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**DISTRICT IV**

January 12, 2016

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

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2015AP541-CR

State of Wisconsin v. Pao Choua Vue (L.C. # 2012CF291)

Before Lundsten, Sherman and Blanchard, JJ.

Pao Choua Vue appeals a judgment of conviction for first-degree reckless homicide, as party to the crime, and an order denying Vue's postconviction motion to withdraw his guilty plea. Vue contends that he was denied due process when the State failed to disclose exculpatory evidence prior to Vue entering a plea and that his trial counsel was ineffective by failing to obtain that evidence. Based upon our review of the briefs and record, we conclude at conference

that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).<sup>1</sup> We summarily affirm.

Following shootings in March 2012, Vue was charged with first-degree intentional homicide, attempted first-degree intentional homicide, and armed burglary, all as party to the crime, as well as felony bail jumping. The criminal complaint indicated that Vue's co-defendant, Kong Vue,<sup>2</sup> had provided the following information to police in April 2012. Kong was driving with Vue as a passenger in the car on the day of the shooting when Vue fired a gun toward a residence. Kong and Vue then "went to another house to get some money." Vue waited in the car while Kong took the gun, entered an apartment, and shot and killed the apartment's occupant. Kong returned to the car, told Vue what had happened, and gave the gun to Vue. Vue then drove Kong home.

At a joint preliminary hearing in May 2012, an investigating officer testified that Kong had told the officer that Kong was driving the car and Vue took out a gun and fired several rounds at a residence. Kong drove away. They then switched seats so that Vue was driving. Vue parked the vehicle, and Kong took the gun and exited the car to go "get some money." Kong entered an apartment, saw the occupant, panicked, and shot her. Kong then ran back to the car, told Vue what happened and gave Vue the gun, and Vue drove away.

Pursuant to a plea agreement, Vue pled guilty to first-degree reckless homicide as party to the crime. The court relied on the criminal complaint and the preliminary hearing testimony

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

<sup>2</sup> Because Vue and his co-defendant share a surname, we refer to the codefendant as "Kong" for ease of reading.

as the factual basis for the plea. Vue filed a postconviction motion to withdraw his plea, arguing that he was denied due process when the State failed to disclose the full details of a second statement Kong gave to police in August 2012, prior to Vue entering his plea, and that Vue's trial counsel was ineffective by failing to obtain the full details of Kong's second statement through discovery before Vue entered a plea.<sup>3</sup> After an evidentiary hearing, the circuit court denied postconviction relief.

Vue contends that Kong's August 2012 statement contained material exculpatory evidence that the State was required to disclose. *See State v. Sturgeon*, 231 Wis. 2d 487, 503, 605 N.W.2d 589 (Ct. App. 1999) ("A defendant has a constitutional right to all material exculpatory evidence in the hands of the prosecutor."). Specifically, Vue cites statements by Kong that Kong had not communicated to Vue that Kong's intent, as he was exiting the car, was to use the gun to obtain money; that Kong's plan to obtain money was "just all in my head"; and that Kong merely told Vue to wait while Kong took the gun and exited the car. Vue argues that those statements were material and exculpatory because they would have supported Kong's defense to party to the crime liability by corroborating Vue's statements that Vue did not know what Kong was doing when Kong left the car with the gun. Vue asserts that he would have insisted on a trial rather than entering a plea had he possessed that information. *See id.* at 503-04 (when a defendant seeks to withdraw a plea based on the State's failure to disclose evidence, "the relevant inquiry is whether there is a reasonable probability that, but for the failure to disclose, the defendant would have refused to plead and would have insisted on going to trial").

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<sup>3</sup> Vue also argued that the details of Kong's second statement constituted newly discovered evidence, but does not pursue that argument on appeal.

The problem with Vue's argument, however, is that the detail Vue identifies as material and exculpatory in Kong's August 2012 statement—that Kong did not express his intent to use the gun to obtain money prior to exiting the car—does not contradict or significantly add to the information provided to Vue based on Kong's first statement to police.

At the time Vue pled guilty to a reduced charge of first-degree reckless homicide as party to the crime, Vue knew that Kong had told police that Vue took out a gun and shot at a house while Kong was driving, that shortly thereafter Vue waited in the car while Kong left the car with the gun to get money, and that Vue then drove Kong home after Kong told Vue that Kong had shot someone and gave Vue the gun.

After Vue entered a plea, Vue learned that in giving a second statement to authorities, Kong had explicitly told police that Kong did not tell Vue of Kong's plan to use the gun to obtain money at the time he exited the car in the second incident. Specifically, Kong stated that "I just told [Vue] to stay there and wait for me, cause [sic] I only took a couple of seconds to open the door and slam it. I just told him to ... stay here and wait for me and I will be back, and I closed the door." Kong explained that he decided to use the gun to get money after Vue shot at the house, but that he did not explain his plan to Vue. Kong said that it "was just all in my head, like, if I use a gun, like, if he used the gun already, then I could use the same gun and you know, try to scare somebody into you know, giving me money."

Thus, in both the first and second statements, Kong consistently asserted that Vue used the gun first to shoot at a house, and that shortly thereafter Vue waited in the car while Kong took the gun and used it to commit an attempted burglary and a homicide. Nothing in Kong's original version of the events indicated that Kong told Vue about Kong's intention.

Additionally, nothing in Kong's second statement indicated that Kong expressed to Vue any innocent purpose for Kong to take the gun out of the car, after Vue had just committed a drive-by shooting, while Vue waited for him.

Because Kong's August 2012 statement that he did not express his plan to Vue upon exiting the car was consistent with the information Kong previously provided to police, and which was known to Vue when he entered his plea, there is no reasonable probability that Kong would not have pled guilty had the State provided that detail to Vue. *See id.* Moreover, nothing about that detail alters the overall strength of the State's case against Vue under party to the crime liability. *See State v. Asfoor*, 75 Wis. 2d 411, 427-31, 249 N.W.2d 529 (1977) (a person aids and abets a crime, and thus is liable as a principal, if the person undertakes conduct that, as a matter of objective fact, aids another person in committing a crime, and the person intends to yield such assistance); *State v. Zelenka*, 130 Wis. 2d 34, 47, 387 N.W.2d 55 (1986) ("In Wisconsin, there is no requirement that an aider and abettor share the specific intent required for commission of the substantive offense he aids and abets."); *Bautista v. State*, 53 Wis. 2d 218, 223, 191 N.W.2d 725 (1971) (criminal conviction may be based in whole or in part on circumstantial evidence, and may rely on reasonable inferences drawn from the evidence).

Vue also contends that his trial counsel was ineffective by failing to obtain the full details of Kong's August 2012 statement to police and to explain the full extent of the statement to Vue either before the plea hearing or before sentencing. *See Strickland v. Washington*, 466 U.S. 668, 687-694 (1984) (counsel was ineffective if "counsel's performance was deficient [in that] counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and also that "the deficient performance prejudiced the defense," that is, the deficiency undermines our confidence in the outcome). However, because

we conclude that nothing in the undisclosed detail from Kong's August 2012 statement to police would have reasonably altered Kong's decision to plead guilty, any deficient performance by counsel was not prejudicial to Vue. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985). For the same reason, we reject Vue's contention that he would have sought plea withdrawal prior to sentencing had counsel explained the full content of Kong's August 2012 statement to police after he pled guilty but before he was sentenced.

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*