

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 2, 2010

A. John Voelker
Acting 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. 2009AP2634-CR

Cir. Ct. No. 2007CF209

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERRAD C. O'DONNELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Jerrad O'Donnell appeals a judgment convicting him of two counts of homicide by intoxicated use of a vehicle and one count of injury by intoxicated use of a vehicle. He also appeals an order denying his postconviction motions in which he alleged ineffective assistance of counsel and

newly discovered evidence. O'Donnell argues that his trial counsel, Eric Schulenburg, performed deficiently: (1) by failing to present evidence and argument challenging the State's "retrograde extrapolation" of O'Donnell's blood alcohol content (BAC); (2) by failing to elicit evidence that would have created doubt about whether O'Donnell's driving caused the accident; and (3) by failing to object to the prosecutor's closing argument and by his own closing argument. He also argues that he should be granted a new trial based on newly discovered evidence or in the interest of justice. We reject these arguments and affirm the judgment and order.

BACKGROUND

The Trial

¶2 O'Donnell was charged with causing the death of Ronald Hart and Tanner Zimmerman and injuring Jerald Sprecher when he crossed the center line and struck their three motorcycles. Sprecher testified that the motorcyclists were northbound on Highway 113 in a staggered formation, with Hart and Zimmerman traveling near the fog line, and Sprecher between them near the center line. As they were climbing a hill on a blind curve, a car came across the center line and struck them. After crawling six or eight feet toward his friends, Sprecher returned to his motorcycle and called 911 for help. The 911 call was received at 8:21 p.m.

¶3 O'Donnell was also injured in the accident and was med-flighted to the hospital. At 9:40 p.m., the hospital drew O'Donnell's blood for testing. The hospital laboratory indicated a BAC of 0.13. At 11:58 p.m., O'Donnell's blood was again drawn for law enforcement purposes. This blood sample was given to a detective, who stored it in a styrofoam container in his squad car for four days

before turning it over to the crime lab for analysis. That sample showed a BAC of 0.071.

¶4 David Hannon, a toxicologist for the crime lab, performed a retrograde extrapolation calculating that O'Donnell's BAC at 8:20 p.m. was 0.125. This calculation depended on no additional alcohol entering O'Donnell's bloodstream after 8:20 and was based on average elimination rates. Hannon testified that a preservative in the blood sample would prevent microbial growth and, although refrigeration is recommended, placement in a sealed styrofoam box would also work. Hannon further testified that the medical lab test would elevate the BAC reading by 10 to 15% because the medical lab test is done on serum, not whole blood. On cross-examination, Hannon testified that the absorption rate of alcohol is influenced by factors, such as whether there is food in the stomach. He acknowledged that he had no information regarding O'Donnell's stomach contents, and his calculation was based on the assumption that there was no unabsorbed alcohol in O'Donnell's stomach. Knowledge of O'Donnell's stomach content might have altered his calculation from 0.125 to 0.12 or 0.13. Hannon characterized this distinction as statistically insignificant.

¶5 Thomas Parrott, a crash reconstructionist, testified about the location of the vehicles at the time of the accident. Based on damage to the vehicles, paint transfer, skid marks and tire smudges, fluid patterns, debris fields, biological material, and furrowing, Parrott confirmed that O'Donnell's car crossed the center line at the time of the accident. He opined that O'Donnell was traveling much faster than the speed limit and faster than the curve could be negotiated.

¶6 Leigh Wille, a former deputy sheriff, testified regarding a conversation he monitored between O'Donnell and his father. Wille testified that

O'Donnell told his father he was going in excess of seventy miles per hour down the hill because he had just put new tires on his car and wanted to see how they cornered going down a hill.

¶7 The defense called three witnesses. Two of the witnesses saw O'Donnell at the bar shortly before 8:00 p.m. He did not appear intoxicated. O'Donnell also testified. He said that he arrived at the bar shortly after 6:00 p.m. and had approximately three beers. When he left the bar, he forgot his sunglasses and returned for them at approximately 7:45 or 7:50 p.m. He drank one more beer before leaving the bar. As he approached the accident scene traveling fifty-five or sixty miles per hour, he lost control of his car when he swerved to miss an object in the road. He went off the road, over-corrected, and tried to get control of the car by accelerating. O'Donnell confirmed that he had new tires on the car, and agreed he told his father that he was driving at seventy miles per hour and testing his new tires. He confirmed that he gave different excuses to different people after the accident, and confirmed that he previously indicated Sprecher crossed the center line, causing him to swerve. He no longer believed that was the case.

