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

2015AP288-CRNM State of Wisconsin v. Max J. Winkel (L.C. #2011CF172)

Before Kloppenburg, P.J., Sherman, and Blanchard, JJ.

Max Winkel appeals three related criminal judgments convicting him, following a jury trial, of five felonies and one misdemeanor arising out of a fatal, alcohol-related, traffic accident. Winkel also appeals a post-conviction order denying his motion for a new trial. Attorney Timothy O'Connell has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-14);[1] ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State ex***

[1] All further references in this order to the Wisconsin Statutes are to the 2013-14 version, unless otherwise noted.

rel. McCoy v. Wisconsin Court of Appeals, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the sufficiency of the evidence to support the verdict, and Winkel's sentences.[2] Winkel was sent a copy of the report, and filed a response complaining about trial counsel's performance in several respects. O'Connell then filed a supplement, with an attached affidavit, asserting that he had spoken with Winkel, and that Winkel did not want to pursue a new trial based upon a claim of ineffective assistance of counsel, but merely wanted this court to be aware of trial counsel's conduct. Winkel subsequently filed another response complaining about prior inconsistent statements that he asserts had been made by a witness at trial. Upon reviewing the entire record, as well as the no-merit report, responses, and supplement, we conclude that there are no arguably meritorious appellate issues.

Sufficiency Of The Evidence

We begin by addressing whether there is any non-frivolous basis to challenge the sufficiency of the evidence, both because discussing the evidence produced at trial places other potential issues in context, and because a successful claim on that issue would result in a vacation of the conviction and directed verdict for acquittal rather than a retrial—which Winkel asserts that he is no longer seeking.

The general test for sufficiency of the evidence is whether the evidence is "so lacking in probative value and force that" it can be said as a matter of law "that no trier of fact, acting

[2] The no-merit report also addresses the circuit court's refusal to allow Winkel to obtain new counsel shortly before trial. We will not address this issue because counsel informs us that Winkel does not wish to pursue it.

reasonably, could have found guilt beyond a reasonable doubt." ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (citing ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)). Here, Winkel was convicted of homicide by intoxicated use of a vehicle; causing great bodily harm while operating a vehicle while impaired; causing injury during a first offense of operating a motor vehicle under the influence with a blood alcohol level over 0.15 (collectively, the OWI counts); and three counts of failing to give information or render aid following an accident—one involving death, one involving great bodily harm, and one involving injury (collectively, the hit and run counts).[3]

As the circuit court properly instructed the jury, the three OWI counts each required proof that Winkel had: (1) "operated" a vehicle (meaning that he had physically manipulated or activated any of the controls of the vehicle necessary to put it in motion), and (2) was "under the influence" of alcohol at the time he operated the vehicle (meaning that his ability to safely control a vehicle was materially impaired, such that he was less able to exercise the clear judgment and steady hand necessary to handle and control a vehicle). *See* WIS. STAT. §§ 940.09(1)(a), 940.25(1)(a), 346.63(2)(a)1; WIS JI—CRIMINAL 1185, 1262, 2665. The three hit and run offenses each required proof that Winkel had: (1) "operated a vehicle involved in an accident on a highway"; (2) "knew that the vehicle he was operating was involved in an accident involving an attended vehicle"; (3) did not immediately stop his vehicle at the scene of the accident and remain at the scene until he had (a) given his name, address, and vehicle registration

[3] The jury also found Winkel guilty of homicide by use of a vehicle with a prohibited alcohol concentration, causing great bodily harm while operating a vehicle with a prohibited alcohol concentration, and causing injury while operating with a prohibited alcohol concentration, but the three PAC counts were appropriately dismissed on the prosecutor's motion based upon the correlating OWI convictions for the same underlying facts.

number to an occupant attending any vehicle collided with, (b) exhibited his operator's license, if requested and it was available, to an occupant attending any vehicle collided with, and (c) rendered to any person injured in such accident reasonable assistance, including making arrangements to obtain medical treatment if requested or if it is apparent that such treatment is necessary; and (4) was physically capable of complying with the requirements for giving information or rendering aid. *See* WIS. STAT. § 346.67; WIS JI—CRIMINAL 2670.

Additionally one of the OWI counts and one of the hit and run counts required proof that Winkel's respective intoxicated operation of the vehicle and failure to give information or render aid had "caused" (that is, was a substantial factor in producing) the death of Devlin Klein; one of the OWI counts and one of the hit and run counts required proof that Winkel's conduct had caused "great bodily harm" (that is, injury that creates a substantial risk of death or serious permanent disfigurement or a permanent or protracted loss or impairment of the function of any bodily member or organ) to Austin Page; and one of the OWI counts and one of the hit and run counts required proof that Winkel's conduct had caused "injury" (meaning physical pain or injury, illness, or any impairment of physical condition) to Chase Rogers.

