COURT OF APPEALS
DECISION
DATED AND FILED

June 23, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP744-CR **Cir. Ct. No. 2008CF151**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHNATHAN E. HYDE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Oconto County: RICHARD DELFORGE, Judge. *Affirmed*.

Before Lundsten, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Johnathan Hyde appeals a judgment convicting him of aggravated battery by use of a dangerous weapon. He also appeals an order denying his postconviction motion for a new trial. Hyde claims that: (1) the circuit court erred in refusing to give the jury a self-defense instruction; (2) trial

counsel provided ineffective assistance by failing to secure the presence of an out-of-state witness; and (3) the circuit court should have granted Hyde's motion to discharge counsel mid-trial. For the reasons discussed below, we reject each of these contentions and affirm.

BACKGROUND

¶2 The State charged Hyde with attempted first-degree intentional homicide and felony battery by use of a dangerous weapon based on allegations that Hyde struck another man, Craig Medema, multiple times with a piece of aluminum conduit at a construction site. Hyde admitted to striking the blows, but claimed that he was defending himself in response to fear generated by a prior incident.

¶3 Defense counsel, Attorney David Brown, intended to call Richard Welch to establish that Medema had acted aggressively toward Hyde during the prior incident. Brown mailed a subpoena to Welch for Welch to show his employer, but did not make arrangements to formally serve Welch because Hyde's father had already made travel arrangements for Welch, and Brown believed that Welch was going to appear voluntarily as a friendly witness. However, Welch did not appear at trial because he was unable to get to the airport. Brown requested an adjournment, which was denied, but did not provide the court with an offer of proof, ask the court to secure Welch's presence, or request the court's leave to allow Welch to testify by phone.

¶4 Hyde sought to discharge Brown on the second day of trial, expressing concern over Brown's alleged lack of preparation and failure to ask certain questions. Brown subsequently explained that he had been out of town for a month before the trial and did not have the file with him, but had been in contact

with his office and felt prepared. The circuit court denied the motion, stating that it was not going to delay the matter after the jury had already been impaneled, but also noting that it would allow the defense to have recesses if Hyde needed to discuss with counsel additional questions to be asked of witnesses.

¶5 Hyde then took the stand.[1] Hyde testified that earlier in the day of the incident Medema had dragged some fiberglass grating being used as a stool past Hyde, striking Hyde's leg. Hyde then threw the grating toward Medema, and asked him what the problem was. Medema told Hyde, "You ain't nothing but a punk. If that grating would have hit me, I would have whooped your ass." Hyde responded that he wasn't scared of Medema, and Medema told him, "Well, you should be." Hyde then decided the hostility level was too high for him and Medema to work together, so he packed up his tools and left the work site.

¶6 Hyde returned to the hotel where he'd been staying to pack up, but then came back to the site in order to inform the foreman that he was quitting. Another foreman who was friendly with Medema, Lance Krause, followed Hyde as he walked back toward his truck. According to Hyde, this made him so uneasy that he picked up a piece of aluminum conduit for protection. As Hyde came around a blind corner, he encountered Medema, who had a drill in his hand. Hyde testified that he feared that Medema and Krause were going to jump him, so he preemptively attacked Medema with the conduit. When Medema tried to run away, Hyde followed him because Krause was coming at Hyde from the other

[1] Although Hyde's account differed in some respects from that of other witnesses, we will accept his account for the purpose of determining whether there was a sufficient evidentiary basis for a self-defense instruction.

direction. Hyde struck some additional blows to get by Medema, and then ran toward his truck.

¶7 On cross-examination, Hyde admitted that the conduit attack occurred about thirty to forty-five minutes after the incident with the grating stool, and was not a direct response to it, though it had caused him to be fearful. He acknowledged that the drill Medema had in his hand was not operational because it was not plugged in. Hyde also acknowledged that the drill Medema held in front of himself in a defensive posture became bent during the attack. Hyde further admitted that he said, "Who's the punk now," as he hit Medema, and that he did "more than [he] had to [do to] get away from Mr. Medema."

¶8 Following the close of evidence, Brown requested a self-defense instruction for both the homicide and aggravated battery charges. The record does not contain the proposed instruction, and Brown's argument to the court does not clarify whether an instruction on necessary or unnecessary force was sought. The circuit court denied the request on the ground that no evidence was presented establishing that Hyde had an objectively reasonable belief that he needed to use force to stop an unlawful interference with his person.

¶9 The jury acquitted Hyde on the attempted homicide charge, but found him guilty of aggravated battery. The circuit court denied Hyde's postconviction motion, and he now appeals.

DISCUSSION

Jury Instruction

¶10 There are two different types of self-defense justifications available in Wisconsin: the use of necessary force (also known as "perfect" self-defense),

and the use of unnecessary force (also known as "imperfect" self-defense), which may be used to mitigate a charge of first-degree intentional homicide to second-degree intentional homicide. *See* ***State v. Head***, 2002 WI 99, ¶45, 255 Wis. 2d 194, 648 N.W.2d 413. A defendant is entitled to an imperfect self-defense instruction if there is some evidence to show that the defendant held a subjective belief that he or she was in danger of great bodily harm, regardless whether that belief was reasonable. *See* WIS. STAT. § 940.01(2)(b) (2009-10);[2] ***Head***, 255 Wis. 2d 194, ¶124. In order to obtain a perfect self-defense instruction, the party requesting it must point to some evidence to show that the defendant held an objectively reasonable belief that force was necessary to prevent or terminate an unlawful interference with the defendant's person. *See* WIS. STAT. § 939.48(1); ***Head***, 255 Wis. 2d 194, ¶125. Whether sufficient facts have been presented to warrant a self-defense instruction is a question of law subject to *de novo* review. ***State v. Peters***, 2002 WI App 243, ¶12, 258 Wis. 2d 148, 653 N.W.2d 300.

¶11 Hyde contends that the circuit court erred when it rejected his request for a self-defense instruction based on the court's view that there was no evidence to support an objectively reasonable belief that Hyde needed to use force to defend himself from Medema, without considering whether there was evidence that Hyde subjectively believed that he was in danger of being harmed by Medema based upon the prior incident. Hyde's argument appears to confuse the standards for perfect and imperfect self-defense. In other words, evidence that Hyde held a subjective fear of Medema based upon the earlier incident—absent some additional evidence that the circumstances at the time of the attack gave rise to an

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

objectively reasonable belief that force was necessary to stop an interference with his person—would at most have supported an imperfect self-defense instruction on the attempted homicide charge. Since Hyde was acquitted of the attempted homicide charge, the question whether the circuit court should have provided an imperfect self-defense instruction based upon the earlier incident is moot.

¶12 With respect to the aggravated battery charge on which Hyde was convicted, the only potentially available statutory justification was perfect self-defense under WIS. STAT. § 939.48(1). Therefore, the circuit court properly applied the "objectively reasonable" test to the evidence when considering whether Hyde was entitled to a perfect self-defense instruction on the aggravated battery charge. We agree with the circuit court's conclusion that the evidence presented did not meet that standard. Hyde's own testimony established that he attacked Medema with the conduit as soon as he saw Medema and that he followed Medema when Medema tried to run away. Even assuming, for the sake of argument, that prior interactions with Medema may have left Hyde in subjective fear of Medema, there was absolutely no evidence that Medema was engaging in any conduct that could reasonably be classified as an unlawful interference with Hyde's person at the time Hyde attacked him.

Ineffective Assistance

¶13 The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. Claims of ineffective assistance of counsel present mixed questions of law and fact. ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). We will not set aside the circuit court's

findings about counsel's actions and the reasons for them, unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's constitutional right to the effective assistance of counsel is ultimately a legal determination, which this court decides *de novo*. ***Id.***

¶14 Hyde argues that trial counsel provided ineffective assistance by failing to secure the presence of Welch at trial. We will assume for the sake of argument that failing to serve Welch with a subpoena constituted deficient performance, since Welch could have provided a third-party confirmation of the primary incident that Hyde claimed triggered his subjective fear of Medema. Again, however, the primary relevance of Hyde's claimed subjective fear would have been to mitigate the homicide charge based upon an imperfect self-defense theory. Welch did not observe the subsequent conduit attack, and therefore had no information that would have changed the evaluation of whether Hyde was entitled to a perfect self-defense instruction on the aggravated battery charge. That is, Welch's testimony about prior events would not have made it any more objectively reasonable for Hyde to have believed it was necessary to attack Medema with a conduit in order to stop a non-existent interference with Hyde's person. Because Hyde was acquitted of the homicide charge to which Welch's testimony might have been relevant, we conclude that Hyde cannot demonstrate prejudice stemming from counsel's failure to secure Welch's presence at trial.

Motion To Discharge Counsel

¶15 "If, at any point in the proceedings, a defendant presents a substantial complaint that reasonably could be interpreted as a request for new counsel, the trial court should inquire into the reasons for the request and

determine whether new counsel is required." ***State v. McDowell***, 2003 WI App 168, ¶25, 266 Wis. 2d 599, 669 N.W.2d 204. A circuit court has discretion whether to grant a requested discharge of counsel, taking into account the length of the requested delay; the availability of successor counsel; prior requests for continuances by the defendant; the inconvenience to the parties, the witnesses, and the court; the legitimacy of the reason for the request; and whether the request is being made for dilatory purposes. *See* ***State v. McMorris***, 2007 WI App 231, ¶19, 306 Wis. 2d 79, 742 N.W.2d 322. In reviewing the circuit court's exercise of its discretion, this court will consider the adequacy of the court's inquiry; the timeliness of the defendant's motion; whether an alleged conflict resulted in a total lack of communication, prevented an adequate defense, or frustrated a fair presentation of the case; and whether there was good cause for the substitution. ***State v. Lomax***, 146 Wis. 2d 356, 359-60, 432 N.W.2d 89 (1988).

¶16 Hyde claims that the circuit court prevented him from making a contemporaneous record as to why he wished to discharge counsel, and did not adequately address the relevant factors. We disagree. The court gave both Hyde and defense counsel an opportunity to explain the basis for the discharge request. The court then balanced the proffered reason for the discharge request—Hyde's dissatisfaction with counsel's preparation and questions—against the fact that the case was already in the middle of trial.

¶17 While the court's inquiry into the reason for the discharge request was not extensive, there was little need to delve further given the obvious strength of the factors weighing against allowing counsel to withdraw in the middle of trial. It was plain from the court's discussion that it would have taken an extraordinary problem with counsel to warrant the requested relief at that stage in the proceedings, since it would have resulted in a mistrial, wasting the time of the

court, the prosecutor, witnesses, and jurors. Nothing in either Hyde's or counsel's explanations even hinted at a problem of that magnitude. In other words, the requested relief was both untimely and poorly supported. Denying the requested relief clearly did not prevent counsel from presenting an adequate defense on Hyde's behalf, since counsel was able to obtain an acquittal on the most serious charge. We therefore see no basis to set aside the circuit court's exercise of discretion in refusing the discharge request.

By the Court.—Judgment and order affirmed.

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