COURT OF APPEALS
DECISION
DATED AND FILED

March 7, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 98-1768-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEREMY ARMSTRONG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Jeremy Armstrong appeals from a judgment of conviction entered after a jury found him guilty of first-degree reckless homicide.

See WIS. STAT. § 940.02 (1995-96).[1] Armstrong argues: (1) that the trial court erred in excluding polygraph evidence from the hearing on his motion to suppress his custodial statement; (2) that his custodial statement was coerced, and, therefore, should have been suppressed; (3) that the trial court erred in refusing to instruct the jury on self-defense; (4) that the trial court read the jury instructions in the wrong order, thus preventing the jury from acquitting him on the basis of self-defense; (5) that the juvenile disposition statutes are unconstitutional; and (6) that the trial court erred in refusing his request for a juvenile disposition. We affirm.

BACKGROUND

¶2 On June 19, 1997, Armstrong, then fifteen years old, shot and killed his father's roommate, Robert Drury. Earlier that day, Armstrong had learned that Drury had cashed some checks and was carrying a large amount of money. Armstrong armed himself with a gun, went to his father's home with a few of his friends, and waited for Drury to arrive so he could rob him.

¶3 According to Armstrong's trial testimony, when Drury arrived, he showed Armstrong his money and swatted Armstrong on the head with the wad of bills. Armstrong then pulled out his gun and demanded the money from Drury, but Drury refused to give Armstrong the money, laughed at him and walked away. Armstrong raised the gun and repeated his demand for the money, but Drury said that Armstrong would have to kill him to get the money. Armstrong testified that Drury then lunged for the gun, and Armstrong closed his eyes and fired. Drury fell to the floor, then Armstrong and his friends fled from the home.

[1] All references to the Wisconsin Statutes are to the 1995-96 version unless otherwise noted.

¶4 Armstrong testified that after he fled, he dropped the gun in a field. He also realized that he had not taken the money from Drury after shooting him, so he went back to get the money. Armstrong testified that he reached into Drury's front pocket and took the money, and then returned to the place where he dropped the gun and retrieved it. Later that day, Armstrong and his friends went out to dinner and to an arcade.

¶5 Two days later, the police discovered Drury's body, and learned that Armstrong was involved in the shooting. On June 22, 1997, the police saw Armstrong walking down the road, identified themselves as police officers and ordered Armstrong to stop. Armstrong fled from the police, and they chased him on foot. The police caught up with Armstrong when his path of flight was blocked by a fence. Armstrong struggled with the police as they attempted to arrest and handcuff him, and he injured his forehead during the struggle. The police called an ambulance to treat the injury, but Armstrong refused treatment and was then taken to the police station, where he eventually gave an inculpatory statement regarding the shooting.

¶6 Armstrong was subsequently charged with first-degree intentional homicide. He filed a motion to suppress his inculpatory custodial statement, but the trial court denied the motion after a hearing. Thereafter, Armstrong was tried by a jury and found guilty of the lesser offense of first-degree reckless homicide. Armstrong requested that he be given a juvenile disposition rather than a criminal sentence, but the trial court denied the motion after a hearing. The trial court sentenced Armstrong to an indeterminate period of confinement, not to exceed twenty years.

DISCUSSION

¶7 Armstrong argues that the trial court erred in excluding polygraph evidence from the hearing on his motion to suppress his custodial statement. He asserts that the results of a polygraph test he took would have supported his claim that his custodial statement was coerced.

¶8 As Armstrong acknowledges, ***State v. Dean*** held that "polygraph evidence is not to be admitted in any criminal proceeding in this state." 103 Wis. 2d 228, 229, 307 N.W.2d 628, 629 (1981). Armstrong asserts, however, that the rule announced in ***Dean*** has been legislatively overruled by WIS. STAT. § 301.132. We disagree.

