COURT OF APPEALS
DECISION
DATED AND FILED

September 15, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal Nos. 2009AP937-CR
2009AP1869-CR

Cir. Ct. No. 2005CF1445

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT PROUTY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Waukesha County: LEE S. DREYFUS, JR., Judge. *Affirmed.*

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

¶1 PER CURIAM. Scott Prouty pled guilty to three felony counts of injury by intoxicated use of a vehicle and one misdemeanor count of causing

injury by operating while intoxicated (OWI). *See* WIS. STAT. §§ 940.25(1)(a), 346.63(2)(a)1. (2007-08).[1] He appeals pro se from the judgment entered upon those pleas and from the denial of various postconviction motions. He raises a host of issues on appeal, several of them waived by his guilty pleas. The remaining ones simply have no heft. We affirm.

¶2 Prouty's vehicle crossed the center line and ran head-on into a vehicle occupied by Russell Berg and his five- and eleven-year-old sons, Dakotah and Cameron, and his seven-year-old stepson, Brandon. Berg, who suffered serious multiple trauma, had to be extricated from his vehicle. The boys' injuries included multiple lacerations, broken bones and pelvic fractures. Brandon was in the ICU at Children's Hospital.

¶3 Prouty also was pinned in his vehicle with chest and leg injuries. Waukesha county sheriff's deputy Michael Powell noted that Prouty had slurred speech and bloodshot eyes. Prouty admitted drinking light beer, consuming "[t]oo much to remember." Before emergency personnel transferred Prouty to the hospital, Powell told them, but not Prouty, that Prouty was under arrest. Officers followed the ambulance to the hospital.

¶4 At the emergency room, Deputy Aaron Bogie found Prouty wearing an oxygen mask and being readied for transfer to the ICU. They spoke briefly. Bogie observed that Prouty had bloodshot, glassy eyes and slurred speech. As medical staff tended to Prouty, Bogie read him the Informing the Accused form,

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

issued OWI citations and informed him he was under arrest. Neither Powell nor Bogie detected the odor of alcohol or performed field sobriety tests.

¶5 Prouty's blood alcohol level tested at 0.097 percent. The State charged him with six felony counts of injury by intoxicated use of a vehicle and one count each of causing injury by OWI and causing injury while operating with a prohibited alcohol concentration. Civil cases were filed about six months later.

¶6 Prouty filed a motion to suppress, citing lack of probable cause to arrest him, but did not claim a ***Miranda***[2] violation. Despite his injuries, he argued that the lack of sobriety testing allowed only a suspicion of intoxication. Powell conceded that he had not detected the odor of intoxicants but testified that Prouty smelled strongly of aftershave and the accident scene reeked of spilled oil, antifreeze and gasoline. Concluding that the totality of the other facts and observations supplied sufficient probable cause to arrest, the trial court denied the motion.

¶7 Prouty pled guilty to the three felonies relating to Berg, Cameron and Brandon and to causing injury by OWI. The remaining counts were dismissed outright. An unrelated pending disorderly conduct case was dismissed and read in. On two of the felony charges, the court ordered consecutive sentences of three years' initial confinement and five years' extended supervision—a total of six and ten years, respectively. It withheld sentence on the remaining felony and the misdemeanor and ordered six years' probation on each, consecutive to the other imprisonment and concurrent to each other for a total sentence of twenty-two

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

years. The court found him eligible for the Earned Release Program (ERP). After a series of hearings, restitution was set at $75,212.27, with twenty-five percent of his prison wages to be applied toward the obligation.

¶8 Having discharged his second attorney by this time, Prouty filed a pro se postconviction motion seeking to withdraw his plea and for resentencing or a new trial. He alleged procedural errors, "errant plea(s)," defects in the sentence, new factors and "ineffective counsel(s)." The court set a ***Machner***[3] hearing. Prouty's first attorney successfully moved to quash the subpoena as to him.

