COURT OF APPEALS
DECISION
DATED AND FILED

May 27, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP390 **Cir. Ct. No. 1991CF1820**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PHILIP H. JOINER-EL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Philip Joiner-El, pro se, appeals from an order denying a WIS. STAT. § 974.06 (2007-08)[1] motion alleging ineffective assistance of counsel. We reject Joiner-El's claims and affirm.

¶2 Joiner-El was convicted after a jury trial of aggravated battery, extortion while armed with a dangerous weapon, false imprisonment and first-degree reckless endangerment, as a habitual criminal. The convictions stemmed from the beating of Rosalie Stankovich, who was eight-and-one-half months' pregnant with his child. Stankovich had been beaten on both legs with a baseball bat, punched about the head more than ten times, and had a knife stuck in her mouth that left a wound, among other things.

¶3 The next morning, when Joiner-El finally agreed to take Stankovich to the hospital because she was in labor, he first took Stankovich to the credit union where he forced her to sign a check, and took $200 of the proceeds. He then stopped at an apartment building before going to the hospital.

¶4 Voluminous postconviction proceedings followed the trial, including at least one previous WIS. STAT. § 974.06 motion and a previous appeal.[2] The circuit court subsequently denied another pro se § 974.06 motion, and this appeal follows.

¶5 When a defendant files a WIS. STAT. § 974.06 motion after he has already filed a previous motion or direct appeal, a sufficient reason must be shown

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] The record indicates an appeal was voluntarily dismissed in 1993 and another notice of appeal was filed in 2001.

for failure to raise the new issues. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994); WIS. STAT. § 974.06(4). A possible justification for belatedly raising a new issue is ineffective assistance of the attorney who represented the defendant in those proceedings. ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681-82, 556 N.W.2d 136 (Ct. App. 1996). Before ineffective assistance can serve as a sufficient reason for raising a defaulted claim, the defendant must show that his attorney was ineffective, demonstrating that his performance was deficient and also that such deficiency prejudiced his defense. ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433.

¶6 Joiner-El's arguments are difficult to discern. It appears Joiner-El first argues his postconviction counsel should have alleged as error the fact that trial counsel did not seek a third-party defense jury instruction. *See* WIS. STAT. § 939.48(4). Although Joiner-El concedes he struck Stankovich, he claims he did so during a struggle out of fear for his unborn child's health upon discovering Stankovich injecting a needle in her arm in the bathroom. Joiner-El also insists in his reply brief that "there were no serious injuries sustained …."[3]

¶7 The privilege of defense of others, like the privilege of self-defense, has two components: (1) subjectively, the defendant must have actually believed he was acting to prevent or terminate an unlawful interference; and (2) objectively,

[3] Joiner-El's briefs contain citations to "exhibits" contained in the appendixes to his briefs, but he fails to cite to the record on appeal. We will not search the record for evidence to support a party's contentions. ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463. In addition, a party may not use a brief's appendix to supplement the record. *See* ***Reznichek v. Grall***, 150 Wis. 2d 752, 754 n.1, 442 N.W.2d 545 (Ct. App. 1989). Moreover, Joiner-El makes conclusory and unsupported statements such as, "… the exhibits will show there were no serious injuries sustained …." Unsupported, undeveloped and unexplained statements will not be considered. ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

the belief must be reasonable. *See* ***State v. Giminski***, 2001 WI App 211, ¶¶11, 13, 247 Wis. 2d 750, 634 N.W.2d 604. A person may use only such force as he reasonably believes is necessary to prevent or terminate the interference. *See* ***id.***, ¶12.

