COURT OF APPEALS
DECISION
DATED AND FILED

March 1, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1276-CR **Cir. Ct. No. 2011CF2934**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL GEFFERY LAGALBO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN A. DIMOTTO and WILLIAM W. BRASH III, Judges. *Affirmed*.

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

¶1 PER CURIAM. Paul Lagalbo appeals a judgment convicting him of multiple offenses, including fleeing or eluding a traffic officer. He also appeals an order denying postconviction relief. Lagalbo argues the evidence presented at

trial was insufficient to support the fleeing/eluding conviction. He also argues he is entitled to resentencing because the sentencing court relied on inaccurate information. We reject these arguments and affirm.

BACKGROUND

¶2 An Amended Information charged Lagalbo with five counts: (1) third-offense operating while intoxicated (OWI); (2) third-offense operating with a restricted controlled substance in the blood; (3) first-degree recklessly endangering safety, while using a dangerous weapon; (4) fleeing or eluding a traffic officer; and (5) failing to perform a duty upon striking an occupied or attended vehicle (property damage only). The case was tried to a jury in June 2012.[1]

¶3 At trial, detective Brian Morgan testified he was driving east on Interstate 94 when he saw a gray minivan in the center lane decelerate rapidly and cross into the right lane in front of a green sedan, forcing the sedan to make an evasive maneuver and drive off the road to avoid a collision. Morgan, who was driving in the right lane, had to move into the center lane to avoid striking the sedan. He decided to stop the van because he suspected the driver was intoxicated.

¶4 Morgan was driving an unmarked squad car equipped with a siren and red and blue lights on the front and back. He slowed down slightly to allow the van to pass him, and once he was behind it, he activated his vehicle's red and

[1] The Honorable Jean A. DiMotto presided over Lagalbo's jury trial and sentencing. The Honorable William W. Brash III denied Lagalbo's postconviction motion.

blue lights. The van slowed down and exited the interstate at 35th Street. Once off the interstate, the van came to a stop at a traffic light, with Morgan's vehicle directly behind it. When the light turned green, the van turned north onto 35th Street and proceeded "at a slow rate of speed[.]"

¶5 Morgan believed the van was attempting to find an appropriate place to stop. However, instead of stopping, the van proceeded to another set of lights, and as soon as those lights turned green, it accelerated rapidly. At that point, Morgan turned on his siren. As he continued pursuing the van with his lights and siren activated, the van swerved back and forth, went over a curb, and nearly struck a parked vehicle. The van then turned onto a dead end street. Morgan followed and parked his squad car at an angle to block as much of the road as possible.

¶6 Morgan then exited his vehicle with his weapon drawn, holding it at the "low ready" position, and walked toward the van. The driver's side window of the van was rolled down, and Morgan "[v]ery loud[ly] and direct[ly]" told the driver to turn off the vehicle and show Morgan his hands. The driver, who was later identified as Lagalbo, looked at Morgan and said, "[Y]ou are not going to shoot me, I'm drunk." Morgan testified there was "an indication" Lagalbo recognized him as a law enforcement officer, but he did not elaborate as to the basis for that testimony.

¶7 At some point during this encounter, Lagalbo "briefly" put his hands outside his vehicle's window. Lagalbo then attempted to make a U-turn and struck a guard rail. Because Lagalbo was not complying with his orders, Morgan began moving back toward his squad car so that he would be in a position to continue the pursuit. As the van drove toward Morgan, who was standing in the

middle of the road, he aimed his gun at Lagalbo and yelled "[s]omething to the effect of stop or I'm going to fucking shoot you." The van continued moving, and Morgan continued yelling at Lagalbo, telling him to stop the vehicle. Lagalbo accelerated toward Morgan, who then fired his gun several times at Lagalbo. Morgan moved out of the way, and Lagalbo drove past him.

¶8 Morgan then returned to his squad car and continued his pursuit of Lagalbo's van. He lost track of the van briefly, but then encountered it again as it was driving straight toward his squad car. The van sideswiped Morgan's squad car, and by the time Morgan was able to turn his vehicle around in order to follow the van, he had lost sight of it.

