. § 906.09 is within the discretion of the trial court. ***State v. Kruzycki***, 192 Wis. 2d 509, 525, 531 N.W.2d 429 (Ct. App. 1995). When we review a discretionary decision, we consider only whether the court properly exercised its discretion, putting to one side whether we would have made the same ruling. ***Id.*** A court properly exercises its discretion when it correctly applies accepted legal standards to the facts of record and uses a rational process to reach a reasonable conclusion. ***Id.*** A court should consider the lapse of time since the conviction, the rehabilitation or pardon of the person, the gravity of the crime, whether the crime involved dishonesty or false statements, and whether the probative value of the evidence of the crime is substantially outweighed by the danger of undue prejudice. *See* ***id.*** (citing ***State v. Kuntz***, 160 Wis. 2d 722, 745-46, 467 N.W.2d 531 (1991)).

¶16 In ruling on this issue, the court stated that Johnson's association with Nordrum, who had a "substantial criminal record," indicated that Johnson

had not been rehabilitated. However, because the 2003 convictions arose from a single incident, the court ruled that Johnson could be impeached with one conviction. The court stated "that's pretty much always been my policy when there are multiple charges arising from one incident."

¶17 Nordrum argues that the trial court's "policy" of merging multiple convictions if arising from a single incident is an incorrect application of the law. We decline to read the court's comments so broadly. A court is permitted to consider whether the probative value of the evidence is substantially outweighed by the danger of undue prejudice. ***Id.*** (citing ***Kuntz***, 160 Wis. 2d at 752). The court's "policy" is little more than the recognition that undue prejudice may often arise when a single incident spawns multiple convictions and, if the jury learns of multiple convictions, it might wrongly conclude that the witness was convicted for repeated criminal conduct separate in time.

¶18 Even if the trial court did err, we agree with the State that the error was harmless. An error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." ***State v. Mayo***, 2007 WI 78, ¶47, 301 Wis. 2d 642, 734 N.W.2d 115 (quoted sources omitted). WISCONSIN STAT. § 906.09 is premised upon the belief that "one who has been convicted of a crime is less likely to be a truthful witness than one who has not been convicted." ***Kuntz***, 160 Wis. 2d at 752. In this case, Johnson was impeached. The jury was told that he had a prior conviction. The jury heard considerable evidence of Johnson's intoxication at the time of the accident. Johnson hit his head on the truck's windshield. And, Johnson had a self-evident interest from the start in denying that he was driving at the time of the crash. Moreover, Johnson's claim that Nordrum was driving was not, as claimed by Nordrum on appeal, the only direct evidence that Nordrum was the driver.

Satterwhite and Smith both testified Nordrum got out of the truck on the driver's side. Nordrum tried to drive the truck away after the crash and fled the scene. Physical evidence suggested that Johnson was the passenger: the passenger-side windshield was "spider-webbed" and Johnson sustained substantial facial injuries while several witnesses testified that Nordrum was not visibly injured. Johnson's blood was found on the passenger-side "A-frame." Given the entirety of evidence, any error in impeaching Johnson with one conviction rather than two convictions was harmless.

Destruction of D.E.'s Vehicle

¶19 Sometime between Nordrum's conviction and the filing of a postconviction motion, D.E.'s car, which had been impounded, was released and destroyed. Nordrum argues his due process rights were violated and he is entitled to a new trial. To succeed on that argument, Nordrum must show that either D.E.'s car was apparently exculpatory or that it was destroyed in bad faith. *See* ***State v. Luedtke***, 2015 WI 42, ¶41, 362 Wis. 2d 1, 863 N.W.2d 592.

¶20 Nordrum contends that the impoundment of the car while the trial was pending reflects the State's recognition that the car had "apparent exculpatory value." *See* ***State v. Hahn***, 132 Wis. 2d 351, 360, 392 N.W.2d 464 (Ct. App. 1986) *abrogation recognized by* ***State v. Hoffmann***, No. 1994AP2235, unpublished slip op. (WI App Mar. 27, 1996) (impoundment of a defendant's vehicle before trial showed the State's recognition that the vehicle had apparent exculpatory value). Nordrum argues that the post-trial destruction of D.E.'s car precludes access, on appeal, to the vehicle's event data recorder which he argues may contain exculpatory evidence concerning how the crash happened.

¶21 Not every vehicle impounded after a crash contains exculpatory evidence. In ***Hahn***, the defendant who was charged with homicide by intoxicated use of a motor vehicle argued that a mechanical defect in his car caused the accident. ***Hahn***, 132 Wis. 2d at 358-60. In this case, causation of the crash was not at issue. Neither the State nor Nordrum introduced any accident reconstruction evidence. Both D.E. and N.F. testified that D.E.'s car was in her lane of traffic when it was struck head-on by the truck. The only factual issue at trial was whether Nordrum was driving the truck. The event data recorder in D.E.'s car could not possibly have shed light on that inquiry. The post-trial destruction of D.E.'s car does not entitle Nordrum to a new trial on due process grounds.

Effectiveness of Trial Counsel

¶22 Nordrum claims that his trial counsel was ineffective in several respects. At a postconviction hearing, trial counsel and an independent forensic analyst testified. The trial court found counsel's testimony to be "credible and uncontradicted" and concluded that none of Nordrum's complaints constituted deficient performance.

