COURT OF APPEALS
DECISION
DATED AND FILED

August 29, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1645-CR **Cir. Ct. No. 2008CF873**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL P. HENNINGSEN,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed*.

Before Blanchard, P.J., Higginbotham and Kloppenburg, JJ.

¶1 PER CURIAM. Daniel Henningsen appeals judgments of conviction for homicide by intoxicated use of a motor vehicle, causing injury by operating a motor vehicle while under the influence, and operating after revocation, causing death, following a trial to the court. Henningsen also appeals

the circuit court order denying Henningsen's postconviction motion. Henningsen contends that: (1) the circuit court misapplied the traffic law in determining that Henningsen forfeited his right-of-way by speeding; (2) the State failed to establish that Henningsen's actions were the legal cause of the crash in this case; (3) the circuit court did not adequately explain its reasoning for the sentence it imposed; and (4) the court's sentencing determination placed too much emphasis on Henningsen's role in the crash while disregarding the victim's role, and was unduly harsh and unconscionable. We conclude that the evidence was sufficient to support the convictions and that the circuit court properly exercised its sentencing discretion. Accordingly, we affirm.

Background

¶2 Henningsen was charged with multiple criminal counts based on a collision between a vehicle driven by Henningsen and a vehicle driven by William Gray. Gray had pulled out of a driveway from a parking lot to turn left onto a through highway when Henningsen's vehicle crashed into Gray's vehicle. Gray was killed in the collision, and two passengers in Gray's vehicle were injured.

¶3 Henningsen pled guilty to operating with a prohibited blood alcohol concentration, seventh offense, and to possession of marijuana. A possession of drug paraphernalia charge was dismissed. The remaining charges—homicide and injury by intoxicated use of a motor vehicle and operating after revocation, causing death—were tried to the court.

¶4 At the outset of the court trial, the parties stipulated that the crash occurred, that Henningsen and Gray were operating the vehicles involved in the crash, and that Gray suffered fatal injuries as a result of the crash. They also stipulated that, at the time of the crash, Henningsen's blood alcohol level was

.194, and Gray's blood alcohol level was .207. The dispute at trial was whether Henningsen caused the crash by his intoxicated use of a motor vehicle or if the crash would have occurred regardless of Henningsen's intoxication.

¶5 The State and Henningsen offered competing expert opinions as to the cause of the crash. The State's expert, Jeffrey Muttart, offered the following opinions: Henningsen had at least five seconds to see and react to Gray's vehicle prior to impact. The average response time for a driver in that situation would be 1.3 seconds, and Henningsen's response time was 4.6 seconds. Henningsen's speed on the highway, which had a posted speed limit of fifty miles per hour, was eighty-one miles per hour five seconds before the crash. Henningsen did not apply his brakes until .4 seconds before the crash. Henningsen's speed was seventy miles per hour when he applied his brakes, and his speed was sixty-three miles per hour at the time of the collision. If Henningsen had been travelling at fifty miles per hour, he would have been able to avoid the crash. Gray was travelling two miles per hour at five seconds before the crash and seven miles per hour at the time of the crash. Under the facts prior to the crash, Henningsen was so far away that nearly every driver would have elected to pull out onto the highway.

¶6 Henningsen's expert, James Sobek, offered the following opinions: Henningsen would not have been able to perceive Gray's vehicle as an immediate threat until three seconds prior to impact. An average person would have a 1.5 second reaction time to the hazard, leaving 1.5 seconds to respond before impact. At that point, Henningsen was too close to Gray's vehicle to avoid a collision. Three seconds prior to the crash, Henningsen was travelling seventy-eight miles per hour; when Henningsen applied the brakes, he was travelling seventy miles per hour; and at the point of impact, he was travelling sixty-three miles per hour. It was unclear whether Gray stopped at the stop sign at the end of the parking lot

driveway before entering the highway, but Gray's vehicle was travelling two miles per hour five seconds prior to the crash, and seven miles per hour at impact. In any event, Gray should have recognized that Henningsen's vehicle was approaching and that it was unsafe to enter the highway. The collision was unavoidable after Gray pulled in front of Henningsen, and would have been unavoidable even if Henningsen had been travelling at the speed limit of fifty miles per hour.