¶9 Before the hearing could take place, Prouty filed a flurry of pro se motions. He sought recusal; judicial substitution; postconviction discovery seeking the victims' prior medical records; plea withdrawal; sentence modification; withdrawal of the ineffectiveness claim against his first counsel; ineffective assistance of his second counsel; removal of the presentence investigation report (PSI) from his prison file for claimed inaccuracies; correction of transcript records; and discontinuation of restitution. The common thread in many of the motions was that the boys' injuries did not amount to "great bodily harm" under WIS. STAT. §§ 940.25(1)(a) and 939.22(14) and thus did not warrant the sentence imposed. After numerous hearings, all motions were denied.

¶10 Prouty moved for reconsideration of the denial of his motion to modify sentence. Citing ***State v. Hall***, 2002 WI App 108, ¶¶7-8, 255 Wis. 2d 662, 648 N.W.2d 41, the motion admonished the court to "READ the Brief and review the cases cited" and to "[p]lease use the Law to reconsider." At the hearing on the

[3] *See* ***State v. Machner***, 92 Wis. 2d. 797, 285 N.W.2d 905 (Ct. App. 1979).

motion, Prouty argued that he essentially was denied his right of allocution because he thought he was limited to expressing remorse. He claimed the court should have told him it was his "last chance to represent [him]self," and that this would have been "an excellent time" to argue points with which he disagreed. Prouty also asserted that the court's initial explanation of why it ordered consecutive sentences bore "some degree of vagueness." The court's re-explanation spanned eight transcript pages.

¶11 Next, citing the State's blood alcohol curve exhibit from the civil case, Prouty argued that his BAC at testing could have been 0.078 percent if he were in a rising blood alcohol curve at the time of the accident. The court noted the presumed accuracy of the result but pointed out that he also might have been in a declining curve, with an even higher BAC at the time of the accident.

¶12 The court next addressed Prouty's motion for correction of the PSI inaccuracies. The court declined to append to the PSI a list of claimed errors, a document cataloging thirty-five items over four and a half single-spaced pages. It found that the "errors" more aptly were disagreements, that Prouty had been given ample opportunity at sentencing to offer corrections and that over two years later was too late for modification of the PSI. The court did agree, however, to append to the relevant transcripts Prouty's list of proffered corrections. The court then advised Prouty of his appellate rights. Prouty exercises them here.

1. No State Briefing on Postconviction Motions

¶13 Prouty first contends the trial court erroneously exercised its discretion in denying his various postconviction motions because the State filed no response briefs in the trial court, thereby conceding his positions. He looks for

support to ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) ("Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute"); WIS. STAT. RULE 809.19(3); an Eastern District of Wisconsin local rule of civil practice; and a string of unpublished cases.

¶14 None pertain to or support his position. By its own language, ***Charolais Breeding Ranches*** applies "on appeal," as does WIS. STAT. RULE 809.19(3), a rule of appellate procedure. The local rule of civil practice governs dismissal for a defendant's failure to answer a complaint in a federal trial court. And the unpublished opinions may not be cited as precedent or authority for the purpose for which Prouty seeks to use them. *See* WIS. STAT. RULE 809.23(3)(a). Released before July 1, 2009, they also have no persuasive value. *See* RULE 809.23(3)(b). The parenthetical summaries also suggest that they are not on point. Regardless, we have no obligation to distinguish or discuss them. *See* ***id.***

2. Suppression

¶15 Prouty next raises several suppression arguments. A voluntary plea of guilty generally waives all nonjurisdictional defects and defenses, including claims of constitutional violations occurring prior to the plea. ***State v. Riekkoff***, 112 Wis. 2d 119, 123, 332 N.W.2d 744 (1983). WISCONSIN STAT. § 971.31(10) provides an exception for suppression motions. The sole suppression argument Prouty preserved for appeal is whether there existed probable cause for the arrest.

