COURT OF APPEALS DECISION DATED AND FILED

April 1, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 02-1647-CR

Cir. Ct. No. 00-CF-667

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOEL M. FURST,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Joel Furst appeals a judgment convicting him of two counts of homicide by intoxicated use of a vehicle. He argues that:

(1) he was denied a fair trial because a prospective juror said during voir dire that it was not Furst's first-offense and the trial court's instruction did not adequately cure the resulting prejudice;

(2) the court prejudicially erred when it excluded Furst's prior consistent statements that the victims' headlights were not on;

(3) the court improperly exercised its discretion when it allowed testimony regarding a mid-trial inspection of the victims' headlights without the prosecution establishing a chain of custody;

(4) the prosecutor's closing argument deprived Furst of a fair trial by misrepresenting the defense; and

(5) the interest of justice requires a new trial because the mid-trial discovery and disclosure of the headlights prevented the case from being fully tried and undermined Furst's rights to prepare a defense, to effective counsel and to knowingly enter a plea.

We reject these arguments and affirm the judgment.

¶2 The State presented evidence that around 11 p.m. Furst ran a stop sign and collided with David and Audrey Kiecker's vehicle, killing both of them. At the accident scene, a deputy asked Furst how much he had been drinking. Furst replied "Way too much." One hour and thirty-five minutes after the accident, Furst's blood alcohol content was .16%. A nurse at the hospital reported that Furst told her that he had been drinking mixed drinks, "Lots of them." He admitted to drinking four mixed drinks between 4 p.m. and 7:30 p.m. Between 7:30 and 11, he consumed two additional beers. Trooper Timothy Austin testified that Furst was driving between fifty-six and sixty-two miles per hour at impact. Based on his reconstruction of the accident, he opined that Furst did not stop at the stop sign.

¶3 Furst testified that he stopped at the stop sign, was not intoxicated at the time of the accident, and that the Kieckers' car lights were off. He testified that he drank five beers at his friend's home without his friend knowing it, finishing the last beer minutes before leaving. He contends that he was not

intoxicated at the time of the accident because the alcohol he consumed just before leaving his friend's house did not get into his bloodstream until after the accident. He also testified that he came to a complete stop at the stop sign before entering the intersection.

¶4 Furst's claim that the Kieckers' headlights were off was first raised in his counsel's opening statement. The prosecutor sent investigators to find the headlights. Their investigation concluded that the low beam lights were on at the time of the accident based on bowing of the filaments. They also testified that the light switch was on. In addition, the Kieckers' daughter testified that the lights were on when they dropped her off one-half hour earlier. An eyewitness testified that he saw a car coming from the direction of the Kiecker vehicle, with its lights on about one-half mile away until a building blocked his view. Three to five seconds later, he heard the accident. There was no other car in front of or behind the vehicle whose headlights he saw. Furthermore, a car dealership service manager testified that the Kieckers' car included a "Twilight Sentinel" system that automatically turns on headlights at twilight. It was impossible to turn off the headlights if the car was in drive after dark. If the system failed, the headlights automatically turned on. In addition, their car had a daytime running light system that came on day and night, and that system could only be turned off if the car was in park.

¶5 Furst contends that he was denied due process and a fair trial when a prospective juror stated that this was not Furst's first offense. Defense counsel requested a mistrial or a curative instruction. The court instructed the jury as requested. Furst now contends that the court should have told the jurors that the prospective juror's comment was false. The instruction that Furst requested the trial court to give did not include a statement that the information was false.

Because Furst did not object to the instruction, he waived any deficiency. *See* WIS. STAT. § 805.13(3); ***State v. Schumacher***, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988). Furthermore, the court's instruction adequately protected Furst's rights. The court instructed the jury to disregard the statement, and jurors are presumed to follow the court's instruction. *See* ***State v. Adams***, 221 Wis. 2d 1, 12, 584 N.W.2d 695 (Ct. App. 1998).

