STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

CASE NO. 2013AP1675-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

KENNETH HARE,

Defendant-Appellant.

ON APPEAL TO REVIEW THE JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE DENNIS CIMPL, PRESIDING, AND THE DENIAL OF THE POST-CONVICTION MOTION ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE MICHAEL GUOLEE, PRESIDING

BRIEF AND APPENDIX OF THE APPELLANT

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BRIEF OF THE APPELLANT

ISSUES PRESENTED

I. Was the defendant deprived of his constitutional right to the effective assistance of counsel because trial counsel elected not to request a jury instruction on the law of self defense?

Trial court answered: **No.**

II. Was the defendant entitled to an evidentiary hearing on his claim that he was deprived of his constitutional right to the effective assistance of counsel because trial counsel did not request the jury be instructed on the crime of Theft, a lesser included crime of Armed Robbery?

Trial court answered: **No.**

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CASES CITED

POSITION ON ORAL ARGUMENT AND PUBLICATION

This appeal involves only settled issues of law and presentation of the arguments can adequately be made in the briefs. Therefore, neither oral argument nor publication is requested.

STATEMENT OF THE CASE

This case was commenced on January 7, 2012 with the filing of a criminal complaint against Kenneth Hare, alleging in count one, Armed Robbery, contrary to §943.32(1)(a) and (2) of the Wisconsin Statutes and in count two, Attempted First Degree Intentional Homicide, contrary to §940.01(1)(a) and §939.32 of the Wisconsin Statutes.

On March 19, 2012 the jury trial commenced. On March 21, 2012 the jury returned verdicts of guilty as charged in count one, Armed Robbery, contrary to §943.32(1)(a) and (2) of the Wisconsin Statutes, and in count two, guilty of the lesser included crime of First Degree Recklessly Endangering Safety, contrary to §941.30(1) of the Wisconsin Statutes.

On May 4, 2012 the Honorable Dennis Cimpl sentenced the defendant on count one to serve 15 years in the Wisconsin State Prison, with 10 years as initial confinement followed by 5 years as extended supervision. As to count two, the defendant was ordered to serve a concurrent term of 6 years in the Wisconsin State Prison, with 3 years as initial confinement followed by 3 years as extended supervision.

On February 14, 2013 the defendant filed a post-conviction motion alleging that he was denied the constitutional right to effective assistance of counsel because trial counsel elected to not request the trial court instruct the jury on self defense or accident for count two, the Attempt First Degree Intentional Homicide charge, and for failing to request the court instruct the jury on count one, the Armed Robbery charge, of the lesser included crime of Theft, contrary §941.20(1)(a) of the Wisconsin Statutes.

On May 1, 2013 the trial court issued a written decision denying, without an evidentiary hearing, the defendant's claim to ineffective assistance of counsel as to the failure to request the lesser included instruction of Theft. The trial court, in that same written decision, also denied, without an evidentiary hearing, the defendant's claim to ineffective assistance of counsel for the failure to request an Accident instruction. Finally, the trial court, in the same written decision, ordered an evidentiary hearing on the defendant's claim of ineffective assistance of counsel for the decision not to request a self defense instruction. [R.38].

On June 27, 2013 the evidentiary hearing was held. The court denied the defendant's remaining post-conviction claim. The order was reduced to writing and signed by the court on July 18, 2013. [R.41].

STATEMENT OF FACTS

At the jury trial, City of Milwaukee Police Detective Jason Dorav testified that on December 24, 2011 at about 11:30 P.M., he went to 2508 North 53rd Street in the City of Milwaukee to investigate a shooting. There, in an alley, he testified that he observed a projectile that had been fired from a gun, observed an unfired casing, and saw some blood. [R.50: 38]. City of Milwaukee Police Officer Robakowski testified that on January 2, 2012 at about 6:15 P.M. he went to 2707 North 54th Street in the City of Milwaukee in an attempt to locate the defendant. [R.50: 56]. Officer Robakowski testified that the defendant was arrested in the hallway area of his apartment building. [R.50: 59].

Benjamin Trice testified that on December 24, 2011 at about 11:00 P.M. he was driving along Lisbon Avenue heading westbound when he noticed a gentleman running in the middle of the street. Trice testified that he saw blood on the man's shirt. The man told Trice that he had been shot. Trice testified that he gave the man a ride to St. Joseph's Hospital. Trice testified that the man told him that he was trying to buy pills from someone in the alley. [R.50: 67-69].

City of Milwaukee Police Detective Warren Allen testified that on December 24, 2011 he went to St. Joseph's Hospital to investigate what happened to a shooting victim that had been brought there. At the hospital, Detective Allen made contact with Benjamin Trice. Detective Allen testified that he went to Trice's vehicle to check it for evidence. Detective Allen told the jury that in the vehicle he found a gray button down shirt with blood and a couple of holes in it. [R.50: 77-79].