¶16 In determining whether probable cause exists, a court must look to the totality of the circumstances to determine whether the "arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to

believe … that the defendant was operating a motor vehicle while under the influence of an intoxicant." ***State v. Nordness***, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). Whether an arrest was supported by probable cause is a question of constitutional fact. ***State v. Secrist***, 224 Wis. 2d 201, 208, 589 N.W.2d 387 (1999). We review the trial court's factual findings under the clearly erroneous standard, but review the application of those facts to constitutional principles independently. ***State v. Post***, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. Because the facts here essentially are undisputed, we address only whether the facts supported probable cause, a question of law we review de novo. *See* ***id.*** If more than one inference can reasonably be drawn from the historical facts, we accept the inference drawn by the fact-finder. *See* ***State v. Drogsvold***, 104 Wis. 2d 247, 256, 311 N.W.2d 243 (Ct. App. 1981).

¶17 The court found that Prouty's vehicle crossed the center line and struck the Berg vehicle head-on; that Prouty's eyes were bloodshot and his speech was slurred; that he admitted both drinking beer and that he had had "too much to remember." Prouty suggests innocuous justifications for the officers' observations. Probable cause does not require an officer to rule out innocent explanations before making an arrest, however. *See* ***State v. Nieves***, 2007 WI App 189, ¶14 304 Wis. 2d 182, 738 N.W.2d 125.

¶18 Prouty also stresses that no field sobriety tests were performed and no odor of alcohol detected. We acknowledge that field sobriety tests offer useful information. They need not be performed in all cases before an officer can arrest for OWI, however. *See* ***State v. Wille***, 185 Wis. 2d 673, 684, 518 N.W.2d 325 (Ct. App. 1994); *see also* ***State v. Babbitt***, 188 Wis. 2d 349, 357, 525 N.W.2d 102 (Ct. App. 1994). The test is whether the information available would lead a reasonable

officer to believe that "guilt is more than a possibility" and is assessed on a case-by-case basis. ***State v. Paszek***, 50 Wis. 2d 619, 625, 184 N.W.2d 836 (1971).

¶19 The trial court found that with Prouty pinned in his vehicle with "clearly … quite significant" medical needs and the potential for a head injury, field sobriety tests were impractical, if not inadvisable. Forgoing sobriety testing was reasonable. Also reasonable is the inference that heavy odors at the accident scene and the oxygen mask served to camouflage the smell of alcohol. The lack of testing and absence of an odor of alcohol do not negate sufficient probable cause under the totality of the circumstances here.

3. Motion for Plea Withdrawal

¶20 Prouty next contends that the trial court misused its discretion in denying his post-sentencing motion to withdraw his guilty pleas on the basis of new evidence. "After sentencing, a defendant who seeks to withdraw a guilty or no contest plea carries the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice." ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). Newly discovered evidence may be sufficient to establish that a manifest injustice has occurred. ***Id.*** The defendant first must prove that: (1) the evidence was discovered after conviction; (2) he or she was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. ***Id.*** If he or she does so, the trial court then must determine whether a reasonable probability exists that a trial would yield a different result. ***Id.*** Plea withdrawal rests in the trial court's discretion, and we will reverse only if the court has erroneously exercised its discretion in denying the request. ***Id.***

¶21 Prouty's "newly discovered evidence" consists of: (1) blood-alcohol-curve data in the State's toxicology report from the associated civil case showing that his BAC could have been less than 0.08; (2) a medical report showing, according to Prouty, that Brandon's injuries were not permanent; and (3) interrogatories revealing that Berg was involved in prior accidents and may have been using his cell phone at or near the time of this accident.

¶22 Taken within three hours of the accident, Prouty's 0.097 percent BAC at the time of testing was prima facie evidence of his BAC at the time of the accident. *See* WIS. STAT. § 885.235(1g)(c). The toxicology report extrapolated three estimates of what his BAC could have been at the time of the collision. They ranged from a high of 0.172, assuming his BAC was falling at testing, to a low of 0.078 at the time of the accident, assuming his BAC was rising at testing.

¶23 Prouty argues that the report presents a "theory" of a legal BAC which would "disprove the Prima Facie evidence" and that it is "highly probable that [he] was on the front side of the bell curve." We disagree. The toxicology report pointedly draws attention through italics and bold print to the fact that the low estimate as to him is "highly unlikely." A highly unlikely theory does not establish a reasonable probability of a different result at a trial. *See* ***McCallum***, 208 Wis. 2d at 473-74.