¶9 WISCONSIN STAT. § 301.132 provides:

> **Honesty testing of sex offenders. (1)** In this section:
>
> (a) "Lie detector" has the meaning given in s. 111.37 (1) (b).
>
> (b) "Polygraph" has the meaning given in s. 111.37 (1) (c).
>
> (c) "Sex offender" means a person in the custody of the department who meets any of the criteria specified in s. 301.45 (1).
>
> **(2)** The department may require, as a condition of probation or parole, that a probationer or parolee who is a sex offender submit to a lie detector test when directed to do so by the department.
>
> **(3)** The department shall promulgate rules establishing a lie detector test program for probationers and parolees who are sex offenders. The rules shall provide for assessment of fees upon probationers and parolees to partially offset the costs of the program.[2]

[2] The current version of this statute also applies to "persons on extended supervision who are sex offenders." *See* WIS. STAT. § 301.132 (1997-98).

This statute does not relate to the admissibility of polygraph evidence in criminal proceedings; it provides only that sex offenders may be required to take lie detector tests as a condition of probation or parole, not that the results of those tests will be admissible in a criminal proceeding.[3] We reject Armstrong's assertion that ***Dean*** has been legislatively overruled.

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[3] Indeed, WIS. STAT. § 942.06 limits the use of polygraph evidence obtained under WIS. STAT. § 301.132:

> **Use of polygraphs and similar tests. (1)** Except as provided in sub. (2m), no person may require or administer a polygraph, voice stress analysis, psychological stress evaluator or any other similar test purporting to test honesty without the prior written and informed consent of the subject.
>
> **(2)** Except as provided in sub. (2q), no person may disclose that another person has taken a polygraph, voice stress analysis, psychological stress evaluator or any other similar test purporting to test honesty and no person may disclose the results of such a test to any person except the person tested, without the prior written and informed consent of the subject.
>
> **(2m)** Subsection (1) does not apply to any of the following:
>
> (a) An employe or agent of the department of corrections who conducts a lie detector test of a probationer, parolee or person on extended supervision under the rules promulgated under s. 301.132.
>
> (b) An employe or agent of the department of health and family services who conducts a lie detector test of a person under the rules promulgated under s. 51.375.
>
> **(2q)** Subsection (2) does not apply to any of the following:
>
> (a) An employe or agent of the department of corrections who discloses, to any of the following, the fact that a probationer or parolee has had a lie detector test under the rules promulgated under s. 301.132 or the results of such a lie detector test:
>
> 1. Another employe or agent of the department of corrections.
>
> 2. Another agency or person, if the information disclosed will be used for purposes related to correctional programming or care and treatment.
>
> (b) An employe or agent of the department of health and family who discloses, to any of the following, the fact that a person has had a lie detector test under the rules promulgated under s. 51.375 or the results of such a lie detector test:
>
> 1. Another employe or agent of the department of health and family services.
>
> 2. Another agency or person, if the information disclosed will be used for purposes related to programming or care and treatment for the person.

(continued)

¶10 Armstrong next claims that the trial court erred in concluding that his custodial statement was not coerced. He asserts that his statement was coerced by a detective who "grabbed him by the neck, squeezed his neck, smashed his head against the wall and told him if he did not confess, he would go to prison where he would be raped all night long." Brief of Defendant-Appellant at 19-20.

> In determining whether a confession was voluntarily made, the essential inquiry is whether the confession was procured via coercive means or whether it was the product of improper pressures exercised by the police. The presence or absence of actual coercion or improper police practices is the focus of the inquiry because it is determinative on the issue of whether the inculpatory statement was the product of a "free and unconstrained will, reflecting deliberateness of choice."

State v. Clappes, 136 Wis. 2d 222, 235–236, 401 N.W.2d 759, 765 (1987) (citations omitted). If a defendant establishes improper police conduct, the court must determine whether the statement was voluntary by balancing "the personal characteristics of the defendant against the pressures imposed upon him by the police in order to induce him to respond to the questioning." ***Id.***, 136 Wis. 2d at 236, 401 N.W.2d at 766.

¶11 Armstrong testified at the suppression hearing that a detective had threatened him, held him by the neck and pushed his head against the wall while questioning him about the shooting. The detective, however, denied that he had threatened or touched Armstrong, and the trial court credited the detective's testimony over Armstrong's. We must accept the trial court's credibility determinations, and its conclusion that the detective did not threaten or abuse Armstrong. *See* ***id.***, 136 Wis. 2d at 235, 401 N.W.2d at 765 ("[D]isputes as to the

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> **(3)** Whoever violates this section is guilty of a Class B misdemeanor.

factual circumstances surrounding the admission must be resolved in favor of the trial court."). Moreover, as the trial court noted, Armstrong refused to cooperate with the detective who allegedly coerced him, and initially denied any involvement in the shooting. Armstrong later gave an inculpatory statement to two other detectives because, according to Armstrong's testimony, "they were nicer," and "[he] felt like [he] could trust them." The trial court did not erroneously exercise its discretion in admitting Armstrong's inculpatory custodial statement. *See* ***id.***, 136 Wis. 2d at 239, 401 N.W.2d at 767 ("[I]n order to justify a finding of involuntariness, there must be some affirmative evidence of improper police practices deliberately used to procure a confession.").

¶12 Armstrong claims that the trial court erred in denying his request to instruct the jury on self-defense. He asserts that the evidence supported instructions on both perfect self-defense and imperfect self-defense.[4] He further

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[4] ***State v. Camacho***, 176 Wis. 2d 860, 501 N.W.2d 380 (1993), explains:

> The absolute privilege of perfect self-defense applies where a defendant shows all three of the following elements: (1) the defendant reasonably believed that he was preventing or terminating an unlawful interference with his person; (2) the defendant reasonably believed that force or threat thereof was necessary to prevent or terminate the interference; and (3) the defendant reasonably believed that the actual amount of force used was necessary to prevent or terminate the interference.

Id., 176 Wis. 2d at 869, 501 N.W.2d at 383. "[T]he jury must find that all three beliefs were reasonable before acquitting the defendant on the grounds of perfect self-defense." ***Id.***, 176 Wis. 2d at 869–870, 501 N.W.2d at 383. Armstrong's assertion of imperfect self-defense would have mitigated the charge of first-degree intentional homicide to second-degree intentional homicide, pursuant to WIS. STAT. § 940.01, which provides, in relevant part:

> **First-degree intentional homicide. (1)** OFFENSE. Except as provided in sub. (2), whoever causes the death of another human being with intent to kill that person or another is guilty of a Class A felony.
>
> ….
>
> **(2)** MITIGATING CIRCUMSTANCES. The following are affirmative defenses to prosecution under this section which

(continued)

asserts that the trial court erred in refusing to give a self-defense instruction after the jury asked a question regarding self-defense.

¶13 A trial court has broad discretion in determining which instructions to give the jury. *See* ***State v. Turner***, 114 Wis. 2d 544, 551, 339 N.W.2d 134, 138 (Ct. App. 1983). A trial court's discretionary decision will be sustained if it is "the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16, 20 (1981). The trial court has properly exercised discretion if the instructions given adequately cover the law applicable to the facts. *See* ***State v. Higginbotham***, 110 Wis. 2d 393, 403–404, 329 N.W.2d 250, 255 (Ct. App. 1982). A trial court need give a requested instruction only where the evidence reasonably requires the instruction. *See* ***State v. Dyleski***, 154 Wis. 2d 306, 310, 452 N.W.2d 794, 796 (Ct. App. 1990). On review of the denial of a requested instruction, the evidence is to be viewed in the light most favorable to the defendant. *See* ***State v. Stoehr***, 134 Wis. 2d 66, 87, 396 N.W.2d 177, 185 (1986).

¶14 The trial court properly exercised its discretion in refusing to instruct the jury on self-defense. Under ***Ruff v. State***, 65 Wis. 2d 713, 223 N.W.2d 446

> mitigate the offense to 2nd-degree intentional homicide under s. 940.05:
>
> ….
>
> (b) *Unnecessary defensive force.* Death was caused because the actor believed he or she or another was in imminent danger of death or great bodily harm and that the force used was necessary to defend the endangered person, if either belief was unreasonable.

WIS. STAT. § 940.01(1) & (2)(b). A defendant must have a reasonable belief that he was preventing or terminating an unlawful interference with his person before he can claim imperfect self-defense. *See* ***Camacho***, 176 Wis. 2d at 865, 501 N.W.2d at 381.

(1974), an armed robber who is threatened by his intended victim is not entitled to the privilege of self-defense. The question addressed in ***Ruff*** was phrased as follows:

> Assuming that the defendant, with a .38-caliber revolver in his hand, confronted the victim with the announcement of an armed holdup, and that the intended robbery victim turned and shot twice at the stickup man, who then fired back to prevent himself from being killed, [is the] right of self-defense then and there available to the armed robber?

Id., 65 Wis. 2d at 724, 223 N.W.2d at 452. The court concluded that under the facts asserted, the armed robber "had no legally recognizable right of self-defense." ***Id.***, 65 Wis. 2d at 727, 223 N.W.2d at 453. In coming to this conclusion, the court explained:

> Under his own testimony, defendant, armed with a deadly weapon, was moving toward the commission of a robbery, not away from it. He comes clearly under the rule set forth in ***Banks*** [***v. State***, 51 Wis. 2d 145, 186 N.W.2d 250 (1971)], stated to be: "'…self-defense in not available as a plea in excuse or justification, to one who was himself the aggressor in the difficulty which resulted in death or other injury....'" This is the common-law rule that one who himself brings on the necessity to take a person's life cannot claim self-defense in so doing. A Wisconsin statute provides that "...[t]he common-law rules of criminal law not in conflict with the criminal code are preserved." The right to regain the right of self-defense is not available to an armed gunman at the moment when he points his gun at an intended victim and announces, "This is a stickup." At that moment, the right of self-defense is on the part of the intended victim at whom the holdup man's gun is pointed, not on the side of the gunman commencing the stickup.

Id., 65 Wis. 2d at 725–726, 233 N.W.2d at 453 (footnotes omitted).[5]

[5] WISCONSIN STAT. § 939.10 provides, in relevant part, that "[t]he common-law rules of criminal law that are not in conflict with chs. 939 to 951 are preserved."

¶15 Like the armed gunman in ***Ruff***, Armstrong confronted his intended robbery victim with a gun and announced that he wanted the victim's money. At that point, the right of self-defense was not available to Armstrong as an excuse or justification for killing the victim. The trial court did not err in refusing to instruct the jury on self-defense.[6]

¶16 Armstrong also argues that the trial court erroneously exercised its discretion in instructing the jury because the order of the instructions prevented the jury from acquitting him on the basis of self-defense. As noted, the evidence did not support a finding of self-defense. We therefore reject Armstrong's argument that he was prejudiced by the order in which the instructions were given.

¶17 Armstrong argues that the statutes governing whether he is eligible for a juvenile disposition, WIS. STAT. §§ 938.183(2) and 938.18(5), are unconstitutionally vague. He asserts that the statutes do not provide reasonable notice to a juvenile of when he will be eligible for a juvenile disposition. He also asserts that the statutes are unconstitutional because they do not allow for a juvenile disposition when a juvenile who was originally charged with first-degree intentional homicide is convicted of the lesser offense of first-degree reckless homicide.

¶18 The statutory provisions that Armstrong challenges provide:

> **938.183 Original adult court jurisdiction for criminal proceedings.**
>
> ….

[6] This analysis applies equally to perfect self-defense and imperfect self-defense because, under the facts here and in ***Ruff v. State***, 65 Wis. 2d 713, 223 N.W.2d 446 (1974), the victim has the right of self-defense and the defendant, therefore, cannot claim a reasonable belief that he was preventing or terminating an unlawful interference with his person. *See supra* note 2.

