COURT OF APPEALS
DECISION
DATED AND FILED

July 9, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1454-CR **Cir. Ct. No. 2005CF219**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGORY J. NELSON,

DEFENDANT-APPELLANT.

APPEAL from judgment of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed*.

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Gregory J. Nelson appeals from a judgment convicting him of first-degree intentional homicide by use of a dangerous weapon,

contrary to WIS. STAT. §§940.01(1)(a) and 939.63(1)(b) (2005-06).[1] His trial theory was self-defense. Nelson contends the trial court should have admitted a recorded conversation between him and his brother referring to the victim having a weapon, and should have allowed him to counter testimony about the victim's peaceful nature with evidence of specific acts of violence by the victim. He also contends that the evidence did not support giving the provocation instruction and was insufficient to support the guilty verdict. Lastly, Nelson contends the trial court erroneously exercised its sentencing discretion. We disagree and affirm.

¶2 Nelson and an acquaintance, Dean Freitag, were drinking beer and playing cards at Nelson's house when an argument erupted. Freitag pushed Nelson, who fell against the fireplace. Nelson picked up a heavy board, backed Freitag down a dark hallway, and hit him twice over the head. Shortly thereafter, Nelson called 911. Freitag was pulseless and not breathing when police and EMTs arrived. Despite Nelson's claim of self-defense, the jury convicted him of first-degree intentional homicide by use of a dangerous weapon. Sentenced to life imprisonment without parole, probation or extended supervision, Nelson appeals.

Exclusion of recorded conversation

¶3 The first issue involves two recorded telephone conversations Nelson had while in the Kenosha county jail, one with his father, the other with his brother, Peter. Nelson and his father discussed the charges and the self-defense. In the other, Nelson tells Peter that Freitag "is always carrying a weapon. I mean

[1] All references to the Wisconsin Statutes are to the 2005-06 version.

he's always got one on him." The State introduced only the recording of the conversation Nelson had with his father.

¶4 In opening statements, the prosecutor told the jury that the police would testify that the victim was unarmed and that Nelson "never said anything about weapons." To rebut this, Nelson sought at various points in the proceedings to introduce a transcript of the "Peter" conversation, to allow Peter to testify about the conversation and, finally, to permit the jury to hear the recording itself. The court ruled the transcript inadmissible because it had been modified and that the recording and Peter's testimony about it both were hearsay.

¶5 Nelson argues on appeal that the prosecutor's opening statement remarks opened the door to the second conversation and excluding it violated his due process right to present a full and fair defense.[2] He also argues it is admissible as a residual hearsay exception under WIS. STAT. § 908.045(6).[3] We review a decision to admit or exclude evidence under an erroneous exercise of discretion

[2] Nelson repeatedly contends the prosecutor "argued" that Nelson made no statements that Freitag had a weapon and that, by not admitting the recording, the court allowed this "demonstrably false" claim to stand unchallenged. We observe that the prosecutor's comment was made during opening statements, which—immediately before the prosecutor began speaking—the court expressly cautioned the jury is not evidence. *See* WIS JI—CRIMINAL 101. Admonitory instructions presumptively erase potential prejudice. ***State v. Collier***, 220 Wis. 2d 825, 837, 584 N.W.2d 689 (Ct. App. 1998).

[3] Nelson does not assert here, as he did below that the evidence also was admissible under WIS. STAT. § 901.07, the "rule of completeness." An issue raised in the trial court, but not raised on appeal, is deemed abandoned. ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998).

standard. ***State v. Ford***, 2007 WI 138, ¶30, 306 Wis. 2d 1, 742 N.W.2d 61. Whether the application of an evidentiary rule deprives a defendant of the constitutional right to present a defense, however, is a question of constitutional fact subject to independent appellate review. ***State v. Williams***, 2002 WI 58, ¶69, 253 Wis. 2d 99, 644 N.W.2d 919. To determine if the exclusion of evidence violated Nelson's right to present a defense, we examine whether (1) the proffered evidence was "essential to" his defense, and (2) without the proffered evidence, he had "no reasonable means of defending his case." *See* ***id.***, ¶70 (citation omitted).

¶6 Nelson has not shown that the "Peter" conversation was essential to his defense or that its exclusion left him with no other reasonable means of defending his case. On the contrary, the jury heard evidence consistent with a theory of self-defense, including the testimony of the 911 dispatcher that Nelson himself placed the 911 call; testimony of the responding officer that, on his arrival, Nelson told him to hurry and that Nelson had an abrasion on his back which he said he got when he fell into the fireplace; and Nelson's statement to the police and the recorded conversation with his father, both of which portrayed Freitag as the aggressor. Nelson is not obliged to testify, but had he opted to do so, he could have circumvented any hearsay defect. Having exercised his right not to testify, however, we agree with the trial court that he should not be permitted to "backdoor" the evidence, and essentially "testify … without having to testify."

