COURT OF APPEALS
DECISION
DATED AND FILED

October 14, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP285-CR **Cir. Ct. No. 2011CF001592**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GABRIEL JUSTIN BOGAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ and JEFFREY A. WAGNER, Judges. *Affirmed.*

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

¶1 BRENNAN, J. Gabriel Justin Bogan appeals from: (1) a judgment of conviction entered after a jury found him guilty of first-degree reckless homicide with use of a dangerous weapon and first-degree recklessly endangering

safety with use of a dangerous weapon, *see* WIS. STAT. §§ 940.02(1), 941.30(1), & 939.63(1)(b) (2011-12)[1]; and (2) the trial court's order denying his postconviction motion.[2] He argues that he received constitutionally ineffective assistance from his trial counsel because counsel failed to argue that the defense-of-others privilege applied, and failed to request the defense-of-others jury instruction. Because there was no evidence to support the defense-of-others privilege, we affirm.

BACKGROUND

¶2 On March 18, 2011, Dontez Jefferson was involved in a dice game. At some point, Leroy Newman accused Jefferson of cheating and an argument ensued.

¶3 Jefferson left the dice game and went to his brother's house where he retrieved a gun. Jefferson then returned to the site of the dice game with his brother. When Jefferson returned, he saw Newman at the corner of 47th Street and Rohr Street with nine other individuals.

¶4 Jefferson and his brother stood across the street from Newman and his companions and words were exchanged. Jefferson lifted his shirt to show Newman's group his gun. Jefferson then made some phone calls and amassed a group of eight individuals, including Amuri Burgess and Ladarius Young, to help him "solve" his problem with Newman.

[1] All references to the Wisconsin Statutes are to the 2011-12 version.

[2] The Honorable Richard J. Sankovitz entered the judgment of conviction, and the Honorable Jeffrey A. Wagner entered the order denying Bogan's postconviction motion.

¶5 Jefferson's group of eight then crossed the street and approached Newman's group of nine. Newman's group split up and began to run. Jefferson's group initially chased Newman alone but eventually lost him. Jefferson's group then split up and continued to look for Newman and members of his group. When Jefferson's group split up, Jefferson was no longer with Burgess and Young.

¶6 At some point soon thereafter, Bogan fired several shots into the group that included Burgess and Young.[3] Bogan's shots hit the two men, killing Young and injuring Burgess.

¶7 The State filed a criminal complaint, charging Bogan with first-degree reckless homicide with use of a dangerous weapon and first-degree recklessly endangering safety with use of a dangerous weapon. At trial, Bogan's trial counsel focused on the lack of evidence tying Bogan to the shooting: police had not recovered the gun, there was no physical evidence tying Bogan to the shooting, and there were no eye-witnesses.[4] Despite counsel's best efforts, the jury found Bogan guilty of both counts following a four-day jury trial. On the reckless-homicide count, the trial court sentenced Bogan to thirty years of imprisonment, consisting of twenty-two years of initial confinement and eight years of extended supervision. On the reckless-injury count the court sentenced Bogan to ten years of imprisonment, consisting of five years of initial confinement

[3] The parties do not explain in their briefs, and it is unclear from the record, how Bogan came to be on the scene. Both parties seem to agree, however, that Bogan was not part of either Newman's or Jefferson's groups.

[4] Police arrested Bogan based upon the eye-witness testimony of Tavarius Morgan, who lived in the home where the controversial dice game had been played. However, Morgan recanted his identification at trial. He also testified that he had received a number of threatening phone calls prior to his testimony.

and five years of extended supervision to be served concurrent with the reckless-homicide count.

¶8 Bogan filed a motion for postconviction relief, seeking a new trial. He alleged that his trial counsel was constitutionally ineffective because she failed to pursue the proper strategy at trial. Rather than challenge the identity of the shooter, Bogan claimed that his trial counsel should have argued that Bogan lawfully shot Young and Burgess in defense of Newman, and should have requested the corresponding defense-of-others jury instruction. The postconviction court denied the motion without a hearing. Bogan appeals.

DISCUSSION

¶9 Bogan now argues, contrary to his defense at trial, that he was the shooter. However, he contends that he was justified in shooting Burgess and Young because he was trying to protect Newman from Jefferson. Bogan believes that his trial counsel was constitutionally ineffective for pursuing a strategy at trial that focused on the lack of evidence identifying him as the shooter; instead, he apparently believes that his trial counsel should have proceeded on a defense-of-others theory and requested the corresponding jury instruction. Because the evidence does not support the defense-of-others privilege, Bogan has not shown that his trial counsel was ineffective for failing to pursue that theory of defense. As such, we affirm.

¶10 To prevail on a claim of ineffective assistance of trial counsel, a defendant must establish both that trial counsel's performance was deficient and that this performance prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "The defendant must overcome a strong presumption

that his or her counsel acted reasonably within professional norms." ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12.

¶11 To show deficiency, the defendant must demonstrate that his attorney made serious mistakes that could not be justified in the exercise of objectively reasonable professional judgment, and we deferentially consider all of the circumstances from counsel's contemporary perspective to eliminate the distortion of hindsight. *See* ***Strickland***, 466 U.S. at 689-91. To prove prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. The critical focus is "not on the outcome of the trial but, on 'the reliability of the proceedings.'" ***State v. Thiel***, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted).

¶12 An ineffective assistance of counsel claim presents this court with a mixed question of fact and law. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The trial court's findings of fact will not be disturbed unless clearly erroneous. ***Id.*** We review whether trial counsel was ineffective independently of the trial court. ***Id.***

¶13 Here, we conclude that Bogan's trial counsel was not deficient for failing to argue that Bogan was justified in shooting Burgess and Young because the evidence did not support the defense-of-others privilege, and as such, trial counsel's failure to request the defense-of-others jury instruction did not prejudice Bogan. A defendant is entitled to a jury instruction on a statutory defense only if there is a reasonable construction of the evidence, viewed in a light most favorable to the defendant, that meets the requirements of the statutory defense. ***State v. Giminski***, 2001 WI App 211, ¶11, 247 Wis. 2d 750, 634 N.W.2d 604. Contrary to

Bogan's assertions on appeal, the evidence submitted at trial did not support the defense-of-others instruction here.

¶14 The defense-of-others privilege, 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, the belief must be reasonable. *See* ***id.***, ¶13. A person may use only such force as he reasonably believes is necessary to prevent or terminate the interference. *See* ***id.***, ¶12.

¶15 Bogan submits that the following evidence elicited at trial supported giving the defense-of-others jury instruction:

> Jefferson had left the dice game to go to his brother's residence. He then obtained a snubnose revolver. However, instead of "forgetting about the situation," he returned to the scene to confront Newman. He showed Newman's group the firearm from his waistband. Jefferson then "rounded up" a number of friends to assist in the confrontation. Jefferson indicated that he had eight friends. Jefferson indicated that Newman's group numbered about nine. However, [one witness] testified that Newman's group actually numbered about five or six. [Another witness told police] that Jefferson was loud, screaming, mad, and confrontational.
>
> Jefferson and his group met Newman's group at a street corner. After Jefferson had showed Newman his gun, and had rounded up his friends, Jefferson's group had crossed the street to confront Newman's group. However, Newman's group attempted to flee and avoid a confrontation. Of both groups, only Jefferson had shown a firearm. No other individual in either group had shown a firearm. After Newman's group tried to flee in order to basically "get away," … Jefferson's armed group began to chase them. Jefferson's group split up in order to essentially "corner" Newman's group from both the west and the east. Newman was justifiably afraid for his life. Jefferson was angry, armed, and chasing after him with a large number of friends. Jefferson was attempting to corner and trap him. Clearly, had Newman shot at this group,

> under the circumstances, he would have acted in self-defense. Such force would have reasonably have been necessary in order to prevent imminent death or great bodily harm to him. Reasonably, there would have been no other purpose for Jefferson's group to trap Newman except to probably shoot and/or severely injure him. Otherwise, Jefferson's group would have left and not bothered to chase and corner Newman and his group. Essentially, Jefferson's group was a "lynch mob."

However, contrary to Bogan's assertions, these facts, even when viewed in the light most favorable to Bogan, do not support the defense-of-others instruction.

¶16 It is undisputed that Jefferson had a gun and that Jefferson and a group of his friends, including the victims, Burgess and Young, were chasing after Newman. However, it is also undisputed that at the time Bogan shot Burgess and Young: Burgess and Young were not with Jefferson[5]; Bogan was not with Newman[6]; and neither Burgess nor Young was armed.[7] Even if we were to accept Bogan's somewhat incredulous argument that he believed he needed to shoot Burgess and Young to prevent them from seriously harming Newman, we cannot

[5] To support its assertion that Jefferson was not with Burgess and Young at the time of the shooting, the State cites to Jefferson's trial testimony, during which he stated that he was no longer with Burgess and Young when the shooting occurred. Burgess testified consistent with Jefferson's testimony. Bogan does not contest this testimony or otherwise provide testimony countering Jefferson's and Burgess's recollection of events.

[6] The State asserts in its brief that Newman was not with Bogan when Bogan shot Burgess and Young, but does not support its assertion with a citation to the record, contrary to the Rules of Appellate Procedure. *See* WIS. STAT. RULE 809.19(1)(e) (requiring a brief to contain "[a]n argument … with citations to the authorities, statutes and *parts of the record* relied on") (emphasis added). However, Bogan does not challenge the State's assertion that he was not with Newman at the time of the shooting, and "unrefuted facts are deemed admitted." *See* ***State v. Bean***, 2011 WI App 129, ¶24 n.5, 337 Wis. 2d 406, 804 N.W.2d 696.

[7] To support its assertion that Burgess and Young were not armed at the time they were shot, the State cites to testimony from Milwaukee Police Officer Matthew Dresen, who told jurors that he did not find any weapons on either Burgess or Young. Bogan does not contest this testimony and, instead argues that "regardless of whether or not Young or Burgess were personally armed, they were part of a visibly armed mob, hunting Newman and his group."

conclude that his belief was reasonable when neither Burgess nor Young had a weapon, much less a gun, and Newman was not present. *See* ***Giminski***, 247 Wis. 2d 750, ¶13. Because Bogan was not entitled to the defense-of-others instruction, trial counsel was not deficient for failing to request it nor was Bogan prejudiced by the fact that it was not given.

¶17 In sum, we affirm the trial court's decision to deny Bogan's postconviction motion without a hearing. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (A ***Machner***[8] hearing is not necessary "if the [postconviction] motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief."). Bogan's postconviction motion was meritless on its face because the evidence elicited at trial, even when viewed in the light most favorable to him, does not support the defense-of-others privilege. Trial counsel's decision to put the State to its proof and challenge the State's lack of evidence tying Bogan to the shooting was rational based on the law and facts of this case. As such, Bogan's ineffective assistance of counsel claim is meritless. *See* ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) ("A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel."); *see also* ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983) (We will not "second-guess[ ] the trial counsel's considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel.").

[8] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.