

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 19, 2012

Diane M. Fremgen
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. 2010AP3054-CR

Cir. Ct. No. 2008CF387

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH C. ELAM,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dodge County: STEVEN G. BAUER, Judge. *Affirmed.*

Before Lundsten, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Joseph Elam appeals a judgment convicting him of a fifth or subsequent offense of operating a motor vehicle while intoxicated. He also appeals an order denying his motion for postconviction relief. Elam claims

that he is entitled to a new trial based on ineffective assistance of counsel. We disagree, and affirm for the reasons discussed below.

BACKGROUND

¶2 The charges here were based on allegations that, while on Huber release, Elam drove to a bar in his employer's pickup truck, became intoxicated, and later rolled the truck over into a field. Elam's defense was that his girlfriend was driving at the time of the accident.

¶3 At trial, a bar manager testified that Elam had arrived at the bar in a black truck, and she observed him having a drink and two shots with friends. The bar manager did not see Elam's girlfriend. She believed that Elam left alone after receiving a call that his sister needed a ride, and that the truck left at the same time. The bar manager's account was corroborated by two other people at the bar. Both saw Elam leave alone, and one testified she did not see Elam's girlfriend.

¶4 Regarding the accident scene, the driver of an oncoming vehicle testified that he stopped his vehicle after he saw a truck go off the road. He observed a tall, thin, white male with brown hair climb out of the window of the truck and run toward a marsh. The oncoming driver did not see a woman either in the truck or at the scene.

¶5 A nearby homeowner heard a squeal and looked out his window in time to see the truck sliding off the road. The homeowner called 911 as he went outside, and also saw just one person running across the field toward the marsh. The homeowner directed police toward the marsh when they arrived, which was six to seven minutes after the 911 call had been placed.

¶6 The police searched and found Elam lying in the grass along a fence near the marsh, and they placed him in handcuffs at gunpoint. The officers then questioned Elam about what he was doing in the field, why he had run from them, and why he was limping and had lacerations. Elam told the officers that he was just out for a hike and denied driving the truck or having any involvement with the accident. The officers did not advise Elam of his rights until after they had administered field sobriety tests and taken Elam to the hospital, where a blood test was done.

¶7 Elam's employer identified the keys found in the ignition of the truck as Elam's. The employer spoke to Elam after the accident, and commented that he would have thought that Elam would have had enough common sense to not drink when driving the employer's truck. Elam responded, "I know, I know, the whole—I keep thinking of it, too. I'm like why did I drink."

¶8 Elam's girlfriend, Cassie Moriearty, testified that she drove to the bar to pick Elam up, left her car there, and was driving Elam home in the truck when she became distracted, drifted into a lane of oncoming traffic, and swerved off the road. Moriearty said that, after they both exited the vehicle through a window, Elam ran off through a field while Moriearty ran back to the bar to get her own car.

¶9 Video from the dashboard camera of one of the responding squad cars did not show Moriearty running back to the bar, but did show her car headed from the crash scene toward the bar. When Moriearty admitted that she was driving the car captured on the dashboard video, the prosecutor asked her if she wanted to change her story. The court then interrupted to advise Moriearty that anything she said might incriminate her and she had a right to remain silent at that

point. The court subsequently acknowledged that it should not have made such a comment in front of the jury, and it provided a curative instruction advising the jury that it should not draw any inferences from the court's advisement of rights to a witness and that the jurors were to judge the credibility of the witnesses for themselves.

¶10 The State also introduced a recorded telephone conversation that Elam had with Moriarty while he was awaiting trial. During the call, Moriarty commented that "it's gonna have to just ..., I guess, be me if we can't figure anything else out, you know?" Moriarty then asked, "So what happens if I come forward and say that I was driving?" to which Elam responded, "I don't know. [Y]a know, that would help."

STANDARD OF REVIEW

¶11 Claims of ineffective assistance of counsel present mixed questions of law and fact. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). We will not set aside the circuit court's factual findings about what actions counsel took or the reasons for them unless those findings are clearly erroneous. *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's constitutional right to the effective assistance of counsel is ultimately a legal determination, which this court decides de novo. *See id.*

DISCUSSION

¶12 A claim of ineffective assistance of counsel has two parts: (1) deficient performance by counsel; and (2) prejudice resulting from that deficient performance. *State v. Swinson*, 2003 WI App 45, ¶58, 261 Wis. 2d 633,

660 N.W.2d 12. To prove deficient performance, a defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms and show that his or her attorney made errors so serious that he or she was essentially not functioning as the counsel guaranteed the defendant by the Sixth Amendment of the United States Constitution. *Id.* To prove prejudice, the defendant must additionally show that counsel's errors rendered the resulting conviction unreliable in light of the other evidence presented. *Id.* We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. *Id.*

¶13 Elam claims that counsel provided ineffective assistance by: (1) failing to move to suppress the statements Elam made, prior to having been advised of his rights, about being out for a hike; and (2) failing to request a mistrial after the court advised Moriarty of her right to remain silent in front of the jury. For purposes of this opinion, we will assume that counsel performed deficiently in both respects. The question then becomes whether Elam was prejudiced by either mistake. We conclude that he was not.

¶14 The evidence of Elam's guilt was overwhelming. Elam does not dispute that he drove the truck to the bar, that he was intoxicated when he left the bar, and that he was in the truck when it rolled over less than a mile from the bar. Two eyewitnesses saw Elam, but not his girlfriend, at the bar. Two more eyewitnesses who observed the accident saw someone matching Elam's description exiting the truck and running away, but did not see any woman at the scene. There was no evidence that the girlfriend had any visible injuries, unlike Elam, who was limping and had lacerations. And most telling of all, it was simply not plausible that the girlfriend had been in the accident, had run about a mile back to the bar, had driven back to the accident scene to look for Elam, and then turned

her car around to return to the bar, all within less than the six-to-seven minute response time of the police. In sum, we see no reasonable probability that there would have been any different outcome if the jury had not known that Elam gave a different story to police immediately after the accident, or had the trial court not advised the girlfriend of her right against self-incrimination in front of the jury.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

