COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP358-CR **Cir. Ct. No. 2011CF122**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK ALAN SPERBER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: MARC A. HAMMER, Judge. *Reversed and cause remanded*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 HOOVER, P.J. Mark Sperber appeals a judgment of conviction for hit and run involving death, and an order denying his postconviction motion.[1] During deliberations, the jury twice asked the court whether, to be found guilty, Sperber had to have known he struck a person at the time of the accident, or whether it was sufficient that he obtained that knowledge at some later time. In response to both questions, the court instructed the jury to reread the pattern jury instruction. Sperber argues his trial counsel was ineffective for failing to request that the court instruct the jury that Sperber's knowledge was to be considered as of the time he departed the accident scene. Additionally, Sperber argues the real controversy was not fully tried. We accept both of Sperber's arguments, and reverse and remand.

BACKGROUND

¶2 At the time of trial, Sperber was forty years old and lived with his wife in rural Forestville, Wisconsin, about forty miles northeast of Green Bay. He was employed by Roland Machinery, a heavy equipment dealer and servicer located in De Pere. He was a corporate trainer and previously worked as a field service technician.

¶3 On Tuesday, January 25, 2011, Sperber accepted an invitation from trainees to have a drink with them at their Green Bay hotel. Between 4:00 p.m. and when he left at 5:30 p.m., he consumed three double scotch and waters. By his own account, he did not feel intoxicated. He typically ate all day during

[1] *See* WIS. STAT. §§ 346.67(1); 346.74(5)(d). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

trainings. One of his students testified he did not appear intoxicated, thick tongued or unsteady.

¶4 Sperber left the hotel in a company-owned white Ford F-150 pickup truck with a white topper. He traveled west on Velp Avenue, which was a four-lane road with no shoulder. The curbs were covered with blackened snow banks that intruded two feet into the roadway. It was rush hour, and Sperber had cars behind him and on the left. The roadway was dark and wet. Sperber explained that just as he passed Gallagher Street, while traveling in the right lane, he hit what he assumed to be one of the larger type of garbage cans used for automatic pickup. He saw something move to the right. He maneuvered left but stayed in the right lane because there was a vehicle to his left. He did not stop on Velp, but continued less than 100 feet to Lyndon Street, the next road to the right. He followed Lyndon to the intersection with Mary Street, where he found light from a house situated on the corner to his right.

¶5 Sperber exited the truck and walked around the front to the right front side, and observed damage to the grille. He believed something hit his right front tire, but he was not able to fully inspect it. He got back in the truck, turned right on Mary to Shea Avenue, took Shea back to Velp (now east of the accident site) and then went east on Velp. Sperber looked both ways when he turned on Velp, but could not see the point of impact from that location.

¶6 The truck was driving fine, but Sperber was concerned about the tire. He explained he decided to go east on Velp rather than continue west because he could pick up the road north either way and going east he had the option of stopping at Pomp's Tire. By the time he got to Webster Avenue, however, he

noticed the tire indicator was reading normal and the engine was not overheating, so he took Webster to I-43 to Highway 54/57 north.

¶7 There were three eyewitnesses to the collision: Melissa Wolcanski, Daniel Emmel, and Jeffrey Holl. Wolcanski was about four car lengths behind Sperber in the right lane. She saw Sperber's brake lights come on, but he did not stop. She did not see anything fly up in front of the truck or anything else to suggest a collision. She moved into the left lane to go around him. She then observed a wheelchair in the road, but did not see a person. As she passed Sperber's truck, she saw him turn onto a side street and slow down.

