COURT OF APPEALS
DECISION
DATED AND FILED

February 11, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2291-CR
2007AP2912-CR

Cir. Ct. No. 2004CF246
2004CF246

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TODD A. JOHNSTON,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed.*

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. In this appeal from four convictions for second-degree recklessly endangering safety and the denial of his postconviction motion, Todd Johnston challenges the assistance he received from his trial counsel and the circuit court's exercise of sentencing discretion. We conclude that Johnston was

not prejudiced by his trial counsel's representation, and the circuit court properly exercised its sentencing discretion. We affirm the judgments of conviction and the order denying Johnston's postconviction motion.

¶2 The jury convicted Johnston of second-degree recklessly endangering the safety of Trisha Wagner, Scott Martarona, George Russell and Ronald Berry. The charges against Johnston arose from an October 2004 bar fight that later moved outside. Martarona was in the bar with Berry and Russell; Johnston was in the bar with Wagner. As a result of the fight between them, the bartender ejected Johnston and Martarona. Berry and Russell also left, and Johnston told the bartender that he was going to kill the men. Shortly after Johnston left the bar, the bartender heard yelling, looked outside and saw Johnston enter his truck. The bartender observed Johnston drive toward the parking lot. Martarona, Berry, Russell and others were milling around the entrance to the parking lot and jumped out of the way to avoid being hit by Johnston's truck. Johnston drove into the parking lot, reversed and backed into Berry's truck. As he exited the parking lot, Johnston drove over the curb toward Russell. To avoid being struck by Johnston's truck, Russell grabbed the truck and held onto the hood for approximately five seconds before he fell off.

¶3 Johnston testified that after he left the tavern, he headed toward his truck. There, he encountered his attackers, and another fight ensued. Johnston eventually entered his truck and started to drive away, but he noticed that the truck was difficult to maneuver. The truck's handling characteristics were consistent with a flat tire. He pulled into the parking lot because the truck was not operating properly, and he felt he should not drive due to the amount of alcohol he had consumed. He did not see his attackers when he pulled into the parking lot. Thereafter, the attackers, Martarona, Russell and Berry, appeared alongside his

truck and attempted to gain entry. Johnston tried to exit the parking lot because he was afraid of the attackers, but his exit was blocked by another vehicle. Johnston had difficulty maneuvering his truck out of the parking lot, and while reversing, he struck Berry's vehicle. He pushed Berry's vehicle out of the way because people were in front of his truck, hitting the hood, and trying to enter from the driver's side. As he was maneuvering to leave the parking lot, Russell jumped in front of his truck and attempted to climb onto the hood. Johnston then moved forward out of the parking lot toward the police station. In describing his injuries from the beatings, Johnston did not contend that the injuries impaired his ability to function.

¶4 Officer Nye stopped Johnston a few blocks from the parking lot. Johnston's truck had a flat tire. Johnston exhibited obvious signs of intoxication, and he had facial injuries. Johnston's account of the confrontation changed several times during the traffic stop. Johnston gave different versions of the location of the confrontation, the number of vehicles involved, the attackers' actions and Johnston's conduct. Johnston did not recall telling Officer Nye that he was angry when he drove out of the parking lot and although there may have been people in the way, these were the people who had beaten him. Johnston was cross-examined about his statements to police in which he did not mention that he drove into the parking lot due to a flat tire or that someone jumped onto his vehicle as he entered the parking lot.

¶5 Wagner testified that Johnston and Martarona continued the bar fight in the street, and Martarona pushed her out of the way as Johnston drove his truck into the parking lot and then hit Berry's truck. Wagner opined that Johnston did not act intentionally; rather, he hit the gas and entered the lot. Wagner was impeached with her statements to police on the night of the incident in which she

described aggressively dangerous driving by Johnston, including accelerating straight at a group of people.

¶6 Berry testified that Johnston's truck came at him and Russell in the parking lot. Berry got away, but Russell ended up on the truck's hood before he fell off. The jury convicted Johnston of four counts of second-degree recklessly endangering safety. In denying Johnston's postconviction motion, the circuit court concluded that he did not demonstrate that he was prejudiced by his trial counsel's representation.

¶7 Johnston contends that his trial counsel did not provide effective assistance. The ineffective assistance of counsel standards are:

> To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground.…
>
> We review the denial of an ineffective assistance claim as a mixed question of fact and law. We will not reverse the trial court's factual findings unless they are clearly erroneous. However, we review the two-pronged determination of trial counsel's effectiveness independently as a question of law.