¶7 Nor does the residual hearsay exception, WIS. STAT. § 908.045(6), salvage Nelson's argument. He simply asserts that the recorded conversation is admissible under § 908.045(6) but takes the argument no further to show how the proffered evidence has circumstantial guarantees of trustworthiness comparable to other § 908.045 exceptions. We may decline to review undeveloped issues. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

Exclusion of victim's specific acts of violence

¶8 Nelson next argues that the trial court erred when it ruled that the State could offer evidence of Freitag's character for peacefulness but Nelson could not challenge it with evidence of specific instances of Freitag's violence. The court relied on WIS. STAT. § 904.04(1), ***McMorris v. State***, 58 Wis. 2d 144, 205 N.W.2d 559 (1973), and ***Werner v. State***, 66 Wis. 2d 736, 226 N.W.2d 402 (1975). We review a decision to admit or exclude evidence under an erroneous exercise of discretion standard. ***Ford***, 306 Wis. 2d 1, ¶30.

¶9 WISCONSIN STAT. § 904.04 provides in relevant part:

> **(1)** CHARACTER EVIDENCE GENERALLY. Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:
>
> **….**
>
> (b) *Character of victim*. Except as provided in s. 972.11 (2) … evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor[.]

¶10 We construe a statute independent of the trial court's interpretation. ***Williams***, 253 Wis. 2d 99, ¶8. Our aim is to ascertain and give effect to the legislature's intent. ***State v. Franklin***, 2004 WI 38, ¶9, 270 Wis. 2d 271, 677 N.W.2d 276. We begin with the plain and ordinary meaning of the language of the statute, and if it is clear on its face, we simply apply it. ***Id.***

¶11 The statute permits the prosecution to offer evidence of the victim's peacefulness "to rebut evidence that the victim was the first aggressor." WIS. STAT. § 904.04(1)(b). Nelson argues that evidence of Freitag's peaceful nature was wrongly admitted because *the prosecution* introduced the initial

evidence that Freitag was the first aggressor, and thus did not offer it "to rebut" such evidence. The statute does not say, however, who may or must offer the evidence that the victim was the first aggressor. The trial court read the statute as reflecting the legislature's intent not to limit the offeror to a specific entity, explaining that it could envision a scenario where a State witness might become hostile and the State could elicit rebutting evidence. We conclude this is a reasonable reading of the statute's plain language; we therefore apply it.

¶12 The court also relied on ***McMorris*** and ***Werner*** when it rejected Nelson's written offer of proof seeking to introduce evidence of specific instances of violent behavior by Freitag. When self-defense is asserted in a prosecution for homicide, the defendant's state of mind is material. *See* ***McMorris***, 58 Wis. 2d at 151. Therefore, an accused who maintains self-defense should be allowed to show *he or she knew of* prior specific instances of the victim's violence to show the accused's state of mind. ***Werner***, 66 Wis. 2d at 743 (emphasis added); *see also* ***McMorris***, 58 Wis. 2d at 152 ("[W]hen the defendant seeks to introduce such evidence to establish his state of mind at the time of the affray, it must be shown that he knew of such violent acts of the victim prior to the affray."). The evidence is not to support an inference about Freitag's actual conduct during the incident but to help the jury decide whether Nelson acted as a reasonably prudent person would under similar beliefs and circumstances. *See* ***McMorris***, 58 Wis. 2d at 151.

¶13 Nelson argues that reliance on ***McMorris*** and ***Werner*** is misplaced because he did not offer the "violent acts" evidence to show his state of mind but only to challenge the State's evidence of Freitag's peacefulness. Specific conduct evidence is admissible under WIS. STAT. § 904.05(2) where character is an essential element of a defense, but using character evidence to prove that the victim was the aggressor in a fight is not such a situation. ***Werner***, 66 Wis. 2d at

744 n.6. ***Werner*** thus precludes precisely what Nelson sought to do. Moreover, Nelson offers no law to support his view that reliance on ***McMorris*** and ***Werner*** is misplaced. We need address this issue no further. *See* ***Pettit***, 171 Wis. 2d at 627.

