COURT OF APPEALS
DECISION
DATED AND FILED

August 16, 2012

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2011AP2518-CR **Cir. Ct. No. 2009CF252**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES JOSEPH HENKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Columbia County: ALAN J. WHITE, Judge. *Affirmed*.

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

¶1 LUNDSTEN, P.J. James Henke appeals after a jury found him guilty on multiple counts, including second-degree intentional homicide and false imprisonment. These and other charges against Henke stemmed from two related incidents. The false imprisonment charge stemmed from a domestic violence

incident between Henke and a woman with whom he was romantically involved. The homicide charge stemmed from a subsequent fight between Henke and Thomas Kratz, who confronted Henke after learning of the domestic incident. During that fight, Henke fatally stabbed Kratz.

¶2 Henke's trial counsel did not seek severance of the counts before or at trial. Post-conviction, Henke sought a new trial, asserting that his trial counsel was ineffective for failing to seek severance. Henke also raised a variety of other ineffective assistance of counsel claims, and further alleged that the circuit court made evidentiary errors. The circuit court rejected Henke's arguments. We affirm.

Background

¶3 On June 19, 2009, there was a domestic violence incident at Henke's apartment between James Henke and a woman with whom Henke had been romantically involved. At trial, the woman victim testified that she and Henke argued, that Henke "grabbed a hold of [her] neck," resulting in bruising, and that Henke would not let her leave his apartment when she attempted to leave.

¶4 Around the same time, the woman victim was also romantically involved with Thomas Kratz. She told Kratz about the domestic incident with Henke. Late in the evening of June 22, 2009, and early morning of June 23, while the woman victim was with Kratz at a bar, Henke sent a series of text messages to the woman victim, purporting to apologize. Kratz became agitated and spoke to Henke over the phone, stating that Kratz was coming to Henke's residence to "kick [Henke's] ass." Kratz and the woman victim left the bar in Kratz's vehicle, and arrived on the street outside of Henke's apartment building. Henke was

waiting outside of his building with a knife. He approached Kratz in the middle of the street. A fight ensued and, during that fight, Henke fatally stabbed Kratz.

¶5 Based on the June 19 domestic incident, Henke was charged with multiple counts, including false imprisonment. Based on the June 23 stabbing, Henke was charged with first-degree intentional homicide. He was also charged with two counts of possession of a switchblade knife, which police discovered in Henke's apartment after the stabbing. Henke's trial counsel did not seek severance, and all of the counts were tried together. As to the homicide charge, Henke argued self-defense based on the assertion that Kratz attacked Henke with a metal pipe while Henke's back was turned and that Henke stabbed Kratz trying to fend off that attack.

¶6 The jury found Henke guilty of false imprisonment, a class H felony, and of the lesser-included offense of second-degree intentional homicide with use of a dangerous weapon, a class B felony. The jury also found Henke guilty of the two counts of possession of a switchblade knife, class A misdemeanors.

¶7 Henke sought postconviction relief, which the circuit court denied after a ***Machner*** hearing. We include additional facts as necessary below.

Discussion

¶8 Henke argues that his trial counsel was ineffective in multiple respects. Henke also complains that the circuit court committed errors when it declined to exclude certain evidence. We address and reject each of Henke's arguments below.

I. Ineffective Assistance Of Counsel Issues

¶9 To address Henke's arguments that his counsel was ineffective, we apply a two-part test:

> To prevail on an ineffective-assistance-of-counsel claim, the defendant must prove that his or her counsel's performance was deficient and that the deficiency prejudiced his or her defense. In this analysis, courts may decide ineffective assistance claims based on prejudice without considering whether the counsel's performance was deficient.

State v. Roberson, 2006 WI 80, ¶28, 292 Wis. 2d 280, 717 N.W.2d 111 (citations omitted).

¶10 To show deficient performance, Henke must show that his counsel "'made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.'" ***State v. Cleveland***, 2000 WI App 142, ¶10, 237 Wis. 2d 558, 614 N.W.2d 543 (citation and internal quotation mark omitted). The burden is on the defendant to overcome "'a strong presumption that counsel acted reasonably within professional norms.'" ***Id.*** (citation omitted). "[W]e judge the reasonableness of counsel's conduct based on the facts of the particular case as they existed at the time of the conduct, and determine whether, in light of all the circumstances, the omissions fell outside the wide range of professionally competent representation." ***Id.***

¶11 To show prejudice, a defendant must show there is a reasonable probability that, but for the errors alleged, the result of the trial would have been different. ***Roberson***, 292 Wis. 2d 280, ¶29. "A reasonable probability is one sufficient to undermine confidence in the outcome." ***Id.***

A. Severance Issues

¶12 Henke argues that his trial counsel should have requested severance of both the domestic incident counts and the possession of switchblade counts from the homicide count. He contends that each of these failures constitutes ineffective assistance. We are not persuaded.

1. Severance Of Domestic Incident Counts From Homicide Count

a. Effect On Homicide Count

¶13 Based on the June 19 domestic incident, Henke was charged with battery, disorderly conduct, and false imprisonment. Henke contends that much of the evidence for those counts was irrelevant to the homicide case. It follows, in Henke's view, that severance was warranted to avoid a risk of unfair prejudice. *See* ***State v. Bettinger***, 100 Wis. 2d 691, 696-97, 303 N.W.2d 585 (1981) (stating that, when a trial encompasses multiple counts, there is a risk that the jury will improperly "consider that the defendant is a 'bad person' prone to criminal conduct," but that, "when evidence of both counts would be admissible in separate trials, the risk of prejudice arising due to a joinder of offenses is generally not significant").

¶14 Henke asserts that, here, prejudice was "overwhelming" because of a difference between what the jury would have heard about the domestic incident in a stand-alone homicide trial versus what the jury heard about the domestic incident in the joint trial that was held. We reject this argument because Henke fails to develop it.

¶15 Henke concedes that *some* information about the domestic incident would have been admissible in a stand-alone homicide trial. Specifically, Henke

concedes that what the woman victim told Kratz about the domestic incident was admissible with respect to the homicide charge. As Henke recognizes, that evidence provided context for the fight between Henke and Kratz, and supported Henke's defense that Kratz was "motivat[ed] … to attack" Henke based on anger over the domestic incident.

¶16 On this topic, the State summarizes the what-Kratz-was-told evidence as follows: "Kratz … became angry at Henke when he heard [the woman victim] claim that Henke had beaten her in recent days, when he saw bruises on her body that allegedly went back to the recent incident, and when he saw a series of text messages in which Henke was apologizing in the aftermath of the incident and pleading with [the woman victim] to stay with him." Henke does not dispute this summary and, thus, does not dispute that, regardless of severance, the jury would have heard that the woman victim told Kratz that Henke had "beaten" her to the point of causing visible bruising.

¶17 Accordingly, this is not a situation where severance would have prevented a jury from hearing about the domestic incident and the allegation that Henke battered the woman victim. Henke's argument, so far as he explains it, is that the lack of severance led to the admission of more details about the domestic incident and that the admission of these additional details mattered. Henke, however, merely makes this general assertion without pointing to specific evidence or providing an explanation as to why such specific evidence would have made a difference. Thus, Henke fails to provide a developed prejudice argument, and we reject it on that basis.

¶18 Before leaving this topic, we observe that our review of the record indicates that Henke's trial counsel could have reasonably thought that a joint trial

of the charges could help Henke. That is, to the extent that not severing meant that more evidence of the domestic incident was before the jury, at least some of that additional evidence placed Henke in a more positive light. For example, at trial, the woman victim did not maintain that Henke intentionally "beat" her, but rather agreed that statements she made in a 2009 affidavit, in which she stated that she and Henke "briefly struggled" but that "Henke was not trying to injure [her]," were true. For his part, Henke testified at trial that he did not beat the woman victim or cause her bruises. Thus, it appears that a joint trial of the domestic incident charges and the homicide charge gave the jury an opportunity to hear some evidence *favorable* to Henke that the jury would not have heard in a separate homicide trial.

b. Effect On False Imprisonment Count

¶19 We turn to Henke's argument that not severing harmed him with regard to the false imprisonment count. Henke argues that, "[a]t a trial on the … domestic charges involving [the woman victim], the fact that defendant was accused of committing the offense of first degree homicide several days later would never have been admissible against defendant during that trial." Henke, however, does not persuade us that a failure to seek severance was deficient performance in the circumstances of this case.