At trial, the State called seven witnesses who had spent various parts of the afternoon and evening of September 3 into the early morning hours of September 4 with Winkel. These witnesses provided uncontroverted testimony that Winkel and his friend Zachary Strebelinski had been drinking heavily and continuously for hours before the accident at a series of locations—including at a private residence, at a dorm party, and ultimately, at an underage keg party held on a rural property—and that Winkel appeared to be highly intoxicated throughout the evening. The eyewitness reports of Winkel's level of intoxication and impairment were fully

supported by a blood test taken after the accident that showed that Winkel had a blood ethanol content of 0.197 grams per 100 milliliters—more than twice the legal limit for driving.

It was further uncontroverted that the victims Klein, Page, and Rogers attended the same keg party as Winkel and Strebelinski, and that the three victims left the party together around 4:00 a.m. in Page's blue Renault at nearly the same time that Winkel and Strebelinski left the party in Winkel's red Dodge pickup. Page, who had not been drinking, acted as the designated driver for the victims, with Klein in the front passenger seat and Rogers in the back seat. Just minutes later, Winkel's Dodge rear-ended Page's Renault, sending the Renault spinning off the road into a cornfield, while the Dodge continued south on the same road for about two miles before failing to negotiate a curve and crashing into a row of trees. Both Page and a property owner who heard the crash and came to investigate testified that the vehicle that had hit Page's car did not remain at the scene.

The medical examiner who performed an autopsy on Klein testified that Klein had died as the result of skull fractures and injuries to the brain suffered during the crash. A doctor who had treated Page in the emergency room immediately after the crash testified that Page had suffered a skull fracture and brain contusion in the crash that, left untreated, could have resulted in death or a seizure disorder. Page testified that he continued to have headaches and dizziness for several weeks after the crash, and that it took nearly a year after the accident for him to be medically cleared to join the Marine Corps. Rogers testified that he suffered sharp pain from a torn muscle in his lower back as a result of the crash.

Ultimately, the only issue that was contested at trial was whether Winkel or Strebelinski had been driving Winkel's pickup truck when it crashed into Page's Renault. The following

evidence strongly supported the conclusion that Winkel was the driver. First, Strebelinski testified that he was the passenger and Winkel was the driver of the pickup truck, consistent with what Strebelinski told the investigating officer. Second, two other witnesses from the keg party testified that they saw Strebelinski get into the passenger seat of the pickup truck, and that Winkel was sitting in the driver's seat shortly before the pickup truck left the party. Third, Strebelinski made a highly emotional 911 call that was played for the jury, during which he told the dispatcher that "f**kin' Max crashed his truck," and "Max was driving," and also made a series of statements directly to Winkel repeatedly trying to talk him out of attempting to drive the pickup truck away from the scene. Winkel could also be heard in the background of the 911 tape saying "Don't talk to 'em" as Strebelinski continued to talk to the dispatcher. Fourth, one of the first responders testified that when she first encountered Winkel at the scene, Winkel kept repeating, "I'm sorry" over and over again. Fifth, an audio recording from the scene of the second crash captured one of the investigating officers asking Winkel "Do you remember striking a vehicle? [Pause with no answer] Remember going across highway 21?"—to which Winkel responded, "No I do not, well, um, I can tell you the truth, I remember driving." And sixth, the results of DNA tests performed on biological evidence recovered from a smear around a starburst crack on the driver's side of the windshield included Winkel as a potential donor of Y-chromosome material, and excluded Strebelinski as a potential donor. An accident reconstructionist testified that the starburst crack could only have been made by the driver during the pickup truck's first crash with the Renault, and the reconstructionist also matched the location of an injury on Winkel's right knee to a cup holder that had been knocked off a central console during the second crash and the reopening of a prior wound above Winkel's right ear to a dislodged ceiling console.

In his response to the no-merit report, Winkel asserts that his "medical records showed a CLEAR chest x-ray, something that would have been impossible for the driver," and that he had "no bumps or bruises to [his] head, neck or chest." However, the accident reconstructionist testified that he took into account a notation by an EMT that there *was* bruising on Winkel's abdomen (which would explain why Winkel was given a chest X-ray, although his medical records were not introduced at trial), and would be entirely consistent with Winkel having hit the steering wheel. The only pictures presented of Winkel at trial showed him asleep or unconscious in a hospital bed, with bandages on his head and leg and wearing a hospital gown, which would have covered any bruises to his chest, abdomen, or head. In contrast, evidence at trial included photographs of Strebelinski without his shirt, showing no chest or abdominal injuries, and Strebelinski was not seriously enough injured to be taken to the hospital.

In sum, there was more than sufficient evidence for the jury to conclude that all of the elements of each offense of conviction had been proven beyond a reasonable doubt.

Competence to Stand Trial

In Wisconsin, "[n]o person who lacks substantial mental capacity to understand the proceedings or assist in his or her own defense may be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures." WIS. STAT. § 971.13(1). In order to ascertain whether this standard has been satisfied, WIS. STAT. § 971.14(2) directs a Wisconsin court to "appoint one or more examiners having the specialized knowledge determined by the court to be appropriate to examine and report upon the condition of the defendant," whenever the issue of competency is raised.

