COURT OF APPEALS
DECISION
DATED AND FILED

October 31, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2050-CR **Cir. Ct. No. 2012CF3383**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALEXANDER GOODENOUGH,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Alexander Goodenough appeals a judgment of conviction, entered upon a jury's verdict, for first-degree intentional homicide while using a dangerous weapon. Goodenough also appeals from an order denying his motion for postconviction relief. Goodenough argues that he is entitled to a new trial because his right to confrontation was violated because expert testimony regarding the victim's cause of death was provided by a doctor who did not perform the autopsy.

¶2 Alternatively, Goodenough asserts that he is entitled to resentencing because during the sentencing hearing the trial court questioned Goodenough about his family's efforts to assist him with his drug abuse problems; Goodenough alleges that his reply was compelled self-incrimination, which the trial court then improperly relied upon for sentencing. We affirm.

BACKGROUND

¶3 On the afternoon of July 7, 2012, Milwaukee police officers were sent to the residence of the victim, Kenneth Johnson, who they found in the living room with multiple stab wounds. He was pronounced dead at the scene and transferred to the medical examiner's office for an autopsy to be performed.

¶4 The autopsy was performed by Dr. Christopher Poulos, an assistant medical examiner at the Milwaukee County Medical Examiner's Office. Dr. Poulos found that Johnson had been stabbed approximately fifty times throughout his body, but that the lethal stab wound had occurred in the back of his neck. Dr. Poulos determined, to a reasonable degree of medical certainty, that Johnson had died from a loss of blood from multiple stab wounds. Goodenough was arrested for the crime, claiming that he had initially stabbed Johnson by accident, and then in self-defense, during an argument.

¶5 At Goodenough's trial in November 2012, Dr. Brian Peterson, the chief medical examiner for Milwaukee County testified on behalf of the State; Dr. Poulos had since resigned and was not available at the time of trial. Dr. Peterson was present for part of the autopsy procedure being performed by Dr. Poulos, and observed Johnson's body during the procedure. He also reviewed, prior to trial, the autopsy report, autopsy photographs, crime scene photographs, the police report, and the investigative report prepared by medical legal death investigators from the Medical Examiner's Office, as well as some "ancillary things" such as the toxicology report.

¶6 Dr. Peterson testified that two of the stab wounds—the wound to the back of Johnson's neck, which had hit his jugular vein, and the wound to his nose which had resulted in the tip of his nose almost being completely cut off—had caused Johnson to aspirate blood into his lungs, which was a substantial factor in his death. He further testified that twenty-four of the stab wounds were to the arms and legs and were all "relatively superficial" because they did not hit bone or any major arteries. These wounds therefore could be characterized as "defensive injuries," in that it is a natural tendency for a person who is being stabbed to use his or her extremities, particularly the hands and arms, to attempt to protect his or her head, neck, and torso. Based on all of the information he had observed and reviewed, Dr. Peterson testified that in his independent opinion, made to a reasonable degree of medical certainty, Johnson had died of "multiple sharp force injuries of the head, neck, and torso."

¶7 After the jury convicted Goodenough of first-degree intentional homicide while using a dangerous weapon, he was sentenced in April 2013. At the sentencing hearing, the trial court discussed the factors appropriate for consideration in determining a sentence, including the character of the defendant.

In that context, the trial court asked Goodenough whether his family had attempted to intervene and assist him with his drug abuse problem and whether he had accepted help; Goodenough replied that he had ignored his family's attempts to help him. The trial court noted that it considered Goodenough's drug use to be an "aggravating factor" for purposes of determining Goodenough's sentence. Goodenough received a mandatory life sentence, with eligibility for release to extended supervision after thirty years.

¶8 Goodenough filed a motion for postconviction relief, alleging ineffective assistance of trial counsel, which was denied December 20, 2013. He then filed a notice of appeal in January 2014; however, that appeal was voluntarily dismissed in July 2015, with deadlines for pursuing additional postconviction relief extended by this court. After numerous extensions, the notice of appeal was filed in October 2016.[1]

DISCUSSION

Right to Confrontation

¶9 Goodenough first argues that his right to confrontation was violated because the trial court erroneously allowed Dr. Peterson, who had not personally performed the autopsy, to testify regarding Johnson's cause of death. As a result, Goodenough contends that he is entitled to a new trial.

[1] We note that upon Goodenough's voluntary dismissal of his initial appeal, our order indicated that we were extending the deadlines for Goodenough to file a motion for postconviction relief. He did not file another postconviction motion beyond the motion that was denied by the trial court on December 20, 2013 (although Goodenough's most recent notice of appeal erroneously referenced that denial date as being December 20, 2015). Our subsequent orders in this matter—which further extended Goodenough's filing deadlines—indicated that Goodenough could file either a postconviction motion or a notice of appeal.

¶10 The right of an accused to confront the witnesses against him or her, set forth in the Sixth Amendment of the United States Constitution and known as the Confrontation Clause, is "a fundamental right" that is guaranteed by the Wisconsin Constitution as well. ***State v. Griep***, 2015 WI 40, ¶18, 361 Wis. 2d 657, 863 N.W.2d 567; ***State v. Hale***, 2005 WI 7, ¶43, 277 Wis. 2d 593, 691 N.W.2d 637. "Although a [trial] court's decision to admit evidence is ordinarily a matter for the court's discretion, whether the admission of evidence violates a defendant's right to confrontation is a question of law subject to independent appellate review." ***State v. Williams***, 2002 WI 58, ¶7, 253 Wis. 2d 99, 644 N.W.2d 919.

¶11 Our supreme court specifically addressed the issue of expert testimony as it relates to the Confrontation Clause in ***Griep***. Defendant Michael Griep was convicted of operating a motor vehicle while intoxicated (third offense). ***Griep***, 361 Wis. 2d 657, ¶1. The Confrontation Clause violation alleged in that case was that the expert witness who testified regarding Griep's blood alcohol concentration (BAC) was not the same analyst from the Wisconsin State Laboratory who conducted the test; that analyst was unavailable at the time of trial. ***Id.***, ¶¶1-3. The court found that the testifying expert's review of the lab's file on Griep, including the test results, had allowed him "to form an independent opinion to which he testified," and thus the testimony did not violate the Confrontation Clause. ***Id.***, ¶3.

¶12 The ***Griep*** court in its analysis relied on a two-prong test previously established in ***Williams*** to determine whether expert testimony that is "based in part on tests conducted by a non-testifying analyst satisfies a defendant's right of confrontation." ***Griep***, 361 Wis. 2d 657, ¶47. For that test, if the testifying expert has "(1) reviewed the analyst's tests, and (2) formed an independent opinion to

which he [or she] testified at trial," then the defendant's right to confrontation has not been violated. ***Id.*** This test ensures that an expert witness is "'not merely a conduit'" for introducing evidence derived from a non-testifying expert. ***Id.***, ¶40 (citation omitted).

¶13 In this case, Dr. Peterson, the expert who testified as to Johnson's cause of death, satisfied both prongs of this test. First, Dr. Peterson testified that he had reviewed the autopsy report and photographs prepared by Dr. Poulos; in fact, although Dr. Peterson did not actually perform the autopsy, he was present for part of the procedure and observed the body. Accordingly, the first prong of the test is satisfied.

¶14 With regard to the second prong, Dr. Peterson stated unequivocally that his testimony was an independent opinion about Johnson's cause of death. He further described the other information in addition to the autopsy report and photographs that he reviewed in order to form that independent opinion: crime scene photographs, the police report, the toxicology report, and the investigative report prepared by medical legal death investigators from the Medical Examiner's Office.

¶15 This testimony demonstrates that Dr. Peterson, after thoroughly reviewing all of the available information relevant to Johnson's death, formed his own independent opinion and did not rely only upon Dr. Poulos's findings in the autopsy report. Thus, Dr. Peterson did not act as "merely a conduit" for Dr. Poulos. *See* ***id.*** Therefore, the second prong of the test is also satisfied.

¶16 Goodenough argues that ***Griep*** is distinguishable from his case due to the nature of the procedures to which the expert witnesses were testifying. Specifically, Goodenough contends that an autopsy requires a higher level of

"professional skill and judgment" than a BAC analysis which is a "simple measurement of quantities." However, Goodenough cites no legal authority for his contentions, and arguments that are "unsupported by references to legal authority will not be considered." ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶17 Rather, we base our decision on the sound reasoning in ***Griep*** with its factual scenario that closely tracks the facts of this case. Accordingly, based on the test for determining whether expert testimony violates the Confrontation Clause, as established in ***Williams*** and reiterated in ***Griep***, we find that both prongs of the test were satisfied. Therefore Goodenough's right to confrontation was not violated.

Resentencing

¶18 Goodenough also argues that he is entitled to resentencing because the trial court relied on an improper factor in determining his sentence. Specifically, Goodenough contends that the trial court's question to him regarding his family's efforts to assist him with his drug abuse problems resulted in a self-incriminating answer that should not have been considered by the trial court as a factor in sentencing.