¶8 Daniel Emmel explained he had been heading west on Velp. Just before Gallagher Street, he saw a man in a wheelchair traveling in the right lane. He swerved to miss him and then turned right on Gallagher to drop off a friend. When he got back to Velp he looked both ways but was unable to locate the wheelchair. Just then, a white truck drove by heading west on Velp. It appeared to be going the speed limit of thirty-five miles-per-hour. As the truck passed, Emmel saw the wheelchair illuminated by the truck's headlights in the far right lane. The truck "applied brakes, hit the wheelchair, [and] the person in the wheelchair rolled 20 yards roughly along the snowbank." Emmel believed the truck driver hit the brakes "hard," but road conditions were wet and there was no tire squealing. The truck "momentarily stopped" as it pulled around and then turned right on Lyndon Street. The truck stopped on Lyndon with Emmel's view of the front half of the truck obscured behind a house. He could not see whether the driver was in or out of the truck. Emmel then pulled up to the accident scene, activated his emergency flashers, and dialed 911. After calling 911, he exited and started walking toward the truck, when it drove off. He was the only person at the scene at the time.

¶9 Jeffrey Holl was stopped on Gallagher Street facing south toward Velp when he saw a man in a wheelchair directly in front of him crossing Velp from south to north, and then heading west on Velp in the right lane. Holl then turned right on Velp and went around the wheelchair. He kept watching in his rearview mirror because "there's a guy in the lane of traffic and it was fairly dark and he was in a wheelchair." He was mostly able to see the wheelchair because of the headlights of the vehicle coming behind him. That vehicle collided with the back of the wheelchair. Both the wheelchair and the person went airborne, with the person moving more toward the right. The truck then paused, went halfway into the left lane, and turned right on Lyndon. As "soon as it got past like these houses and stuff, I didn't see any more of him."

¶10 In addition to the eyewitnesses, Paul DeGrave came onto the scene shortly after the accident. He stopped and approached the person standing there, and asked where the vehicle was that struck the wheelchair. The person pointed west toward Lyndon, where a truck was parked facing north. He observed the "silhouette of an individual leaning over his steering wheel and staring back at what was going on in the roadway ...." DeGrave could not tell who it was, but "[t]hey were watching us, just a shadow." He turned his attention to the accident scene and when he looked back up, "the truck was pulling away." When asked if someone had walked toward the vehicle, DeGrave responded, "Nobody had walked, not that I'm aware of."

¶11 Officer Ronald Schaden responded to the scene. He observed the victim was wearing black winter gloves, black pants, black multicolored socks, a black and multicolored jacket, and a purple and black checkered shirt. The wheelchair was black without any reflective materials. Schaden described the accident scene as "kind of dark." When presented with the State's photo of the

scene taken eleven months after the accident, Schaden explained, "It wasn't illuminated this well when I was there …." The nearest street lamp was 119 feet from the point of impact, on the other side of the road. According to the forensic examiner, the victim died from a head injury and was not run over.

¶12 Sperber arrived home around 6:15 p.m. and told his wife he hit a garbage can on the way home. At 6:46 p.m., Sperber called his training supervisor, Michael Bond, and left a message. Sperber stated he struck a garbage can or dumpster and had minor damage. Bond thought Sperber sounded normal. Bond explained that in the morning they discussed the damage and how they were going to get it repaired. Sperber asked Bond if they should do it in the shop, and Bond authorized an in-house repair. Bond reasoned the shop was not busy and they would have to pay a $1,000 deductible if they made a claim on their insurance policy. As the general manager explained, the general rule was that if the damage exceeded $1,000, the matter was forwarded to the insurance carrier. Otherwise, the employee's immediate supervisor had discretion whether and how to fix it.

¶13 At Sperber's request, service manager Brent Richardson assigned Adam VandeHey to help with the repairs. Sperber did not seem worried or nervous to Richardson. Sperber removed the grille and the headlight, and over the next few days Sperber and VandeHey did the body work when they had time. Sperber called Dorsch Ford and two other auto parts dealers in Green Bay for a used grille and headlamp. None had used parts available, and new parts were around $600. Sperber then called Terrence Telford, a person in the Milwaukee area from whom he regularly obtained parts. Telford could not find used parts, but did offer to supply new parts for around $400. Richardson also spoke with

Telford about getting parts. Telford delivered the parts to Sperber over the noon hour on Wednesday, January 27, in Port Washington.

