COURT OF APPEALS
DECISION
DATED AND FILED

July 14, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1602-CR **Cir. Ct. No. 2012CF963**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VICTOR H. BENITEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: WILLIAM E. HANRAHAN, Judge. *Affirmed.*

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. This case arises from a single-car accident in which four of the five occupants were killed. Victor Benitez, the sole survivor, appeals from a judgment of conviction and an order denying his motion for postconviction relief. Following a jury trial, Benitez was convicted of thirteen

counts, including twelve homicide-related charges. Benitez argues that: (1) the evidence was insufficient to support the jury's conclusion that he was driving the car at the time of the crash; (2) the circuit court erred in denying his ineffective assistance of counsel claims without a hearing; and (3) his sentence was unduly harsh. We reject each of these claims and affirm.

BACKGROUND

¶2 Benitez was one of five occupants traveling in a car that crossed into oncoming traffic, crashed into a utility pole, and rolled onto its roof. On the theory that Benitez was the car's driver, the State charged Benitez with causing the deaths of the four other occupants. Following a jury trial, Benitez was convicted of four counts of homicide by operating a vehicle while intoxicated, four counts of homicide by operating a vehicle with a restricted controlled substance in his blood, four counts of operating without a valid driver's license causing death, and one count of obstructing an officer. The circuit court imposed a global aggregate sentence of fifty-two years, bifurcated into thirty-two years of initial confinement followed by twenty years of extended supervision.

¶3 Postconviction, Benitez filed a motion challenging the sufficiency of the evidence and asserting that trial counsel was ineffective for failing to object to the testimony and report of Trooper Ryan Zukowski, and to the jury view of the car. In the alternative, Benitez requested a new sentencing on grounds that his sentence was unduly harsh. At a non-evidentiary hearing, the circuit court

determined that Benitez was not entitled to a ***Machner***[1] hearing on his ineffective assistance of counsel claims and denied the postconviction motion in full.

DISCUSSION

I. Sufficiency of the Evidence

¶4 Benitez maintains that the evidence at trial was insufficient to support the jury's conclusion that he was driving the car at the time of the accident. We review the sufficiency of the evidence de novo, but in the light most favorable to sustaining the conviction. ***State v. Hanson***, 2012 WI 4, ¶15, 338 Wis. 2d 243, 808 N.W.2d 390. The standard of review is the same whether the conviction relies upon direct or circumstantial evidence. ***State v. Poellinger***, 153 Wis. 2d 493, 503, 451 N.W.2d 752 (1990). We will sustain a conviction unless the evidence is so insufficient "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." ***Id.*** at 501. In addition,

> If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

Id. at 507.

¶5 We conclude that a reasonable juror could have found beyond a reasonable doubt that Benitez was driving the car at the time of the accident. The

[1] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) (where a defendant claims he or she received the ineffective assistance of trial counsel, a postconviction hearing "is a prerequisite … on appeal to preserve the testimony of trial counsel").

car was registered to Benitez's mother, who testified that Benitez regularly drove the car and had possession of the car for the two days leading up to the crash. Benitez's friend testified that they traveled to Rockford together on the day of the crash and that Benitez drove to and from Rockford, and was still driving when he dropped her off prior to the crash.

¶6 After the accident, Benitez was observed inside the overturned car, lying on the ceiling of the front compartment. The bottom half of his body was toward the driver's seat and the top half toward the passenger's seat. Trooper Zukowski testified it was unlikely that a rear-seat passenger could have ended up in that position. A first-responder observed Benitez attempting to exit the car through the broken front passenger's side window; the front driver's side window was still intact. Pursuant to an accident reconstruction, there was testimony that the passengers in the back seats would have experienced the most significant crash forces and injuries, while the driver would have experienced the least significant force and injury. Benitez's injuries were relatively minor. The chief medical examiner testified that none of the deceased occupants' injuries suggested that they were driving the car.

¶7 Other physical evidence supported an inference that Benitez was the driver. His footwear impression was found on the driver's side door. His DNA was found on the headliner of the car above the driver's seat and was consistent with the contusion to his head. Benitez's DNA was not found in the rear passenger area.

