

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

September 26, 1996

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. 95-2741-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**ROSS H. HERMANSON,**

**Defendant-Appellant.**

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

Before Eich, C.J., Dykman, P.J., and Robert D. Sundby, Reserve Judge.

PER CURIAM. Ross Hermanson appeals from a judgment convicting him of second-degree reckless homicide and an order denying postconviction relief. The issues are whether the trial court erred by allowing the State to introduce evidence Hermanson contends was irrelevant and highly

prejudicial and whether Hermanson received effective assistance of trial counsel. We reject his arguments on both issues, and therefore affirm.

The evidence against Hermanson included testimony that he entered a ninety-degree highway turn at sixty miles per hour, despite a passenger's warning to slow down, and lost control of his car. It then spun over the center line and struck an on-coming car, killing its driver.

Hermanson sought to exclude additional evidence that while driving into the turn he had been drinking beer from a bottle and placed the bottle between his legs between sips. He also sought to exclude evidence that he took bottles of beer that had been in his car and placed them in and around the victim's car after the accident. The trial court refused to exclude this evidence, and it was used against Hermanson at trial.

Before deliberations began, the trial court instructed the jury that it could find Hermanson guilty of the lesser-included offense of negligent homicide. However, Hermanson asserts that trial counsel's closing argument undermined the lesser-included strategy and contradicted Hermanson's trial testimony by arguing that the collision was purely accidental. Consequently, after he was convicted, he filed a postconviction motion alleging ineffective assistance of trial counsel. The trial court denied that motion, resulting in this appeal.

Relevant evidence is that which makes the existence of any consequential fact more or less probable than it would be without the evidence. The consequential fact in this case was whether Hermanson engaged in criminal recklessness, which is conduct that creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk. Section 939.24(1), STATS. Whether Hermanson was holding a bottle of beer in his hand or between his legs as he entered the curve at a high speed was highly relevant to whether he was then engaged in criminal recklessness or, for that matter, criminal negligence. As for placing the remaining beer bottles in and around the victim's car, acts of an accused which are intended to obstruct justice or avoid punishment are admissible to prove consciousness of guilt. *State v. Bettinger*, 100 Wis.2d 691, 698, 303 N.W.2d 585, 589, amended, 100 Wis.2d 691, 305 N.W.2d 57 (1981).

The trial court properly determined that admitting the evidence did not unfairly prejudice Hermanson. Under § 904.03, STATS., relevant evidence should be excluded if the danger of unfair prejudice substantially outweighs the probative value. Hermanson was no doubt prejudiced by the introduction of the evidence. However, the trial court could reasonably conclude that he was not unfairly prejudiced to a degree requiring exclusion. The evidence was highly probative of recklessness or negligence, and it could not have misled the jury into treating this as a drunk driving case. Hermanson undisputedly had no measurable blood alcohol content when the accident occurred.

Hermanson failed to show that counsel ineffectively represented him during the closing argument. The defendant bears the burden of proving ineffective assistance of counsel. *State v. Pitsch*, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). To meet that burden the defendant must present the testimony of trial counsel at the postconviction motion hearing. *State v. Machner*, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). Here, Hermanson did not call trial counsel as a witness or explain his failure to do so. That omission resolves the issue against him.

*By the Court.* – Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.