Quintin Wynn testified that on December 24, 2011 he was robbed and shot by the defendant. [R.50: 90-91]. Wynn told the jury that he knew the defendant for a week or two prior to being shot by him. [R.50: 91]. Wynn told the jury that on December 24, 2011 he met the defendant intending to buy about 20 ecstasy pills from him. [R.50: 92]. Wynn identified the bloody shirt with holes in it that was retrieved by Detective Allen from Benjamin Trice's vehicle as the same shirt he was wearing when he was shot by the defendant. [R.50: 95].

Wynn testified that he went to meet the defendant to buy the ecstasy pills from him and the defendant surprised him by pulling out a gun and demanding "everything I got." [R.50: 98]. Wynn stated he looked closely at the gun and knew that it was a real. [R.50: 99]. Wynn testified that he gave the defendant money, his Michael Jordan watch, his wallet, his cell phone and his jacket. [R.50: 101-102].

Wynn testified after that the defendant then ordered him to go to a nearby abandoned house. Wynn testified that he told the defendant that he wouldn't go to the abandoned house and told the defendant: "If you're going to shoot me, shoot me in the alley right here, right now." [R.50: 105]. Wynn testified that the defendant ordered him to get down on his knees, which he did. Wynn told the jury that the defendant then shot him in his left shoulder under his right breast, in his side and his right forearm. [R.50: 106].

Wynn testified that when this happened he had a knife on him. He told the jury that he had the knife in his jacket pocket. Wynn denied taking it out at any point during the encounter with the defendant. Wynn testified that he decided

not to pull it out because it might be: "one false move that I couldn't afford." [R.50: 112]. Wynn testified that during the shooting he tried to defend himself by grabbing the gun with his left hand, pushing the defendant off from him, and then running away. [R.50: 118].

City of Milwaukee Police Detective William Sheehan testified that on January 3, 2012 he spoke with the defendant in a video recorded interview. [R.51: 31]. The video recording of the interview was played in court for the jury. [R.51: 33-37]. Detective Sheehan testified that the defendant told him that he met up with a person he knew only as "Q" and "Q" pulled out a knife on him and the defendant responded by pulling out a gun and pointing it at "Q". [R.51: 41]. Detective Sheehan testified that the defendant told him that after this he then began to wrestle with "Q". [R.51:63].

In the video recording, which was played for the jury once during the trial and for them again, at their request after deliberations were underway, the defendant told Detective Sheehan that on December 24, 2011 he went to meet up with "Q" to sell him some ecstasy pills. [R.__:1]. The defendant explained that he had taken two ecstasy pills and two bars of Xanax earlier that day and was feeling "high". [R.__:1-2]. The defendant told Detective Sheehan that "Q" was "acting too frigidity" so the defendant pulled out his gun and demanded that "Q" remove his hand from his pocket. [R.__:2]. The defendant told Detective Sheehan that "Q" responded by grabbing the gun and it went off. [R.__:2].

The defendant stated that when they began to struggle over the gun "Q" then pulled out an army surplus knife. [R.__:5]. The defendant stated that "Q" eventually dropped the knife to the ground and ran off. [R.__8]. The defendant told Detective Sheehan that prior to running off, "Q" dropped his wallet. [R.__5]. The defendant stated that the wallet fell out on the ground while they were wrestling. [R.__:7]. The defendant stated that at no point did he demand that "Q" give him any of his property. [R.__:7]. The defendant however admitted that he picked up the wallet and the items inside it and took them to his baby's mother's house. [R.__5]. The defendant told Detective Sheehan that the wallet, the identification cards and a condom were still at the baby's

mother's house inside a computer pouch in the living room closet. [R.__:5-6].

Detective Sheehan testified at trial he went with a search warrant to that location. [R.51: 53]. Detective Sheehan testified that there he found Wynn's social security card, his Wisconsin identification card and the condom. [R.51: 58-61].

ARGUMENT

I. The defendant was deprived of his constitutional right to the effective assistance of counsel because trial counsel elected not to request a jury instruction on the law of self defense.

The United States and Wisconsin Constitutions guarantee a criminal defendant to the right to the effective assistance of counsel. U.S. Const. amends. VI, XIV, Wisconsin Const. art. I, §7; ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis.2d 571, 665 N.W.2d 305. To establish the denial of effective assistance of counsel, the defendant must prove first, that counsel's performance was deficient, and second, that counsel's deficiencies prejudiced his defense. ***Id***., (*citing* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)).