¶24 Prouty next asserts that a medical report filed fifteen months after the collision shows that Brandon has progressed well and that his injuries are not permanent, casting doubt on whether the boy suffered "great bodily harm." He contends that, taken "in conjunction with the BAC of 0.078," this factor warrants plea withdrawal at least on the count relating to Brandon.

¶25 WISCONSIN STAT. § 940.25(1)(a) provides that a person who causes great bodily harm by the operation of a vehicle while under the influence of an intoxicant is guilty of a Class F felony. "Great bodily harm" means bodily injury which creates a substantial risk of death, causes permanent disfigurement, causes a permanent or protracted loss or impairment of the function of any bodily member or organ or causes other serious bodily injury. WIS. STAT. § 939.22(14).

¶26 The report stated that Brandon presented with multiple deep facial cuts, extensive abdominal bruising and a transverse fracture of the iliac bone. He later was found to have three intestinal perforations due to blunt trauma, needing emergency surgical repair.[4] Due to comminuted fractures of a pelvic bone, Brandon had to be non-weight bearing for approximately two months, so that he required a hospital bed and wheelchair at home. He developed complications from the intestinal surgery and required a bronchoscopy after a lobe of his lung collapsed. His dozen or more facial scars remain "quite noticeable" despite revision, partly due to "tattooing" from the vehicle's tinted glass. Further revision of the "persistent and noticeable facial scarring" likely will be necessary to reduce his "abnormal appearance." Some permanent scarring is likely. If Prouty were allowed to withdraw his plea, a jury reasonably could find that the seven-year-old's injuries constituted "a protracted loss or impairment of the function of a bodily member or organ" or "other serious bodily injury." There is not a reasonable probability of a different result at a trial.

[4] Prouty has suggested that some of Brandon's bone injuries are related to his history of severe scoliosis for which he has had multiple surgeries, and that the bowel perforations could have been related to pre-accident antibiotics or medical malpractice.

¶27 The final piece of "newly discovered evidence" is information from a police report that Berg had used his cell phone shortly before the accident and from undated interrogatories that Berg was involved in three prior motor vehicle accidents. Prouty offers this "evidence" to "cast some doubt regarding the lack of ordinary care [Berg] used in the operation of his vehicle" on the night of the accident. This argument goes nowhere.

¶28 The only cell phone use cited in the police report was a call ending before Berg's vehicle even was on the road where the accident occurred. Further, all three accidents were remote in time. In two of them, Berg did not admit fault and no insurance claims or lawsuits were filed. The third was a one-car accident in which Berg reported "hit[ting] a patch of ice and then a telephone pole." Likely not admissible in any event, *see* WIS. STAT. § 904.04(2)(a), this information does not establish a reasonable probability of a different result at a trial.

4. Right of Allocution

¶29 At sentencing, Prouty read a lengthy statement he prepared expressing his remorse and accountability. He now asserts that he effectively was denied his right to allocution because the trial court "failed to intelligently inform" him that he also had the right to address any issue that might influence the sentence. Properly advised, he contends, he would have contested matters such as attacks on his character, "coercive police tactics" and "nonfactual statements of injury." He claims his plea should be withdrawn and the sentence "remanded to allow a fact-finding hearing on the factual basis of all injuries and if they meet the criteria sent [sic] forth in [WIS. STAT.] § 939.22, then resentenced accordingly in a non-vindicate [sic] manner."

¶30 WISCONSIN STAT. § 972.14(2) directs a trial court to "ask the defendant why sentence should not be pronounced upon him or her and allow the … defendant an opportunity to make a statement with respect to any matter relevant to the sentence." Here, the court permitted Prouty to read, without interruption, the statement he himself prepared, setting no time, length or subject-matter limits on it. Prouty's statement—six and a half pages in the transcript—acknowledged his alcoholism, expressed his shame and "grave feelings of wrongdoing and guilt" over the "devastation" he caused, and explained his treatment and rehabilitative efforts. He apologized to the victims, their families and his, and asked forgiveness. This may not be what Prouty wanted to say, but it strains credulity that a remorseless and combative statement—challenging, among other things, the extent, nature and cause of the victims' injuries—could work in any way to Prouty's benefit. His argument fails.

5. Restitution

¶31 The trial court set restitution at $97,489.52, later subtracting Berg's civil attorneys' fees for a final amount of $75,212.27. Prouty levels a four-pronged challenge, asserting that: (1) the restitution hearing was untimely; (2) the amount should have been offset; (3) the State did not carry its burden of demonstrating the amount of loss; and (4) the court improperly analyzed his ability to pay.[5] His claims fail.

[5] Prouty also asserts that "the court has taken two surcharges of restitution 5% & 10% in error, See R181:37-40." We miss his meaning. The portion of the record cited has nothing whatsoever to do with surcharges. The issue does not appear to relate to timeliness, the subject of the sentence before it in his brief, or to burden of proof, the subject of the sentence after it. If it is a stand-alone claim, it is fatally undeveloped. We need not develop his arguments for him. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987).

a. Delay

¶32 The overall objective of WIS. STAT. § 973.20 is to efficiently compensate crime victims for their pecuniary loss. ***State v. Perry***, 181 Wis. 2d 43, 54, 510 N.W.2d 722 (Ct. App. 1993). Before being sentenced, a defendant has the opportunity to stipulate to the amount of restitution the victims claim. Sec. 973.20(13)(c). Failing stipulation, the court may follow one of several avenues, including, as was done here, adjourning the sentencing proceeding for up to sixty days pending the court's resolution of the restitution amount. *See* § 973.20(13)(c)2.

¶33 At Prouty's sentencing hearing on March 19, 2007, the court held restitution open at both parties' request and set a tentative hearing date for May 15, fifty-seven days out. On April 21, Prouty advised the court by letter that he discharged his attorney. A week later, he wrote another letter with eleven pages of "supporting documents" regarding restitution, some indicating his disagreement with injuries and medical expenses. The May 15 hearing went forward but restitution could not be set due, in part, to ongoing medical issues, Berg's pending surgeries, uncertain insurance coverage and the potential for a civil settlement. The court set the next hearing date for June 4 to give Prouty time to ascertain whether his lawyer in the civil action would represent him in this matter or, if not, for Prouty to get through the "significant [amount of] information" on his own.

¶34 The civil attorney appeared on June 4 but declined to represent Prouty in the criminal matter. After two more delays resulting from Prouty's

nonappearances,[6] one due to a slip-up by corrections officials, one unexplained in the record, the restitution hearing finally was held on September 27, just over six months after Prouty's sentencing hearing.

¶35 The sixty-day restitution determination period is directory, not mandatory. ***Perry***, 181 Wis. 2d at 53. The court may impose restitution outside the statutory time frame if valid reasons exist for the delay and if the delay does not prejudice the defendant. *See* ***State v. Johnson***, 2002 WI App 166, ¶¶8-14, 256 Wis. 2d 871, 649 N.W.2d 284. Valid reasons existed here. Prouty hardly can claim prejudice when the delays largely flowed from his actions and requests and in consideration of his pro se status. In addition, restitution could not be determined until the victims' losses were more certainly known. We see no error.

b. Offset

¶36 A fundamental policy of WIS. STAT. § 973.20 is to make victims whole without allowing them to receive double recoveries. ***Huml v. Vlazny***, 2006 WI 87, ¶22, 293 Wis. 2d 169, 716 N.W.2d 807. To that end, a defendant may assert any defense, including offset, in the sentencing hearing at which the trial court determines whether to impose restitution. ***Id.***; *see also* § 973.20(14)(b). The burden of proving that an offset should be afforded lies with the defendant ***State v. Walters***, 224 Wis. 2d 897, 907, 591 N.W.2d 874 (Ct. App. 1999).

