COURT OF APPEALS
DECISION
DATED AND FILED

February 15, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP507 **Cir. Ct. No. 2008CF52**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JACINTO S. RICO,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Jacinto Rico appeals pro se from a circuit court order denying his WIS. STAT. § 974.06 (2015-16)[1] motion alleging ineffective

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

assistance of trial counsel arising from a failure to request jury instructions relating to defense of others and accident. We conclude that the circuit court did not err in declining to hold an evidentiary hearing on Rico's postconviction motion. Rico also argues that his convictions should be reversed because there was an error in the self-defense jury instruction. We see no error. We affirm the order denying Rico's postconviction motion.

¶2 In 2010, we affirmed Rico's 2008 convictions for first-degree reckless injury for stabbing T.L. and first-degree recklessly endangering safety for stabbing J.T. ***State v. Rico***, No. 2009AP1370-CR, unpublished slip op. (WI App Mar. 3, 2010). In that appeal, Rico did not dispute that he stabbed the victims. Rather, he claimed that the evidence was insufficient to support the convictions. We recite our review of the evidence to the extent relevant for this appeal.

> [T.L.] testified that he and [J.T.] left a strip club after several hours of drinking at various bars. Rico was outside the club talking to Brandie Gregory, [T.L.]'s "blind date" which mutually had not worked out. [J.T.] and Rico began arguing and it escalated to a physical altercation. [T.L.], who had been trying to "talk them down," got between the two men to separate them. He heard [J.T.] say, "He's got a knife." [T.L.] then realized he had been stabbed.
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> [J.T.] testified that he was introduced to Rico inside the club, that there was "an attitude" between them and that they "both didn't like each other." He and Rico exchanged words outside the club. [J.T.] admitted he hit Rico first, punching him three times in the face. Rico then stabbed [J.T.] in the side.
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> Gregory testified that [J.T.] grew upset with her during the evening because she rebuffed his advances. She was talking to Rico when she saw [T.L.] and [J.T.] leave through the front door so she and Rico went out the back. [T.L.] and [J.T.] came around to the back of the club. [J.T.] called her names and pushed her so she "smacked him in the face." [J.T.] pushed her to the ground. Rico then "got in the middle of it" and [J.T.] hit him. Both she and [T.L.] tried to break up the fight. When the fight ended, she and

Rico went back inside the club. She did not know anyone had been stabbed.

Rico testified in his own defense. He shared a six-pack with a friend at his house, went later to a bar where he had more beer and two shots and then stopped at the strip club "for a last drink" about 11:30 p.m. He and Gregory began talking inside but went outside because [J.T.] was looking at him "like he had a problem." When [T.L.] and [J.T.] showed up behind the club, [J.T.] began insulting Gregory. Rico did not want to get involved at first but did when Gregory "hit the ground" because he thought [J.T.] had "gone too far." [J.T.] hit him several times. Rico got "very scared" when [T.L.] stepped in because Rico thought it would be two against one and he "could barely stand" [J.T.]'s punches. Rico did not leave because he did not want to leave Gregory alone with [T.L.] and [J.T.]. He felt "trapped" and decided to use the knife he carries in his back pocket and uses for work.

A police officer who responded to the scene testified that he arrived to find [T.L.] bleeding from the chest, going in and out of consciousness and "not really responsive." The officer recovered a five-inch folding-blade knife from Rico's pants pocket. The emergency room physician testified that [T.L.] presented in critical condition with "life-threatening" injuries. He had three stab wounds, the most serious being one to the left side of his chest. [J.T.]'s abdominal wound was "relatively superficial" and did not cause internal injury.

The totality of Rico's conduct establishes his lack of regard for human life. He had been drinking throughout much of the evening. He carried a knife in his pocket. He decided to use the knife on unarmed men, one of whom testified to trying to defuse the situation. He did not report the incident despite knowing that he stabbed two men. The jury alone determines the credibility of the witnesses, resolves conflicts in the testimony, weighs the evidence and draws reasonable inferences from it. Thus, the jury was entitled to discredit Rico's testimony that the knife was for use at work and that he was "very scared" and felt "trapped." It reasonably could have believed instead that Rico should have known [T.L.] was not an aggressor and that Rico and [J.T.] were equally working out their "attitudes" and mutual dislike. [J.T.] may have provoked Rico, but the jury also reasonably could have concluded that a reasonable person in Rico's position would have known that a knife presents a "heightened risk" and "potentially lethal danger."

