COURT OF APPEALS
DECISION
DATED AND FILED

July 20, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2455-CR **Cir. Ct. No. 2008CF2357**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL PERRY OSWALD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Milwaukee County: CARL ASHLEY, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 FINE, J. Daniel Perry Oswald appeals the judgment entered after a jury found him guilty of two counts of homicide by negligent operation of a motor vehicle. *See* WIS. STAT. § 940.10(1). He also appeals that part of the postconviction order denying his motion for a new trial. Oswald argues that the

trial court erroneously exercised its discretion in allowing his parole agent to testify about his missing an appointment shortly after the accident and that Oswald seemed nervous when he met with the agent later. We affirm.

I.

¶2 On October 19, 2007, two people in a van died in a car accident after a Dodge Stealth matching the description of a car owned by Oswald cut in front of them and hit the van. Oswald was on extended supervision at the time and missed his appointment with parole agent Michael Rudig on October 22, 2007. Oswald did not call Rudig to explain why he did not keep the appointment. Rudig called Oswald and left him a voicemail about the missed appointment and then sent him a letter re-setting the appointment for October 30. Oswald missed that appointment too, but phoned Rudig on October 31, and left a voicemail message saying that he was having car problems. Oswald met with Rudig on November 1. According to Rudig, Oswald seemed nervous at that meeting, and, when asked about the nervousness, Oswald said he had post-traumatic stress because he lost some of his fingers as the result of a factory accident in January of 2007.

¶3 The State wanted to call Rudig at Oswald's trial, arguing that the testimony was "highly probative" to show Oswald's consciousness of guilt:

> [T]he evidence is highly probative here because … in the past [when] he missed he called in or he explained his absence or he gave some excuse … three days after this incident … which … was a Friday. [On what] would be the [following] Monday he fails to show up and gives no explanation, doesn't call and just says nothing to his agent. His agent leaves a phone message, sends a letter, and sets an appointment for the 30th. Mr. Oswald misses that appointment and then at least at that point he does call in. And it is rescheduled for the first. And Mr. Oswald, then shows up, but appears nervous speaking, different things along that line.

> I think given the time frame that you have here, Judge, that he has a history of showing up at his appointments. He has no outstanding non[-]compliance issues at this time. That would explain why he wouldn't show up. That when you [are] talk[ing] … three days after this incident that he fails to show up to his agent. I think that's highly probative of consciousness of guilt, especially when he doesn't call in and report it and say anything to his agent why he missed that specific day and then misses the next day as well.

Oswald objected, arguing that the agent's testimony was irrelevant because Rudig had just been recently assigned to him and, as such, was unfamiliar with Oswald's demeanor and likelihood to keep appointments. Oswald also argued that the evidence was unfairly prejudicial. The trial court agreed with the State and ruled that Rudig's testimony was admissible to show consciousness of guilt, but gave the jury a limiting instruction, which we set out below.

II.

¶4 A trial court's decision to admit or exclude evidence is a discretionary determination and will not be upset on appeal if it has "a reasonable basis" and was made "'in accordance with accepted legal standards and in accordance with the facts of record.'" ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498, 501 (1983) (citation omitted). In determining whether to admit evidence, the trial court considers, as material here, whether the probative value of the evidence is "substantially outweighed by the danger of unfair prejudice." *See* WIS. STAT. RULE 904.03. Here, the trial court considered both the probative value of Rudig's testimony and Oswald's claim of unfair prejudice and found that Rudig's testimony was "clearly relevant" and "clearly based on consciousness of guilt." It also determined that it could ameliorate whatever prejudice inhered in Rudig's testimony by first reviewing the questions the State was going to ask Rudig, and by giving the jury a limiting instruction.

¶5 At the trial, Rudig testified that:

- He had been Oswald's agent since October 12, 2007, and Oswald has been on parole supervision since June of 2005.
- Oswald did not make his scheduled appointment on October 22, 2007, and did not call to explain even though when Oswald had previously missed appointments with agents he always called with a reason.
- He telephoned Oswald and sent him a letter scheduling a new appointment for October 30, 2007.
- Oswald did not keep the October 30 appointment either. He telephoned Rudig the next day to say that he missed it because he had trouble with his car, but said that he would come in on November 1.
- When Oswald arrived at Rudig's office on November 1, Oswald "was extremely nervous so much so he was speaking very hurriedly and actually visibly shaking and so much to the point I asked him, What's going on? I mean you seem really nervous. I inquired as to why he seemed so nervous and then he responded that he has post-traumatic stress syndrome from having his fingers cut off from a [factory] finger incident."

¶6 Further, the jury heard evidence that Oswald was driving the car that caused the accident, including:

- Testimony by an eyewitness to the accident, who identified the car as Oswald's, both by color and make, and by unique spokes on the car's wheels.

- Testimony by an eyewitness to the accident who identified the jacket Oswald was wearing at the time of the incident.

- Evidence that Oswald had staged another accident to his car after the October 19 collision with the van to cover up damage from that collision.

- Evidence that shortly after his collision with the van and the staged accident, Oswald traded his car for another car.

- Testimony from Oswald's former girlfriend that he admitted having been in an accident where two people were killed, and said that he wanted to say goodbye to her because he was going to be put away for a long time.

¶7 The trial court ruled that Rudig's testimony was relevant. That decision was not an erroneous exercise of discretion because evidence of an accused's "consciousness of guilt" is admissible at trial. *See, e.g.,* ***Gauthier v. State***, 28 Wis. 2d 412, 420, 137 N.W.2d 101, 105-106 (1965). The next question is whether the evidence was "substantially outweighed by the danger of unfair prejudice." *See* WIS. STAT. RULE 904.03. As Oswald argued, Rudig's testimony necessarily meant that the jurors knew he had been convicted of another crime. We assume that this was prejudicial. The probative value of the evidence was not, however, "substantially outweighed" by that prejudice. Further, as noted, the trial

court ameliorated that prejudice. It not only pre-screened the State's questions, but also told the jury:

> You heard testimony from a witness concerning the defendant's status as being on extended supervision. The evidence was offered by the State for the limited purpose of showing a consciousness of guilt by the defendant. It was offered for that limited issue. You cannot use this evidence for any other purpose. The fact that the defendant was on extended supervision is not evidence of his guilt in this case. He is not on trial for any other crime and his status as being on extended supervision does not have any bearing on his guilt or innocence in this case, nor are you to infer from this status that the defendant is a person of bad character or has a criminal disposition.

We presume that juries follow instructions. *See* ***State v. Shillcutt***, 116 Wis. 2d 227, 238, 341 N.W.2d 716, 721 (Ct. App. 1983), *aff'd*, 119 Wis. 2d 788, 350 N.W.2d 686 (1984). We affirm.

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.