COURT OF APPEALS
DECISION
DATED AND FILED

August 30, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2360-CR **Cir. Ct. No. 2008CF3597**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH GAYDEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS R. CIMPL and GLENN H. YAMAHIRO, Judges. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 BRENNAN, J. Joseph Gayden appeals from a judgment of conviction entered following a jury trial in which he was found guilty of substantial battery with use of a dangerous weapon, and from an order denying his

postconviction motion.[1] Gayden argues that the trial court erroneously exercised its discretion when it: (1) improperly instructed the jury on the use of self-defense; and (2) imposed restitution. For the reasons which follow, we disagree with Gayden and affirm the trial court.

BACKGROUND

¶2 Following a jury trial, Gayden was convicted of substantial battery with use of a dangerous weapon. The conviction stemmed from an incident on June 21, 2008, when Gayden stabbed security guard Diangelo Stewart in the abdomen with a pocket knife during an altercation at a party in Milwaukee. Gayden concedes that he stabbed Stewart, but alleges that he did so in self-defense.

¶3 At trial, Stewart testified that he was a security guard at Richardson Manor, a housing complex for individuals with physical and mental disabilities. On June 21, 2008, he arrived at work, unarmed, but wearing a uniform. Upon his arrival, he noticed that a group of people were having an outdoor barbeque and that a table that should have been inside the building had been moved outside and was full of liquor. Around 9:15 p.m., Stewart heard screaming, yelling, and cursing, like someone was in trouble. He followed the noise outside, and found Mattie Seals, a resident of the building, yelling that she wanted Gayden and his friend "thrown out." Stewart did not recognize either Gayden or his friend.

[1] The Honorable Dennis Cimpl presided over trial and entered the judgment of conviction. The Honorable Glenn H. Yamahiro presided over all relevant postconviction proceedings and entered the order denying Gayden's postconviction motion. All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶4 Stewart testified that Gayden and his friend appeared to be drunk, and that Gayden had a beer in his hand. Gayden was at the trunk of his car and stated, "if anybody try to make me leave I'll shoot the shit out of everybody." Stewart asked Gayden to leave because he was making threats. Gayden's friend then ran up to Stewart and "took a swing at [Stewart]," but missed. Stewart testified he took a retaliatory swing, and knocked the friend down. Gayden, who was approximately seven feet away, then attacked Stewart. Stewart backed up and attempted to call for assistance on his walkie-talkie. As Gayden got closer to Stewart, Stewart ran towards Gayden with his arms stretched out, knocking Gayden down. Stewart then attempted to handcuff Gayden, but Gayden's friend was running back at Stewart, so Stewart was forced to get up and knock the friend down again. When Stewart turned around, Gayden was rushing back towards him. Stewart was attempting to run backwards into the building when Gayden stabbed him with a knife. Stewart did not see the knife before Gayden stabbed him.

¶5 Stewart testified that he was stabbed in the right side of his abdomen around the navel area. He said the hole was "big" and that he was bleeding. Stewart was taken to the hospital where he underwent surgery. The hole was closed with stitches and staples. Stewart was told that the knife tore muscles and tissue and was only an inch away from his lungs.

¶6 Gayden's version of events varied somewhat from Stewart's version. Gayden testified that on June 21, 2008, he attended a barbeque at a housing complex after being invited by his then-girlfriend. He testified that he had been drinking beer and brandy that afternoon but was not drunk. Following a dispute with his girlfriend, Gayden began packing his things in his car to leave with a male friend. Gayden testified that as he and his friend were loading lawn chairs and other items into the trunk of his car, he heard someone approach him from behind.

When he turned around to see who it was, Stewart, who Gayden did not know and who he did not recognize as a security guard, picked him up and threw him to the ground without explanation, injuring Gayden's knee. Gayden testified that Stewart then walked over and slammed Gayden's friend to the ground, and then came back towards Gayden. As he saw Stewart approaching him, Gayden reached into his back pocket and pulled out a pocket knife. Gayden testified that he showed Stewart the knife to frighten him off, but that Stewart continued coming towards him, so Gayden "stuck him" with the knife. Gayden then got into the car and drove his friend home. He testified that he did not stay on the scene because "I was in fear of my life. I didn't know who this guy was."

¶7 Prior to closing arguments, the parties disputed the proper self-defense instruction. Gayden's trial counsel argued that the jury should be instructed pursuant to WIS JI-CRIMINAL 800, while the State advocated for an instruction pursuant to WIS JI-CRIMINAL 805. The instructions were identical, but for the following language at the end of the WIS JI-CRIMINAL 805: "The defendant may intentionally use force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to himself." Gayden's trial counsel argued that the evidence presented at trial was insufficient to support WIS JI-CRIMINAL 805 because the evidence did not show that Gayden "was acting in a way that would have created a substantial risk of death." The trial court disagreed and instructed the jury pursuant to WIS JI-CRIMINAL 805. The jury found Gayden guilty of substantial battery with use of a dangerous weapon.

