

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

September 26, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 93-3057-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DARREN M. MUELLER,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Dane County: GEORGE A. W. NORTHRUP, Judge. *Affirmed.*

Before Dykman, P.J., Paul C. Gartzke and Robert D. Sundby, Reserve Judges.

PER CURIAM. Darren Mueller appeals from a judgment convicting him of first-degree reckless injury and hit-and-run driving and an order denying his motion for postconviction relief. The issues are whether the trial court erred by allowing evidence of Mueller's prior similar act and whether Mueller received ineffective assistance of counsel. Because we conclude that the

trial court properly allowed evidence of the prior act and that Mueller received effective assistance from counsel, we affirm.

Mueller spent an afternoon drinking with his girlfriend. When she drove off with another man, James Williams, Mueller followed. After several miles, Williams stopped and walked back toward Mueller's car. Mueller then drove forward, struck Williams, and drove off.

The State charged Mueller with attempted first-degree intentional homicide, first-degree reckless injury, and hit-and-run. At trial, over Mueller's objection, the court allowed evidence that Mueller had once struck another man with his car and left the scene, following a fight. The court reasoned that the earlier incident was relevant and admissible on the issues of intent, knowledge and absence of mistake or accident. The jury acquitted Mueller of attempted homicide and convicted him on the other two charges.

Mueller's postconviction motion alleged that counsel ineffectively failed to (1) confer with Mueller before deciding not to ask for a lesser-included instruction on second-degree reckless injury, (2) properly investigate, (3) present exculpatory expert testimony, (4) adequately elicit Mueller's testimony or cross-examine two other witnesses, and (5) avoid damaging Mueller with comments made during closing argument. Mueller also sought postconviction relief based on the State's alleged failure to disclose exculpatory photographs of Mueller's car taken after the accident. The trial court denied relief on both issues.

OTHER CRIMES EVIDENCE

Relevant evidence of other crimes is not admissible to prove bad character or acts in conformity with a bad character, but is admissible for other purposes, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Section 904.04(2), STATS. Before allowing the evidence, the trial court must also determine whether the probative value of the evidence "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." Section 904.03, STATS. The decision to admit other crimes evidence is discretionary. *State v. Fishnick*, 127 Wis.2d 247, 257, 378 N.W.2d 272, 278 (1985).

The trial court properly admitted evidence of Mueller's prior hit-and-run. Intent to kill is an element of intentional first-degree homicide. Section 940.01, STATS. That Mueller had previously committed virtually the same act substantially reduced the likelihood that striking Williams was an accident or mistake and therefore substantially increased the likelihood that Mueller intended the potential consequences of his act, including the victim's death. Additionally, criminal recklessness and utter disregard for human life are elements of first-degree reckless injury. Section 940.23(1), STATS. Again, evidence that the act was intentional is substantially relevant to proving these elements as well. Although Mueller also argued that admitting the evidence unfairly prejudiced him, he has not satisfactorily reconciled that argument with the fact that the jury acquitted him on the most serious charge. We are not persuaded that the trial court necessarily had to conclude that the unfair prejudice substantially outweighed the highly probative value of the evidence.

TRIAL COUNSEL'S PERFORMANCE

To prove ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that counsel's errors or omissions prejudiced the defense. *State v. Pitsch*, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Deficient performance falls outside the range of professionally competent representation and is measured by the objective standard of what a reasonably prudent attorney would do in similar circumstances. *Id.* at 636-37, 369 N.W.2d at 716. Prejudice results when there is a reasonable probability that but for counsel's errors the result of the proceeding would have differed. *Id.* at 642, 369 N.W.2d at 719. Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 637, 369 N.W.2d at 716. Whether counsel's performance was deficient and whether it was prejudicial to the defendant are questions of law. *Id.* at 634, 369 N.W.2d at 715.

