COURT OF APPEALS
DECISION
DATED AND FILED

February 5, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1347 **Cir. Ct. No. 2003CF4180**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAMAR S. WESTBROOK,

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 PER CURIAM. Lamar S. Westbrook, *pro se*, appeals from an order denying his motion for postconviction relief filed pursuant to WIS. STAT.

§ 974.06 (2011-12).[1] He alleges that he received ineffective assistance from his trial counsel. The circuit court rejected his claims, and we affirm.

BACKGROUND

¶2 The criminal complaint underlying this case alleged that in July 2003 Westbrook fired a gun on a residential street and killed a twelve-year-old girl, Latara Dancy. In count one of the complaint, the State charged Westbrook with first-degree reckless homicide while armed with a dangerous weapon. In count two of the complaint, the State alleged that Westbrook possessed a firearm while a felon. Incident to a plea bargain, Westbrook pled guilty to one count of first-degree reckless homicide. He then pursued a direct appeal, alleging that the circuit court erroneously refused to suppress his custodial statements. We affirmed. *See* ***State v. Westbrook***, No. 2005AP1729-CR, unpublished slip op. (WI App Oct. 24, 2006).

¶3 Westbrook next sought to collaterally attack his conviction. As relevant here, he filed a postconviction motion in the circuit court pursuant to WIS. STAT. § 974.06, alleging that his trial counsel was ineffective.[2] The circuit court rejected his claims without a hearing. He appeals, asserting that the circuit court erred by refusing him a hearing and by denying him substantive relief.

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

[2] Westbrook also filed a petition in this court seeking a writ of *habeas corpus* on the ground that his appellate counsel was ineffective. We denied the petition. *See* ***State ex rel. Westbrook v. Thurmer***, 2008AP1993-W, unpublished slip op. (WI App Sept. 8, 2008).

DISCUSSION

¶4 Westbrook contends that his trial counsel was ineffective. The two-pronged test for claims of ineffective assistance of counsel requires a defendant to prove both that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show that counsel's actions or omissions "fell below an objective standard of reasonableness." *See* ***id.*** at 688. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). If a defendant fails to satisfy one component of the analysis, a reviewing court need not address the other. ***Strickland***, 466 U.S. at 697.

¶5 We first consider Westbrook's claim that his trial counsel was ineffective by not pursuing a challenge to the criminal complaint. Westbrook contends that "the criminal complaint is fundamentally defective" and lacks "essential facts" necessary to show probable cause to believe that he committed first-degree reckless homicide while using a dangerous weapon. He believes that the complaint neither shows that he "caused the death of the victim nor [names] any eye witness [who] point[ed] him out." He also contends that the criminal complaint is insufficient because it does not identify the caliber of his gun or include an autopsy report stating the "caliber [of the] bullet [that] cause[d] the fatal shot." He alleges that his trial counsel was ineffective by failing to make these claims.

¶6 A challenge to the sufficiency of the complaint presents a question of law. *See* ***State v. Reed***, 2005 WI 53, ¶11, 280 Wis. 2d 68, 695 N.W.2d 315. To determine the sufficiency of the complaint, we examine the document to determine "whether there are facts or reasonable inferences set forth that are sufficient to allow a reasonable person to conclude that a crime was probably committed and that the defendant probably committed it." ***Id.***, ¶12. The complaint is sufficient if it answers five questions: "'(1) Who is charged?; (2) What is the person charged with?; (3) When and where did the alleged offense take place?; (4) Why is this particular person being charged?; and (5) Who says so? or how reliable is the informant?'" ***Id.*** (citation omitted). The test is one "of minimal adequacy, not in a hypertechnical but in a common sense evaluation." ***State ex rel. Evanow v. Seraphim***, 40 Wis. 2d 223, 226, 161 N.W.2d 369 (1968).

¶7 The complaint in this case named Westbrook as the defendant and alleged in count one that he committed first-degree reckless homicide by use of a dangerous weapon. A person commits that crime by recklessly causing the death of another human being while using a dangerous weapon, under circumstances showing utter disregard for human life. *See* WIS. STAT. §§ 940.02(1), 939.63(1).

¶8 According to the complaint, police arrived in the area of 23rd Street and Center Street in Milwaukee, Wisconsin on July 20, 2003, at approximately 5:20 p.m., in response to a report of shots fired. Upon investigation, police found a twelve-year-old girl, Latara Dancy, in a residence at 2725 N. 23rd Street "suffering from an apparent gunshot wound to her side." The complaint further alleged that the victim was pronounced dead on arrival at Children's Hospital of Wisconsin and that she died of a gunshot wound.

¶9 The complaint goes on to allege that police interviewed Candace Williams, "who stated that she witnessed the shooting in which Latara Dancy was shot." Williams told the police that "she was talking to Ed Dancy, Latara's father, in front of 2741 N. 23rd Street." Williams saw three cars full of people arrive on the scene, and she then saw that "the Dancy family all went up onto the porch at 2725 N. 23rd Street." Next, the complaint alleged: "Williams stated that one of the black males that had arrived in the car, whom she subsequently identified in a photo array as the defendant, pulled out a black gun and fired that gun 6 times toward the members of the Dancy family who were on the front porch."

¶10 The complaint additionally reflects that a second witness, Walter Perkins, said that he saw Westbrook at the scene of the shooting. Perkins heard Westbrook say: "[n]o matter what, I'm killing them." According to the complaint, Perkins saw Westbrook "pull the gun out, and everyone started running into the house; there were four people on the porch and Latara was in the doorway." Next, "Perkins stated that he saw the defendant point the gun at the house and fire three shots."

