COURT OF APPEALS
DECISION
DATED AND FILED

February 1, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1985-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CONRAD J. KORBISCH,

DEFENDANT-APPELLANT

APPEAL from a judgment and an order of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Affirmed.*

¶1 LUNDSTEN, J.[1] Conrad J. Korbisch was convicted of two misdemeanors: disorderly conduct, WIS. STAT. § 947.01 (1997-98), and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

endangering safety through negligent handling of a dangerous weapon, WIS. STAT. § 941.20(1)(a) (1997-98). These charges arose from an incident in which Korbisch, while driving on a highway, engaged in dangerous driving behavior and displayed a handgun out of the window of his truck as a threat directed at another driver.

¶2 Korbisch argues on appeal that: (1) the trial court erroneously exercised its discretion in declining to instruct the jury on self-defense; (2) Korbisch did not validly waive his right to testify at trial; and (3) Korbisch's counsel was ineffective for failing to advise him that his testimony was needed to bolster a self-defense argument. None of these arguments warrant reversal of Korbisch's convictions.

Jury Instruction Issue

¶3 Korbisch asserts that the trial court erroneously exercised its discretion in declining to give a self-defense instruction to the jury. He argues that the trial court based its decision to deny the requested instruction not on what a jury could find, but instead on "what the trial court would probably find." Korbisch also complains that the trial court did not consider the self-defense instruction "standing alone," but erroneously insisted on considering a package of instructions. We reject Korbisch's characterizations of the trial court's approach to the topic and hold that the trial court properly exercised its discretion.

¶4 The privilege of self-defense is codified in WIS. STAT. § 939.48(1), which states in pertinent part:

> A person is privileged to ... intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with his or her person by such other person. The actor may intentionally use only such force or threat thereof as the actor reasonably believes is necessary to prevent or terminate the interference.

This defense is set forth in the standard jury instructions on self defense, *see* WIS JI—CRIMINAL 801 (1994). Applying self-defense to this case, Korbisch would have needed to show the following:

(1) that he actually and reasonably believed he was threatened with an unlawful interference with his person;

(2) that he actually and reasonably believed that the threat of force he used was necessary to prevent the unlawful interference; and

(3) that he only used such force or threat of force as he actually and reasonably believed was necessary to prevent the unlawful interference.

See WIS JI—CRIMINAL 801; ***State v. Camacho***, 176 Wis. 2d 860, 869, 501 N.W.2d 380 (1993).

¶5 Also relevant here is the jury instruction on duty to retreat. WISCONSIN JI—CRIMINAL 810 (1994) contains the following language:

> There is no duty to retreat. However, in determining whether the defendant reasonably believed the amount of force used was necessary to prevent or terminate the interference, you may consider whether the defendant had the opportunity to retreat with safety, whether such retreat was feasible, and whether the defendant knew of the opportunity to retreat.

¶6 A defendant is entitled to a self-defense instruction when a request is timely made, the defense is not adequately covered by other instructions, and the

defense is supported by the evidence. ***State v. Coleman***, 206 Wis. 2d 199, 212-13, 556 N.W.2d 701 (1996).

¶7 When assessing whether self-defense is supported by the evidence, courts do not look to the totality of the evidence, but instead determine "whether a reasonable construction of the evidence, viewed favorably to the defendant, supports the alleged defense." ***Coleman***, 206 Wis. 2d at 213-14. *See also* ***State v. Mendoza***, 80 Wis. 2d 122, 153, 258 N.W.2d 260 (1977).

¶8 Contrary to Korbisch's assertion, the record in this case does not show that the trial court misapprehended the applicable law. Instead, it simply appears that the trial court thought there was no reasonable construction of the evidence which would support a finding of self-defense by a reasonable juror. This conclusion is supported by the record.

¶9 Korbisch was charged with disorderly conduct and negligent handling of a firearm. Briefly stated, the charges were based on evidence showing that Korbisch was driving in a reckless manner while in a dispute with another motorist named Bendixen and showing that Korbisch threatened Bendixen by displaying to Bendixen a .44 caliber handgun. Korbisch displayed the handgun by sticking it out the window of his truck while he was driving through the city of Mineral Point.

¶10 Much of the evidence in this case was uncontested. A third party, who was not a friend of either Korbisch or Bendixen, testified that he saw Bendixen repeatedly attempt to pass Korbisch and saw Korbisch repeatedly swerve to block Bendixen from passing. On two occasions, Korbisch forced Bendixen's vehicle onto the gravel shoulder of the highway. From this witness's

vantage point, it appeared that Korbisch was attempting to run Bendixen off the road. The witness saw Korbisch come to an abrupt stop while traveling in front of Bendixen, causing Bendixen to stop abruptly. He saw Korbisch display the large handgun out the window of his truck.

¶11 Korbisch contends he was entitled to a self-defense instruction because of evidence showing what he told a police officer shortly after the incident. Korbisch's statements about the event, as related to the jury by the police officer, do not present a complete picture, but they do present an assertion on Korbisch's part that he displayed the gun in reaction to Bendixen's aggressive and reckless driving.

¶12 The officer told the jury that Korbisch said he threw some pop cans at the other vehicle, passed Bendixen's vehicle before entering Mineral Point, and displayed his handgun out the window of his truck. Korbisch told the police officer that he displayed his gun to let the other man know he had it. Korbisch told the officer that Bendixen was driving recklessly and that Bendixen "rear-ended" Korbisch's vehicle. He told the officer this "angered him and also scared him, so he pulled out his gun and held it out the window to show it off." Korbisch told the officer he brandished his weapon and drove recklessly in response to Bendixen's reckless behavior.

¶13 In the trial court's view, and in the view of this court, the evidence was insufficient to warrant a self-defense instruction. Even assuming that Bendixen engaged in dangerous driving behavior directed at Korbisch, Korbisch's response was not reasonable. It was uncontroverted that Korbisch responded to Bendixen's repeated attempts to pass him by repeatedly swerving to block

Bendixen's path. It was uncontroverted that Korbisch abruptly stopped his vehicle while driving in front of Bendixen. Even if the jurors had believed that in the course of this dangerous driving behavior Bendixen intentionally "rear-ended" Korbisch's truck, no reasonable juror would have thought it was reasonable for Korbisch to swerve to prevent Bendixen from passing and to then pull out and display a handgun while he was driving through Mineral Point.

¶14 Korbisch had no duty to retreat, but this court agrees with the trial court's observation that Korbisch could have withdrawn from the car chase simply by pulling over. Instead, Korbisch chose to remain involved in the incident and chose to take the reckless and dangerous action of displaying a large-caliber handgun. This evidence did not present a question in need of resolution by the jury. The factual basis asserted by Korbisch would not have supported a finding of self-defense by a reasonable juror. ***Cf. Shawn B.N. v. State***, 173 Wis. 2d 343, 369-70, 497 N.W.2d 141 (Ct. App. 1992).

¶15 Accordingly, the trial court did not erroneously exercise its discretion in declining to give the self-defense instruction.

Waiver of Right to Testify and Ineffective Assistance of Counsel

¶16 The record plainly shows that Korbisch personally decided not to testify at his trial and that he was not coerced by his trial counsel.

¶17 As the State points out, Korbisch's affidavit in support of his motion for postconviction relief states:

> [Defense counsel] told me that if I really wanted to testify, I could do so, and that it was my decision to make. [Defense counsel] further told me that he did not think that it was a

> good idea to testify. He specifically said that it might hurt my case more than it would help.

¶18 The postconviction hearing reveals that Korbisch's counsel advised him to not testify in order to avoid having the jury learn that Korbisch had a prior criminal conviction. Korbisch stated at this hearing that he made the decision to follow his counsel's recommendation based on counsel's experience as a lawyer and that he understood what he was doing. Likewise, Korbisch's trial counsel testified that Korbisch made the decision not to testify based on counsel's advice. The record also shows that Korbisch remained silent when his counsel stated at trial that Korbisch would not testify.

¶19 The standard of review is whether the record demonstrates that the defendant knowingly and voluntarily waived his right to testify. ***State v. Simpson***, 185 Wis. 2d 772, 778-79, 519 N.W.2d 662 (Ct. App. 1994). The Wisconsin Supreme Court has held that "counsel, in the absence of the express disapproval of the defendant on the record during the pretrial or trial proceedings, may waive the defendant's right to testify." ***State v. Albright***, 96 Wis. 2d 122, 133, 291 N.W.2d 487 (1980). A defendant's silence at the time that his lawyer tells the trial court that he will not testify is presumptive evidence of a valid waiver. ***State v. Wilson***, 179 Wis. 2d 660, 672-73, 508 N.W.2d 44 (Ct. App. 1993); ***State v. Turner***, 200 Wis. 2d 168, 177, 546 N.W.2d 880 (Ct. App. 1996).

¶20 Under these standards, this record shows a knowing and voluntary waiver of the right to testify.

¶21 Still, Korbisch complains that his waiver was not truly knowing and voluntary because it was a product of his counsel's incomplete advice on the issue of self-defense. He asserts that the reason he was denied a self-defense instruction

and, consequently, that his jury was denied an opportunity to properly consider self-defense was that his counsel failed to produce sufficient evidence to support the giving of a self-defense instruction. Korbisch apparently argues that if he had received complete advice, he would have testified, the jury would have been instructed on self-defense, and he might have been acquitted.

¶22 To prevail on an ineffective assistance of counsel claim, the defendant must show that counsel's actions or inaction constituted deficient performance and that the deficiency caused him prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶23 Deficient performance requires a showing that counsel's representation fell below an objective standard of reasonableness. ***Id.*** at 687-88. A court's review accords great deference to the trial attorney, and the burden is placed on the defendant to overcome the strong presumption that counsel acted reasonably within professional norms. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Professionally competent assistance encompasses a "wide range" of behaviors. ***Strickland***, 466 U.S. at 689. Reviewing courts "do not look to what would have been ideal, but rather to what amounts to reasonably effective representation." ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994).

¶24 In order to show prejudice, a defendant must establish "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome" of a case. ***Id***. at 694. "The bottom-line test is whether the alleged

ineffectiveness 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" ***State v. Vinson***, 183 Wis. 2d 297, 305, 515 N.W.2d 314 (Ct. App. 1994), quoting ***Strickland***, 466 U.S. at 686.

¶25 Whether an attorney's actions constitute ineffective assistance of counsel is a mixed question of fact and law. ***Johnson,*** 153 Wis. 2d at 127. What the attorney did or did not do is a question of fact, and the trial court's determinations on that subject will not be overturned unless they are clearly erroneous. ***Id.*** The ultimate question of whether an attorney's conduct constitutes constitutionally deficient representation or prejudice is a question of law, which this court reviews *de novo*. ***Id.*** at 128.

¶26 Korbisch has failed to meet his burden of showing that his trial counsel's performance was deficient. Counsel pursued a reasonable strategy at trial. He sought to put before the jury evidence showing that Korbisch acted in response to aggressive driving by Bendixen without letting the jury learn that Korbisch had a prior criminal conviction.[2]

¶27 Counsel's belief that it was in Korbisch's best interest to keep the jury in the dark about Korbisch's criminal history was sound. This tactic enabled Korbisch's counsel to highlight Bendixen's criminal conviction during closing arguments. Trial counsel argued:

[2] Korbisch complains that his counsel failed to seek a ruling excluding reference to Korbisch's criminal conviction. However, Korbisch fails to develop this argument and this court need not respond. Furthermore, based on the record before this court, there is no reason to believe that such an effort would have been successful.

> Okay, how do you evaluate [Bendixen's] credibility? Well, the glaring way is the fact a person has a criminal record. The law tells us you should be wary of believing their testimony, you know. It says it bears on their credibility, and you could consider that. Aside from that, whether he has a criminal record or not, this guy is a hot-head. You can see when he's on the witness stand apparently he's a person of vast mood-swings. He could be up here giggling and laughing when he's testifying in a serious matter like a trial. Imagine what he's like on the road sometime if somebody offends him in some way, passes him. We know what he would do. He'll tailgate the person and ram them. This guy, you know, there's something wrong with this character and, you know, and so it leads us to the question, why is my client being charged.

The force of this argument would have been much diminished if the jury knew that Korbisch also had a criminal history.

¶28 Furthermore, counsel correctly calculated that the trial evidence would support a defense argument that Korbisch was responding to dangerous aggressive driving by Bendixen. This evidence came from the third-party eyewitness who saw Bendixen repeatedly attempt to pass Korbisch, from testimony showing that Bendixen had a prior criminal conviction, from statements made by Bendixen to a police officer shortly after the incident,[3] and from the statements Korbisch made to the police after the incident.[4] Taken together, this evidence allowed Korbisch's counsel to argue that Bendixen acted aggressively and that Korbisch was simply trying to scare Bendixen off.

[3] For example, Bendixen told an officer that he stayed right with Korbisch even after Korbisch displayed the gun because "[a]nyone who pulls a gun is scared, is not man enough. Anyone who carries a gun is not a man basically."

[4] As recounted above, Korbisch told the police he was angry and scared because of Bendixen's aggressive behavior.

¶29 The fact that this strategy failed does not mean that it was unreasonable. A review of this record supports the assessment of the public defender who originally represented Korbisch and who characterized Korbisch's case as "pretty much hopeless." Just because the chosen strategy had no realistic chance of success does not mean that it was not the best available strategy. Korbisch's trial counsel could not alter the fact that Korbisch's response was completely unreasonable.

¶30 Korbisch also fails to prove his assertion that his testimony would have supplied a basis for a self-defense jury instruction. In essence, Korbisch argues that his counsel should have advised him that his testimony was needed to supply evidence of his state of mind, a component of self-defense. Korbisch complains that the only evidence of his state of mind was the officer's testimony that Korbisch said he was "angry *and* scared." Korbisch asserts that his trial testimony could have clarified "which 'reckless behavior' by Bendixen prompted [Korbisch] to hold out the gun."

¶31 However, the trial testimony of the police officer did specify the alleged reckless behavior to which Korbisch was responding. The officer testified that Korbisch told him that Bendixen was driving recklessly and rear-ended Korbisch's truck and that "this angered him and also scared him, so he pulled out his gun and held it out the window to show it off."

¶32 At the postconviction hearing, Korbisch points to conclusory statements he made about his state of mind. This testimony did not detail Bendixen's behavior, but instead only asserted generally that Bendixen had been "harassing" Korbisch for twenty minutes and asserted that Korbisch thought

Bendixen was trying to kill him and run him off the road. Such testimony would have added only slightly to trial evidence showing that Bendixen was repeatedly trying to pass Korbisch and that immediately after the incident Korbisch told a police officer he displayed his gun because Bendixen rammed him and Korbisch was scared.

¶33 Furthermore, the main obstacle for Korbisch at trial was not convincing the jury that he actually felt threatened, it was convincing the jury that a *reasonable person* would have thought that the action of pulling a gun was a *reasonable* attempt to end the interference. Proof that Korbisch was subjectively fearful or that he acted in response to aggressive driving by Bendixen would not have supplied proof that Korbisch's response was reasonable. Accordingly, Korbisch has not demonstrated that his counsel's performance was deficient.

¶34 For many of these same reasons, Korbisch has failed to show that he suffered prejudice. Even if Korbisch had testified at trial in a manner consistent with his postconviction hearing testimony, the trial court would still not have been compelled to instruct the jury on self-defense. And, even if Korbisch had testified and the jury had been instructed on self-defense, there is no "reasonable probability that ... the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694.

By the Court.—Judgment and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.