¶20 Henke's trial counsel, understandably, was more concerned about the homicide charge than he was about the domestic incident charges. And, with respect to counsel's decision not to seek severance, counsel focused on the possible benefits that a joint trial would have with regard to the homicide charge. In keeping with this focus, Henke's trial counsel explained at the postconviction hearing that he believed the domestic incident provided useful "context" for the

homicide incident and that inconsistent statements made by the woman victim about the domestic incident were useful for impeaching her credibility and, thus, cast doubt on her statements about the homicide. Henke appears to contend that these reasons for not severing were flawed because these goals still could have been achieved in a separate homicide trial.

¶21 Henke does not, however, explain how these goals could have been accomplished in a severed homicide trial or, as importantly, how they could have been accomplished *to the same degree*. For example, Henke does not explain what mechanism he believes would have allowed his trial counsel to successfully introduce all of the inconsistencies in the woman victim's accounts of the domestic incident and their context in a trial *solely* about the homicide. Accordingly, Henke's argument lacks development.

2. Severance Of Switchblade Counts From Homicide Count

¶22 Henke also argues that his trial counsel should have sought severance of the possession of switchblade counts from the homicide count. Two switchblades were found in Henke's apartment, and neither of these was used in the stabbing. Henke asserts that the switchblade evidence did not overlap with the homicide case, and that presenting the switchblade charges in the same trial improperly "allowed the jury to infer defendant was a bad person who possessed illegal weapons when considering the homicide count."

¶23 Accepting that Henke is correct that the switchblade evidence did not meaningfully overlap with the homicide case, we nonetheless agree with the State that Henke's argument fails under the prejudice prong.

¶24 First, we observe that the primary focus at the six-day trial was the homicide charge and the events surrounding the fight between Henke and Kratz. Very little time was spent on the possession of switchblade counts, which were relatively simple charges requiring little by way of evidence or argument.

¶25 Second, Henke does not explain, and we do not discern, anything particularly inflammatory about knowing that Henke possessed illegal switchblade knives in a drawer in his apartment. This is especially true in light of evidence presented to the jury showing that Henke had a weapons collection in his apartment, including "axes, knives, and swords."[1]

B. Voir Dire Issues

1. Questioning About Recantation

¶26 Henke complains that his trial counsel deficiently failed to object when the prosecutor's questioning during voir dire included comments about the behavior of domestic abuse victims. Henke refers to the fact that the prosecutor asked whether potential jurors understood that domestic abuse victims might have feelings for an abuser, might fear an abuser, or might be persuaded by an abuser and, as a result, "may not want to testify against her abuser" or "will change their stories because of those … factors."[2] Henke complains that the questions were not

[1] We note that there is no dispute that the evidence of Henke's weapons collection was admissible with regard to the homicide charge. Indeed, Henke acknowledges that it was relevant that his collection had "many dangerous weapons." This evidence supported Henke's explanation as to why he came down from his apartment to confront Kratz on the street—that is, that Henke did not want to have a confrontation in his apartment where Kratz might grab one of Henke's many accessible weapons.

[2] Henke points to the following voir dire questions:

(continued)

proper under the voir dire statute, WIS. STAT. § 805.08(1).[3] He further asserts that the questions were unfairly prejudicial because they "had the impact of expert testimony" and gave the prosecution "the benefits of expert testimony without having [to] take the risks associated with calling such an expert."

¶27 Although the question is debatable, we will assume for purposes of this discussion only that the factual assertions made by the prosecutor in questioning jurors were objectionable. Nonetheless, we agree with the State that prejudice, if any, was minimal and plainly not enough to undermine our confidence in the outcome.

> Okay. Is there anyone here that finds it hard to understand that a victim of domestic violence may still love their abuser even though they're being abused? Everyone understand that that can happen in a domestic violence situation?
>
> Is there anyone who believes that they would not be able to understand that a victim who loves the abuser may feel that everything will just get better if she just covers up for his actions? Anyone disagree that that can happen sometimes in domestic violence?
>
> Now, sometimes a victim may not want to testify against her abuser because she has feelings of love or loyalty, fear, or the defendant may even — or the abuser may even use some persuasion against the victim.
>
> Does everybody understand that that can happen in a domestic violence situation? Anyone that doesn't think that happens, or that you find it so unbelievable that you would hold it against the victim?
>
> Do you also understand that sometimes domestic violence victims will change their stories because of those same factors?

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶28 As the State points out, "[c]omments of counsel during voir dire are not evidence and the jury was so instructed." The jury was admonished, both before and after the evidentiary phase of the trial, to only consider sworn testimony of witnesses, exhibits received into evidence, and stipulated facts. The jury was further instructed that "[r]emarks of the attorneys are not evidence. If the remarks suggested certain facts not in evidence, disregard the suggestion." We agree with the State that we should assume the jurors followed these instructions and did not interpret the prosecutor's comments as providing, in effect, expert testimony that the jurors could or should consider. *See* ***State v. Grande***, 169 Wis. 2d 422, 436, 485 N.W.2d 282 (Ct. App. 1992) ("The jury is presumed to follow all instructions given.").

¶29 Furthermore, to the extent the prosecutor made factual assertions, those assertions are of a type not likely to improperly influence jurors. It is not apparent that the jurors would have perceived the prosecutor's references to the behavior of domestic abuse victims in general as anything more than an appeal to the jurors' common sense. For example, the prosecutor's assertion that domestic abuse victims sometimes love and cover up for their abusers was, on its face, an assertion by the prosecutor that this is an accepted fact by most people. It would seem that most, if not all, of the potential jurors, based on their life experiences or exposure to victim accounts, likely believed these things about domestic abuse victims to be true. However, any potential juror who did not believe them to be true was not likely to change his or her mind based on the brief and bald assertion by the prosecutor.

¶30 Accordingly, the absence of an objection at voir dire to comments about the behavior of domestic abuse victims does not undermine our confidence in the verdicts.

2. Questioning About Self-Defense

¶31 Henke also complains about voir dire questions by the prosecutor regarding self-defense. Henke acknowledges that the prosecutor could properly ask questions about self-defense if those questions were probative of juror impartiality. Henke complains, however, that the prosecutor's questioning of one juror went too far by eliciting "specific facts" about that juror's experience. Henke complains about the following exchange:

> [Juror]: ... I did have to defend myself at my line of work —
>
> ….
>
> [Juror]: — a couple of times.
>
> [Prosecutor]: And in doing that, did you limit yourself to just what needed to be done to stop it?
>
> [Juror]: Yes, yes. For what I was trained to do.
>
> [Prosecutor]: So you used your training as well.
>
> [Juror]: Right.
>
> [Prosecutor]: And in your training as a correctional officer, you're trained in a continuum of what you use, right?
>
> ….
>
> [Prosecutor]: You start out with the least amount of force —
>
> [Juror]: Right. That's what we used. It was the least amount of force. There were no weapons involved. It was mostly the hands.
>
> [Prosecutor]: Okay. And you actually probably could have gotten weapons available if you needed to, right?
>
> [Juror]: No.

> [Prosecutor]: You couldn't call in any back-up or anything?
>
> [Juror]: There's usually back-up there, but we don't carry weapons.
>
> [Prosecutor]: Right. You don't carry the weapons, but you could have called them in.
>
> [Juror]: Yes. There was more — when it happened, he attacked me and there [were] about four other people that [were] right there.
>
> [Prosecutor]: And did every one of you use only the force necessary to stop the attack?
>
> [Juror]: Yes, um-hum.
>
> [Prosecutor]: Once the attack stopped, did you stop —
>
> [Juror]: Yeah.

