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DISTRICT I

May 2, 2023

To:

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Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Sara Lynn Shaeffer
Electronic Notice

James A. Walrath
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You are hereby notified that the Court has entered the following opinion and order:

2020AP2101-CR State of Wisconsin v. Devin Levar Henderson
(L.C. # 2018CF1296)

Before Brash, C.J., Dugan and White, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Devin Levar Henderson appeals from a judgment of conviction and from an order denying his postconviction motion. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] The judgment and order are summarily affirmed.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Background

On March 18, 2018, West Allis police responded to an early-morning complaint of an intoxicated and aggressive person at a residence. When police arrived, Henderson was "yelling and being hostile" and refused commands to come out of the residence. Officers eventually forced entry and had to "actively fight[]" Henderson, which included deploying a Taser, to get him in handcuffs. Henderson was initially charged with one count of failure to comply with an officer's attempt to take a person into custody. An amended information later added a charge of making a threat to a law enforcement officer—specifically, Sergeant J.M.—contrary to WIS. STAT. § 940.203(2) (2017-18).

At trial, three officers and Sergeant J.M. testified about the various things Henderson said while he was being taken into custody.[2] Officer A.S. testified that Henderson said, "he would kick our asses. That he would kill us. That he would break our necks multiple times." When asked whether he felt threatened, A.S. testified, "I did. Based on Mr. Henderson's size and his agitation level, I wholeheartedly believed that if he were out of handcuffs that he would continue to fight us and attempt to kill us." A.S. testified that he takes it seriously when someone threatens to kill him and that he believed Henderson when he said he would shoot police if they ever came to his house again.

Sergeant J.M. testified that when he arrived, officers were ordering Henderson out of the residence, but he refused by cursing at officers and demanding they leave his property. After forcing entry, police ordered Henderson to the ground. He complied, but refused orders to put

[2] Body camera footage from at least three officers was also played at trial.

his arms to the side, cursing again. J.M. testified that Henderson made three "direct threats." The State asked J.M., "And what sorts of the things specifically did you believe that these were true threats to yourself or other officers?" He answered, "Just the adamancy of them, the continuation of them from when inside the house and then back outside. Outside the residence, he was specific about it in regard to knowing [Martial] Arts or karate specifically. So that seemed very valid to me."

Officer R.S. testified that when he arrived on scene, Henderson was very agitated, telling officers to get off of his property and that "I will shoot you." As police finally escorted Henderson from the residence, R.S. heard him tell Sergeant J.M., "I will kill you."

Officer R.F., who rode in the ambulance with Henderson so he could be medically cleared after being tased, testified that Henderson was saying "[v]arious vulgarities" and was "[s]houting that he was going to get a gun." R.F. also testified that Henderson said that "[i]f we came back to his residence he was going to be strapped up. One shot, one kill. That you need to call the coroner." R.F. testified that he took the threats seriously. When asked why, R.F. explained that the threats

> seemed to be rather directed towards us. Previous times I have had, you know, vague statements towards me, but in this specific situation they are more direct. He seemed rather focused on, you know, mentioning that he … was going to be having a firearm and he was going to come after us.

The jury ultimately acquitted Henderson of the failure to comply charge but convicted him of threatening an officer.

Under the applicable jurisprudence, "[o]nly a 'true threat' is constitutionally punishable under statutes criminalizing threats"; other threats are protected speech. *See* ***State v. Perkins***,

2001 WI 46, ¶17, 243 Wis. 2d 141, 626 N.W.2d 762. The phrase "true threat" is a term of art used to refer to threatening language that is not protected by the First Amendment. ***Id.*** Thus, when Henderson filed a postconviction motion seeking a new trial, he claimed that the State had introduced "irrelevant and unduly prejudicial opinion testimony from police officers relating to the ultimate issue in the case," which was whether Henderson made "true threats" to J.M. Anticipating that the trial court might find this issue had been waived, Henderson also sought an evidentiary hearing on claims that trial counsel was ineffective.

The trial court denied the motion. It explained that any challenge to the officers' testimony was "clearly forfeited" by lack of contemporaneous objection. The trial court also concluded that even if trial counsel had objected, the officers still would have been permitted to testify about the circumstances surrounding Henderson's statements, including their reactions to the alleged threats. The trial court, therefore, concluded that Henderson had not shown any prejudice, meaning he failed to satisfy the burden for alleging ineffective assistance of counsel. Henderson appeals.