Counsel's performance is deficient when it falls below objective standards of reasonableness. ***Id***., at ¶19 (citing ***Strickland***, 466 U.S. at 688). To prove prejudice, a defendant must demonstrate a reasonable probability that, but for counsel's deficient conduct, the result of the proceeding would have been different. ***Strickland***, 466 U.S. at 694. However, a defendant does not need to establish that the final result of the proceeding would have been different. ***State v. Smith***, 207 Wis.2d 258, 275, 558 N.W.2d 379 (1997). The prejudice inquiry's focus is not the outcome of the trial, but rather "the reliability of the proceedings." ***Thiel***, 264 Wis. 2d 571, ¶20 (quoting ***State v. Pitsch***, 124 Wis.2d 628, 642, 369 N.W.2d 711 (1985)). "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the

outcome." ***Pitsch***, 124 Wis. 2d at 642 (quoting ***Strickland***, 466 U.S. 694).

At the post-conviction hearing trial counsel testified that he did not request a self defense instruction in the case because: "the self defense instruction did not apply to our theory of defense." [R.55: 16]. Trial counsel explained that his theory of defense for the case was that: "there was a struggle over the gun and the gun went off. That it was not intended to be an armed robbery and it was not intended to be a homicide." [R.55:17]. Trial counsel testified that he had ultimately concluded not to request a self defense instruction because that would have: "muddled our theory of defense" for the jury. [R.55: 22].

Those explanations are dramatically inconsistent with the way trial counsel argued the case to the jury at trial. In his opening statement, trial counsel telegraphed to the jury that self defense was going to be an issue in the case. He did so by explaining to the jury that: "Kenneth Hare didn't pull out a gun because he was trying to rob anybody. He pulled out a gun because he realized that Quintin Wynn, the other man, had a knife." [R.50: 25]. Trial counsel also told the jury in his opening remarks that they could expect to: "hear that both of these men, Mr. Hare and Mr. Wynn, were concerned about their safety during this transaction and took steps towards protecting themselves." [R.50: 26].

Trial counsel told the jury in his opening remarks that the evidence would show that the defendant: "got scared when he realized that Mr. Wynn was standing there in front of him with a weapon in his hand." [R.50: 30]. Trial counsel went on to explain that: "Mr. Hare didn't intend to kill Mr. Quintin Wynn. The gun went off accidentally, unintentionally when they had their hands around it and they were struggling and pulling on it." [R.50: 30].

Later, in his closing argument, trial counsel reminded the jury that, in his video recorded statement, the defendant justified his decision to come armed to his meet up with Wynn because: "People be getting' robbed up around Center street." [R.52: 62]. Trial counsel pushed self defense to the jury when he argued that: "Mr. Hare gave his explanation to

the detective of what it is that happened that night…he pulled his gun out because there's Mr. Wynn standing a couple feet in front of him with a knife." [R.52: 74].

Trial counsel also defended his decision to not ask for a self defense instruction by testifying at the post-conviction motion hearing that: "I did not see a factual basis for claiming self defense. I didn't see a factual basis that the judge would allow that and I thought it was bad for our defense." [R.55: 23]. This explanation is belied by the record. The trial court indicated to trial counsel quite clearly that a self defense instruction would be given if it were requested:

> "I know in the jury instructions of the State, the State asked for two lesser included crimes, 1st degree recklessly endangering safety and 2nd degree recklessly endangering safety; defense asked for none; nobody asked for anything regarding self defense. What I want the two of you to do overnight is both of you mock up what you want in the way of your substantive jury instructions on Count 2, I don't need Count 1, I have those worked out, I also have the rest of the jury instructions worked out too. But I need the two of you to give me an idea of what you want in the way of substantive jury instruction on the attempt 1st degree intentional homicide with any lesser included crimes, ***with any self defense instructions.***" [emphasis added]; [R.51: 78-79].

In arguing the defendant's case to the jury, trial counsel emphasized that the defendant acted with the intent to protect his life and his safety. That argument was consistent with the justifications the defendant made on the video recorded statement as to why he brought a gun to his meeting with Wynn, why he pulled it out, and why he then struggled with Wynn for control of the gun. Requesting a self defense instruction on these facts was an obvious call. It was deficient performance for trial counsel not to make that call.

The jury ultimately elected not to convict the defendant of the crime of Attempted First Degree Intentional

Homicide in favor of finding guilt on the lesser included crime of First Degree Recklessly Endangering Safety. Their verdict expresses in part that that they had reasonable doubt the defendant acted with intent to kill. Their verdict is at odds with what Wynn told them: that the defendant ordered him to get down on his knees before shooting directly at him multiple times. [R.50: 106].

Their verdict is arguably more consistent with the defendant's version of what took place in the alley that night. In his statement, the defendant explains that because he feared for his life and safety he brought a gun to his meeting with Wynn, pulled the gun out after seeing Wynn arm himself with a knife, and thereafter struggled aggressively with Wynn for control of the firearm. However, because of trial counsel's error, the jury was not unaware that they could accept these claims as legally justified under a claim of self defense. The consequence of that error is that the confidence in the reliability of the proceedings is shaken. The defendant was therefore prejudiced and a new trial is required.

II. The trial court erred by ruling that the defendant was not entitled to an evidentiary hearing on his claim that he was deprived of his constitutional right to the effective assistance of counsel because trial counsel did not request the jury be instructed on the crime of Theft, a lesser included crime of Armed Robbery.

When a post-conviction motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. ***State v. Bentley***, 201 Wis.2d 303, 310 548 N.W.2d 50 (1996) (citations omitted); ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis.2d 568, 682 N.W.2d 433 (citations omitted). Whether a post-conviction motion meets this standard is a question of law which this Court reviews *de novo*. ***Bentley***, 201 Wis. 2d at 310 (citations omitted). In reviewing a post-conviction motion to determine whether a hearing is warranted, the circuit court must accept the factual allegations as true and then decide

whether there are sufficient objective material factual assertions that entitle the defendant to relief. See ***State v. Love***, 2005 WI 116, ¶37, 284 Wis.2d 111, 700 N.W.2d 62.

A trial court may, in its discretion, deny a motion without a hearing if the motion does not raise a question of fact, presents only conclusory allegations or if a review of the record conclusively demonstrates that the defendant is not entitled to relief. ***Allen***, 274 Wis. 2d 568, ¶9, 12 (citations omitted). This discretionary decision is subject to deferential review under the erroneous exercise of discretion. ***Allen***, 274 Wis. 2d 568, ¶9.

In his closing argument to the jury, trial counsel conceded that the defendant took property which belonged to Wynn. [R.52: 76-77]. Although trial counsel argued the taking was not connected to the crime of Armed Robbery, he otherwise did not contest the defendant's actions met all the elements of theft: that he took property of another intentionally and knowingly without consent with the intent to permanently deprive the owner of possession. [R.52: 76-77]. Trial counsel's argument was consistent with the admissions made by the defendant in the video recorded statement. [R.__:5-7].

The difference in exposure between Armed Robbery [40 years] and Misdemeanor Theft [9 months] is clearly very substantial. Given the concessions trial counsel was forced to make in arguing the case to the jury as to the taking of Wynn's property by the defendant, requesting the lesser included crime of Theft was another obvious call. Unfortunately, because of the trial court's decision not to allow an evidentiary hearing on this issue, no record has been made as to why trial counsel did not make that call.

In its ruling denying the defendant's request for an evidentiary hearing on this issue, the trial stated that: "[E]ven if counsel had sought the lesser included offense of theft in this case, the defendant cannot demonstrate to a reasonable probability that counsel's failure to request it would have affected the outcome of the verdict." [R.38: 2].

The analysis employed by the trial court on this issue is in error. First, the trial court neglected in its decision to address whether the defendant's post-conviction motion presented sufficient material facts entitling him to relief therefore requiring an evidentiary hearing. Second, the trial court neglected to address whether trial counsel's decision not to seek the lesser included instruction met the deficiency prong under the ***Strickland*** test. Finally, the trial court failed to apply the correct prejudice standard, whether the deficient performance undermines the reliability of the proceedings. Instead, the trial court chose to apply an outcome-determinative test.

Under the correct standard the failure to provide the jury with the lesser included instruction undermines the reliability of the proceedings. As previously argued in this brief, by going for the lesser included offense in count two, the jury concluded there was reasonable doubt that the defendant intended to kill. Their verdict on this count more closely reflects what the defendant reported took place than what Wynn testified to. The defendant's version of what happened in the alley between him and win is more consistent with his commission of a Theft as opposed to an Armed Robbery. The jury was unaware that they could conclude what the defendant admitted to constituted Theft rather than Armed Robbery. It was an error for trial counsel not to ensure that the jury had this option in the deliberation room. The consequence of that error is that the confidence in the reliability of the proceedings is shaken. The defendant has therefore suffered prejudice and a new trial is required.

CONCLUSION

For the foregoing reasons, Kenneth Hare respectfully requests this court find that the trial court erred when denying his request for a new trial based on ineffective assistance of counsel because he failed to request a self defense instruction. Kenneth Hare alternatively requests this court remand this case back to the trial court for an evidentiary hearing on his claim that he was deprived of his constitutional right to the effective assistance of counsel because trial counsel did not

request the jury be instructed on the crime of Theft, a lesser included crime of Armed Robbery.

Dated this 8th day of November 2013.

Respectfully Submitted,

_____

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CERTIFICATION

I certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix printed in a proportional font. The length of this brief is 4,377 words.

Dated this 8th day of November 2013.

Respectfully Submitted,

_____

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Signed,

Patrick Flanagan
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CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with §809.19(2)(a) and that it contains at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of person, specifically including juveniles, with a notation that portions of the record have been produced to preserve confidentiality and with appropriate references to the record.

Dated this 8th day of November 2013.

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