COURT OF APPEALS
DECISION
DATED AND FILED

July 29, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1675-CR **Cir. Ct. No. 2012CF000101**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH L. HARE, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS R. CIMPL and MICHAEL D. GUOLEE, Judges. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 BRENNAN, J. Kenneth L. Hare appeals the judgment convicting him of armed robbery with use of force, *see* WIS. STAT. § 943.32(2) (2011-12),[1] and first-degree recklessly endangering safety, *see* WIS. STAT. § 941.30(1), and from the order denying his postconviction motion.[2] Hare argues that: (1) his trial counsel was ineffective for failing to request that the jury be instructed on the law of self-defense; and (2) the trial court erred in ruling that he was not entitled to an evidentiary hearing on his claim that trial counsel was ineffective for failing to request that the jury be instructed on the law of theft. We reject his arguments and affirm.

BACKGROUND

¶2 On March 21, 2012, Hare was convicted after a jury trial of armed robbery with use of force, contrary to WIS. STAT. § 943.32(2), and first-degree recklessly endangering safety, contrary to WIS. STAT. § 941.30(1), a lesser-included of count two in the information, attempted first-degree intentional homicide.

¶3 At trial, Quintin Wynn testified that on December 24, 2011, he met Hare to buy about twenty ecstasy pills from him. Hare surprised him by pulling out a gun and demanding "everything I got." Wynn gave Hare $120 in cash, his watch, his wallet, his cell phone and his jacket.

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

[2] The Honorable Dennis R. Cimpl presided at trial and sentencing, and entered the judgment of conviction. The Honorable Michael D. Goulee presided over postconviction proceedings and entered the order denying Hare's postconviction motion.

¶4 Wynn told the jury that, after the robbery, Hare told him to go into an abandoned house, but Wynn refused, saying: "If you're going to shoot me, shoot me in the alley right here, right now." Hare told Wynn to get down on his knees. Wynn complied and Hare shot Wynn in "[his] left shoulder, under [his] right breast, [his] side and [his] right[] forearm." Wynn testified that although he had a knife on him, he did not take it out at any time during the encounter with Hare because he "figured it would be one false move that [he] couldn't afford." Wynn testified that he did try to defend himself during the shooting by grabbing for Hare's gun with his left hand, pushing Hare off of him and running away.

¶5 Benjamin Trice testified at the trial that at about 11:00 p.m. on December 24, 2011, he was driving along Lisbon Avenue heading westbound when he saw a man running down the middle of the street with blood on his shirt. The man, later identified as Wynn, told Trice that he had been shot while trying to buy pills from someone in the alley. Trice testified that he drove the man to St. Joseph's Hospital.

¶6 City of Milwaukee Police Detective William Sheehan testified that he interviewed Hare twice. In the first interview, Hare denied meeting with Wynn on December 24, 2011. The second interview took place the next day, January 3, 2012, and was recorded and transcribed. The video of the January 3 interview was played for the jurors and they were given a copy of the accompanying transcript.

¶7 In the recorded interview, Hare told Detective Sheehan that on December 24, 2011, he went to meet up with Wynn to sell him some ecstasy pills. Hare told Detective Sheehan that he had taken two ecstasy pills and two bars of Xanax earlier that day and was feeling "high."

¶8 Hare told Detective Sheehan that he pulled out his gun because Wynn would not take his hands out of his pockets, telling Detective Sheehan: "He was acting too frigidity, when we met up he had his hand in his pocket, I asked him to take his hand outta his pocket and he wouldn't so I pulled the gun out." Hare said that he "accidentally" shot Wynn, stating: "He wouldn't take his hands out of his pocket, he was, he grabbed for the gun and I accidentally shot him." Hare continued:

> [W]e [were] wrestling for the gun, it went[] off, [Wynn's] hands come out like this, he dropped the knife, the knife is on the ground and all that, he dropped it, his jacket was on the ground, his hoodie, all, everything, only thing he had on was his shirt and his pants and he took off running down the street.

Hare explicitly told Detective Sheehan that Wynn did not pull out his knife until after the gun was fired. Hare denied ever demanding that Wynn give him everything, but admitted to Detective Sheehan that he collected Wynn's discarded belongings and took them to his girlfriend's house.

