OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

May 3, 2017

To:

Hon. Peter L. Grimm
Circuit Court Judge
Fond du Lac County Courthouse
160 South Macy St.
Fond du Lac, WI 54935

Katherine Seifert
Seifert Law Office
430 Ahnaip St.
Menasha, WI 54952

Ramona Geib
Clerk of Circuit Court
Fond du Lac County Courthouse
160 South Macy St.
Fond du Lac, WI 54935

Eric Toney
District Attorney
Fond du Lac County
160 South Macy St.
Fond du Lac, WI 54935

Michael C. Sanders
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

You are hereby notified that the Court has entered the following opinion and order:

2016AP1225-CR State of Wisconsin v. Jason J. Hyatt (L.C. #2013CF408)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

A jury found Jason J. Hyatt guilty of fifth-offense operating a motor vehicle while under the influence of an intoxicant (OWI) and with a prohibited alcohol concentration (PAC);[1] pre-trial, he pled guilty to operating after revocation. He appeals the judgment of conviction and the order denying his postconviction motion seeking a new trial based on his claim of ineffective assistance of trial counsel or, alternatively, in the interest of justice. Upon our review of the

[1] Although convicted of both OWI and PAC, Hyatt was sentenced only for OWI. *See* WIS. STAT. § 346.63(1)(c). All references to the Wisconsin Statutes are to the 2015-16 version unless noted.

briefs and the record, we conclude at conference that summary disposition is appropriate. *See* WIS. STAT. RULE 809.21. We affirm the judgment and order.

Hyatt renews two ineffective-assistance-of-counsel arguments made in his motion for a new trial. He first contends that, when the State told jurors during voir dire that he was subject to a .02 blood alcohol concentration (BAC) standard instead of "what's usually called a .08 standard," trial counsel should have objected under ***State v. Alexander***, 214 Wis. 2d 628, 571 N.W.2d 662 (1997). Hyatt also contends counsel failed to view a police video of his arrest with him in advance of trial. To prevail on a claim of ineffective assistance, a defendant must prove both that counsel's performance was deficient and that the deficient performance was prejudicial. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

In ***Alexander***, the trial court admitted evidence of Alexander's prior OWI convictions. ***Alexander***, 214 Wis. 2d at 637-38. The supreme court held that was error because, where the sole purpose of introducing evidence of prior OWIs was to prove the status element, the danger of unfair prejudice from the evidence far outweighed its probative value. ***Id.*** at 651.

This case does not raise ***Alexander*** concerns. The prosecutor asked jurors if they were familiar with the .08 standard; if they thought .02 was too strict or unfair; and if, were the judge to instruct them that "in this case that standard is .02," anyone would disagree and disregard the instruction. One juror immediately asked why a .02 was being enforced if .08 was state law. The prosecutor responded only: "So if the judge explains that that's the legal standard for today's hearing, would you be able to follow that instruction?" The juror said, "I believe so, yes." Hyatt contends advising the jury that he was subject to a lower standard improperly

suggested his prior OWI convictions and, already having stipulated to them, the danger of unfair prejudice far outweighed its probative value. We disagree.

Evidence of Hyatt's four prior OWIs was not admitted. No one mentioned the convictions to the jury.[2] The prosecutor's comments simply informed jurors of the applicable legal standard, inquired as to whether they would be able to apply the law as instructed, and eliminated the possibility that .02 might be thought a misprint of the familiar .08 standard. Further, the court followed the juror's question with these comments:

> Let me just point out for the entire panel that one of the instructions I've already talked to you about … is that your duty once you take your oath is to decide the case solely on the evidence at this trial, and there [are] lots of juries that wish they had more information or they want to have answers to questions that would be logical or reasonable, but sometimes the law says, well, no, you just get what we give you, and that's the best you get, and you make a decision on what we tell you. So you have to really accept that role as a juror to decide the case based on the evidence that is given to you and the legal instructions that you are required to follow, and that's your oath as a juror. Not to say those aren't good questions, but you don't get the answers to everything.

There was no ***Alexander*** violation. The court addressed it well. As the State's remarks were not objectionable, it follows that the failure to object was not deficient performance.

Hyatt's second ineffectiveness argument is that defense counsel failed to show him the entire squad video of the traffic stop in advance of trial. Trial counsel testified at the ***Machner***[3] hearing that the police reports contained the same information as the video, that she gave Hyatt

[2] Hyatt testified that he had ten prior convictions. The jury did not learn that any of them were for OWI-related offenses.

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

copies of the police reports before trial and discussed them with him, that he did not ask to see the video, and that if he had she would have let him view it. He asserts that as a result of not viewing the entire video he was left "unprepared for trial."

The trial court was unpersuaded. It found that Hyatt heard the video in court during the State's case-in-chief, and before he testified; that the video did not differ from what was in the police reports; that Hyatt was cross-examined on topics the video raised; that any inconsistencies between his video statements and trial testimony were for the jury to sort out; and that he thus proved neither deficiency nor prejudice.

We agree. Hyatt does not explain at all how not viewing the video before trial made him unprepared for trial when he had copies of police reports covering the same material and counsel had reviewed those reports with him. We are left to imagine reasons why not seeing the video deprived him of a fair trial, a trial whose result is reliable. *See* ***Johnson***, 153 Wis. 2d at 127. We reject this claim of ineffectiveness. Therefore,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited under WIS. STAT. RULE 809.23(3)(b).

Diane M. Fremgen
Clerk of Court of Appeals