¶11 In light of the foregoing, we cannot agree with Westbrook's contention that the complaint is deficient. First, Westbrook is plainly incorrect in asserting that the complaint omits the names of witnesses who saw him fire shots at the Dancy family. Second, although Westbrook accurately states that the complaint lacks information about the caliber of both his gun and the fatal bullet, that information is not necessary to establish probable cause. The complaint explains the crime that Westbrook allegedly committed, where and when he committed it, and the identity of the people who accused him. Further, the complaint demonstrates that the accusations are reliable because the accusers witnessed the crime. A reasonable person could conclude from the criminal

complaint that someone recklessly killed Latara Dancy with a firearm and that Westbrook probably was the culprit. No more is required. *See* ***Evanow***, 40 Wis. 2d at 226.

¶12 A motion challenging the sufficiency of the complaint would have lacked arguable merit. Therefore, Westbrook's trial counsel did not perform deficiently by failing to pursue such a motion. An attorney is not ineffective for failing to make meritless arguments. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

¶13 Westbrook next alleges that his trial counsel was ineffective by failing to pursue a self-defense claim based on Westbrook's alleged need to protect himself from Perkins. Westbrook asserts: "the record shows Westbrook confessed that he shot twice, believing that Perkins shot at [Westbrook]." Westbrook fails, however, to demonstrate, that he could rely on self-defense in this case.

¶14 Pursuant to WIS. STAT. § 939.48(3):

> [t]he privilege of self-defense extends not only to the intentional infliction of harm upon a real or apparent wrongdoer, but also to the unintended infliction of harm upon a 3rd person, except that if the unintended infliction of harm amounts to the crime of first-degree or 2nd-degree reckless homicide ... the actor is liable for whichever one of those crimes is committed.[3]

Thus, a person's privilege to act in self-defense against a wrongdoer does not extend to actions amounting to unintended first-degree reckless homicide of a third party.

[3] The current version of WIS. STAT. § 939.48(3) is identical to the version in effect in 2003.

¶15 Here, Westbrook faced a charge of first-degree reckless homicide while armed for causing the death of Latara Dancy. Westbrook acknowledges that his proposed claim of self-defense would have turned on his allegation that he fired a gun to protect himself only from Perkins. Therefore, the plain language of WIS. STAT. § 939.48(3) bars Westbrook from asserting self-defense to avoid conviction of the charge against him. Moreover, Westbrook cites no case law or other authority interpreting § 939.48(3) in a way that would have permitted him to claim the privilege under the facts of this case.

¶16 Accordingly, Westbrook does not demonstrate that his trial counsel should have mounted a self-defense claim on his behalf. An attorney is not ineffective by failing to pursue a novel legal theory. *See* ***State v. McMahon***, 186 Wis. 2d 68, 84, 519 N.W.2d 621 (Ct. App. 1994). Pursuant to the deficient performance prong of an ineffective assistance of counsel claim, "[w]e do not look to what would have been ideal, but rather to what amounts to reasonably effective representation." *See* ***id.*** at 80. Successful claims of ineffective assistance of counsel therefore "should be limited to situations where the law or duty is clear." ***Id.*** at 85. Because Westbrook offers no legal authority demonstrating the viability of the self-defense claim that he advances, he fails to show that his trial counsel performed deficiently by not pursuing the claim.

¶17 Westbrook also asserts that his trial counsel performed deficiently because trial counsel "was fully aware [that] the independent judicial determination of probable cause (police detention report) was not signed," and that trial counsel did not object to "the violation of constitutional right with a[n] unsigned independent judicial determination of probable cause report." (Some punctuation, capitalization, and emphasis omitted.) Westbrook offers nothing more in support of this claim, and we agree with the State that his contentions in

this regard are too vague and undeveloped to address. Westbrook does not tell us where in the record we might locate the document that he objects to, the constitutional right that he believes his trial counsel did not protect, or the legal basis for claiming that an objection would have afforded him relief. We will not develop Westbrook's amorphous and conclusory argument for him. We cannot act as both advocate and judge. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

¶18 Finally, Westbrook complains that the circuit court denied his motion for postconviction relief without granting him a hearing. A defendant, however, is not automatically entitled to a hearing upon filing a postconviction motion. A circuit court must grant a hearing only if the postconviction motion contains allegations of material fact that, if true, would entitle the defendant to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. If, however, the defendant does not allege sufficient material facts that, if true, entitle him or her to relief, if the allegations are merely conclusory, or if the record conclusively shows that the defendant is not entitled to relief, the circuit court has discretion to deny a postconviction motion without a hearing. ***Id.***

¶19 We are satisfied that the circuit court properly denied Westbrook's claims without a hearing in this case. Westbrook offers allegations related to the criminal complaint and to a theory of defense that are not supported by the law or the facts, and the record thus conclusively shows that those claims earn him no relief. *See* ***id.*** He offers only vague and conclusory allegations in support of his remaining claim, and he therefore fails to allege sufficient material facts that, if true, would entitle him to relief in regard to that matter. *See* ***id.*** Accordingly, the circuit court was not obligated to conduct a hearing to inquire further into his contentions. *See* ***id.*** We therefore affirm the order of the circuit court.

By the Court.—Order affirmed.

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