¶8 Evidence concerning Benitez's conduct and statements following the accident also supported an inference that he was the driver. He left the accident scene and was found by firefighters walking in a nearby marsh. Benitez told an

officer he had driven home more drunk before, and when an officer opined that he was not ejected from the car because he was pinned between the driver's seat and steering wheel, Benitez asked if that was why his legs hurt above his knees. Benitez's statements about the accident were inconsistent and changed over time. He first claimed that he was not in the car at all but was walking home. Benitez then told officers he was asleep in the middle of the backseat when the crash occurred. This story was inconsistent with an eyewitness's account that right before the crash, it was very chaotic in the car, with much movement among the passengers. At one point Benitez stated that he had been in the front seat.

¶9 Benitez concedes that a jury's verdict can be based entirely on circumstantial evidence, but argues that the evidence at trial was not "sufficiently strong and convincing to exclude every reasonable hypothesis consistent with the defendant's innocence in order to meet the demanding standard of proof beyond a reasonable doubt." *See* ***id.*** at 502. However, it is the jury's function to determine the credibility of the witnesses, reconcile inconsistent testimony, and weigh the evidence. ***Id.*** at 504, 506. If more than one inference can be drawn from the evidence, this court will follow the inference that supports the jury's finding "unless the evidence on which that inference is based is incredible as a matter of law." ***Id.*** at 506-07. Because trial evidence that was not "incredible as a matter of law" supported a reasonable inference that Benitez was the driver beyond a reasonable doubt, it was sufficient to support Benitez's convictions.

II. Ineffective Assistance of Counsel Claims

¶10 Benitez contends that trial counsel was ineffective for failing to challenge the admissibility of Trooper Zukowski's expert testimony and the jury

view of the car, and argues that the circuit court erred by denying these claims without holding an evidentiary hearing.

¶11 To prevail on an ineffective assistance of counsel claim, the defendant must show that counsel's actions or inaction constituted deficient performance which caused prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. "To prove constitutional deficiency, the defendant must establish that counsel's conduct" fell "below an objective standard of reasonableness." ***Love***, 284 Wis. 2d 111, ¶30; *see also* ***Strickland***, 466 U.S. at 687. To prove constitutional prejudice, the defendant must show that but for counsel's unprofessional errors a reasonable probability exists that the result of the proceeding would have been different. ***Strickland***, 466 U.S. at 694; ***Love***, 284 Wis. 2d 111, ¶30.

¶12 A postconviction motion alleging ineffective assistance of counsel does not automatically trigger the right to a ***Machner*** hearing. ***State v. Phillips***, 2009 WI App 179, ¶17, 322 Wis. 2d 576, 778 N.W.2d 157. In order to obtain a hearing on a postconviction motion, a defendant must allege material facts sufficient to warrant the relief sought. ***State v. Allen***, 2004 WI 106, ¶¶9, 36, 274 Wis. 2d 568, 682 N.W.2d 433. In the context of a claim of ineffective assistance of counsel, the defendant's motion must allege facts that, if true, establish that trial counsel's performance was both deficient and prejudicial. ***State v. Bentley***, 201 Wis. 2d 303, 310, 313-18, 548 N.W.2d 50 (1996). "[N]o hearing is required if the defendant fails to allege sufficient facts in his or her motion, if the defendant presents only conclusory allegations or subjective opinions, or if the record conclusively demonstrates that he or she is not entitled to relief." ***Phillips***, 322 Wis. 2d 576, ¶17. Non-conclusory allegations should present the "who, what, where, when, why, and how" with sufficient particularity to allow the circuit court

to meaningfully assess the claim. ***Allen***, 274 Wis. 2d 568, ¶23. Whether a motion alleges sufficient facts entitling the defendant to relief is a question of law that we review independently. ***Bentley***, 201 Wis. 2d at 309-10. Similarly, whether the record conclusively demonstrates that a defendant is not entitled to relief presents a question of law. *See* ***State v. Sulla***, 2016 WI 46, ¶¶41, 43, __ Wis. 2d __, __ N.W.2d __.

A. Trooper Zukowski's report and testimony

¶13 Prior to trial, counsel filed a ***Daubert***[2] motion seeking to prevent Trooper Zukowski, Deputy Garth Blake, or any other State's witness from testifying about who was driving the car at the time of the crash unless the circuit court first determined the witness was qualified to offer such expert opinion. The circuit court denied the motion as insufficient and trial counsel filed a new ***Daubert*** motion challenging only the expert testimony of Deputy Blake.[3] Counsel also filed a motion to dismiss the charges, alleging there was insufficient evidence to prove the driver's identity. The motion attached and relied on Trooper Zukowski's expert report which contained Zukowski's ultimate conclusion stating "it is my professional opinion that there is insufficient scientific evidence to determine who was driving the [car] at the time of the crash to a reasonable degree of scientific certainty."

