COURT OF APPEALS
DECISION
DATED AND FILED

November 1, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1582-CR **Cir. Ct. No. 2011CF71**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARVIN A. CORBINE, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sawyer County: JOHN P. ANDERSON, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Marvin Corbine, Jr., appeals from a judgment of conviction following a jury trial for first-degree reckless homicide, attempted first-degree intentional homicide, aggravated battery, criminal trespass, and felony

bail jumping.[1] Corbine also appeals an order denying a postconviction motion seeking a new trial. We affirm.

BACKGROUND

¶2 Police were dispatched in the early morning hours to a residence near Hayward after being advised of a stabbing. Upon arrival, officers observed an individual exit the front door of the residence severely injured and covered in blood, yelling "come help my brother." Once inside, officers observed John McDaniel lying on his back in the middle of the living room floor, dead, with multiple stab wounds to his face, chest, abdomen, and back. Officers discovered a large amount of blood on the living room floor, in a dining room area, throughout a hallway, in three separate bedroom areas, and also in a bathroom.

¶3 Evidence supporting the conviction indicated that Corbine went to McDaniel's residence to fight, after a night of drinking, because Corbine was angry after receiving text messages from Teah Nickence saying someone was calling him out to fight. Corbine arrived at the residence around 4:30 a.m., with Caleb Miller and five other individuals. Numerous witnesses testified fighting started almost immediately.

¶4 Corbine admitted to the jury he swung first at McDaniel, and they "ended up on the ground wrestling around." Miller then started hitting McDaniel and the fight escalated. Miller started stabbing McDaniel with a knife while Corbine was hitting and kicking him at the same time. Shortly thereafter, Miller and Corbine were in the kitchen with McDaniel, where Corbine "was standing

[1] All of the counts except bail jumping were as a party to a crime.

there holding his head" and Miller held a steak knife with blood on his hands. Corbine and Miller left the residence "bragging that they got that niggie."[2]

¶5 Following a six-day trial, the jury convicted Corbine on all counts. Corbine moved for postconviction relief, which the circuit court denied after a ***Machner*** hearing.[3] Corbine now appeals.

DISCUSSION

¶6 Corbine raises various ineffective assistance of counsel claims on appeal. To establish ineffective assistance, Corbine bears the burden of proving that counsel's performance was deficient and that such performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Deficient performance requires showing that counsel made errors so serious that counsel was not functioning as counsel under the Sixth Amendment, and the defendant must overcome a strong presumption that counsel acted reasonably within professional norms. ***Id.*** at 688. To establish prejudice, Corbine must prove there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *See* ***State v. Roberson***, 2006 WI 80, ¶¶28-29, 292 Wis. 2d 280, 717 N.W.2d 111.

¶7 Corbine argues his trial counsel was ineffective for failing to prevent evidence of Corbine's gang involvement from being admitted. However,

[2] D.K. was the victim in counts two and three. In count two, Corbine was charged with attempted first-degree intentional homicide, as party to a crime; in count three, Corbine was charged as party to a crime of aggravated battery. Evidence indicated D.K. walked into the living room to help McDaniel and ended up on the floor with three life-threatening injuries: a wound just in front of his heart, into the pericardium; a pneumothorax; and a scalp laceration.

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

Corbine's attorney filed a pretrial motion in limine objecting to any evidence of gang activity. Counsel argued that such evidence had no probative value, and any possible relevance was outweighed by the prejudicial effect of inflaming the jury. The circuit court reserved ruling on the motion until it could determine in what context the State would be presenting the evidence. In its postconviction motion decision, the court noted:

> [The evidence] was allowed on cross-examination by the State, when the issue became relevant to show witness bias at trial. It was never introduced in the State's case in chief. There was sufficient reference to gangs or "Latin Kings" outside the State's main case to make the issue suitable for cross-examination and exploration by the State to undermine certain testimony.

¶8 Ray Quagon and Cameo Hart testified at trial concerning gang affiliation issues. Hart testified, "I heard somebody yell, King Territory, or King Land …."[4] Hart stated she "hang[s] out with gang members," who claim to be Latin Kings. Hart testified the phrase she heard was gang related, and that when such a phrase is used it means "that's supposedly their spot and they do what they want, where they want." Quagon, who was among those accompanying Corbine to the McDaniel residence, testified concerning his affiliation with the Latin Kings.

¶9 The gang evidence was offered to show bias, and also for the purpose of showing motive. The circuit court ruled the relevance of the evidence was not outweighed by its prejudicial effect. The court determined the testimony

[4] Hart testified she lived next door to the McDaniels but was at the McDaniel residence when Corbine and his associates arrived. Hart said she heard, "knocking on the door and then a door opened and what sounded like a stampede come in." Hart testified she then "heard people fighting. I heard a lot of movement and what sounded like people hitting each other …." Hart then "heard somebody yell, King Territory, or King Land … and just more fighting after that."

relating to gangs was not overwhelming in view of the length of the trial and volume of evidence. The court's ruling was a proper exercise of discretion.

¶10 Corbine also argues it was "surely unreasonable performance" to fail to seek an adjournment when Hart gave an interview to police a week prior to trial, disclosing her testimony regarding gangs. However, the circuit court denied counsel's objection to Hart's testimony and counsel's associated request for a "recess or continuation." An unsuccessful argument does not equate to ineffective assistance. Moreover, Corbine has not shown a continuance would have made any difference in the result at trial, especially in light of the fact that Hart was cross-examined at trial regarding a previous statement to police, in which she conceded she lied.

¶11 We also agree with the circuit court's conclusion that it was neither deficient nor prejudicial for trial counsel to choose not to request a modified jury instruction to limit the impact of the gang evidence. At the ***Machner*** hearing, Corbine's attorney testified that he could not think of a purpose for offering WIS JI—CRIMINAL 275, which could have only served to emphasize, and not dispel, any potential effect of the gang evidence on the jury. As the circuit court recognized, the evidence regarding gangs was only a minor part of the entirety of the evidence from both sides. As the court concluded in its postconviction decision:

> There is also a logical disconnect with the defense argument regarding a failure to ask for Jury Instruction[ ] 275 …. Instruction 275 may have simply reminded the jury, or worse yet, enforced a negative inference of gang affiliation. Not requesting such an instruction in the totality of this case is not prejudicial.

¶12 Corbine also argues his counsel was ineffective for failing to object to the prosecutor's closing argument that Corbine "might also have used a knife to stab John McDaniel to death when the evidence established … it was Miller who had used the only knife involved …." We conclude failure to object to this statement was not deficient because the statement was based upon credible evidence. Corbine's then-girlfriend, Sophie Miller, testified that while driving away from McDaniel's residence after the attack, Corbine stated he thought he had "dropped his knife."

¶13 In addition, Dr. Butch Huston, a forensic pathologist, testified that McDaniel was stabbed seven times and that at least three of the wounds could have been fatal wounds. Some of the stab wounds went from front to back; other stab wounds went from back to front. A single-edged knife was recovered and entered into evidence. Five of the seven stab wounds were caused by the single-edged knife because of their shape. Doctor Huston could not say whether a single-edged knife caused the other two stab wounds, due to a lack of similar shape in those wounds. Because the argument that another weapon was involved was based on reasonable inferences from the evidence, Corbine's attorney's choice not to object to the statement that Corbine "might also have used a knife to stab John McDaniel" was neither deficient nor prejudicial since it does not create a probability of a different result sufficient to undermine confidence in the guilty verdicts. We also reject Corbine's attempt to characterize counsel's failure to object as "plain error."

¶14 Corbine next argues trial counsel unreasonably failed to investigate or effectively cross-examine Sophie Miller. Corbine claims, "It was only Sophie Miller, Corbine's current girlfriend, who claimed their group sought to 'fight' individuals at the McDaniel residence." According to Corbine, Sophie Miller

angrily broke off their relationship, providing motive for her to extract retribution upon Corbine.

