COURT OF APPEALS
DECISION
DATED AND FILED

June 25, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1593-CR **Cir. Ct. No. 2009CF202**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL R. TULLBERG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Shawano County: JAMES R. HABECK, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Michael Tullberg appeals a judgment, entered upon a jury's verdict, convicting him of six crimes, including homicide by

intoxicated use of a motor vehicle.[1] Tullberg also appeals the order denying his motion for postconviction relief. He argues the trial court erred by denying his pretrial motion to suppress blood test results. He also challenges several of the trial court's evidentiary rulings and further contends the court erred by refusing to strike comments the prosecutor made during the State's closing argument. He asserts that these claimed errors warrant a new trial. We reject Tullberg's arguments and affirm the judgment and order.

BACKGROUND

¶2 The State charged Tullberg with nine crimes, arising from a one-truck rollover accident in which Matthew Alf died and two other passengers, Ashley M. and Christopher Malueg, were injured. The court denied Tullberg's pretrial motion to suppress the results of a nonconsensual warrantless blood draw. A jury found Tullberg guilty of six of the crimes charged: homicide by intoxicated use of a motor vehicle; homicide by use of a vehicle with a prohibited alcohol concentration; hit and run—failure to render assistance; causing injury to Ashley by the operation of a vehicle while under the influence of an intoxicant; causing injury to Ashley while operating a vehicle with a prohibited alcohol concentration; and resisting or obstructing an officer.

¶3 The court imposed consecutive and concurrent sentences totaling twenty-nine years and nine months, consisting of nineteen years and nine months' initial confinement followed by ten years' extended supervision. The court denied Tullberg's postconviction motion for a new trial and this appeal follows.

[1] The judgment of conviction also included several civil citations that tracked the criminal charges.

DISCUSSION

I. Motion to Suppress

¶4 Tullberg contends the circuit court erred by denying his motion to suppress the results of a nonconsensual warrantless blood draw. The taking of a blood sample is a search and seizure within the meanings of the United States and Wisconsin Constitutions. ***State v. Bentley***, 92 Wis. 2d 860, 863, 286 N.W.2d 153 (Ct. App. 1979). As a general rule, a nonconsensual warrantless blood draw is unreasonable unless it is supported by probable cause to conclude that a blood test might furnish evidence of a crime; exigent circumstances exist to excuse the requirement of a search warrant; and the blood is drawn in a reasonable manner. ***State v. Erickson***, 2003 WI App 43, ¶9, 260 Wis. 2d 279, 659 N.W.2d 407. The denial of a suppression motion is analyzed under a two-part standard of review: we uphold the trial court's findings of fact unless they are clearly erroneous, but we independently review whether those facts warrant suppression. ***State v. Conner***, 2012 WI App 105, ¶15, 344 Wis. 2d 233, 821 N.W.2d 267.

¶5 Here, Tullberg does not dispute that the blood draw was performed in a reasonable manner, but he claims there was neither probable cause nor exigent circumstances justifying the warrantless search. Whether probable cause for a search exists is determined by analyzing the totality of the circumstances. ***State v. DeSmidt***, 155 Wis. 2d 119, 131, 454 N.W.2d 780 (1990). "The test is objective: what a reasonable police officer would reasonably believe under the circumstances ...." ***Erickson***, 260 Wis. 2d 279, ¶14 (quoting ***State v. Londo***, 2002 WI App 90, ¶10, 252 Wis. 2d 731, 643 N.W.2d 869). Probable cause is assessed by looking at practical considerations on which reasonable people, not legal technicians, act. *See* ***State v. Pozo***, 198 Wis. 2d 705, 711, 544 N.W.2d 228 (Ct. App. 1995).

Further, probable cause does not mean more likely than not—"[i]t is only necessary that the information support a reasonable belief that guilt is more than a possibility." ***State v. Paszek***, 50 Wis. 2d 619, 625, 184 N.W.2d 836 (1971).