Postconviction Proceedings

¶8 In his postconviction motion, O'Donnell cited publications that are critical of retrograde extrapolation because that procedure relies on potentially unwarranted assumptions about a person's rate of eliminating alcohol. The motion faulted Attorney Schulenburg for failing to cross-examine Hannon about these unwarranted assumptions. It also faulted Schulenburg for failing to show that three-quarters of O'Donnell's fourth beer would not have been absorbed into his bloodstream at the time of the accident because the accident occurred only about five miles from the bar and it takes twenty minutes for the entire drink to enter the

bloodstream. The motion also alleged deficient performance because Schulenburg failed to present evidence of the Department of Justice guidelines that say blood samples should be refrigerated. The motion cited articles indicating that lack of refrigeration can cause fermentation and lead to artificially inflated BAC levels and that the preservative used to prevent fermentation would only be effective for two days.

¶9 Regarding the cause of the accident, the motion faulted Schulenburg for failing to elicit evidence that Parrott's reconstruction of the accident may have been slanted by his knowledge that O'Donnell smelled like alcohol after the accident and for failing to exploit Parrott's inability to determine where Sprecher's motorcycle was on the roadway at the time of impact. The motion faulted Schulenburg for failing to impeach Sprecher's testimony with inconsistent statements regarding the position of the motorcyclists before the accident, when Sprecher first saw O'Donnell's car, how much Sprecher could remember after the accident, and whether Sprecher jumped or was thrown from his motorcycle. The motion also faults Schulenburg for failing to present evidence that blood tests taken of Hart and Zimmerman revealed that they were both intoxicated at the time of the accident. Finally, the motion alleged ineffective representation because Schulenburg did not object when the prosecutor urged the jury to consider the victims, and for Schulenburg's own closing argument in which he said the blame "goes mostly on my client."

¶10 In addition to testifying at the postconviction hearing, Schulenburg filed a written response to the motions. He stated he could not find an expert witness to contradict Hannon's calculation. However, he agreed that he could have done a better job exploring the weaknesses of the retrograde extrapolation. Schulenburg's strategy was to persuade the jury that O'Donnell was not

intoxicated at the time he left the bar rather than attempting to impeach an expert. He conceded he could have done both.

¶11 Regarding the absorption rate, Schulenburg conceded that it would have been helpful to point out that O'Donnell had not absorbed all of the fourth beer at the time of the accident, and Schulenburg had no strategic reason for not asking that question or arguing that point. Regarding the failure to refrigerate the blood sample, Schulenburg indicated that he could not find support for the proposition that failure to refrigerate could invalidate the test result. He was aware of guidelines recommending refrigeration, but was not aware that lack of refrigeration could cause fermentation. He had no strategic reason for failing to cross-examine Hannon regarding the guidelines. Schulenburg also was not aware that the preservative could prevent fermentation for only two days.

¶12 Regarding the cause of the accident, Schulenburg testified that Parrott's report was difficult to circumvent, and an engineering firm that Schulenburg contacted concluded that Parrott's report was accurate and well done. O'Donnell's testimony did not fit the physical evidence.

¶13 Regarding his failure to impeach Sprecher with inconsistent statements about the formation the motorcyclists were riding in, Schulenburg indicated that the physical evidence supported Sprecher's testimony. Schulenburg testified that he did not attempt to impeach Sprecher's testimony with inconsistent statements because he believed the jury would accept Sprecher's eyewitness testimony corroborated by Parrott's reconstruction of the accident. Schulenburg did not pursue evidence that Hart and Zimmerman were intoxicated because he did not believe it was relevant. Based on Parrott's reconstruction, there was no

evidence that the motorcyclists had been driving recklessly and Schulenburg felt, therefore, that their level of intoxication was irrelevant.

