COURT OF APPEALS
DECISION
DATED AND FILED

October 14, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2105-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GLENN E. HADLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: STANLEY A. MILLER, Judge. *Affirmed.*

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

PER CURIAM. Glenn E. Hadley appeals from a judgment of conviction following a jury trial on one count of first-degree intentional homicide with a dangerous weapon. *See* §§ 940.01 and 939.63(1)(a)2, STATS. Hadley also appeals from an order denying his postconviction motion. On appeal, Hadley claims that he should be granted a new trial in the interest of justice because the

real controversy was not tried. He also claims that the trial court misused its discretion in setting his parole eligibility date. We affirm.

In July 1994, Hadley was living with Jeanette Claus and her brother Rufus Bobbitt. On August 31, 1994, the police responded to a report of a possible suicide at the Claus residence. Upon their arrival, the police found Bobbitt with a .25 caliber handgun in his left hand, lying face down in a pool of blood in the front room of the Claus residence.[1] Bobbitt was pronounced dead at the scene. The police found one .25 caliber bullet near Bobbitt's feet, two similar casings near a sofa in the front room, and another casing behind some furniture in the Claus residence. No gunshot residue was found on Bobbitt's hands and no fingerprints were found on the gun. The room where Bobbitt was found was in disarray.

An autopsy of Bobbitt revealed two gunshot wounds on each side of his head. According to the medical examiner, one wound was a contact wound to the left temple. The other gunshot wound was to the upper right side of Bobbitt's scalp, produced by a bullet fired from a distance of at least one foot. The medical examiner estimated that Bobbitt had died between approximately 5:00 and 6:00 p.m. on August 31, 1994. According to a crime lab expert, all the bullets found had been fired from the gun in Bobbitt's hand.

Claus testified that between 3:30 and 4:30 p.m. on the day of the shooting she spoke to Bobbitt on the phone from a friend's house. Claus stated that she subsequently ran errands and eventually stopped in front of her home around 5:00 p.m. She stated that she pulled up to the house and honked the horn

[1] According to Claus, Bobbitt was right-handed.

for Hadley to come out but she received no response. She left without going inside because she had to take a friend to an appointment.

Claus testified that after the appointment she returned to her friend's house at around 7 p.m. and called her home several times without getting an answer. She then called the home of Hadley's sister looking for Hadley. According to Claus, Hadley told her on the phone that he, Bobbitt and some others had been getting high at Claus's house for the last four hours. Claus did not believe Hadley and asked him where Bobbitt was. Hadley responded that he had last seen Bobbitt at Claus's house. Hadley also claimed that Bobbitt had pulled a gun on him and that another man at the house responded by pulling a gun on Bobbitt. Claus testified that Hadley told her that he had been arguing with Bobbitt and had "r[u]n out the door."

Claus then told Hadley that she was going home and would pick him up on the way. She said that when she picked up Hadley he was "walking, very slow[ly] and looking very sad and depressed" which was out of character for him. When Claus and Hadley arrived at Claus's house, she turned on the lights and found Bobbitt's body.

Officer Lamont Hodnett testified that he spoke to Hadley at the Claus residence shortly after the discovery of Bobbitt's body. Hadley told Hodnett that he had last seen Bobbitt at the Claus residence between 3 and 4 p.m. along with Bobbitt's girlfriend and another man. According to Officer Hodnett, Hadley said he spent the rest of the day at his sister's house until Claus picked him up.

Detective Timothy Koceja testified that he spoke with Hadley a few hours later at the police station. Hadley told him that he had left the Claus

residence at noon on the day of the shooting and returned to the Claus residence at 5 p.m. where he found Bobbitt, Bobbitt's girlfriend, and some others, one of whom had a gun. Hadley stated that he had asked Bobbitt if Claus had called and Bobbitt responded that he was "sick of" Hadley asking him about Claus and if he did it again, Bobbitt would "shoot" him. He stated that he left and went to his sister's house and stayed there until Claus picked him up. After this interview, Hadley was arrested.