Henke appears to argue that knowing about this juror's experience unfairly suggested to jurors that Henke should have been able to use non-lethal force. Once more, Henke complains that his counsel deficiently failed to object. We disagree.

¶32 First, Henke does not explain, and we do not perceive, any conflict between the juror's answers and the law that the jury was asked to apply. As the State points out, Henke's trial counsel, at the postconviction hearing, pointed to this lack of conflict as the reason for why he did not object. Second, as the State explains, whether Henke used a proper level of force when defending himself has no apparent connection to the force used by a correctional officer in a particular situation. Simply put, Henke provides no reason to suppose that these voir dire answers would have caused the jury to think that Henke was not permitted to use self-defense as described in the jury instructions. It follows that the absence of an objection to this questioning was not deficient performance.

C. Instructional Error

¶33 Henke argues that his trial counsel deficiently failed to object to a jury instruction on provocation. Henke contends that this is significant because the instruction "put an additional duty on [Henke] to retreat in the face of victim Kratz's attack." According to Henke, the trial evidence was insufficient to justify the instruction because the evidence showed that Kratz initiated the altercation. We are not persuaded.

¶34 "A circuit court is required to give a requested jury instruction if the evidence reasonably requires it." ***State v. Johannes***, 229 Wis. 2d 215, 228, 598 N.W.2d 299 (Ct. App. 1999). "Whether there are sufficient facts to allow the giving of an instruction is a question of law which we review de novo." ***State v. Head***, 2002 WI 99, ¶44, 255 Wis. 2d 194, 648 N.W.2d 413.

¶35 For our purposes, it is enough to explain that the provocation instruction directed the jurors to "consider whether the defendant provoked the attack," and that, if the jurors found that Henke provoked the attack, they should apply a somewhat different self-defense law.[4]

[4] The provocation instruction stated, in full:

> You should also consider whether the defendant provoked the attack. A person who engages in unlawful conduct of the type likely to provoke others to attack and who does provoke an attack is not allowed to use or threaten force in self-defense against that attack.
>
> However, if the attack which follows causes the person reasonably to believe that he is in imminent danger of death or great bodily harm, he may lawfully act in self-defense. But the person may not use or threaten force intended or likely to cause death or great bodily harm unless he reasonably believes he has

(continued)

¶36 In response to Henke's argument, the State points to evidence that, according to the State, supported giving the provocation instruction. Specifically, the State points to evidence that, after being told over the phone by Kratz that Kratz was coming to Henke's residence to "kick [Henke's] ass," Henke came outside his residence and waited downstairs for Kratz while holding a knife. When Kratz arrived, Henke was spinning the knife in his hand in a way that made the knife visible to Kratz as "plain as day." Henke then approached Kratz with the knife displayed, and met Kratz in the middle of the street, where a fight ensued. The State contends that, based on this evidence of Henke displaying a knife and approaching Kratz with it, the jury could reasonably have found that Henke "provoked Kratz to swing at Henke with the pipe."

¶37 Henke does not address these circumstances. Rather, Henke focuses solely on the fact that, in the phone conversation, Kratz threatened to "kick [Henke's] ass," and told Henke he was coming. In making this argument, Henke seemingly assumes that it was not legally possible for Henke to provoke Kratz because Kratz had already decided to engage Henke in a fight. However, if this is his view, Henke provides no legal or logical support for it.

¶38 We agree with the State that the relevant question is whether Henke could have been found to have provoked the street fight that occurred and that this question is not resolved by the undisputed evidence that Kratz threatened Henke

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> exhausted every other reasonable means to escape from or otherwise avoid death or great bodily harm.
>
> A person who provokes an attack, whether by lawful or unlawful conduct, with the intent to use such an attack as an excuse to cause the death or great bodily harm to another person is not entitled to use or threaten force in self-defense.

during an earlier telephone conversation. More simply put, the question is whether there was evidence that Henke provoked the actual fight, and this question is easily resolved against Henke. The jury instruction on provocation makes sense because, absent Henke's aggression at the scene, there might have been a less serious fight, or Kratz might have decided not to physically engage Henke at all.