¶14 Schulenburg agreed that the prosecutor's closing argument appealed to the jury's emotions by calling for sympathy for the victims. He indicated he had a strategic reason for not objecting because he did not want to remind the jury of the argument. As for Schulenburg's own closing argument in which he indicated that O'Donnell was blameworthy, Schulenburg testified that he wanted the jury to understand that the accident was caused by fate or road design, and he needed to acknowledge that O'Donnell was in the wrong lane for reasons other than consumption of intoxicants.

¶15 O'Donnell also filed a supplemental postconviction motion alleging newly discovered evidence. Christine Frey testified that she encountered the motorcyclists approximately four hours before the accident. They drove alongside her car and were "razzing" her because she was going the speed limit. She did not perceive them as operating in a dangerous manner, although one of the motorcyclists may have gone over the center line when he pulled alongside her car. She described their behavior as "playful."

¶16 The circuit court denied both postconviction motions. The court concluded that Frey's testimony did not constitute newly discovered evidence because it was not reasonably probable that the outcome of the trial would have been different if she had testified. The court concluded that Schulenburg did not perform deficiently because he adequately cross-examined Hannon regarding retrograde extrapolation, he could not find an expert witness to support his position on O'Donnell's alcohol level, and his effort to focus the jury's attention on the fact that O'Donnell did not appear to be intoxicated constituted a

reasonable trial strategy. The court further found that Schulenburg did cross-examine Hannon regarding his assumptions and the absorption issue. The fact that Schulenburg could have asked further questions does not meet the burden of overcoming the presumption that counsel acted reasonably and within professional norms. Because Hannon testified that lack of refrigeration would not adversely affect O'Donnell's blood sample, the issue was appropriately placed before the jury and Schulenburg's performance was not deficient.

¶17 Regarding the allegation that Parrott's accident reconstruction may have been influenced by knowledge that O'Donnell had been drinking before the accident, the court noted that experts retained by the defense could not dispute Parrott's conclusions. Therefore, Schulenburg reasonably chose not to challenge Parrott's conclusions.

¶18 The court also concluded that Schulenburg's failure to impeach Sprecher with inconsistent statements represented a strategic decision that did not constitute deficient performance. Likewise, Schulenburg appropriately chose not to attempt to establish that Hart and Zimmerman were intoxicated because there was no evidence that they deviated from their lane of travel and therefore their level of intoxication would have been irrelevant.

¶19 Finally, with respect to the closing arguments, the court found that Schulenburg's lack of an objection to the prosecutor's closing argument was a reasonable strategic choice designed to avoid highlighting the argument. Regarding Schulenburg's closing argument that O'Donnell was blameworthy, the court found that the statement was not a concession in light of the balance of the closing argument, and it constituted a reasonable strategy to convey to the jury that

the accident occurred as a result of fate, road design, and timing, rather than a criminal act.

DISCUSSION

Effective Assistance Of Counsel

¶20 To establish ineffective assistance of trial counsel, O'Donnell must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's performance is deficient if his representation fell below an objective standard of reasonableness. *Id.* at 688. O'Donnell must overcome a strong presumption that Schulenburg's conduct fell within the wide range of reasonable professional assistance, and that the conduct cannot be considered a sound trial strategy. *Id.* at 689. Strategic choices made after thorough investigation of the law and facts are virtually unchallengeable. *Id.* at 690. The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. *Id.* at 691. To establish prejudice, a defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one that undermines our confidence in the outcome. *Id.* at 694. Because the defendant has the burden of showing both deficient performance and prejudice, this court need not address both components if the defendant makes an insufficient showing on one of them. *Id.* at 697.

¶21 O'Donnell has failed to establish prejudice from Attorney Schulenburg's alleged deficiencies regarding Hannon's retrograde extrapolation because the hospital blood test confirms Hannon's conclusion that O'Donnell's BAC exceeded .08 at the time of the accident. The hospital blood test indicated a

BAC of .13. That sample was not improperly stored. Therefore, O'Donnell's issues relating to the elimination rate and possible fermentation do not apply to that blood sample. Hannon's unchallenged testimony established that the medical lab test would elevate the BAC by 10 to 15%. Reducing the .13 reading by 15% yields a BAC of .1105. Even if Hannon's fourth beer is entirely eliminated from consideration, his BAC would remain above .08. Therefore, regardless of any defects in Hannon's analysis of the blood sample taken by law enforcement, the hospital's medical test independently confirms Hannon's calculation. Schulenburg's failure to challenge Hannon's retrograde extrapolation of O'Donnell's BAC does not undermine our confidence in the outcome.

