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

March 5, 2024

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

2022AP2080-CR State of Wisconsin v. Pablo Maurice Johnson
(L.C. # 2019CF4527)

Before White, C.J., Donald, P.J., and Geenen, 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).

Pablo Maurice Johnson appeals a judgment of conviction entered after a jury found him guilty of first-degree reckless homicide and first-degree recklessly causing injury, all by use of a dangerous weapon and as a party to a crime. He also appeals an order denying his postconviction motion without a hearing. He alleges that his trial counsel was ineffective for not requesting additional jury instructions regarding party-to-a-crime liability and for not "adequately" impeaching one of the State's witnesses, Jonathan Robinson, with evidence regarding the terms of his plea agreement. Based upon a review of the briefs and record, we conclude at conference that

this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] We summarily affirm.

This case arose following a March 30, 2019 high-speed car chase that also involved gunfire. The chase ended in a multi-car collision in the 2900 block of North 37th Street in Milwaukee. J.D.B. died as a result of the crash, and D.S.W. suffered injuries that left her partially paralyzed.[2] The State charged Johnson with three crimes: first-degree reckless homicide and first-degree recklessly causing injury, both by use of a dangerous weapon and as a party to a crime; and being a felon in possession of a firearm. The three charges proceeded to a jury trial.

Johnson's trial counsel described the theory of defense to the jury in an opening statement:

> [T]he evidence that you are going to see may place [Johnson] in a vehicle that was chasing the vehicle occupied by [the victims], however, there will not be evidence sufficient to show that [Johnson] had a firearm or that he used that firearm during the course of this car chase or that any actions that [Johnson] may or may not have done caused the car accident which ultimately led to the death and injuries of the parties in the vehicle.
>
> The only evidence that you will hear that will put a gun in the hand of [Johnson] is evidence from two individuals who have some skin in the game, so to speak. Mr. [Demitri] Jackson and Mr. [Jonathan] Robinson, two individuals who, as the State has indicated to you, have pled guilty and who are going to testify before you arguably in the hopes of gaining something to improve their own situation.... There will be no DNA or fingerprint evidence that attributes a firearm to [Johnson], there will be no firearm found that matches the description of firearms that Mr. Jackson and Mr. Robinson give that they're attributing to [Johnson]. The only evidence as far as [Johnson] and a weapon comes from those two individuals.

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[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

[2] Pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we use initials to refer to the victims in this case. Although the confidentiality rule does not extend to homicide victims, *see* RULE 809.86(3), we use initials for the homicide victim here to protect his family's privacy. *See* WIS. STAT. § 950.02(4)(a)4.a.

Trial counsel concluded her opening statement by telling the jurors that they would be asked to decide if Johnson acted "in con[ce]rt" with his co-defendants "to cause this car crash and ultimately cause the death[] and injuries to [the victims].... I'm going to ask that you find [Johnson] not guilty because the State's evidence will not show that any of [Johnson's] actions contributed to the causation of these injuries or death."

The evidence that the State presented included testimony from citizens who saw people running from the scene immediately after the crash and from the medical examiner who conducted the autopsy of J.D.B. A probation agent testified that Johnson was wearing a GPS tracking device on March 30, 2019. The device revealed that he was in a speeding vehicle at the time and place of the crash and that he left the crash site at a pedestrian's speed. A detective testified that one firearm, a rifle, was found near the crash site, and the parties stipulated that Jackson's DNA was on that rifle. The State also introduced D.S.W.'s deposition testimony. D.S.W. said that on March 30, 2019, a vehicle began chasing the car in which she was a passenger. She described hearing "constant shooting" during the chase and then her car crashed and she broke her neck. Later, she watched cellphone video that captured the immediate aftermath of the crash, and she recognized Robinson as the gunman who approached her car on foot and fired shots at one of her companions.

Additionally, the jury heard testimony from Jackson and Robinson. Jackson said that he had reached a plea agreement with the State that required him to plead guilty to both second-degree reckless injury and first-degree reckless homicide and to testify truthfully against the other parties involved in the crimes. Jackson acknowledged that he had not yet been sentenced for the homicide and that he was testifying because he hoped that by doing so he would "receive less time, get back home." He then told the jury that J.D.B. and several co-actors had robbed and shot at Jackson on

March 30, 2019, and when Jackson told Johnson about the attack, Johnson wanted to "take revenge." Later that day, Johnson, Jackson, Robinson and a fourth man, Montrell McCullum, got into a Hyundai and drove through a Milwaukee neighborhood searching for Jackson's assailants. According to Jackson, he and his co-actors spotted the assailants in a Buick. Robinson was driving, and he sped after the Buick while the other men shot at it, Johnson and McCullum each using a handgun and Jackson using a rifle. Jackson said that when the cars reached 37th and Locust Streets, "everybody in [Robinson's] car said 'stop following him, we did our job.... [T]urn off, leave them alone,' [but Robinson] kept going." The chase ended with the cars crashing "somewhere near 38th and Locust [Streets]."

Robinson also testified. He described driving the Hyundai "real fast" in pursuit of a car that J.D.B. was driving while two of Robinson's passengers—Johnson and McCullum—fired handguns from the Hyundai's windows. Robinson then saw J.D.B.'s car collide with a third vehicle. Robinson said that he was unable to stop his own car before crashing into the pile-up. Robinson testified that after the crash, his third passenger, Jackson, fired a rifle several times and then Robinson and his three co-actors fled the scene.

Robinson acknowledged that he had reached a plea agreement with the State that included pleading guilty to both second-degree reckless injury and second-degree reckless homicide and then "testify[ing] truthfully against all parties who were involved" in the crimes. He said that he had already been sentenced for the former crime and that he would be sentenced for the homicide after giving his testimony. He acknowledged that, as part of the plea agreement, the State had promised not to make any recommendation to the circuit court regarding the length of his sentence. On cross-examination, Robinson said that he was testifying because he believed J.D.B.'s family

"deserve[s] justice and if—if I do get credited or whatever the case may be, then I will take that as well."

In closing argument, Johnson's trial counsel contended that only Jackson and Robinson provided evidence implicating Johnson in any criminal activity but that Jackson and Robinson lacked credibility because they had "nothing to lose and everything to gain by telling the State what it wants to hear." Trial counsel asserted that the other evidence in the case showed that Johnson was merely "a guy in a car.... [He] didn't plot, he didn't plan, he didn't scheme, he was in a car with some guys he knew."

The jury found Johnson guilty of both first-degree reckless homicide and first-degree reckless injury, all by use of a dangerous weapon and as a party to a crime. The jury acquitted Johnson of being a felon in possession of a firearm.

Johnson filed a postconviction motion alleging that his trial counsel was ineffective for failing to request certain jury instructions regarding party-to-a-crime liability and for failing to impeach Robinson with additional evidence regarding the terms of his plea agreement. The circuit court denied the motion without a hearing. Johnson appeals, arguing that he is entitled to a hearing on his postconviction claims.

To prevail on a claim of ineffective assistance of counsel, a defendant must prove both that counsel's performance was deficient and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must show that counsel's actions or omissions "fell below an objective standard of reasonableness." ***Id.*** at 688. To prove 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.

A defendant alleging ineffective assistance of counsel must seek to preserve counsel's testimony in a postconviction hearing. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). The defendant, however, is not automatically entitled to such a hearing. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Rather, the circuit court is required to hold an evidentiary hearing only if the defendant has alleged, within the four corners of the postconviction motion, "sufficient material facts that, if true, would entitle the defendant to relief." ***Id.***, ¶¶14, 23. Whether a defendant's motion alleges sufficient material facts to entitle the defendant to relief is a question of law that we review *de novo*. ***Id.***, ¶9. If the defendant's motion "does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," the circuit court, in its discretion, may deny relief without a hearing. ***Id.***, ¶¶9, 34. We review a circuit court's discretionary decisions with deference. ***Id.***, ¶9.

With the foregoing principles in mind, we turn to whether Johnson made a sufficient showing in his postconviction motion to require a hearing. We conclude that he did not.

We begin with Johnson's claim that his trial counsel should have requested additional jury instructions regarding party-to-a-crime liability. Pursuant to WIS. STAT. § 939.05, a person can be guilty as a party to a crime in three alternative ways: (a) by directly committing the crime; (b) by intentionally aiding and abetting the commission of the crime; or (c) by conspiring with another to commit the crime. ***State v. Hahn***, 221 Wis. 2d 670, 686, 586 N.W.2d 5 (Ct. App. 1998). When a person is charged as a party to a crime, the jurors are not required to agree unanimously on the

way in which the person was concerned in the commission of a crime, but the jury cannot convict unless all of the jurors agree that the person participated in one of the possible ways. ***Holland v. State***, 91 Wis. 2d 134, 143, 280 N.W.2d 288 (1979).

In the instant case, the circuit court instructed the jury regarding two of the three ways that a person can be a party to a crime, namely, by direct commission, and by aiding and abetting. Johnson alleges now that his trial counsel was ineffective for failing to request an instruction regarding the third way—conspiracy—and for failing to request an accompanying instruction that a person cannot be convicted as a conspirator if the person timely withdraws from the conspiracy. *See* WIS JI—CRIMINAL 410, 412;[3] *see also* WIS. STAT. § 939.05(2)(c).