State v. Kimbrough, 2001 WI App 138, ¶¶26-27, 246 Wis. 2d 648, 630 N.W.2d 752 (citations omitted). The test for prejudice is whether our confidence in the outcome is sufficiently undermined. ***State v. Johnson***, 153 Wis. 2d 121, 129, 449 N.W.2d 845 (1990). The defendant has the burden of proof. ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997).

¶8 On appeal, Johnston argues that his trial counsel was ineffective for failing to investigate various witnesses and other aspects of the case. A defendant who contends that counsel failed to investigate "must allege with specificity what the

investigation would have revealed and how the investigation would have altered the outcome of the trial." ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994) (citation omitted), *cert. denied*, 514 U.S. 1030 (1995).

¶9 Johnston argues that pretrial investigation would have revealed how his truck tire became damaged. The circuit court found that it was not clear during trial how the tire became damaged, i.e., whether it was slashed or Johnston damaged it by the way he drove that night. We agree with the circuit court that the origin of the tire's damage made no difference to the outcome of the trial. It was undisputed that the tire was damaged; Johnston and Officer Nye testified to that fact. The jury heard Johnston's claim that he could not control his truck because of the tire's condition, even though he was able to drive the truck several blocks from the parking lot before being intercepted by Officer Nye. Investigation and testimony regarding how the tire was damaged would not have added anything to the case. Johnston was not prejudiced by his counsel's failure to develop this issue.

¶10 Johnston next argues that his counsel should have interviewed Wagner, a witness at the bar and in the parking lot. In particular, Johnston argues that Wagner would have offered information about the personal and business relationship between the bartender and the victims in order to impeach the bartender's credibility.[1] Wagner described this relationship at the postconviction

[1] Johnston also contends that Wagner had information that the victims carried knives, which would have bolstered Johnston's claim that his tire was slashed. We have already held that evidence regarding the manner in which the tire became damaged would not have added anything to the case. No weapons were used or brandished during the two fights. Therefore, the absence of this information does not undermine our confidence in the outcome of the trial.

motion hearing on Johnston's ineffective assistance claim.[2] Johnston also contends that his trial counsel could have learned from Wagner that Wagner and the victims coordinated their accounts of the incident to paint Johnston as the aggressor and themselves as the victims.[3]

¶11 At the postconviction motion hearing, the circuit court found that Wagner was a friend of Johnston and his family, and that her trial testimony differed from her statements to the police on the evening of the events. The court found that Wagner's statements to police were more credible than her trial testimony, the former having been made shortly after the threatening incident. In addition, Wagner admitted that she drank extensively the night of the incident and could not recall anything she said that night. The court characterized Wagner's postconviction motion testimony as obviously biased in favor of Johnston and suggested that the jury would have perceived such testimony as more of the same. The circuit court was in the best position to assess Wagner's trial testimony. *Cf.* ***State v. Hagen***, 181 Wis. 2d 934, 948-49, 512 N.W.2d 180 (Ct. App. 1994) (circuit court has an advantage over this court in assessing the impact and effect of matters on the outcome of the proceeding). Johnston did not establish prejudice arising from trial counsel's approach to Wagner's trial testimony.

[2] At the time she testified at the postconviction motion hearing, Wagner's last name had changed to LaPlante. We will continue to refer to her as Wagner to avoid confusion.

[3] Johnston overstates the record on this point. Wagner testified postconviction that the witnesses were together when they filled out their statement forms and that they were still talking about the events of the evening. Wagner did not recall if the witnesses made any specific statements about how they were going to write their statements. The postconviction motion transcript does not support Johnston's claim that the witnesses colluded on their statements to his detriment.

¶12 Johnston criticizes trial counsel's failure to determine whether an expert would have been available to discuss the effect of Johnston's injuries on his conduct. Trial counsel testified postconviction that she did not pursue such an expert because there was no indication that Johnston's injuries rendered him confused or unable to recall events. Johnston did not testify at trial or on postconviction motion that he was incapacitated in some manner as a result of his injuries or that any alleged incapacity extended to his vision or his ability to operate his truck. Therefore, Johnston did not sustain his burden to show that he was prejudiced by trial counsel's failure to pursue such information for trial.

¶13 Johnston criticizes trial counsel's choice of the necessity defense and suggests that counsel should have also argued self-defense. When Johnston raised the possibility of a self-defense instruction during trial, the circuit court ruled that the instruction was not warranted by the evidence because Johnston denied that he intentionally operated his vehicle in a manner that recklessly endangered the victims.[4] Johnston does not argue that the circuit court's view of the evidence was erroneous. Because the circuit court rejected a self-defense instruction, counsel cannot be faulted for not pursuing such a defense. *Cf.* ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994) (counsel cannot be faulted for not bringing a motion that would have failed).

¶14 Johnston argues that his trial counsel failed to request a unanimity instruction and that the jury should have been instructed to unanimously determine which acts constituted second-degree reckless endangerment. The unanimity instruction, WIS JI—CRIMINAL 517, states: "[b]efore you may return a verdict of

[4] Self-defense contemplates the intentional use of force. WIS JI—CRIMINAL 801.

guilty, all 12 jurors must be satisfied beyond a reasonable doubt that the defendant committed the same act and that the act constituted the crime charged."

¶15 Johnston argues that he committed separate acts: the acts that occurred when he drove into the parking lot and the acts that occurred when he drove out of the parking lot. Therefore, he argues, the jury should have been instructed to agree unanimously on the acts constituting the crime. Johnston's premise is flawed. "Wisconsin has historically held that in 'continuing course of conduct' crimes, the requirement of jury unanimity is satisfied even where the jury is not required to be unanimous about which specific underlying act or acts constitute the crime." ***State v. Johnson***, 2001 WI 52, ¶17, 243 Wis. 2d 365, 627 N.W.2d 455. Johnston drove his truck into the parking lot, threatened the victims, crashed into Berry's vehicle, and threatened the victims again as he exited the parking lot. This was a continuing course of conduct, and there was no "break in the action." ***State v. Giwosky***, 109 Wis. 2d 446, 456, 326 N.W.2d 232 (1982). Johnston was charged with one crime per victim, and the events in the parking lot were properly considered by the jury as a continuing course of conduct.

¶16 Finally, Johnston alleges that at the sentencing, the court considered inaccurate information and pending criminal charges. The court sentenced Johnston to a four-year term consisting of eighteen months of initial incarceration and thirty months of extended supervision. On the other three counts, the circuit court withheld sentence and placed Johnston on concurrent five-year terms of probation consecutive to his period of incarceration.

¶17 The court was aware of its duty under ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197, to enunciate its sentencing rationale and show an exercise of sentencing discretion. The court considered Johnston's

character, his lack of remorse, and the need to protect the public. The court found that the offenses were very serious and that the victims were at great risk of injury by Johnston's operation of his truck. Johnston was intoxicated and driving dangerously. The court acknowledged that it was aware that Johnston had four unresolved bail jumping charges and that he had been in contact with a witness in violation of a bond condition. The court stated that it was aware that probation was an option, but that placing Johnston in the community would not impress upon Johnston the seriousness of his conduct. Postconviction, the court declined to modify the sentence.

¶18 Johnston argues that the court erroneously considered the unresolved bail jumping charges. A sentencing court may consider pending charges that shed light on the defendant's character. ***State v. Hubert***, 181 Wis. 2d 333, 346, 510 N.W.2d 799 (Ct. App. 1993). Clearly, a defendant charged with bail jumping is a risk for probation because he or she has allegedly demonstrated an inability to follow rules while in the community. Allegations of bail jumping also shed light on a defendant's character.

¶19 Johnston argues that the court did not comply with ***Gallion*** in imposing sentence. We disagree. The court stated its sentencing rationale and relied upon appropriate sentencing factors, the weight of which was within the circuit court's discretion. ***State v. Russ***, 2006 WI App 9, ¶14, 289 Wis. 2d 65, 709 N.W.2d 483.

¶20 Johnston argues that the court placed excessive weight on the fact that he did not express remorse. First, the weight placed on sentencing considerations is solely within the circuit court's discretion. ***Id.*** Second, the court considered other appropriate sentencing factors, including the severity of the

offenses, the need to protect the public and the need to deter such conduct by others. *See* ***id.***

¶21 Johnston complains that the circuit court did not state any reasons for the eighteen-month period of initial incarceration. The exercise of sentencing discretion does not lend itself to mathematical precision. ***Gallion***, 270 Wis. 2d 535, ¶49. The court adequately explained why incarceration rather than probation was appropriate. The court properly exercised its sentencing discretion.

By the Court.—Judgments and order affirmed.

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