¶19 The State, on the contrary, asserts that Goodenough forfeited this claim because he did not raise an objection to the question during the sentencing hearing. In order to promote a "policy of judicial efficiency," it has been firmly established that "a party seeking reversal may not advance arguments on appeal which were not presented to the trial court." ***State v. Rogers***, 196 Wis. 2d 817, 826-27, 539 N.W.2d 897 (Ct. App. 1995). However, the courts have recognized that "'certain fundamental constitutional rights … cannot be forfeited by mere

failure to object'"; this includes "'the right to refrain from self-incrimination.'" ***State v. Ndina***, 2009 WI 21, ¶31, 315 Wis. 2d 653, 761 N.W.2d 612 (citation omitted). We therefore address Goodenough's resentencing argument.

¶20 "It is a well-settled principle of law that a [trial] court exercises discretion at sentencing." ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. Our review on appeal is limited to determining whether that discretion was erroneously exercised. *See* ***id.***

¶21 If the trial court "'actually relies on clearly irrelevant or improper factors,'" it has erroneously exercised its discretion. ***State v. Alexander***, 2015 WI 6, ¶17, 360 Wis. 2d 292, 858 N.W.2d 662 (citation omitted). A compelled self-incriminating statement is an improper factor that should not be considered at sentencing because its use violates the defendant's "Fifth Amendment privilege against self-incrimination [which] continues ... through sentencing." ***Id.***, ¶24. The defendant "bears the burden of proving, by clear and convincing evidence, that the sentencing court actually relied on irrelevant or improper factors." ***Id.***, ¶17.

¶22 We first point out that it is "well-established in Fifth Amendment jurisprudence that '[t]he Fifth Amendment prohibits only compelled testimony that is incriminating.'" ***State v. Mark***, 2006 WI 78, ¶16, 292 Wis. 2d 1, 718 N.W.2d 90 (citations omitted). Goodenough fails to explain how his reply to the trial court's question regarding his family's involvement in his drug problem was incriminating; rather, he seems to simply rely on the trial court's response—its statement that Goodenough ignoring his family's attempts to help him was an "aggravating factor."

¶23 Notwithstanding this conclusory and undeveloped argument, we review whether Goodenough has met his burden of proving that the trial court

actually relied on his response as a factor in determining his sentence. At the sentencing hearing, the trial court "'must articulate the basis for the sentence imposed'" which "plays an important role in determining whether the [trial] court actually relied on an improper factor." ***Alexander***, 360 Wis. 2d 292, ¶25 (citation omitted). On appeal, we review the record relating to the sentencing "[i]n the context of the whole sentencing transcript," determining (1) "whether the court gave explicit attention to the allegedly improper factor"; and (2) "whether the improper factor 'formed part of the basis for the sentence,' which could show actual reliance." ***Id.***, ¶29 (citation omitted).

¶24 Clearly, the trial court gave "explicit attention to the allegedly improper factor" in stating that Goodenough's ignoring of his family's attempts to help him was an aggravating factor for purposes of sentencing. *See* ***id.*** However, this factor does not seem to have played an integral role in the basis of the sentence. In the first place, first-degree intentional homicide, the crime for which Goodenough was convicted, is a Class A felony which requires the imposition of life imprisonment. WIS. STAT. §§ 940.01(1)(a) & 939.50(3)(a) (2015-16).[2] Therefore, the only discretionary issue for the trial court was to determine Goodenough's eligibility for extended supervision. The trial court allowed eligibility for extended supervision after thirty years although the State had recommended eligibility after forty-five years.

¶25 Furthermore, in reviewing the sentencing transcript as a whole, the trial court focused on the nature of the crime as opposed Goodenough's drug

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

problem. For example, the court noted that the number of stab wounds was an aggravating factor, and that punishment for the crime was "certainly preeminent" in his consideration of the factors for sentencing. The court also noted that in general homicides "are a problem for the entire community," and thus deterrence was also a primary factor in its sentence determination. The court further stated that Goodenough's showing of remorse for the crime as well as his "relatively limited" prior record were factors on which it based its decision on eligibility for extended supervision.

¶26 Therefore, even if Goodenough's reply regarding his family's involvement in his drug problem could be construed as compelled self-incrimination and thus an improper factor for sentencing determination, Goodenough has failed to establish that the trial court actually relied on his response and that it formed part of the basis of his sentence. *See* ***Alexander***, 360 Wis. 2d 292, ¶29. Accordingly, Goodenough is not entitled to resentencing.

By the Court.—Judgment and order affirmed.

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