COURT OF APPEALS DECISION DATED AND FILED

July 5, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2016AP1164-CR **Cir. Ct. No. 2012CF5841**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAVARRAY JOHNIKIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: STEPHANIE ROTHSTEIN, Judge. *Affirmed.*

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

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Lavarray Johnikin appeals a judgment of conviction, following a jury trial, of first-degree intentional homicide, attempted first-degree intentional homicide, two counts of armed robbery with the use of force, and false imprisonment, all as a party to a crime. He also appeals the order partially denying his postconviction motion for relief. We affirm.

BACKGROUND

¶2 On November 30, 2012, Johnikin was charged with first-degree intentional homicide, attempted first-degree intentional homicide, two counts of armed robbery with the use of force, and false imprisonment, all as a party to a crime. The charges stemmed from the armed robbery and shooting of D.C. and A.C., which resulted in D.C.'s death on November 26, 2012. According to the facts adduced at trial, on the night of November 9, 2012, A.C. was at her home in Milwaukee when she heard the doorbell ring. A.C. looked out the window and thought she saw her cousin. A.C. opened the door and encountered two individuals, one of whom asked for a person named "Markala"; the other brandished a gun. One individual led A.C. to a bedroom by gunpoint, while the other moved around the house taking items and loading them into a car parked in the alley behind the house.

¶3 At some point during the robbery, A.C.'s brother, D.C., arrived. Seeing that the door to A.C.'s bedroom was slightly open, D.C. entered the room and was jumped by one of the individuals. The other individual led A.C. out of a closet, where he was hiding A.C. The gun-carrying individual held both A.C. and D.C. at gunpoint, while the other individual continued to take and load property from the house. When the robbery was complete, D.C. thanked the individuals for

not harming them. The gun-carrying individual said "fuck it" and began firing his weapon. The suspects then left.

¶4 D.C. and A.C. were able to crawl out of the home and signal to D.C.'s girlfriend, who was waiting for D.C. in a car parked in front of the house. D.C.'s girlfriend called 911. Neither D.C. nor A.C. could identify the robbers when asked by first responders. Both A.C. and D.C. were transported to local hospitals. Ultimately, D.C. died from his gunshot wounds, but prior to his death he was able to identify two brown houses as the possible residence of one of the suspects prior to his death. Milwaukee police were then able to pinpoint Johnikin as one of the suspects, but determined that Johnikin was not the shooter. Johnikin was subsequently arrested and charged.

¶5 Prior to trial, the State moved to admit statements D.C. made at the hospital prior to his death. The State also submitted medical reports describing the severity of D.C.'s condition. Johnikin's counsel opposed the motion, contending that D.C.'s statements were inadmissible hearsay and violated Johnikin's Sixth Amendment right to confrontation.

¶6 At a hearing on the motion, the State called multiple witnesses to testify about statements D.C. made during his hospitalization. D.C.'s girlfriend, A.B., told the court that in the days following D.C.'s shooting, D.C. was intubated and unable to speak, but that D.C. was able to gesture and write in order to communicate. Through writings and gestures, D.C. was able to communicate that one of the individuals involved in the robbery lived in the brown house across the street from him. A.B. asked D.C. if the individual D.C. was referring to was the same individual involved in a confrontation with D.C.'s sister the previous month. D.C. responded in the affirmative. A.B. also stated that a few days after the

shooting, D.C. wrote a note on a piece of paper for his mother, asking if he was going to die. A.B. stated that D.C. would have "rough nights" and would ask doctors to pray with him, which was out of character for such a "strong guy."

¶7 D.C.'s father, O.H., told the trial court that once D.C. was able to speak, D.C. began to question whether he was "gonna live through this" and constantly asked O.H. to pray with him. O.H. asked D.C. if D.C. knew the robbers and the shooter. D.C. told O.H. "that it was [Johnikin], the boy who lives across the street." D.C. recognized Johnikin because one of Johnikin's relatives "did odd jobs" around D.C.'s grandmother's home. O.H. said that D.C. identified Johnikin as the robber who was holding A.C. in the closet and the one who was taking property from the home and loading the car parked in the alley—not the individual carrying a gun. O.H. said that D.C. thanked the gun-carrying individual for not harming him and A.C., at which point Johnikin told the other individual, "Do what you do. Do what you came here to do." The individual then began shooting.

