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DISTRICT III

January 17, 2018

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

2016AP847-CRNM State of Wisconsin v. Michael J. Dettlaff (L. C. No. 2014CF166)

Before Stark, P.J., Hruz and Seidl, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Counsel for Michael Dettlaff filed a no-merit report concluding there is no arguable basis for Dettlaff to challenge his conviction and sentence for eighth-offense operating a motor vehicle while intoxicated, or for appealing an order denying his motion for a new trial. Dettlaff filed several responses raising multiple issues, and his counsel filed responses to some of his issues.

Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable basis for appeal.

Deputy Brian Lenzner came upon Dettlaff's pickup truck sitting perpendicular to traffic with its rear wheels in the ditch. Upon approaching, he saw Dettlaff put the vehicle in park. When Dettlaff exited the truck through the driver's side door, Lenzner observed that Dettlaff had wet his pants. Lenzner said he asked Dettlaff if he was alone. At first Dettlaff said no, he had a girlfriend, but then said he was alone. Lenzner reported Dettlaff told him he made a wrong turn and was attempting to turn around and "went too far." Lenzner testified Dettlaff told him he was driving. That conversation was not recorded because, according to Lenzner, his body microphone had been turned off by the person who drove the squad car in an earlier shift.

After Dettlaff failed field sobriety tests, he was arrested and transported to a hospital for a blood draw. His conversations with Lenzner in the squad were recorded. While parked outside the hospital, in response to no questions, Dettlaff stated, "I had no idea what I did." Several minutes later, after providing his address and phone number, Dettlaff said,

> My girl, my love, she's looking for me right now. She's probably really scared and I'm scared. I'm very scared. She would come and get me. Well she's a very good woman. She would come and get me. She's a really good woman. I'm blessed that she would be so kind.

At the jury trial, Lenzner testified consistent with his report. A lab analyst testified that Dettlaff's blood alcohol content tested at .312 gm/100ml. Dettlaff admitted he was intoxicated, but contended he was not driving. He denied telling Lenzner he was driving and claimed he was too drunk to have driven the five miles from the bar to the location where his truck got stuck. He also claimed he was too drunk to perform the "perfect" Y-turn that led to his truck's rear wheels

leaving the road. Dettlaff testified he called his fiancée, Jane Mortazavi, later that morning, and she kept asking what happened. He described her as "hysterical." He told her he believed his friend, Mark Steinfest, drove him to the scene and left him there after driving the truck off the road. Dettlaff testified he lived east of the bar and would not have driven north because he was very familiar with the roads. Dettlaff further testified: "I have something firmly engrained in my mind about not driving under the influence. And I wouldn't, there's nothing in the world that would get me to get behind the wheel and move a vehicle after even the slightest bit of alcohol in me." The court allowed the State to impeach that testimony with evidence of Dettlaff's prior drunk driving convictions and the fact that the terms of his extended supervision prohibited him from consuming any intoxicants.

Jane Mortazavi testified in support of Dettlaff's contention that someone else drove him to the scene. She testified she talked to Dettlaff approximately three hours before his arrest when she got off work. The next morning, Dettlaff called her at her home in Wauwatosa, telling her of his arrest. She then drove to Langlade County to retrieve the pickup truck that had been towed from the scene. She believed someone other than Dettlaff had driven the truck because the seat was pushed back farther than Dettlaff prefers, none of Dettlaff's belongings were on the passenger side of the seat, she found a note with Steinfest's phone number in the truck, and the driver's side seat was not moist. Several days later, she detected the smell of urine in the truck and determined it came from the passenger side. Because Dettlaff told her Steinfest drove the truck that night, she called Steinfest. She concluded Steinfest was defensive and evasive.

Steinfest testified he was with Dettlaff in the bar and walked home, approximately four blocks, before Dettlaff left. He denied driving Dettlaff's truck that night. The jury found Dettlaff guilty of operating the vehicle while intoxicated.

Dettlaff filed a postconviction motion requesting a new trial, alleging newly discovered evidence based on Mortazavi's post-trial statement that she, not Dettlaff, drove the truck that night. She testified she left the truck after backing it into the ditch, and then walked five miles back to the bar to her vehicle. She then drove back to Wauwatosa. After learning that Dettlaff had been arrested for drunk driving, she did not notify police, the district attorney or Dettlaff's attorney because she was angry with Dettlaff and felt he needed to suffer consequences for his drinking. By the time she concluded he had suffered enough, she withheld that information because she was afraid Dettlaff would be angry with her and she relied on the judicial system, believing the jury would find him not guilty.