[2] ***Daubert v. Merrell Dow Pharms., Inc.***, 509 U.S. 579 (1993). In 2011, WIS. STAT. § 907.02(1), which governs the admissibility of expert testimony, was amended to adopt the ***Daubert*** reliability standard embodied in the Federal Rules of Evidence. *See* ***State v. Giese***, 2014 WI App 92, ¶17, 356 Wis. 2d 796, 854 N.W.2d 687.

[3] At a pretrial hearing, counsel made it clear that Benitez was withdrawing his ***Daubert*** challenge as to Zukowski and that the purpose of his renewed motion was to preclude Deputy Blake from offering his opinion about the driver's identity.

¶14 At trial, Trooper Zukowski testified that he was a member of the Wisconsin State Patrol's technical reconstruction unit specializing in crash and crime scene reconstruction. Zukowski testified that he is an accredited traffic accident reconstructionist with over fourteen years of experience who performs crash and crime scene reconstruction on a full-time basis. Zukowski testified that his role in the case was to perform a study of occupant motion wherein he applied relevant laws of physics to occupant behavior during and after a collision. Consistent with his report, Zukowski testified that he was unable to offer a conclusion to a reasonable degree of scientific certainty as to who was driving the car at the time of the crash.

¶15 In his postconviction motion, Benitez asserted that a reasonable attorney would have objected to the admission of Zukowski's expert testimony and report on grounds that it failed to meet the requirements of WIS. STAT. § 907.02(1) (2013-14).[4] Specifically, Benitez alleged that trial counsel performed deficiently in failing to object to Zukowski testifying as an expert because the trooper was unable to offer an opinion as to the driver's identity. Benitez asserted that because Zukowski's analysis yielded no conclusion, "[his] testimony was not based on 'the *product* of reliable principles and methods" and therefore ran afoul of § 907.02(1). The postconviction court rejected this claim, reasoning that Zukowski's inability to offer an opinion about who was driving the vehicle did not disqualify him as an expert under § 907.02(1), which provides that an expert may testify "in the form of an opinion or otherwise …." The court determined that Zukowski's testimony about the dynamics of the crash was appropriate expert

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

testimony under § 907.02(1), because it was relevant to the issue and useful to the jury.

¶16 We conclude that the circuit court properly denied this claim without an evidentiary hearing because Benitez's postconviction motion failed to allege facts that, if true, would establish trial counsel's deficient performance. The circuit court properly determined that Zukowski's expert testimony and report were admissible under WIS. STAT. § 907.02(1). Trial counsel did not perform deficiently by failing to raise a meritless claim. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441. To the extent Benitez intimates that trial counsel should have raised a particular challenge to the reliability of Zukowski's methods, his motion fails to allege with any particularity what trial counsel could or should have argued. As the circuit court observed, Zukowski testified about his experience, training, and knowledge, and "after the introduction of other evidence, [] was allowed to testify as to the dynamics of a crash, that is, to speak directly to the jury to facts that are in issue without actually offering an opinion."

¶17 Furthermore, the record conclusively demonstrates that Benitez was not entitled to relief. After receiving Zukowski's report opining that there was insufficient evidence to identify the car's driver, trial counsel affirmatively withdrew his challenge to the admission of Zukowski's testimony while maintaining his ***Daubert*** challenge as to Deputy Blake. Trial counsel then used Trooper Zukowski's testimony and report to bolster the defense's theory that there was a reasonable doubt as to the driver's identity, even calling Zukowski in Benitez's case-in-chief. As the State pointed out when arguing in favor of the admissibility of Deputy Blake's opinion, trial counsel made a reasonable strategic decision not to challenge the admission of Zukowski's testimony and report. We

will not second-guess counsel's reasonable strategic decision. *See* ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983) (counsel's performance is not deficient where he or she has made "strategic or tactical decisions … based upon rationality founded on the facts and the law.").