¶37 The restitution order included Berg's $48,000 lost-wages claim. Prouty argues that the court should have offset approximately $26,000 in

[6] Prouty wrote to the court asking that hearings regarding restitution "all take place with my attendance, or my person in Waukesha."

payments Berg received through a disability insurance policy. This assumes that the disability payments were for lost wages, which may or may not be the case. In the worker compensation realm, for instance, some disability benefits compensate for lost wages, others for lifelong impairment of bodily function and lost earning capacity. *See* ***GTC Auto Parts v. LIRC***, 184 Wis. 2d 450, 458-59, 516 N.W.2d 393 (1994).

¶38 Prouty did not establish then or at the hearing on his motion to reconsider that there was overlap giving Berg a double recovery. Furthermore, the court agreed that ultimately there may be an offset should a sufficient factual basis be made. Prouty may be able to obtain relief at that time. *See* ***Huml***, 293 Wis. 2d 169, ¶22 (before a trial court reduces unpaid restitution to a civil judgment, a probationer may prove that the victim already has recovered damages from him or her that are the same as the damages covered by the restitution order); *see also* WIS. STAT. § 973.09(3)(b).

¶39 At the restitution hearing, Prouty asserted that "we" tendered $100,000 to Berg. He claims the court failed to offset "the amount of a partial civil settlement … paid out of $100,000.00" listed in Berg's settlement statement with a law firm, and that the partial settlement "was awarded in part ambiguously."

¶40 Prouty's argument is unclear. He includes a portion ("Page 2 of 2") of a settlement statement in the appendix to his brief but does not argue or show that any settlement monies duplicated compensation for amounts included in restitution. Moreover, we are unable to locate the document at the record cite

given, and Prouty does not say whether the trial court saw or considered it.[7] We therefore consider it no further. *See* ***Van Deurzen v. Yamaha Motor Corp. USA***, 2004 WI App 194, ¶6, 276 Wis. 2d 815, 688 N.W.2d 777 (we normally do not consider evidence presented for the first time on appeal).

¶41 Lastly, Prouty objected at the restitution hearing to a $9,285.13 bill for Berg's medical insurance and to a copy of a $3,000 money order to Froedtert for Berg's outstanding medical expenses. His brief mentions the fact of his objection and, implying error, that the court ordered no offset but he offers no rationale. We decline to develop his argument for him. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987) (reviewing court will not consider undeveloped arguments).

c. Burden of Proof

¶42 Prouty's entire appellate argument on this point is that the court misused its discretion in not following WIS. STAT. § 973.20 because it "did not address the lack of the burden of proof. § 973.20(14)(a) was not met." Section 973.20(14)(a) provides that the victim must prove the amount of his or her loss by a preponderance of the evidence. This argument, too, is not sufficiently developed. We consider it no further. *See* ***Gulrud***, 140 Wis. 2d at 730.

d. Ability to Pay

¶43 Prouty asserts that the court wholly ignored his ability to make restitution. The record demonstrates otherwise. The court took care to break

[7] At the restitution hearing, the court and counsel indicated that the civil action still was ongoing.

down the amount ordered into what Prouty would owe monthly and annually over the length of his sentence, explained that, contrary to civil judgments, interest would not accrue, and advised Prouty that a civil damages award would be offset and may even resolve his obligation. It concluded that Prouty's income over the course of his twenty-two-year sentence would be sufficient to satisfy the restitution ordered. Prouty's argument has no merit.

6. Resentencing

¶44 Finally, Prouty asserts that the trial court based the sentence on inaccurate information; sentenced him more harshly than others similarly situated; failed to consider positive aspects of his character; erroneously exercised its sentencing discretion under ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197; failed to explain why ERP was awarded instead of AODA (Alcohol and Other Drug Abuse) treatment; and made false statements at the hearing on his motion for reconsideration. His arguments all fail.

a. Inaccurate information

¶45 A defendant has a constitutionally protected due process right to be sentenced upon accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. In a motion for resentencing based on inaccurate information, the defendant must establish that the sentencing court had inaccurate information before it and actually relied on it. ***Id.***, ¶31. Whether a defendant was denied this due process right is a constitutional issue we review de novo. ***Id.***, ¶9.