Discussion

In general, opinion testimony is only permitted from expert witnesses with specialized "knowledge, skill, experience, training or education[.]" *See* WIS. STAT. § 907.02(1). Non-expert opinion testimony is limited to opinions that are rationally based on the witness's perception, helpful to the determination of a fact in issue, and not based on scientific, technical, or other specialized knowledge within the scope of an expert witness. *See* WIS. STAT. § 907.01. Opinion testimony that is otherwise admissible is not objectionable simply because it "embraces an ultimate issue to be decided by the trier of fact." *See* WIS. STAT. § 907.04. However, the

ultimate issue "may not … be one that is a legal concept for which the jury needs definitional instructions." *See* ***Lievrouw v. Roth***, 157 Wis. 2d 332, 351-52, 459 N.W.2d 850 (Ct. App. 1990).

On appeal, Henderson complains that the State "introduced irrelevant and unduly prejudicial opinion testimony that went beyond eliciting how police officers reacted to Henderson's statements, and instead elicited their opinions that Henderson had made 'serious' and 'true threats' of harm." He further contends that the officers "gave opinion evidence in response to the prosecutor's leading questions" about how seriously they took the threats and asserts that this "line of questioning was improper, and the predictable answers from the officers were unduly prejudicial." Specifically, Henderson contends that the officers' testimony was objectionable because whether something is a "true threat" is the type of ultimate issue on which ***Lievrouw*** prohibits opinion testimony.

First, we note that the trial court correctly determined that Henderson had forfeited any challenge to the officers' testimony by failing to object to that testimony at the time of trial. *See* WIS. STAT. § 901.03(1)(a); ***State v. Gustafson***, 119 Wis. 2d 676, 683, 350 N.W.2d 653 (1984); *see also* ***State v. Mercado***, 2021 WI 2, ¶35, 395 Wis. 2d 296, 953 N.W.2d 337. On appeal, Henderson does not challenge the validity of the forfeiture determination. Because of that forfeiture, however, Henderson's postconviction motion also alleged that trial counsel was ineffective for failing to make the necessary objections.

"To prevail on an ineffective assistance claim, a defendant must prove both that counsel performed deficiently and that the deficient performance prejudiced the defense." ***State v. Prescott***, 2012 WI App 136, ¶11, 345 Wis. 2d 313, 825 N.W.2d 515. "If a defendant fails to

establish either prong … we need not determine whether the other prong was satisfied." ***Id.*** "Whether a defendant received ineffective assistance of counsel presents a mixed question of fact and law." ***State v. Domke***, 2011 WI 95, ¶33, 337 Wis. 2d 268, 805 N.W.2d 364. We uphold the circuit court's findings of fact unless clearly erroneous, though we review *de novo* the ultimate conclusion of whether counsel was ineffective. *See* ***id.***

Here, we need not determine whether there was any deficient performance because we conclude that there was no prejudice. First, a "true threat" means "that a reasonable person making the threat would foresee that a reasonable person would interpret the threat as a serious expression of intent to do harm." *See* WIS JI—CRIMINAL 1240D. One of Henderson's concerns was that the officers' opinions may have misled the jury into believing that the proper perspective for determining a true threat "was the perspective of the arresting police officers" rather than a reasonable person. However, the jury was properly instructed on what constitutes a "true threat." We presume jurors follow the trial court's instructions, *see* ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989), so we presume that the jury applied the "reasonable person" standard. Henderson does not contend that there is insufficient evidence to support the verdict as the jury was instructed or point to any evidence that might rebut the presumption.

Moreover, in determining whether a statement is a true threat, the totality of the circumstances must be considered. *See* ***Perkins***, 243 Wis. 2d 141, ¶29. This includes consideration of the full context of the statement, including all relevant factors that might affect how the statement could reasonably be interpreted. *See* ***id.***, ¶31. These factors include:

> how the recipient and other listeners reacted to the alleged threat, whether the threat was conditional, whether it was communicated

> directly to its victim, whether the maker of the threat had made similar statements to the victim on other occasions, and whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence.

The officers' testimony clearly informs on each of these factors and, thus, was properly admitted.

Upon the foregoing, therefore

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals