COURT OF APPEALS
DECISION
DATED AND RELEASED

August 1, 1995

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

NOTICE

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

No. 95-0704-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDREW J. BILLER,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

FINE, J. Andrew J. Biller appeals from a judgment of conviction entered on a jury's verdict finding him guilty of failing to comply with § 346.67(1)(a), STATS., which requires motorists involved in accidents with other occupied motor vehicles to stop and exchange information.[1] Biller asserts the

[1] Section 346.67(1)(a), STATS., provides:

> **Duty upon striking person or attended or occupied vehicle. (1)** The operator of any vehicle involved in an accident resulting in injury to or death of any person or in damage to a vehicle which is driven or attended by any person shall immediately stop such vehicle at the

following claims of trial-court error, which we have re-ordered for ease of analysis. First, he contends that his trial counsel was ineffective, and that the trial court erred in not permitting his trial counsel to testify in support of Biller's ineffective-assistance-of-counsel claim. Second, he argues that the trial court erred in receiving "other crimes" evidence under RULE 904.04(2), STATS. Finally, he claims that there was insufficient evidence to support his conviction. We affirm.

The dispute in this case was whether Biller, following an accident with Mark A. Mork, intentionally left the scene without first complying with § 346.67(1)(a), STATS., or whether, as he claimed at trial, he was unable to successfully follow Mork after he and Mork agreed to pull off of the bridge where the accident happened. Biller admitted that he and Mork did not exchange the required information, but contended that he would have done so if he, Biller, had not lost Mork while attempting to follow him.

Biller's testimony was contradicted by Thomas Turczynski, Mork's friend who was in his own car that evening and was being followed by Mork when the accident happened. Turczynski testified that after the accident, he, Mork and Biller agreed to meet in an area across the river spanned by the bridge, and that as he and Mork drove to that area Biller first followed them but "then took a left and sped off down the road" away from them. Mork and Turczynski found a police officer and gave him Biller's description as well as the description and license-plate number for Biller's car. The officer testified that he then went to Biller's home where he saw a car that not only matched Mork's and Turczynski's description but that also had damage that was consistent with the accident as Mork and Turczynski had described it. The officer knocked on Biller's door: "[S]omeone said, `Who is it,' and I said, `It's the Milwaukee police,'

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> scene of the accident or as close thereto as possible but shall then forthwith return to and in every event shall remain at the scene of the accident until the operator has fulfilled the following requirements:
>
> (a) The operator shall give his or her name, address and the registration number of the vehicle he or she is driving to the person struck or to the operator or occupant of or person attending any vehicle collided with.

and the response was, `Go away, get fucked." No one answered the telephone at Biller's house when the officer called a little later.

1. *Ineffective-assistance-of-counsel claim*.

Biller contends that his trial counsel was ineffective in the following respects. First, that he did not object to Turczynski's hearsay testimony that an unidentified bystander yelled contemporaneously with the accident "Did you see what happened?" to which another unidentified bystander replied to the effect that he did see what happened and that it "didn't look good." Second, that on his direct-examination of Biller he elicited Biller's 1989 conviction for fleeing an officer. He also claims that the trial court erred in not permitting him to call his trial counsel as a witness during the post-conviction hearing on Biller's ineffective-assistance-of-counsel claim.

Every criminal defendant has a Sixth Amendment right to the effective assistance of counsel. ***Strickland v. Washington***, 466 U.S 668, 686 (1984). In order to establish violation of this fundamental right, a defendant must prove two things: (1) that his or her lawyer's performance was deficient, and, if so, (2) that "the deficient performance prejudiced the defense." ***Id.***, 466 U.S. at 687. A lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the `counsel' guaranteed the defendant by the Sixth Amendment." ***Ibid.*** Similarly, a defendant alleging prejudice must demonstrate that the trial lawyer's errors "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Ibid***. As recently restated, the "prejudice" component of ***Strickland*** "focusses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." ***Lockhart v. Fretwell***, 113 S. Ct. 838, 844, 122 L.Ed.2d 180, 191 (1993).

On appeal, the standard of review is a question of both fact and law. ***Strickland***, 466 U.S. at 698. The trial court's findings of fact will not be reversed unless clearly erroneous. ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985). Questions of whether counsel's actions were deficient, and, if so, whether they prejudiced the defense, are questions of law to be determined independently by the reviewing court. ***Id.*** at 634, 369 N.W.2d at 715.