Provocation jury instruction

¶14 Nelson next asserts that insufficient evidence supported giving the provocation instruction the State requested. *See* WIS JI—CRIMINAL 815. A circuit court has broad discretion in instructing the jury and, in exercise of that discretion, must fully and fairly inform the jury of the rules of law applicable to the case to help it reasonably analyze the evidence. ***State v. Coleman,*** 206 Wis .2d 199, 212, 556 N.W.2d 701 (1996). We review independently whether a jury instruction is appropriate under the facts of the case. ***State v. Draughon***, 2005 WI App 162, ¶9, 285 Wis. 2d 633, 702 N.W.2d 412. To determine whether sufficient evidence supported an instruction, we neither weigh nor look to the totality of the evidence. ***State v. Mendoza***, 80 Wis. 2d 122, 152, 258 N.W.2d 260 (1977). Rather, we must view it in the light most favorable to the requesting party. ***Suhaysik v. Milwaukee Cheese Co.***, 132 Wis. 2d 289, 295, 392 N.W.2d 98 (Ct. App. 1986).

¶15 Here, the court read Nelson's statement into the record. The statement described that, after Freitag pushed him down during the escalating argument, Nelson picked up a nearby board, about forty-five inches by three inches and "heavy," and waved it at Freitag while backing him down a darkened hallway to the door. Nelson said Freitag stated, "You ain't going to use that board," and lunged at Nelson. Nelson swung twice, hitting Freitag in the head. The medical examiner testified that Freitag's injuries were consistent with the first blow striking the back his head and with a large amount of force being used.

¶16 By Nelson's statement, Freitag pushed him first. The evidence also supported an inference, however, that when Nelson armed himself with the board and backed Freitag down a darkened hallway, Nelson became the aggressor. The jury was instructed only that it should "consider" whether Nelson provoked the attack, and that Nelson could "lawfully act in self-defense" if the ensuing attack caused him to reasonably believe he imminently faced death or great bodily harm. *See* WIS JI-CRIMINAL 815. Viewed in the light most favorable to the State, we agree with the trial court that the facts permitted the inference that Nelson provoked Freitag's attack. The instruction was proper.

Sufficiency of the evidence

¶17 Nelson next contends that insufficient evidence supported the jury verdict. We therefore must determine whether the evidence at trial, viewed most favorably to the State and to the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact acting reasonably could have found guilt beyond a reasonable doubt. ***State v. Searcy***, 2006 WI App 8, ¶22, 288 Wis. 2d 804, 709 N.W.2d 497. We must keep in mind that the credibility of the witnesses and the weight of the evidence is for the trier of fact, and we must adopt all reasonable inferences which support the jury's verdict. ***Id.*** The question is not are we convinced of Nelson's guilt beyond a reasonable doubt, but can we conclude that the jury, acting reasonably, could be so convinced by evidence it had a right to believe and accept as true. *See* ***id.***

¶18 The medical examiner testified that Freitag was killed by blunt force trauma and brain injury. He had a skull fracture between his eyes, an ear-to-ear "hinge fracture" through the center of his skull consistent with a large amount of force, and internal bruising. The medical examiner testified that she found no

defensive wounds. Nelson told his father in the telephone conversation that he knew he hit Freitag and he "just swung until [he] knew [Freitag] was done." It was for the jury to accept or reject Nelson's claim of self-defense. Viewing the evidence most favorably to the State and to the conviction, we conclude that the jury, acting reasonably, could have been convinced of Nelson's guilt beyond a reasonable doubt.

Sentencing discretion

¶19 Lastly, Nelson asserts that the trial court erroneously exercised its sentencing discretion. His primary challenge is that life imprisonment without the possibility of parole, probation or extended supervision is too harsh for this crime.

¶20 Sentencing is within the trial court's discretion, and review is limited to determining if its discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "Appellate judges should not substitute their preference for a sentence merely because, had they been in the trial judge's position, they would have meted out a different sentence." ***McCleary v. State***, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971).

¶21 We start with the presumption that the trial court acted reasonably, ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998), and will search the record to determine whether, in the exercise of proper discretion, the sentence can be sustained, ***McCleary***, 49 Wis. 2d at 282. The sentencing court must address three primary factors, namely, the nature of the offense, the character of the offender, and the need to protect the public, and may consider any other relevant factors, balancing them as it sees fit. ***State v. Russ***, 2006 WI App 9, ¶14, 289 Wis. 2d 65, 709 N.W.2d 483. Still, the court must provide a "rational and explainable basis" for the sentence it imposes. ***Gallion***, 270 Wis. 2d 535, ¶39.

¶22 Here, the trial court discussed each of the primary factors, and also considered Nelson's refusal to cooperate with the PSI writer; his assaultive history and the escalation in the resulting harm; the fact that intoxication was associated with most of Nelson's arrests; Nelson's mental health issues; his history of involvement with weapons, and threats and assaults against others; and his reluctance to participate in rehabilitation. The court explained that the aggravated nature of the crime, Nelson's need for close rehabilitative control and the need to protect the public warranted lengthy incarceration without extended supervision in the community. We are satisfied from the record that the sentence represents a proper exercise of the court's discretion.

By the Court.—Judgment affirmed.

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