COURT OF APPEALS
DECISION
DATED AND FILED

October 31, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP891-CR **Cir. Ct. No. 2009CF113**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALFREDO VEGA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dodge County: BRIAN A. PFITZINGER, Judge. *Affirmed*.

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 PER CURIAM. Alfredo Vega appeals a judgment convicting him of attempted second-degree intentional homicide, first-degree reckless injury, aggravated battery with intent to cause great bodily harm, and battery by a prisoner—each by use of a dangerous weapon and as a repeat offender. He also

appeals an order that denied his postconviction motions. Vega raises three claims of ineffective assistance of counsel, and also contends that he could not properly be convicted of both the attempted homicide and reckless injury charges because they have inconsistent mental elements. For the reasons discussed below, we reject each of Vega's contentions and affirm the circuit court.

BACKGROUND

¶2 All four of the charges in this case arose out of an incident in which Vega stabbed another inmate with a scissors blade, puncturing his liver. Vega took the stand and admitted that he had dismantled his scissors, hidden one of the blades in his underwear, and used the blade to stab the other inmate during a fight. Vega claimed that he had been carrying the blade for protection because there were rumors in the prison that some of the Spanish Cobra gang members were planning to jump some Latin King gang members, and that he pulled the blade out only after the other inmate had jumped him and had him pinned to the floor. Vega produced testimony from four inmates to try to support his claim that he needed to defend himself due to gang dynamics in prison.

¶3 The victim, Randy Wynkoop, gave a different account of the incident. Wynkoop claimed that Vega had jumped him while he was delivering food trays to the cells, in retaliation for a dispute that had developed earlier on the handball court. During his testimony, Wynkoop mentioned that the warden had "overturned" "a conduct report" that prison staff had issued against Wynkoop.

¶4 The State also produced testimony from a number of correctional personnel, including one officer who observed Vega being overly aggressive during the handball game; several officers who interacted with Vega and Wynkoop shortly after the fight and conducted an investigation; another officer

who observed Wynkoop being treated in the operating room; and a prison record custodian who testified that Vega was in prison due to a felony conviction.

¶5 After his conviction on all four counts, Vega filed the postconviction motion that is the subject of this appeal. Additional facts will be set forth below as relevant to the specific issues on appeal.

DISCUSSION

Assistance of Counsel

¶6 A claim of ineffective assistance of counsel has two parts: (1) deficient performance by counsel and (2) prejudice resulting from that deficient performance. ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. To prove deficient performance, a defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms and show that his or her counsel made errors so serious that he or she was essentially not functioning as the counsel guaranteed the defendant by the Sixth Amendment of the United States Constitution. ***Id.*** To prove prejudice, the defendant must additionally show that counsel's errors rendered the resulting conviction unreliable in light of the other evidence presented. ***Id.***

¶7 We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. ***Id.*** We will not set aside the circuit court's factual findings about what actions counsel took or 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 have effective assistance of counsel is ultimately a legal determination that this court decides *de novo*. ***Id.***

¶8 Vega contends that trial counsel provided ineffective assistance by failing to object to the admission of Wynkoop's testimony that the warden had overturned a conduct report issued to Wynkoop for his role in the fight, and by failing to object to the admission of graphic testimony from a correctional officer about the treatment of Wynkoop's injury. The third ineffective assistance claim relates to counsel's failure to request a curative instruction to disregard testimony after the court sustained a defense objection to the record custodian's stating that Vega was in prison based upon a felony conviction. We conclude that none of the alleged errors were prejudicial.

¶9 First, in response to a question about whether Wynkoop believed he had "whipped" Vega during the fight as he had told his mother, Wynkoop testified:

> Well, there's more to that story, what you're saying right there. What it was, when the whole time I was in the hospital my mother was trying to contact me and no one would tell her where I was at. So when they brought me back from Memorial, Waupun Hospital, back to WCI, I got a hold of her by phone and was explaining to her and she was in a panicky state thinking I was going to die and I'm in danger and all that. And I was trying to calm her, let her know, said Mom, I'm all right, don't worry, I got him, it's okay. I said I'm going to be okay. So at the same time they're wanting to, I guess the lieutenant, Lieutenant Smith I think, I'm not sure of the name, but he was wanting to write me a conduct report for using excessive force on Vega. So he used that in giving me a conduct report which was later overturned by the warden after evidence.

Vega complains that the comment about the warden having overturned Wynkoop's conduct report was nonresponsive hearsay that improperly bolstered Wynkoop's credibility because it suggested that the warden had found Wynkoop's account more credible than Vega's. Putting aside the fact that Vega does not explain how the warden's action would qualify as a hearsay "statement" within the

meaning of WIS. STAT. § 908.01(1),[1] we are satisfied there was no prejudice because the comment did little, if anything, to bolster Wynkoop's credibility. Wynkoop's passing reference to the warden overturning his conduct report was part of a rambling speech in which Wynkoop was attempting to explain away an inculpatory comment he had made. It was not the main focus of his answer. Moreover, the jury was not told what "a conduct report" was, or what specific allegations were made in the conduct report against Wynkoop, or what the warden's basis for overturning the report was.

¶10 Second, Correctional Officer Clint Schlieve testified about what he observed when he accompanied Wynkoop to the operating room:

> At that point they were really concerned with the—his abdomen seemed to be really distorted. It was swollen up. There wasn't a whole lot of blood at that point but you could tell he was—the shape of it was just, you know, it was just bloated out. His stomach was bloated out and stuff like that. He was in a lot of pain....
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> ….
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> [Once the surgery started] I guess what really brought [on] my attention were the size of the incisions that they made on Mr. Wynkoop. It was pretty large and the blood that just came out of his abdomen was tremendous. It was just all over the floor, all over the staff. It was all over everywhere.
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> ….
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> After the surgery, they closed him up. I was amazed at the amount of stiches and how long that took and the size of it.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Vega contends that, if counsel had objected to this testimony as being unduly prejudicial, the circuit court "would have been obligated to exclude the evidence." However, the circuit court stated at the postconviction hearing that it would not have excluded the evidence because it was presented in an unemotional manner. Because the officer's observations were relevant to whether the victim suffered great bodily harm, the circuit court would have had discretion to admit them and Vega suffered no prejudice from counsel's decision not to challenge the testimony.

¶11 Third, Vega suffered no prejudice from counsel's decision not to move to strike testimony from the prison record custodian that Vega was in prison based upon a felony conviction. The jury could already make a fair assumption that Vega had a felony conviction based upon the fact that he was in prison. Moreover, the State could have asked Vega himself how many convictions he had when he took the stand, if the testimony had not already come in.

Inconsistent Verdicts

¶12 Vega next asserts that "he cannot be convicted of both an offense requiring an intentional act and an offense requiring a reckless act if the same act forms the basis of both charges." He does not, however, identify any constitutional or statutory provision that he believes would be violated by inconsistent verdicts in a criminal case.[2] Because Vega attempts to distinguish a double jeopardy case in which this court disagreed with the proposition that

[2] We note that, unlike civil cases, there is no per se requirement that verdicts on multiple counts in a criminal case be consistent "'since there is no way of knowing whether the inconsistency was the result of leniency, mistake, or compromise.'" ***State v. Thomas***, 2004 WI App 115, ¶¶42-43, 274 Wis. 2d 513, 683 N.W.2d 497 (quoted source omitted). Rather, claims of inconsistent verdicts in criminal cases are generally evaluated in the framework of the sufficiency of the evidence to support each count. ***United States v. Powell***, 469 U.S. 57, 67 (1984).

"conceptually it is impossible to show that the same act was both reckless and intentional," the State has construed Vega's argument as raising a multiplicity issue. *See* ***State v. Eastman***, 185 Wis. 2d 405, 414, 518 N.W.2d 257 (Ct. App. 1994). We need not resolve any conflict between the parties as to how to characterize the defendant's argument because we are satisfied that Vega's convictions for both attempted second-degree intentional homicide and first-degree reckless injury based upon the single act of stabbing a fellow inmate were neither inconsistent nor multiplicitous.

¶13 Regarding the consistency of the mental states required to support the verdicts, Vega's conviction for attempted second-degree intentional homicide required proof that Vega "intended to kill" the victim and committed acts that unequivocally demonstrated that intent, without any reasonable belief that deadly force was necessary to prevent imminent death or great bodily harm to himself. WIS JI—CRIMINAL 1072 (2005). Vega's conviction for first-degree reckless injury required proof that Vega engaged in conduct that he was "aware … created the unreasonable and substantial risk of death or great bodily harm" to the victim—and which did in fact, cause great bodily harm—under circumstances showing utter disregard for human life. WIS JI—CRIMINAL 1250 (2012). Rather than being inconsistent, engaging in an act of stabbing that demonstrated a mental state of intent to kill plainly encompassed awareness that the same act created a substantial risk of death.

¶14 As to multiplicity, the State does not dispute Vega's assertion that the offenses are identical in fact and Vega does not dispute the State's assertion that the offenses are different in law because each requires an element not required for the other offense. The question then becomes whether the legislature intended

there to be cumulative punishments. ***State v. Davison***, 2003 WI 89, ¶¶33, 44-46, 263 Wis. 2d 145, 666 N.W.2d 1.

¶15 The Wisconsin legislature has enacted a statutory scheme wherein "if an act forms the basis for a crime punishable under more than one statutory provision, prosecution may proceed under any or all such provisions[,]" but, if one crime is a lesser included offense of the other, a judgment of conviction can be entered on only one of the crimes. WIS. STAT. §§ 939.65 and 939.66. Vega does not point to any statutory provision or case law that defines first-degree reckless injury as a lesser-included offense of attempted second-degree intentional homicide, and we are aware of none. Nor does Vega provide this court with any other clear evidence that the legislature did not intend there to be cumulative punishments for the two offenses at issue here. Therefore, we conclude that there was no multiplicity problem with the convictions.

By the Court.—Judgment and order affirmed.

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