STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2013AP1675-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KENNETH L. HARE, JR.,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDERS DENYING A MOTION FOR POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE DENNIS R. CIMPL AND MICHAEL D. GUOLEE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

CASES CITED

Page

Page

STATUTES CITED

OTHER AUTHORITY

STATE OF WISCONSIN

C O U R T O F A P P E A L S

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The parties' briefs will fully develop

the issues presented, which can be resolved by applying well-established legal principles.

STATEMENT OF THE CASE AND FACTS

As Respondent, the State exercises its option not to include separate statements of the case and facts. *See* Wis. Stat. (Rule) § 809.19(3)(a)2. Relevant information will be included where appropriate in the State's argument.

ARGUMENT

Defendant-Appellant Kenneth L. Hare, Jr., appeals a judgment of conviction for one count each of armed robbery by use of force and first-degree recklessly endangering safety (25). *See* Wis. Stat. §§ 943.32(2); 941.30(1). Hare was convicted of these crimes for robbing and shooting Quintin Wynn during a drug deal in Milwaukee. The jury convicted him of the armed robbery as charged, but found him guilty of recklessly endangering safety as a lesser-included offense of attempted first-degree intentional homicide (52:22-29; 53:8-9).

Hare also appeals orders denying his motion for postconviction relief (29; 38; 41).[1] In his motion, Hare argued that his trial counsel, Nathan Opland-Dobs, was ineffective for failing to request jury instructions on self-defense and theft as a lesser-included offense to the armed robbery (29:5-

[1] The Honorable Dennis R. Cimpl presided at Hare's trial and entered the judgment of conviction against him (25). The Honorable Michael D. Guolee heard and denied Hare's postconviction motion (38; 41; 55).

7). The circuit court denied relief on both claims, holding a hearing on the former, but not the latter (38:2-3; 41; 55:59-73). On appeal, Hare argues the circuit court's decisions were erroneous (Hare's brief at 8-13).

This court should affirm. The circuit court correctly held that Opland-Dobs was not deficient for not requesting a self-defense instruction. It is not clear the instruction would have been appropriate under the facts of the case and in any event, Opland-Dobs made a reasonable strategic decision not to ask for one. Additionally, the circuit court properly denied Hare's claim that Opland-Dobs should have requested a theft instruction without a hearing because the allegations in Hare's postconviction motion were insufficient and the record showed that Opland-Dobs had a valid reason for not requesting it.

HARE HAS NOT SHOWN THAT THE TRIAL COURT ERRED IN DENYING HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.

A. Opland-Dobs was not deficient for failing to request a self-defense instruction.

1. Applicable law and standard of review.

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). To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*.

In proving that counsel was deficient, 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 (citation omitted). The defendant must demonstrate that his attorney made serious mistakes which could not be justified in the exercise of objectively reasonable professional judgment, deferentially considering all the circumstances from counsel's contemporary perspective to eliminate the distortion of hindsight. *See Strickland*, 466 U.S. at 689-91.

To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. *Strickland*, 466 U.S. at 687. A 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. 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 (quoted source omitted).

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). Under this standard of review, the trial court's findings of fact will not be disturbed unless they are clearly erroneous. *Id.* The ultimate issue whether counsel was ineffective based on the facts is subject to independent appellate review. *State v. Balliette*, 2011 WI 79, ¶¶ 18-19, 336 Wis. 2d 358, 805 N.W.2d 334.

2. Discussion.

a. The evidence did not support a self-defense instruction.

Initially, this court should conclude that Hare has failed to prove that Opland-Dobs performed deficiently by not asking for a self-defense instruction because he has not shown that the court would have given one had counsel requested it. *See State v. Ambuehl*, 145 Wis. 2d 343, 352, 425 N.W.2d 649 (Ct. App. 1988).

In order to be entitled to a jury instruction setting forth a defense to the crime charged, there must be sufficient evidence in the record to support it. *See State v. Hemphill*, 2006 WI App 185, ¶ 8, 296 Wis. 2d 198, 722 N.W.2d 393 (citing *State v. Coleman*, 206 Wis. 2d 199, 212-13, 556 N.W.2d 701 (1996)). "Evidence to support the instruction is sufficient if 'a reasonable construction of the evidence will support the defendant's theory "viewed in the most favorable light it will reasonably admit of from the standpoint of the accused."'" *State v. Giminski*, 2001 WI App 211, ¶ 10, 247 Wis. 2d 750, 634 N.W.2d 604 (quoting *State v. Mendoza*, 80 Wis. 2d 122, 153, 258 N.W.2d 260 (1977)).

