COURT OF APPEALS
DECISION
DATED AND FILED

March 26, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1330 **Cir. Ct. No. 2003CF5704**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROMEY J. HODGES,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 FINE, J. In 2004, Romey J. Hodges pled guilty to first-degree reckless homicide. *See* WIS. STAT. § 940.02(1) (2003–2004). We affirmed Hodges's conviction on direct appeal. *See* ***State v. Hodges***, No. 2005AP127-CR, unpublished slip op. (WI App Nov. 26, 2006). In January of 2012, Hodges filed a

WIS. STAT. § 974.06 motion claiming that his trial and postconviction lawyer gave him constitutionally deficient representation. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136, 139 (Ct. App. 1996) (ineffective postconviction assistance may be a sufficient reason for not having previously raised issues). The circuit court denied the motion without holding a hearing under ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979) (hearing to determine whether lawyer gave a defendant ineffective assistance). Hodges appeals *pro se*. We affirm.

I.

¶2 In September of 2003, Hodges, then fifteen-years-old, went for a walk. According to Hodges, he saw a man with his hands in his pocket walking behind him. Hodges claimed that he was afraid that the man might "rob and/or possibly shoot him," so he walked faster. The man, identified as seventeen-year-old, Javon Tucker, said "Come here, come here. You know what time it is?" When Tucker was six feet away, Hodges pulled out a handgun and shot Tucker, hitting him in his leg, ankle, arm, abdomen, clavicle, chest and back. Tucker died as a result.

¶3 The State charged Hodges with one count of first-degree reckless homicide. He pled guilty. At the plea hearing, the circuit court asked Hodges if he understood "that by pleading guilty, you are giving up any possible defenses, including but not limited to self-defense, intoxication, insanity, and alibi?" Hodges answered "Yes." Hodges's trial lawyer also explained at the hearing:

> I went over self-defense with my client. I did do that. It's part of the form, but also because there is sort of an element of that in this case, and I went over the fact with my client that he was -- in his mind, he thought he might be attacked, but the person who he shot was not attacking him. He was

> walking up behind him. My client got scared. He panicked. There was no threat from the other person who got shot. There was no gun, anything else. My client understands that he panicked. He understands under those circumstances self-defense is not a viable defense, and I did discuss that with him.

The circuit court then specifically followed up by directly asking Hodges: "Is that correct, Mr. Hodges?" to which Hodges answered "Yes."

¶4 Hodges argues that his postconviction lawyer gave him constitutionally ineffective representation because the lawyer did not raise the issue of his trial lawyer's ineffectiveness. Hodges contends his trial lawyer was ineffective because the lawyer did not sufficiently investigate self-defense and improperly told him that he could not raise self-defense as an issue. He also argues that his postconviction and trial lawyers should have researched recent scientific findings about adolescent brain development and used it to assert a self-defense claim. We reject Hodges's contentions.

II.

¶5 In order to show constitutionally ineffective representation, Hodges must show: (1) deficient representation; and (2) resulting prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient representation, he must point to specific acts or omissions by his lawyer that are "outside the wide range of professionally competent assistance," *see* ***id.***, 466 U.S. at 690, and to prove resulting prejudice, he must show that his lawyer's errors were so serious that he was deprived of a fair trial and reliable outcome, *see* ***id.***, 466 U.S. at 687. We do not need to address both ***Strickland*** aspects if a defendant does not make a sufficient showing on either one. *See* ***id.***, 466 U.S. at 697.

¶6 The circuit court must hold an evidentiary hearing on an ineffective-assistance claim only if the defendant "'alleges sufficient material facts that, if true, would entitle the defendant to relief.'" ***State v. Love***, 2005 WI 116, ¶26, 284 Wis. 2d 111, 123, 700 N.W.2d 62, 68 (quoted source omitted). If the postconviction motion does not assert sufficient facts, or presents only conclusory allegations, or if the Record conclusively demonstrates that the defendant is not entitled to relief, the circuit court may deny the claim without a hearing. ***Ibid.*** We review *de novo* whether a defendant is entitled to an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50, 53 (1996).

A. *Self-Defense*.

¶7 Hodges claims that his trial lawyer gave him ineffective assistance because he did not sufficiently investigate a self-defense claim and because he improperly told Hodges that he could not raise self-defense. Hodges contends that he shot Tucker in self-defense because he was afraid and because Tucker's question about the time really meant: "it's time to get robbed."

¶8 To assert self-defense under WIS. STAT. § 939.48(1), Hodges needed to show that he had: "(1) a reasonable belief in the existence of an unlawful interference; and (2) a reasonable belief that the amount of force the person intentionally used was necessary to prevent or terminate the interference." ***State v. Head***, 2002 WI 99, ¶84, 255 Wis. 2d 194, 236, 648 N.W.2d 413, 433.[1] We apply

[1] WISCONSIN STAT. § 939.48(1) provides:

> 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

(continued)

a reasonable-person standard to determine if a defendant's belief was reasonable. *See* ***Maichle v. Jonovic***, 69 Wis. 2d 622, 627, 230 N.W.2d 789, 793 (1975). When children are involved, we apply the standard of a "reasonable person of like age, intelligence and experiences." ***Id.***, 255 Wis. 2d at 627–628, 230 N.W.2d at 793.

¶9 Hodges has not shown that his actions the night of the shooting were reasonable. Hodges shot Tucker when Tucker was six feet away. Tucker did not have a gun, and aside from saying "You know what time it is?" did not make any statement, threatening or otherwise, to Hodges. Tucker did not physically assault or physically threaten Hodges. Moreover, even assuming Tucker's statement could be interpreted to be a robbery attempt, Hodges has not shown that a fifteen-year-old of similar intelligence would reasonably believe it necessary to fire a volley of shots in response.

¶10 Further, we reject Hodges's claim that his trial lawyer did not sufficiently investigate the facts to see if he could argue self-defense. It is clear from the Record that his trial lawyer knew the law pertaining to self-defense, and gave Hodges effective representation.

B. *Adolescent Brain Research.*

¶11 Hodges next claims that both his trial lawyer and postconviction lawyer should have done more investigation into new scientific research about

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> 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.

how adolescents are more impulsive and lacking in good-decision making than are mature adults. Hodges argues this information could have supported a self-defense claim.

¶12 The circuit court rejected this contention in its order denying the postconviction motion:

> Nowhere in the science offered by Mr. Hodges is there any claim that we should expect reasonable teens of Mr. Hodges' age, intellect and experience to perceive threats in circumstances like those Mr. Hodges faced at the time he shot Mr. Tucker. The science he offers might stand for the proposition that teens might resort to force more readily than adults, because they have a harder time suppressing the instinct to fight or flee. But the premise of any such opinion must be the preexistence of some kind of actual threat, and the evidence in Mr. Hodges' case shows there was none.

Hodges points to nothing in the scientific literature that is contrary to the circuit court's analysis. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343, 349–350 (Ct. App. 1994) (defendant who alleges a failure to investigate must allege with specificity what the investigation would have revealed and how it would have altered the outcome). His argument is wholly conclusory.

¶13 We also decline Hodges's request to reverse in the interest of justice under WIS. STAT. § 752.35. *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 26–27, 456 N.W.2d 797, 809 (1990) (Bablitch, J., on behalf of six members of the court). Hodges's request is simply a rehash of his other meritless contentions. *See* ***State v. Arredondo***, 2004 WI App 7, ¶56, 269 Wis. 2d 369, 405, 674 N.W.2d 647, 663–664 (Ct. App. 2003).

By the Court.—Order affirmed.

Publication in the official reports is not recommended