¶14 The State called a witness from Broadway Chevrolet of Green Bay who stated they would have delivered the parts to Roland Machinery at the wholesale price of $425. When asked, Sperber testified he did not call Broadway because they are a Chevrolet dealer.

¶15 The body work and painting were completed on Wednesday, but the truck was left in the shop until Thursday so the paint could dry. Sperber had decided not to repair a pop-can-sized dent in the bumper because it was only cosmetic and a new bumper was not worth the cost. Richardson helped Sperber remove the truck topper before Sperber took the truck home on Thursday. Sperber intended to take Friday off and planned on hauling some wood. Sperber typically took Fridays off during the weeks he did training. He had not been feeling well all week, so he called in sick.

¶16 The Green Bay police received an anonymous tip that Sperber was having right-front repairs done at Roland on a vehicle consistent with that identified at the scene. According to detective James Duebner, he and another detective went to Roland on Friday and learned Sperber had called in sick. They arrived at Sperber's residence around 10:00 a.m. and observed a white truck sitting in the driveway. The topper was off and there were woodcutting tools in the back. Sperber exited the garage and the detectives told him they were investigating a hit and run. They noted the truck had been washed and smelled of fresh paint. They also saw the dent in the bumper and asked Sperber if the damage was fresh. Sperber stated it was and that he had hit a garbage can on Tuesday night. When asked if he replaced any other parts, he told them he replaced the grille and the

headlight. Sperber stated he got the parts from his residence from a damaged vehicle. Duebner told Sperber he did not believe his explanation because a garbage can would not leave that kind of dent in the bumper.

¶17 The three then joined Sperber's wife inside the home. The detectives asked Sperber for a detailed account of what happened Tuesday night. According to Duebner, Sperber initially denied going to the bar before the accident, but later admitted he had three double scotch and waters. Duebner also stated he never got a clear answer concerning Sperber's route home after he stopped on Lyndon Street. As the interview progressed, Sperber and his wife started asking why hitting a garbage can was being treated so seriously. Duebner purposely ignored the question, but eventually told them Sperber had hit a wheelchair. Sperber asked if the wheelchair was occupied, and Duebner informed him it was. Sperber then asked if the person was okay, and Duebner revealed the person had died. When asked if either of the Sperbers were surprised to hear this information, Duebner testified, "Mrs. Sperber was definitely. Mr. Sperber there was a reaction, whether it was out of surprise or the fact that, you know, if you want to say the cat is out of the bag, for lack of a better term." In a previous hearing, Duebner had testified that Sperber "appeared a little bit stunned." According to Sperber, this was the first he learned he had hit someone.

¶18 Sperber disagreed with some of Duebner's testimony. He asserted he did not specify which parts he had replaced on the truck or that he got the replacement parts from a damaged vehicle at his home. Rather, Sperber asserted he told the detectives he had used paint from home that was left over from a previous repair. Sperber also claimed he did not deny going to the bar, but rather said that he had considered not going.

¶19 Following the jury's guilty verdict, Sperber moved for postconviction relief. Sperber argued his trial counsel was ineffective for failing to request that the court inform the jury that the knowledge inquiry—whether Sperber knew the accident involved a person—focused on the time Sperber left the accident scene. Sperber alternatively argued the real controversy was not fully tried. The court denied Sperber's motion, and he now appeals.

DISCUSSION

Ineffective Assistance of Counsel

¶20 Sperber first argues trial counsel was ineffective for failing to request a clarifying instruction in response to the jury's repeated questions. A defendant claiming ineffective assistance of counsel must prove both deficient performance and resulting prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. Trial counsel's performance is deficient if it falls outside "prevailing professional norms" and is not the result of "reasonable professional judgment." ***Strickland***, 466 U.S. at 690. To demonstrate prejudice, the defendant must show 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.*** at 694.

¶21 The trial court instructed the jury consistent with WIS JI—CRIMINAL 2670, explaining that the charged crime involved five elements the State must prove. Essentially, these elements were that: (1) Sperber operated a vehicle that was involved in an accident on a public road; (2) Sperber knew the accident involved a person; (3) the accident resulted in death; (4) Sperber did not immediately stop and remain at the scene until fulfilling several requirements,

including providing his contact information and license plate number and rendering aid to any injured person; and (5) Sperber was physically capable of complying with the requirements set forth in element four.[2]

[2] The parties did not cite, and we did not locate, a written copy of the jury instructions in the record. The trial court, which subsequently observed it had sent its copy of the instructions into the jury room, orally instructed the jury as follows with regard to the charged crime:

> Now, before you … may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.
>
> The first element requires that the defendant operated a motor vehicle involved in an accident on a premise held out to the public for use of their motor vehicles. A vehicle is operated when it is set in motion.
>
> The second element requires that the defendant knew that the vehicle he was operating was involved in an accident involving a person.
>
> The third element requires that the accident resulted in the death of John M. Kennedy.
>
> The fourth element requires that the defendant did not immediately stop his vehicle at the scene of the accident and remain at the scene until he had fulfilled the following requirements.
>
> First, given [sic] his name, his address, and the registration number of the vehicle he was driving to the person struck, and if it was requested and was available, exhibited his operator's license to the person struck, and render to any person injured in such an accident reasonable assistance, including the carrying or making of arrangements for the carrying of such person to a physician, surgeon, or hospital for medical or surgical treatment if it's apparent that such treatment is necessary or if carrying—or if such caring [sic] is requested by the injured person.
>
> The fifth element in this case requires that the defendant was physically capable of complying with the requirements I just outlined for you.

(continued)

¶22 Just over an hour after the jury was released for deliberations, it came back with the following question: "Concerning time [sic] two on the list of rules, does the defendant have to be aware that he hit a person at the time of the accident or in the days following the incident in order to fulfill the requirements for the second item?" Following a discussion, the parties agreed with the court's decision to respond, "I cannot answer this question. Refer to Instruction 2670."

¶23 Three hours after the first question, the jury again asked: "Are we trying to determine Mark's guilt of knowing he hit a person or a trash can immediately after the accident happened or whether or not he knew before or on the day he was taken into custody?" After reading the question to the parties, the court observed, "My inclination is to instruct them to again review the jury instruction that we had focused on." The State responded, "I think simply reading 2670— …. I think it's self-explanatory …." Defense counsel replied, "I would

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> You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.
>
> If you are satisfied beyond a reasonable doubt that the defendant operated a motor vehicle involved in an accident on premises held out to the public for … use of their motor vehicle which resulted in the death of any person, that the defendant knew that the vehicle he operated was involved in an accident involving a person, that the defendant did not immediately stop his vehicle at the scene of the accident, that the defendant did not remain at the scene of the accident until he had given the information I have described to you and rendered reasonable assistance to a person injured in the accident as I have described it to you, and [the] defendant was physically capable of performing such acts, then you should find the defendant guilty.
>
> If you are not so satisfied as to each of those elements, you must find the defendant not guilty.

agree. I guess the only thing I would suggest is maybe saying read 2670 in its entirety." The court agreed, explaining:

> I think that makes sense. My concern is that the jury may infer that they're doing something wrong. They're not. They're having a tough time. This is a tough case. And I think to supplement the instruction by telling them to review the whole thing in its entirety, hopefully, they'll think it's got to be in here or else the judge wouldn't tell us to do it, so the answer has to be in here and eventually they will hopefully realize it's their directive [sic] knowledge that's going to answer that question ….

Accordingly, the jury was told, "Read 2670 in its entirety."