¶22 O'Donnell established neither deficient performance nor prejudice from Schulenburg's failure to elicit evidence to impeach Parrott's reconstruction of the accident or to suggest that Sprecher may have caused the accident by crossing into O'Donnell's lane. Schulenburg consulted with an engineering firm and was unable to find an expert witness to contest Parrott's report. There is no evidence that Parrott's conclusions were influenced by knowledge that O'Donnell had been drinking before the accident. Parrott itemized the factors that influenced his analysis, and O'Donnell's drinking was not considered. Parrott's conclusions were consistent with the physical evidence and with Sprecher's eyewitness account of the accident. It was objectively reasonable for Schulenburg not to attempt to establish that Parrott's conclusion was based on bias rather than on the physical evidence.

¶23 It was also objectively reasonable for Schulenburg to decline to present evidence that Sprecher caused the accident because there was no proof to support that theory. Schulenburg also reasonably chose not to challenge Sprecher's credibility. The fact that Sprecher's motorcycle came to rest 200 feet

north of the other motorcycles does not show that he was first in line in light of the relative damage to each of the motorcycles. Discrepancies in Sprecher's testimony regarding the position of each of the motorcyclists, when he first saw the car, how much he could remember after the accident, and whether he jumped or was thrown from his motorcycle are not details that would seriously undermine the State's case.

¶24 O'Donnell established neither deficient performance nor prejudice from Schulenburg's failure to establish that Hart and Zimmerman were intoxicated at the time of the accident. The circuit court prohibited introduction of that evidence, subject to reconsideration if relevancy could be established. Schulenburg correctly concluded that their intoxication was not relevant because there was no evidence to suggest that their driving caused the accident.

¶25 Our confidence in the outcome is not undermined by Schulenburg's failure to object to the prosecutor's closing argument. The prosecutor's comments encouraged the jury not to "overlook the victims," and to not focus solely on what O'Donnell did. But he immediately further stated that "[o]bviously that has to be your main focus." In addition, the jury was instructed not to be swayed by sympathy, prejudice, or passion. We cannot conclude that the prosecutor's statement of sympathy for the victims affected the verdict. In addition, Schulenburg reasonably failed to object for the strategic reason that he did not want to highlight the argument by objecting.

¶26 Schulenburg's concession that O'Donnell was blameworthy does not undermine our confidence in the verdicts. The gist of his argument was to draw a distinction between blameworthiness based on O'Donnell's loss of control of his car versus legal guilt as defined by the law. In light of Parrott's testimony, the

physical evidence, and O'Donnell's concession that he no longer believed Sprecher invaded his lane of travel, Schulenburg had little choice but to accept some blame for O'Donnell based on the speed he was driving and for losing control of his vehicle. Schulenburg's effort to blame road design, timing, and fate, and to urge the jury to find these factors rather than intoxication caused the accident, constituted a reasonable strategy.

Newly Discovered Evidence

¶27 The circuit court correctly concluded that Christine Frey's testimony did not warrant a new trial based on newly discovered evidence because her testimony did not create a reasonable probability of a different result at a new trial. *See State v. Bembenek*, 140 Wis. 2d 248, 252, 409 N.W.2d 432 (Ct. App. 1987). Frey's testimony that the motorcyclists were playfully "razzing" her hours earlier in a different location is weak evidence that the motorcyclists were driving carelessly at the time of the accident.

New Trial In The Interest Of Justice

¶28 Finally, O'Donnell has not established a basis for granting a new trial in the interest of justice. He argues that the real controversy was not fully tried. A controversy is not fully tried when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue in the case. *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). O'Donnell's argument is based on the jury not hearing evidence critical of one of the two blood tests, unpersuasive evidence regarding the cause of the accident, strategic decisions by Attorney Schulenburg, and irrelevant evidence about the victims' intoxication and their behavior hours before the accident occurred. For essentially the same reasons that we conclude these issues do not warrant a new trial in the

contexts we discuss them in above, we conclude they do not provide a basis for concluding that the real controversy was not fully tried. As we have explained, these matters either did not involve error or ineffective assistance of counsel, or they were of little consequence.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

