

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 3, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 01-2527-CR
STATE OF WISCONSIN**

Cir. Ct. No. 99-CF-375

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVID J. BALLIETTE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: ROBERT A. HAWLEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. David J. Balliette appeals from the judgment of conviction entered against him and from the order denying his motion for postconviction relief. He argues on appeal that he received ineffective assistance of trial counsel. We disagree and affirm.

¶2 Balliette was convicted after a jury trial of homicide by the intoxicated use of a motor vehicle. The court sentenced him to forty years in prison. Balliette then brought a motion for postconviction relief arguing, among other things, that he received ineffective assistance of trial counsel. The court held a hearing and denied the motion. Balliette appeals.

¶3 The underlying incident occurred on the evening of August 30, 1999. Balliette was driving his truck after having consumed a number of beers and two shots of whiskey. The car in front of him slowed down and Balliette went to pass the car. The car turned left. Balliette struck the car, killing the driver. The driver had been turning into her driveway at the time of the accident, and her husband and two young children witnessed the event. Eventually Balliette was taken to a hospital where his blood was drawn. His blood alcohol content at the time of the accident was estimated to be 0.21%, more than twice the legal limit.

¶4 At trial, Balliette's defense was that he believed that the victim was pulling over to allow him to pass her, and that she had not used her blinker to indicate that she was turning left into her driveway. He argued, therefore, that the accident would have occurred even if he had not been intoxicated. The court gave the following instruction to the jury:

If you are satisfied beyond a reasonable doubt that the defendant caused the death of [the victim] by operating a vehicle while the defendant was under the influence of an intoxicant or had a prohibited blood alcohol concentration, you must determine whether the defendant has a defense to the crime by considering the following:

Would the death of [the victim] have occurred even if the defendant had been exercising due care and had not been under the influence or had a prohibited alcohol concentration?

Wisconsin law provides that it is a defense to the crime charged in this case if you're satisfied to a reasonable

certainty by the greater weight of the credible evidence that the death would have occurred even if the defendant had been exercising due care and had not been under the influence of an intoxicant or had not had a prohibited alcohol concentration.

....

Evidence has been received relating to the conduct of [the victim] at the time of the alleged crime. Any failure by [the victim] to exercise due care does not by itself provide a defense to the crime charged against the defendant. Consider evidence of the conduct of the [the victim] in deciding whether the defendant has established that the death would have occurred even if the defendant had not been under the influence of an intoxicant and had been exercising due care.

If you're satisfied to a reasonable certainty by the greater weight of the credible evidence that the death of [the victim] would have occurred even if the defendant had been exercising due care and had not been under the influence or had not had a prohibited alcohol concentration, you must find the defendant not guilty.

¶5 Balliette argues that he received ineffective assistance of trial counsel because counsel did not request that the theory of defense instruction include factually specific language. Balliette asserts that the comment to the jury instruction suggests that the more general statements used by the court should be followed with a more specific description of how the victim's conduct relates to the facts of the particular case. *See* WIS JI—CRIMINAL 1188, n.7. At the hearing on Balliette's motion for postconviction relief, his trial counsel testified that he was not aware of the footnote's suggestion at the time of trial.

¶6 Balliette also argues that his counsel was ineffective at sentencing because he did not object to the many letters considered by the court from the victim's friends and family. He asserts that the letters were not provided to counsel before sentencing and he should have objected to them as being unfairly prejudicial.

¶7 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. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. If this court concludes that the defendant has failed to prove one prong, we need not address the other prong. *Id.* at 697. Consequently, if counsel's performance was not prejudicial, the claim fails and this court need not examine the performance prong. See *State v. Moats*, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶8 Without deciding whether counsel's performance was in fact deficient, we conclude that Balliette has not established that he was prejudiced. To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. *Strickland*, 466 U.S. at 687. As to the jury instruction, defense counsel hammered home the theory of the defense throughout the trial. Counsel argued that Balliette believed that the victim had slowed down to let him pass and had not used her turn signal. The jury, therefore, was aware of the specific factual underpinnings of the theory of the defense. It was not a conceptually difficult defense. The instruction given provided the legal framework for applying the facts which had already been argued. We cannot conclude that omission of specific facts from the jury instruction deprived Balliette of a fair trial.

¶9 Similarly, Balliette has not explained how he was prejudiced when the court considered the letters of the victim's friends and family. He asserts that the information was highly inflammatory and that he was denied the opportunity to deny or explain the information presented. He does not, however, explain what information he would have denied or explained. As a defendant who alleges that

his or her counsel failed to investigate “must allege with specificity what the investigation would have revealed and how it 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), so must the appellant here allege with specificity what information was prejudicial.¹ Since we conclude that Balliette was not prejudiced by any of the omissions he asserts, we conclude that he did not receive ineffective assistance of counsel.

¶10 Finally, Balliette also argues that the court erred when it refused to consider the sentencing recommendation of two of the jurors who sat on the trial. The views of the jurors as to an appropriate sentence may be considered by the trial court, but this is a matter of the trial court’s discretion. *State v. Marhal*, 172 Wis. 2d 491, 500 n.7, 493 N.W.2d 758 (Ct. App. 1992). In this case, the trial court would not consider the jurors’ recommendation because they had not had access to the presentence investigation report, and because of the court’s concerns about the pressures on jurors if this became a regular practice. We conclude that the trial court properly exercised its discretion by not considering the jurors’ sentencing recommendations. For the reasons stated, the judgment and order of the trial court are affirmed.

By the Court.—Judgment and order affirmed.

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

¹ Balliette also argues that the trial court erred when it considered the letters. Since there was no objection at trial, however, the issue was not preserved for appeal.