¶6 The State concedes that the trial court erred when it excluded Furst's prior consistent statements that the Kieckers' headlights were off. The error, however, was harmless beyond a reasonable doubt. Even without considering the testimony that the filaments were bowed, indicating that the lights were on at the time of the accident, overwhelming evidence establishes that the lights were on. The only way the car could operate after dark without the lights on is if the car blew at least one fuse or there was a short circuit or bad connection in the headlights. Unbiased eyewitness testimony established, however, that the headlights were operating three to five seconds before the accident. Furst's earlier self-serving statements that the headlights were off would not have added credibility to his testimony. We conclude that there is no possibility that the error contributed to the verdict. *See* ***State v. Dyess***, 124 Wis. 2d 525, 544-45, 370 N.W.2d 222 (1985).

¶7 Furst's challenge to the testimony regarding the headlight filaments based on the State's failure to establish a chain of custody fails for three reasons. First, although Furst's counsel alluded to the chain of custody, he never specifically objected to the testimony on that ground. *See* ***State v. Johnson***, 184 Wis. 2d 324, 344-45, 516 N.W.2d 463 (Ct. App. 1994). Second, to the extent the trial court was asked to consider the chain of custody, it properly exercised its discretion by allowing the testimony. Headlight filaments are not the type of

evidence that is readily contaminated. The officers found the headlights in the back seat of the Kieckers' vehicle in the junk yard and they appeared to match the type of headlight that would be found on that car. The State adequately established that it was improbable the headlights had been exchanged, contaminated or tampered with. *See* ***B.A.C. v. T.L.G.***, 135 Wis. 2d 280, 290, 400 N.W.2d 48 (Ct. App. 1986). Furst's contention that the filaments might not have been from the Kiecker vehicle was a matter for the jury to determine because it relates to the weight, not the admissibility of the evidence. Third, Furst has established no prejudice from the trial court's ruling. The State presented overwhelming credible evidence that the Kieckers' car headlights were on without considering the filament testimony.

¶8 Furst next argues that he was denied a fair trial because the prosecutor's closing argument misstated his defense. The prosecutor said that the defense wanted the jury to ignore the law. In the context of the entire argument, the prosecutor was referring to the jury instruction that jurors may utilize common sense when reaching a verdict. The prosecutor merely argued that Furst was not interested in common sense or reasoned thinking and that his defense encouraged the jury to disregard common sense. That argument constitutes a reasonable commentary on the evidence and the quality of the defense presented.

¶9 The prosecutor also suggested that Furst's defense amounted to a character attack against the Kieckers. Defense counsel suggested that Kiecker was driving at forty-eight miles per hour in a fifty-five mile per hour zone because he knew that his headlights were not operating. The prosecutor questioned the defense theory, arguing that Furst wanted the jury to believe that the Kieckers were a wild, reckless couple out for a joy ride. Defense counsel did not object to that statement. Rather, he utilized his closing argument to clarify the defense

theory. In light of the overwhelming evidence that the Kieckers' car lights were on and defense counsel's explanation of the defense theory, we conclude that the prosecutor's conduct did not "so infect the trial with unfairness as to make the resulting conviction a denial of due process." *See* ***State v. Wolff***, 171 Wis. 2d 161, 167, 191 N.W.2d 498 (Ct. App. 1992).

¶10 Finally, there is no basis for granting a new trial in the interest of justice. We conclude that the matter was fully and fairly tried. The trial court offered the defense a reasonable opportunity to examine the headlights. Nothing in the record suggests that additional time for testing would have produced any contrary evidence. Furthermore, the mid-trial discovery and disclosure of additional evidence that the headlights were on merely confirmed other overwhelming evidence that belied Furst's contention that the lights were off. The interest of justice would not be served by granting Furst a new trial merely to give him the opportunity to feign accepting responsibility for his acts by pleading guilty.

By the Court.—Judgment affirmed.

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