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COURT OF APPEALS

COURT OF APPEALS
STATE OF WISCONSIN
DISTRICT III

CASE NO. 2023AP0006000

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

JACOB T. THORNBURG,
Defendant-Appellant.

APPEAL FROM JUDGMENT IN
EAU CLAIRE COUNTY CIRCUIT COURT
THE HONORABLE JOHN F. MANYDEEDS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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COURT OF APPEALS
STATE OF WISCONSIN
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v.

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BRIEF OF PLAINTIFF-RESPONDENT

ISSUE PRESENTED FOR REVIEW

- I. WHETHER DURING A SITUATION THAT REQUIRES REDUCED SPEED BY A MOTOR VEHICLE IT IS RELEVANT TO EXAMINE THE CAUSE OF A COLLISION IN DETERMINING WHETHER OR NOT A DRIVER VIOLATED WIS. STAT. 346.57(2).
- II. WHETHER THE TRIAL COURT ERRED IN FAILING TO PROVIDE THE APPELLANT HIS PROCEDURAL DUE PROCESS RIGHTS

STATEMENT OF ORAL ARGUMENT AND PUBLICATION

Oral argument should not be necessary for the prosecution of this appeal. It is expected that the parties' legal briefs will fully present and address the issue presented for appeal. Additionally, the court's decision need not be published since it is anticipated that it will be controlled by existing case law.

STATEMENT OF FACTS

On December 2, 2022 at 10:45 p.m. State Trooper Alan Christian was working the patrol shift in Eau Claire County, Wisconsin. (R. 14; 4-5). It was at this time that Trooper Christian responded to car accident. (R. 14; 5). Upon arrival, Trooper Christian spoke with Mr. Thornburg, who was the driver of a vehicle involved in an accident. (R. 14; 7) Mr. Thornburg admitted to Trooper Christian that he was swerving his vehicle. (R. 14; 27). Mr. Thornburg also admitted that he entered other lanes of traffic. (R. 14; 8). Trooper Christian testified that Mr. Thornburg stated to him that he was initially in the right lane, but once he was swerving he went into both the left and right lanes and was struck by another vehicle. (R. 14; 8).

The road conditions were unfavorable and there was snow on the ground located on Interstate 94. (R. 14; 8). Trooper Christian testified that there were hazardous road conditions on above-mentioned date, there were icy and snowy roads that would require somebody to slow down significantly. (R. 14; 20).

After testimony was concluded the circuit court found that the State had met its burden and believed that the Mr. Thornburg did not exercise the proper care needed as required by Wis. Stat. § 346.57(2). Thus, the circuit court found the Mr. Thornburg guilty of failing to maintain control of their vehicle under Wis. Stat. §346.57(2).

ARGUMENT

I.1 The Trial Court did not err in finding Mr. Thornburg guilty of violating Wis. Stat. § 346.57(2) by sustaining the State's objection to relevancy regarding Mr. Thornburg's photos of a collision.

Whether the cause of a collision is relevant in determining whether or not a driver violated Wis. Stat. §346.57(2).

The trial court has broad discretion in determining relevance and proffered evidence, when reviewing admission of evidence, the appellate court must determine whether the trial court exercised its discretion in accordance with accepted legal standards and with facts of record. *State v. Wiese*, 162 Wis.2d 507, 512, 469 N.W.2d 908 (WI App. 1991).

Moreover, the Wisconsin Attorney General's Office has provided guidance when proving a violation of Wisconsin Statute §346.57(2) or (3). Proof of a violation of (2) and (3) relating to situations that require reduced speed by motor vehicles would not require a showing of a collision with an object, person, or vehicle, or other conveyance on or entering the highway. 52. Op. Atty. Gen. 30 (1963).

Mr. Thornburg mistakes the purpose of Wis. Stat. §346.57(2). Mr. Thornburg argues that a collision that occurred on December 2, 2022, is relevant in determining whether the Appellant failed to keep his vehicle under control. Additionally Mr. Thornburg argues that he did not cause the collision, drove using due care, and is therefore not guilty of violation Wis. Stat. §346.57(2). However, Mr. Thornburg mischaracterizes the issue and does not show that the trial court abused their discretion in sustaining the State's objection.

It was not err of the trial court to sustain the State's objection to the introduction of Mr. Thornburg's photos of a collision with another vehicle.

Mr. Thornburg's violation of Wis. Stat. §346.57(2) is based on Mr. Thornburg failing to keep his vehicle under control given the conditions of the road on December 2, 2022. The State presented evidence that there were hazardous road conditions, including icy and snowy roads that would require somebody to slow down significantly. (R.14:20). Mr. Thornburg was initially traveling in the right lane, upon engaging ice, Mr. Thornburg went into the left lane partially and pressed the brakes. Additionally, there were other crashes that occurred that night that would require a driver of a motor vehicle to exercise caution. *Id.*

Therefore, the judgment for violating Wis. Stat. §346.57(2) rests on the fact that Mr. Thornburg encountered a situation that required reduced speed by Mr. Thornburg, and does not require a showing of a collision with an object, person or vehicle, or other conveyance on or entering the highway. The State relied on the

body cam footage of Trooper Christian, Mr. Thornburg's statements, and Trooper Christian's testimony in proving a violation of Wis. Stat. §346.57(2).

The trial court sustained the State's objection based on accepted legal standards and facts of record. (R 14; 18). The trial court used their discretion in sustaining the objection. *Id.* Furthermore, the trial court found due to the accepted legal standards and facts of record that it did not matter if there was a collision with a vehicle, but whether Mr. Thornburg's vehicle was traveling at a greater than is reasonable speed under the conditions and having regard for the actual and potential hazards then existing. *Id.*

Therefore, the Court should find that the trial court did not err in sustaining the States's objection to admission of photos of Mr. Thornburg's collision. As stated above, the trial court is given broad discretion and exercised their discretion using accepted legal standards and facts of record.

I.2. There was sufficient evidence to find Mr. Thornburg guilty of violating Wis. Stat. §346.57(2).

The Appellate Court will not disturb trial court's findings of fact unless they are clearly erroneous. *State v. Aderemi*, 406 Wis. 2d 132 (WI App. 2023). When evidence in the record consists of disputed testimony and a video recording, the court of appeals will apply the clearly erroneous standard of review when reviewing

the trial court's finding of fact. *State v. Walli*, 334, Wis.2d 402, 799 N.W.2d 898, 2011 App. 86 (WI App. 2011).

Mr. Thornburg argues that none of the actions he took to avoid a road hazard were dangerous, and the fact that he made such choices indicate that he had not lost control of the vehicle.

The Court found otherwise that the body cam footage of Trooper Christian, Mr. Thornburg's statements made in Court, and Trooper Christian's testimony were sufficient to prove a violation of Wis. Stat. §346.57(2). Mr. Thornburg has not made a showing that the trial court's factual findings were clearly erroneous.

The body cam footage of Trooper Christian, Mr. Thornburg's statements, and Trooper Christian's testimony, contain sufficient facts to find Mr. Thornburg guilty of violating Wis. Stat. §346.57(2).

Therefore, this Court should affirm the Trial Court's Judgment.

I.3. Swerving is evidence to support a violation of Wis. Stat. §346.57(2).

Whether swerving is evidence to support a violation of Wis. Stat. §346.57(2) is a question of statutory interpretation. Questions of statutory interpretation are reviewed de novo. *State v. Rector*, 407 Wis.2d 321 (2023).

Wisconsin Statute §346.57(2) states, "No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard

for the actual and potential hazards then existing. The speed of a vehicle shall be so controlled as may be necessary to avoid colliding with any objects, person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and due care.”

Mr. Thornburg argues that swerving is not illegal and can be necessary to avoid a collision. Thus, Mr. Thornburg ultimately argues that swerving away from an ice hazard was the safe and right decision and did not violate Wis. Stat. §346.57(2).

Swerving is evidence to support a finding that a vehicle was driving at a speed greater than is reasonable and prudent under the conditions and potential hazards then existing. Here, Mr. Thornburg has conceded to the fact that he swerved his vehicle away from an ice hazard on the road. That is evidence supporting a finding of a violation of Wis. Stat. §346.57(2).

Under Wis. Stat. §346.57(2), “No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard for the actual and potential hazards then existing.” Thus, the fact that Mr. Thornburg swerved his vehicle, is evidence to support that Mr. Thornburg was driving his vehicle at a speed greater than is reasonable and prudent under the conditions and having regard for the actual and potential hazards then existing.

Furthermore, the State presented evidence that there were hazardous road conditions on December 2, 2022, including icy and snowy roads that would require

somebody to slow down significantly. (R.14:20). Given the hazardous road conditions on December 2, 2022 and the fact that Mr. Thornburg swerved his vehicle to avoid ice, support an inference that Mr. Thornburg was traveling at a speed greater than is reasonable and prudent under the conditions then existing.

Therefore, the Court should affirm the Trial Court's judgment in the above-mentioned matter.

II.1. The Trial Court interrupting Mr. Thornburg's closing arguments is not a violation of Mr. Thornburg's Procedural Due Process Rights.

Under the Wisconsin Constitution, Article I Section 8, affords the Appellant his procedural due process rights. *Thorp v. Town of Lebanon*, 235 Wis. 2d 610, 642 612 N.W.2d 59 (2000). The procedural due process clause protects individuals from governmental "denial of fundamental procedural fairness." Id. The Respondent must show a deprivation by state action of a constitutional protected interest in "life, liberty, or property without due process of law. Id.

When a procedural due process violation is claimed, the first question is whether Mr. Thornburg has been deprived of a constitutionally protected interest in life, liberty, or property. If such a deprivation has occurred, we reach the second level of analysis: what process was provided and whether it was constitutionally adequate. *Zinerman v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990).

Additionally, in State v. Petit, the Wisconsin Court of Appeals stated that when arguments are supported by only general statements, the Court may decline to review issues inadequately briefed. *State v. Petit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

Mr. Thornburg alleges that the Trial Court interrupted his closing argument and as a result he was denied the right to a fair and impartial hearing in violation of his procedural due process rights. However, Mr. Thornburg has not made a showing of a violation of his procedural due process rights nor stated a claim for relief under the procedural due process clause.

Included in Mr. Thornburg's argument, is an inadequately briefed argument regarding a potential violation of Section 202 of The Americans with Disabilities Act. *Americans with Disabilities Act of 1990*, 42 U.S.C.A. ch.126 §12101 (1990). Mr. Thornburg argues that the Court has a responsibility to provide reasonable accommodation to a cognitively disabled defendant and that the Trial Court was informed of his concussion.

The State argues that Mr. Thornburg's argument regarding a potential violation of Section 202 of the Americans with Disabilities Acts is underdeveloped and is a general statement. *Id.* Therefore, the State respectfully requests that the Appellate Court decline to review this argument. *Petit*, 171 Wis. 2d 627 (Ct. App. 1992).

Moreover, The State argues that Mr. Thornburg has not been deprived a constitutionally protected interest in life, liberty, or property. Mr. Thornburg was provided the opportunity to have a closing argument. (R 14: 25, 29). Mr. Thornburg has failed to state a claim for which relief can be granted.

Therefore, the State respectfully requests that the Court affirm the trial court's judgment in this matter and find that Mr. Thornburg was not denied his procedural due process rights during the court trial.

II.2. The Trial Court directing the State to give closing arguments before Mr. Thornburg was allowed to present his case was harmless error.

Whether an error was harmless is a question of law, subject to independent review of the Court. *State v. Magett*, 2014 WI 67, ¶29, 355 Wis. 2d 617, 850 N.W.2d 42 (2014). An error is harmless if “the guilty verdict actually rendered in this trial was surely unattributable to the error. *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). The overall strength of the State’s case is often an important consideration. *State v. Deadwiller*, 350 Wis. 2d 138, 834 N.W.2d 362, 2013 WI 75 (2013). Other considerations include the frequency of the error and nature of the defense. *State v. Martin*, 2012 WI 96, ¶46, 343 Wis.2d 278, 816 N.W.2d 270 (2012).

Mr. Thornburg argues that after the State finished their examination of Trooper Christian, the Trial Court immediately directed the State to give closing arguments and this unfairly disadvantaged Mr. Thornburg. (R14).

The State concedes that the Trial Court allowed the State to present their closing argument before Mr. Thornburg was allowed to present their case. (R 14, 23). However, this error was harmless and was corrected by the trial court. (R 14; 25). After the State made their initial closing argument, Mr. Thornburg then began making his closing statement. (R 14; 24). During Mr. Thornburg's closing statement, Mr. Thornburg stated that he had a concussion. *Id.* The trial court then stopped him and stated that he did not state during the case that he had a concussion. (R 14; 25). The trial court offered Mr. Thornburg to reopen the case and let him testify as a witness. *Id.* Mr. Thornburg wished to testify as a witness. *Id.* It was at this time, Mr. Thornburg made comments regarding the incident. (R 14; 26). After Mr. Thornburg was finished, the court asked Mr. Thornburg that he thought he heard on the video that Mr. Thornburg told Trooper Christian say he was swerving. (R 14; 27). Mr. Thornburg then replied that he did say to Trooper Christian that he was swerving. *Id.* After this, the State was able to cross-examine Mr. Thornburg. *Id.* Mr. Thornburg did not have any other witnesses to call and the court proceeded with closing arguments. (R 14; 29).

The State argues that their case was strong to find Mr. Thornburg guilty of violating Wis. Stat. §346.57(2). The State presented evidence from Trooper

Christian, Trooper Christian's dash cam footage, and showed Mr. Thornburg's admission of swerving his vehicle. Therefore, the State argues that their case is strong to support that Mr. Thornburg is guilty of violating Wis. Stat. §346.57(2).

The trial court correctly reopened the case to allow Mr. Thornburg to testify as a witness. The error was corrected, and was harmless.

Therefore, the State is respectfully requesting that the Court find that this error was harmless and affirm the Trial Court's judgment in the above-mentioned matter.

II.3. Mr. Thornburg's Argument that the Court ended Mr. Thornburg's witness statements while there was still truth to be ascertained is an underdeveloped argument.

In Filipowicz v. American Stores Benefit Plans Comm., the 7th Circuit Court stated that the appellate court will not search the record for an alleged abuse of discretion. *Filipowicz v. American Stores Benefit Plans Comm.*, 56 F.3d 807, 816 (7th Cir. 1995). Furthermore, if an appellant fails to make a minimally complete and comprehensible argument for each of his or her claims, he or she loses regardless of the merits of these claims as they might have appeared on a fuller presentation. *Tyler v. Runyon*, 70 F.3d 458, 465 (7th Cir. 1995).

Additionally, in State v. Petit, the Wisconsin Court of Appeals stated that when arguments are supported by only general statements, the Court may decline to review issues inadequately briefed. *State v. Petit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

The State argues that Mr. Thornburg has presented an undeveloped argument regarding the Trial Court ending Mr. Thornburg's witness statements while there is truth to be ascertained. The reasoning for this argument is that Mr. Thornburg was asked by the Trial Court if he any other witnesses that he wished to call (R 14;28). Mr. Thornburg replied, "no sir." *Id.*

Therefore, the State argues that Trial Court did not end Mr. Thornburg's witness statements when there was truth to be ascertained, instead Mr. Thornburg ended his own testimony by stating that he did not have any more witnesses to call. Additionally, the State respectfully requests that the appellate court respectfully decline to review this argument made by Mr. Thornburg as it supported by only general statements.

Thus, the State respectfully requests that the Appellate Court affirm the Trial Court's Judgment in the above-mentioned matter.

II.4. The State respectfully disagrees with Mr. Thornburg's argument that the State misspoke in his closing arguments and stated statements that Mr. Thornburg did not make and spoke on issues that had not been proven by the evidence of the

case. The Trial Court did not err in failing to recognize or acknowledge this allegation made by Mr. Thornburg.

It is the function of the trial court, not the Court of Appeals, to assess the weight and credibility of witnesses. *Mullen v. Braatz*, 50 N.W.2d 446, 179 Wis. 2d 749 (App. 1993). Venom, arrogance, and *ad hominem* attacks are not to be condoned, whether they are by a member of the practicing bar or by a person acting pro se. *Strook v. Kedinger*, 2009 WI App. 31, 316 Wis. 548, ¶ 6 and n.3, 766 N.W.2d 219 (2009).

The State argues that they showed and followed their duty of candor toward the court, as it is central to the truth seeking function of any court. SCR 20:3.3. Additionally, the Trial Court found that Mr. Thornburg was guilty of Wis. Stat. § 346.57(2) after hearing evidence from Trooper Christian, watching Trooper Christian's dash cam video, and from Mr. Thornburg's statements. Therefore, the Trial Court did not err in finding Mr. Thornburg guilty of violating Wis. Stat. §346.57(2).

The State respectfully requests that the Court affirm the Trial Court's judgment in the above-mentioned matter.

II.5. Mr. Thornburg's Argument that Trooper Christian contradicted himself during testimony and that it was not recognized by the Trial Court is an underdeveloped argument.

It is the function of the Trial Court to assess the weight and credibility of the witnesses and not the Appellate Court. *Mullen v. Braatz*, 50 N.W.2d 446, 179 Wis. 2d 749 (App. 1993). Furthermore, in Petit, the Wisconsin Court of Appeals stated that when arguments are supported by only general statements, the Court may decline to review issues inadequately briefed. *State v. Petit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

Here the State argues that Mr. Thornburg's argument regarding Trooper Christian's testimony is inadequately briefed and respectfully requests the Appellate Court decline to review this argument. Additionally, it is the function of the Trial Court to assess weigh the witnesses' credibility.

The State respectfully requests that the Appellate Court affirm the Trial Court's judgment in the above-mentioned matter.

CONCLUSION

For the reasons stated above, this Court respectfully should affirm the trial court judgment in this matter.

Dated this 15th day of September, 2023.

"Electronically signed by" Jansen Van Daalwyk

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 22 pages and 3973 words.

Dated this 15th day of September, 2023.

”Electronically signed by” Jansen Van Daalwyk

Jansen Van Daalwyk
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