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DISTRICT I

September 8, 2021

To:

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Clerk of Circuit Court
Milwaukee County
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Assistant Attorney General
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You are hereby notified that the Court has entered the following opinion and order:

2019AP2076-CR State of Wisconsin v. Darnell J. Mungon (L.C. # 2017CF1759)

Before Dugan, Graham and White, 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).

Darnell J. Mungon appeals a judgment of conviction and an order denying postconviction relief. Mungon argues that his trial counsel was ineffective and that the trial court erred when it excluded evidence that the victim in this case was not wearing his seat belt. Mungon additionally argues that he is entitled to a new trial in the interest of justice. Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2019-20).[1] We summarily affirm.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

According to the criminal complaint, Mungon told the police that he drove his vehicle into an intersection at a speed of forty-five miles per hour (mph) and when a minivan made a left turn in front of him, he was unable to stop or swerve in time to avoid a collision. The driver of the minivan was ejected from his vehicle and died of multiple blunt force injuries. A test taken shortly after the accident revealed that Mungon had a detectable amount of delta-9-tetrahydrocannabinols (THC) in his blood. The complaint additionally alleged that an officer with experience in accident reconstruction concluded that at the time of impact, Mungon's vehicle was traveling fifty-four or fifty-five mph, and that the speed limit at the location of the accident is thirty-five mph.

The State charged Mungon with homicide by operating a vehicle with a detectible amount of a restricted controlled substance in his blood and operating a motor vehicle without a license, causing death. *See* WIS. STAT. §§ 940.09(1)(am), 343.05(3)(a) (2015-16). The case proceeded to trial, and a jury found Mungon guilty of both crimes.

Mungon filed a postconviction motion for a new trial alleging that his trial counsel was ineffective for failing to object to the State's request to allow the victim's son to testify to the victim's "good character." Once the decision was made to allow the victim's son to testify, Mungon asserts that trial counsel asked the trial court to revisit its earlier decision to exclude the victim's driving record; however, the specifics of the victim's driving record were not discussed. Mungon argues that trial counsel "could have moved to admit the fact that [the victim] had made an illegal left hand turn and caused an accident three months prior to this accident," which would have rebutted the testimony of the victim's son. The trial court denied the motion without a hearing.

A. Trial counsel was not ineffective.

On appeal, Mungon renews his ineffective assistance of counsel claim. Our analysis of an ineffective assistance of counsel claim involves the familiar two-pronged test: the defendant must show that his trial counsel's performance was deficient and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "To prove constitutional deficiency, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness." ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. "To prove constitutional prejudice, the defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Id.*** (citations and one set of quotation marks omitted).

The court "need not address both components of this inquiry if the defendant does not make a sufficient showing on one." ***State v. Smith***, 2003 WI App 234, ¶15, 268 Wis. 2d 138, 671 N.W.2d 854. "The ultimate determination of whether counsel's performance was deficient and prejudicial to the defense are questions of law which this court reviews independently." ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

Mungon seeks a ***Machner*** hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, a defendant is not automatically entitled to an evidentiary hearing relating to his or her postconviction motion. ***State v. Bentley***, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996). Rather, the trial court is required to hold an evidentiary hearing only if the defendant has alleged "sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. If, on

the other hand, the postconviction motion "does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," the trial court, in its discretion, may either grant or deny a hearing. ***Id.***, ¶9.

Mungon argues that trial counsel was ineffective for failing to object to the State's request to allow the victim's son to testify regarding his father's good character. Outside the presence of the jury, the trial court explained that the State had raised the issue of whether trial counsel, during his opening statement, suggested Mungon did not cause the accident and that, instead, "the victim died because he was old, because he was—and this is my word 'doddering,' because he may have if this was a civil case[,] there might have been some contributory negligence." In response to this suggestion, the State sought to have the victim's son testify, in the words of the prosecutor, "to explain just what [the victim]'s actual condition was[.]" Trial counsel did not object to allowing the victim's son to testify, and the trial court ruled that the door had been opened during the opening statement based on trial counsel's remarks that the age of the victim had something to do with the accident.[2]

After the trial court ruled that the victim's son could testify, trial counsel asked the court to revisit its decision to exclude the victim's driving record. The trial court adhered to its earlier assessment that the victim's driving record was not relevant.

[2] The State erroneously represents in its brief that trial counsel objected to testimony by the victim's son about his father's active life and accomplishments. The record belies the State's representation in this regard.

The victim's son went on to testify that his father was eighty-two years old when he died, was retired from being the president of Schlitz Brewing Company, and prior to that had been the chief executive officer of a couple of other companies. The victim's son additionally testified that his father was a member of the board of directors of a college until two or three years before his death and was mentally "sharp." On cross-examination, the victim's son testified that neither he, nor his siblings had any concerns about the victim's driving abilities.

Mungon contends that after the victim's son testified that there were no concerns with his father's driving or dementia, the specifics of the victim's driving record should have been admissible as rebuttal evidence. According to Mungon, the jury was left with incorrect and incomplete information regarding the victim.

