COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2013

Diane M. Fremgen
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. 2013AP342-CR **Cir. Ct. No. 2008CF3777**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGORY GARRO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ and CHARLES F. KAHN, JR., Judges. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 BRENNAN, J. Gregory Garro appeals from a judgment of conviction entered after a jury found him guilty of three counts of willfully omitting a material fact in the offer and sale of a security, as party to a crime,

contrary to WIS. STAT. §§ 551.41(2) and 939.05 (2001-02),[1] and from the order denying his postconviction motion. Garro complains that the trial court improperly denied his motion for a new trial because he did not knowingly, intelligently, and voluntarily waive his right to counsel and because the trial court improperly excluded a loan commitment form that Garro argues was critical to his defense. Because the trial court properly determined that Garro knowingly, intelligently, and voluntarily waived his right to counsel and because the trial court properly determined that the loan commitment form was irrelevant, we affirm.

BACKGROUND

¶2 In November 2008, the State filed a criminal complaint, charging Garro with three counts of security fraud for issuing promissory notes to Kelly Hanley without advising her of material facts, the omission of which made the transactions misleading. *See* WIS. STAT. § 551.41(2) (2001-02). In short, the State alleged that Garro failed to tell Hanley that he and his company were in dire financial circumstances and that it was unlikely that Garro would be able to repay Hanley the money she loaned him as promised in the notes.

¶3 In the course of pre-trial proceedings, Garro twice retained counsel. However, in each instance counsel moved to withdraw, citing Garro's failure to fulfill financial obligations. And in each instance, the trial court granted counsel's motion.

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

¶4 After Garro's second attorney moved to withdraw from the case, Garro informed the trial court that while he could afford to spend $10,000-$15,000 on counsel, he could not afford the $50,000-$60,000 fees quoted by his previous two attorneys. As such, Garro told the court that he wished to represent himself.

¶5 The trial court asked Garro whether he had looked for an attorney who would charge him less, and Garro told the court that he had not. The trial court encouraged Garro to do so, explaining:

> I don't think you should take this decision lightly for two reasons. First of all, the charges against you carry some significant prison time. Second, this is a complex case even for somebody who spent three years in law school and maybe have been practicing for 5, 10, 15 years. For a novice, this may be overwhelming.

The trial court then adjourned the case for two weeks to give Garro time to look for a new attorney and consider his options.

¶6 At the next court hearing, Garro informed the trial court again that he wished to proceed *pro se*. The trial court then engaged Garro in a lengthy colloquy. The trial court asked Garro about his education and whether he could read, specifically asking whether Garro had read the documents the State had supplied during discovery and whether Garro was able to understand them. Garro assured the court he had no problem reading the documents provided by the State and that he read contracts and blueprints as a regular part of his construction business.

¶7 The trial court also inquired whether Garro understood "that there are three charges against you in this case" and "that each of the three charges against you alleges that you made false statements in connection with selling a security?" Garro told the court he understood. The trial court went on to ask

Garro if he understood "that if you are convicted of any one of these three crimes, the court can order you spend up to seven and a half years in prison and pay a fine of up to $5,000" and that if "convicted of all three of these, you're looking at the potential of 22 and a half years in prison[?]" Again, Garro told the court he understood.

¶8 During the colloquy, the trial court also asked Garro about his experiences in court, asking if he had ever examined a witness on the stand or made opening or closing arguments to a jury. Garro admitted that he had not and that his experience in court was limited to small claims. As such, the trial court explained to Garro the complexities of trying a case of this nature, asking Garro if he understood:

> that where this case is headed at this point is a trial, which would mean that you would be responsible for organizing the evidence before trial so that you could understand the [S]tate's evidence and be in a position to watch and see whether the [S]tate was presenting the evidence correctly, and whether that was something that you could attack or not.
>
> You'd also have to organize whatever evidence you wanted to present in your own defense, if there is a defense, and if you wanted to present a defense. You're not required to.
>
> You'd also be required to pick a jury. You'd have some say in which jurors would sit in your case. You'd have to be prepared to do that.
>
> You'd have to be prepared to stand up in front of the jury and give them a summary of the case at the beginning -- that's what an opening statement is -- and ask questions of witnesses, and then make a statement to the jury at the end of the case about what you think the jury should do in the case.
>
> And you'd have to follow all the same rules that apply to the other attorneys.