Defense counsel raised the question of competecy in this case because Winkel claimed to have significant gaps in his memory due to both his level of intoxication and the residual effects of a prior traumatic brain injury he had suffered in an ATV accident about six months earlier. Licensed psychologist Richard Hurlbut, Ph.D., examined Winkel and determined that he understood the charges and the legal process, and was able to recall enough of the night in question to provide an alternate version of events. Winkel's correspondence to this court similarly demonstrates an understanding of the legal process and a sufficient grasp of the facts to assist with his defense.

Assistance of Counsel

Winkel also complains that trial counsel "refused to prepare for trial" and repeatedly pushed him to take a plea deal, telling him that there was no doubt that he'd been driving the vehicle, and that he was a fool to insist on a jury trial.

However, the evidence summarized above and the guilty verdicts show that counsel provided sound advice when advising Winkel about the strength of the State's case. Moreover, the record shows that trial counsel was sufficiently prepared at trial to be able to induce the State's reconstruction expert to concede as "plausible" some alternate explanations for how Winkel and Strebelinski had obtained each of their injuries and how their blood had become mixed and dispersed throughout the cab of the pickup truck after the accident. Counsel also highlighted the biggest contradiction in Strebelinski's account of events—namely, that Strebelinski claimed he had scraped his right arm on the broken window of the passenger's side of the truck while climbing out of that window because the passenger-side door would not open,

whereas the first responders testified that they had to pry the driver-side door open with a crow bar because it would not open.

To the extent that Winkel argues that counsel could have found additional evidence to impeach the testimony of one or more of the admittedly intoxicated witnesses, we conclude that no such testimony would have undermined the overwhelming physical evidence placing Winkel in the driver's seat at the time of the fatal crash.

Sentences

A challenge to Winkel's sentences would also lack arguable merit. Our review of a sentence determination begins with a "presumption that the [circuit] court acted reasonably" and it is the defendant's burden to show "some unreasonable or unjustifiable basis in the record" in order to overturn it. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the record shows that Winkel was afforded an opportunity to comment on the PSI and address the court. The court proceeded to consider the standard sentencing factors and explained their application to this case. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197.

With respect to Winkel's character, the court acknowledged that Winkel was a "fundamentally decent person" with a number of positive traits, including a strong work ethic, and that Winkel's conduct could, in part, be attributed to being at "a stage in life when an awful lot of bad decisions get made," as well as to a substance abuse problem—if not as an alcoholic, then at least as a binge drinker. As to the protection of the public going forward, the court considered Winkel's continuing refusal to take responsibility for his actions, as well as his untreated alcohol problems, to be the biggest obstacles to his rehabilitation, rendering him "a

continuing risk for poor decisions." Regarding the severity of the offenses, the court emphasized that, beyond the "horrific outcome" of Winkel's decision to drive while impaired, what aggravated "a horribly sad, tragic, preventable, irresponsible act" was that Winkel fled the scene, leaving three people injured or dying in a cornfield because he did not want to take responsibility.

The court then sentenced Winkel to concurrent terms of ten years of initial confinement and five years of extended supervision on the OWI-homicide count, five years of initial confinement and four years of extended supervision on the OWI-great bodily harm count, and one year in jail on the OWI-injury count, and imposed five-year terms of probation on each of the hit and run counts, to be served concurrent with one another, but consecutive to the OWI-homicide sentence. The court also revoked Winkel's driver's license for five years, awarded 133 days of sentence credit; ordered restitution in the amount of $1,892.50; imposed standard costs and conditions of supervision; directed Winkel to provide a DNA sample but waived the fee; and determined that Winkel was not eligible for the challenge incarceration program or the substance abuse program.

The components of the bifurcated sentences imposed were within the applicable penalty ranges. *See* WIS. STAT. §§ 940.09(1)(a) (classifying homicide by intoxicated use of a vehicle as a Class D felony); 940.25(1)(a) (classifying operating a motor vehicle while impaired—causing great bodily harm as a Class F felony); 346.63(2)(a) and 346.65(3m) (setting penalty for unclassified misdemeanor of a first offense of operating a motor vehicle while intoxicated—causing injury, with a PAC); 346.74(5)(d) (classifying hit and run—involving death as a Class D felony); 346.74(5)(c) (classifying hit and run—involving great bodily harm as a Class E felony); and 346.74(5)(e) (designating hit and run—involving injury as a felony); 973.01(2)(b)4. and

(d)3. (providing maximum terms of fifteen years of initial confinement and ten years of extended supervision for a Class D felony); 973.01(2)(b)5. and (d)4. (providing maximum terms of ten years of initial confinement and five years of extended supervision for a Class E felony); 973.01(2)(b)6m. and (d)4. (providing maximum terms of seven and one-half years of initial confinement and five years of extended supervision for a Class F felony).

There is a presumption that a sentence "'well within the limits of the maximum sentence'" is not unduly harsh, and the sentences imposed here were not "'so excessive and unusual and so disproportionate to the offense[s] committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***State v. Grindemann***, 2002 WI App 106, ¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted source omitted).

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

IT IS ORDERED that the judgments of conviction are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that counsel is relieved of any further representation of the defendant in this matter pursuant to WIS. STAT. RULE 809.32(3).

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

Diane M. Fremgen
Clerk of Court of Appeals