¶8 Following Gayden's conviction, the trial court held a hearing on restitution. The only witness was Nikki Zahnen, a subrogation files handler for Sentry Insurance, which insured Stewart's employer. She testified that Sentry

Insurance was requesting reimbursement for $37,857.92 in medical payments and $1548.92 in wage loss payments, for a total of $39,406.84. Zahnen testified that she had not personally interviewed the doctors who treated Stewart the night of the incident and that she did not know if Stewart had any preexisting conditions. But she stated that she had reviewed Stewart's medical records and she believed they all appeared to be associated with the stabbing. She further stated that Sentry Insurance would not have paid for treatment of any injuries unrelated to the stabbing.

¶9 The trial court concluded, based on Zahnen's testimony, that the State had met its burden to prove that Gayden was responsible for the entire $39,406.84 in restitution. When Gayden's counsel argued that Zahnen's testimony was insufficient, the trial court replied: "This isn't a civil trial, all [the insurance company] ha[s] to do is testify that [it] paid out and that, in [its] opinion, it was reasonably related to the injury and it was necessary and that is it. That is the law."

¶10 Gayden filed a postconviction motion arguing that he received ineffective assistance of counsel, and that the trial court erred in instructing the jury pursuant to WIS JI-CRIMINAL 805 and in ordering restitution. Following a hearing, the trial court denied the motion. Gayden now appeals.[2]

[2] Gayden has abandoned his ineffective assistance of counsel claim on appeal. *See* ***Tatur v. Solsrud***, 167 Wis. 2d 266, 269, 481 N.W.2d 657 (Ct. App. 1992) (An issue raised in the trial court, but not raised on appeal, is deemed abandoned.).

DISCUSSION

I. The trial court properly exercised its discretion when instructing the jury on self-defense.

¶11 Gayden first argues that he is entitled to a new trial because the trial court erroneously exercised its discretion when it instructed the jury pursuant to WIS JI-CRIMINAL 805 because the evidence did not show that Gayden "use[d] force which [was] intended or likely to cause [Stewart] death or great bodily harm." We disagree.

¶12 The "[trial] court has broad discretion in deciding whether to give a particular jury instruction." ***State v. Fonte***, 2005 WI 77, ¶9, 281 Wis. 2d 654, 698 N.W.2d 594. However, the trial court must exercise its discretion so as "'to fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence.'" ***State v. Coleman***, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996) (citation omitted). Whether a jury instruction is an accurate statement of the law applicable to the facts of a given case is a question of law we review *de novo*. ***Fonte***, 281 Wis. 2d 654, ¶9. We will reverse a conviction and order a new trial "[o]nly if the jury instructions, as a whole, misled the jury or communicated an incorrect statement of law." ***State v. Laxton***, 2002 WI 82, ¶29, 254 Wis. 2d 185, 647 N.W.2d 784.

¶13 Both self-defense jury instructions advocated by the parties, WIS JI-CRIMINAL 800 and 805, state as follows:

> Self-defense is an issue in this case. The law of self-defense allows the defendant to threaten or intentionally use force against another only if:
>
> - the defendant believed that there was an actual or imminent unlawful interference with the defendant's person; and,

- the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and
- the defendant's beliefs were reasonable.

(Footnote omitted.) WISCONSIN JI-CRIMINAL 805, the instruction advocated by the State and ultimately read to the jury, also includes the following language: "The defendant may intentionally use force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to himself."

¶14 Gayden argues that the evidence shows that the injury Stewart suffered was akin to "substantial bodily harm" rather than "great bodily harm" as required by WIS JI-CRIMINAL 805. Gayden cites to WIS JI-CRIMINAL 1222—which defines "[s]ubstantial bodily harm" as "bodily injury that causes a laceration that requires stitches [or] staples"—and WIS JI-CRIMINAL 1225—which defines "[g]reat bodily harm" as "[i]njury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ." Because Stewart testified that the injury he received from the stabbing required stitches and staples and because Stewart did not testify that the injury left him seriously disfigured or impaired, Gayden claims the instruction regarding "great bodily harm" was read to the jury in error.

¶15 In so arguing, Gayden misreads the instruction given to the jury. WISCONSIN JI-CRIMINAL 805 does not ask the factfinder to consider the injury actually suffered by the victim. Rather, the instruction asks the jury to consider whether the force used was intended or likely to cause death or great bodily harm.

Whether the force actually caused death or great bodily harm is inapposite to the jury's verdict.

¶16 To the extent that Gayden argues that the State presented no evidence to demonstrate that he "use[d] force which [was] intended or likely to cause [Stewart] death or great bodily harm," we disagree. As noted by the trial court, the uncontroverted testimony shows that Gayden stabbed Stewart in the abdomen with a knife, only an inch from his lungs. It is not at all unreasonable to infer that when someone thrusts a knife into an individual's abdomen, only an inch from his lungs, in an area generally known to contain many vital organs, that someone does so with the intent to cause death or great bodily harm or that such an action is likely to cause death or great bodily harm. Such an inference is based upon common knowledge and common sense. That Stewart was not so injured in this case is merely good fortune.

¶17 In sum, the trial court properly exercised its discretion in instructing the jury pursuant to WIS JI-CRIMINAL 805.

II. The trial court properly exercised its discretion when ordering restitution.

¶18 Next, Gayden asks us to vacate the trial court's restitution award because he contends that the State, on behalf of the victim, failed to present sufficient evidence to demonstrate a causal link between Gayden's actions and Stewart's injuries. We disagree.

¶19 WISCONSIN STAT. § 973.20(1r) provides, in relevant part, that, when imposing a sentence, a trial court "shall order the defendant to make full or partial restitution … to any victim of a crime considered at sentencing … unless the court finds substantial reason not to do so and states the reason on the record."

However, before restitution can be ordered, the victim must prove by a preponderance of the evidence, § 973.20(14)(a), that there is "a causal nexus" between "the 'crime considered at sentencing' and the disputed damage," ***State v. Canady***, 2000 WI App 87, ¶9, 234 Wis. 2d 261, 610 N.W.2d 147 (citation omitted). To prove causation, the "victim must show that the defendant's criminal activity was a 'substantial factor' in causing damage. The defendant's actions must be the 'precipitating cause of the injury' and the harm must have resulted from 'the natural consequence[s] of the actions.'" ***Id.*** (citations omitted; brackets in ***Canady***).

¶20 Determinations of restitution are left to the sound discretion of the trial court. ***Id.***, ¶6. "We may reverse a discretionary decision only if the [trial] court applied the wrong legal standard or did not ground its decision on a logical interpretation of the facts." ***Id.*** However, in cases where the trial court inadequately sets forth its reasoning, or fails to fully explain its ruling, we "independently review the record to determine whether it provides a basis for the trial court's exercise of discretion." ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983).

¶21 Zahnen, a subrogation files handler at Sentry Insurance, testified that Sentry Insurance had provided coverage to Stewart's employer at the time of the underlying incident and sought $39,406.84 in restitution to cover medical payments and wage loss payments. She further testified that she had seen Stewart's medical records and believed that they were all associated with the injuries incurred by Stewart the night Gayden stabbed him, and that Sentry Insurance would not have paid out anything that was not related to the stabbing and the injuries suffered by Stewart as a result. Gayden argues this testimony is insufficient because Zahnen could not explain how the medical treatment Stewart

received was necessitated by the stabbing. In essence, Gayden argues that a medical expert was necessary to prove causation.

¶22 Following Zahnen's testimony, the trial court concluded, in relevant part:

> This isn't a civil trial, all they have to do is testify that they paid it out and that, in their opinion, it was reasonably related to the injury and it was necessary and that is it. That is the law.
>
> ….
>
> [Zahnen] testified that Sentry Insurance's claims adjuster looked at the bills, made a determination that they were related to the injury, and paid them out. That is it, that is all they have to do.
>
> ….
>
> If this wasn't an insurance company, if the victim was claiming this, yes, the victim would have to have more testimony. But an insurance company will not pay more than [it is] supposed to pay.
>
> ….
>
> Have you ever argued with an insurance company? I have. The fact is, [it] make[s] the determination what [it] think[s] is medically necessary. [Sentry Insurance] made it in this case, I don't think there is any question that $39,406.84 is the amount….
>
> ….
>
> [Sentry Insurance] wouldn't have paid it out…. [It] know[s], as well as everybody else in the courtroom, that the likelihood of [Gayden] reimbursing [it] on this, even if I order it, is negligible. [Sentry Insurance is] not going to pay out one more nickel than is necessary. [It has] a responsibility to [its] shareholders.

In so holding, the trial court properly exercised its discretion, and its decision is properly supported by evidence in the record.

¶23 As set forth above, Stewart testified at trial that Gayden stabbed him in the abdomen, causing him injuries, and that he received medical services—including surgery, stitches, and staples—as a result. Zahnen testified at the restitution hearing that Sentry Insurance, on behalf of Stewart's employer, paid Stewart's medical bills following the stabbing, and that the insurance company believed the medical bills to be related to the stabbing. By concluding that $39,406.84 in restitution was reasonable, the trial court implicitly found both Stewart and Zahnen to be credible witnesses. *See* ***Triplett v. State***, 65 Wis. 2d 365, 368-69, 222 N.W.2d 689 (1974) (questions of credibility are left to the finder of fact). Moreover, there was no evidence entered contradicting the evidence that the $39,406.84 award was rationally related to the injuries Stewart underwent as a result of the stabbing. In other words, the State presented enough evidence to demonstrate by a preponderance of the evidence that the $39,406.84 paid by Sentry Insurance was related to injuries Stewart sustained as result of being stabbed by Gayden. Consequently, we affirm the trial court's restitution award.

By the Court.—Judgment and order affirmed.

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