Again, Garro assured the court he understood.

¶9 The trial court also inquired into whether Garro understood that "if you take this case to trial, you're going up against a professional … trained and … employed by the [S]tate to put people like you in prison?" The trial court asked Garro if he understood "that [the assistant district attorney is] going to be more comfortable in the courtroom. He's going to be experienced in the courtroom. He's going to appear to the jury as if he knows what he's doing. And just the difference in appearance is something that's going -- there's just no way it's not going to leave an impression on the jury." Garro told the court: "I totally agree. I'll be the first to admit it's an uphill battle, but one I welcome." Garro told the court that, despite the court's warnings, he felt "more than capable" of representing himself.

¶10 The trial court then explicitly told Garro that "if you cannot afford a lawyer, given what a reasonably competent lawyer would charge in a case like this and given your resources, that the court would appoint one for you." Garro told the court he understood, but he did not ask the court to appoint him counsel nor did he withdraw his request to proceed *pro se*.

¶11 Based upon that colloquy, the trial court permitted Garro to proceed *pro se*.

¶12 During trial, the trial court denied Garro's request to introduce a loan commitment form that Hanley allegedly signed on April 23, 2003, well after the promissory notes at the center of the case were executed. In refusing to admit the form, the trial court found that it was irrelevant in that it did not demonstrate what knowledge Hanley had of Garro's financial situation at the time the promissory notes were executed.

¶13 The jury found Garro guilty on all three counts of willfully omitting a material fact in the offer and sale of a security. The court sentenced Garro on all three counts, but then stayed the sentences and placed Garro on probation for three years.[2]

¶14 Garro filed a postconviction motion, through counsel, requesting a new trial on the grounds that: (1) he did not knowingly, intelligently, and voluntarily waive his right to counsel; and (2) the trial court improperly excluded the loan commitment form. The trial court denied Garro's motion.[3] Garro appeals.

DISCUSSION

¶15 Garro raises three issues on appeal. First, Garro complains that he did not knowingly, intelligently, and voluntarily waive his right to counsel because the record does not show that his waiver was "free from financial constraint." Second, he complains that the trial court improperly excluded the loan commitment form, which he contends was critical to his defense. And third, he argues he is entitled to a new trial in the interest of justice. We address each in turn.

[2] The Honorable Richard J. Sankovitz presided over all pre-trial proceedings, trial, and sentencing, and entered the judgment of conviction.

[3] The Honorable Charles F. Kahn, Jr., presided over postconviction proceedings and entered the order denying Garro's postconviction motion.

I. The record demonstrates that Garro knowingly, intelligently, and voluntarily waived his right to counsel.

¶16 Garro first argues that he did not knowingly, intelligently, and voluntarily waive his right to counsel. While Garro admits that the trial court engaged him in the colloquy required by ***State v. Klessig***, 211 Wis. 2d 194, 564 N.W.2d 716 (1997), Garro argues that the colloquy was insufficient to establish that his decision to proceed *pro se* was "free from financial constraint." We affirm the trial court.

¶17 Article I, § 7 of the Wisconsin Constitution and the Sixth Amendment of the United States Constitution guarantee both a criminal defendant's right to counsel and the right to defend oneself. ***Klessig***, 211 Wis. 2d at 201-03. The Wisconsin Supreme Court has noted "the apparent tension between these two constitutional rights," stating "'that the right of an accused to conduct his own defense seems to cut against the grain of this [c]ourt's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel.'" ***State v. Imani***, 2010 WI 66, ¶21, 326 Wis. 2d 179, 786 N.W.2d 40 (citation omitted).

