

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 15, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP3016-CR

Cir. Ct. No. 2009CF149

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NICOLAS SUBDIAZ-OSORIO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County:
MARY KAY WAGNER, Judge. *Affirmed.*

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Nicolas Subdiaz-Osorio appeals a judgment of conviction. He argues that the court erred by denying his suppression motions, but we conclude the dispositive issue is harmless error. We affirm.

¶2 Subdiaz-Osorio was charged with first-degree intentional homicide in the death of his brother. He moved to suppress evidence, but the motion was denied. Subdiaz-Osorio then pled guilty to one count of first-degree reckless homicide. He now appeals on the suppression issue under WIS. STAT. § 971.31(10) (2009-10).¹

¶3 For purposes of this appeal, we assume, without deciding, that the evidence should have been suppressed. The parties agree that harmless error analysis applies in appeals under WIS. STAT. § 971.31(10). See *State v. Semrau*, 2000 WI App 54, ¶21, 233 Wis. 2d 508, 608 N.W.2d 376. In that context, an error is harmless if the State proves beyond a reasonable doubt that the error complained of did not contribute to the result. *State v. Rockette*, 2005 WI App 205, ¶¶25-26, 287 Wis. 2d 257, 704 N.W.2d 382.

¶4 The factors we may consider include the persuasiveness of the evidence in dispute, whether the improperly admitted evidence duplicates untainted evidence, the relative strength and weakness of the State's case and the defendant's case, the reasons, if any, expressed by the defendant for choosing to plead guilty, the benefits obtained by the defendant in exchange for the plea, and the thoroughness of the plea colloquy. *Semrau*, 233 Wis. 2d 508, ¶22; *Rockette*, 287 Wis. 2d 257, ¶26.

¶5 On appeal, Subdiaz-Osorio suggests two possible lines of defense that he might have pursued. One of those is self-defense. In response, the State points out the potential difficulties of such a defense, such as his continued assault

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

on the victim after wounding him with the knife, and his refusal to seek medical help for the victim. In his reply brief, Subdiaz-Osorio does not refute these difficulties, and discusses only his second theory of defense. In light of the unrefuted difficulties pointed out by the State, we are satisfied that self-defense was not a theory on which Subdiaz-Osorio would have gone to trial, with or without the evidence he wanted suppressed.

¶6 Subdiaz-Osorio's second suggested line of defense is that he did not act with the utter disregard for human life required for a conviction on first-degree reckless homicide. In that context, we look more closely at the evidence he wanted suppressed.

¶7 Subdiaz-Osorio points to two pieces of information that he regards as "highly prejudicial." The first is that police learned he was in Arkansas. He asserts that at trial this would have supported an inference that he fled Wisconsin, which could imply consciousness of guilt on his part. We conclude that flight would not be persuasive evidence for the State in this case.

¶8 Flight is most persuasive as showing consciousness of guilt when a defendant entirely denies being involved in a crime. In that situation, flight can be powerful evidence because it undercuts the entire defense by suggesting that the defendant knew he was involved and at risk of prosecution. Here, Subdiaz-Osorio does not suggest that his defense would have been based on non-involvement. Subdiaz-Osorio acknowledges there "was strong evidence that [he] had caused the death."

¶9 Furthermore, flight cannot reasonably be taken as indicating consciousness of guilt in this case. Even if Subdiaz-Osorio is correct that he did not act with utter disregard, there is little doubt that he committed *some* crime,

such as second-degree reckless homicide or aggravated battery. His flight does not show that he was conscious of being guilty of any specific statutory crime, but shows only consciousness of a potentially serious crime. Subdiaz-Osorio's flight cannot reasonably be taken to mean anything more specific than that he knew he had been involved in a major incident that would involve police and probably prosecution. Those things are, by themselves, a substantial motivation to flee. It is not reasonable to say that his flight indicates consciousness that he had acted with utter disregard.

¶10 The second piece of evidence that Subdiaz-Osorio wanted suppressed is a statement he made during interrogation in Arkansas, and possibly another one he made later. The statements themselves are apparently not of record, and the parties rely on the prosecutor's description of them at sentencing. In the first statement, Subdiaz-Osorio told police that the victim brought the knife into the room, but then in the second he admitted that was not true.

¶11 Subdiaz-Osorio argues that these inconsistent statements discredit a claim that he was not acting with utter disregard for human life. However, he does not explain how they do that. Subdiaz-Osorio does not appear to be proposing a defense in which he significantly contests the historical facts of the incident in which the victim died. His focus is on whether those facts satisfy the test for utter disregard. Statements that Subdiaz-Osorio made later do not appear to have significant bearing on whether his earlier conduct met the test for utter disregard, which is whether he acted with utter disregard under the totality of the circumstances including conduct before, during, and after a crime. *State v. Burris*, 2011 WI 32, ¶¶39-41, 333 Wis. 2d 87, 797 N.W.2d 430.

¶12 In addition to the lack of persuasive value of the unsuppressed evidence, we note that the State's case for utter disregard, while perhaps not unbeatable, was strong, based on an eyewitness account. And we also note that Subdiaz-Osorio obtained a significant benefit from the reduction in charge from first-degree intentional homicide to reckless homicide. Putting these factors together, we are satisfied beyond a reasonable doubt that Subdiaz-Osorio would have accepted the same plea deal even if the suppression motion had been granted.

By the Court.—Judgment affirmed.

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