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[3] WIS JI—CRIMINAL 410, titled "Party to a Crime: Conspiracy to Commit the Crime Charged," provides, in part:

> A person is a member of a conspiracy if, with intent that a crime be committed, the person agrees with or joins with another for the purpose of committing that crime. A conspiracy is a mutual understanding to accomplish some common criminal objective or to work together for a common criminal purpose. It is not necessary that the conspirators had any express or formal agreement, or that they had a meeting, or even that they all knew each other.

WIS JI—CRIMINAL 412, titled "Party to Crime: Withdrawal from a Conspiracy," provides:

> WHERE THERE IS EVIDENCE OF WITHDRAWAL, ADD THE FOLLOWING
>
> You must also consider whether the defendant withdrew from the conspiracy before the crime was committed.
>
> A person withdraws if (he) (she) voluntarily changes (his) (her) mind, no longer desires that the crime be committed, and notifies the other parties concerned of the withdrawal within a reasonable period of time before the commission of the crime so as to allow the others also to withdraw.

To support his claim, Johnson asserts that testimony from Jackson and Robinson established Johnson as a conspirator who joined with multiple co-actors to exact vengeance by participating in a shooting and car chase. Johnson next points to testimony from Jackson that he, Johnson, and McCullum all urged Robinson to stop the car chase approximately a block before the collision occurred, and Johnson maintains that this evidence established that he timely withdrew from the conspiracy. Johnson then argues that his trial counsel should have requested jury instructions regarding conspiracy and withdrawal from a conspiracy because, he says, "a theory of defense instruction is appropriate if the defense is not adequately covered by other instructions and the defense is supported by sufficient evidence."

Johnson, however, did not pursue a theory of defense that he joined a conspiracy from which he later withdrew. Rather, he offered a defense that he was a hapless passenger in a car whose other occupants engaged in criminal activity without his consent or participation. He argued that he did not "plot," "scheme," or "plan," and that the only evidence of his criminality was the testimony of the co-defendants who had actually committed the crimes and whose credibility was suspect because they had "skin in the game." Therefore, as the State accurately explains, the argument that Johnson presents in his postconviction litigation, although couched as a claim that his trial counsel failed to request certain jury instructions, in fact is a claim that his trial counsel failed to pursue a theory of defense that Johnson joined but then withdrew from a conspiracy.

This claim fails. The rule is long settled that "[t]rial counsel may select a particular defense from the available alternative defenses." ***State v. Hubanks***, 173 Wis. 2d 1, 28, 496 N.W.2d 96

> A person who withdraws from a conspiracy is not held accountable for the acts of the others and cannot be convicted of any crime committed by the others after timely notice of withdrawal.

(Ct. App. 1992). The defense need not be the one that looks best in hindsight as long as the chosen defense was objectively reasonable. ***State v. Mull***, 2023 WI 26, ¶¶50-51, 406 Wis. 2d 491, 987 N.W.2d 707. Here, nothing in Johnson's postconviction motion demonstrated that trial counsel performed deficiently by pursuing a theory that Johnson was with the wrong people at the wrong time and that his former comrades subsequently turned on him in the hopes of improving their own situations. Indeed, the record shows that the theory of defense that counsel selected comported with the physical evidence, which did not connect Johnson to a firearm, and the theory drew on Jackson's and Robinson's conceded motivation to testify in a way favorable to the State.

Johnson argues now that his trial counsel could have presented more than one defense, but this argument does not support an allegation of deficient performance. Trial counsel is not required to "undermine the chosen defense by presenting the jury with inconsistent alternatives." ***Hubanks***, 173 Wis. 2d at 28. In this case, trial counsel argued that the jury should not believe Jackson and Robinson in light of their motives to lie. A defense based on withdrawal from a conspiracy, however, would have required trial counsel to undercut the chosen defense by arguing that Jackson and Robinson testified credibly when they claimed that Johnson agreed to participate in a retaliatory scheme and that Jackson testified credibly about Johnson's withdrawal from the scheme while the car chase was underway.

In the absence of any showing that trial counsel's choice of legal strategy was unreasonable, Johnson failed to demonstrate that his trial counsel performed deficiently by not requesting jury instructions regarding an alternative strategy involving withdrawal from a

conspiracy. His trial counsel therefore was not ineffective on this ground. The circuit court properly denied the claim without a hearing.[4]

We turn to the claim that Johnson's trial counsel was ineffective for failing to impeach Robinson "adequately." Johnson showed in his postconviction motion that the State originally charged Robinson with first-degree reckless homicide but that Robinson ultimately pled guilty to second-degree reckless homicide, which carries a lower maximum term of imprisonment. Johnson asserted: "the fact that Robinson's homicide charge had gone from forty-five years of initial confinement down to twenty years of initial confinement clearly supports a finding that he had received a benefit for testifying for the State.... [T]he jury had not learned of this immense amount of reduced exposure." Johnson alleged that his trial counsel's failure to ensure that the jury "was fully apprised" of this aspect of the plea agreement constituted ineffective assistance of counsel.

