COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1186-CR **Cir. Ct. No. 2010CF127**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT JOHN KLINE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marinette County: TIM A. DUKET and JAMES A. MORRISON, Judges. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Scott Kline appeals a judgment of conviction and an order denying postconviction relief.[1] Kline argues the circuit court relied upon inaccurate information at sentencing. He also argues his trial attorney was ineffective for failing to object to a restitution claim. We affirm.

¶2 This case arises out of a drunken brawl in which Kline stabbed Jarrid Larson with a forty-inch sword. The blade severed Larson's veins and arteries, requiring medical resuscitation and emergency surgery. Kline also caused deep lacerations to Larson's finger with the sword. Kline was convicted after a jury trial of two counts of aggravated battery and one count of first-degree recklessly endangering safety, all enhanced by use of a dangerous weapon. The circuit court imposed an aggregate thirty-year sentence consisting of twenty years' initial confinement and ten years' extended supervision.

¶3 Kline argues he is entitled to resentencing because the circuit court relied upon inaccurate information in emphasizing the seriousness of the injury concerning count one, in which the court imposed the maximum allowable sentence. Essentially, Kline challenges his sentence to the extent the court's discretion reflected a belief that, absent medical intervention, Larson would have died from the wounds, a conclusion Kline insists is without support in the record. Kline does not challenge the evidence that Larson's wound *could* have been fatal absent medical intervention. However, he insists the court erred by stating Larson *would* have died without medical intervention.

[1] The Honorable Tim A. Duket presided over the trial and entered the judgment of conviction. The Honorable James A. Morrison entered the order denying Kline's postconviction motion.

¶4 We will uphold a sentence "if there exists a reasonable basis for the trial court's determination." ***McCleary v. State***, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). We also recognize that a circuit court may base its sentence on facts "reasonably derived by inference from the record." ***Id.*** This includes inferences regarding the likely physical consequences of the defendant's acts. *See*, *e.g.*, ***United States v. Larsen***, 615 F.3d 780, 789 (7th Cir. 2010).

¶5 Here, we conclude inferences drawn from the facts of record support the circuit court's statement that Larson would have died absent medical intervention. Many witnesses testified to Larson's copious blood loss and deteriorating condition before he received medical attention. Larson's girlfriend testified at the preliminary hearing that "[b]lood [was] just pouring" out of Larson, "[l]ike a garden hose with water coming out but it was blood. … Like low water pressure was coming out. … It was bad." Her trial testimony essentially tracked her earlier testimony with respect to the severity of Larson's injuries.

¶6 A responding police sergeant testified at trial that he found "a large amount of red fluid that I believed to be blood in the roadway." He also testified that virtually every room in the house had red splatter he believed to be blood. Another responding officer testified that he found Larson in the street, "kind of bent over in a painful manner. You could see there was a lot of pain on his face." The officer saw "a lot of blood dripping" from Larson. Blood pooled where Larson stood, and trailed back into the house where the stabbing occurred. When the officer tried to speak to Larson, "because of the blood loss and the fact that he was almost going to be coming into unconsciousness, his speech was slow and very low and slurred." Larson's skin appeared very pale and the officer testified, "I could tell that he had lost a lot of blood. Just from what he had been standing in and the trail that was leading all the way up to the door, significant blood loss."

¶7 Another officer with military first-aid training testified at trial that he found Larson in the street with "blood everywhere on the ground," and blood soaking the sweatshirt Larson's girlfriend used in an attempt to staunch the bleeding. Larson's speech became more slurred as the officer attempted to question him, he was slumped over and it appeared he was about to faint from the blood loss.

¶8 Kline insists this collective evidence "does not warrant a conclusion that Larson would have died absent prompt professional medical assistance." According to Kline, "that collective testimony merely established that there was a great deal of blood on the scene, and that Larson's speech was slurred." Kline argues such observations do not establish that Larson would have died absent medical intervention, especially given that Larson's blood alcohol content was .178 when he arrived at the hospital. Moreover, Kline contends "none of those making the observations possessed anything approaching the medical expertise of … the vascular surgeon, who … testified that the result '[c]ould have been' catastrophic absent medical intervention."

¶9 However, the testimony of those observing Larson's condition before medical personnel arrived supported a reasonable inference that Larson would have died in the street from blood loss absent medical intervention. Even with preliminary medical treatment provided by emergency medical personnel, Larson's bleeding had not stopped when he finally reached the hospital, and it required emergency surgery to save Larson's life. We are therefore not persuaded by Kline's argument.

¶10 Significantly, the record reveals no other reason to challenge Kline's sentence. The circuit court discussed in detail the proper sentencing factors. *See*

State v. Harris, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The court considered the seriousness of the offense, Kline's low character and the need to protect the public. The court stated, "[T]his is amazing in the sense that this is the second time he's facing prison for having stabbed somebody." The court noted Kline's attempts to cover up the crime in the present case by washing the blood off the sword, hiding bloody clothes and telling another person at the scene, "don't forget the story we concocted."

¶11 The court described Kline's "despicable lifestyle":

> [T]his is what they did all day long all summer long. Get up and drink. You don't know if it's Tuesday, Friday, Saturday, Sunday because every day pretty much looks the same. You get up and you just drink until you're highly intoxicated, and then you go to bed and get up and do the same thing over and over again, and this was a flophouse.

¶12 The court noted "he's done a great deal of time in prison" and concluded that Kline exhibited "a pervasive pattern of just not being able to conform [his] behavior to the requirements of the law." The court also reiterated Kline's failure at earlier rehabilitation attempts.

¶13 The court stated the "primary purpose of this sentence is protection of the community because we don't want anybody else seriously harmed or stabbed when Mr. Kline is angry and drunk." In the final analysis, the court concluded, "I think a significant sentence has to be imposed." Although the court imposed the maximum on the first count involving the stabbing of Larson, the aggregate sentence was far less than the forty-two and one-half years' initial confinement and fifteen years' extended supervision allowable by law. The court properly exercised its sentencing discretion.

¶14 Kline next argues his trial attorney was ineffective by failing to object to the amount of restitution owed Larson for lost wages. Before sentencing, the victim-witness coordinator submitted a restitution amount of $33,106.26, including a claim of $1,638 for fourteen days of wages lost by Larson. Kline did not object to the sum for lost wages at sentencing and the court incorporated the amount into the judgment of conviction.

¶15 In his postconviction motion, Kline claimed ineffective assistance of counsel for failing to object to the amount of lost wages. Kline asserted that due to Larson's intoxication at the time of the stabbing, he would not have been able to work that day even if Kline had not stabbed him. He also claimed the trial testimony "indicates, or at least strongly suggests, that Larson had no concrete plans to work the 13 days immediately following the day of the stabbing."

¶16 To establish ineffective assistance of counsel, a defendant must show: (1) deficient performance; and (2) actual prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not discuss both prongs "if the defendant makes an insufficient showing on one." ***Id.*** at 697.

¶17 At the ***Machner***[2] hearing, trial counsel testified that he had no independent recollection of discussing the lost wages claim with Kline. However, he testified his "usual practice [is] to sit down with the defendant and to talk about the restitution." He testified he asks his client if there is an objection to the amount of restitution "and if there is an objection I would note it. Here I don't

[2] Referring to ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

recall there being any objections to the restitution figure. As such, I did not pursue the restitution as being objectionable."

¶18 Trial counsel also testified:

> Had there been an objection, I would have discussed this further with Mr. Kline. Dealing with the fact that he had a very lengthy exposure hanging over his head, I believe we had other matters that were more pressing than that restitution figure, and the fact that I had a feeling this would be a very contentious sentencing hearing, I don't know if I – if it would have been something I would have pressed had Mr. Kline asked me to, or I would have talked to him about that saying that, you know, it's probably a good way to make the judge more angry, so that was my recollection what occurred, sir.
>
> ….
>
> Again, we were looking at more serious issues with the very lengthy exposure, if my memory serves me, of approximately 40 years, so that was more our focus going into the sentencing hearing, trying to minimize the sentence as much as possible.

¶19 Kline did not testify at the ***Machner*** hearing. He presented no evidence that trial counsel deviated from his standard practice in handling restitution issues. He also presented no evidence that he told his counsel he wanted him to challenge the amount of restitution, or preferred such a challenge over attempts to mitigate his sentence.

¶20 Accordingly, trial counsel's testimony was uncontroverted concerning his normal practices, as well as his recollection that Kline did not object to the amount of restitution, which would have triggered further discussions. Trial counsel did not perform deficiently.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).