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WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

November 15, 2016

To:

Hon. Tammy Jo Hock
Circuit Court Judge
Brown County Courthouse
P.O. Box 23600
Green Bay, WI 54305-3600

John VanderLeest
Clerk of Circuit Court
Brown County Courthouse
P.O. Box 23600
Green Bay, WI 54305-3600

David L. Lasee
District Attorney
P.O. Box 23600
Green Bay, WI 54305-3600

Jeffrey Mann
Mann Law Office, LLC
404 N. Main St., Ste. 102
Oshkosh, WI 54901-4954

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Charles J. Fabry
509 Crooks Street
Green Bay, WI 54301

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

2016AP794-CRNM State of Wisconsin v. Charles J. Fabry (L. C. No. 2013CF609)

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

Counsel for Charles Fabry filed a no-merit report concluding there is no arguable basis for challenging Fabry's convictions and sentences for resisting an officer/causing a soft tissue injury (WIS. STAT. § 946.41(2)(r)),[1] obstructing an officer (§ 946.41(1)), and third offense operating a motor vehicle while intoxicated (WIS. STAT. § 346.63(1)(a)). Fabry was advised of his right to respond to the report and has not responded. Upon our independent review of the

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

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

The no-merit report inexplicably fails to address the sufficiency of the evidence to support the jury's verdicts. Nonetheless, our independent review of the record confirms the State presented sufficient evidence to support the convictions.

Officers testified that, as they were leaving the scene of an unrelated call, Fabry sped past them at forty- to forty-five miles per hour in a twenty-five-mile-per-hour zone. One of the officers pulled up behind Fabry's car and activated his emergency lights and siren. Fabry did not pull over. After driving several blocks, Fabry pulled into his driveway and walked briskly, almost running, toward his house, ignoring the officer's order to stop. After the officer attempted to disable Fabry with his Taser, the officer grabbed Fabry, who turned around and took a fighting stance. The officer struggled with Fabry, who was attempting to hit and kick him.

The second officer who arrived on the scene attempted to secure Fabry's legs. Fabry kicked him and trapped the officer's leg under his, injuring the officer's calf. Additional officers arrived and repeatedly attempted to disable Fabry using Tasers, eventually subduing him. Fabry was arrested and taken to a hospital where his blood was drawn. A lab technician testified his blood alcohol content was 0.094 gm/100 ml.

Officers who remained at the scene searched Fabry's car and found many beer bottles and a cup containing beer. The injured officer testified that, within ten minutes of the altercation, he felt such pain in his leg that he went to an emergency room for treatment. The emergency room

doctor diagnosed the injury as a deep bruise or torn muscle. A treating physician subsequently suggested a possible torn tendon.

Fabry was the only witness called by the defense. He denied he was speeding, and claimed to have consumed "a couple of beers" in the hours before the incident. He testified the cup containing beer might have been in his car for days. He said he did not stop when the officer activated his emergency lights and siren because he did not believe he did anything wrong and he thought the officer would pull around him. He first realized the officer was trying to stop him just before he entered his driveway. He claimed not to have heard the officer call for him to stop, but only heard someone yell "Hey," which he assumed was a friend calling to him from a passing bicycle at 11:55 p.m. He was not curious about why someone grabbed his arm as he was trying to enter his house. He claimed he was rendered unconscious by the Taser, and denied trying to kick the injured officer. The defense conceded Fabry had two prior drunk driving convictions. As the arbiter of the witnesses' credibility, *see* ***State v. Webster***, 196 Wis. 2d 308, 320, 538 N.W.2d 810 (Ct. App. 1995), the jury could reasonably believe the State's witnesses' testimony and find Fabry guilty of all three offenses.

The no-merit report addresses four other issues. We agree with counsel's analysis of those issues.

The defense filed a pretrial motion to dismiss the complaint, alleging the State destroyed a video recording that would have shown whether Fabry was speeding. The camera was mounted on a parking garage. Because no specific request was made for the recording, the video was recorded over. When evidence has been destroyed, a defendant's due process rights are violated if the State either failed to preserve apparently exculpatory evidence or acted in bad

faith by failing to preserve potentially exculpatory evidence. ***State v. Greenwold***, 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Ct. App. 1994). The circuit court properly applied ***Greenwold***, finding the recording was of no apparent exculpatory value. The court stated it would be nearly impossible to detect Fabry's speed from the camera's location. The court further determined the State did not act in bad faith by failing to preserve the video. The video had not been specifically requested by the defense. The defense was relying on a generic request for exculpatory evidence, and the State had no reason to predict that a camera far from the scene of the arrest might provide any exculpatory evidence.

The no-merit report also addresses whether the circuit court properly denied the defense's request for a mistrial or a continuance after the injured officer testified regarding the possible torn tendon. The defense contended it was unaware of that diagnosis. The circuit court properly exercised its discretion when it denied the request for a mistrial or a continuance because the evidence of the additional diagnosis was inconsequential. A soft tissue injury would include a deep bruise, a torn muscle, or a torn tendon. The injured officer was competent to testify to his injuries on the basis of his personal knowledge and experience. *See* ***Ludwig v. Dulian***, 217 Wis. 2d 782, 794, 579 N.W.2d 795 (Ct. App. 1998). The prosecutor was not aware of the alternative diagnosis and, because it was one of three possible diagnoses (all of which would constitute a soft tissue injury), the fact that the defense was not earlier informed of the possible torn tendon was not sufficiently significant to necessitate a mistrial or a continuance.

The no-merit report also addresses whether the circuit court properly exercised its discretion when it denied a defense request to have an expert witness appear telephonically. The witness was an expert in the use of force, Tasers and the potential effect Tasers might have on Fabry's actions on the night of the arrest. The defense argued that Fabry's flailing of his arms

and legs due to the Taser deployments might have been misconstrued as kicking or punching actions. The prosecution objected, noting the expert did not purport to have an opinion on that question. The circuit court stated it was not satisfied that the witness was in fact an expert on that question or that the evidence was relevant to the elements the State was required to prove. No-merit counsel states he spoke with the expert and reaffirmed that he would not have been able to testify with any certainty about the effect, if any, the Taser may have had on Fabry's actions. Because the proffered telephonic testimony would not have supported Fabry's defense, his right to a fair trial was not violated by the circuit court's decision to disallow the telephonic testimony.

Finally, the record discloses no arguable basis for challenging the sentencing court's discretion. On the charge of resisting an officer/causing a soft tissue injury, the court placed Fabry on probation for three years, with six months in jail as a condition of probation. On the charge of obstructing an officer, the court imposed a sentence of six months in jail concurrent with the resisting sentence. On the charge of driving while intoxicated, the court imposed a sentence of sixty days in jail, consecutive to the other sentences. The court could have imposed consecutive sentences totaling seven years and nine months' imprisonment and fines totaling $22,000. The court specifically considered the seriousness of the offenses, Fabry's character, and the need to protect the public. *See* ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The court considered no improper factors and the sentences it imposed are 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 judgments are summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Jeffrey Mann is relieved of his obligation to further represent Fabry in this matter. WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals