

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 11, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2006AP3134-CR

Cir. Ct. No. 2005CF3984

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOSE M. GODINA,

DEFENDANT-APPELLANT.

APPEAL from a judgment¹ of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¹ In the notice of appeal, Godina indicates that he is appealing from both the judgment of conviction entered on April 17, 2006, and the corrected judgment entered on April 19, 2006.

¶1 CURLEY, P.J. Jose Godina appeals the judgment of conviction for first-degree intentional homicide while armed with a dangerous weapon entered following a jury verdict. Godina argues that the trial court erred in admitting both statements he gave to the police because they were not voluntary, and later erred in instructing the jury by giving WIS JI—CRIMINAL 835, subtitled “Provocation,” because he did nothing to provoke the victim and others to attack. Because the statements were voluntary and Godina’s actions provided a basis for the jury instruction, we affirm.

I. BACKGROUND.

¶2 On July 17, 2005, Godina and several others were driving around in Milwaukee in the early morning hours. Godina asked the driver to take him to his house so that Godina could pick up a gun. Godina claimed later that he picked up the gun because he planned to walk home from his girlfriend’s sister’s house.² After he got the gun, they then proceeded to Godina’s girlfriend’s sister’s house. Godina was a member of a gang known as the Mexican Posse. Another Mexican Posse member, Miguel Lopez, also went to Godina’s girlfriend’s sister’s house and arrived there before Godina did. While Godina, Godina’s girlfriend’s sister, and Miguel were standing outside the home, a white Lincoln Town Car drove by and flashed a C-14 gang symbol at them. The C-14 gang was a rival gang. There also appeared to be a gray car with a sunroof following the white Lincoln. Seeing this, Miguel, Godina, and one other person (whom Godina did not know), jumped

² There is testimony in the record that Godina went to his sister-in-law’s house. However, Godina’s testimony at trial was that he went to his girlfriend’s sister’s house.

into Miguel's car, where Miguel's cousin was passed out, and chased after the white Lincoln, which was also being chased by the gray car with a sunroof.

¶3 At about the same time, several other young men from the C-14 gang or who were at one point affiliated with that gang, Uriel Aleman, Juan Garcia, and Ray Cherry, had stopped the Ford Explorer they were in near a street corner when they observed Aleman's brother approach while driving the white Lincoln.³ The white Lincoln then sped off when the gray car and the car containing Godina and three others approached it. Aleman, Cherry, and Garcia, in Aleman's Ford Explorer, joined the chase. The four cars, traveling at high rates of speed, sped through city streets.

¶4 When the white Lincoln attempted to turn onto Cesar Chavez Drive, it lost control and ultimately crashed into a building. However, the gray car successfully negotiated the turn. By the time the police would arrive, the gray car would be gone. Miguel's car containing Miguel, Godina, the unknown person, and Miguel's drunken cousin was the next to approach the intersection. The car also successfully made the turn, and Miguel, Godina, and the unknown person got out and chased a person who had exited the white Lincoln. According to Godina, after catching up to the person and letting him go, they began walking back to the car. As Miguel and Godina walked some distance from one another, the Ford Explorer appeared and failed to execute the turn. Unfortunately, the path of the Ford Explorer took it directly to where Miguel was walking, and he was struck with such force that he was thrown up into the air. At the same time Aleman,

³ There was testimony at trial that although Juan Garcia was a member of the C-14 gang at one time, he was not a member at the time this incident occurred.

driving the Ford Explorer, now stuck on a cement island, attempted to leave the scene by putting the car in drive and then in reverse. Godina later testified that upon seeing the back-up lights go on, he believed that the driver was attempting to back up and run over the ailing Miguel. Godina then pulled out his gun and shot at the Ford Explorer numerous times. Garcia was killed by the gunfire. Eventually Godina went home and disposed of the gun. Miguel was taken to a hospital.

¶15 The police arrested Godina the next day, and with Godina's assistance, the gun was recovered. Godina was first interviewed by the police for approximately eight hours. He originally told the police that at the time of the shooting he had a different caliber gun than the murder weapon. When he was interviewed the next day, he admitted that he had a gun similar to that used in the shooting, which he fired numerous times at the passenger side of the Ford Explorer. Godina was charged with first-degree reckless homicide while using a dangerous weapon. Godina waived his preliminary hearing and filed a motion to suppress the two statements he gave to the police. At the hearing, one of the two detectives who took his statements testified, as did Godina. The trial court denied the motion. Shortly thereafter, the State filed an amended information charging Godina with first-degree intentional homicide while armed with a dangerous weapon. The case was tried to a jury. Over Godina's objection, the trial court decided to read WIS JI—CRIMINAL 835 to the jury. The jury convicted him of the charge. This appeal follows.

II. ANALYSIS.

A. *Godina's statements to the detectives were voluntary.*

¶6 Godina contends that the trial court erred in denying his motion to suppress the two statements he gave to the police. He claims that his statements were not voluntary for a number of reasons. First, he claims that the police, who he alleged were very aggressive in their manner, did not read him his *Miranda* rights before asking him questions, and he did not know that he had the right to remain silent.⁴ He also argues that the length of the first interview (approximately eight hours) wore him down “both physically and psychologically,” and he points to his lack of experience with the police which made him more vulnerable than most people. Next, he claims the police threatened to call his family members as witnesses against him and said he would go to prison for the rest of his life. He also claims that his lack of sleep and having gone thirty-six hours without food contributed to his inability to resist the police pressure to confess. Finally, he argues that the room in which he was being held was small and confined and filling up with smoke as one of the detectives testified he was smoking a pipe.⁵

¶7 In reviewing a denial of a motion to suppress, this court will uphold the trial court’s findings of fact unless they are clearly erroneous. *State v. Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997). “Whether those facts satisfy the constitutional requirement of reasonableness is a question of law, which

⁴ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁵ This last issue was never raised in the trial court at the hearing on Godina’s motion to suppress, and we decline to address it, pursuant to *State v. Rogers*, 196 Wis. 2d 817, 826, 539 N.W.2d 897 (Ct. App. 1995) (failure to raise specific challenges in the trial court waives the right to raise them on appeal).

we review de novo.” *Id.*; see also *State v. Waldner*, 206 Wis. 2d 51, 54, 556 N.W.2d 681 (1996).

¶8 The principles of law governing the voluntariness inquiry are summarized in *State v. Hoppe*, 2003 WI 43, ¶36, 261 Wis. 2d 294, 661 N.W.2d 407. There, the court observed that a defendant’s statements are voluntary “if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant’s ability to resist.” *Id.* (citing *State v. Clappes*, 136 Wis. 2d 222, 236, 401 N.W.2d 759 (1987); *Norwood v. State*, 74 Wis. 2d 343, 364, 246 N.W.2d 801 (1976); *State v. Hoyt*, 21 Wis. 2d 284, 308, 128 N.W.2d 645 (1964)).

¶9 A necessary prerequisite for a finding of involuntariness is coercive or improper police conduct. *Id.*, ¶37 (citing *Colorado v. Connelly*, 479 U.S. 157, 167 (1986); *Clappes*, 136 Wis. 2d at 239). The voluntariness of a confession is evaluated on the basis of the totality of the circumstances surrounding that confession. *Id.*, ¶38 (citing *Clappes*, 136 Wis. 2d at 236). This analysis involves a balancing of the personal characteristics of the defendant against the pressures and tactics used by law enforcement officers. *Id.* (citing *Clappes*, 136 Wis. 2d at 236).

¶10 As noted, the trial court heard the testimony from one of the two detectives who took Godina’s statements and from Godina. The trial court in its remarks following the testimony and arguments of counsel stated that it was “confident” that the detective advised Godina of his constitutional rights and found that there was no improper police coercion. Addressing Godina’s

contention that he did not know he could remain silent, the trial court observed that it would be hard for people to not know that they have the right to remain silent. Moreover, the trial court stated that Godina was not a child and his gang membership possibly educated him on law enforcement practices. The trial court also rejected Godina's suggestion that the length of time he was interrogated was excessive, noting that the actual time of the first interrogation was a little over five hours. The trial court also observed that even if the police had claimed they were going to have Godina's family members testify against him and told him he would go to prison for life, those were acceptable interrogation techniques. We agree.

¶11 The trial court found that Godina was advised of his *Miranda* rights each time the detectives spoke to him. This finding is not clearly erroneous. So, too, the trial court's other findings are not clearly erroneous. Although the time that Godina spent in the interrogation room was lengthy, this was due in part to the detectives needing to verify information that Godina gave them. The trial court found that the actual length of the first interrogation was slightly more than five hours, and the second interrogation was approximately two hours in length. Godina was offered food, which he declined, and beverages. He was also given numerous bathroom breaks. The testimony of the detective was that Godina was "a very friendly individual" and that they parted ways by shaking hands. The trial court implicitly found this description of the atmosphere more credible than Godina's assertions that the police were aggressive and yelling at him. Supporting the trial court's findings is the fact that Godina signed both statements written by the police, which contained a clause just before his signature that said, "this statement is true and correct." The trial court noted that Godina was a gang member and heard testimony that this was not his first brush with the law. These facts counter his claim that he was naive and overpowered by police tactics.

Indeed, much of what Godina told the police were half-truths, and he minimized his involvement with the shooting. Thus, under the totality of the circumstances, we conclude that Godina's statements to the detectives were voluntary.

B. The Provocation Instruction was appropriate.

¶12 Over Godina's objection, the trial court read WIS JI—CRIMINAL 835, which concerns the effect of provocation, to the jury.⁶ He argues that:

The evidence did not support the idea that Godina had "provoked" Aleman to run over Miguel with the Green Ford Explorer. Indeed, Godina could not have provoked that attack because: (1) he was not driving the Dodge Stratus; and (2) the Dodge Stratus in which he was a passenger was *in front of* the green Ford Explorer and therefore cannot be said to have prompted its reckless driving. Indeed, by all accounts, Godina was a pedestrian when Aleman guided the Ford Explorer around the corner and ran over Miguel.

Nor can it be said, on the facts in the record, that Godina prompted the Ford Explorer to attempt to back up toward him and the badly injured Miguel. An eyewitness account from inside the Ford Explorer establishes that Aleman was acting not in response to anything Godina had done or was doing. Instead, Aleman was acting at Cherry's urging, or perhaps out of his own desire to leave the scene of an accident in which he must have known he had badly injured, if not killed, a pedestrian. In short, the facts of record did not support an instruction which advised the jury that Godina, by provoking the attack, had perhaps lost his privilege to use force in self-defense or defense of others.

(Emphasis in original.) As a result, Godina argues that "it largely negated [his] defense in the action without a factual basis for doing so."

⁶ The trial court stated it was accepting the State's argument for giving the instruction. The argument was not on the record.

¶13 A trial court has broad discretion in deciding whether to give a particular jury instruction, and the court must exercise its discretion “to fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence.” *State v. Coleman*, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996) (citation omitted). However, we will independently review whether a jury instruction is appropriate under the specific facts of a given case. *State v. Groth*, 2002 WI App 299, ¶8, 258 Wis. 2d 889, 655 N.W.2d 163, *overruled on other grounds by State v. Tjepelman*, 2006 WI 66, ¶31, 291 Wis. 2d 179, 717 N.W.2d 1.

¶14 The trial court combined WIS JI—CRIMINAL 835 with WIS JI—CRIMINAL 830, and gave the following instruction:

Defense of another is an issue in this case. The law of defense of another allows the defendant to threaten or intentionally use force to defend another only if:

The defendant believed that there was an actual or imminent unlawful interference with the person of Miguel Lopez; and,

The defendant believed that Miguel Lopez was entitled to use or threaten to use force in self-defense; and,

The defendant believed that the amount of force used or threatened by the defendant was necessary for the protection of Miguel Lopez; and,

The defendant’s beliefs were reasonable.

The defendant may intentionally use or threaten force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force was necessary to prevent imminent death or great bodily harm to Miguel Lopez.

You should also consider whether the defendant provoked the attack. A person who engages in unlawful conduct of a type likely to provoke others to attack, and who does provoke an attack, is not allowed to use or

threaten force in self-defense or defense of others against that attack.

However, if the attack which follows causes the person reasonably to believe that he or another is in imminent danger of death or great bodily harm, he may act lawfully in self-defense or defense of another. But the person may not use or threaten force intended or likely to cause death or great bodily harm unless he reasonably believes he has exhausted every other reasonable means to escape from or otherwise avoid death or great bodily harm.

¶15 As noted, Godina claims that there was no evidence to support that he engaged in any conduct that would provoke others to attack. We disagree.

¶16 Testimony in the record revealed that the reason for the car chase was to extract some sort of vengeance on the rival C-14 gang member who flashed his gang sign in front of members of the Mexican Posse gang. The chase was not merely a sporting event among young men driving cars. The gang members had to have believed that the other gang intended some sort of harm, or there would not have been a chase in the first place. Supporting this theory is the fact that Godina had a gun and Miguel possessed a tire iron, and when the two arrived at the scene of the Lincoln car crash, they exited the car with their weapons and ran after the person who had exited from the Lincoln. Deciding to chase the rival gang member was sufficient evidence to provoke the rival gang members into believing they were going to be attacked. Thus, that evidence is sufficient to permit the trial court to give the provocation instruction. Moreover, the State presented a video from a local store that supported the State's suggestion that the occupants of the Ford Explorer witnessed the C-14 gang member being chased by Godina and Miguel, and the driver may have purposefully struck Miguel to prevent their fellow gang member from being injured. This hypothesis would also permit the giving of the instruction. Thus, the underpinnings for a provocation

instruction were met and the giving of the provocation instruction was proper. For the reasons stated, the judgment of conviction is affirmed.

By the Court.—Judgment affirmed.

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