¶46 Again taking issue with the boys' injuries, Prouty argues that eleven-year-old Cameron's hip fracture, shoulder injury and facial injuries did not constitute "great bodily harm" because they were not medically serious, prolonged

or life-threatening and did not cause impaired function or permanent disfigurement. He also argues that Brandon's accident-caused injuries did not amount to "great bodily harm" and that he is not responsible for "secondary injuries" caused by malpractice or pre-existing conditions.

¶47 At the plea hearing, the court read the definition of "great bodily harm." Prouty acknowledged that he understood it and that the State would have to prove it as to counts one through three. Prouty thus waived this issue by his voluntary guilty plea. *See* ***Riekkoff***, 112 Wis. 2d at 123. Having followed one course of strategy, he cannot now seek to undo it because he is dissatisfied with the result. *See* ***State v. Kraemer***, 156 Wis. 2d 761, 765, 457 N.W.2d 562 (Ct. App. 1990). "A waiver which is the result of a strategic choice binds both the defendant and the appellate court, precluding review of the waived claim." ***Id.*** at 765-66.

¶48 Prouty also claims the PSI "contained approximately 33 major errors and statements of [his] ex-wife" and that the cumulative effect of the errors "specific to medical injuries" prejudiced him at sentencing. He describes none of the errors or offending statements. At sentencing, through counsel, Prouty offered five "reasonably minor corrections" but did not identify or attempt to correct other errors he alludes to now. He therefore is not entitled to relief based upon them. *See* ***State v. Johnson***, 158 Wis. 2d 458, 470, 463 N.W.2d 352 (Ct. App. 1990).

¶49 In addition, Prouty complains that the court considered "letters to the Court and other hearsay." Prouty knew at the sentencing hearing that the court had received letters in support of the victims. He did not object. Nor does he complain that over a dozen character letters also were submitted to the court in his behalf. In any case, "[a] sentencing court may consider uncorroborated hearsay

that the defendant has had an opportunity to rebut." ***State v. Damaske***, 212 Wis. 2d 169, 196, 567 N.W.2d 905 (Ct. App. 1997) (citation omitted).

b. Disparate sentence

¶50 Prouty lists in his January 2009 postconviction brief fifteen cases he claims involved an OWI motor vehicle accident resulting in injury or death. He contends that his case is similar in nature all were heard by the same court, yet he was sentenced more harshly than any of them. He argues that similarly situated defendants merit similar sentences.

¶51 Similar crimes do not necessarily make for similarly situated defendants. Prouty presents nothing about the defendants. A sentence is to be personalized to the individual defendant. *See* ***Gallion***, 270 Wis. 2d 535, ¶48. A sentence tailored to the crime, not the criminal, is improper. ***State v. Ogden***, 199 Wis. 2d 566, 571, 544 N.W.2d 574 (1996). Even leniency in one case does not by itself transform a reasonable punishment in another case into a cruel one. ***Ocanas v. State***, 70 Wis. 2d 179, 189, 233 N.W.2d 457 (1975). Here, the court found that Prouty made a "whole series of bad decisions" that night. He drove after drinking to intoxication, going out to ex-wife's home despite a restraining order, and took a curve going "much too fast" to negotiate it given the road and weather conditions. Prouty has not shown that any sentencing disparity was arbitrary or based upon considerations not pertinent to proper sentencing. *See* ***id.*** at 187.

c. Sentencing discretion

¶52 Prouty raises several issues related to his sentence. Sentencing is left to the trial court's discretion, and we review only whether it erroneously exercised its discretion. ***Gallion***, 270 Wis. 2d 535, ¶17. The record must show

that the court's decision had a "rational and explainable basis." ***Id.***, ¶76 (citation omitted). The court must specify on the record the sentence's objectives and their importance. ***Id.***, ¶¶40-41. The objectives include, but are not limited to, protecting the community, punishing the defendant, rehabilitating the defendant, and deterring others. ***Id.***, ¶40. We have a strong policy against interference with a demonstrated proper exercise of discretion, and we presume that the sentencing court has acted reasonably. ***Id.***, ¶18.

¶53 Prouty first complains that the trial court did not consider his positive aspects, such as his college education and volunteerism, yet permitted attacks on his character through a victim impact statement and a "malicious" statement by Berg's ex-wife, the mother of the three injured boys. The record shows that much was said in Prouty's favor at sentencing. The court itself commented that "[w]ithout question" it was "a good thing" that Prouty was addressing his alcoholism. The court also heard that he was an involved father to his three children and maintains a good relationship with his ex-wife, who, along with his mother, spoke in his behalf. Naturally, the court also received letters and statements supporting the victims, including a statement from the boys' mother explaining the life-altering effects on the family. Prouty does not claim that any of the comments were untrue or say how the mother's statement was malicious.

¶54 That Prouty's accomplishments and family ties did not outweigh the gravity of his volitional conduct and the substantial harm that flowed from it does not mean they were not considered. It remains within the court's wide discretion to discuss only those factors it believes are relevant and to attach to each the weight it deems appropriate. *See* ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20. We see no error.

¶55 Prouty next contends that the trial court failed to name the objectives of greatest importance or explain how the elements of the sentence and the existence and duration of extended supervision would advance the goals of the sentence. Again, the record does not bear this out.

¶56 The court devoted thirty-four pages to reviewing the events of the night, the victims' injuries, Prouty's alcohol-related history, the chances he bypassed to address his alcoholism, the need to protect the innocent public from the dangers drunk drivers pose, the need to punish him and his need for lengthy supervision to address his sobriety needs. At the postconviction motion hearing, the court clarified, that it imposed consecutive sentences to recognize the seriousness of the offenses, the multiple victims and Prouty's failure to seize opportunities which could have averted the tragedy. How much explanation is necessary will vary from case to case, but we are satisfied that the court's explanation here more than sufficed to provide a "rational and explainable basis" for the sentence imposed. *See* ***Gallion***, 270 Wis. 2d 535, ¶39.

¶57 Prouty next asserts that the trial court failed to explain why it found him eligible for ERP and not an AODA program. We construe his challenge to be to the initial eligibility finding despite his ineligibility due to his convictions under WIS. STAT. ch. 940. *See* WIS. STAT. §§ 302.05(3)(a)1. and 973.01(3g).

¶58 The court explained in its oral decision on Prouty's postconviction motions that it was aware at sentencing that Prouty was statutorily ineligible for ERP participation. It stated that it meant the finding to be prospective, "[p]resuming the Legislature makes a change" and exempts WIS. STAT. ch. 940 offenses from ERP consideration. The court explained that should that change occur at some point in Prouty's incarceration or reconfinement after revocation, it

wanted the ERP eligibility finding on the record so that Prouty would not have to request it later. As at sentencing, the court again made clear that entry into ERP is wholly discretionary with the Department of Corrections. Even if Prouty currently were eligible, therefore, participation always is at the grace of the DOC, not the court. And regardless of ERP, AODA programs still are available to Prouty in prison and while on extended supervision and probation.

d. Court's "false statements"

¶59 Prouty's final complaint is that the trial court made "false statements in explaining its sentencing" at the hearing on Prouty's motion to reconsider. Prouty points to the court's statement that he was traveling "on a blind curve that's 25 miles an hour." The speed limit on that road is 55 mph. Powell testified at the suppression hearing that a cautionary sign posted at the curve warns motorists to reduce their speed to 25 mph. Prouty's dispute is one of semantics.

¶60 Prouty also contends the court falsely stated that he was on bail the night of the accident and so must have been referring to someone else, perhaps a former in-law, with a different surname, whom the court had sentenced for OWI at some point. This claim raises form over substance. The court stated that, being intoxicated, Prouty should not have been driving at all and should not have been where he was because "[t]hose are violations of bail conditions." Prouty interjected: "I wasn't on bail, Your Honor." The court corrected itself, stating that there was a restraining order in place and Prouty's driving by his ex-wife's house was a violation of that order. The court's point was that the accident would not have occurred but for Prouty making a series of poor decisions. Prouty's claims do not shake our confidence in the integrity of the sentence.

By the Court.—Judgment and orders affirmed.

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