**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

November 2, 1999

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 99-1008-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**AUDELL HERNANDEZ,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Brown County: JOHN D. MCKAY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Audell Hernandez appeals a judgment convicting him of first-degree intentional homicide following a jury trial and an order denying his postconviction motions. He contends that he was denied his right to testify because he did not waive his right in open court and that there is no

evidence of waiver. He also claims that his counsel was ineffective by failing to inform him that he had an absolute right to testify and that the decision was his alone to make. He further contends that even if informed of the right, it was prior to trial and counsel was ineffective for failing to inform him again during trial. We conclude from our examination of the entire record, including the post-trial motions, that Hernandez's counsel fully advised him of his right to testify and that Hernandez knowingly, intelligently and voluntarily waived that right. We also determine that Hernandez has failed to develop a record to show that his counsel's assistance was ineffective. Accordingly, the judgment and order are affirmed.

¶2 Hernandez was charged with one count of first-degree intentional homicide in connection with the death of Julian Rodriguez. Rodriguez had been dating Hernandez's daughter and was going to take her to New York. Hernandez had an incestuous relationship with his daughter, and he was displeased that she had a boyfriend. Hernandez told his attorney that he got into a fight with Rodriguez and, after Rodriguez was slumped over the wheel in the car, he struck him in the base of the neck a number of times with a wrench. Hernandez later attempted to dispose of the body by putting it into Rodriguez's car trunk, driving to another county and setting fire to the car. Hernandez told the agent conducting the presentence investigation that Rodriguez had initiated the fight, that he knocked Rodriguez down and then kicked Rodriguez's head a number of times with steel-toed shoes.

¶3 Hernandez met with his attorney several times during the course of the action. Hernandez spoke only Spanish, and his attorney spoke only English. An interpreter was present for their meetings. They had two lengthy conversations regarding the trial and his rights at trial. At one of the meetings, counsel recommended that Hernandez plead no contest to first-degree intentional

homicide. Hernandez chose not to. At that meeting, counsel informed Hernandez of his right to testify and that Hernandez alone had to choose whether to testify. Counsel recommended he not exercise that right because he would have to tell the truth on the stand and that would mean having to admit incest with his daughter and moving and burning Rodriguez's body and car. In addition, counsel informed him that his truthful testimony would not support a self-defense theory. Hernandez agreed to counsel's recommendation and indicated he chose not to testify.

¶4 At trial, after the State rested, the defense also rested without calling any witnesses. The trial record contains no indication that Hernandez chose not to testify. Hernandez's counsel requested jury instructions on first- and second-degree reckless homicide. He based the request on evidence that he had elicited from prosecution witnesses that might have been consistent with a self-defense theory. The court declined to give the instruction. The jury found Hernandez guilty of first-degree intentional homicide.

¶5 Hernandez filed postconviction motions for a new trial based upon ineffective assistance of counsel and denial of his right to testify. The trial court held an evidentiary hearing on these matters. Hernandez called his trial counsel as a witness and also testified himself. The State called the interpreter who had translated trial counsel's discussions with Hernandez. The court rejected the motions. Hernandez appeals the order and judgment.

¶6 Issues concerning waiver of the right to testify involve historical and constitutional questions. We will uphold a court's findings of fact unless they are clearly erroneous. *See* § 805.17(2), STATS.; *see also* ***State v. Williams***, 225 Wis.2d 159, 168, 591 N.W.2d 823, 827 (1999). Whether the trial court's findings

of fact pass statutory or constitutional muster, however, is a question of law that this court reviews de novo. *See* ***id***.

¶7 Hernandez contends that his right to testify in defense of the homicide charge is a fundamental constitutional right that only he may waive and that his waiver must be done on the record. He claims that he had no specific discussion with trial counsel about the right to testify. He also asserts that because there was no mention at trial of whether he would testify, there is no evidence in the record that he waived his right to testify.

¶8 The right to testify on one's own behalf in defense of a criminal charge is a fundamental constitutional right. ***State v. Flynn***, 190 Wis.2d 31, 49, 527 N.W.2d 343, 350 (Ct. App. 1994). Only the defendant may waive the right, and the defendant's waiver must be knowing and voluntary. ***Id***. The record must show a knowing and voluntary waiver. *See* ***State v. Wilson***, 179 Wis.2d 660, 671-72, 508 N.W.2d 44, 48 (Ct. App. 1993). We consider the totality of the record, including the record of postconviction proceedings, in deciding whether a defendant knowingly and voluntarily waived his right to testify.[1] ***State v. Simpson***, 185 Wis.2d 772, 779, 519 N.W.2d 662, 664 (Ct. App. 1994).

¶9 The trial court implicitly found that Hernandez was, in fact, informed of his right to testify and that he waived the right. The court's finding was not clearly erroneous. Defense counsel testified at the postconviction hearing:

[1] Although we examine the entire record, we encourage trial courts to engage in an on-the-record colloquy with the defendant regarding his right to testify. As we noted in ***State v. Wilson***, 179 Wis.2d 660, 672 n.3, 508 N.W.2d 44, 48 n.3 (Ct. App. 1993), "it would be advisable for the trial court, immediately prior to the close of the defense's case, to make a record inquiry as to whether the defendant understands he has a right to testify and that it is his personal decision, after consultation with counsel, not to take the stand." (Quoted source omitted.)

