OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

December 7, 2021

To:

Hon. Michelle Ackerman Havas
Circuit Court Judge
Electronic Notice

John Barrett
Clerk of Circuit Court
Milwaukee County
Electronic Notice

Sarah Burgundy
Electronic Notice

John D. Flynn
Electronic Notice

Matthew Brandon Hardin 558357
Green Bay Correctional Inst.
P.O. Box 19033
Green Bay, WI 54307-9033

You are hereby notified that the Court has entered the following opinion and order:

2020AP425 State of Wisconsin v. Matthew Brandon Hardin
(L.C. # 2016CF1377)

Before Brash, C.J., Donald, P.J., and White, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Matthew Brandon Hardin, *pro se*, appeals an order denying his motion for postconviction relief. Hardin argues that his trial counsel and his postconviction counsel were ineffective for failing to pursue an adequate provocation defense. Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2019-20).[1] We summarily affirm.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

In 2016, the State charged Hardin with six crimes: two counts of attempted first-degree intentional homicide, with use of a dangerous weapon, as a repeater; two counts of first-degree reckless injury, with use of a dangerous weapon, as a repeater; one count of possessing a firearm as a felon, as a repeater; and one count of fleeing/eluding a traffic officer causing damage to property, as a repeater. The charges stemmed from allegations that Hardin shot his friend and his girlfriend numerous times and then attempted to avoid arrest by driving away from police, damaging city police squad cars and other county property.

Hardin subsequently pled guilty to one count of attempted first-degree intentional homicide and one count of first-degree reckless injury, with use of a dangerous weapon. The circuit court accepted Hardin's pleas, and Hardin, with the assistance of counsel, filed a WIS. STAT. § 809.30 postconviction motion. The circuit court denied Hardin's motion, and he did not appeal.

Next, Hardin, *pro se*, filed the underlying WIS. STAT. § 974.06 motion alleging that his trial counsel and his postconviction counsel were ineffective for failing to pursue an adequate provocation defense. Hardin claimed he shot the victims because he believed they were having an affair. The postconviction court denied the motion without a hearing, concluding that Hardin failed to satisfy his pleading burden. This appeal follows.

The standard of review for a circuit court's denial of a postconviction motion without an evidentiary hearing is mixed. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). An evidentiary hearing on a postconviction motion is only required if the defendant alleges "sufficient material facts—e.g., who, what, where, when, why, and how—that, if true, would entitle [the defendant] to the relief he seeks." ***State v. Romero-Georgana***, 2014 WI 83, ¶37, 360

Wis. 2d 522, 849 N.W.2d 668 (citation and italics omitted; brackets in ***Romero-Georgana***). Whether the defendant has alleged sufficient material facts in a postconviction motion is an issue of law reviewed *de novo*. ***Bentley***, 201 Wis. 2d at 310. If a defendant's postconviction motion does not allege sufficient facts, only presents conclusory allegations, or is refuted by the record, we review the circuit court's decision to grant or deny a hearing for an erroneous exercise of discretion. ***Id.*** at 309-11.

Even if we generously read Hardin's motion to advance a claim that postconviction counsel was ineffective for not challenging trial counsel's failure to advance an adequate provocation defense, the claim would have been meritless. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682-83, 556 N.W.2d 136 (Ct. App. 1996) (holding that the ineffective assistance of postconviction counsel may constitute a reason sufficient to overcome ***Escalona***'s procedural bar).[2] Adequate provocation is a statutory affirmative defense "*only* to first-degree intentional homicide and mitigates that offense to 2nd-degree intentional homicide." WIS. STAT. § 939.44(2) (emphasis added). In this case, Hardin was charged with *attempted* first-degree intentional homicide.[3] Given that adequate provocation is not a viable defense to attempted first-degree intentional homicide, counsel cannot be ineffective for failing to pursue it. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W2d 113 (Ct. App. 1994) (explaining that "trial counsel was not ineffective for failing or refusing to pursue feckless arguments").

[2] *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

[3] We additionally note in passing that Hardin did not file a reply refuting the State's argument that an adequate provocation claim would have been meritless, and therefore, concedes the issue. *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578.

Moreover, absent from Hardin's motion are any allegations that but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Consequently, he has failed to demonstrate the requisite prejudice. *See* ***Bentley***, 201 Wis. 2d at 312 (holding that to demonstrate prejudice, for purposes of the ineffective-assistance-of-counsel analysis, the defendant must show "that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial" (citation omitted)). The postconviction court properly denied his motion without a hearing.

Therefore,

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals