STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2013AP358-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARK ALAN SPERBER,

Defendant-Appellant.

APPEAL FROM A JUDGMENT AND ORDER OF THE CIRCUIT COURT FOR BROWN COUNTY, MARC A. HAMMER, JUDGE

BRIEF FOR PLAINTIFF-RESPONDENT

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ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal because it would add nothing to the arguments in the briefs. The opinion should not be published because this case involves only the application of settled law to the facts of this case.

ARGUMENT

I. SPERBER FAILED TO PROVE THAT HIS ATTORNEY WAS INEFFECTIVE FOR AGREEING THAT THE CIRCUIT COURT SHOULD NOT GIVE THE JURY A SUPPLEMENTAL INSTRUCTION THAT THEY HAD TO FIND HE KNEW HE WAS IN AN ACCIDENT INVOLVING A PERSON AT THE TIME HE LEFT THE SCENE.

The issue on this appeal is not whether the circuit court erred by failing to give the jury a supplemental instruction advising them that before they could convict the defendant-appellant, Mark Alan Sperber, of the crime of failing to give information or render aid following an accident, they had to find that he knew he was involved in an accident involving a person at the time he left the scene without giving information or rendering aid.

Any right to complain that the court erred by failing to give this instruction was waived when Sperber's attorney expressly agreed that no such instruction should be given (116:673, 685-86). *State v. Wanta*, 224 Wis. 2d 679, 700, 592 N.W.2d 645 (Ct. App. 1999); *Bergeron v. State*, 85 Wis. 2d 595, 605, 271 N.W.2d 386 (1978). *See State v. Lippold*, 2008 WI App 130 ¶ 10 n.4, 313 Wis. 2d 699, 757 N.W.2d 825; Wis. Stat. § 805.13(3) (2011-12). *See also State v. Mann*, 135 Wis. 2d 420, 427, 400 N.W.2d 489 (Ct. App. 1986) (acquiescence in court's answer to jury's question waives right to object).

When the defendant has waived any right to complain about an instructional error, this court is prohibited from directly reviewing the alleged error. *State v. Becker*, 2009 WI App 59, ¶¶ 16-17, 318 Wis. 2d 97, 767 N.W.2d 585; *State v. Marcum*, 166 Wis. 2d 908, 916, 480 N.W.2d 545 (Ct. App. 1992).

Such errors may be reviewed as claims that defense counsel was ineffective for failing to request an instruction or object to its absence. *Becker*, 318 Wis. 2d 97, ¶ 18; *Marcum*, 166 Wis. 2d at 916.

A criminal defendant who claims his attorney was ineffective has a dual burden to prove both that his attorney's performance was deficient and that the deficient performance prejudiced his defense. *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433; *State v. Thiel*, 2003 WI 111, ¶ 18, 264 Wis. 2d 571, 665 N.W.2d 305; *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997).

A claim of ineffective assistance fails if the defendant fails to prove either one of these requirements. *State v. Williams*, 2006 WI App 212, ¶ 18, 296 Wis. 2d 834, 723 N.W.2d 719; *State v. Taylor*, 2004 WI App 81, ¶ 14, 272 Wis. 2d 642, 679 N.W.2d 893. So claims of ineffective assistance may be disposed of without considering whether counsel performed deficiently when the defendant fails to prove prejudice. *State v. Roberson*, 2006 WI 80, ¶ 28, 292 Wis. 2d 280, 717 N.W.2d 111; *State v. Johnson*, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).[1]

[1] Sperber correctly states the allocation of the burden of proving prejudice at the beginning of his argument. Brief for Defendant-Appellant at 21. But then he erroneously seems to suggest that the burden is on the state to prove lack of prejudice or harmless error. Brief for Defendant-Appellant at 24-25. Sperber fails to note that while *State v. Harvey*, 2002 WI 93, 254 Wis. 2d 442, 647 N.W.2d 189, does state in ¶ 40, which he cites, that the burden to prove no prejudice is ordinarily on the beneficiary of an error, that case goes on to state in the next paragraph that "in an ineffective assistance of counsel claim, the defendant must prove prejudice." *Harvey*, 254 Wis. 2d 442, ¶ 41. Similarly, Sperber fails to note that while *State v. Gordon*, 2003 WI 69, 262 Wis. 2d 380, 663 N.W.2d 765, does state in ¶ 40, which he cites, that instructional error is subject to the harmless error rule, that case goes on to state in the next paragraph that its overruling the "automatic reversal rule returns this issue to the realm of *Strickland's*, prejudice analysis, because Gordon's attorney did not object to the omission of the . . . instruction." *Gordon*, 262 Wis. 2d 380, ¶ 41.