> A. I considered very seriously the testimony of the defendant, and I went over with him what his testimony would be, both—well, prior to trial, and I asked him whether or not he wanted to testify prior to trial and also during the trial.
>
> Q. And so then you did have a discussion with him regarding his right to testify?
>
> A. Yes.
>
> Q. Okay. And that was prior to trial and at trial?
>
> A. Well, I discussed his right to testify prior to trial. I asked him at trial and prior to trial whether or not he wanted to testify.
>
> Q. How did you explain that to him?
>
> A. Well, maybe a better way to approach this is I also recommended that he plead no contest at some point both prior to trial and at trial. … I do have notes which I basically read to him and which were interpreted to him prior to the trial about the plea of no contest, and that did discuss basically his taking the stand or not taking the stand.
>
> Q. And when you discussed specifically the taking of the witness stand, did you tell the defendant that it was a right bestowed upon him or that he had a personal right to take the witness stand or anything like that?
>
> A. I would tell him, and I did tell him, that he had a right to take the stand. It was his choice. It was up to him. I think that would be as close as I could come as far as what I told him.
>
> ….
>
> Q. Did you explain to the defendant that it was also his right not to take the witness stand?
>
> A. Yes, I think that was covered also in my talks with him. Again, I told him the ramifications of him testifying in my opinion and the ramifications of his not testifying in my opinion.

The interpreter confirmed that defense counsel discussed with Hernandez his right to testify. Both defense counsel and the interpreter also testified that Hernandez indicated that he did not want to testify.

¶10 We conclude that the postconviction hearing testimony establishes that Hernandez knowingly and voluntarily waived his right to testify. Hernandez's decision to follow defense counsel's recommendation that he not testify does not diminish his understanding that he did not have to follow the recommendation and could testify.

¶11 Hernandez next contends that his counsel's assistance was ineffective.[2] He asserts that counsel failed to specifically discuss the right to testify with him. He asserts that the failure to advise him of his right to testify was prejudicial; that without his testimony, there was no evidence in the record to support the request for jury instructions on first- and second-degree reckless homicide.

¶12 Hernandez has failed to show that defense counsel was ineffective. First, as indicated, the trial court's finding that Hernandez was informed of his right to testify is not clearly erroneous. Second, Hernandez failed to meet his burden of providing this court with sufficient detail of what the omitted testimony would have been to enable us to assess its value and significance. *See* ***Flynn***, 190 Wis.2d at 48, 527 N.W.2d at 350. In his affidavit supporting his postconviction motion, Hernandez asserts he told trial counsel that he had acted in self-defense and claims that he would have testified had he known the decision was his to make. In his legal arguments, he asserts that his testimony would have supported instructions on lesser included offenses. Yet, at no time has Hernandez specified

[2] The right to effective assistance of counsel derives from the Sixth Amendment to the United States Constitution, made applicable by the Fourteenth Amendment, and WIS. CONST. art. I, § 7. ***State v. O'Brien***, 223 Wis.2d 303, 323, 588 N.W.2d 8, 17 (1999). To establish ineffective assistance of counsel, the defendant must prove both that counsel's performance was deficient and that such deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

what his self-defense testimony would have been. Without such information, there is no way for this court to assess whether Hernandez had a viable self-defense claim.[3]

¶13 Finally we address Hernandez's contention that trial counsel cannot simply explain the right to testify prior to trial and not discuss it again during trial, particularly at the close of the State's case.[4] He contends that the evidence does not always come in as expected and that there may be situations where the trial testimony necessitates that the defendant testify despite a contrary pretrial decision. We agree that there are instances where the defendant's decision whether to testify is influenced by developments at trial. In such instances, counsel may be ineffective for failing to reconsider an earlier decision regarding whether to testify. Hernandez has failed to show that this is such an instance.

¶14 Hernandez has not specified any unexpected testimony or evidence introduced during the trial that would necessitate reconsideration of his earlier decision not to testify. It is his obligation to provide this court with sufficient detail of the evidence calling for reconsideration of his decision not to testify to enable us to assess its value and significance. *See* ***Flynn***, 190 Wis.2d at 48, 527 N.W.2d at 350.

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[3] The record currently contains two different versions of what happened that Hernandez related to others. He has not adopted either version in his affidavit or testimony. He does not address which version this court should assess or whether there is yet another version.

[4] For purposes of this argument, we assume that, during trial, defense counsel did not discuss with Hernandez whether he wanted to take the stand. Because our resolution of this issue is dispositive, we do not address whether, during trial, Hernandez or his counsel revisited the issue whether Hernandez would testify. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983).

¶15 We conclude, from our examination of the record, that Hernandez's counsel fully advised him of his right to testify and that Hernandez knowingly, intelligently and voluntarily waived that right. We also determine that Hernandez has failed to show that his counsel's assistance was ineffective. Accordingly, the judgment and order are affirmed.

*By the Court.*—Judgment and order affirmed.

Not recommended for publication in the official reports.