¶9 Detective Rodolfo Gomez testified he interviewed Lagalbo the same day at a hospital, where Lagalbo was being treated for gunshot wounds. Lagalbo initially told Gomez he had been the victim of a carjacking and was shot when he fled the scene. However, Lagalbo later admitted to Gomez that he was "traveling westbound on 94 when he observed the red and blue lights of a police officer attempting to pull him over, and the next thing he recalled, he observed a police officer ordering him at gunpoint to get out of the vehicle." Gomez testified Lagalbo did not appear to be confused about the fact that "a police officer was trying to pull him over[.]"

¶10 Several witnesses who saw the interaction between Morgan and Lagalbo also testified at trial. S.P. testified she looked out the front window of her home after hearing sirens. She saw "a sheriff out of his car" with his gun out, telling the driver of a minivan to turn off his vehicle. S.P. then described the subsequent actions of the "officer" and the driver. On cross-examination, S.P. conceded the person with the gun was wearing plain clothes, and she did not hear

him identify himself as a law enforcement officer. However, she stated she assumed the person was a sheriff's deputy "because he had sirens … and the gun out."

¶11 Another witness, D.L., testified he saw "red and blue flashing lights" while letting his dogs in. He "stopped to see what was going on" and saw a "cop trying to stop the guy that was—he was trying to pull over." Like S.P., D.L. conceded he did not hear the "cop" identify himself as a law enforcement officer. However, he testified he knew the person was a police officer based on "the car he was driving" and "the way he was acting towards the other guy[.]"

¶12 K.M., a third witness called by the State, testified he looked out his window after hearing a siren. He saw "a plain clothes guy" with a gun yelling at the driver of a van "to turn his vehicle off, get out of the car and raise his hands." The man in the van "was not paying attention to what the officer's orders were." On cross-examination, K.M. testified he was not able to definitively identify the man with the gun as a police officer, but he made a "guesstimate that this is probably a police officer" based on "the lights on and all that … and then an order like that[.]"

¶13 The defense called another area resident, L.G., to testify about the interaction between Morgan and Lagalbo. L.G. testified he went onto his front porch after hearing a siren and saw "a gray minivan and an unmarked police car." He further testified he saw an "officer trying to hang onto the window of the van." When asked how he identified the person outside the van as a law enforcement officer, L.G. testified he "didn't at first except for the fact that it was an unmarked vehicle and his sirens were roaring away and his lights were flashing."

¶14 The jury ultimately found Lagalbo guilty of all five charges. The circuit court imposed the following consecutive sentences: forty-five days in the House of Correction on the operating with a restricted controlled substance in the blood count; four years' initial confinement and four years' extended supervision on the recklessly endangering safety count; one year initial confinement and one year extended supervision on the fleeing/eluding count; and one month in the House of Correction on the failing to perform a duty upon striking an occupied or attended vehicle count.[2]

¶15 Lagalbo moved for postconviction relief, arguing: (1) there was insufficient evidence to support the jury's guilty verdict on the fleeing/eluding charge; and (2) he was entitled to resentencing because the sentencing judge relied on inaccurate information. The circuit court denied Lagalbo's motion, and this appeal follows.

DISCUSSION

I. Sufficiency of the evidence

¶16 When a defendant challenges the sufficiency of the evidence to support his or her conviction, we may not reverse the conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). It is not our

[2] Lagalbo could not be sentenced on both the OWI charge and the operating with a restricted controlled substance in the blood charge, and the State elected to have him sentenced on the latter charge.

function to resolve conflicts in the testimony, weigh the evidence, or draw reasonable inferences from basic facts to ultimate facts; those duties belong to the trier of fact. ***Id.*** at 506. If there is any possibility the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the defendant guilty, we will not overturn the verdict, even if we believe the trier of fact should not have found guilt based on the evidence before it. ***Id.*** at 507. When faced with a record that supports more than one inference, we must accept and follow the inference drawn by the trier of fact, unless the evidence on which it is based is incredible as a matter of law. ***Id.*** at 506-07.

¶17 Lagalbo was charged with violating WIS. STAT. § 346.04(3),[3] which provides:

> No operator of a vehicle, after having received a visual or audible signal from a traffic officer, or marked police vehicle, shall knowingly flee or attempt to elude any traffic officer by willful or wanton disregard of such signal so as to interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians, nor shall the operator increase the speed of the operator's vehicle or extinguish the lights of the vehicle in an attempt to elude or flee.

As Lagalbo correctly notes, this statute required the State to prove, among other things, that he received a visual or audible signal from a traffic officer or marked police vehicle. *See* ***State v. Oppermann***, 156 Wis. 2d 241, 245, 456 N.W.2d 625 (Ct. App. 1990) ("[U]nder [WIS. STAT. § 346.04(3)], the state must show that defendant received a signal either from a police officer or from a marked police

[3] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

vehicle[.]"). Lagalbo then devotes considerable effort to demonstrating that Morgan's squad car was not a marked police vehicle.

¶18 However, the State does not dispute that Morgan's vehicle was unmarked. Instead, the State's theory, both at trial and on appeal, is that Lagalbo violated WIS. STAT. § 346.04(3) by fleeing after receiving a visual or audible signal from a traffic officer. The Amended Information alleged that Lagalbo knowingly fled "after having received a visual or audible signal from a traffic officer[.]" The circuit court instructed the jury that Lagalbo was charged with "operating a vehicle to flee an officer[,]" and that offense "is committed by a person who drives a vehicle on a public street after receiving visual or audible signals from a traffic officer and who knowingly flees the officer by increasing the speed of the vehicle." The court also instructed the jury regarding the definition of a "traffic officer."

¶19 In support of his argument that the State's theory at trial was that he fled from a marked police vehicle, Lagalbo quotes a lengthy passage from the prosecutor's closing argument. In that passage, the prosecutor referred to Morgan's vehicle as a "squad car" and noted it was equipped with red and blue lights. The prosecutor did not, however, describe the vehicle as a marked police car. Moreover, immediately before the passage Lagalbo quotes, the prosecutor explained that Lagalbo was charged with "[o]perating a motor vehicle to flee an officer[,]" and the basis for that charge was that Lagalbo "drove a vehicle on a public street after receiving an audiovisual or audible traffic signal from the traffic officer[.]" The prosecutor then discussed the definition of a "traffic officer." Thus, contrary to Lagalbo's assertion, the prosecutor's closing argument cannot reasonably be construed as urging the jury to find Lagalbo guilty because he fled after receiving a signal from a marked police vehicle. Rather, the prosecutor's

argument, along with the jury instructions, unambiguously explained to the jury that it needed to determine whether Lagalbo fled after receiving a signal from a traffic officer.

¶20 Lagalbo does not argue there was insufficient evidence to prove Morgan was a traffic officer. Indeed, he concedes that "any officer might be said to be a traffic officer in the sense that every officer has the right to direct traffic[.]" *See* WIS. STAT. § 340.01(70) ("'Traffic officer' means every officer authorized by law to direct or regulate traffic or to make arrests for violation of traffic regulations[.]"). Instead, Lagalbo argues the "question of sufficiency of the evidence … hinges solely on whether the defendant *knowingly* disregarded the signals of a traffic officer." In other words, Lagalbo claims there was insufficient evidence to prove he knew that Morgan was a traffic officer.

¶21 As support for this argument, Lagalbo notes that Morgan's squad car was unmarked. He asserts there is no evidence he saw Morgan before Morgan exited the squad car, and, as a result, Lagalbo's conduct before that point cannot constitute fleeing or eluding. Lagalbo further observes it is undisputed that Morgan was wearing plain clothes, did not announce himself as a law enforcement officer, and did not display a badge.

¶22 Lagalbo's argument on this point ignores our standard of review. Although the evidence Lagalbo cites could, potentially, have provided a basis for the jury to infer Lagalbo did not know Morgan was a traffic officer, other evidence supported a contrary inference. First, evidence was introduced at trial that Morgan was operating a vehicle with a siren and red and blue flashing lights. Although the presence of a siren and flashing lights does not prove, as a matter of law, that the

person operating a vehicle is a law enforcement officer, it certainly supports that conclusion.

¶23 Second, Morgan's behavior during the stop of Lagalbo's vehicle was consistent with the type of actions a jury could reasonably conclude a law enforcement officer would have taken under the circumstances. After Lagalbo failed to pull over, despite Morgan activating his vehicle's lights and siren, Morgan continued following him. Once Lagalbo turned onto a dead end street, Morgan positioned his vehicle across the road in an attempt to prevent Lagalbo from driving away, then exited his vehicle and approached Lagalbo with his gun drawn. Morgan ordered Lagalbo to turn off the vehicle and show his hands. After Lagalbo refused to follow Morgan's commands and instead drove away, Morgan returned to his own vehicle and continued the pursuit. These are the type of acts a reasonable jury could conclude a law enforcement officer would have performed in the situation presented.

¶24 Third, Morgan testified there was an "indication" Lagalbo recognized him as a law enforcement officer after Lagalbo's brief stop and encounter with Morgan, and prior to Lagalbo's fleeing.

¶25 Fourth, four bystander witnesses testified they were under the impression the person who stopped Lagalbo's van was a law enforcement officer. Notably, they formed this impression even though Morgan did not identify himself as a law enforcement officer, was not wearing a uniform, did not display a badge, and was not driving a marked police vehicle.

¶26 Fifth and finally, at the hospital, Lagalbo told detective Gomez he "observed the red and blue lights of a police officer attempting to pull him over, and the next thing he recalled, he observed a police officer ordering him at

gunpoint to get out of the vehicle." Lagalbo claims this statement is ambiguous and could support an inference that Lagalbo first realized Morgan was a law enforcement officer when he was arrested for fleeing or eluding. However, an equally reasonable inference from Lagalbo's statement to Gomez is that Lagalbo knew Morgan was a law enforcement officer from the time he first saw the red and blue lights.

¶27 When the record supports more than one inference, we must accept the inference drawn by the trier of fact unless the evidence on which it is based is incredible as a matter of law. ***Poellinger***, 153 Wis. 2d at 506-07. The evidence summarized above is not incredible as a matter of law, and it amply supports a reasonable inference that Lagalbo knew Morgan was a law enforcement officer. Lagalbo does not argue the evidence was insufficient in any other respect to support his conviction on the fleeing/eluding charge. We therefore reject Lagalbo's sufficiency-of-the-evidence argument.

II. Resentencing

¶28 Lagalbo also asserts he is entitled to resentencing because the sentencing court relied on inaccurate information.[4] "A defendant has a constitutionally protected due process right to be sentenced upon accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717

[4] Lagalbo's brief-in-chief discusses at length the standards governing a circuit court's exercise of sentencing discretion. However, Lagalbo does not develop any argument that the circuit court erroneously exercised its discretion when sentencing him. Instead, he argues only that the court relied on inaccurate information. We therefore need not address whether Lagalbo's sentences constitute proper exercises of the court's discretion. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not address undeveloped arguments).

N.W.2d 1. Whether a defendant has been denied this right is a question of law that we review independently. ***Id.***

¶29 A defendant requesting resentencing due to the circuit court's use of inaccurate information must prove both that the information was inaccurate and that the court actually relied on it at sentencing. ***Id.***, ¶26. Whether the court actually relied on the incorrect information at sentencing is based on "whether the court gave 'explicit attention' or 'specific consideration' to it, so that the misinformation 'formed part of the basis for the sentence.'" ***Id.***, ¶14 (quoting ***Welch v. Lane***, 738 F.2d 863, 866 (7th Cir. 1984)). If the defendant demonstrates actual reliance on inaccurate information, the burden shifts to the State to prove the error was harmless. ***Id.***, ¶26. "The State can meet its burden to prove harmless error by demonstrating that the sentencing court would have imposed the same sentence absent the error." ***State v. Travis***, 2013 WI 38, ¶73, 347 Wis. 2d 142, 832 N.W.2d 491. To satisfy this burden, the State should "rel[y] on the transcript of the sentencing proceeding" and "refrain[] from relying on the circuit court's assertions during the hearing on the defendant's postconviction motion or speculation about what a circuit court would do in the future upon resentencing." ***Id.***

¶30 At the beginning of its sentencing remarks, the circuit court commented on several letters it had received on Lagalbo's behalf. The court noted that, in one of the letters, "there was a belief stated that the Defendant's arms were out of his van window during this incident." The court stated, "There's not one scintilla of evidence to support that. Not one. In fact, to the contrary, the evidence was that Mr. Lagalbo's hand and arms were never out of the window, and that was one of the problems here."

¶31 The State concedes the circuit court was mistaken when it stated there was no evidence Lagalbo put his hands outside the window. Morgan testified that, after he ordered Lagalbo to show his hands, Lagalbo briefly put his hands out the window, but then resumed driving. The State also concedes the circuit court gave "explicit attention" to this inaccurate information during its sentencing remarks, and, consequently, actually relied on it. *See* ***Tiepelman***, 291 Wis. 2d 179, ¶14.

¶32 However, the State argues, and we agree, that the circuit court's reliance on this inaccurate information was harmless. After the court made its comment about Lagalbo's hands never being outside the window, the court explained that its general objectives in sentencing Lagalbo were punishment, protection of the community, rehabilitation, and deterrence of similar behavior by both Lagalbo and others. The court stated, "Drinking and doing dope that night, and then getting behind the wheel of a car, was irresponsible, utterly irresponsible, and in fact, criminal."

¶33 The court then rejected Lagalbo's family's belief "that Deputy Morgan is the problem here and is at fault and Mr. Lagalbo would never have acted as he did, but for the conduct of Deputy Morgan." The court explained:

> [T]hat's a really upside down, inside out, weird way of looking at it. I know that being shot as a result of this experience is not what Mr. Lagalbo was anticipating when he foolishly and criminally got behind the wheel of a car and began driving that night.
>
> But none of this would have transpired, he would not have gotten shot, if he had merely pulled over on the freeway in response to the officer's siren and lights.

The court rejected as "ridiculous" Lagalbo's father's suggestion that Lagalbo was "looking for a lighted place to stop and didn't find one until he got to the street

where the actual shooting took place," and only then did he notice the flashing lights on Morgan's vehicle. The court stated there would "be no reason to pull over anywhere, for any reason, if Mr. Lagalbo hadn't seen those lights on the freeway."

¶34 The court then emphasized the fact that Lagalbo engaged in highly reckless conduct by driving on a stormy night while "drunk and high." It described his conduct as "[t]erribly criminal," "[t]erribly irresponsible," and "[f]rankly stupid." It further stated Lagalbo must have known he was drunk because he stated "You're not going to shoot me just because I'm drunk" when Morgan approached him. The court asserted Lagalbo "had no business whatsoever, being behind the wheel of a car, and he's the one that started this chain reaction."

¶35 The court also observed that Lagalbo did not stop his vehicle, "even though the lay witnesses all knew that this was a cop, even though he was in street clothing[.]" The court stated there was "an utter and complete and criminal lack of cooperation in stopping, and instead, Mr. Lagalbo never stopped and took off, fleeing the officer, and recklessly endangering the officer's safety."

¶36 The court acknowledged that being shot by Morgan had traumatized Lagalbo. It commended Lagalbo for maintaining his sobriety since the charges against him were filed. Nevertheless, the court stated Lagalbo's criminal record counted against him "in every respect[,]" particularly because all of his past criminal and traffic convictions were drug- or alcohol-related. The court observed that Lagalbo "kept up this criminal behavior of doing dope and driving while drunk" for "a dozen years," and it was "only after [he] got shot, frankly, that [he] stopped."

¶37 Finally, the court stated Lagalbo had been "anything but cooperative with the police" until "late, late, late in this long, long incident." The court agreed that Lagalbo "didn't mean or intend to hurt anybody, much less Deputy Morgan," but it stated Lagalbo "invited that [possibility] by [his] conduct."

¶38 The sentencing court's remarks demonstrate that Lagalbo's sentences were based on the high degree of recklessness exhibited by his conduct, the danger his conduct posed to Morgan, Lagalbo's long history of drug- and alcohol-related offenses, and Lagalbo's persistent lack of cooperation and utter disregard of Morgan's orders throughout the incident. Given the court's comments, it is clear beyond a reasonable doubt it would have imposed the same sentence regardless of whether Lagalbo failed to show his hands in response to Morgan's command, as the court believed, or showed his hands briefly before continuing to drive. Under either scenario, Lagalbo failed to comply with Morgan's directive. Accordingly, we are satisfied the court would have imposed the same sentence even absent its erroneous belief that Lagalbo failed to show his hands. Its reliance on the inaccurate information was therefore harmless.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.