> **(2)** (a) Notwithstanding ss. 938.12 (1) and 938.18, courts of criminal jurisdiction have exclusive original jurisdiction over a juvenile who is alleged to have attempted or committed a violation of s. 940.01 or to have committed a violation of s. 940.02 or 940.05 on or after the juvenile's 15th birthday. Notwithstanding subchs. IV to VI, a juvenile who is alleged to have attempted or committed a violation of s. 940.01 or to have committed a violation of s. 940.02 or 940.05 on or after the juvenile's 15th birthday is subject to the procedures specified in chs. 967 to 979 and the criminal penalties provided for the crime that the juvenile is alleged to have committed, except that the court of criminal jurisdiction shall impose a disposition specified in s. 938.34 if any of the following conditions applies:
>
> 1. The court of criminal jurisdiction convicts the juvenile of a lesser offense that is not an attempt to violate s. 940.01, that is not a violation of s. 940.02 or 940.05 and that is not an offense for which the court assigned to exercise jurisdiction under this chapter and ch. 48 may waive its jurisdiction over the juvenile under s. 938.18.
>
> 2. The court of criminal jurisdiction convicts the juvenile of a lesser offense that is an attempt to violate s. 940.01, that is a violation of s. 940.02 or 940.05 or that is an offense for which the court assigned to exercise jurisdiction under this chapter and ch. 48 may waive its jurisdiction over the juvenile under s. 938.18 and the court of criminal jurisdiction, after considering the criteria specified in s. 938.18 (5), determines by clear and convincing evidence that it would be in the best interests of the juvenile and of the public to impose a disposition specified in s. 938.34.

WIS. STAT. § 938.183(2).[7]

[7] WISCONSIN STAT. § 938.18(5) provides:

> **(5)** If prosecutive merit is found, the court shall base its decision whether to waive jurisdiction on the following criteria:
> (a) The personality and prior record of the juvenile, including whether the juvenile is mentally ill or developmentally disabled, whether the court has previously waived its jurisdiction over the juvenile, whether the juvenile has been previously convicted following a waiver of the court's jurisdiction or has been previously found delinquent, whether such conviction or delinquency involved the infliction of serious bodily injury, the juvenile's motives and attitudes, the juvenile's physical and mental maturity, the juvenile's pattern of living, prior offenses,

(continued)

¶19 "A challenge of a criminal statute for vagueness requires that the statute prohibit specific conduct," and not procedure. ***State v. Dums***, 149 Wis. 2d 314, 324, 440 N.W.2d 814, 817 (Ct. App. 1989). The challenged statutes do not regulate conduct, but dictate when the criminal courts have jurisdiction to try and impose sentence upon juveniles. The statutes are thus not subject to a challenge on vagueness grounds. *See* ***id.*** (declining to address vagueness challenge of statute that did not prohibit conduct, but regulated court procedure); *see also* ***State v. Strassburg***, 120 Wis. 2d 30, 37, 352 N.W.2d 215, 218 (Ct. App. 1984) (vagueness inquiry concerns whether "the law gives the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that the person might act accordingly and the innocent will not be trapped without fair warning."). Moreover, Armstrong offers no authority for the proposition that a statute cannot dictate the punishment to which a juvenile is subject for a violation of the criminal law. We therefore reject his argument that the statutes are unconstitutional because they allegedly prevent him from obtaining a juvenile disposition for his crime. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be

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> prior treatment history and apparent potential for responding to future treatment.
>
> (b) The type and seriousness of the offense, including whether it was against persons or property, the extent to which it was committed in a violent, aggressive, premeditated or wilful manner, and its prosecutive merit.
>
> (c) The adequacy and suitability of facilities, services and procedures available for treatment of the juvenile and protection of the public within the juvenile justice system, and, where applicable, the mental health system and the suitability of the juvenile for placement in the serious juvenile offender program under s. 938.538 or the adult intensive sanctions program under s. 301.048.
>
> (d) The desirability of trial and disposition of the entire offense in one court if the juvenile was allegedly associated in the offense with persons who will be charged with a crime in the court of criminal jurisdiction.

considered."); ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) (reviewing court need not address "amorphous and insufficiently developed" arguments).[8]

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[8] Section 938.183(2) of the Wisconsin Statutes has been amended and now provides:

> **(2)** Notwithstanding ss. 938.12 (1) and 938.18, courts of criminal jurisdiction have exclusive original jurisdiction over a juvenile who is alleged to have attempted or committed a violation of s. 940.01 or to have committed a violation of s. 940.02 or 940.05 on or after the juvenile's 15th birthday. Notwithstanding ss. 938.12 (1) and 938.18, courts of criminal jurisdiction also have exclusive original jurisdiction over a juvenile specified in the preceding sentence who is alleged to have attempted or committed a violation of any state law in addition to the violation alleged under the preceding sentence if the violation alleged under this sentence and the violation alleged under the preceding sentence may be joined under [s. 971.12 (1)]. Notwithstanding subchs. IV to VI, a juvenile who is alleged to have attempted or committed a violation of s. 940.01 or to have committed a violation of s. 940.02 or 940.05 on or after the juvenile's 15th birthday and a juvenile who is alleged to have attempted or committed a violation of any state criminal law, if that violation and an attempt to commit a violation of s. 940.01 or the commission of a violation of s. 940.01, 940.02 or 940.05 may be joined under s. 971.12 (1), is subject to the procedures specified in chs. 967 to 979 and the criminal penalties provided for the crime that the juvenile is alleged to have committed, except that the court of criminal jurisdiction shall, in lieu of convicting the juvenile, adjudge the juvenile to be delinquent and impose a disposition specified in s. 938.34 if the court of criminal jurisdiction finds that the juvenile has committed a lesser offense than the offense alleged under this subsection or has committed an offense that is joined under s. 971.12 (1) to an attempt to commit a violation of s. 940.01 or to the commission of a violation of s. 940.01, 940.02 or 940.05 but has not attempted to commit a violation of s. 940.01 or committed a violation of s. 940.01, 940.02 or 940.05, and the court of criminal jurisdiction, after considering the criteria specified in s. 938.18 (5), determines that the juvenile has proved by clear and convincing evidence that it would be in the best interests of the juvenile and of the public to adjudge the juvenile to be delinquent and impose a disposition specified in s. 938.34.

WIS. STAT. § 938.183(2) (1997-98).

¶20 Finally, Armstrong argues that the trial court erroneously exercised its discretion in concluding that he should be sentenced as an adult rather than be given a juvenile disposition. Armstrong argues that the trial court failed to sufficiently consider his age and background in deciding that he should be sentenced as an adult.

¶21 Contrary to Armstrong's assertion, the trial court thoroughly considered Armstrong's age and background, as well as the other relevant factors, before imposing sentence. The trial court recognized that Armstrong was an "angry young boy" who had a "very troubling background," including a father with a drug problem and a mother with psychological problems. The trial court also noted that, despite this background, Armstrong performed very well academically. The trial court concluded that it was in Armstrong's best interest to receive a juvenile disposition because "its educational facilities [and] its counseling facilities far exceed anything offered in the criminal justice system for adults." The trial court determined, however, that, in light of the seriousness of the crime and Armstrong's conduct after the crime, it was not in the best interest of the public to impose a juvenile disposition. The trial court considered the appropriate factors in arriving at this conclusion. Assigning weight to those factors is a function of the trial court, not this court. *Cf.* ***State v. Curbello-Rodriguez***, 119 Wis. 2d 414, 434, 351 N.W.2d 758, 768 (Ct. App. 1984) (the weight afforded to each of the relevant sentencing factors is particularly within the wide discretion of the trial court).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997–98).