COURT OF APPEALS
DECISION
DATED AND FILED

September 6, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0560-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH BOGDANSKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marinette County: CHARLES D. HEATH, Judge. *Affirmed in part; reversed in part, and cause remanded with directions.*

¶1 CANE, C.J.[1] Joseph Bogdanske appeals from his convictions for operating while intoxicated (third offense), in violation of WIS. STAT.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

§ 346.63(1)(a), and hit and run, in violation of WIS. STAT. § 346.67(1)(a), and from an order denying postconviction relief. Bogdanske contends that he is entitled to a new trial in the interest of justice on the hit and run conviction because two key witnesses who could provide exculpatory testimony were not available at trial and, thus, the controversy was not fully tried. Bogdanske also argues that he is entitled to a new trial on the OWI conviction because defense counsel was ineffective for failing to object to the jury instruction on expert testimony and hypothetical questions that he claims impermissibly shifted the burden of proof to the defense. This court rejects Bogdanske's argument on the OWI charge, but agrees that in the interest of justice, he is entitled to a new trial on the hit and run charge.

¶2 In the late evening of July 16, 1998, Bogdanske's truck stalled while crossing a main highway. An approaching car on the highway then ran into the driver's side of Bogdanske's truck. A few moments later, the truck started and left the scene of the accident. It is undisputed that no person from the truck stopped to give any identification or insurance information. Less than a mile from the accident, a sheriff's deputy who was dispatched to the accident scene observed the truck with a blown tire riding on a rim, throwing sparks. The deputy stopped the truck, finding Bogdanske's nephew, Russell Brunette, sitting behind the steering wheel. Mark Brunette, Bogdanske's other nephew, sat in the passenger seat, and Bogdanske sat in the middle between his two nephews. Because the deputy suspected Bogdanske had been driving while intoxicated at the time of the accident, she arrested Bogdanske for OWI and then took him to the hospital for a

blood tests and treatment of his injuries.[2] The hospital treated him for three broken ribs and measured his blood alcohol concentration at .152%.

¶3 Because Bogdanske's blood was not drawn for testing within three hours of the accident, the State presented expert testimony at trial estimating Bogdanske's blood alcohol concentration to be over .08% at the time of the accident.[3] The trial court instructed the jury that when considering expert testimony based upon a hypothetical question:

> Such an opinion should be considered only to the extent that the assumed facts upon which it is based are true and correct. Such an opinion does not establish the facts of the truth upon which it is based.
>
> If you find that the facts stated in the hypothetical question have not been proved, then the opinion based thereon is not to be given any weight.

¶4 At the postconviction hearing, Bogdanske argued that the instruction impermissibly shifted the burden of proof to him. Although he conceded that his trial counsel did not object to this instruction, he argued then, as he does now, that his counsel was ineffective for failing to object to it.

¶5 Also, Bogdanske's two nephews testified for the first time at the postconviction hearing. Russell Brunette testified that Bogdanske was driving the truck when it stalled on the highway. Because Bogdanske appeared to be badly hurt and in need of medical attention after the collision, Russell got out of the

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[2] Bogdanske does not challenge his arrest for OWI, and therefore this is not an issue on appeal.

[3] Bogdanske stipulated that he had two prior OWI convictions. Pursuant to WIS. STAT. § 340.01(46m)(b), for a person with two or more prior OWI convictions, the prohibited BAC is reduced from .10 to .08%.

truck and shoved his uncle to the middle seat. Russell then drove the truck from the accident scene in order to get his uncle to the hospital without giving him a choice as to whether they should leave. Russell acknowledged that he originally told the police that after the accident his uncle drove the truck off to a side road and it was at that point, he took over the driving. He explained that he was nervous when talking to the police and did not want to get in trouble even though he was not the driver at the time of the accident. He admitted that it was he, not his uncle, who drove away from the accident scene. Mark Brunette also testified for the first time at the postconviction hearing. He stated that his brother, Russell, drove away from the accident scene without consulting Bogdanske.

INEFFECTIVE ASSISTANCE OF COUNSEL

¶6 The Sixth Amendment right to counsel is the right to effective assistance of counsel. *See* ***McMann v. Richardson***, 397 U.S. 759, 771 n.14 (1970). To prevail on his claim for denial of effective assistance of counsel, Bogdanske must show that his trial counsel's performance was deficient and that this deficient performance prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The performance inquiry determines whether counsel's assistance was reasonable under prevailing professional norms and considering all the circumstances. *See* ***id.*** at 688. A defendant must overcome the presumption that, under the circumstances, the challenged action of trial counsel might be considered sound trial strategy. *See* ***id.*** at 689.

¶7 Under the prejudice prong, the defendant must show there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *See* ***id.*** at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *See* ***id.*** The trial

court's determinations of what the attorney did and did not do, and the basis for the challenged conduct, are factual and will be upheld unless clearly erroneous. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The ultimate determinations of whether counsel's performance was deficient and prejudicial to the defense are questions of law that this court reviews independently. *See* ***id.*** at 128. This court is to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." ***Strickland***, 466 U.S. at 689.

¶8 Here, without deciding whether the jury instruction impermissibly shifted the burden of proof to the defendant, this court is more than satisfied that Bogdanske has failed to satisfy this court that the second prong of prejudice has been met. As the State correctly argues in its brief, the jury first heard that the State must prove its case beyond a reasonable doubt in voir dire from defense counsel and the court. Again, the jury heard during opening statements and closing arguments that the State had to prove its case beyond a reasonable doubt. When instructing the jury, the trial court referred numerous times to the State's burden of proving Bogdanske's guilt beyond a reasonable doubt. Because it is even questionable whether the instruction was erroneous and because the jury was told repeatedly by the court and counsel that the burden remained with the State, this court is satisfied that there is no reasonable probability that the error, if any, contributed to Bogdanske's conviction for OWI.

INTEREST OF JUSTICE

¶9 It is undisputed that both nephews intentionally made themselves unavailable for the trial. The trial court rejected Bogdanske's argument that a new

trial was warranted in the interest of justice because it believed the testimony could have been obtained at trial.

¶10 Bogdanske concedes that this is not newly-discovered evidence, but argues that a new trial is warranted in the interest of justice because, without the testimony, the jury did not have a full opportunity to consider the real controversy in the trial.

¶11 This court is now asked to grant a new trial in the interest of justice by exercising its statutory discretion as provided for in WIS. STAT. § 752.35, rather than to rule on a claimed erroneous exercise of trial court discretion in denying the motion for a new trial. A rule often stated is that "a new trial in the interest of justice will be granted only if there has been an apparent miscarriage of justice and it appears that a retrial under optimum circumstances will produce a different result." ***Garcia v. State***, 73 Wis. 2d 651, 654, 245 N.W.2d 654 (1976). It is generally recognized that appellate courts are reluctant to grant a new trial in the interest of justice upon our own motion. Although this is done only in exceptional cases, this case is one of those exceptions.

¶12 The administration of justice is and should be a search for the truth. *See* ***id.*** at 655. The only fact in dispute at the trial on the hit and run charge was the identification of Bogdanske as the driver of the truck leaving the scene of the accident. In this case, all of the material evidence as to this issue was not presented to the jury. The testimony of the two nephews that Bogdanske was not the driver and in no way participated in leaving the scene of the accident is very material and significant. True, the nephews made themselves unavailable for trial and, thus, did not disclose this evidence. It is also true that counsel could have made a greater effort to locate the nephews. However, the record does not reveal

this was an intentional strategic maneuver by Bogdanske or his counsel. While this court cannot condone the conduct of the nephews, it does not go to the matter of whether the controversy was fully tried and whether Bogdanske was, in fact, guilty.

¶13 The major issue was the credibility of the witnesses. The driver of the car identified Bogdanske as the person driving the truck when leaving the accident scene. On the other hand, Bogdanske's version was the same as the nephews' present version. The testimony of the nephews could well have changed the minds of the jury. There is evidence in the record that could challenge the credibility of the nephews, but the jury did not have an opportunity to hear or evaluate their testimony. As Bogdanske correctly observes in his brief, in ***Garcia***, the supreme court granted a new trial in the interest of justice, even though the missing evidence was previously available and the defendant himself was responsible for hiding it. *See* ***id.*** at 655-56. In that case, Garcia was charged with intentionally discharging a firearm into a building with a witness identifying him as one of the men involved in the offense. *See* ***id.*** at 652-53. However, during the trial, Garcia did not reveal that he had a friend who had participated in the crime and could provide testimony exonerating Garcia.

¶14 This is a close case, but the integrity of our system of administration of criminal justice should afford a jury the opportunity to hear and evaluate the

evidence of the nephews. A new trial is therefore ordered on the hit and run charge.[4]

¶15 In conclusion, this court affirms the conviction for OWI, but in the interest of justice reverses the hit and run conviction and remands that matter for retrial.

By the Court.—Judgment and order affirmed in part; reversed in part, and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[4] As the supreme court noted in ***Garcia v. State***, 73 Wis. 2d 651, 656, 245 N.W.2d 654 (1976), this court similarly notes that had the trial court heard the testimony of the nephews at the hearing on the motion for a new trial and concluded that their testimony was incredible and not subject to belief, this court, in all probability, would have accepted that evaluation and would not have granted a new trial.