¶18 In order to ensure that the right to counsel is upheld, before a defendant is permitted to represent himself or herself, "the [trial] court must ensure that the defendant[:] (1) has knowingly, intelligently, and voluntarily waived the right to counsel, and (2) is competent to proceed pro se." ***Id.***, ¶21. "If the [trial] court finds that both conditions are met, the court must permit the defendant to represent himself or herself." ***Id.*** "Whether a defendant was denied his or her constitutional right to self-representation presents a question of constitutional fact" that we review independent of the trial court. ***Id.***, ¶19.

¶19 Garro only argues that he did not knowingly, intelligently, and voluntarily waive his right to counsel; he does not contend that the trial court improperly concluded that he was competent to proceed *pro se*. To ensure that a defendant knowingly, intelligently, and voluntarily waived his or her right to counsel, ***Klessig*** requires a trial court to conduct a colloquy designed to ensure that the defendant: "'(1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on him.'" *See* ***Imani***, 326 Wis. 2d 179, ¶23 (citation omitted). We may conclude that a defendant knowingly, intelligently, and voluntarily waived the right to counsel only if the trial court engaged in the colloquy and found that the defendant satisfied all four inquiries. ***Id.***

¶20 Garro conclusorily asserts that his waiver was not voluntary because the trial court failed to establish that his waiver was "free from financial constraint." Garro's argument is entirely without merit.

¶21 First, Garro's argument is unsupported by citation to any legal authority requiring the trial court to ensure that his waiver was "free from financial constraint," and he fails to otherwise explain how his argument relates to the four ***Klessig*** factors. We do not consider undeveloped arguments that are unsupported by legal authority. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶22 Second, the law dictates that Garro was entitled to "an adequate lawyer, not the best lawyer." *See* ***State v. Hanson***, 2000 WI App 10, ¶20, 232 Wis. 2d 291, 606 N.W.2d 278 (Ct. App. 1999). While Garro informed the

court that he could not afford to pay $50,000-$60,000 for an attorney, he could afford to pay $10,000-$15,000. Furthermore, the trial court told Garro that it could, upon Garro's request, appoint him counsel if he could not afford a lawyer. Garro made no request for a court-appointed lawyer and continued to request permission to represent himself. The record demonstrates that Garro certainly had access to a constitutionally adequate attorney and that he was not financially limited to proceeding *pro se*.

¶23 Because Garro does not otherwise complain that the trial court failed to ascertain that the ***Klessig*** factors were met, and because our review of the record shows that the trial court's colloquy complied with the dictates of ***Klessig***, we affirm the trial court.

II. The trial court properly exercised its discretion when it excluded the loan commitment form.

¶24 Prior to trial, and again during the course of the trial, Garro asked the trial court to admit into evidence a loan commitment form. Garro claimed that the form would rebut Hanley's testimony that she was unaware of Garro's poor financial situation when she agreed to sign the promissory notes. According to the form, Bayfront Properties applied for a loan with The Farmer's State Bank of Waupaca on December 1, 2002. Hanley allegedly signed the form on April 23, 2003.

¶25 The complaint against Garro alleged that he made misleading statements to Hanley in the offer and sale of a security on or about November 14, 2002 (count 1), on or about December 19, 2002 (count 2), and at sometime between December 21, 2002, and January 20, 2003 (count 3). The trial court, noting that it was Hanley's knowledge at the time she entered into the transactions

with Garro that was relevant, denied Garro's request to use the loan commitment form to impeach Hanley's testimony because the "loan document shows nothing about her knowledge at any point before April 23rd, 2003," the date Hanley allegedly signed the form. However, the trial court told Garro:

> I don't have a problem with you asking Ms. Hanley questions about whether she applied for a loan before these promissory notes were signed or in the midst of the signing them, somewhere between the date of the first note and the date of [the] 3rd note -- that's what I mean "in the midst of" -- I don't have a problem with you asking her whether, isn't it true you knew of my difficulties and you knew about them to such a degree that you applied for a loan in your own name and not mine because you knew I couldn't get credit? I don't have any problem with you asking a question like that.

¶26 Garro now complains that the trial court erroneously exercised its discretion and prevented him from presenting his theory of defense by prohibiting him from admitting the loan commitment form into evidence.[4]

[4] In his brief-in-chief, Garro also abstractly mentions other evidence he contends that the trial court improperly omitted, stating:

> The Court further denied Mr. Garro's request to impeach Ms. Hanley with information about other transactions.
>
> These exclusions should also have been subject to an other acts evidence analysis, rather than a blanket ruling that these events occurred outside an artificial time frame.
>
> These rulings affected Mr. Garro's substantial rights and rationally contributed to the outcome of the case.

(Record citations omitted.) That is the entirety of Garro's argument that the trial court improperly excluded "information about other transactions." Such general arguments, supported only by conclusory statements, and lacking any legal reasoning or legal citation, are undeveloped, and we will not address them. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶27 A trial court's determination to admit or exclude evidence is a discretionary decision that will not be upset on appeal absent an erroneous exercise of discretion. ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992). We review evidentiary issues to determine if the trial court applied the correct law to the relevant facts and reached a reasonable conclusion. ***State v. Smith***, 2002 WI App 118, ¶¶7–8, 254 Wis. 2d 654, 648 N.W.2d 15.

¶28 Here, the trial court excluded admission of the loan commitment form because it found the form irrelevant. The court's decision in that regard was reasonable, and Garro fails to persuade us otherwise.

¶29 Evidence is not admissible unless it is relevant. WIS. STAT. § 904.02. Relevant evidence is defined as that evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01.

¶30 Garro contends that the loan commitment form was relevant because his:

> theory of defense was that the loan commitment applied for on 12/01/2002 and signed by Ms. Hanley on 04/23/2003 occurred in the middle of the time frame alleged in the complaint and information, subsequent to count 1 but prior to counts 2 and 3, [and] demonstrated Ms. Hanley's knowledge of his financial condition.

Garro's argument has several fatal flaws.

¶31 First, Garro never explains in his submissions to this court how the loan commitment form, even if executed by Hanley during the relevant time

period, demonstrates that Hanley knew of Garro's poor financial condition when the promissory notes were issued.

¶32 Second, although the loan commitment form indicates that a loan was applied for on December 1, 2002, during the charging period, the applicant is identified as Bayfront Properties, not Hanley. There is nothing on the form itself that indicates that Hanley was associated with Bayfront Properties, and Garro does not explain any association between Bayfront Properties and Hanley in his submissions to this court.

¶33 Third, while Hanley's name does appear on the signature line of the loan commitment form, neither the document nor the signature were ever authenticated.

¶34 Fourth, as noted by the trial court, even if Hanley's signature and the document were authenticated, Hanley did not sign the document until April 23, 2003, well after all of the promissory notes in this case were executed. Her signature on the form months after execution of the notes does nothing to prove that she knew of Hanley's financial situation several months earlier.

¶35 In sum, the trial court's decision to omit the loan commitment form because it was irrelevant was reasonable and not an erroneous exercise of its discretion.[5]

III. Garro is not entitled to a new trial in the interest of justice.

¶36 In a last-ditch effort to save his appeal, Garro argues that the cumulative effect of the foregoing alleged errors entitle him to a new trial in the interest of justice, pursuant to WIS. STAT. § 752.35. We disagree. "We have found each of these arguments to be without substance. Adding them together adds nothing. Zero plus zero equals zero." *See* ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976).

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

[5] Garro also conclusorily argues that the loan commitment form should have been analyzed as other-acts evidence pursuant to ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). His argument in that regard is limited to complaining that the trial court did not perform the analysis; however, in his brief-in-chief, Garro also fails to undertake an analysis of the loan commitment form under ***Sullivan*** or otherwise explain how it is admissible as other-acts evidence. Again, we will not address undeveloped arguments. *See* ***Pettit***, 171 Wis. 2d at 646. To the extent that Garro performs a very limited analysis of that evidence under ***Sullivan*** in his reply brief, we note that we do not address issues raised for the first time in a reply brief. *See* ***Pettit***, 171 Wis. 2d at 646.