¶24 Sperber asserts trial counsel unreasonably failed to request that the jury be told that, under element two, it had to determine whether Sperber knew he struck a person at the time he left the accident scene. The State agrees—as it did when the jury asked the questions—that this is the applicable knowledge standard.

¶25 Nonetheless, the State argues Sperber fails to demonstrate prejudice.[3] It contends the instruction is self-explanatory, particularly because element four requires a finding that "the defendant did not immediately stop his vehicle at the scene of the accident and remain at the scene until he had fulfilled" his duties to give identifying information and render aid. The State further asserts the instruction's meaning is obvious because it "makes little sense to punish someone criminally for leaving the scene of an accident without rendering aid

[3] The State does not address the deficiency prong of the ineffective assistance standard. Accordingly, it is deemed to have conceded the issue. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

when he honestly does not know that the accident involved another person who might be injured and in need of assistance."

¶26 The jury, however, is tasked not with questioning the statute or deciphering its purpose, but with applying it according to the court's instructions. In any event, the State's argument ignores that the statute also criminalizes the failure to identify oneself after being involved in an accident involving another person. Thus, a juror might reasonably believe that it "makes sense to punish" one who subsequently realizes they were involved in a serious accident, but fails to report their involvement to police.

¶27 More importantly, the State's arguments are made in a vacuum. We are not inquiring whether a juror *might* have reasonably questioned the meaning of the jury instructions. Rather, the jury did, in fact, repeatedly ask for clarification as to when Sperber had to "know" that the accident involved a person. Obviously, the instruction's meaning was neither obvious nor self-explanatory to Sperber's jury.

¶28 We further observe that the trial court's instruction to reread the entirety of instruction 2670 may well have misled the jury. Immediately following the five elements, the instruction addressed "knowledge."[4] It seems apparent that, if jurors have a question about "knowing" and are told to review the entire instruction, this is a likely focus of their attention. The knowledge section instructs the jury, "Knowledge must be found, if found at all, from the defendant's

[4] The written pattern instruction utilizes bolded headings between its components. The numbered elements are set forth under the heading, "**Elements of the Crime That the State Must Prove**[.]" Immediately following this section, is the heading, "**Deciding About Knowledge**[.]" *See* WIS JI—CRIMINAL 2670 (May 2010).

acts, words, and statements, if any, and *from all the facts and circumstances in this case* bearing upon knowledge." (Emphasis added.) Thus, rather than limiting itself to only those facts bearing on Sperber's knowledge when he left the accident, the jury very well may have believed they should consider all facts and circumstances up through the time police arrested him at his home.

¶29 Given that the jury was so fixated on the timing-of-knowledge issue—asking essentially the same question one hour and four hours into deliberations—it is evident that one or more jurors believed the facts supported a conclusion that Sperber did not know the accident involved a person when he left the scene, but gained such knowledge prior to his arrest. The State asserts there were no facts supporting such a conclusion. To the contrary, there were repeated references to media coverage of the accident during testimony and arguments, including denials by Sperber and his wife that they viewed any such coverage. Indeed, the record includes a pretrial motion with exhibits seeking to change venue due to media coverage. Additionally, jurors may have reasonably inferred that, upon closer inspection of the vehicle damage, Sperber would have realized he did not merely strike a garbage can.

¶30 The State also asserts the jury should have deciphered the proper knowledge standard from its theory of prosecution. In support, the State quotes from its opening argument. A fuller review of that argument casts doubt on the State's assertion:

> It's an interesting and difficult case because the crime is not hitting John. The crime is leaving John after you hit him. And I want … you have to know that.
>
> The fundamental rub in this case is the State has to prove that Mark Sperber knew he hit John Kennedy in the wheelchair. In all fairness, it's not fair to charge someone with hit and run causing homicide if they didn't know they

> hit anybody. That wouldn't be fair. So throughout this case, the State will consistently come back to the idea that the defendant knew he hit John.
>
> You're going to hear testimony in the case after the collision what Mr. Sperber did to his vehicle. …
>
> *Throughout this all, throughout this entire trial, I would like you to keep one thing in mind.* As I sit down now, and [defense counsel] will be allowed to speak to you, *I would like you to know that after this event happened, I want you to know that after this event happened*—and, members of the jury, every once in awhile you'll sneak a glance at [the attorneys] or Mr. Sperber. *When you look at Mr. Sperber, please remember as this trial is going forward, he never came forward even after the collision. We had to find him.*
>
> Ladies and gentleman, thank you.

(Emphasis added.) First, we observe the State's references to Sperber knowing he struck the victim are ambiguous as to timing. More importantly, the State explicitly focused the jury's attention on the irrelevant fact that Sperber did not contact police "even after the collision." Thus, the State's "theory of prosecution" was at least as likely to confuse or mislead the jury as it was to properly guide it.

¶31 For the foregoing reasons, we conclude Sperber was prejudiced by his trial attorney's failure to request clarification of the jury instruction. In light of the jury's repeated questions, counsel's failure undermines our confidence in the verdict.

Interest of Justice

¶32 Sperber alternatively seeks a new trial in the interest of justice, asserting the real controversy was not fully tried. *See* WIS. STAT. § 752.35. To invoke our discretionary reversal power on this ground, we need not determine that the outcome of the trial would have been different on retrial. *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). Further, we may grant a new

trial on this ground even where a defendant fails to preserve an issue regarding jury instructions. *See* ***id.*** at 20.

¶33 The purpose of a jury instruction is to fully and fairly inform the jury of a rule or principle of law applicable to a particular case. ***State v. Hubbard***, 2008 WI 92, ¶26, 313 Wis. 2d 1, 752 N.W.2d 839. "The objective of 'an instruction is not only to state the law accurately[,] but also to explain what the law means to persons who usually do not possess law degrees.'" ***State v. Hubbard***, 2008 WI 92, ¶26, 313 Wis. 2d 1, 752 N.W.2d 839 (citation omitted).

¶34 The only contested issue at trial was whether Sperber knew the accident involved a person. The jury twice asked for clarification on this issue, demonstrating it was confused as to *when* knowledge was required for conviction under the statute. This was a pure question of law that the court should have clarified. Although a circuit court enjoys broad discretion when instructing the jury, "[w]hen a jury makes explicit its difficulties[,] a trial judge should clear them away with concrete accuracy." *See* ***Bollenbach v. United States***, 326 U.S. 607, 612-13 (1946); *see also* ***State v. Booth***, 147 Wis. 2d 208, 212-13, 432 N.W.2d 681 (Ct. App. 1988) (circuit court has a "duty" to respond to a jury inquiry with sufficient specificity to clarify the jury's problem). "Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depend[s] on discharge of the judge's responsibility to give the jury the required guidance" about the law. ***Bollenbach***, 326 U.S. at 612. As one commentator observes:

> Although it is presumed that jurors understand and follow jury instructions, which is a "crucial assumption underlying the system of trial by jury, … [o]nce it is established that jurors do not fully understand instructions, the related assumption that jurors faithfully follow them also becomes subject to grave doubt. Even with the best of intentions, people cannot follow instructions that they do not comprehend."

Charles M. Cork, III, *A Better Orientation for Jury Instructions*, 54 Mercer L. Rev. 1, 6 (2002-03) (citations omitted).

¶35 Here, the State is correct that the jury's verdict was entirely consistent with a proper finding of guilt—a finding that Sperber knew the accident involved a person at the time he left the scene. Nonetheless, the verdict was similarly consistent with a finding that should have resulted in acquittal—a finding that Sperber did not know a person was involved until some later point in time. Because the only admissible evidence providing direct insight into the jury's understanding of the legal standard are the communications between it and the court, there is no way to know which time frame the jury ultimately applied. Accordingly, the real controversy was not fully tried.

By the Court.—Judgment and order reversed and cause remanded.

Not recommended for publication in the official reports.