¶6 Tullberg contends that nothing law enforcement learned at the hospital indicated Tullberg was impaired by alcohol or was driving when the accident occurred. We disagree. At the suppression motion hearing, sheriff's deputy Justin Hoffman testified that the accident was reported at approximately 12:55 a.m., he arrived five to ten minutes later, and he did not see anybody at the scene. The pick-up truck was resting on its driver's side, and Hoffman discovered Alf's body pinned under the bed area of the truck. After approximately five to ten minutes, an emergency crew and Tullberg's father, Melvin Tullberg, arrived. Melvin informed Hoffman that the vehicle belonged to his son, that both his son and a female passenger were en route to a hospital and there was a third person they could not locate.

¶7 Hoffman proceeded to the hospital to investigate the circumstances surrounding the crash. When questioning Tullberg, Hoffman noticed that Tullberg's eyes were red and glassy, his speech was slurred and his breath smelled of intoxicants. Both Tullberg and Ashley indicated that Alf was driving the vehicle, Tullberg was in the passenger seat and Ashley was in the bed/box portion of the vehicle.[2] Tullberg reported that when the truck left the roadway, he was wearing a seatbelt and the passenger's side airbag deployed. Hoffman noted that Tullberg had injuries consistent with a deployed airbag, including singed hair on

[2] It was not initially reported that Christopher Maleug was also in the truck. Maleug left the scene because he was in violation of his probation conditions.

his arm and a distinct odor of airbag residue on his body and clothing. In conversations with an officer at the accident scene, however, Hoffman learned that the driver's side airbag was the only one that deployed. Further, based on observations of the vehicle in relation to the position of Alf's body, officers deduced that it was unlikely Alf was driving. Based on the information garnered from both the accident scene and the hospital, Hoffman could reasonably believe that Tullberg was drinking and driving.

¶8 Turning to the exigent circumstances inquiry, exigency is determined case by case based on the totality of the circumstances. ***Missouri v. McNeely***, 133 S. Ct. 1552, 1556 (2013). Because an individual's alcohol level gradually declines soon after he or she stops drinking, a significant delay in testing will negatively affect the probative value of the results. ***Id.*** at 1561. Therefore, although the dissipation of alcohol in the blood does not categorically create an exigency, it may support a finding of exigency in a specific case. ***Id.*** at 1563.

¶9 Here, Hoffman testified that his training recommended blood be drawn within a "three-hour time period" from the time of an accident. By the time Hoffman garnered sufficient information to establish probable cause for Tullberg's blood draw, he estimated "maybe a little over two and [one-half] hours had passed" since the accident. Emphasizing that Hoffman neither asked Tullberg to consent to the blood draw nor read him the Informing the Accused form, Tullberg asserts that exigent circumstances "could not exist" where voluntary or informed consent were alternatively viable options. Tullberg, however, provides no authority for this assertion.

¶10 According to Hoffman, medical staff indicated that Tullberg needed to have a CT scan soon and were "real persistent." Because Hoffman did not want

to interfere with Tullberg's medical care and was aware of the diminishing time frame, he believed he had to make an immediate decision to have Tullberg's blood drawn. Looking at the totality of the circumstances in this case, we conclude Hoffman reasonably believed that he was confronted with an emergency, "in which the delay necessary to obtain a warrant … threatened the destruction of evidence." *See* ***Schmerber v. California***, 384 U.S. 757, 770 (1966). The circuit court, therefore, properly denied Tullberg's motion to suppress his blood test results.

II. Evidentiary Rulings

¶11 Next, Tullberg argues the trial court erred in both the admission and exclusion of evidence at trial. The admissibility of evidence lies within the trial court's sound discretion. ***State v. Pepin***, 110 Wis. 2d 431, 435, 328 N.W.2d 898 (Ct. App. 1982). We will uphold an evidentiary ruling if we conclude the trial court "examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach." ***State v. Walters***, 2004 WI 18, ¶14, 269 Wis. 2d 142, 675 N.W.2d 778. To merit a new trial based on erroneously admitted evidence, there must be a reasonable possibility that the error contributed to the outcome of the proceeding, sufficient to undermine our confidence in the outcome. ***Martindale v. Ripp***, 2001 WI 113, ¶¶30-32, 246 Wis. 2d 67, 629 N.W.2d 698.

¶12 Tullberg challenges the admission of detective Richard Wright's testimony that Tullberg's family was uncooperative during his investigation of the accident. Tullberg asserts that admission of this testimony was inadmissible hearsay and was more prejudicial than probative. We disagree. Hearsay is defined as an out-of court statement—that is, an oral or written assertion or

nonverbal conduct intended as an assertion—offered in evidence "to prove the truth of the matter asserted," other than a prior inconsistent statement by a witness or an admission by a party opponent. WIS. STAT. §§ 908.01(3) and (4) (2011-12).[3] The family's refusal to talk is not an assertion and, therefore, did not constitute hearsay.

¶13 Evidence, however, is not admissible unless it is relevant. WIS. STAT. § 904.02. Relevant evidence is defined as that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01. Further, evidence that has some relevance may still be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." WIS. STAT. § 904.03.

¶14 Tullberg asserts that testimony about his family's unwillingness to talk to law enforcement was irrelevant because they were under no obligation to talk to the officers. The State, however, did not offer the subject testimony to suggest that Tullberg's family was obligated to talk. Rather, the testimony was offered to counter Tullberg's defense strategy of convincing the jury that Malueg drove the vehicle. Wright's testimony was consequently offered to explain that although Tullberg's relatives had the opportunity to identify Malueg as the driver during the investigation, his name only surfaced "as a trial strategy." The State,

[3] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

therefore, wanted to explain that what might appear at trial to be a shortcoming in the police investigation was merely the defense's attempt to create the appearance that officers failed to do their job. Evidence that Malueg's name did not come up during the investigation was, therefore, properly admitted as more probative than prejudicial.

¶15 Next, Tullberg challenges the trial court's admission of 911 audio recordings made by Tullberg's father and brother. Tullberg asserts that the audio recordings constitute inadmissible hearsay. We address each in turn. Tullberg's brother, Joe Hauke, called 911 reporting, in relevant part: "Um, my little brother just called me up and said that he crashed his truck and there's people hurt." Tullberg's statement to Hauke, however, is excluded from the definition of hearsay because it is an admission by a party opponent. WIS. STAT. § 908.01(4)(b)1. Hauke's 911 call was alternatively admissible as impeachment evidence, as Hauke testified he did not remember telling the dispatcher that his brother crashed his car. Prior statements inconsistent with trial testimony are not hearsay. WIS. STAT. § 908.01(4)(a)1.

¶16 Tullberg's father, Melvin, reported to 911: "[M]y son called and said that he run in the ditch, or they run in the ditch, or somebody ran his truck in the ditch there." At trial, Tullberg clarified that the son who called him was Hauke, not Tullberg. However, any error in admitting Melvin's equivocal statement does not undermine our confidence in the outcome of the trial. *See* ***Martindale***, 246 Wis. 2d 67, ¶¶30-32.

¶17 Tullberg also contends the trial court erred by excluding law enforcement's videotaped interview of Malueg. In a pretrial motion, Tullberg sought to introduce the videotape believing it would discredit Malueg's statement

that Tullberg was driving as coerced. The court acknowledged that some of Tullberg's observations about the interview were accurate: the detective asked Malueg leading questions and gave some incentives. The court ultimately deemed Malueg's statement to be valid and determined that the videotape would be available only if necessary to contradict Malueg's trial testimony.

¶18 During the trial, Malueg testified Tullberg was driving the truck at the time of the accident and Malueg was in the passenger seat. Malueg further testified he was uninjured except for cuts on his arm, leg and back. According to Malueg, they looked for Alf for fifteen minutes after the accident and he did not see anybody call 911. He left the scene because he was drunk and feared his probation would be revoked. Malueg testified that he later turned himself in to his probation agent and initially told law enforcement that he did not know who was driving or what happened because he did not want to get anyone in trouble.

¶19 In describing the subject police interview, Malueg testified that he was informed his probation might be revoked, but his cooperation might help him. Malueg then told the detective that Tullberg drove the truck, they could not find Alf after the accident and Malueg left the scene. According to Malueg, the detective did not make any promises or offers in exchange for the information, but told Malueg if he lied it could mean revocation. On cross-examination, Malueg admitted that his selective memory about the night of the accident appeared self-serving. Malueg also admitted that he did not, in fact, turn himself in, but went to a regularly scheduled meeting with his probation agent. Malueg further conceded that during the subject police interview, the detective did most of the talking and he said almost nothing. Malueg noted he did not fully answer questions, but nodded his head and reluctantly answered questions. Malueg also acknowledged that the detective never asked if he was driving the vehicle.

¶20 Tullberg did not renew his request to introduce the videotaped interview during Malueg's trial testimony. Tullberg nevertheless contends the court's initial exclusion of the videotape significantly prejudiced him by "limiting his ability to highlight the unreliable circumstances under which Malueg's statement was obtained." To the extent Tullberg intimates the videotape would have aided the jury in "assessing the veracity of Malueg's statement," the jury could assess Malueg's credibility directly from his trial testimony. Tullberg described the conditions of the interview and Tullberg does not identify any conflict between the recorded interview and Malueg's trial testimony.

¶21 Tullberg also contends his argument on this issue "is one of fairness." Specifically, he asserts that because the State was allowed to introduce some audio evidence, he should have been allowed to do the same. Tullberg, however, provides no authority to support his "quid pro quo" argument. The admissibility of each piece of evidence must be reviewed on its own merit.

III. Prosecutor's Comments

¶22 Finally, Tullberg claims the court erred by failing to strike comments the prosecutor made during the State's closing argument. Counsel is allowed latitude in closing argument and it is within the trial court's discretion to determine the propriety of counsel's statements and arguments to the jury. ***State v. Wolff***, 171 Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992). The State may comment on evidence and argue from it to a conclusion. ***State v. Cockrell***, 2007 WI App 217, ¶41, 306 Wis. 2d 52, 741 N.W.2d 267. The line between permissible and impermissible argument, however, is drawn where the prosecutor goes beyond reasoning from the evidence and suggests that the jury should arrive at a verdict by considering factors other than the evidence. ***State v. Draize***, 88 Wis. 2d 445, 454,

276 N.W.2d 784 (1979). The constitutional test is whether the prosecutor's remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ***Wolff***, 171 Wis. 2d at 167. Whether the prosecutor's conduct affected the fairness of the trial is determined by viewing the statements in context. ***Id.*** at 168.

¶23 During the State's closing argument, the prosecutor made the following comments:

> Now remember, the last thing is that no one came in here and gave you any evidence that Christopher Malueg was driving that vehicle. Arguments of counsel are not evidence, and the evidence you received in this case came from all of the witnesses that came through my case in chief. [Tullberg] did not present one witness.

Tullberg objected, asserting that he did not have to present witnesses. The court agreed, stating: "That's true, but time is up. I already explained that to the jury also." On appeal, Tullberg contends that the prosecutor's comments shifted the burden of proof to him and implied an obligation for him to testify. We are not persuaded.

¶24 As noted above, Tullberg's defense at trial was that Malueg was driving the truck. The State merely pointed out that the jury had heard no evidence to establish Malueg as the driver. In context, the comment was not a suggestion that Tullberg should have testified but, rather, that the evidence showed it was Tullberg, not Malueg, who drove. Further, the court instructed the jury on the proper burden of proof and we assume the jury followed the court's instructions. *See* ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989).

By the Court.—Judgment and order affirmed.

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