¶7 The circuit court found that the State's expert was more credible than Henningsen's expert. The court found, relying on Muttart's testimony, that Henningsen was travelling eighty miles per hour in a fifty miles per hour zone prior to the crash; the crash would have been avoidable if Henningsen had been travelling the speed limit of fifty miles per hour; and Gray was acting with reasonable due care in entering the highway. The court stated: "[T]his entire crash would have been avoidable if Mr. Henningsen had simply been abiding by the posted speed limit…. It was his excessive speed that eventually caused this crash to occur resulting in the death of Mr. Gray and the injuries to Miss Borden and to Miss Gray herself." Accordingly, the court found Henningsen guilty of the charged offenses. The court sentenced Henningsen to a total of twenty-seven years of initial confinement and fifteen years of extended supervision.

¶8 Henningsen moved for sentence modification, arguing that the circuit court did not adequately explain the sentence it imposed, the court erroneously exercised its sentencing discretion, and the sentence was unduly harsh and unconscionable. Alternatively, Henningsen moved to vacate his judgments of conviction, asserting that the evidence was insufficient to establish that Henningsen, rather than Gray, caused the crash. The circuit court denied Henningsen's postconviction motion. Henningsen appeals.

Standard of Review

¶9 Whether evidence was sufficient to support a conviction is a question of law, which we review de novo. *See* ***State v. Smith***, 2012 WI 91, ¶24, 342 Wis. 2d 710, 817 N.W.2d 410. The question is whether the evidence, viewed in a light most favorable to the convictions, is so lacking in probative value that no reasonable fact finder could have found Henningsen guilty. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 451 N.W.2d 752 (1990).

¶10 We review a circuit court's sentencing decision for an erroneous exercise of discretion. *See* ***State v. Ramuta***, 2003 WI App 80, ¶23, 261 Wis. 2d 784, 661 N.W.2d 483.

Discussion

¶11 Henningsen argues first that the circuit court misapplied the right-of-way law in determining that Henningsen caused the crash. Henningsen cites the circuit court as stating:

> Much has been made by [defense counsel] that Mr. Henningsen had the right-of-way on Highway 190 and I would agree with him to a degree. He did have the right-of-way on Highway 190, which I know had a posted speed limit of 50 miles per hour, but he forfeited that right-of-way with his excessive speed. The statutes ... clearly indicate that [the] right-of-way that normally a driver would have would be forfeited if they violate the rules of the road. That's exactly what we had here, a violation of those rules by Mr. Henningsen traveling at a rate in excess of 30 miles over the posted speed limit.

Henningsen argues that the court's determination that Henningsen forfeited his right-of-way by speeding was contrary to the right-of-way rules under WIS. STAT.

§ 346.18 (2011-12).[1] He points out that § 346.18(1), which applies to uncontrolled intersections, states that driving at an unlawful speed forfeits the right-of-way under that subsection; § 346.18(3), which applies to intersections with through highways, does not contain the forfeiture language. Henningsen argues that, contrary to the circuit court's statements, Henningsen had the right-of-way on the highway. Thus, Henningsen asserts, Gray caused the crash by failing to yield the right-of-way.

¶12 The State responds that we need not decide whether the circuit court erred in determining that Henningsen forfeited the right-of-way by speeding. Rather, the State asserts, the issue of causation does not depend on which driver had the legal right-of-way. The State argues that, even if a driver has the right-of-way, that driver must exercise ordinary care in maintaining a proper lookout. *See generally* ***Gibson v. Streeter***, 241 Wis. 600, 602, 6 N.W.2d 662 (1942). Here, the State asserts, the evidence established that, even if Henningsen had the right-of-way, he caused the crash by failing to exercise ordinary care. Henningsen replies that the State has not disputed that Henningsen had the right-of-way, and thus has conceded the point.

¶13 We agree with the State that the issue of the legal right-of-way is not dispositive. Henningsen cites no authority for his apparent assertion that a driver who had the right-of-way may not be found to have caused an accident. Moreover, contrary to Henningsen's assertion, the circuit court did not rely on its belief that Henningsen forfeited the right-of-way to find that Henningsen caused

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

the crash. Rather, the circuit court analyzed the expert testimony and determined that the more credible evidence established that Henningsen's conduct in driving eighty miles per hour on a highway with a fifty miles per hour speed limit caused the crash.

¶14 We turn, then, to Henningsen's next argument: that the evidence was insufficient to establish that Henningsen's actions caused the crash. Henningsen cites ***State v. Serebin***, 119 Wis. 2d 837, 849, 350 N.W.2d 65 (1984), for the proposition that, to establish cause in a criminal case, "'mere physical causation is not always enough; a particular physical cause is enough only when it is a cause of which the law will take cognizance.'" (Quoted source omitted.) Henningsen cites language in ***Serebin*** "'requiring that the accused's conduct be a substantial factor in causing the harmful result or that it be the proximate, primary, efficient, or legal cause of such harmful result.'" ***Id.*** (quoted source omitted). Henningsen argues that, in this case, Gray's negligence in pulling out into the highway in front of Henningsen was the "legal or proximate" cause of the crash. He asserts that Gray failed to stop at the stop sign and yield the right-of-way, as required by law, and thus Gray's negligence superseded any negligence on the part of Henningsen. We disagree.

¶15 The causation element in a criminal case requires proof that the defendant's conduct was a "substantial factor" in producing the harm. WIS JI—CRIMINAL 901. In ***Serebin***, 119 Wis. 2d at 849, the supreme court stated that the causation element requires a showing that, but for the defendant's conduct, the harm would not have occurred. It also stated, as Henningsen points out, that the causation element requires that the defendant's conduct was "a substantial factor in causing the harmful result or that it be the proximate, primary, efficient, or legal cause of such harmful result." ***Id.*** However, in ***State v. Miller***, 231 Wis. 2d 447,

457-58, 605 N.W.2d 567 (Ct. App. 1999), we clarified the threshold for the "substantial factor" requirement set forth in ***Serebin***, explaining that "a substantial factor contemplates not only the immediate or primary cause, but other significant factors that lead to the ultimate result." Thus, under the present test for causation, "a substantial factor 'need not be the sole or primary factor'" in causing the harm to establish the causation element in a criminal case. *See* ***id.*** at 458 (quoted source omitted).

¶16 We conclude that the evidence at trial was sufficient to meet this test of causation. The State's expert testified that Henningsen would have been able to view Gray in the road ahead of him and avoid the collision if he had been exercising ordinary care, and that the average driver in Gray's circumstances would have pulled into the highway. The court found that testimony credible and adopted those findings. Henningsen correctly points out that there was evidence that both drivers were intoxicated, and thus negligent, and that there was also evidence that Gray may have failed to stop at the stop sign before pulling into the highway. However, the circuit court heard the evidence that both drivers were negligent, and determined that Henningsen's negligence caused the crash. Moreover, as we explained in ***Miller***, there may be more than one significant factor leading to the ultimate harm; each significant factor constitutes a substantial factor for purposes of the causation element. Here, the evidence at trial was sufficient to support the court's finding that Henningsen's conduct—driving eighty miles per hour down a highway with a fifty miles per hour speed limit, while intoxicated, and failing to observe a hazard on the highway in time to respond—was a significant factor in causing the crash.

¶17 Next, Henningsen argues that the circuit court did not adequately justify the length of the sentence it imposed. *See* ***State v. Gallion***, 2004 WI 42, ¶1,

270 Wis. 2d 535, 678 N.W.2d 197 ("'requisite to a prima facie valid sentence is a statement by the trial judge detailing his reasons for selecting the particular sentence imposed'" (quoted source omitted)). Henningsen asserts that the court did not set forth reasons justifying the length of twenty-five years of initial confinement for the homicide conviction, as opposed to a shorter but still significant length of initial confinement. He asserts that the court failed to explain why a sentence of a lesser duration would not have served the court's sentencing objectives. *See* ***id.***, ¶24 ("'The justification for the length of the sentence should always be set forth in the record, as well as the reasons for not imposing a sentence of lesser duration.'" (quoted source omitted)). We discern no error in the court's exercise of its sentencing discretion.

¶18 A circuit court must explain its reasons for imposing a particular sentence. ***Id.***, ¶22. The amount imposed must be the minimum amount consistent with the court's sentencing objectives. ***Id.***, ¶24. A circuit court must also set forth its sentencing objectives in a particular case, which may include protection of the public, punishment and rehabilitation of the defendant, and deterrence to others. ***Id.***, ¶40. Additionally, the court must consider relevant sentencing factors, which may include the defendant's character and criminal history, the severity of the offense, and the need to protect the public. ***Id.***, ¶43 & n.11.

¶19 Here, the court considered the facts relevant to the primary sentencing factors and objectives. It explained that it considered Henningsen's six prior convictions for operating a motor vehicle while intoxicated, which indicated that Henningsen had not come to terms with his alcoholism and that he would continue to drive while intoxicated despite having previously received a prison sentence for that conduct. The court explained that it considered that Henningsen made the choice to become intoxicated and then drive a motor vehicle despite his

multiple prior operating while intoxicated convictions and his prior alcohol treatment both in and out of prison. The court also considered that Henningsen had graduated from high school and had steady employment and a promising career prior to his convictions for operating while intoxicated. The court acknowledged that Henningsen was remorseful and that he had suffered both physically and mentally from the crash.

¶20 The court explained that it needed to impose a sentence that would protect the public and deter others who have multiple operating while intoxicated convictions from continuing to drink and drive. The court explained that it believed a very lengthy term of confinement was necessary based on the facts of the case and because Henningsen could not be trusted not to drive while intoxicated in the future. The court considered that Henningsen was on extended supervision when he committed the crime, and explained that it needed to protect the public from Henningsen by imposing a sentence that would ensure that Henningsen was a much older man by the time he is released from prison. Thus, the court adequately explained why it imposed a total term of initial confinement of twenty-seven years—twenty-five years for the homicide conviction and one year for each causing injury conviction—and why it believed a lesser sentence would not meet its sentencing objectives.

¶21 Henningsen contends that the circuit court placed too much weight on Henningsen's role in the crash and did not adequately consider Gray's negligence. However, this issue was extensively litigated at trial, and as explained above, the court, as the fact finder, found that it was Henningsen's negligence that caused the crash. As we have explained, that finding was supported by the trial evidence. Additionally, as the State points out, Henningsen has not explained why

Gray's negligence would be relevant to the court's exercise of discretion in sentencing Henningsen.

¶22 Finally, Henningsen contends that the sentence was unduly harsh and unconscionable. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Henningsen asserts that he did not intend to kill or injure anyone, and that the length of the sentence was unwarranted given his age of forty-five at the time of sentencing and his substantial physical injuries, which may prevent him from ever driving a motor vehicle in the future. However, as the State points out, it is immaterial that Henningsen did not intend to cause harm; he was not convicted of intentionally causing harm. While the court imposed the maximum sentences for homicide by intoxicated use of a motor vehicle and operating while intoxicated, causing injury, the court adequately explained why it did so. *See* WIS. STAT. §§ 940.09(1)(a) and (1c)(b); 939.50(3)(c); 346.63(2)(a); 346.65(3m); 973.01(2)(b)3. Additionally, as explained above, the court did consider Henningsen's age and physical condition at sentencing. We discern no basis to disturb the court's sentencing discretion. We affirm.

By the Court.—Judgments and order affirmed.

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