Counsel properly and reasonably chose not to ask for a lesser-included instruction on reckless injury. Counsel testified that he did, in fact, consult with Mueller on the issue and that Mueller consistently maintained his innocence and his intent to seek total acquittal. The trial court believed that testimony, which ends the matter. The trial court's credibility determinations are not subject to review. *Turner v. State*, 76 Wis.2d 1, 18, 250 N.W.2d 706, 715 (1977). Additionally, counsel followed a reasonable strategy. Asking for the lesser-included instruction conflicted with the accident theory of defense, and counsel reasonably believed that a lesser-included instruction might tempt the jury into a compromise verdict when acquittal was the goal.

Counsel did not negligently investigate the case. The State introduced evidence showing damage to Mueller's car after he used it to strike Williams. Mueller contends that had counsel properly investigated, he would have discovered photographs showing that the car was damaged before the accident. However, Mueller has not explained how counsel could have known of the photographs or obtained them. In any event, failure to discover the photographs did not prejudice Mueller. It was never disputed that his car struck and seriously injured Williams. As counsel explained, why Mueller struck Williams was the principal issue at trial, and the extent or source of the damage to Mueller's car did not have any particular relevance to that issue.

Mueller has not proved counsel ineffective for failure to call an expert witness on accident reconstruction. At trial, a witness testified that Mueller was driving fast when he struck Williams. At the postconviction hearing, Mueller produced an expert who testified that Mueller's maximum speed when he struck Williams would have been no more than thirteen miles per hour. Such evidence may have been exculpatory on the attempted homicide charge, but not reckless injury. Deliberately striking someone with a car driven thirteen miles per hour still evinces criminal recklessness and utter disregard of human life. There was no prejudice.

Counsel properly questioned the witnesses at trial. Mueller contends that counsel should have asked him about the prior damage to his car and about his version of the first hit-and-run incident to refute the victim's version of that incident. He also contends that counsel failed to properly impeach that victim on cross-examination and failed to adequately cross-examine the sheriff's deputy who offered opinions on the condition of Mueller's

car and the way Williams impacted it. Again, evidence on the condition of Mueller's car was not particularly relevant to the reckless injury charge. As for the prior incident, counsel reasonably chose not to emphasize it by prolonging either the direct examination of Mueller or cross-examination of the victim of that incident. The basic facts of the incident, that Mueller struck and injured another person and then fled, were undisputed. None of the evidence counsel theoretically could have elicited from any of the witnesses would have assisted Mueller in establishing an accident as opposed to a deliberate act. It only pertained to the amount of injury he intended to inflict. He was acquitted on the only charge for which that intent mattered.

Counsel's closing argument did not prejudice Mueller. He contends that counsel mistakenly told the jury that Mueller cracked his windshield when it impacted with Williams. Counsel also, in Mueller's view, improperly conceded his guilt on the hit-and-run charge. As noted elsewhere in this opinion, the issue of the cracked windshield was significant only on the attempted homicide charge. As for counsel's concession of guilt, that issue was undisputed at trial and was the only possible conclusion consistent with the evidence. Counsel made a reasonable strategic choice to concede guilt in order to maintain credibility with the jury.

Mueller asks for the opportunity, if necessary, to file an additional brief addressing whether the Wisconsin Constitution provides a more rigorous standard for determining prejudice when analyzing ineffective assistance of counsel claims. We do not believe that further briefing is necessary or appropriate. It does not appear that addressing the issue would change the outcome of this case.

Mueller has failed to demonstrate that the State improperly withheld an exculpatory photograph. If available, that photograph would have shown that, contrary to other evidence introduced by the State, Williams' handprints were not on the hood of Mueller's car. However, as noted, the decisive issue at trial was whether Mueller struck Williams by accident or by design. Whether Williams' handprints appeared on the hood of Mueller's car was not relevant to that issue. There remains no dispute that Mueller struck and seriously injured Williams. The withheld photograph was not exculpatory on the issue that mattered.

By the Court. – Judgment and order affirmed.

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