We focus our attention on the prejudice prong of the ineffective assistance of counsel analysis. In his postconviction motion, Mungon's argument as to prejudice amounts to little more than the conclusory assertion that trial counsel's failure to object to the good character testimony offered by the victim's son or to otherwise rebut it with the victim's poor driving record resulted in prejudice. Such an assertion, which amounts to sheer speculation, is insufficient to establish prejudice. *See* ***State v. Erickson***, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999) (holding that speculation is insufficient to satisfy the prejudice prong of ***Strickland***).

We additionally note that "[w]hen there is strong evidence supporting a verdict in the record, it is less likely that a defendant can prove prejudice." ***State v. Trawitzki***, 2001 WI 77, ¶45, 244 Wis. 2d 523, 628 N.W.2d 801. To convict Mungon of a violation of WIS. STAT. § 940.09(1)(am) (2015-16), the State had to prove the following three elements: (1) Mungon operated a vehicle; (2) Mungon's operation of a vehicle caused the victim's death; and

(3) Mungon had a detectable amount of a restricted controlled substance in his blood at the time he operated a vehicle. *See* WIS JI—CRIMINAL 1187. To convict Mungon for a violation of WIS. STAT. § 343.05(3)(a) (2015-16), the State had to prove he operated a motor vehicle on a highway and that he did not hold a valid license at the time he did so. *See* WIS JI—CRIMINAL 2610.

At trial, an investigating officer who responded to the accident scene testified that the accident occurred when the victim made a left turn at an intersection as Mungon's vehicle was traveling through the intersection. Mungon testified that he did not have a license on the date of the accident and was driving five miles over the posted speed limit as he entered the intersection in an effort to "make the [yellow] light." Mungon admitted that he did not apply his brakes given where he was when the light turned yellow.

An officer with experience in accident reconstruction testified that at the time of impact, Mungon's vehicle was traveling at fourteen or fifteen miles over the posted speed limit. That witness additionally testified that by exceeding the speed limit, Mungon lost the right of way. Trial testimony further revealed that Mungon's blood was tested shortly after the accident and he had a detectable amount of delta-9-THC in his system.

In light of the strong evidence against him, Mungon has not established that the allegedly deficient performance by his trial counsel resulted in a probability sufficient to undermine confidence in the outcome of his trial. *See* ***State v. Jacobs***, 2012 WI App 104, ¶31, 344 Wis. 2d 142, 822 N.W.2d 885 (holding that "the relevant, admissible evidence against [the defendant] was overwhelming, more than enough to convince us that no jury would have been swayed by the mother's irrelevant testimony about her son's good character").

B. The trial court did not err when it excluded evidence that the victim was not wearing his seat belt.

Next, Mungon argues that the trial court erred when it excluded evidence that the victim was not wearing his seat belt. After the trial court allowed the victim's son to testify, trial counsel moved the court to allow him to present evidence that the victim was not wearing his seat belt at the time of the crash. Relying on ***State v. Turk***, 154 Wis. 2d 294, 453 N.W.2d 163 (Ct. App. 1990), the trial court ruled that such evidence was inadmissible.

We agree with the trial court that the rationale in ***Turk*** is applicable here. In that case, the intoxicated defendant drove a car with three passengers into a utility pole, causing injuries to the passengers. ***Id.*** at 295. The circuit court excluded expert testimony that the passengers would have sustained injuries regardless of whether the defendant was intoxicated because the passengers were not wearing seat belts. ***Id.*** We upheld the trial court's decision, concluding that the passengers' failure to wear seat belts was not a "new and independent force" breaking "the causal connection between the original act ... and the injury, and itself becomes the direct and immediate cause of the injury." *See* ***id.*** at 296 (citation omitted).

Here, the victim's failure to wear a seat belt was not a "new and independent" force breaking the causal connection between Mungon's driving and the victim's death. The trial court properly concluded evidence that the victim was not wearing a seat belt was not admissible.

C. Mungon is not entitled to a new trial in the interest of justice.

Lastly, we address Mungon's argument that he is entitled to a new trial in the interest of justice. He asks for this relief pursuant to WIS. STAT. § 752.35, which allows this court to

reverse a judgment "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried[.]" *See* ***id.*** Such reversals "should be granted only in *exceptional* cases." ***State v. McKellips***, 2016 WI 51, ¶30, 369 Wis. 2d 437, 881 N.W.2d 258 (emphasis in ***McKellips***; citation omitted).

Mungon argues for discretionary reversal because he believes the real controversy has not been fully tried given that the jury never heard rebuttal evidence related to the victim's driving record and was not allowed to consider evidence that the victim was not wearing his seat belt. Our review of the trial proceedings as well as Mungon's arguments on appeal lead us to conclude that a new trial in the interest of justice is not warranted. We have rejected Mungon's arguments on their merits, and he has not presented any other basis that would justify the exercise of our discretionary reversal power.

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals