COURT OF APPEALS
DECISION
DATED AND FILED

June 17, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2568-CR **Cir. Ct. No. 01 CF 2932**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NOEL DAVILA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Noel Davila appeals from a judgment of conviction, following a jury trial, for first-degree reckless homicide, while armed

with a dangerous weapon, and from the order denying his motion for postconviction relief.[1] He presents several issues for review. We affirm.

I. BACKGROUND

¶2 At approximately 6:30 p.m. on June 1, 2001, Davila and his roommate, Ricky Zielinski, stopped their car at the intersection of 26th and Burnham Streets to argue with occupants of a car with which they had nearly collided. Rey Ruiz and Mark Palacios, driving from the tavern they had just left, came upon the blocked intersection and exited their car to see what was happening. A confrontation ensued and developed into two fights, one between Zielinski and Ruiz, the other between Davila and Palacios. Moments later, Zielinski stabbed Ruiz and Davila stabbed Palacios, killing him.

¶3 Zielinksi and Davila fled the scene but subsequently turned themselves in and were charged with crimes related to the stabbings. After plea negotiations, Zielinski pled no contest to first-degree reckless injury and agreed to testify at Davila's trial.

¶4 At trial, Davila claimed that he acted in self-defense and in defense of Zielinski when he stabbed Palacios. Davila testified that he felt threatened when Palacios confronted him with his hand behind his back. Davila said he thought that Palacios might have had a gun, so he pulled out his buck knife and

[1] We note that the judgment of conviction is for first-degree reckless homicide, while armed; the complaint and information, however, charge the offense as party to a crime. The trial court did not instruct on party-to-a-crime liability, and the jury's verdict states: "We, the Jury, find the defendant, Noel Davila, guilty of First[-]Degree Reckless Homicide as charged in the Information." Obviously, therefore, certain technical defects are in this record. Neither party, however, has raised any issue related to these discrepancies. If either party deems it necessary to return to the trial court to amend the judgment, it may do so.

opened it. When Palacios punched him, Davila retaliated by stabbing him multiple times in the leg, abdomen, and chest.

¶5 The State rebutted Davila's defense by introducing Davila's post-arrest statement in which he described his repeated stabbing of Palacios. Detective Alfonso Morales testified that Davila told him that he stabbed Palacios because he (Palacios) was not backing away. Detective Morales stated that Davila never claimed that he had feared for his life or that he had stabbed Palacios because he had feared Palacios would kill him or Zielinski. Davila also told Detective Morales that as he and Zielinski drove away from the scene, he (Davila) threw his knife out the car window, and that after returning home, he destroyed his clothing.

¶6 The State also called Zielinski who testified that he saw Davila and Palacios fighting, and that he saw Davila "swing with upward motion to [Palacios'] chest." He further stated that moments later he saw Palacios's shirt covered in blood and heard Davila yell, "let's get the fuck out of here." Zielinski also testified that he never heard Palacios threaten to shoot Davila, and never heard Davila's claim that Palacios had a gun. He also denied having told his fiancé that "[Davila] pulled out his knife and went crazy on [Palacios]."

¶7 After an eight-day trial, the jury convicted Davila. The trial court sentenced him to forty years in prison, consisting of twenty-five years of initial confinement and fifteen years of extended supervision. Davila filed a motion for postconviction relief, which the trial court denied without a hearing.

II. ANALYSIS

¶8 Davila first argues that the trial court erroneously exercised discretion by allowing the State to elicit testimony from Zielinski about his (Zielinski's) actions and state of mind. Davila argues that such testimony was not relevant to whether he (Davila) was or could have been acting in self defense. Davila also argues that counsel was ineffective for failing to object to such testimony. We reject his arguments.

¶9 At trial Davila never objected to any of Zielinski's testimony. As a result, he waived any claimed error. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 737 (Generally, issues not preserved by a contemporaneous objection will not be reviewed on appeal.). Thus, our review of these claimed errors is limited to Davila's ineffective-assistance-of-counsel claims.

¶10 To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden of establishing that counsel's performance was deficient and that the deficient performance produced prejudice. ***State v. Sanchez***, 201 Wis. 2d 219, 232-36, 548 N.W.2d 69 (1996). To show prejudice, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶11 Ineffective-assistance-of-counsel claims present mixed questions of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous.

State v. Harvey, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant present questions of law, which we review *de novo*. ***Pitsch***, 124 Wis. 2d at 634. The defendant has the burden of persuasion on both prongs of the test, and a reviewing court need not address both prongs if the defendant fails to make a sufficient showing on one. ***Strickland***, 466 U.S. at 687, 697.

¶12 A defendant is not automatically entitled to a hearing on a postconviction motion. ***State v. Bentley***, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996). If a defendant presents only conclusory allegations that fail to raise a question of fact, or if the record conclusively demonstrates that the defendant is not entitled to relief, the court may deny the motion on its face. ***Id.*** at 309-10. Whether a motion alleges facts warranting relief, thus entitling a defendant to a hearing, is a legal issue we review *de novo*. ***Id.*** at 310. If the motion and affidavits fail to allege sufficient facts, the trial court has discretion to deny the postconviction motion without a hearing, ***id.*** at 310-11, and this court reviews that denial solely to determine whether the court erroneously exercised discretion, ***id.*** at 311.

¶13 Davila's argument that his counsel was ineffective for not objecting to Zielinski's testimony fails for a number of reasons. First, Davila never specifies the allegedly objectionable testimony. Instead, he implies that none of it was relevant given that the fights were separate, and given that Zielinski testified that he did not see most of Davila's fight with Palacios. We disagree. Zielinski's testimony was clearly relevant to help the jury understand the context of the whole incident. He testified about the activities leading up to the fights, described what he witnessed of the fight between Davila and Palacios, and related that Davila

never told him that he (Davila) thought Palacios had a gun. Clearly, Zielinski's testimony was relevant to rebut Davila's defense.

¶14 Second, as the State points out, while Davila's argument might be tenable if he had pursued only a theory of self-defense, his argument is flawed because, at trial, Davila also pursued a theory of "defense of others." *See* WIS JI—CRIMINAL 830.[2] Thus, as the State explains: "Davila was entitled to use deadly

[2] WISCONSIN JI—CRIMINAL 830, provides:

> 830 PRIVILEGE: DEFENSE OF OTHERS: FORCE INTENDED OR LIKELY TO CAUSE DEATH OR GREAT BODILY HARM
>
> Defense of others is an issue in this case. The law of defense of others allows a person to threaten or intentionally use force to defend another under certain circumstances.
>
> The state must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was not acting lawfully in defense of others.
>
> The law allows the defendant to act in defense of others only if the defendant believed that there was an actual or imminent unlawful interference with the person of (name of third person), believed that (name of third person) was entitled to use or to threaten to use force in self-defense, and believed that the amount of force used or threatened by the defendant was necessary for the protection of (name of third person). The defendant may intentionally use or threaten force which is intended or likely to cause death or great bodily harm only if he believed that such force was necessary to prevent imminent death or great bodily harm to (name of third person).
>
> In addition, the defendant's beliefs must have been reasonable. A belief may be reasonable, even though mistaken. In determining whether the defendant's beliefs were reasonable the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now.

force to defend Zielinski only if Davila reasonably believed Zielinski himself was entitled to use deadly force in self defense. Accordingly, the issue of whether Zielinski was entitled to use self-defense and the degree of force (if any) he was entitled to use were relevant issues in this case." Therefore, the State maintains, any objection to Zielinski's testimony about his own conduct and state of mind would have been meritless. The State is correct, and Davila offers no response. *See* ***State v. Peterson***, 222 Wis. 2d 449, 459, 588 N.W.2d 84 (Ct. App. 1998) (unrefuted arguments deemed conceded).

¶15 Davila next argues that the trial court erroneously exercised discretion in allowing the State to elicit testimony from Zielinski and Zielinski's fiancé, Margaret Alba, about their attempts to dispose of the car involved in the incident, as evidence of consciousness of guilt, given the lack of evidence that he (Davila) "directed, knew of, assisted in or agreed to those efforts." Again, because Davila did not object to this evidence at trial, only his ineffective-assistance-of-counsel argument will be addressed.

¶16 Here, as with Zielinski's testimony about his own conduct and state of mind, Zielinski's consciousness of guilt was relevant because, as explained, whether Zielinski was entitled to exercise self defense was directly relevant to whether Davila was entitled to use force in the defense of another. Hence, this evidence was relevant and counsel was not deficient for failing to object to it.

¶17 Moreover, Davila has failed to establish that he was prejudiced by this testimony. Here, evidence of the disposal of the car was merely cumulative to evidence of Davila's own disposal of his knife and his clothing, showing his consciousness of guilt. And, regardless of Zielinski's actions, overwhelming evidence established that: (1) Davila stabbed Palacios to death; and (2) Davila was

not entitled to use deadly force because he could not have reasonably believed that use of such force was necessary to prevent imminent death or great bodily harm.

¶18 Davila also argues that his trial counsel was ineffective for failing to "request that [Rey] Ruiz be recalled as a witness so that he could be examined as to his conduct in this case or that the jury be otherwise informed" that, subsequent to testifying at trial, Ruiz had committed perjury in a collateral matter. He argues that counsel's failure to do so establishes a basis for his ineffective-assistance-of-counsel claim. We are not persuaded.

¶19 Ruiz, a participant in the fight and a stabbing victim, testified about the events leading up to the fight. He said that Davila was the aggressor by "flipping them off," and that Zielinski stabbed him several times. Ruiz testified that he did not threaten to kill anyone or pretend to have a gun. He also acknowledged, however, that he did not see the fight between Davila and Palacios.

¶20 After testifying, Ruiz violated the sequestration order by talking to Pauline Hoaglan, a citizen witness who came upon the scene of the fight, while she was waiting outside the courtroom before testifying. After learning this, the trial court, outside the presence of the jury, confronted Ruiz with his alleged violation of the sequestration order. Ruiz initially lied about his understanding of the sequestration order but then admitted having been ordered not to talk to witnesses and having defied the order. He admitted that he had spoken to Hoaglan and had told her not to get "tripped up" by defense counsel. The court concluded that Ruiz's conduct was "outrageous" and held him in contempt.

¶21 Davila argues that the court had an obligation to inform the jury of Ruiz's perjury; he fails, however, to offer any authority to support his argument, particularly given his failure to request the court to do so. *See* ***State v. Pettit***, 171

Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered."). Although Davila fairly argues that counsel's failure to expose Ruiz's conduct and perjury was deficient, he has again failed to establish prejudice. *See* ***State v. Koller***, 2001 WI App 253, ¶7, 248 Wis. 2d 259, 635 N.W.2d 838. Davila never established or even suggested that Ruiz's violation of the sequestration order tainted Hoaglan's testimony. Further, because Ruiz acknowledged that he had not seen the actual fight between Davila and Palacios, his testimony was not critical to the issue of whether Davila acted lawfully in self defense or defense of others. Hence, the evidence of Ruiz's perjury was of little or no consequence.

¶22 Finally, Davila argues that the court erroneously exercised sentencing discretion "in imposing an excessive sentence where … the comments … at sentencing demonstrate that the sentence was not based upon facts that are of the record or that could reasonably be derived from the record." Specifically, Davila challenges the court's comments that he could have "continued driving that vehicle away from the situation." We reject his argument.

¶23 The principles governing appellate review of a court's sentencing decision are well established. *See* ***State v. Larsen***, 141 Wis. 2d 412, 426, 415 N.W.2d 535 (Ct. App. 1987). Appellate review is tempered by a strong policy against interfering with the trial court's sentencing discretion. ***Id.*** We will not remand for resentencing absent an erroneous exercise of discretion. ***State v. Thompson***, 172 Wis. 2d 257, 263, 493 N.W.2d 729 (Ct. App. 1992). In reviewing whether a court erroneously exercised sentencing discretion, we consider: (1) whether the court considered the appropriate sentencing factors; and (2) whether the court imposed an excessive sentence. ***State v. Glotz***, 122 Wis. 2d 519, 524, 362 N.W.2d 179 (Ct. App. 1984). To obtain relief on appeal, a defendant "must

show some unreasonable or unjustified basis in the record for the sentence imposed." ***State v. Borrell***, 167 Wis. 2d 749, 782, 482 N.W.2d 883 (1992). Here, Davila has failed to establish any basis for relief.

¶24 During sentencing, the court stated to Davila: "You had the keys. You were in control of how that vehicle went, like in a different direction than the other vehicle." Davila points out, however, that Zielinski was the driver, that it was Zielinski's car, that the car had a stick shift and that no evidence established that he knew how to drive a stick shift. At his sentencing, however, Davila failed to challenge the sentencing court's comments, never pointing out that he was not the driver. Thus, he waived this challenge. *See* ***Koller***, 248 Wis. 2d 259, ¶7.

¶25 Nevertheless, even addressing the merits of his argument, we conclude that the record establishes that the trial court's statements regarding Davila's ability to have driven away were not a critical factor at sentencing. *See* ***State v. Littrup***, 164 Wis. 2d 120, 132, 473 N.W.2d 164 (Ct. App. 1991) (defendant must show court actually relied on inaccurate information at sentencing). Rather, what was a critical factor, in the court's view, was Davila's failure to avoid the fight altogether, his decision to use a knife to fight an unarmed person, and his actions—stabbing the victim repeatedly, and delivering the final, fatal stab wound to the heart. Consequently, the trial court properly denied Davila's request for sentence modification.

By the Court.—Judgment and order affirmed.

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