¶8 Here, both Stankovich and her physician described the extent of the injuries inflicted by Joiner-El. These included beatings around the head more than ten times so hard her vision blurred, beatings on the legs with a baseball bat and injuries inflicted with a knife. Moreover, the photographs received into evidence depicted the massive injuries to Stankovich's legs, head and body.[4] The beating of

[4] Stankovich testified "[h]e made me go into the bathroom," and "[h]e was arguing with me about something, asking me questions." Stankovich stated:

> He said that I made him get sick with his drugs because I had messed with his needles and things, which I hadn't. And the more I tried to convince him I didn't touch his things, the madder he got with me and started hitting me and made me tell him what he wanted to hear.

Stankovich described at trial how Joiner-El began hitting her "around the sides of the head" more than ten times so hard "that my vision was blurred." Joiner-El then grabbed a baseball bat and began striking Stankovich on the front and sides of both legs for over half an hour. Joiner-El then took a six-inch knife and stuck it down Stankovich's throat prior to cutting her on the arm.

Stankovich's physician, Milton Johnson, Jr., testified that when he first observed her in the hospital after the beating:

> her face was very obviously swollen and bruised … her left eye was very swollen and bruised, her right ear had lacerations on it, cuts, her cheeks were very swollen. She could not open her mouth fully because her jaw was so tender.

Dr. Johnson also described cuts on the roof of Stankovich's mouth and on the back of her elbow, which he characterized as "very clean" and consistent with a sharp object such as a knife. He also described large bruises on the arms and armpits, the left side of her back and "very large bruises on both legs, she had a lot of pain in both of her legs." Dr. Johnson also testified that he saw Stankovich ten to twelve times during the preceding six months for prenatal care, and he observed no evidence whatsoever that Stankovich was using drugs.

(continued)

Stankovich was so severe that there is no reasonable possibility that a jury would have found the force used was objectively necessary, even if it found Joiner-El subjectively believed his unborn child's life was in jeopardy. Indeed, we conclude such a defense would have prejudiced Joiner-El at trial. In addition, although he denied he struck her with the baseball bat, Joiner-El himself admitted that he could not say how many times he had hit and kicked Stankovich.

¶9 It is not ineffective assistance to fail to make a request which would have failed. *See* ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994). There is no support for Joiner-El's claim that postconviction counsel was ineffective for failing to allege ineffective assistance of trial counsel. There was no error in failing to seek a third-party defense jury instruction.[5]

¶10 Joiner-El also argues postconviction counsel should have alleged as error the lack of objection by trial counsel to the admission into evidence of the baseball bat with which Joiner-El was alleged to have beaten Stankovich. Specifically, Joiner-El contends the State failed to establish a sufficiently reliable chain of custody.[6] However, the record contains documents signed by a Madison police detective indicating the bat was obtained from the victim, released from the

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Joiner-El contends in his reply brief that "the attending physician was M.J. Cullenward," but provides no record citation to support such a contention and concedes "he did not testify at court." Joiner El's contention in that regard will therefore not be considered.

[5] Joiner-El also argues that trial counsel "should have brought forth a defense of … habit evidence." This appears to relate to an argument in his WIS. STAT. § 974.06 motion that his trial counsel did not call available character witnesses to testify to an alleged cocaine addiction of Stankovich. This argument is undeveloped in Joiner-El's brief on appeal and will not be considered. *See* ***M.C.I.***, 146 Wis. 2d at 244-45.

[6] Joiner-El contends the State "blatantly" destroyed exculpatory evidence. This argument is undeveloped, conclusory and will not be considered. *See* ***M.C.I.***, 146 Wis. 2d at 244-45.

evidence room, and delivered to the prosecutor, who introduced it into evidence. Furthermore, Stankovich positively identified the bat as the one used in the attack upon her by Joiner-El. The documents together with the victim's identification were sufficient to "render it improbable that the original item has been exchanged, contaminated or tampered with."[7] *See* ***State v. McCoy***, 2007 WI App 15, ¶¶9, 18-19, 298 Wis. 2d 523, 728 N.W.2d 54 (citation omitted). Accordingly, no deficiency arose from failing to object to the admission into evidence of the baseball bat.