¶23 To succeed on a claim of ineffective assistance of counsel, a defendant must show both that counsel's representation was deficient and that the deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** A defendant must establish that counsel's conduct falls below an objective standard of reasonableness. ***Id.*** at 687-88; ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571,

665 N.W.2d 305. However, "every effort is made to avoid determinations of ineffectiveness based on hindsight.... and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The objective standard of reasonableness encompasses a wide range of professionally competent assistance. *See* ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). We presume that counsel's performance was satisfactory; we do not look to what would have been ideal, but rather to what amounts to reasonably effective representation. *See* ***id.***

¶24 To prove constitutional prejudice, "the defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Thiel***, 264 Wis. 2d 571, ¶20 (quoting ***Strickland***, 466 U.S. at 694).

¶25 With those standards in mind, we address Nordrum's claims.

¶26 Several witnesses testified that Johnson's blood was drawn for purposes of blood alcohol testing by law enforcement. Nordrum faults trial counsel for not informing the jury that police later cancelled the test. In his postconviction testimony, trial counsel stated he believed it was a mistake to not introduce the cancellation into evidence. Nordrum argues that the evidence would have shown the police's "tunnel vision" focus on Nordrum. We are not persuaded.

¶27 It is undisputed that the test was cancelled after law enforcement came to the conclusion that Nordrum was driving the truck at the time of the crash. If trial counsel had introduced evidence that Johnson's blood test had been

cancelled, the State would have countered by explaining that the test became unnecessary when it determined that Johnson was not driving. The State would have simply pointed to the many pieces of evidence that showed Nordrum was driving—evidence already before the jury. We agree with the State that counsel's performance was not deficient and we further fail to see how the cancellation evidence would have affected the jury's decision.

¶28 Nordrum faults trial counsel for not impeaching Johnson with the fact that he had previously been convicted of operating a motor vehicle while intoxicated, first offense. Nordrum argues that the jury may have questioned Johnson's credibility if they knew he faced a second-offense OWI prosecution if he had been driving. We agree with the State that there is no reasonable probability that the result of the proceeding would have been different if the jury had known of Johnson's first-offense OWI conviction. If Johnson had been the driver, he would have faced the same criminal charges, including two felonies, facing Nordrum. A second-offense OWI prosecution is far less serious. As the State points out, there is no reason to believe that the jury would have believed that Johnson was more likely to say that Nordrum was driving because of the potential second-offense OWI prosecution rather than the threat of four criminal charges, including two felonies. Nordrum cannot show he was prejudiced.

¶29 Smith gave a statement to a deputy sheriff the night before trial in which he said that, at the time of the incident, Nordrum admitted driving the truck. The State did not introduce the statement at trial. In his postconviction testimony, trial counsel said that the district attorney agreed to not question Smith about the statement and trial counsel agreed to not cross-examine Smith. Nordrum argues that trial counsel should have affirmatively sought the exclusion of the statement as untimely. He also suggests that counsel could have sought an adjournment in

order to further investigate Smith's statement. And, under either scenario, Nordrum faults trial counsel for not cross-examining Smith.

¶30 We have already addressed the minimal value of Smith's testimony. The rationale underlying our rejection of Nordrum's WIS. STAT. § 906.09 argument applies with equal force to this argument. Cross-examination of Smith would have been of minimal value given the limited nature of Smith's trial testimony. We agree with the postconviction court's observation that trial counsel's failure to cross-examine Smith was "inconsequential." Therefore, Nordrum has not shown a reasonable probability that the result of the proceeding would have been different. *See* ***Thiel***, 264 Wis. 2d 571, ¶20.

¶31 Nordrum next faults trial counsel for not presenting evidence that police had not obtained or analyzed the event data recorder in D.E.'s car. This argument is akin to Nordrum's complaint that D.E.'s car was destroyed after the trial. Like his stand-alone argument, Nordrum's ineffective-assistance-of-counsel claim fails, at a minimum, because the event data recorder from D.E.'s car is wholly irrelevant to the factual issue at trial—who was driving the truck.

¶32 Next, Nordrum enumerates several alleged missteps made by police during the accident investigation, relying on the postconviction testimony of James Greenwold, an independent forensic analyst. Nordrum argues that trial counsel was ineffective for not informing the jury that police did not comply with "best practices," particularly with regard to the collection of biological samples from the truck.

¶33 One alleged investigative misstep—the failure to properly label the passenger-side airbag so that its orientation could be established—was before the jury. Nordrum does not explain how any other alleged inadequacies affected the

trial. Courts must be highly deferential when evaluating counsel's performance and must avoid the distorting effects of hindsight. ***Thiel***, 264 Wis. 2d 571, ¶19. The postconviction court recognized that danger when it noted that the "benefit of a transcript and time to reflect" often reveals "other things trial counsel could have done." The following language from ***Strickland*** is particularly appropriate to this case.

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Strickland, 466 U.S. at 689 (citation omitted). Nordrum has not shown either deficient performance or prejudice.

New Trial in the Interest of Justice

¶34 Lastly, Nordrum asks for a new trial in the interest of justice by chronicling his already-argued challenges to the conviction. This argument, however, merely rehashes contentions that we have already rejected. *See* ***State v. Arredondo***, 2004 WI App 7, ¶56, 269 Wis. 2d 369, 674 N.W.2d 647. A final catch-all plea for discretionary reversal based on the cumulative effect of non-errors cannot succeed. ***State v. Marhal***, 172 Wis. 2d 491, 507, 493 N.W.2d 758 (Ct. App. 1992). "[Z]ero plus zero equals zero." ***Id.*** (citations omitted).

By the Court.—Judgment and order affirmed.

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