COURT OF APPEALS
DECISION
DATED AND FILED

SEPTEMBER 16, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1094-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

REED CUDNOHUSKY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marinette County: CHARLES D. HEATH, Judge. *Affirmed.*

Before Cane, P.J, Myse and Hoover, JJ.

PER CURIAM. Reed Cudnohusky appeals a judgment convicting him of two counts of attempted first-degree intentional homicide and an order denying postconviction relief.[1] He argues that trial counsel was ineffective for

[1] Cudnohusky does not challenge his other convictions for fleeing and resisting.

failing to obtain the testimony of an expert witness and that he is entitled to a new trial in the interest of justice. We reject his arguments and affirm the judgment.

The charges arose out of what began as a traffic stop. At 3:26 a.m. on September 10, 1995, a Marinette city police officer pulled Cudnohusky over because he was speeding and his S-10 Blazer displayed no license plates. While the officer checked the vehicle registration and Cudnohusky's license status, Cudnohusky's passenger fled on foot. The officer radioed for backup and returned to question Cudnohusky, who denied anyone had been with him.

Because he appeared intoxicated, the officer asked Cudnohusky to turn off the vehicle and step out. According to the officer, Cudnohusky just looked at him and said "It's time for you to die" and drove away. Cudnohusky disputed this, testifying that he said "It's time for *me* to die." (Emphasis added.)

As the officer ran back to his squad, he noticed Cudnohusky's vehicle about two houses down. The officer testified that it made a sharp U-turn, crossed the centerline and came directly at him at a "high rate of speed," which the officer estimated to be twenty-five miles per hour. The officer got in his squad, put on his seat belt, put his car in drive and swerved to the right. Cudnohusky narrowly missed him. The officer then turned to pursue. Cudnohusky made another U-turn and again drove directly toward the officer. The officer, taking evasive action, avoided the collision. For a third time, Cudnohusky made a U-turn and drove toward the officer at a high rate of speed. The officer made his own U-turn "to get out of there, fearing for my safety." These attempted collisions form the basis of count one.

Cudnohusky chased the officer through a series of right turns in the downtown area. The officer observed Cudnohusky go over the centerline toward

an oncoming vehicle, forcing it onto the sidewalk. Eventually a backup officer appeared and chased Cudnohusky. The backup officer testified that he was one-half block behind Cudnohusky when Cudnohusky made a U-turn and came directly toward him. The officer put his car in reverse for about a half a block where he tried to back around a corner. He was blocked by a fire hydrant and Cudnohusky struck the squad's right front bumper, bounced off and scraped his left front side. The backup officer estimated that Cudnohusky was going a "[m]inimum of 40 miles an hour" when the vehicles collided. Cudnohusky freed his vehicle and backed toward the squad, but the officer was able to avoid him. He began to chase Cudnohusky. The first officer appeared and they cut him off, pulled him from his vehicle and, through the use of a canine unit, pepper spray and batons, subdued him. While resisting, Cudnohusky told the officers "You are going to have to kill me."

Cudnohusky testified that he had no intent to collide with or harm either officer, but was heading at an oak tree in a suicidal gesture. He testified that he was not able to gain sufficient speed and abandoned the attempt. When the officer moved between him and the tree, Cudnohusky claimed to have taken evasive action. After that, he had no plan and did not know why he kept making additional U-turns, other than he was scared and "I knew I was going to go to jail after that."

Cudnohusky presented the testimony of an auto body specialist concerning the minimal damage to the second squad. Cudnohusky estimated he was traveling "pretty slow" when he hit the second squad, and not "too fast" when he aimed for the oak tree. He also testified that his speed was not fast enough to kill himself if he had hit the oak tree and, during the chase, was somewhere

between twenty and thirty miles per hour. He believed the first squad was going "way faster" than he was.

At the postconviction hearing, Cudnohusky presented the testimony of an accident reconstruction expert. Based on a review of the scene, the vehicle, road tests, and the officers' descriptions, the expert concluded that any impact with the first squad would have occurred at fourteen to nineteen miles per hour with only minor injury to the officer. The frontal impact with the second vehicle would have occurred at fifteen miles per hour, with no appreciable risk of injury. The absence of this expert testimony at trial forms the basis of Cudnohusky's ineffective assistance of counsel claim.

The right to counsel "is meant to assure fairness in the adversary criminal process." ***United States v. Morrison,*** 449 U.S. 361, 364 (1981). To demonstrate ineffective assistance of counsel, a defendant must show counsel's deficient performance and that the deficient performance prejudiced the defense. ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984). To establish deficient performance, it must be shown that "counsel's representation fell below an objective standard of reasonableness." ***Id.*** at 688. With respect to prejudice, the test is whether "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.*** at 687. "The defendant must show that 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.

Ultimately, the reasonableness of the attorney's conduct and whether it was prejudicial to the defense are questions of law that the appellate court must determine independently. ***State v. Pitsch,*** 124 Wis.2d 628, 634, 369 N.W.2d 711,

715 (1985). A defendant's failure to establish either the deficiency component or the prejudice component is dispositive. ***Strickland,*** 466 U.S. at 697.

Cudnohusky argues that trial counsel was ineffective for failing to obtain an accident reconstruction expert to testify at trial. He argues that expert testimony to the effect that had any collision occurred, neither officer would have been seriously injured or killed negated two elements, namely: (1) intent to kill and (2) whether the acts committed were "unequivocal" and would have resulted in the death of another but for some extraneous factor. Cudnohusky argues that the question of his speed goes directly to the issue of intent, and that only expert analysis could take into account the vehicles' mass, positioning and respective damage. He also argues that clear, objective and unequivocal expert testimony has higher probative value than testimony of the defendant or other lay witnesses.

We conclude that it was reasonable for counsel to rely on other evidence in the record rather than expert testimony. Although the officer who made the stop characterized Cudnohusky's speed as "a high rate," he qualified this description by estimating it to be twenty-five miles per hour. This officer's estimate was not significantly different from Cudnohusky's estimate and the expert's calculations. Also, the officer testified that he was able to get into his car, put on his seat belt, and move the squad out of the way after he allegedly saw Cudnohusky coming at him on a collision course from approximately two houses away. This testimony is inconsistent with an allegedly "high rate of speed."

Further, the damage to the second squad was slight, raising an inference to rebut the backup officer's testimony that Cudnohusky approached him at a minimum of forty miles per hour. The jury also had ample evidence of the Blazer's "rough shape," that it did not drive well, had a bad transmission and

limited ability to accelerate. We conclude that it was reasonable for trial counsel to rely on the non-expert testimony of record. Counsel's performance was not deficient for failing to obtain expert testimony.

Although our conclusion is dispositive, we also agree with the trial court's assessment that the lack of expert testimony was not prejudicial to the defense. The expert's opinion put Cudnohusky's speed at fourteen to nineteen miles per hour, and based upon that speed, he concluded that had a collision occurred, the injuries, if any, would have been slight. We are not satisfied that there is a reasonable probability of a different outcome had this opinion been before the jury.

In this case, for one of the counts, there was an actual collision with no injury and only slight damage to the squad. Therefore, the jury had before it undisputed evidence that Cudnohusky's speed at the point of impact was not sufficiently fast to cause serious injuries or death. The jury rejected the inference that Cudnohusky sought to establish, which is that because his speed was not fast enough to cause severe injury and damage, he lacked the prerequisite intent. Also, as for the remaining count, the officer who made the stop estimated Cudnohusky's speed to have been around twenty-five miles per hour, a figure not significantly different from either Cudnohusky's estimate or the expert's post-trial calculations.

Because the record fails to reveal deficient performance or prejudice to the defense, we reject Cudnohusky's ineffective assistance of counsel claim. We also decline his request to reverse on the ground that justice has miscarried or that the real issue in controversy has not been fully tried. *See* § 752.35, STATS.

By the Court.—Judgment and order affirmed.

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