The circuit court denied the motion, concluding Dettlaff "operated" the vehicle based on Lenzner's testimony that the truck was running and Dettlaff put the vehicle in park. Therefore, even if Mortazavi's testimony was true, it is immaterial because Dettlaff "operated" the vehicle after she walked away. The court also found Mortazavi's testimony "unbelievable." It found incredible her testimony that, wearing department store clothes and shoes, she walked many miles back to her vehicle, drove three hours to her home, and returned to Langlade County the next morning. The court noted there was no corroborating testimony or evidence. In addition, Mortazavi spoke for twenty minutes at Dettlaff's sentencing hearing without mentioning she was the driver. Therefore, at that stage of the proceedings her explanation that she believed he would be acquitted would not motivate her to keep silent about her driving.

The record discloses no arguable basis for challenging the sufficiency of the evidence to support the jury's verdict. This court may not substitute its judgment for that of the jury unless the evidence, viewed most favorably to the State and conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable

doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). The jury, not the appellate court, resolves conflicts in the testimony, weighs the evidence, and draws reasonable inferences from the basic facts. ***Id.*** at 506. The jury had the right to believe Lenzner's testimony that the truck's engine was running and that Dettlaff shifted it into park. *See* ***id.*** The jury was shown the dashboard video including the field sobriety tests, and could reasonably reject Dettlaff's argument that he was too drunk to successfully drive the five miles from the bar. His argument that he was too drunk to perform the "perfect" Y-turn is contradicted by the fact that his truck's rear wheels went into the ditch. Dettlaff's exiting the vehicle from the driver's side and Lenzner's testimony that Dettlaff admitted he was driving support the jury's finding. As the arbiter of the witnesses' credibility, the jury could also disbelieve Mortazavi's testimony that the smell of urine came from the passenger's side of the seat. *See* ***State v. Webster***, 196 Wis. 2d 308, 320, 538 N.W.2d 810 (Ct. App. 1995). Because the truck was towed, the jury could reasonably disregard her assertion that the seat was not properly adjusted to Dettlaff's height. Based on Steinfest's denial that he was the driver, the jury could reasonably find that the note containing his phone number did not raise a reasonable doubt as to who was driving.

After the postconviction hearing, Dettlaff for the first time saw the squad car recording. He raises numerous issues regarding the effectiveness of his trial counsel for failing to play that part of the video for him, his postconviction counsel's ineffectiveness for failing to play the video at the postconviction hearing, prosecutorial misconduct for failing to play that portion of the video at trial, and the district attorney's "perjury" at the postconviction hearing when he "testified" that Mortazavi's postconviction testimony was not credible. As to each of these allegations, Dettlaff exaggerates the significance of the recorded statements from the squad car. He never indicated Mortazavi was driving or that he was not driving. At most, the statement that

his girlfriend was looking for him could be construed as support for the proposition that she was in the vicinity. Dettlaff's statement, "I had no idea what I did," is not a denial that he was driving.

As to Dettlaff's specific arguments, his trial attorney had no reason to believe the recorded statements were exculpatory. Counsel's effectiveness can be determined or substantially influenced by the defendant's own statements or actions. ***Strickland v. Washington***, 466 U.S. 668, 691 (1984). Dettlaff's trial counsel had the right to depend on Dettlaff's assertion that Steinfest drove the vehicle that night. Even if the recorded statements suggest Mortazavi was in the vicinity, that fact is irrelevant in light of her testimony to the contrary, and Dettlaff's assertion that Steinfest was the driver.

Regarding Dettlaff's claim of ineffective assistance of postconviction counsel, he has failed to establish prejudice from his attorney's failure to play the video at the postconviction hearing. To establish prejudice, Dettlaff must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See* ***id.*** at 694. A reasonable probability is one that undermines our confidence in the outcome. ***Id.*** Dettlaff's recorded squad car statements to Lenzner are not sufficient to bolster Mortazavi's postconviction testimony that she was the driver. Her inconsistent trial testimony, her initial support of the theory that Steinfest was the driver, and her failure to come forward after she knew Dettlaff was convicted all belie her postconviction testimony. In addition, the postconviction motion would have been denied based on Lenzner's observation of Dettlaff operating the vehicle by putting it in park. Therefore, Dettlaff was not prejudiced by his postconviction counsel's failure to play the recording.

Dettlaff contends he cannot be convicted of "operating" a vehicle that was stuck in the ditch because it was "completely immobile," and "akin to one with no engine, no transmission, or no tires as far as its ability to be driven or moved forward without a tow truck to do so." Under WIS. STAT. § 346.63(3)(b) (2015-16),[1] a person operates a vehicle if the person physically manipulates or activates any of the controls "necessary to put it in motion." Operating the shift is necessary to put the vehicle in motion. "Necessary" does not mean sufficient to move the vehicle.

Dettlaff contends the district attorney committed perjury by testifying that Mortazavi's postconviction testimony was not credible because Dettlaff believes the squad car recording shows Mortazavi was in the vicinity that night. First, the district attorney's statements were not perjury because they were not sworn. Second, they were not testimony. They were arguments based on the district attorney's view of the evidence. The State is allowed to argue its view of what the evidence shows. *See, e.g.,* ***State v. Draize***, 88 Wis. 2d 445, 454-56, 276 N.W.2d 784 (1979). The district attorney's argument reasonably reflects the State's view of the totality of the evidence.

In his response to the no-merit report, Dettlaff also alleges the State "suppressed" the squad car video by not playing the disc of his recorded conversation with Lenzner for the jury. The recordings were turned over to the defense as required by ***Brady v. Maryland***, 373 U.S. 83, 87 (1963). No law requires the State to show the jury evidence that is consistent with the

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

defense. In addition, because there was no evidence that Mortazavi drove the vehicle that night, the State had no reason to believe the recorded statements were relevant.

Dettlaff contends the jury, not the judge, should determine the credibility of Mortazavi's claim that she was the driver. Before a new trial may be ordered based on newly discovered evidence, a defendant must show a manifest injustice. ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42. Among the factors the court must consider is whether a reasonable probability exists that, had the jury heard the newly discovered evidence, it would have had a reasonable doubt as to the defendant's guilt. ***Id.*** Therefore, it was appropriate for the circuit court to make that determination. The jury decides credibility only after a defendant meets the test set forth in ***Plude***.

Dettlaff also accuses Lenzner of evidence tampering and malfeasance based on Lenzner's testimony that his body microphone was turned off by the person who used the squad car in an earlier shift. Dettlaff provides no motive for Lenzner to have intentionally disabled the audio recording of the initial stop and field sobriety test. Dettlaff's claims are speculative and provide no basis for appeal.

Dettlaff also challenges the circuit court's decision to allow the State to question him about his previous convictions after Dettlaff testified he would never drive, "after even the slightest bit of alcohol in me." As the circuit court noted, Dettlaff's testimony "opened the door" by making a statement that was demonstrably false. *See* ***McClelland v. State***, 84 Wis. 2d 145, 164, 267 N.W.2d 843 (1978). Dettlaff explained that, years earlier, his brother received a brain injury from a drunk driver and his best friend in college was seriously injured by a drunk driver. The State appropriately noted these incidents and the consequences from Dettlaff's prior drunk

driving convictions were not sufficient to deter him from driving while intoxicated seven times. The circuit court properly exercised its discretion by allowing the State to question Dettlaff about his prior record to impeach his assertion that he would never drink and drive. *See* ***Whitty v. State***, 34 Wis. 2d 278, 292, 149 N.W.2d 557 (1967).

Finally, Dettlaff questions whether the sentence of four years' initial confinement and five years' extended supervision is justified. The circuit court could have imposed a sentence of five years' initial confinement and five years' extended supervision. The court appropriately considered the seriousness of the offense, Dettlaff's character, and the need to protect the public. *See* ***State v. Gallion***, 2002 WI App 265, ¶26, 258 Wis. 2d 473, 654 N.W.2d 446. The weight to be given each factor is within the sentencing court's discretion. ***Id.*** The court considered no improper factors, and the nine-year sentence is not arguably so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our independent review of the record discloses no other potential issue for appeal. Therefore,

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Angela Henderson is relieved of her obligation to further represent Dettlaff in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Acting Clerk of Court of Appeals