¶11 Joiner-El also argues trial counsel was ineffective for failing to request a "nexus" jury instruction connecting Joiner-El to the knife used on Stankovich. Ordinarily, where the State alleges that the defendant merely possessed a dangerous weapon in the commission of a crime for purposes of the "while armed" penalty enhancer, a nexus instruction is required. *See* ***State v. Gordon***, 2003 WI 69, ¶31, 262 Wis. 2d 380, 663 N.W.2d 765. In contrast, where a defendant used or threatened to use a dangerous weapon in the commission of a crime, "a nexus exists for purposes of the penalty enhancer as a matter of law." ***Id.***, ¶32. Joiner-El was convicted of crimes committed by the use of a dangerous weapon, not the mere possession thereof. Trial counsel cannot be said to have provided ineffective assistance with regard to this issue.[8]

[7] Indeed, Joiner-El's argument that the bat presented at trial "was [n]ot the weapon claimed to have been used" is essentially a contention that he must be exonerated if he beat his girlfriend with a different baseball bat. Such a suggestion is ludicrous.

[8] Joiner-El also appears to claim error in the inability of the State to produce the knife at trial. However, Stankovich testified that Joiner-El stuck the knife down her throat and Dr. Johnson corroborated that testimony, which the jury was entitled to believe.

¶12 Finally, regarding the penalty enhancer for habitual criminality, Joiner-El insists in his reply brief that "no counsel has ever 'investigated, or tried to refute or objected to the state[']s contention that Joiner-El, had multiple felonious convictions in a variety of … States …." Joiner-El asserts, "It appears that somehow I have been incorrectly referenced to another Person's criminal history Quite Possible another person with the same name."

¶13 It appears Joiner-El raises this issue for the first time on appeal in his reply brief. Generally, we do not consider issues raised for the first time in the reply brief. *See* ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995). Regardless, Joiner-El's argument is swiftly disposed of on the merits.

¶14 Under WIS. STAT. § 973.12, a court may enhance a repeater penalty, pursuant to WIS. STAT. § 939.62, if the defendant admits the prior conviction or the State proves the prior conviction. ***State v. Rachwal***, 159 Wis. 2d 494, 505-06, 465 N.W.2d 490 (1991). Section 973.12 specifies that an "official report" by a governmental agency "shall be prima facie evidence of any conviction or sentence therein reported." A presentence investigation report may be treated as an official report under § 973.12, and a certified copy of a judgment has been recognized as "excellent documentary evidence" for proving a prior conviction, although a certified copy is not needed as proof in this context. *See* ***State v. Saunders***, 2002 WI 107, ¶¶24, 46-48, 255 Wis. 2d 589, 649 N.W.2d 263.

¶15 At the sentencing hearing, the State offered certified records from the Indiana state prison system regarding a robbery for which Joinder-El served eight years in prison. The State also relied upon the presentence investigation report, and detailed a twenty-year history of criminal activity. The author of the

PSI testified that the information in the PSI was correct to the best of his ability, "[a]nd in particular, the prior criminal history information is accurate."

¶16 The circuit court found the certified Indiana records satisfied the request to apply the repeater provision of WIS. STAT. § 939.62. The court specifically noted the records contained a photograph of Joiner-El:

> I do find that the repeater provision has been proven based on the state of Indiana certified records, including a picture of Mr. Joiner. I also note that on the picture he is referred to as Joiner-El, which would be further support that it is the right person and that the conviction is valid. So that has been proven.

¶17 Accordingly, we are not persuaded Joiner-El was subject to sentence enhancement based upon mistaken identity. The court was provided sufficient information upon which to conclude that Joiner-El was a repeater.[9]

By the Court.—Judgment affirmed.

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

[9] Joiner-El also appears to argue for discretionary reversal in the interests of justice. This argument is also undeveloped and will not be considered. In any event, we conclude the real controversy was fully and fairly tried.