Hadley's next interview with the police took place on September 1, 1994, at the police station. Detective Leroy Shaw testified that after Hadley waived his rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966), he stated that "everything [in the prior statements] was true up until the point that [he] had his confrontation with Rufus in the house." Hadley said that when he returned to the Claus residence at 5 p.m. only Bobbitt was present. According to Hadley, Bobbitt threatened to shoot him for continually calling Claus. Hadley then said that Bobbitt went in Claus's bedroom, where earlier Hadley had placed a gun in one of her drawers. Bobbitt came out of the bedroom and pulled the gun on him. According to Hadley, he "rushed at [Bobbitt] and grabbed at the gun" struggling with Bobbitt. According to Hadley, he and Bobbitt ended up "rolling around on the floor" of the living room and that he was on top of Bobbitt as Bobbitt "was trying to point the gun" at him. Hadley said he "pushed the gun back [at Bobbitt] and it fired." Hadley said Bobbitt pointed the gun at him again and that he again "pushed it back towards [Bobbitt] when it fired two more times" after which Bobbitt "slumped over."

Officer Carl Buschman testified that approximately twelve hours after Detective Shaw's interview and after the police had learned that the physical evidence of Bobbitt's death did not comport with Hadley's statement, Hadley was

reinterviewed. Hadley stated that when he returned to the Claus home at 6 p.m., Bobbitt was on the telephone. Hadley then retrieved Claus's gun from the bedroom and put it inside his pants pocket because he was "afraid" of Bobbitt. According to Hadley, Bobbitt threatened to kill him for calling Claus too much then "made a fist and then raised his arm as if to hit him." Bobbitt then came towards Hadley, prompting Hadley to pull out the handgun. Bobbitt then "got up from the couch [and] grabbed onto" Hadley's arm near the handgun. Hadley said that the gun went off while he struggled with Bobbitt in the living room, and that he then broke free of Bobbitt and backed up towards the kitchen. Hadley said that as Bobbitt again "grabbed for him" he "pulled back and stumbled backwards," knocking items off the cocktail table in the living room. Hadley then stated that he "pulled the trigger" as they continued to struggle. Bobbitt fell to the floor lying on his right side. Hadley then said that as he was kneeling next to Bobbitt, Bobbitt raised his left arm causing Hadley to think Bobbitt was going "to hit him" so Hadley "pointed the gun at [Bobbitt's] head turned his [own] head to the side, … closed his eyes and shot [Bobbitt] a second time." Hadley said that he took a towel and wiped off his hand and gun, then slid the gun under Bobbitt's left hand. Hadley said he knocked over some items in the house when a noise scared him, and that he then ran to his sister's house. He eventually accompanied Claus back to her home where she discovered the body.

At trial, Hadley's theory of defense was perfect self-defense and, in the alternative, imperfect self-defense. *See* §§ 939.48(1) and 940.01(2)(b), STATS.; ***State v. Camacho***, 176 Wis.2d 860, 879–880, 501 N.W.2d 380, 387 (1993) ("both perfect and imperfect self-defense require a defendant to possess a reasonable belief that he is preventing or terminating an unlawful interference with

[his] person").[2] During closing argument, defense counsel talked about a struggle over the gun and how the "gun went off." At the jury instruction conference, Hadley personally indicated that he had discussed with counsel the possible options for lesser-included offenses and that he concurred in his counsel's decision to ask for an instruction of second-degree intentional homicide as a lesser-included offense of the charge of first-degree intentional homicide premised on the mitigating circumstance of unnecessary defensive force. *See* § 940.01(2)(b). The prosecutor concurred. The jury was instructed on perfect self-defense, first-degree intentional homicide and second-degree intentional homicide. The jury found Hadley guilty of one count of first-degree intentional homicide while using a dangerous weapon. Hadley was sentenced to life in prison with a parole eligibility

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[2] Section 939.48(1), STATS., provides:

> **Self-defense and defense of others. (1)** 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.

Section 940.01(2)(b), STATS., provides:

> MITIGATING CIRCUMSTANCES. The following are affirmative defenses to prosecution under this section which mitigate the offense to 2nd-degree intentional homicide under s. 940.05:
>
> ….
>
> (b) *Unnecessary defensive force*. Death was caused because the actor believed he or she or another was in imminent danger of death or great bodily harm and that the force used was necessary to defend the endangered person, if either belief was unreasonable.

date of March 27, 2018. Hadley then filed a postconviction motion seeking a new trial and a modification of his parole eligibility date. The motion was denied.

Hadley first claims that the real controversy was not tried because defense counsel asked for a perfect self-defense instruction then undercut the theory in his closing argument by arguing a theory of accidental discharge upon which no instruction was based. The State asserts that where a defendant alleges that the real controversy was not tried because of an act or omission by a lawyer, the issue should be analyzed under ***Strickland v. Washington***, 466 U.S. 668 (1984), for an ineffective assistance of counsel rather than "a real controversy" analysis. We agree. The issue raised by Hadley in this aspect of his appeal concerns the conduct of Hadley's attorney, and whether his conduct was deficient and resulted in prejudice to Hadley. We, therefore, review Hadley's argument under ***Strickland***. *See* ***State v. Flynn***, 190 Wis.2d 31, 49 n.5, 527 N.W.2d 343, 350 n.5 (Ct. App. 1994) (Section 752.35, STATS., not an alternative way of raising an ineffective-assistance-of-counsel claim).

There are two components to a claim that trial counsel was ineffective: "a demonstration that counsel's performance was deficient, and a demonstration that such deficient performance prejudiced the defendant. The defendant has the burden of proof on both components." ***State v. Smith***, 207 Wis.2d 259, 274, 558 N.W.2d 379, 386 (1997). The trial court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. *See* ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). However, whether counsel's conduct amounted to ineffective assistance is a question of law that we review *de novo*. ***Id.***

On the performance prong, trial counsel is not deficient unless his or her performance fell below objective standards of reasonableness. *See* ***State v. McMahon***, 186 Wis.2d 68, 80, 519 N.W.2d 621, 626 (Ct. App. 1994). Hadley argues that his trial counsel "undercut" his theory of self-defense at closing argument by portraying the shooting death of Bobbitt as an "accident[]" during a struggle over the handgun. In support of his contention, Hadley points to the following passage of trial counsel's closing argument:

> You heard where the bullet wounds were found, what position that they were in. The experts say, if I remember correctly, that even though [the bullets] were in that -- they entered in that position, there's no definite scientific way of determining whether or not [Rufus Bobbitt] shot himself or whether or not they were wrestlin' over the gun and the gun went off. And I think that makes common sense without you even hearing from what we call experts.

The above passage of trial counsel's closing argument did not withdraw the defense theory of self-defense from the jury. Rather, a fair reading of this passage is, as the State suggests, that Hadley was fighting with Bobbitt over the gun "only because of a belief in the need for self-defense." Hadley has not shown that trial counsel's performance was deficient. *See* ***Strickland***, 466 U.S. at 687. His postconviction motion was properly denied.

Hadley also claims that the trial court failed to give sufficient weight to his young age and lack of criminal recording in setting his parole eligibility date. He further claims that the trial court did not specifically explain why it chose the particular parole eligibility date.

A sentencing court sets the parole eligibility date using the same discretionary balancing of factors that govern the imposition of a prison sentence. ***State v. Borrell***, 167 Wis.2d 749, 764, 482 N.W.2d 883, 888 (1992). In reviewing

a parole eligibility date, we follow the same standard of appellate review applicable to sentences, including the presumption that the sentencing court acted reasonably. ***Id.***, 167 Wis.2d at 781–782, 482 N.W.2d at 895.

The primary factors considered in imposing sentence are the gravity of the offense, the character of the offender and the need to protect the public. ***State v. J.E.B.***, 161 Wis.2d 655, 662, 469 N.W.2d 192, 195 (Ct. App. 1991). The weight to be given each factor is a determination particularly within the wide discretion of the sentencing court. ***Id.*** As part of the three primary sentencing factors, a trial court also may consider the following:

> [T]he vicious and aggravated nature of the crime; the past record of criminal offenses; any history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance, and cooperativeness; the defendant's need for rehabilitative control; the right of the public; and the length of pretrial detention.

State v. Echols, 175 Wis.2d 653, 682, 499 N.W.2d 631, 640–641 (1993).

The trial court "must articulate the basis for the sentence imposed on the facts of the record" to permit meaningful review. ***Id.***, 175 Wis.2d at 682, 499 N.W.2d at 640. Hadley argues that the trial court failed to "make any explicit references to [his] age or prior criminal record." Although a defendant's criminal history and age are proper subfactors for consideration at sentencing, a sentencing court need not specifically discuss subfactors "on the record." ***Id.***, 175 Wis.2d at 683, 499 N.W.2d at 641. The trial court considered all three primary sentencing factors. Further, the record reflects that the trial court was aware of Hadley's age

and, through the presentence report, his lack of criminal record. We are satisfied that the trial court properly exercised its discretion in sentencing Hadley.

We are unable to find support for Hadley's position that the trial court was required to specifically explain why it chose a particular parole eligibility date beyond its consideration of the appropriate sentencing factors. We do not further address his argument. *See* ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (appellate court need not consider issues that are inadequately briefed).

By the Court.—Judgment and order affirmed.

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