¶18 As Benitez confirmed at the postconviction hearing, the gravamen of Benitez's complaint is that the State elicited testimony from Zukowski which Benitez perceives as undermining his theory of defense and which Benitez characterizes as tantamount to offering an expert opinion that Benitez was driving the car at the time of the crash. In support, Benitez's motion alleged the following:

> Trooper Zukowski additionally testified as to the following observations: (1) there was "hardly any" damage on the driver's side of the vehicle, (2) there "wasn't much" damage to the front area of the vehicle, (3) the position of the driver's seat "could have" prevented the ejection of a driver, (4) he "[didn't] think" the footwear impression found on the driver's door and argued to have been made by Benitez could have been made by an occupant in the back seat, and (5) he "[didn't] think it is likely at all" that an occupant in [the] back seat of the vehicle could have ended up with his feet in the driver's side compartment after impact. Finally, the State asked:
>
> > Was there anything that you observed in your analysis that suggested to you that any of the deceased occupants, those that were ejected from the car, were driving the car?
>
> Trooper Zukowski answered simply, "No."

¶19 That the State performed its adversarial function by attempting to elicit testimony supporting an inference that Benitez was driving the car at the time of the crash does not render trial counsel's performance deficient. *See* ***Strickland***, 466 U.S. at 689 (a reviewing court must be vigilant against the skewed perspective that may result from hindsight, and it may not second-guess counsel's

performance solely because the defense proved unsuccessful); ***State v. Harper***, 57 Wis. 2d 543, 556-57, 205 N.W.2d 1 (1973) ("In considering alleged incompetency of counsel, one should not [by] hindsight reconstruct the ideal defense.").

¶20 Additionally, Benitez's oversimplified account of Zukowski's testimony exaggerates its inculpatory potential. As to the driver's seat preventing ejection, Zukowski actually testified:

> Well, [the position of the driver's seat] could have acted to contain an occupant seated in that position. It's difficult to know what the occupant of that position at the time it was made, where that person or portions of that person's body were at that time.

In terms of the footwear impression, Zukowski made it clear that his opinion was based on the assumption that the impression "was made post-collision by an occupant in the car." While Zukowski answered "No" when asked if he observed anything to suggest that the deceased occupants were driving, this immediately followed his testimony that there was no "specific scientific evidence" that would place Benitez or any other occupant in the driver's seat. Similarly, when called as a witness in Benitez's case-in-chief, Zukowski agreed that the "[f]inal rest position of the victims does not predict occupant placement all the time," and that the severity of an occupant's injuries does not always correlate to their placement in the car.[5] The record conclusively demonstrates that trial counsel's failure to

[5] At the end of Zukowski's testimony in Benitez's case-in-chief, the following exchange transpired:

> [Trial Counsel]: Is it always true that this scale of severity of injury holds true in a crash?
>
> [Zukowski]: It's not always absolutely certain, no. It's a general rule.

(continued)

challenge the admission of Zukowski's testimony and report did not constitute ineffective assistance of counsel.

B. The jury view of the vehicle

¶21 The jury was permitted to view the car in a parking garage for about five minutes. Benitez argued in his postconviction motion that trial counsel was ineffective for failing to object to the viewing because the car was not in the same condition it was in at the time of the crash, and the evidence was unfairly prejudicially cumulative because the State had introduced extensive photographic evidence of the crashed car.

¶22 Postconviction, the circuit court concluded that the car's condition was no basis for an objection because prior to the view, the jury heard testimony concerning the car's post-crash alterations. The court further determined that viewing the vehicle served a different function than the photographs in that it aided the jury in determining matters such as how a 400-pound person could be ejected through a side window and provided context for the testimony concerning the extent of the injuries, speed of the vehicle, and dynamics of the crash. The

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> [Trial Counsel]: So, again, that's a general theory of trying to explain occupant placement, right?
>
> [Zukowski]: Well, I didn't really—I don't think I connected specific occupant placement to injuries, but I understand your question, and I agree.
>
> [Trial Counsel]: You would agree that that's a general way of looking at that evidence, not a certain way of looking at it?
>
> [Zukowski]: It can't be proved. It's consistent with the laws of physics.

court reasoned that the in-person view was relevant and that any prejudicial effect of viewing the car did not outweigh its probative value.

¶23 WISCONSIN STAT. §§ 805.08(4) and 972.06 specifically authorize a jury view. The purpose of a jury view is to assist the jury in understanding the evidence. ***State v. Coulthard***, 171 Wis. 2d 573, 588, 492 N.W.2d 329 (Ct. App. 1992). Whether to permit a jury view is a discretionary decision for the circuit court. *See* ***id.*** The circuit court here properly determined that the vehicle view was relevant evidence that would assist the jury and was not unduly prejudicial. Trial counsel was not ineffective for failing to raise a meritless objection. *See* ***State v. Swinson***, 2003 WI App 45, ¶59, 261 Wis. 2d 633, 660 N.W.2d 12 ("counsel's failure to bring a meritless motion does not constitute deficient performance"). Because Benitez's postconviction motion failed to allege facts that, if true, would entitle him to relief, the circuit court properly denied this claim without a hearing.

III. Sentencing.

¶24 In his postconviction motion, Benitez asserted that his sentence was unduly harsh and excessive. The thrust of Benitez's argument was that in light of his age and other mitigating circumstances, thirty-two years of initial confinement for "a non[]violent crime lacking criminal intent" was unconscionable. The circuit court disagreed and declined to modify Benitez's sentence or order a new sentencing hearing.

¶25 When a defendant argues his or her sentence is unduly harsh or excessive, an erroneous exercise of sentencing discretion will be found "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of

reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). "We review a [circuit] court's conclusion that a sentence it imposed was not unduly harsh and unconscionable for an erroneous exercise of discretion." ***State v. Giebel***, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (1995). We will not set aside the circuit court's discretionary determination if the court "applied the proper legal standards to the facts before it, and through a process of reasoning, reached a result which a reasonable judge could reach." ***State v. Grindemann***, 2002 WI App 106, ¶30, 255 Wis. 2d 632, 648 N.W.2d 507 (citing ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982)). Further, there is a presumption that a sentence well within the limits of the maximum sentence is not unduly harsh or unconscionable. ***Grindemann***, 255 Wis. 2d 632, ¶¶31-32 (citation omitted).

¶26 In determining that Benitez's sentence was not unduly harsh or excessive, the circuit court acknowledged that "[s]entencing is not a science," but requires the court to consider a number of factors and engage in "an exceedingly difficult balancing test." The court accurately recounted that it had considered the relevant factors on the record at Benitez's original sentencing hearing. Postconviction, the circuit court stated "[i]t torments me to know that the defendant at age 18 is spending a considerable amount of his life deprived of his freedom," but determined that its sentence was not unduly harsh or unconscionable given the amount of harm caused by Benitez's offenses and considering that Benitez received "just slightly over half" of the maximum sentence. The circuit court based its decision on the proper law and facts and reasoned its way to a result that a reasonable judge could reach. ***Loy***, 107 Wis. 2d at 414-15.

¶27 Nor can we discern a basis in the record from which to conclude that Benitez's sentence was unduly harsh or unconscionable.[6] *See* ***Grindemann***, 255 Wis. 2d 632, ¶32 ("We now turn to the record before us to see whether, notwithstanding the fact that Grindemann's sentence was well within the maximum, there is any basis on which a court might reasonably conclude that the sentence was, nonetheless, unduly harsh or unconscionable."). On review, we will sustain a sentencing court's reasonable exercise of discretion even if this court or another judge might have reached a different conclusion. ***State v. Odom***, 2006 WI App 145, ¶8, 294 Wis. 2d 844, 720 N.W.2d 695. Here, the circuit court's remarks at sentencing reflect a consideration of the proper factors. *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court permissibly focused on the severity and grave impact of Benitez's crimes, including that the single accident resulted in four separate deaths. *See* ***id.*** (the weight to be given to each factor is committed to the trial court's discretion). Benitez has not overcome the presumption that his sentence, which is well below the maximum, was not unduly harsh or unconscionable. ***Grindemann***, 255 Wis. 2d 632, ¶¶31-32.

By the Court.—Judgment and order affirmed.

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

[6] For the first time on appeal, Benitez asserts that his sentence was unconscionable in light of allegedly disparate sentences ordered in two purportedly similar OWI-homicide cases. Benitez's brief cites to and attaches sentencing information related to cases from Wisconsin and Texas. Putting aside the fact that Benitez did not present this information to the circuit court, we are not persuaded that these unrelated and factually distinguishable cases support a determination that Benitez's sentence was unduly harsh or excessive. Wisconsin recognizes the importance of "individualized sentencing." ***State v. Gallion***, 2004 WI 42, ¶48, 270 Wis. 2d 535, 678 N.W.2d 197. Alleged disparities from one case to the next do not show an erroneous exercise of discretion. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 187-88, 233 N.W.2d 457 (1975).