D. Victim's Violent Tendencies

¶39 Henke complains that his trial counsel deficiently failed to cross-examine a witness about Kratz's past domestic violence convictions. We disagree.

¶40 Henke's complaint concerns testimony from a friend of Kratz's. The friend stated that Kratz "was a very nice man, very soft-spoken" and that "[h]e would give you anything." Henke asserts that this testimony "opened the door" to cross-examination about the fact that Kratz had past domestic violence convictions, which would have rebutted the suggestion that Kratz's character was peaceful and would have supported Henke's self-defense theory. It follows, according to Henke, that his counsel provided ineffective assistance when counsel failed to cross-examine the witness regarding Kratz's domestic violence convictions to show that Kratz had a violent nature.

¶41 In response, the State argues that choosing not to cross-examine on this topic was an objectively reasonable strategic decision. At the postconviction hearing, Henke's trial counsel explained that his strategy was to focus on events leading up to the fight and, in particular, to focus on witness statements that showed that, before the fight, Kratz was acting like "a loud, very angry person at the bar." Trial counsel further explained that his focus was self-defense in the context of "an attack between one man and another," and that he did not view the

past domestic incidents as particularly helpful. The State contends that, in these circumstances, it was not unreasonable for trial counsel "to consider that Kratz's prior convictions would have carried only minimal if any weight relative to the evidence of his actions and his anger on the night in question."

¶42 In reply, Henke takes the position that there was no "good reason" not to have brought up the past domestic violence convictions because it could have had *some* impact on the jury's view of Kratz. However, Henke's assertion does not come to grips with the State's core point—that trial counsel viewed Kratz's past domestic violence convictions as providing minimal insight into Kratz's behavior toward a man in the circumstances of this case. For that matter, other reasons for not cross-examining on this topic are readily apparent. For example, trial counsel could also have reasonably believed that raising past domestic incidents, with no apparent connection to the fight here, might be viewed by the jury as an effort to smear the victim, something that might have backfired on Henke.

¶43 In sum, Henke fails to show that trial counsel was deficient.

¶44 We also conclude that there is no reason to think that Henke was prejudiced. As the State explains, the jury had before it evidence contradicting the suggestion that Kratz was a peaceful person and, in particular, contradicting that Kratz acted peacefully on the night of the fight. On cross-examination, Kratz's friend stated or agreed that, on the night of the homicide, Kratz was yelling at the woman victim in anger for "maybe fifteen, twenty minutes or longer," was using profanity, and showed other signs of anger. And, Kratz threatened Henke and wielded a pipe when confronted by Henke. This evidence tended to dispel the suggestion that Kratz was, as a general matter, a peaceful person.

E. Cumulative Effect

¶45 Henke asserts that there is a cumulative effect from the alleged errors we have already discussed. *See* ***State v. Thiel***, 2003 WI 111, ¶60, 264 Wis. 2d 571, 665 N.W.2d 305 (stating that, "in determining whether a defendant has been prejudiced as a result of counsel's deficient performance, we may aggregate the effects of multiple incidents of deficient performance in determining whether the overall impact of the deficiencies satisfied the standard for a new trial under ***Strickland***"). Henke's cumulative-effect assertion adds little, and we reject it.

¶46 Henke does not explain with any specificity why analyzing the alleged errors cumulatively should change our analysis. Rather, Henke merely asserts that there is a cumulative effect. It suffices to say that we have concluded that several of Henke's complaints do not show deficient performance. As to what remains, we conclude that the cumulative effect is not cause for reversal because it does not undermine our confidence in the outcome.[5]

II. Issues Related To Alleged Circuit Court Error

A. Evidence Of Prior Convictions

¶47 In his brief-in-chief, Henke argues that the circuit court erred when it allowed the prosecutor to question Henke about having been "caught" driving his truck with a revoked driver's license. Henke refers us to a place in the record