Sperber failed to prove that he was prejudiced by his attorney's failure to request a supplemental instruction specifying the time a defendant must know he was in an accident involving a person.

First, Sperber failed to prove that even in the absence of a supplemental instruction, the jury did not construe the instruction they were given to mean that his knowledge had to be contemporaneous with his departure from the scene of the accident.

Second, Sperber failed to prove that a specific instruction on the need for contemporaneous knowledge would have made any difference in the factual findings actually made by the jury.

A. Sperber Failed To Prove That The Jury Did Not Construe The Pattern Instruction They Were Given To Mean That To Convict Him They Had To Find He Knew At The Time He Left The Scene That He Had Been Involved In An Accident Involving A Person.

The jury questioned whether they could convict Sperber of the crime of failing to give information or render aid following an accident, in violation of Wis. Stat. § 346.67, if they found that he knew he hit a person at any time before he was arrested, or whether they had to find that he knew he hit a person at the time of the accident (51:1-2; 116:669, 684).

The circuit court did not answer the jury's question, but told them to read Wis. JI-Criminal 2670, a copy of which was sent to the jury room, in its entirety (51:1-2; 116:671, 673, 685).

If the jury, on its own, answered their question by correctly construing the pattern instruction to require contemporaneous rather than subsequent knowledge, Sperber could not have been prejudiced by the court's failure to specifically tell them that contemporaneous knowledge is required.

It is not reasonably probable that Sperber was prejudiced because the jury's question, given some thought, basically answers itself. One of their alternatives makes sense. The other does not.

It makes sense to punish someone criminally when he knows that another person is or could have been injured in an accident in which he was involved, but he leaves the scene without attempting to help the person who is or could be injured.

It makes little sense to punish someone criminally for leaving the scene of an accident without rendering aid when he honestly does not know that the accident involved another person who might be injured and in need of assistance.

More than seventy years ago the supreme court assumed that contemporaneous knowledge was required.

In *Sharp v. State*, 241 Wis. 67, 4 N.W.2d 136 (1942), a driver who left the scene of an accident without assisting a person she had injured claimed she was unaware at the time that anyone was hurt, and did not learn she had injured anyone until she read it in the newspaper the next day. *Sharp*, 241 Wis. at 70.

Noting that an obvious purpose of the hit-and-run statute is to require a driver who was involved in causing a personal injury to provide immediate assistance so that the injured person could get attention with the least possible delay, the court held that the evidence was sufficient to convict Sharp because the trier of fact was not obligated to accept as true her claim that she did not know at the time

she left the scene that her car had hit anyone. *Sharp*, 241 Wis. at 70-71. Sharp's knowledge about the injury the next day was not found sufficient to convict her.

If the supreme court could effortlessly assume from the obvious purpose of the statute that contemporaneous knowledge is required for conviction, and that subsequent knowledge is not enough, reasonable jurors could figure it out too.

Indeed, Sperber himself argues that "[a]ny timeframe beyond the ability to stop and render aid at the scene would implicate vagueness . . . ." Brief for Defendant-Appellant at 26 n.8. "In order to stop and render aid [in compliance with the obvious purpose of the statute] defendant's knowledge would have to be contemporaneous with the accident." Brief for Defendant-Appellant at 25-26.

More than twenty years ago this court discerned that the clear purpose of the statute envisions a reasonable person standard for determining whether a driver rendered reasonable assistance to a person injured in an accident. *State v. Swatek*, 178 Wis. 2d 1, 7, 502 N.W.2d 909 (Ct. App. 1993).

Reasonable jurors could have the same vision of the law considering the obvious purpose of the hit-and-run statute.

Under a reasonable person standard, a driver who knew that another person could have been injured in an accident would have reason to stop, while a driver who did not honestly know that another person could have been injured would have no reason to stop. Thus, reasonable jurors could conclude that the statute imposed criminal liability on the former but not the latter for not stopping.

Beyond common sense, the pattern instruction, read reasonably, adequately advises jurors that they

cannot convict a defendant for leaving the scene of an accident without rendering aid unless the defendant leaves knowing that a person may need help.

The first thing the instruction tells jurors is that Wis. Stat. § 346.67 is violated when, among other things, a driver who is involved in an accident resulting in the death of or injury to any person fails to immediately stop at the scene and render assistance to any person injured in the accident. Wis. JI-Criminal 2670 at 1.

In accord with this definition of the offense, jurors are told the state must prove that the defendant did not immediately stop at the scene of the accident and render reasonable assistance to a person injured in the accident. Wis. JI-Criminal 2670 at 2.

Being advised that the crime is completed when the defendant leaves the scene of an accident without stopping, a reasonable jury would understand that the offense is concerned solely with what happens at the scene of the accident at the time it occurs, not what may happen some time or place later after the crime has already been committed.

Jurors are also told the state must prove that the defendant knew the vehicle he was operating was involved in an accident involving a person. Wis. JI-Criminal 2670 at 1.

Understanding that the crime with which the defendant is charged is concerned solely with what happens at the scene of the accident at the time it occurs, jurors would reasonably conclude that the state must prove the defendant knew at the scene of the accident at the time it occurred, before he left the scene, that the vehicle he was operating was involved in an accident involving a person.

Obversely, reasonable jurors would know that what may or may not happen after the defendant already

commits the crime by failing to stop at the scene of an accident is irrelevant, so that it does not matter if the defendant learns after he has left the scene that he had injured another person. What is critical is whether the defendant knows he could have injured another person at the time he leaves the scene.

Although the Criminal Jury Instructions Committee is not infallible, they usually get it right. *See State v. Foster*, 191 Wis. 2d 14, 27, 528 N.W.2d 22 (Ct. App. 1995).

In *State v. Hartnek*, 146 Wis. 2d 188, 195, 430 N.W.2d 361 (Ct. App. 1988), this court cited with approval the pattern instruction's treatment of the element of knowledge. *See also Mann*, 135 Wis. 2d at 426 (Wis. JI-Criminal 2670 fairly and adequately informs jury of elements of offense).

Although the jury could have understood the pattern instruction without help, the correct statement of the law was previewed by the prosecutor in his opening statement.

The prosecutor told the jury that the conduct for which Sperber was charged was not hitting the victim, John Kennedy, but "leaving John after you hit him" (113:84). The prosecutor said the state had to prove that Sperber "knew he hit John Kennedy in the wheelchair. . . . [I]t's not fair to charge someone with hit and run causing homicide if they didn't know they hit anybody. . . . So throughout this case, the State will consistently come back to the idea that the defendant knew he hit John" (113:84).

The state's theory of prosecution, that Sperber knew when he left Kennedy that he had hit Kennedy, was reiterated in the state's closing argument where the prosecutor urged the jury to find that when Sperber "realized what he had done he took off," to find that Sperber "hit John Kennedy, knew it and left him" (116:630, 636).

Although a court can appropriately modify the pattern jury instructions when necessary to fully and fairly state the law, *Foster*, 191 Wis. 2d at 27, a court can also direct the jury to re-read the pattern instruction when the jury asks for clarification. *State v. Hubbard*, 2008 WI 92, ¶ 57, 313 Wis. 2d 1, 752 N.W.2d 839.

Sperber failed to prove that he was prejudiced when the court, with his attorney's approval, told the jury to re-read Wis. JI-Criminal 2670 to determine when a defendant has to know he was in an accident which could have injured another person.

Sperber failed to prove that the result of his trial would have been any different if his attorney had requested a supplemental instruction specifically advising the jury that they had to find Sperber's knowledge was contemporaneous with the accident because Sperber has not proved that the jury probably did not construe Wis. JI-Criminal 2670 to require contemporaneous knowledge despite the absence of such advice from the court.

B. Sperber Failed To Prove That A Specific Instruction On The Need For Contemporaneous Knowledge Would Have Made Any Difference In The Factual Findings Actually Made By The Jury.

The second reason why Sperber failed to prove he was prejudiced by the failure to request and recite a supplemental instruction on the need for contemporaneous knowledge is that Sperber failed to show that such an instruction would have made any difference in the factual findings actually made by the jury. Sperber failed to prove that even without such an instruction the jury based his conviction on anything other than a finding that he knew when he left the scene of the accident that he had hit another person.

Sperber's lengthy discussion of the evidence on which a jury might have found that he did not know he hit another person is beside the point. Of course there was evidence on which the jury might have made such a finding, but they didn't.

The jury convicted Sperber, which means they found that he did know he hit another person. So the only question, in light of the jury's queries, is whether they found that Sperber knew he hit another person before he left the scene of the accident or whether they found that Sperber learned that he hit another person sometime after he left but before he was confronted by the police (51:1-2; 116:669, 684).

In fact, no reasonable jury could have found that Sperber learned he hit another person sometime after he left the scene of the accident but before he was confronted by the police because there is no evidence in the record which would support any such finding. Indeed, the only evidence is to the contrary.

Sperber testified at the trial that he was surprised when the investigating officer told him that he had hit a person in a wheelchair (116:571).

Sperber testified that that was the first time he realized he had hit a person (116:572). Sperber said that up to that point he had no idea that that had happened and that he had always thought he hit a garbage can (116:571-72).

Sperber denied that he had seen any media coverage of the accident throughout the week (116:572).

Sperber suggests that because of the media coverage of the accident there was a "clear implication that Sperber should have at least heard about it in the days after the accident and put two and two together." Brief for Defendant-Appellant at 28 n.10.

But the only inference that could be drawn from the fact that there was media coverage of the accident is that Sperber could have learned about the details of the accident from the media. It could not be inferred that Sperber did in fact learn about the details of the accident from the media.

And in any event, no reasonable jury would have drawn any such inference in light of Sperber's express testimony that he did not hear about the accident through the media coverage, and that he did not put two and two together before that math was done for him by the police.

On the other hand, there was plenty of evidence from which the jury could find that Sperber knew at the time he left the scene of the accident that he had hit another person.

Another driver who was stopped on a side street waiting to cross the street on which Sperber was driving saw in Sperber's headlights Sperber's vehicle hit a person in a wheelchair (114:128, 132). If a person with a side view could see Sperber's vehicle hit a person in a wheelchair, then Sperber with a front view should have seen his vehicle hit that person too.

A second eyewitness who was driving ahead of Sperber saw in his rearview mirror from the illumination provided by Sperber's headlights Sperber's vehicle hit a person in a wheelchair (114:162-66). If a person with a rear view could see Sperber's vehicle hit a person in a wheelchair, then Sperber with a front view should have seen his vehicle hit that person too.

A third eyewitness who was passing Sperber's vehicle in the left lane saw a wheelchair in the road in the right lane (115:443). If a person in the left lane could see the wheelchair, then Sperber should have seen the wheelchair in his lane too.

Therefore, there is no genuine question that between the two alternatives presented in the jury's notes, no reasonable jury would have found that Sperber did not know he hit a person until sometime after he left the scene of the accident he was involved in. The only finding the jury could reasonably make on the evidence before them was that Sperber knew at the time he left the scene of the accident that he had hit another person.

Since the jury probably found that Sperber had knowledge that he hit another person at the time of the accident even without a supplemental instruction that Sperber's knowledge had to be contemporaneous with the accident, the result of his trial would have been no different if that instruction had been given.

For these two separate reasons, Sperber failed to prove he was prejudiced by his attorney's failure to request an instruction supplementing the pattern instruction recited by the circuit court.

II. SPERBER IS NOT ENTITLED TO REVERSAL OF HIS CONVICTION IN THE INTEREST OF JUSTICE.

Sperber is not entitled to reversal of his conviction in the interest of justice on the theory that the real controversy was not fully tried because he has not shown that the real controversy was not fully tried.

Sperber has not shown that the jury did not correctly understand the instruction it was given to require that before they could convict him they had to find he knew at the time he left the scene that he had been involved in an accident involving a person.

Furthermore, Sperber has not shown that, despite the absence of a specific instruction, the jury did not actually find he knew at the time he left the scene that he had been involved in an accident involving a person.

As far as this record shows, the real controversy, whether Sperber had contemporaneous knowledge that he hit a person, was fully and fairly tried.

CONCLUSION

It is therefore respectfully submitted that the judgment convicting Sperber of failing to give information or render aid following an accident, and the order of the circuit court denying Sperber's motion for a new trial should be affirmed.

Dated: July 9, 2013.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,392 words.

Dated this 9th day of July, 2013.

_____
Thomas J. Balistreri
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 9th day of July, 2013.

_____
Thomas J. Balistreri
Assistant Attorney General