Hare has not demonstrated that the circuit court would have been obliged to instruct the jury on self-defense had Opland-Dobs requested it do so. In his brief, he relies heavily on Opland-Dobs' opening statement and closing argument, noting that in them, he made comments consistent with a claim of self-defense (Hare's brief at 9-10). But Hare has to show the trial evidence would have supported the instruction. Counsel's arguments are not evidence. *See State v. Eugenio*, 210 Wis. 2d 347, 358, 565 N.W.2d 798 (Ct. App. 1997). Hare also argues that the circuit court at one point suggested that it might be willing to give the instruction, but again, this does not show that the evidence would have warranted it (Hare's brief at 10).

Further, the record shows that there was no evidence to support a self-defense instruction. Hare argues that self-defense would have excused his decision to pull a gun on Wynn during the drug deal because he believed Wynn was holding onto a knife in his pocket and would not show Hare his hands (Hare's brief at 9-11). Hare told police this is why he drew his gun and a recording of this statement was played at trial (51:33-37; 59:2, 5-6). Hare also claimed the shooting was accidental after Wynn tried to grab the gun (59:4-6, 8-9).

Self-defense would have allowed Hare to threaten or intentionally use force against another person to prevent or terminate what Hare believed was an unlawful interference with his person. *See* Wis. Stat. § 939.48(1). Hare appears to be arguing that he threatened force against Wynn by drawing his gun, and that this was privileged under § 939.48(1) (Hare's brief at 11).

There would have been no basis for the court to give a self-defense instruction on this theory because even assuming Hare's threat of force against Wynn was privileged, it would not have excused his responsibility for any of the charged crimes under the facts of his case.

For example, the threat would not have been applicable to the attempted first-degree intentional homicide charge because it would not have shown that any eventual use of force by Hare was permissible under Wis. Stat. § 939.48(1). While Hare could argue he was justified in drawing his gun, he has pointed to nothing that would suggest that his later intentionally shooting Wynn would also be privileged. This is because Hare never claimed that he intentionally shot Wynn. Instead, he told police his gun went off accidentally when Wynn tried to grab it. Hare's threat of force would have been completely irrelevant to the homicide charge. *See Cleghorn v. State*, 55 Wis. 2d 466, 469, 198 N.W.2d 577 (1972) (defendant not entitled to self-defense instruction on first-degree murder charge where defendant testified he did not intend to shoot victim).[2]

Self-defense would also not have mattered to the first- and second-degree recklessly endangering safety charges given as lesser-included offenses of the homicide (52:25-29). The

[2] The only way self-defense would appear to be relevant to Hare's accident defense would be to establish that he was acting lawfully when he pulled his gun on Wynn, which is a requirement of the accident defense. If Hare's actions were privileged under Wis. Stat. § 939.48(1), then he would have been acting lawfully when the accident happened. *See State v. Watkins*, 2002 WI 101, ¶¶ 41-58, 255 Wis. 2d 265, 647 N.W.2d 244. Hare does not make this claim on appeal, and it was not an issue at trial.

State's theory of these charges was that Hare recklessly endangered Wynn's safety by pulling the gun on him, ordering him to his knees, and holding the gun in close proximity to his head (52:58-59). Even if Hare was privileged in pulling his gun, there is nothing in the record that would support a claim that he needed to order Wynn to the ground and hold a gun on him to terminate the supposed unlawful interference of Wynn having a knife in his pocket.

Finally, self-defense would not apply to the armed robbery charge. Again, even assuming Hare had been entitled to draw his gun, there is no reason that taking Wynn's property was necessary for Hare to terminate any unlawful interference with his person. The record shows that Hare would not have been entitled to a self-defense instruction, and Opland-Dobs was not ineffective for failing to request one.

b. Opland-Dobs made a reasonable decision not to request the instruction.

This court should also hold that, even if a self-defense instruction was available, Opland-Dobs made a reasonable strategic decision not to ask for one.