¶8 D.C.'s mother, T.C., told the trial court that when D.C. first regained consciousness, he was not able to speak, but was able to shake his head and gesture in response to T.C.'s questions. T.C. said that she asked D.C. if he knew who was responsible for his injuries. D.C. shook his head "no," and then nodded his head "yes" and put up one finger, indicating that he knew one of the individuals responsible. D.C. then made a "trigger gun motion" with his hand and shook his head "no," indicating that he did not know the shooter. T.C. asked if the individual D.C. knew was from the neighborhood, to which D.C. nodded his head "yes." T.C. then went through the streets in the neighborhood, the homes on D.C.'s block, and the colors of the homes on the block. T.C. was able to pinpoint Johnikin's home from D.C.'s nods. T.C. knew the home D.C. identified to be Johnikin's home because a month prior to the shooting Johnikin was involved in

an altercation with A.C. T.C. asked D.C. if the individual was the same individual from the altercation. D.C. nodded "yes."

¶9 T.C. said that once D.C. was able to speak, he identified one of the individuals as "[t]he guy across the street." T.C. said that D.C. told her that when the individuals were leaving after completing the robbery, "the boy from across the street told the guy with the gun 'do what you do' and he left the house." T.C. said: "[a]nd then at that point my son said he began to explain to the guy that they came for what they got. There's no need for nobody to get hurt. And basically he was pleading for his life and his sister's life. And initially the guy with the gun agreed and said 'yeah, you're right.' And then in the next split second he said 'fuck that' and began to shoot."

¶10 T.C. said that she also provided D.C. with a clipboard, on which D.C. asked whether he was going to die. T.C. did not answer D.C.'s question because medical personnel told her that D.C. would not survive.

¶11 Detective Ricky Burems testified that on November 14, 2012, he showed D.C. a photo array of potential "targets" that the police were looking into. D.C. identified Johnikin as the robber without the gun. D.C. told Burems that Johnikin told the robber with the gun to "[d]o what you do" before leaving the house.

¶12 When the trial court was ready to issue its decision on the State's motion, trial counsel informed the court that she wished to withdraw her objection to the admissibility of D.C.'s statements as a matter of "strategy." Trial counsel told the court that she spoke with Johnikin and that Johnikin understood her reasons for withdrawing the objection and was in agreement with her strategy. The trial court then conducted the following colloquy with Johnikin:

THE COURT: Okay. So, Mr. Johnikin…. A board game or any kind of video game where you make a move thinking what the other person's move is going to be and that helps you decide what your next play might be, right?

[Johnikin]: Yes, Your Honor.

THE COURT: So trials work not a lot differently than that. The lawyers all spend time trying to figure out what the other lawyer is going to say and do and what they are going to have their witnesses say and how they are going to use the evidence they have. So from that, in that way your lawyer has described to me that she's got a strategy in mind on how to conduct your defense, on how to defend you, right?

[Johnikin]: Yes, Your Honor.

THE COURT: Have you talked about that with her, what her strategy is?

[Johnikin]: Yes, Your Honor.

THE COURT: Do you agree with that kind of strategy?

[Johnikin]: Yes, Your Honor.

THE COURT: Whatever it is, you agree with her? Do you feel like you've had enough time to talk to her about all this?

[Johnikin]: Yes.

THE COURT: Did she come and see you?

[Johnikin]: Yes, Your Honor.

THE COURT: Did she explain things to you?

[Johnikin]: Yes, Your Honor.

THE COURT: She answered all your questions?

[Johnikin]: Yes, Your Honor.

THE COURT: Okay. I mean if she's not, it's not going to be bad. There's nothing bad that's going to happen to you. You need to tell me. All right. So I want to make sure that you're doing this of your own free will. Did anybody try to talk you into this?

[Johnikin]: No, Your Honor.

THE COURT: And have you had a chance to visit with anybody? Have you talked to any of your family members about what you're deciding to do today?

[Johnikin]: Yes, Your Honor.

THE COURT: So you've heard what their opinions might be. You don't have to tell me what they are. But have you heard from your family and your loved ones about this issue?

[Johnikin]: Yes, Your Honor.

THE COURT: And are you thinking about that when you agree to go ahead today?

[Johnikin]: Yes, Your Honor.

THE COURT: Okay. All right. So you agree with what your lawyer told me that you are going to withdraw your objection to [the State] using these statements in trial, right?

[Johnikin]: Yes, Your Honor.

THE COURT: All right. No one forced you with anything or threatened you with anything or promised you anything to get you to do this today?

[Johnikin]: No, Your Honor.

THE COURT: Do you take any medication?

[Johnikin]: No, Your Honor.

THE COURT: I don't remember that you have. Have you ever been diagnosed with a mental illness or disorder?

[Johnikin]: No, Your Honor.

THE COURT: So you feel like you got a clear head today?

[Johnikin]: Yes, Your Honor.

THE COURT: Do you have any questions that you want to ask [trial counsel] or you want to ask me?

[Johnikin]: None, Your Honor.

> THE COURT: All right. I'll accept your client's waiver and certainly determine, Counsel, that you've discussed this with him and you're making a reasoned decision on trial strategy which is certainly within your right to make.
>
> [Trial Counsel]: And just so the record is completely clear because I made the decision today to withdraw it. One of the questions you asked was whether or not he had the opportunity to talk to his family. He answered, yes. I think generally about the case he was referencing, yes, because obviously he didn't have a chance to talk to his family about this decision.
>
> THE COURT: About this decision?
>
> [Trial Counsel]: Right.
>
> THE COURT: But you've talked to your family about the case and what the strategy is at trial?
>
> [Johnikin]: Yes, your Honor.

¶13 Relying on ***State v. Beauchamp***, 2011 WI 27, 333 Wis. 2d 1, 796 N.W.2d 780, the trial court considered the testimony of D.C.'s family, along with testimony from police officers and D.C.'s medical reports, and found that D.C.'s statements while he was hospitalized constituted dying declarations and were admissible at trial. The trial court made the following specific factual findings:

> In this situation, [D.C.] was shot on November 9th. He was admitted to Froedtert about 10:30 p.m. that day, that evening.
>
> And they characterized him as conscious upon his admission but as being, quote, "Anxious and slightly delirious," according to the medical records.
>
> He underwent a very extensive and major surgery upon his admission to Froedtert. Post surgery, the doctor noted on November 10th several different things, that they had a plan to take him back in for basically a follow up surgery on the 11th.

But on the 10th, the doctor noted that [D.C] was still sedated and intubated, but he discussed the severity of his injuries with [his mother] and made her aware.

And the records are replete with references to the gravity of [D.C.'s] condition. Quote, "Prognosis is poor. Challenging prognosis. Devastating injury." These are all words that were used to describe [D.C's] condition and the medical efforts that were being made to save his life.

The medical records substantiate the testimony of the mother and the father and the girlfriend regarding their presence at the victim's bedside on November 10th, November 11th, and November 12th that they were present at the hospital….

But the defendant -- the victim, I'm sorry -- remained intubated according to the hospital records until sometime after November 12th, which is also consistent with the testimony of the witnesses.

On November 12th, he was characterized as intubated, however, with his eyes opened. He was responsive to pain. He responded to his name and … the medical records infer then that although he was intubated and medicated that he was responsive and they substantiate the proposition that by the testimony that he was able to answer questions.

The court notes and finds for the purposes of this hearing which is certainly not proof beyond a reasonable doubt for trial but the mother in her testimony indicated that her son asked her, "Am I going to die," when he was intubated at some time when she was at his bedside post operation. And that I would expect that that would have been post the follow up on November 11th, the follow-up surgery.

The court finds that it is entirely reasonable to conclude that [D.C.] had a reasonable belief that his condition was grave, that his prognosis was poor. These things were being discussed in the room in his presence between the doctors and his parents.

And it is not unreasonable to infer that when a person has been shot and injured in the manner in which he was, undergoes two surgeries[,] awakes in the hospital with his mother, his girlfriend, his father, surrounding his bedside and in the condition that he was in, that an individual would understand that this was an extremely

> serious and grave situation and that death was imminent and that that was reasonable for [D.C] to believe that his death was imminent at that time.
>
> The court doesn't consider in making this determination the fact that he got better for a period of time, that he was apparently able to be up and moved off the intensive care floor and all of those things because at the time he made these statements it was reasonable for him to conclude that he was going to die.
>
> ….
>
> I also find that even if some review of these facts or counsel's decision to give up and abandon this motion or to second guess those decisions that the evidence would be admissible and the statements would be admissible under a forfeiture by wrongdoing theory.
>
> For purposes of this motion, the court finds that the fact is uncontroverted that the defendant is alleged to have said to the gunman, do what you came to do, or do what you have to do, and at that point the gunman started firing.
>
> And the court interprets that action as directing the shooter to basically eliminate any witnesses to this armed burglary or armed robbery that had just occurred and that the purpose of the intent was to make [D.C.] and his sister unavailable to be witnesses in any subsequent prosecution that the state might initiate for armed burglary or armed robbery. And, therefore, the forfeiture by wrongdoing doctrine would apply.
>
> So the court would have granted the State's motion, [Trial Counsel], regardless.

¶14 The jury found Johnikin guilty as charged. Johnikin filed a postconviction motion arguing that the admission of D.C.'s statements to his family members identifying Johnikin as one of the robbers violated his Sixth Amendment right to confrontation and did not constitute dying declarations. He also argued that trial counsel was ineffective for withdrawing her objection to the State's motion to admit the statements without properly explaining the effect of the withdrawal to Johnikin and for failing to properly investigate alibi witnesses.

The postconviction court denied the motion without a hearing.[1] This appeal follows.

DISCUSSION

¶15 On appeal, Johnikin argues that the postconviction court erroneously denied his motion because: (1) his trial counsel was ineffective; and (2) the trial court erred in admitting D.C.'s statements as dying declarations and under the doctrine of forfeiture by wrongdoing.

¶16 Whether a postconviction motion alleges facts which, if true, would entitle the defendant to relief is a question of law that we review *de novo*. *See* ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). In order to obtain a hearing on a postconviction motion, a defendant must allege material facts sufficient to warrant the relief sought. ***State v. Allen***, 2004 WI 106, ¶¶9, 36, 274 Wis. 2d 568, 682 N.W.2d 433. Non-conclusory allegations should present the "who, what, where, when, why, and how" with sufficient particularity for the postconviction court to meaningfully assess the claim. *See* ***id.***, ¶23. No hearing is required when the defendant presents only conclusory allegations or when the record conclusively demonstrates that he or she is not entitled to relief. ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). If the motion fails to allege sufficient facts, the postconviction court has the discretion to deny the postconviction motion without a hearing. *See* ***Bentley***, 201 Wis. 2d at 310-11.

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[1] The postconviction court granted the part of Johnikin's motion requesting that the court vacate four DNA surcharges.

Ineffective Assistance of Counsel

¶17 Johnikin argues that his trial counsel was ineffective for: (1) withdrawing her objection to the admission of D.C.'s statements as dying declarations; and (2) failing to investigate other possible suspects and alibi witnesses. We disagree.

¶18 To set aside a judgment of conviction for ineffective assistance of counsel, a defendant must show both that his or her counsel's performance was deficient and that the deficient performance prejudiced his or her defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove that counsel's performance was deficient, a defendant must point to specific acts or omissions that were "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different. ***Id.*** at 694. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." ***Id.*** Because a defendant must show both deficient performance and prejudice, an appellate court need not consider one prong if the defendant has failed to establish the other. *See* ***State v. Chu***, 2002 WI App 98, ¶47, 253 Wis. 2d 666, 643 N.W.2d 878.

¶19 First, Johnikin claims that his trial counsel was ineffective for "[f]ail[ing] to explain strategy or the consequences of giving up [the] right to confrontation." (Bolding and capitalization omitted.) Specifically, Johnikin argues that trial counsel "lied to the Court" when she said that Johnikin was aware of her strategic reasons for withdrawing her opposition to the State's motion to admit D.C.'s statements. Johnikin contends that he did not object to counsel's statements in order to avoid conflict with counsel. We reject Johnikin's arguments

because: (1) the record clearly establishes that Johnikin agreed on multiple occasions during the colloquy that he understood trial counsel's decision and agreed with it; and (2) even if Johnikin's allegations were true, he suffered no prejudice.

¶20 Before the trial court rendered its decision on the State's motion, Johnikin's counsel informed the court that she planned to withdraw her objection to the motion for strategic reasons, which she discussed with Johnikin. She also stated that Johnikin, then sixteen years old, understood her trial strategy and agreed with her planned approach. The trial court then engaged in a lengthy colloquy with Johnikin, which the court clearly tailored to Johnikin's age. Johnikin clearly and affirmatively told the court that: trial counsel discussed her decision with him, he agreed with her decision, he understood her strategy, his family was aware of the decision, and he had no questions for his attorney. Johnikin cannot contend that he allowed his attorney to "lie[]" to the court, but now fault his counsel for pursuing a failing strategy. *See* ***State v. McDonald***, 50 Wis. 2d 534, 538-39, 184 N.W.2d 886 (1971) (holding that a defendant who acquiesces to trial counsel's strategic choice is bound by that decision).

¶21 Moreover, Johnikin cannot establish that trial counsel's alleged failure prejudiced his case. The trial court said that regardless of counsel's decision to withdraw her opposition to the State's motion, the court would have admitted D.C.'s statements either as dying declarations or under the doctrine of forfeiture by wrongdoing. Counsel cannot be found ineffective for failing to oppose a motion that the trial court would have granted. *See* ***State v. Maloney***, 2005 WI 74, ¶37, 281 Wis. 2d 595, 698 N.W.2d 583.

¶22 As to Johnikin's second basis for alleging ineffective assistance of counsel—trial counsel's failure to investigate other suspects or alibi witnesses—we conclude that Johnikin's arguments are conclusory. The portion of Johnikin's postconviction motion dealing with this issue consists of three short paragraphs in which Johnikin vaguely accuses his trial counsel of not following up with a hired investigator. Rather than explain what the investigator would have found, Johnikin invited the postconviction court to review an excerpt from an investigatory report compiled after Johnikin hired appellate counsel. The report points to other suspects. Johnikin's arguments, however, fail to connect other suspects to the commission of the crimes at issue. Possible grounds for suspecting third parties are not sufficient to sustain an allegation of ineffective assistance of counsel. *See* ***State v. Denny***, 120 Wis. 2d 614, 622, 357 N.W.2d 12 (Ct. App. 1984) (Suspicion "'must be coupled with substantial evidence tending to directly connect [the third party] with the actual commission of the offense.'") (citation omitted).

Right to Confrontation

¶23 Johnikin contends that D.C's statements were not dying declarations, as D.C.'s health improved for a period after D.C made the statements at issue, and that the admission of D.C.'s statements violated his right to confront the witness. Because Johnikin acquiesced in trial counsel's strategic decision to withdraw opposition to the State's motion to admit D.C.'s statements, we do not directly address Johnikin's argument alleging trial court error. Instead, we address the argument under the rubric of ineffective assistance of counsel. *See* ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31 (where trial counsel does not object to the information provided by the State or to the trial court's findings, the defendant has forfeited his right to review other than in an ineffective

assistance of counsel context); ***State v. Erickson***, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999) ("[T]he normal procedure in criminal cases is to address waiver within the rubric of the ineffective assistance of counsel."). We conclude that trial counsel was not ineffective for withdrawing her opposition to the State's motion because D.C.'s statements were indeed admissible as dying declarations and did not violate his right to confrontation.

¶24 WISCONSIN STAT. § 908.045(3) (2015-16)[2] explains the dying declaration exception to the hearsay rule, defining a dying declaration as "[a] statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death." Under established law, a person whose assertion is sought to be used at trial need not specifically say that death is imminent. Rather, "belief of impending death may be inferred from the fact of death and circumstances such as the nature of the wound." *See* Judicial Council Committee Note, 1974, WIS. STAT. § 908.045(3); *see also* ***Oehler v. State***, 202 Wis. 530, 534, 232 N.W. 866 (1930); ***Richards v. State***, 82 Wis. 172, 179, 51 N.W. 652 (1892) (knowledge of impending death permissibly inferred when declarant *in extremis* and was aware of that).

¶25 Here, the record clearly supports the trial court's finding that D.C.'s statements—which both identified Johnikin as one of the robbers and indicated that Johnikin gave the instruction to shoot D.C. and A.C.—were dying declarations. After regaining consciousness following surgery to treat the gunshot wound, D.C. was intubated and unable to speak. Through gestures and writings,

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

D.C. was able to identify Johnikin and pinpoint Johnikin's residence. When D.C. was able to speak, he told multiple people that Johnikin was not carrying a gun, but directed the gun-carrying robber to "do what you do." D.C. asked both parents whether he would survive his injuries, a question those close to D.C. deemed out of character. Indeed, D.C.'s parents were told that D.C. would not survive the injuries and D.C.'s mother refrained from answering D.C.'s question. D.C. also asked those around him to pray with him. While D.C. did improve for a short while, it is clear that D.C.'s statements were made during a period in which he believed he would not survive. Under the circumstances, it was proper for the trial court to infer that D.C. believed he was in danger of dying.

¶26 As to whether admission of D.C.'s dying declarations violated Johnikin's constitutional right to confrontation, we conclude that Johnikin did not suffer a constitutional violation. The Wisconsin Supreme Court addressed this very issue in ***Beauchamp***. In that case, Marvin Beauchamp challenged statements made by a shooting victim in which the victim briefly described his shooter just before dying. ***Id.***, 333 Wis. 2d 1, ¶1. The victim described his shooter as a dark-skinned man with a "bald head and big forehead" named Marvin. ***Id.*** (one set of quotation marks omitted). The victim distinguished his shooter from another man named Marvin by calling the shooter "big head Marvin." ***Id.*** (one set of quotation marks omitted).

¶27 Beauchamp argued that the trial court erred in admitting the victim's statements as dying declarations because he was deprived of his right to confront the victim. ***Id.***, ¶2. Relying on ***Crawford v. Washington***, 541 U.S. 36 (2004), and ***Giles v. California***, 554 U.S. 353 (2008), the Wisconsin Supreme Court "decline[d] to hold that the constitutional right to confront witnesses is violated by the admission of statements under the dying declaration hearsay exception."

Beauchamp, 333 Wis. 2d 1, ¶34. The court noted that "the Sixth Amendment's guarantee of the confrontation right does not apply where an exception to the confrontation right was recognized at the time of the founding." ***Id.***, ¶5 (citation and one set of quotation marks omitted). The dying declaration exception was an established exception at common law. ***Id.***

¶28 In accordance with ***Beauchamp***, we conclude that Johnikin was not deprived of his constitutional right to confrontation because D.C.'s statements were properly admitted as dying declarations. Consequently, trial counsel cannot be found ineffective.[3]

By the Court.—Judgment and order affirmed.

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

[3] The State also argues that the trial court properly found D.C.'s statements to be admissible under the forfeiture by wrongdoing doctrine. Because we have concluded that the statements were properly admissible as dying declarations, we do not discuss the forfeiture by wrongdoing doctrine.