COURT OF APPEALS
DECISION
DATED AND FILED

November 19, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1943 **Cir. Ct. No. 2006CF4619**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALLEN DELL VAUGHN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed*.

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Allen Vaughn appeals from an order that denied, without a hearing, his motion for a new trial on a conviction for attempted first-degree intentional homicide. Vaughn contends that counsel provided ineffective assistance by not pursuing at trial a claim of unnecessary defensive force after

having previously raised a claim of perfect or imperfect self-defense in a motion in limine. For the reasons explained below, we conclude that counsel had an insufficient basis to meet the burden of production on a claim of unnecessary defensive force, and therefore acted within professional norms in abandoning the claim at trial.

BACKGROUND

¶2 Vaughn was charged based upon allegations that he stabbed his mother's live-in boyfriend multiple times while the boyfriend was engaged in a verbal argument with his mother. Vaughn brought a motion in limine seeking to introduce other acts evidence of prior violent acts by the boyfriend "to establish that the intent of the defendant was not to attempt to kill the victim, but rather to defend himself, and his mother."

¶3 Vaughn's motion in limine included an offer of proof that his mother, Cynthia Gofoe-Vaughn, would testify that her boyfriend, Harold Walton, had "a propensity for extreme violence" and had threatened multiples time to kill her, both during the argument preceding the stabbing, and on prior occasions. When the court asked whether there was an agreement between the parties as to what other acts evidence would come in "in the event there is a claim of self-defense," Vaughn interjected several times that his defense was "insanity, not no self-defense." Trial counsel then informed the court that the parties had agreed that events including potential other acts that had transpired on the day of the stabbing would be admissible, but counsel also noted that, in good faith, he no longer anticipated raising a claim of self-defense because Vaughn was not willing to take the stand to provide testimony in support of such a claim. The court then asked Vaughn directly whether he planned to assert self-defense at trial, and

Vaughn again indicated that he did not. Based upon Vaughn's response, the court ruled that any testimony about the boyfriend's past violent acts would not be relevant, but that the parties could still introduce evidence about what happened the day of the stabbing.

¶4 At trial, Vaughn was removed from the courtroom due to disruptive conduct, and he refused thereafter to return to the courtroom, or to appear or to testify by video.

¶5 Gofoe-Vaughn testified on direct examination when called by the State that Walton came home very intoxicated and wanted to have a conversation with her, but she asked him to leave because she was trying to attend to her sick daughter and didn't want to talk to him. Walton then got real loud and belligerent, began cussing and calling her names, and started making "all kinds of wild threats" including threatening to kill her.

¶6 Just as Walton was walking out the door, Vaughn came downstairs, and Walton turned back and told Vaughn, "I always wanted to get you anyway. We can take this out in the backyard." Gofoe-Vaughn told Vaughn to ignore Walton and go back upstairs, while she continued to ask Walton to leave. Walton did finally leave the house, telling Vaughn on his way out that he would burn the house down. Gofoe-Vaughn locked the door after Walton, and then watched out the window to see if Walton drove his truck away. When Walton made a turn that Gofoe-Vaughn suspected meant he was going to circle around back to an alley to park in her garage, she directed Vaughn to watch his sister and went outside to her backyard patio with a phone.

¶7 As Gofoe-Vaughn confirmed her suspicion that Walton was coming back into the alley toward her garage, she called Walton's mother to tell her that

Walton was very intoxicated and that if she didn't come to get her son, Gofoe-Vaughn would have to call the police. Walton came onto the patio, and continued threatening Gofoe-Vaughn and cussing at her, while she just sat there and waited for his mother to arrive. Gofoe-Vaughn testified that Walton did not make physical contact with her at any time during the incident, and that if she had been worried about her safety, she would have stayed in the house and called the police.

¶8 Vaughn eventually realized that Walton was out on the patio, and a few minutes after exchanging more words with Walton from the doorway of the house and subsequently through a window, Vaughn came outside with a knife, circled around through the alley and garage, and approached Walton from behind. Vaughn went straight for Walton and stabbed him until the handle fell off his knife, then reached into his pocket and drew out a second knife and continued to stab him until he saw blood on his mother, who was trying to stop him, and thought he might have cut her.

¶9 Although Walton's account of his level of intoxication and his argument with Gofoe-Vaughn varied somewhat from her account, his testimony about the stabbing itself was generally consistent with hers. Walton testified that Vaughn came at him from behind on the patio and stabbed him seven times in the torso, including cuts to the stomach, diaphragm, liver, and adrenal gland, as well as stabbing him in the back of the neck, on his temple, and in the eye. As Walton was making his escape toward the garage after Gofoe-Vaughn intervened, he heard Gofoe-Vaughn ask her son why he had done that, to which Vaughn responded, "Shut up. He's not dead yet."

¶10 The court subsequently found that Vaughn waived his right to testify, and the defense rested without having called any witnesses. Defense

counsel argued to the jury that Vaughn's state of mind was reckless rather than intentional, given the tense situation and the "flailing" nature of the attack itself. However, the jury convicted Vaughn of attempted first-degree intentional homicide. After an unsuccessful appeal that centered on competency issues, Vaughn filed the present postconviction motion challenging trial counsel's decision not to pursue a mitigation defense of unnecessary defensive force.

STANDARD OF REVIEW

¶11 In order to obtain a hearing on a postconviction motion, a defendant must allege material facts sufficient to warrant the relief sought. ***State v. Allen***, 2004 WI 106, ¶¶9, 36, 274 Wis. 2d 568, 682 N.W.2d 433. In the context of a claim of ineffective assistance of counsel, that means the facts alleged would, if true, establish both that counsel provided deficient performance and that the defendant was prejudiced by that performance. ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. No hearing is required, though, when the defendant presents only conclusory allegations or when the record conclusively demonstrates that he or she is not entitled to relief. ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). Non-conclusory allegations should present the "who, what, where, when, why, and how" with sufficient particularity for the court to meaningfully assess the claim. ***Allen***, 274 Wis. 2d 568, ¶23.

DISCUSSION

¶12 A charge of first-degree intentional homicide can be mitigated to second-degree intentional homicide based upon unnecessary defensive force (commonly called "imperfect self-defense") when the defendant "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(2)(b);[1] *see* ***State v. Head***, 2002 WI 99, ¶¶61-63, 255 Wis. 2d 194, 648 N.W.2d 413.

¶13 In order to raise a mitigation defense, a defendant must come forward with "some evidence" to support the defense theory. ***Head***, 255 Wis. 2d 194, ¶¶111-12. Once a defendant meets that burden of production, he or she is entitled to an instruction on mitigation and the State bears the burden of proving the nonexistence of the claimed mitigating circumstance beyond a reasonable doubt. ***Id.***, ¶113.

¶14 Although the argument portion of Vaughn's brief is not divided into sections that match either his statement of issues or his table of contents, we understand him to be making the following arguments. First, Vaughn contends that the offer of proof in his motion in limine was sufficient to meet his burden of production, shift the burden of persuasion to the State to prove at trial the nonexistence of mitigation, and warrant a jury instruction on imperfect self-defense. This assertion is intertwined with related arguments that both the State and the circuit court effectively acknowledged or conceded in response to the motion in limine that Vaughn had met his burden of production when they agreed that evidence of the victim's threatening statements preceding the stabbing would be admissible. Second, Vaughn contends that trial counsel, as well as the State and the court, appeared to be operating under the mistaken belief that Vaughn

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

needed to take the stand himself in order to raise an unnecessary defensive force claim.

¶15 As to Vaughn's burden of production, he seems to be conflating the admissibility of evidence with the sufficiency of evidence. The fact that the State and the circuit court agreed with trial counsel that the victim's threats preceding the stabbing would be relevant to Vaughn's state of mind and admissible to place the stabbing in context, does not equal a concession that the victim's threats constituted a sufficient quantum of evidence on the issue of unnecessary defensive force to trigger the State's burden to prove the nonexistence of mitigation.

¶16 We also note that the burden of production refers to the evidence actually produced at trial, not evidence that was presented in a motion in limine or other pretrial proceedings. We agree with the circuit court that the mother's testimony at trial that the victim threatened to kill her was insufficient to show that Vaughn held either of the actual beliefs necessary to raise an unreasonable defensive force claim. The issue here is not whether anyone could take the victim's drunken threats seriously, but rather whether Vaughn himself *actually believed* both: (1) that he and/or his mother was at imminent risk of death or great bodily harm out on the patio—despite the fact that Walton was unarmed and had not made any physical contact with anyone during his drunken tirade and that Vaughn's mother had repeatedly told Vaughn that she was fine and could handle the situation; and (2) that stabbing the unarmed victim multiple times—and then taking out a second knife to continue stabbing him when he was already severely injured—was necessary to defend Vaughn and his mother.

¶17 Although we agree with Vaughn that a defendant does not necessarily need to testify in order to meet the burden of production of a claim of

unnecessary defensive force, in the absence of the defendant's testimony there must be other evidence from which the requisite actual beliefs of the defendant can be reasonably inferred. Here, Vaughn's mother did not testify that Vaughn made any statement about being in fear for his or her life either during or after the stabbing, or even that he expressed or exhibited fear during the stabbing or any of the events leading up to it. Additionally, Vaughn's own comment to his mother immediately after the stabbing that Walton was "not dead yet" supports the inference that the degree of force used was intended to kill Walton, not merely that force necessary to save Vaughn or his mother from death or great bodily harm. Since trial counsel knew that Vaughn would not take the stand to offer testimony that might support a contrary inference, counsel had no basis to advance a claim of unnecessary defensive force, and acted well within professional norms by instead arguing that Vaughn's conduct was merely reckless.

By the Court.—Order affirmed.

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