¶15 However, Sophie Miller's conduct at trial belied any perceived attempt to extract retribution. She refused to cooperate with the circuit court when called to testify, and she was held in contempt and jailed in an effort to not have to testify in a way that would hurt Corbine. Furthermore, it was established on cross-examination that she had lied, concocted stories, changed stories, skipped the preliminary hearing, had a material witness warrant out for her, and "[hadn't] wanted to testify." In addition, Quagon corroborated the testimony about Teah Nickence texting Corbine and calling him out to fight. This corroboration supported the truthfulness of Corbine's own statement to police, which the jury heard, in which Corbine said, "[Teah] text, text me … [and] [s]ay come over if you ain't scared."

¶16 Corbine also argues his trial counsel should have established "cultural" evidence that Corbine led a life of nocturnal binge drinking and partying, in order to show a lack of criminal intention at the time of entry into the McDaniel residence. Corbine insists this evidence was critical to the defense strategy and should have been discovered by trial counsel. However, Corbine concedes he did not present this "cultural" evidence to his attorney until after the trial was over. Furthermore, Corbine does not attempt to address how such information, if disclosed to his attorney before trial, would have rendered a different outcome. In his reply brief, Corbine merely asserts "this desultory lifestyle evidence corroborated the critical component of the defense strategy these individuals were aimlessly seeking a party, rather than a group seeking confrontation with 'bad intentions' …." As the circuit court properly concluded, this argument "is both confusing and unsupported." We also fail to see how a

nocturnal binge drinking lifestyle would excuse Corbine's actions, and we will not further address this unsupported issue. *See* ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980).

¶17 Corbine next contends his attorney was ineffective for failing to seek submission of lesser-included offense instructions of second-degree reckless homicide on counts one and two. Submission of a lesser-included offense instruction is proper only when there are reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense. *See* ***State v. Wilson***, 149 Wis. 2d 878, 898, 440 N.W.2d 534 (1989).

¶18 Here, we agree with the circuit court, "[a]s to counts one and two, it is difficult to rationalize a lesser included offense instruction considering the defendant's position at trial regarding his involvement." At trial, Corbine's only defense was that he may have started the fight, but other than a brief scuffle with McDaniel, Corbine was a bystander who did nothing—and was responsible for nothing—Caleb Miller stabbed McDaniel and no witness identified Corbine as stabbing anyone. Corbine claimed he had merely gone to the McDaniel residence looking for an early morning drinking opportunity until the liquor stores opened. That this was an unsuccessful defense does not make the failure to request a lesser-included offense either deficient performance or a basis upon which to find the verdicts unreliable.

¶19 The lesser-included offense instructions also had no evidentiary support in the record. The beating and stabbing of McDaniel, as the facts establish in this case, resulting in his death, cannot reasonably be found not to have been in utter disregard of human life. Counsel has also failed to prove how the three potentially fatal stab wounds inflicted on D.K. show a lack of intent to kill.

Corbine has failed to show that his attorney's failure to request lesser-included offense instructions was either deficient or prejudicial.

¶20 We also reject Corbine's claims of prosecutorial misconduct. The determination whether prosecutorial misconduct occurred warranting a new trial is generally within the circuit court's discretion. ***State v. Lettice***, 205 Wis. 2d 347, 352, 556 N.W.2d 376 (Ct. App. 1996). Prosecutorial misconduct can sometimes rise to such a level that it deprives the defendant of the due process right to a fair trial. ***Id.*** This presents the court with a question of constitutional fact, subject to a two-part review. *See* ***State v. Matejka***, 2001 WI 5, ¶16, 241 Wis. 2d 52, 621 N.W.2d 891. We uphold the circuit court's findings of fact unless clearly erroneous, but applies the facts to the law de novo. *See* ***State v. Williams***, 2002 WI 94, ¶17, 255 Wis. 2d 1, 646 N.W.2d 834. We review the alleged misconduct in light of the entire record. ***Lettice***, 205 Wis. 2d at 353.

¶21 Corbine argues the State had a pretrial duty to inform the circuit court of the absence of any gang membership at the McDaniel residence, "thereby negating any motive for Corbine or others to travel to and enter the McDaniel residence for a 'Latin King' purpose." Corbine insists, "Had the prosecutor so informed the defense or the court pre-trial regarding this evidence, the court would likely not have admitted this evidence [of gang affiliation]." Corbine cites no caselaw to support this issue, and we shall not address it further. *See* ***State v. McMorris***, 2007 WI App 231, ¶30, 306 Wis. 2d 79, 742 N.W.2d 322.

¶22 Our review of the record discloses no prosecutorial misconduct during closing arguments, and we are not persuaded the State engaged in misconduct during sentencing "by placing a knife in Corbine's hand." A reversal is only warranted for alleged prosecutorial misconduct when what the prosecutor

does has "so infect[ed] the trial with unfairness as to make the resulting conviction a denial of due process." ***State v. Davidson***, 2000 WI 91, ¶88, 236 Wis. 2d 537, 613 N.W.2d 606. A prosecutor's arguments at sentencing, when the jury is no longer present and the defendant has already been convicted, cannot result in a denial of a fair trial as Corbine argues. In any event, the prosecutor's argument was proper because it was based on the evidence admitted.

¶23 Corbine's challenge to the exercise of the circuit court's sentencing discretion is without merit. The court considered the proper factors, including Corbine's character, the seriousness of the offenses, and the need to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶44, 270 Wis. 2d 535, 678 N.W.2d 197. The court noted Corbine's undesirable patterns of behavior and emphasized his "remarkable prior [criminal] record." The court stated, "Mr. Corbine comes here today, he's spent a great deal of time incarcerated already. He's never had a job ever. He's never been employed by anybody."

¶24 Corbine's history of juvenile delinquency started at age thirteen, and included adjudications for felony child abuse, disorderly conduct, possession of a firearm by a person previously adjudicated delinquent, possession of a dangerous weapon by a person under age eighteen, and receiving stolen property. Corbine was incarcerated at Lincoln Hills at age fifteen. Corbine also admitted to six adult convictions before the jury, and he was out on bond for four separate felony cases, which included two counts of burglary to dwellings, two counts of criminal damage to property, two counts of theft of movable property, taking and driving a motor vehicle without the owner's consent, battery, felony bail jumping, and interfering with fire-fighting equipment.

¶25 The circuit court also considered the "viciousness and aggravated nature of this crime." The court stated:

> [A]n unauthorized entry into a third-party's home at night … [where] absolutely nothing good … was going to come of your entry into that home that night. You went there with bad intentions. … You didn't go there to party. You may not have intended that someone die or go to the hospital, but you intended for mayhem to occur and that's exactly what happened. … The photographs of the crime scene after you and your cohorts left show blood everywhere, a dead body. Some of the people you left with stepped over a dying body as you left. Nobody called for help. Nobody made any effort. When the trial was over and the jury was excused, I had this sinking feeling that I had listened to and had been in the presence of simply purely evil people.

¶26 The circuit court also found Corbine showed very little ability to rehabilitate himself. The court stated:

> The inference that I've drawn from your demeanor is that you carry with you an enormous ego. …. And there's never been much of a set of rules that have either applied to you or that you felt were worthy of your high self-esteem ….
>
> Today you find out where you sit in the cosmic universe of importance, and it's not very important. … You've shown very little ability to rehabilitate yourself. The needs of the public, the needs of the community, the needs of the people, the needs of your tribe require that people like you be removed for a very, very long time because you cannot be trusted.

¶27 Corbine received an individualized sentence, and we specifically reject Corbine's claimed deprivation of due process because of a disparity between his sentence and Caleb Miller's. Quite simply, Corbine's sentence was different than other co-actors based on Corbine's background, prior record, and the number of convictions in the present case. As the circuit court stated, "It goes without much intellectual musing that a defendant convicted of five serious crimes as

opposed to two serious crimes stands a likelihood of facing additional penalties." Corbine's sentence was far less than the maximum 142 years allowable by law and, therefore, presumptively neither harsh nor excessive. *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶29-33, 255 Wis. 2d 632, 648 N.W.2d 507.

By the Court.—Judgment and order affirmed.

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