¶9 After the video concluded, Detective Sheehan testified at trial that he showed photographs to Wynn who identified Hare as the man who robbed and shot him. Detective Sheehan also told the jury that following his interview with Hare, he retrieved Wynn's social security card and Wisconsin identification card in the execution of a search warrant at Hare's girlfriend's home, as well as a condom that Hare said belonged to Wynn. The $120 was not recovered. Detective Sheehan stated that when he asked Hare about the $120, Hare said that it was "gone." Detective Sheehan also testified that no knife was recovered.

¶10 Hare did not testify at trial. The defense called no witnesses.

¶11 Hare was sentenced on May 4, 2012, to fifteen years of imprisonment on the armed-robbery count, consisting of ten years of initial confinement and five years of extended supervision. On the lesser-included first-degree reckless-endangerment count, the trial court ordered Hare to serve a concurrent term of six years of imprisonment, consisting of three years of initial confinement followed by three years of extended supervision.

¶12 On February 14, 2013, Hare filed a postconviction motion seeking a new trial, or in the alternative a ***Machner*** hearing,[3] alleging that he was denied his constitutional right to effective assistance of counsel because trial counsel did not: (1) request a self-defense jury instruction, *see* WIS JI—CRIMINAL 805; (2) request the accident jury instruction, *see* WIS JI—CRIMINAL 772; and (3) request the theft jury instruction, *see* WIS JI—CRIMINAL 1441, as a lesser included for count one, the armed-robbery charge. The trial court denied Hare's request for a new trial or a ***Machner*** hearing on his claims regarding the accident and the theft instructions but granted the request for a ***Machner*** hearing on the self-defense jury instruction claim.

¶13 A ***Machner*** hearing was held on June 27, 2013, on Hare's claim that trial counsel was ineffective for not requesting the self-defense jury instruction. Trial counsel testified that he did not ask for the self-defense instruction because he did not think there was a factual basis in the record to support it and because it

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). A ***Machner*** hearing is "[t]he evidentiary hearing to evaluate counsel's effectiveness, which includes counsel's testimony to explain his or her handling of the case." ***State v. Balliette***, 2011 WI 79, ¶31, 336 Wis. 2d 358, 805 N.W.2d 334.

would have "muddled" their theory of defense, which was that the shooting was accidental. The trial court denied Hare's request for a new trial. Hare appeals.

DISCUSSION

¶14 Hare makes two arguments on appeal: (1) that trial counsel was ineffective for failing to request a jury instruction on self-defense; and (2) that the trial court erred in denying him a ***Machner*** hearing on his claim that trial counsel rendered ineffective assistance when he failed to request a theft jury instruction for the armed-robbery charge.[4] We address each in turn.

I. Trial counsel's decision not to request a self-defense jury instruction did not deprive Hare of his constitutional right to effective assistance of counsel.

¶15 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.

¶16 To show deficiency, 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 of the circumstances from counsel's contemporary perspective to eliminate the distortion

[4] In his postconviction motion, Hare also argued that his trial counsel was ineffective for not requesting an accident jury instruction. Hare does not address that issue in his brief to this court on appeal and therefore we deem the issue abandoned. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) ("[A]n issue raised in the trial court, but not raised on appeal, is deemed abandoned.").

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 (quoted source omitted).

¶17 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. ***State v. Balliette***, 2011 WI 79, ¶19, 336 Wis. 2d 358, 805 N.W.2d 334.

A. Arguing that Hare accidentally shot Wynn was a reasonable defense strategy, and trial counsel reasonably concluded that self-defense was incompatible with that strategy.

¶18 Hare argues that trial counsel was ineffective because he did not ask for a self-defense jury instruction despite "telegraphing" self-defense to the jury in his opening and closing arguments. Hare bases his argument on parts of trial counsel's opening and closing remarks in which counsel said that Hare pulled out his gun because he realized that Wynn had a knife and that Hare was concerned for his safety so he took steps to protect himself. Hare believes these remarks support a self-defense jury instruction and that trial counsel's explanation for not requesting the instruction—that the instruction was incompatible with their theory that the shooting was accidental—is unreasonable and "dramatically inconsistent with the way trial counsel argued the case to the jury at trial." We disagree.

¶19 Trial counsel testified at the ***Machner*** hearing that his theory of defense at trial was that Hare accidently shot Wynn. Counsel testified that his notes revealed that after the second day of trial, he and Hare discussed the self-defense instruction and decided against it because it would not have been "relevant" to their strategy of arguing that the gun went off by accident and that the self-defense instruction would have "muddled" their defense. The record supports that testimony.

¶20 The record shows that trial counsel's argument and defense strategy was that the gun went off by accident. Trial counsel told the jury during opening statements that "Mr. Hare didn't intend to kill Mr. Quintin Wynn. This gun went off accidentally, unintentionally when they had their hands around it and they were struggling and pulling on it." All of counsel's arguments at trial supported his theory that Hare shot Wynn by accident. Hare's assertion that his trial counsel argued that the shooting was in self-defense is based on statements counsel made to the jury regarding why Hare drew his gun in the first place, that is, out of fear that Wynn had a knife in his pocket. Trial counsel did not argue that Hare intentionally shot Wynn in self-defense.

B. There was no factual basis in the record to support a self-defense instruction.

¶21 Trial counsel also testified at the ***Machner*** hearing that he did not believe the trial court would have given the self-defense instruction had he requested it, stating: "I did not see a basis -- 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."

¶22 Hare glosses over the question of whether there was a factual basis for the self-defense instruction by simply contending that the trial court *said* it would give the instruction. Hare relies on remarks the trial court made after testimony had ended, at the close of the day, before instructions were to be given. At that time, the trial court told the lawyers to bring a "mock up" of the instructions they were requesting the following morning. With regard to self-defense, the court simply told both trial lawyers that if either side was requesting the self-defense instruction, (along with the two lesser-included crimes that the State was asking for), they should bring their printed requests to court the following morning, stating: "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.) The trial court never said that it would actually give the requested instructions. Hare's contention otherwise is simply wrong. The court only told the attorneys that it would decide which instructions to give the following morning.

¶23 Furthermore, as the State has argued, the evidence presented at trial did not support a self-defense instruction. It is Hare's burden to show that the trial court would have given the self-defense instruction if his trial counsel had asked for it. *See* ***State v. Giminski***, 2001 WI App 211, ¶11, 247 Wis. 2d 750, 634 N.W.2d 604 ("To support a requested jury instruction on a statutory defense to criminal liability, the defendant 'has the initial burden of producing evidence to establish [that] statutory defense.'") (citation omitted; brackets in ***Giminski***). A court may only give an instruction supported by the evidence. ***Id.***, ¶10. The standard is whether "'a reasonable construction of the evidence will support the defendant's theory viewed … from the standpoint of the accused.'" ***Id.*** (citations

and one set of quotation marks omitted). Hare's arguments in support of a self-defense instruction are selectively chosen quotes from trial counsel's *arguments*, but arguments are not *evidence*. *See* ***State v. Eugenio***, 210 Wis. 2d 347, 358, 565 N.W.2d 798 (Ct. App. 1997). He cites to no evidence in support of his argument that the self-defense instruction should have been given.

¶24 Relative to the issue of whether there was a factual basis for self-defense and whether the trial court would have given that instruction had trial counsel asked, we review the record and compare it to the law of self-defense, vis-à-vis the charges. The charges Hare faced at trial were attempted first-degree intentional homicide and armed robbery with use of force. He was convicted as charged of the armed robbery. However, the jury found him guilty of the lesser-included to the homicide charge, first-degree recklessly endangering safety. So the question is whether there is support in the evidence for self-defense as to the charged and lesser-included offenses.

¶25 Self-defense is a privilege to threaten or intentionally use force against another person to prevent or terminate an unlawful interference with his person. *See* WIS. STAT. § 939.48(1).[5] Viewing the evidence most favorable to

[5] WISCONSIN STAT. § 939.48(1) states:

> A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with his or her person by such other person. The actor may intentionally use only such force or threat thereof as the actor reasonably believes is necessary to prevent or terminate the interference. The actor may not intentionally use force which is intended or likely to cause death or great bodily harm unless the actor reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself.

self-defense, Hare told Detective Sheehan in the recorded interview that he drew the gun because he *believed* Wynn had a knife in his pocket, although he admitted he did not *see* the knife before he drew his gun. Hare told Detective Sheehan that he was suspicious that Wynn had a knife in his pocket simply because Wynn would not show his hands. Fearing an interference with his person, he drew his gun.

¶26 Hare told Detective Sheehan that after he pulled out his gun, it accidentally fired during a struggle for the gun. Hare did not claim he shot Wynn intentionally to prevent an unlawful interference with his person. Rather, he told Detective Sheehan that he did not intend to shoot the gun. Thus, Hare's own version of events fails to support the statutory definition of self-defense, an intentional use of force against another person to prevent or terminate an unlawful interference with his person. *See* WIS. STAT. § 939.48(1). Accordingly, the trial court would not have given the self-defense jury instruction even if trial counsel had asked for it. *See* ***Giminski***, 247 Wis. 2d 750, ¶10.

C. Trial counsel chose and pursued a reasonable strategy.

¶27 We must defer to an objectively reasonable defense trial strategy. ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996). Here, trial counsel testified that he considered requesting the self-defense instruction, discussed it with Hare and chose not to request the instruction because he deemed it incompatible with their defense strategy. Trial counsel is not obliged to present every non-frivolous defense. ***State v. Snider***, 2003 WI App 172, ¶22, 266 Wis. 2d 830, 668 N.W.2d 784. He made a reasonable choice. Hare has failed to show that trial counsel was ineffective.

II. Hare's postconviction motion failed to raise sufficient, non-conclusory facts to support an evidentiary hearing on his claim that trial counsel was ineffective for failing to request a jury instruction on theft.

¶28 A defendant is entitled to a ***Machner*** evidentiary hearing on his ineffectiveness claim only if his postconviction motion alleges facts 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)) (brackets in ***Allen***). To permit a meaningful assessment, the motion should "allege the five 'w's' and one 'h'; that is, who, what, where, when, why and how." ***Allen***, 274 Wis. 2d 568, ¶23. The trial court has discretion to deny a request for a hearing if the petitioner fails to raise sufficient, non-conclusory facts or if the record conclusively shows that the petitioner is not entitled to relief. ***Bentley***, 201 Wis. 2d at 309-10. We review whether a motion is sufficient to warrant an evidentiary hearing independently of the trial court. ***Id.*** at 310.

¶29 Hare's motion falls far short of setting forth the requirements entitling him to a ***Machner*** hearing on his argument that trial counsel should have requested a jury instruction on theft. In his postconviction motion, Hare argued that trial counsel should have requested a lesser-included theft instruction on the armed-robbery charge because counsel purportedly conceded the elements of a theft in his closing argument. But Hare fails to develop any of the five "w's" and one "h." *See* ***Allen***, 274 Wis. 2d 568, ¶23. Hare's postconviction argument on this issue was one paragraph, followed by one conclusory sentence:

> Trial counsel conceded in his closing that the defendant took property from the scene which belonged to Mr. Wynn. 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.

> …. 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 be instructed accordingly.

(Record cites omitted.)

¶30 Hare's motion is insufficient for several reasons. To begin, Hare does not state the elements of theft nor does he relate them to the alleged "concession" by trial counsel. Our review shows that counsel concedes only one element—the taking away of property—but that concession is consistent with Hare's statement to Detective Sheehan that he only picked up abandoned property. The elements of theft are: (1) the intentional; (2) taking and carrying away; (3) of property of another; (4) without their consent; and (5) with intent to permanently deprive the owner of their property. *See* WIS. STAT. § 943.20(1)(a). Counsel did not concede that Hare *lacked consent* from the owner nor that Hare intended to *keep the property permanently*. In fact, trial counsel specifically denied that Hare took and carried the property away with intent to steal it and while threatening with a dangerous weapon. He repeated that Hare did not intend to rob Wynn.

¶31 Next, Hare does not show what *evidence* in the record, as opposed to closing *arguments*, would support his request for a theft instruction. Furthermore, Hare does not state whether the trial court would have given the theft instruction if asked. *See* ***Giminski***, 247 Wis. 2d 750, ¶10.

¶32 And finally, beyond the insufficiency of his postconviction motion, Hare is not entitled to an evidentiary hearing because the record conclusively shows that trial counsel was not deficient for failing to request the theft jury instruction. *See* ***Bentley***, 201 Wis. 2d at 309-10. The record demonstrates that trial counsel was pursuing a reasonable defense strategy of an "accidental"

shooting and subsequent taking of abandoned property. That strategy was based on Hare's statement to police that he had no intent to shoot and no intent to rob. Inviting a conviction on theft, which requires proof of intent, was inconsistent with that strategy, as well as contrary to Hare's statement. Counsel's strategy was aimed at outright acquittal on both counts and that was a reasonable strategy. For all of the foregoing reasons, the trial court's decision should be affirmed.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.