At the postconviction hearing, Opland-Dobs testified that he and Hare had discussed the possibility of raising self-defense (55:11-12, 20-21). He also said that he ultimately decided to argue, based on what Hare told him and the police, that Hare drew his gun because he thought Wynn had a knife but that the shooting was an accident and

there was no intent to kill or rob him (55:11-15). Opland-Dobs said his theory of the crime was "[t]hat 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" (55:17). Opland-Dobs further testified he did not request a self-defense instruction because it did not apply to the defense he raised, was not relevant, and he thought it "would have muddled what our theory of defense was" (55:16-17).

Additionally, Opland-Dobs said that in light of this defense, he was not going to ask the jury to find Hare guilty of one of the lesser-included endangering safety charges (55:18). He testified that he did not want to concede that what Hare did was a reckless act (55:19). When asked about his comments in his opening statement about why Hare pulled his gun, Opland-Dobs said that he made them to explain why Hare had the gun and why he brandished it, not to establish self-defense (55:15-16, 21-22).

The trial court accepted Opland-Dobs' testimony and held that he made a reasonable decision to argue the shooting was an accident without also claiming self-defense (55:59-73).

This court should affirm. Opland-Dobs considered arguing self-defense and concluded it either did not apply to the facts or raising it would muddle the primary defense of accident. This is exactly the kind of reasoned trial strategy to which appellate courts are required to defer. *See State v. Elm*, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) (citations omitted) (court does not second-guess trial counsel's selection of tactics

in face of alternatives that counsel has weighed). Further, counsel is entitled to choose a particular defense from those that are available, and is not obliged to raise every nonfrivolous defense. *See Knowles v. Mirzayance,* 556 U.S. 111, 127 (2009); *State v. Snider*, 2003 WI App 172, ¶ 22, 266 Wis. 2d 830, 668 N.W.2d 784. Opland-Dobs acted reasonably in deciding not to ask for a self-defense instruction.

In addition, Hare has not shown that Opland-Dobs was deficient. While he criticizes Opland-Dobs' explanations why he did not attempt to argue self-defense as inconsistent with his comments in his opening statement and closing argument, as noted, Opland-Dobs testified at the postconviction hearing that he made these comments to explain why Hare drew the gun in the first place (55:15-16, 21-22). This was part of Opland-Dobs' overall defense strategy, which was reasonable.

Hare also argues that the circuit court indicated it was willing to give a self-defense instruction (Hare's brief at 10; 51:78-79). Even assuming Hare is correctly interpreting the court's comment, the State fails to see how this makes Opland-Dobs' decision deficient. Opland-Dobs was entitled to pick a defense and was not obligated to raise every possible one. Hare has not demonstrated that Opland-Dobs was ineffective for failing to request a self-defense instruction.

B. Hare's postconviction motion was insufficient to warrant a hearing on his claim that Opland-Dobs was ineffective for not requesting a theft instruction.

1. Applicable law and standard of review.

Before a defendant can succeed on an ineffective assistance of counsel claim, the circuit court must hold an evidentiary hearing to preserve counsel's testimony. *See State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

A defendant is not automatically entitled to an evidentiary hearing. To obtain one, the defendant must allege facts in his postconviction motion that "'allow the reviewing court to meaningfully assess [the defendant's] claim.'" *State v. Allen*, 2004 WI 106, ¶ 21, 274 Wis. 2d 568, 682 N.W.2d 433 (quoting *State v. Bentley*, 201 Wis. 2d 303, 314, 548 N.W.2d 50 (1996)). A postconviction motion sufficient to meet this standard should "allege the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." *Allen*, 274 Wis. 2d 568, ¶ 23.

If the petitioner does not raise sufficient facts, if the allegations are merely conclusory or if the record conclusively shows that the petitioner is not entitled to relief, the trial court has the discretion to deny a request for an evidentiary hearing. *Bentley*, 201 Wis. 2d at 309-10 (citation omitted).

Whether a motion is sufficient to warrant an evidentiary hearing is a legal issue this court reviews de novo. *Id.* at 310.

2. Discussion.

Hare also argues that the circuit court erroneously denied without an evidentiary hearing his claim that Opland-Dobs should have requested a jury instruction on theft as a lesser-included offense to the armed robbery charge (Hare's brief at 11-13). The circuit court held that because the jury would have needed to consider the armed robbery charge before considering theft, and the jury convicted Hare of armed robbery, it would have never assessed if he was guilty of theft and thus, there was no probability of a different result due to Opland-Dobs not requesting the instruction (38:2).

This court should affirm, but for different reasons. *See Bence v. Spinato*, 196 Wis. 2d 398, 417, 538 N.W.2d 614 (Ct. App. 1995) (appellate court may affirm trial court's holding on a theory or reasoning different from that relied on by the trial court). Hare's postconviction motion was insufficient to warrant a hearing and the record conclusively demonstrated that Opland-Dobs was not deficient for not asking for a theft instruction.

Hare's argument in his postconviction motion on this issue was conclusory. It stated:

> Trial counsel conceded in his closing that the defendant took property from the scene which belonged to Mr. Wynn. [citation omitted]. Although trial counsel denied the taking of the property was connected to the crime of Armed Robbery, he

> otherwise basically conceded all of the elements that make up the crime of Theft. [citation omitted].
>
> . . . There is also no sound strategic reason for counsel to have conceded the elements of the lesser included offense of Theft and then not ask the jury to be instructed accordingly.

(29:6-7).

This argument was insufficient to warrant a hearing. It does not place Opland-Dobs' closing argument in context and only conclusorily asserts that he was deficient for not requesting the instruction. Further, there is no argument at all addressing prejudice. The circuit court was not obliged to hold a hearing on these sparse allegations.

Further, the record shows that Opland-Dobs would have had no reason to request an instruction on theft because the defense to the armed robbery was that Hare did not intend to steal Wynn's property and a theft instruction would have been inconsistent with this defense.

In order to prove theft, the State would have to show that Hare took Wynn's property without his consent and with the intent to permanently deprive him of possession of it. *See* Wis. Stat. § 943.20(1)(a). Robbery requires a showing of intent to steal, which is defined using the language of the theft statute (14:3; 52:21). *See* Wis. Stat. § 943.32(1); Wis. JI-Criminal 1480 at 2 & n.9 (2009). Hare's defense to the armed robbery charge was that he lacked the intent rob Wynn (55:17). In his statement to police, Hare said that Wynn dropped his property in the scuffle over the

gun and Hare admitted that he took it home with him (59:5). Hare also repeatedly indicated that he had tried to get the property back to Wynn and still wanted to do so (59:3, 5-7).

Requesting theft as a lesser-included offense, which would have suggested Hare had the intent to steal Wynn's property, would have conflicted with the defense that Hare did not intend to rob Wynn. An attorney can reasonably decide not to ask for instructions on lesser-included offenses if doing so would conflict with the theory of defense. *See State v. Eckert*, 203 Wis. 2d 497, 507-11, 553 N.W.2d 539 (Ct. App. 1996) (counsel not ineffective for not asking for robbery instruction as lesser-included offense to armed robbery when defense was that defendant did not participate in the crime; requesting the instruction would have been inconsistent with this defense). *See also State v. Kimbrough*, 2001 WI App 138, ¶ 32, 246 Wis. 2d 648, 630 N.W.2d 752) (an attorney can reasonably decide to take an all-or-nothing approach rather than asking for an instruction on a lesser-included offense).

Hare argues Opland-Dobs should have requested the instruction because he admitted in closing that Hare took Wynn's property and "did not contest" that Hare's "actions met all the elements of theft" (Hare's brief at 12). Any admission that Hare took Wynn's property was consistent with the defense that Hare did not intend to steal from Wynn and wanted to return his property. Additionally, Opland-Dobs argued in his closing that Hare did not have the intent to rob Wynn, and thus contested that Hare had the intent to permanently deprive Wynn of his property (52:77). Hare has failed to demonstrate

that the circuit court improperly denied him relief on this claim without a hearing.

CONCLUSION

Upon the forgoing, the State respectfully requests that this court affirm the circuit court's judgment of conviction and orders denying Hare's motion for postconviction relief.

Dated this 17th day of February, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,212 words.

Dated this 17th day of February, 2014.

_____

AARON R. O'NEIL
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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.

Dated this 17th day of February, 2014.

_____

AARON R. O'NEIL
Assistant Attorney General