COURT OF APPEALS
DECISION
DATED AND FILED

May 4, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1404-CR **Cir. Ct. No. 2008CF988**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERTO I. SERVANTEZ,

DEFENDANT-APPELLANT.

APPEAL from judgment and an order of the circuit court for Racine County: STEPHEN A. SIMANEK, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Roberto I. Servantez pled guilty to threats to injure, as a repeat offender, contrary to WIS. STAT. §§ 943.30(1) and 939.62(1)(b) (2009-

10).[1] He appeals from the judgment of conviction, and from the order denying his postconviction motion to withdraw his plea and for a new trial. Servantez argues that defense counsel's failure to advise him before he pled that an affirmative defense was available to him constituted ineffective assistance, rendered his plea defective and resulted in the real controversy not being tried. We affirm on the basis that counsel had no clear duty to inform him of the defense.

¶2 Servantez was in the Racine county jail for failure to pay child support. His relationship with Stephanie Morales, the mother of one of his four children, is contentious. While incarcerated, Servantez used a monitored jail telephone to call Morales 154 times over a two-month period. Morales reported Servantez's many calls to a sheriff's deputy, and that he left threatening voice mail messages. The deputy listened to recorded calls made from the jail dayroom. In one, Servantez left this message for Morales: "I'm a [V]ice [L]ord and my brothers will fuck you up if you don't give me my fucking money[,] bitch." Servantez later asserted that he had instructed Morales to sell rims from his car so that he could bond out but that, after selling the rims, she kept the money.

¶3 The State charged Servantez with threats to injure, stalking and misdemeanor telephone harassment, all as a repeater. He ultimately pled guilty to threats to injure; the other charges were dismissed and read in. He received a five-year prison sentence, with three years' initial confinement.

¶4 Servantez filed a postconviction motion to withdraw his plea and for a new trial. He contended that his trial counsel was ineffective for not raising the

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

affirmative defense of defense of property; that his plea was not knowing, intelligent and voluntary because he was unaware of the defense; and that the real controversy was not fully tried because the defense had not been considered.

¶5 Both Servantez and defense counsel testified at the evidentiary hearing. The court concluded that the affirmative-defense argument had no merit because there was no imminent threat to Servantez's property to justify raising the issue of privilege. The court concluded that counsel therefore could not be held to have performed deficiently. Servantez appeals.

¶6 "Whoever … threatens … any injury to the person … of another, with intent thereby to extort money … or with intent to compel the person so threatened to do any act against the person's will" is guilty of a crime. WIS. STAT. § 943.30(1). Servantez concedes that the message to Morales constitutes a threat to injure under the statute. He asserts, however, that his criminal conduct is privileged under WIS. STAT. § 939.49(1) governing Defense of Property.[2]

¶7 Servantez contends defense counsel's performance was defective because counsel acknowledged that he did not consider this statutory defense.

[2] WISCONSIN STAT. § 939.49(1) provides in relevant part:

> A person is privileged to threaten … force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with the person's property. Only such degree of force or threat thereof may intentionally be used as the actor reasonably believes is necessary to prevent or terminate the interference. It is not reasonable to intentionally use force intended or likely to cause death or great bodily harm for the sole purpose of defense of one's property.

Servantez contends the failure also was prejudicial because it unnecessarily led him to plead guilty.

¶8 When claiming ineffective assistance of counsel, a defendant must establish deficient performance and prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Both deficient performance and prejudice must be shown; thus reviewing courts need not consider one prong if the defendant fails to establish the other. ***Id.*** at 697. To prove deficient performance, the defendant must identify specific acts or omissions that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. There is a "strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To prove prejudice, the defendant must establish a reasonable probability that without counsel's unprofessional errors the result of the proceeding would have been different. ***Strickland***, 466 U.S. at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.***

¶9 A claim of ineffective assistance of counsel presents a mixed question of fact and law. ***State v. O'Brien***, 223 Wis. 2d 303, 324, 588 N.W.2d 8 (1999). We will affirm the trial court's findings of historical fact concerning counsel's performance unless those findings are clearly erroneous. ***Id.*** at 324-25. The ultimate question of ineffective assistance, however, is one of law subject to independent review. ***Id.*** at 325.

¶10 For several reasons, counsel had no clear duty to raise defense of property as an affirmative defense. First, the record does not establish that the rims, and thus the money, if, in fact, Morales sold the rims, even belonged to Servantez. The trial court observed at sentencing:

> [Servantez is] demanding Miss Morales to give him his money back, and here's how it came about. He got sent to jail. He's got assets. He's got $18,000 worth of cars, rims, stereo, and speakers. $18,000 worth. At a time when he is seventeen thousand dollars in arrears on his child support, and it's ironic that the vehicles he has, ["]my money["], the vehicles are registered in Stephanie's name to avoid them being taken by child support.

¶11 The "Offender's Version" portion of the presentence investigation report was the source of the court's comment. Servantez had the opportunity to review and contest any information in the PSI that he believed to be inaccurate. Servantez did not challenge it, perhaps because it came from his own account. Aside from his claim that the rims were his, nothing in the record refutes the implication that Morales, not he, was the registered owner. We will not consider assertions of fact that are not part of the record. *See* ***Jenkins v. Sabourin***, 104 Wis. 2d 309, 313-14, 311 N.W.2d 600 (1981).

¶12 Second, to justify criminal acts on the basis of self-defense, defense of others, or defense of property, danger must be "imminent." *See* ***State v. Dundon***, 226 Wis. 2d 654, 668, 594 N.W.2d 780 (1999). "Imminent" means "ready to take place: near at hand: impending." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 1130 (1993). There is no evidence that unlawful interference, if any, was imminent. We cannot accept Servantez's argument that we should reject the State's "overreach[ing]" reliance on ***Dundon***'s imminence requirement because that language is dicta. This court may not dismiss a statement from a supreme court opinion by concluding that it is dictum. ***Zarder v. Humana Ins. Co.***, 2010 WI 35, ¶58, 324 Wis. 2d 325, 782 N.W.2d 682.

¶13 Third, threatening Morales that he would have his Vice Lord "brothers" "fuck [her] up" likely would have taken Servantez's threat outside the purview of the privilege WIS. STAT. § 939.49(1) affords. A person may threaten

only the degree of force "reasonably believe[d] … necessary" to terminate the interference. ***Id.*** "It is not reasonable to intentionally use force intended or likely to cause … great bodily harm for the sole purpose of defense of one's property." ***Id.***

¶14 Absent a clear duty to raise defense of property as an affirmative defense, counsel was not ineffective. *See* ***State v. McMahon***, 186 Wis. 2d 68, 85, 519 N.W.2d 621 (Ct. App. 1994) (limiting ineffective assistance cases to situations where the law or duty is clear such that a reasonable counsel should know enough to raise the issue). Our conclusion is not altered by counsel's acknowledgment that he did not consider the defense, since raising it would have been fruitless. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (counsel is not ineffective for failing to pursue a meritless issue).

¶15 The ineffective assistance of counsel issue being dispositive, we need not address Servantez's other arguments.

By the Court.—Judgment and order affirmed.

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