We need not analyze counsel's performance if it is clear that any alleged deficiencies did not prejudice the defendant. ***Strickland***, 466 U.S at 687; ***State v. Johnson***, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990). Although trial counsel whose representation of the defendant is alleged to be ineffective should generally testify at the post-conviction hearing to explain the reasons for his or her actions, ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908–909 (Ct. App. 1979), that testimony—or any evidentiary hearing—is not required unless there is a *prima facie* showing that the defendant is entitled to relief. *See* ***State v. Washington***, 176 Wis.2d 205, 216, 500 N.W.2d 331, 336 (Ct. App. 1993).

Biller has not satisfied his burden under ***Washington*** in connection with either of his two claims. First, the bystanders' statements testified to by Turczynski were admissible under the confluence of RULES 908.03(1) and 908.03(2), STATS.[2] Thus, Biller's trial counsel was not ineffective—there were no valid grounds upon which to object. Moreover, the out-of-court statements were wholly immaterial to the contested issue in the case; Biller never denied that he was involved in an accident, and the accident's severity was, similarly, not an issue. Thus, there was no prejudice. Second, Biller's trial counsel tried to persuade the trial court that the 1989 fleeing conviction should be kept out of evidence. The trial court ruled, however, that it was probative in connection with Biller's theory that he did not intend to leave the scene without first complying with § 346.67(1)(a), STATS., and that the evidence should not be excluded under RULE 904.03, STATS. In light of the trial court's ruling, which, as we discuss below, was well within the ambit of its discretion, the decision by Biller's trial counsel to elicit the evidence first in an attempt to put it in as positive a light as was possible was not deficient performance but was, rather, skillful advocacy. Furthermore, in light of the trial court's correct ruling on the admissibility of the evidence, there was no prejudice as a matter of law. Accordingly, the trial court did not err in either not permitting Biller's trial counsel to testify or in denying Biller's post-conviction motion.

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[2] RULE 908.03(1), STATS., provides:

> **Hearsay exceptions; availability of declarant immaterial.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> **(1)** PRESENT SENSE IMPRESSION. A statement describing or explaining an

2.*Admissibility of the 1989 fleeing conviction under* RULE *904.04(2),* STATS.

RULE 904.04(2), STATS., provides:

> OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

A decision whether to admit evidence under RULE 904.04(2) is within the trial court's sound discretion, ***State v. Pharr***, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983), and will not be upset on appeal if the decision has a reasonable basis in the evidence and was made in accordance with accepted legal principles, ***State v. Jenkins***, 168 Wis.2d 175, 186, 483 N.W.2d 262, 265 (Ct. App. 1992), *cert. denied*, 113 S. Ct. 608. The proponent of the evidence has the burden to show that it is relevant to an issue other than propensity. ***State v. Speer***, 176 Wis.2d 1101, 1114, 501 N.W.2d 429, 433 (1993). Once that burden has been met, the evidence is admitted unless the opponent can show that the probative value of the other crimes evidence is "substantially outweighed by the danger of unfair prejudice," RULE 904.03, STATS. *See* ***Speer***, 176 Wis.2d at 1114, 501 N.W.2d at 433. RULE 904.04(2), STATS., permits the admission of evidence to show, *inter alia*, "intent," "knowledge," and "absence of mistake." The trial court admitted the evidence on "intent" and "absence of mistake."

(..continued)

> event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

RULE 908.03(2), STATS., provides:

> **(2)** EXCITED UTTERANCE. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

As we have seen, Biller claimed that he would have complied with § 346.67(1)(a), STATS., had he not gotten lost. Biller's prior failure to stop his car when directed to do so makes it more likely than not that he was aware of his responsibilities under the traffic laws and that he would not have, as he testified, just felt that it was "not worth my hassle, I'm just going home" rather than to try to find Mork and Turczynski after he claims to have lost them following their agreement to meet in a less congested area. Further, it permitted the jury to assess what they could find was his reaction when the officer went to his home shortly after the accident. The trial court's decision that the evidence was within RULE 904.04(2), STATS., and its determination that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice was well within the ambit of its discretion.

3. *Sufficiency of the evidence.*

When a defendant claims that the evidence was insufficient to support his or her conviction the scope of our review is limited. We must affirm if we can conclude that a jury, acting reasonably, could be convinced of the defendant's guilt beyond a reasonable doubt. *See* ***State v. Teynor***, 141 Wis.2d 187, 204, 414 N.W.2d 76, 82 (Ct. App. 1987). As recently restated:

> [A]n appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. 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, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-758 (1990) (citation omitted). The jury verdict here must be sustained. Although Biller disputes the State's evidence, that evidence is creditable and, as can be seen from our recitation of the salient facts in the first part of this opinion, amply supports the verdict.

By the Court.—Judgment and order affirmed.

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