The circuit court correctly rejected Johnson's claim without a hearing. As the circuit court explained, testimony describing the penalty for first-degree reckless homicide would have revealed the sentence that Johnson faced if the jury found him guilty of that crime. However, "a jury is not to be informed of the effect of its answers upon the rights or liabilities of the parties." ***State v.***

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[4] For the sake of completeness, we note that Johnson did not demonstrate any prejudice arising from the failure to request jury instructions regarding withdrawal from a conspiracy. "If a person is not a party to a crime as a conspirator, either because he never conspired or because prior to its commission he withdrew from the conspiracy, ... he still is a party to the crime if he either directly commits it or if he intentionally aids and abets in its commission." ***May v. State***, 97 Wis. 2d 175, 185, 293 N.W.2d 478 (1980). Thus, "a person who withdraws from a conspiracy does not remove himself from aiding and abetting." ***Id.*** Accordingly, the conspiracy and withdrawal instructions at issue would not have assisted Johnson in defending himself from the State's allegations that he either directly committed the charged crimes or that he aided and abetted their commission. Rather, the conspiracy instruction would have offered the jurors an additional way to find Johnson guilty as a party to a crime, *see* ***Holland v. State***, 91 Wis. 2d 134, 143, 280 N.W.2d 288 (1979), while the withdrawal instruction would have allowed the jurors to reject the conspiracy theory of guilt. Absent those instructions, Johnson reaped the benefit that the withdrawal instruction could confer—no convictions based on conspiracy—without running the risk that some jurors would rely on the conspiracy instruction to conclude that he was a party to a crime.

Shoffner, 31 Wis. 2d 412, 428, 143 N.W.2d 458 (1966). This rule reflects the principles that "providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion." ***Shannon v. United States***, 512 U.S. 573, 579 (1994). The circuit court rightly concluded here that trial counsel did not perform deficiently by failing to offer inadmissible and irrelevant evidence. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel is not ineffective for failing to make meritless arguments).

In this court, Johnson presents a modified claim. He contends now that his trial counsel was ineffective for failing to "simply ... advise [the jury] that Robinson had received a reduction in exposure ... without indicating the amount." We reject Johnson's efforts to reframe his postconviction claim. Our review of a postconviction motion is limited to the four corners of the document itself, and we do not consider additional assertions in the appellate brief. ***Allen***, 274 Wis. 2d 568, ¶¶23, 27.

Moreover, the evidence at trial fully exposed Robinson's potential bias. Robinson acknowledged that he entered a plea agreement that included pleading guilty to second-degree reckless homicide, a lesser degree of homicide than Johnson faced at trial. Robinson acknowledged that the State had made multiple promises to him as part of his plea agreement. He also acknowledged that he told police after his arrest that he was not involved in the March 30, 2019 crimes and only admitted his involvement many months later in anticipation of receiving "a deal" in exchange for his cooperation. Perhaps most importantly, Robinson acknowledged that he hoped to "get credit[]" for his testimony when the circuit court sentenced him. Trial counsel emphasized this evidence in closing argument, reminding the jury that Robinson (and Jackson)

"got deals from the State," and that the terms of Robinson's agreement reflected that Robinson must "testify to what ... the State think[s] is truthful or otherwise you lose your deal."

Under these circumstances, we agree with the circuit court that additional evidence to impeach Robinson with his plea agreement would have been cumulative. Cumulative evidence is "additional evidence of the same general character, to some fact or point which was subject of proof before.... Where the credibility of a prosecution witness was tested at trial, evidence that again attacks the credibility of that witness is cumulative." ***State v. McAlister***, 2018 WI 34, ¶39, 380 Wis. 2d 684, 911 N.W.2d 77. Johnson fails to show that he suffered prejudice from the omission of cumulative impeachment evidence. *See* ***State v. Hineman***, 2023 WI 1, ¶31, 405 Wis. 2d 233, 983 N.W.2d 652 (stating that "[i]mpeachment evidence is cumulative and therefore not material when 'the witness was already or could have been impeached at trial by the same kind of evidence'" (citation, brackets, and footnote omitted)); *see also* ***State v. Eckert***, 203 Wis. 2d 497, 513-14, 553 N.W.2d 539 (Ct. App. 1996) (explaining that counsel is not ineffective for failing to present merely cumulative evidence).

For all the foregoing reasons,

IT IS ORDERED that the judgment of conviction and postconviction order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals