COURT OF APPEALS
DECISION
DATED AND FILED

April 24, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP654-CR **Cir. Ct. No. 2010CF491**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JORGE DOMINGUEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BARBARA A. KLUKA and JASON A. ROSSEL, Judges. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Jorge Dominguez appeals his convictions in connection with a fatal car accident. He raises two issues—(1) whether his right to confrontation was violated when the trial court allowed two expert witnesses to

testify that their findings regarding his estimated blood alcohol level at the time of the accident were reviewed by a peer for accuracy and (2) whether he was denied effective assistance of counsel based on several alleged errors of trial counsel. None of Dominguez's arguments persuade, and we affirm.

¶2 In May 2010 around 10:45 p.m., a car carrying the Glogovsky family was struck by another vehicle, killing Dawn Glogovsky and injuring her husband and son. The driver of the second car fled the scene on foot, and a subsequent search led police to Dominguez, who was intoxicated and injured when police found him. At some point during questioning, he told police that he was a passenger in the car and gave them the name of a driver. Dominguez conceded at trial that the person he initially accused of driving did not exist.

¶3 Despite his concession, Dominguez's theory of defense at trial was that he was not the driver of the car at the time of the crash. His attorney made the argument that a man named Ageo Manchuca-Aguirre, the person who customarily drove the car involved in the collision, was driving at the time.[1] Manchuca-Aguirre testified at trial that he had loaned his car to Dominguez on the day of the crash. Later that night, he received a call from Dominguez's wife stating that Dominguez had been in an accident and was hurt. He agreed to look for Dominguez, and he and his wife ultimately helped police find him. Manchuca-Aguirre acknowledged that he had been drinking on the night of the accident and would have been too drunk to drive.

[1] The car was registered to Manchuca-Aguirre's wife, but both testified that it was a gift to him and he was the primary driver.

¶4 The State presented compelling evidence that Dominguez was the driver of the vehicle. An officer testified that when he arrived at the scene, the driver's side of the car was heavily damaged with the door open, while the passenger door and window were closed. A wallet with Dominguez's driver's license was found in the driver's seat of the car. Blood was found on the driver's side air bag, which later tested positive for Dominguez's DNA. Not enough DNA was found on the passenger side airbag to be tested. No keys were found in the car, but keys matching the type of car were found on Dominguez later that evening.

¶5 Dominguez now complains about several aspects of the trial. First, he complains that the State's toxicology expert and a forensic scientist—who testified as to the results of his blood draw and DNA swabs from the accident scene—inappropriately vouched for themselves by answering questions about a peer review process by which a second person concurred with their analysis of the evidence. Second, Dominguez complains that his attorney was ineffective for failing to object to various other alleged errors.

Standard of Review

¶6 We review a trial court's decision to admit or exclude evidence under the erroneous exercise of discretion standard. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. We will uphold a decision to admit or exclude evidence if the trial court "examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion." ***Id.***

¶7 To sustain a claim of ineffective assistance of counsel, a defendant must show both that his counsel's performance was deficient and that the

deficiency prejudiced him. ***Strickland v. Washington***, 466 U.S. 668, 687-88 (1984). Whether counsel was ineffective is a mixed question of fact and law. ***State v. Balliette***, 2011 WI 79, ¶19, 336 Wis. 2d 358, 805 N.W.2d 334. We will not disturb the trial court's findings of fact unless they are clearly erroneous. ***Id.*** We review the trial court's decision as to whether counsel's performance was deficient or prejudicial de novo. ***State v. Westmoreland***, 2008 WI App 15, ¶18, 307 Wis. 2d 429, 744 N.W.2d 919.

Expert testimony regarding peer review

¶8 Dominguez complains that two expert witnesses improperly vouched for themselves when they explained a peer review process whereby another trained analyst reviewed their findings and came to the same conclusion. Dominguez bases his argument that this evidence should have been inadmissible on ***State v. Haseltine***, 120 Wis. 2d 92, 95, 352 N.W.2d 673 (Ct. App. 1984), which involved a child testifying that her father had sexually abused her. An expert at Haseltine's trial testified that there was "no doubt whatsoever" that the child was a victim of incest, and this court held that it was improper for an expert to vouch for the credibility of another witness in that way. ***Id.*** at 96.

¶9 Put simply, we agree with the trial court that this case is nothing like the situation ***Haseltine*** was attempting to prevent, where a key witness's testimony is bolstered by an expert's testimony that the witness is telling the truth. The ***Haseltine*** court noted that "[t]he credibility of a witness is ordinarily something a lay juror can knowledgeably determine without the help of an expert opinion" and that "[t]he opinion that Haseltine's daughter was an incest victim is an opinion that she was telling the truth." ***Id.*** In this case, by contrast, no one has rendered an opinion that another witness is telling the truth. The experts were merely

testifying about the process by which they came to and verified their conclusions—explaining that part of their preparation for trial involved someone else looking at their work and coming to the same conclusion. We see no problem here.

Ineffective assistance of counsel

¶10 Dominguez complains about three alleged errors he believes his trial attorney should have objected to: (1) the playing of a recording of the 911 call made by the deceased victim's husband, (2) the prosecutor's references to himself in closing argument as a "messenger" to the jury and the defense attorney as representing the interests of his client, and (3) the improper admission of evidence of his prior OWI conviction.

¶11 We begin with Dominguez's claim that counsel performed deficiently by failing to object to the 911 recording being played in court. The State argues, and we agree, that any objection to the recording would have failed. Thus, counsel was not ineffective. *See* ***State v. Berggren***, 2009 WI App 82, ¶21, 320 Wis. 2d 209, 769 N.W.2d 110 (it is not ineffective for counsel to refrain from making a futile motion). The objection was admissible under the "excited utterance" hearsay exception. *See* WIS. STAT. § 908.03(3). The recording contains Glogovsky's repeated description that the other driver "blew the stop sign," so the recording was relevant to prove causation. Dominguez argues that even so, it should have been excluded as overly prejudicial. *See* WIS. STAT. § 904.03. The postconviction court found that the recording's prejudicial effect did not outweigh its probative value, and we see no reason to interfere with its discretion on that issue.

¶12 Next, we address trial counsel's failure to object to the assistant district attorney's closing argument references to himself as a "messenger" and statement that the defense attorney's job was to "represent[] the interests of his client." Dominguez compares the statements to those admonished in ***State v. Bvocik***, 2010 WI App 49, ¶15 n.4, 324 Wis. 2d 352, 781 N.W.2d 719 and ***State v. Mayo***, 2007 WI 78, ¶43, 301 Wis. 2d 642, 734 N.W.2d 115.

¶13 In both ***Bvocik*** and ***Mayo***, prosecutors contrasted their role as truth-seekers from defense attorneys' role of representation by implying that defense attorneys are less interested in the truth than prosecutors. *See* ***Bvocik***, 324 Wis. 2d 352, ¶15 n.4. In this case, the prosecutor made the following relevant commentary during closing argument:

> [I]t's an important function that you serve, as well as myself, the court, and defense counsel; and that's kind of important to keep in mind that each of our participants, stakeholders as we may call them, have a role to play. I have a role to play, and that is my job is to present the evidence to you, the messenger, hopefully in a fair and impartial way.
>
> Defense attorney has a job to do in representing the interests of his client.
>
> Judge Kluka has a job to do in overseeing these proceedings and making determinations as to how the evidence is received and then informing you as to the law.
>
> You have a job to do….

The only thing these remarks have in common with the objectionable remarks in ***Mayo*** and ***Bvocik*** is that they relate to the differing roles of prosecutors and defense attorneys. But where the prosecutors in ***Mayo*** and ***Bvocik*** used defense attorneys' role as advocates to imply dishonesty, the prosecutor in this case merely stated that defense attorneys represent the interests of their clients, which is both

true and common knowledge. *See* ***Mayo***, 301 Wis. 2d 642, ¶44. We agree with the State and the postconviction court that the remarks made in this case do not rise to the level of those in ***Bvocik*** and ***Mayo***. Once again, defense counsel was not ineffective for failing to object because the objection would have been futile. *See* ***Berggren***, 320 Wis. 2d 209, ¶21.

¶14 Finally, we address Dominguez's argument that his trial counsel was ineffective for failing to object to the admission of his prior conviction. We will assume without deciding that the prior convictions should not have been admitted and that trial counsel performed deficiently by failing to object. Dominguez's claim still fails because the admission was not prejudicial when viewed in the context of the entire trial.

¶15 A defendant is prejudiced by counsel's deficient performance if he or she can show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** We acknowledge that the admission of prior convictions, particularly for offenses similar in nature to the ones charged, carries a heightened risk of unfair prejudice. *See* ***Old Chief v. United States***, 519 U.S. 172, 180-181, 185 (1997). Nonetheless, that heightened risk is not enough to undermine our confidence in the outcome of this case because the evidence against Dominguez was so overwhelming.

¶16 It is undisputed that Dominguez was intoxicated and involved in the accident—the only dispute at trial was whether he was the driver. Regarding that issue, the jury learned that on the night of the accident, Dominguez first told police that he was the driver and then accused a person his counsel later acknowledged

did not exist. At trial, he relied instead on the suggestion by his attorney that Manchuca-Aguirre was the driver. Manchuca-Aguirre had an alibi through his wife and a close friend. In addition, an officer testified that Manchuca-Aguirre did not appear to be injured on the night of the accident. Moreover, there was no evidence presented placing Manchuca-Aguirre with Dominguez either immediately prior to or at the time of the accident.[2]

¶17 In contrast, there was physical evidence placing Dominguez in the driver's seat of the vehicle at the time of the collision. The Milwaukee County medical examiner testified, based on Dominguez's medical records and photos from the accident scene, that Dominguez's injuries were consistent with him being in the driver's seat at the time of the collision. Dominguez's driver's license was found in the driver's seat, and blood on the driver's side air bag and steering wheel was tested and found to belong to Dominguez. Not enough DNA was present on the passenger side air bag to determine a source, further supporting the hypothesis that Dominguez was alone at the time of the crash.

¶18 Dominguez points to the following evidence that he argues supports an inference that Manchuca-Aguirre was the driver. First, the son of the deceased victim initially told police that he saw two people near the second car involved in the collision.[3] In addition, an emergency room doctor testified that Dominguez's injuries were more consistent with him being a passenger in the vehicle than the

[2] Manchuca-Aguirre testified that on the afternoon before the accident, he had been drinking "one or two beers" with Dominguez before riding to Janesville and back with his friends and letting Dominguez borrow his car.

[3] At trial, the son testified that he had actually told police that he thought he heard two people speaking Spanish, not that he saw two people. He testified that he only ever saw one person other than his parents at the accident scene.

driver. On cross examination, however, the emergency room doctor conceded that Dominguez could have sustained those injuries as the driver and that his conclusions were drawn based solely on Dominguez's injuries, without the benefit of having seen pictures of the vehicle or accident scene.

¶19 At trial, Dominguez's lawyer argued that Dominguez could have invented a fictitious driver to cover for his friend Manchuca-Aguirre, who was intoxicated at the time of the accident. His lawyer suggested that both Manchuca-Aguirre's wife and friend were also covering for him by giving him an alibi.[4] Finally, his lawyer suggested that Dominguez's blood was on the driver's side of the vehicle because he retrieved the keys from the ignition after Manchuca-Aguirre fled. As we already noted, none of Dominguez's attorney's suggestions as to plausible scenarios where Manchuca-Aguirre was the driver are supported by physical or testimonial evidence placing Manchuca-Aguirre with Dominguez either immediately before or at the time of the collision. Under those circumstances, they are insufficient to undermine our confidence in the outcome of the proceedings, particularly given the abundant physical and testimonial evidence placing Dominguez in the driver's seat of the vehicle at the time of the accident.

By the Court.—Judgment and order affirmed.

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

[4] Along the same lines, he points out that Manchuca-Aguirre and his wife left three young children home alone when they went to look for Dominguez, which he argues Manchuca-Aguirre's wife would be unlikely to do for Dominguez, who was a mere acquaintance.