[5] Henke may mean to assert that we should consider the cumulative effect of *all* alleged errors at trial, that is, not just errors relating to his allegation of ineffective assistance, but also alleged circuit court error. But, even if we were to consider every alleged error that Henke points to, our conclusion would be the same. As our discussion below makes clear, Henke's complaints about circuit court error come up short.

where the prosecutor asked about five occasions in 2009 where Henke was apparently caught by police driving with a revoked license. Henke argues that this was inadmissible "other acts" evidence under WIS. STAT. § 904.04(2) and ***State v. Sullivan***, 216 Wis. 2d 768, 771, 576 N.W.2d 30 (1998) (applying § 904.04(2)). This is Henke's entire argument on the topic, and we reject it based on Henke's failure to respond to the State's argument.

¶48 In its responsive brief, the State contends that the driving-while-revoked evidence "was neither offered nor admitted under [the other acts statute]," as Henke asserts. According to the State, the line of questioning was proper under a different statute, WIS. STAT. § 906.08(2). As pertinent to the State's argument, that subsection states: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, … may not be proved by extrinsic evidence. *They may, however, … if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness* …." ***Id.*** (emphasis added).

¶49 The State points out that Henke testified that he had stopped driving after his license was revoked, and that the challenged line of questioning served to reveal instances when Henke was nonetheless caught driving after that revocation. The State contends that this showed that Henke's representation about not driving was not true and, thus, impeached Henke's truthfulness.

¶50 Henke does not address the State's argument in either his brief-in-chief or in his reply brief. We deem the topic conceded in favor of the State, and address it no further. *See* ***State v. Chu***, 2002 WI App 98, ¶53, 253 Wis. 2d 666, 643 N.W.2d 878 (we may deem an argument made in a responsive brief conceded when a reply brief fails to respond to it).

B. Police Officer's Statement About Self-Defense

¶51 Henke complains that the circuit court erred when it allowed into evidence a statement by a police officer about self-defense. Henke refers to a statement made at the scene of the stabbing, in which an officer stated to Henke, "If we find a weapon … this self defense thing is gone." We reject Henke's complaints about this statement.

¶52 The conversation that included that statement was played for the jury and was admitted into evidence in transcript form. In that conversation, which was between two officers and Henke, Henke maintained that Kratz came at him with a metal "bat," that Henke defended himself by punching Kratz in the face with his fists, and that he "did not stab [Kratz]" and did not have any weapon when fighting Kratz. In the face of these denials, an officer stated to Henke that Kratz was "clearly … stabbed," and further stated his belief that, therefore, Henke's fists-only story had "parts left out." Later in the same conversation, the officer made the statement that Henke complains about: "If we find a weapon somewhere around here, it's going to have your prints on it and blood on it and you're in big trouble cuz this self defense thing is gone."

¶53 Because Henke's assertions about why the officer's statement should have been excluded are not easily summarized, we quote them:

> [T]his amounted to inadmissible expert testimony on an issue to be determined by the jury. The content of the statement implies there is a special standard the officer was aware of in reaching that opinion that was not part of the jury instructions. It implies … there may have been other facts the officer weighed in arriving at his conclusion. The statement easily could have been excised without interfering with the State's presentation of the case.

Henke contends that admitting the statement was not harmless error because the main issue in the case was self-defense, and "[t]he officer's testimony was a pronouncement [that] defendant's self-defense issue was not viable."

¶54 We reject Henke's assertions for lack of coherent development. The officer's statement was not offered as expert testimony, and merely asserting that it was does not constitute a developed argument.

¶55 Moreover, in context, it is apparent that the officer's statement was simply a statement of something obvious: that Henke's fists-only account would be "gone" if the physical evidence showed that he was lying about not having a weapon. For that matter, it is true that Henke's fists-only self-defense assertion was "gone" at trial for the simple reason that Henke changed his account and admitted that he had lied to the police about not using a knife.

¶56 In sum, we reject Henke's argument for two reasons. First, it is undeveloped. Second, the officer's comment on this undisputed point had no possible effect on the verdicts.

Conclusion

¶57 For the reasons discussed, we affirm the circuit court.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.