Id., ¶¶4-9 (footnote and citation omitted).

¶3 In 2014, Rico filed a WIS. STAT. § 974.06 motion alleging ineffective assistance of trial counsel because counsel did not request jury instructions for defense of others and accident. After a hearing at which argument was held but no witnesses testified, the circuit court stated that even though it would have granted a request for a defense of others instruction at trial, on postconviction review the evidence did not warrant either a defense of others or accident instruction. Therefore, counsel was not ineffective. The court reasoned:

> [T]he facts of the case demonstrate that while defendant was motivated to get involved concerning the conduct between Brandie Gregory and J.T. at the point when J.T. pushed Gregory to the ground, however, what is critical in this case is that when the defendant did get between Gregory and J.T., the defendant then became the object of the aggression of J.T. because the defendant was promptly punched in the face three times knocking him down. The defendant's own testimony was that he used the knife to protect himself from the attack, especially when the other victim got closer as the defendant was fearful of a two versus one assault. Thus, counsel's performance was not deficient because the defendant got the self-defense instruction regarding the material and relevant facts of the defendant being struck in the face three times by J.T. At that point in time, Brandie Gregory was no longer the victim nor in any danger of harm by J.T. Furthermore, it is absolutely clear that the defendant's conduct thereafter was to protect himself from further battery and acted in defense of himself. The jury was properly instructed on the defendant's right of self-defense….
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> [With regard to the request for an accident instruction], [t]he Court is satisfied and concludes that trial counsel was not ineffective because the factual predicate for the accident instruction did not exist. The facts are crystal clear that the defendant did deploy and use the knife without warning or notice to the victims, and stabbed them repeatedly with the intent to injure. This was not a flailing or waiving of an arm that resulted in an inadvertent strike or an unintended injury. Here the facts are clear that the

> defendant was using punching and striking motions while the knife was gripped in his fist causing the injuries with each blow.… [T]he accident instruction was not viable and counsel therefore was not ineffective by failing to ask for it.

The circuit court denied the postconviction motion. Rico appeals pro se.[2]

¶4 A circuit court must hold an evidentiary hearing if the WIS. STAT. § 974.06 motion alleges sufficient facts that, if true, show that the defendant is entitled to relief. ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. If the motion does not allege such facts, "or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," the circuit court has the discretion to grant or deny the motion. ***Id.***

¶5 To succeed on an ineffective assistance of counsel claim, a defendant must demonstrate that counsel's representation was deficient and that the deficiency was prejudicial. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. Both deficient performance and prejudice present mixed questions of fact and law. ***Id.*** We will uphold the circuit court's factual findings unless they are clearly erroneous. ***Id.*** However, we review de novo whether counsel's performance was deficient or prejudicial. ***Id.***

¶6 Jury instructions relating to a defense are required if "the evidence, viewed in the light most favorable to the defendant and the instruction, establishes a sufficient basis for the instruction." ***State v. Giminski***, 2001 WI App 211, ¶11, 247 Wis. 2d 750, 634 N.W.2d 604. Whether there was a sufficient basis in the

[2] The State argues that we should refuse to reach the merits of Rico's appeal. We decline the State's invitation, and we reach the merits.

evidence for a jury instruction presents a question of law that we decide de novo. ***Id.*** If the record lacked a basis for instructing on defense of others and accident, then trial counsel was not ineffective for failing to request those instructions. *See* ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994) (counsel cannot be faulted for not bringing a motion that would have failed).

¶7 Defense of others requires that the defendant must have actually and reasonably believed that he or she was acting to prevent or terminate an unlawful interference. ***Giminski***, 247 Wis. 2d 750, ¶13.

¶8 We agree with the circuit court that the evidence did not support giving a defense of others instruction. There is no evidence that Rico could have reasonably believed that he needed to act to prevent an unlawful interference with Brandie Gregory. When Rico deployed the knife, he was the only one in danger as a result of his confrontation with J.T., who hit Rico three times. Rico testified that when he deployed his knife, he was trying to protect himself. Rico also stabbed T.L., who had not, to that point in the confrontation, engaged physically with Rico or Gregory. Furthermore, the jury rejected Rico's self-defense claim. There was no basis in the evidence for a defense of others instruction. Trial counsel did not perform deficiently when counsel failed to request this instruction. *See* ***Simpson***, 185 Wis. 2d at 784.

¶9 We further agree that there was no basis in the evidence for an accident instruction. WIS JI—CRIMINAL 772. The credible evidence did not support that Rico accidentally stabbed either victim. As the circuit court noted, Rico drove the knife into T.L.'s body on more than one occasion. The circuit court found:

> [T]he defendant did deploy and use the knife without warning or notice to the victims, and stabbed them repeatedly with the intent to injure. This was not a flailing or waiving of an arm that resulted in an inadvertent strike or an unintended injury. Here the facts are clear that the defendant was using punching and striking motions while the knife was gripped in his fist causing the injuries with each blow.…

¶10 Because there was no basis in the record for an accident instruction, trial counsel's failure to seek the instruction did not constitute deficient performance. *See* ***Simpson***, 185 Wis. 2d at 784.

¶11 We turn to Rico's final argument: his convictions should be reversed because the jury was not properly instructed regarding self-defense. In so arguing, Rico relies upon ***State v. Austin***, 2013 WI App 96, 349 Wis. 2d 744, 836 N.W.2d 833, which addressed the self-defense instruction, WIS JI—CRIMINAL 801 (2001),[3] as it existed at the time of Austin's 2008 trial. Rico argues that WIS JI—CRIMINAL 801 erroneously placed the burden of proof for self-defense on Rico. ***Austin*** is distinguishable and does not afford Rico a basis for relief.

¶12 "A jury instruction is erroneous if it fails to clearly place the burden of proving all elements of the offense on the State." ***State v. Patterson***, 2010 WI 130, ¶53, 329 Wis. 2d 599, 790 N.W.2d 909. We independently determine whether the jury instruction was appropriate under the facts of the case. ***Austin***, 349 Wis. 2d 744, ¶6 (citation omitted).

¶13 In ***Austin***, we reversed and remanded for a new trial in the interests of justice after we concluded that the jury instructions erroneously implied that the

[3] After the decision in ***State v. Austin***, 2013 WI App 96, 349 Wis. 2d 744, 836 N.W.2d 833, WIS JI—CRIMINAL 801 (2014) was amended. The 2014 version is not relevant to Rico's appeal.

defendant had to satisfy the jury that he acted in self-defense. ***Id.***, ¶17. In reaching that conclusion, we relied upon a significant discrepancy between the jury instructions for defense of others and self-defense: the jury was clearly instructed regarding the correct burden of proof for defense of others, but the self-defense instruction did not address the burden of proof. ***Id.***, ¶7. On this record, we reversed in the interests of justice.

¶14 Rico's jury was instructed only on self-defense, and the instructions as a whole did not create an ***Austin*** problem. Considering the jury instructions as a whole, ***Patterson***, 329 Wis. 2d 599, ¶55, the jury was instructed that the State (1) had the burden of proof on every fact necessary to convict Rico and (2) self-defense negates the elements necessary for a guilty verdict on criminally reckless conduct. We conclude that Rico's jury was properly instructed about self-defense.[4]

¶15 The record conclusively demonstrates that Rico was not entitled to relief on his WIS. STAT. § 974.06 motion. Therefore, the circuit court properly exercised its discretion when it denied Rico's postconviction motion without a hearing. ***Balliette***, 336 Wis. 2d 358, ¶18.

By the Court.—Order affirmed.

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

[4] For this reason, we do not address the other challenges to the self-defense jury instruction (plain error or reversal in the interest of justice or due to a miscarriage of justice).