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

2018AP881

State of Wisconsin v. Anthony R. Owens (L.C. # 2013CF3971)

Before Brash, P.J., Brennan and Dugan, JJ.

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).

Anthony R. Owens, *pro se*, appeals an order denying him postconviction relief under WIS. STAT. § 974.06 (2017-18).¹ He claims he received ineffective assistance from his trial counsel and his postconviction counsel. Upon our review of the briefs and record, we conclude

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

The State alleged that on August 19, 2013, Owens shot and killed Jamal Pinkard on a public street in Milwaukee, Wisconsin. As we explained in our opinion resolving Owens’s direct appeal, City of Milwaukee Police Officer Derek Kitts responded to the report of a shooting and found Pinkard on the ground with a gunshot wound to his chest, gasping for air. *See State v. Owens*, 2016 WI App 32, ¶2, 368 Wis. 2d 265, 878 N.W.2d 736. Kitts attempted to question Pinkard about who shot him and heard him say “Anthony.” *See id.*, ¶3. Pinkard did not know Anthony’s last name but was able to provide two aliases, “Lil Ant” and “2-1.” *See id.*

Pinkard died on his way to the hospital. *See id.*, ¶4. Following an investigation, the State charged Owens with first-degree reckless homicide by use of a dangerous weapon as a party to a crime and with possessing a firearm as a felon, both as a repeat offender. *See id.*, ¶5. Owens demanded a jury trial.

On the first day of trial, Owens moved to discharge his appointed trial counsel and substitute Attorney Peter Kovac as retained counsel. Kovac did not appear for the motion; Owens instead produced a letter from Kovac explaining that he would represent Owens if the circuit court adjourned the trial. Owens’s appointed trial counsel told the circuit court that he was prepared to try the case and did not learn that Owens had engaged another attorney until that morning. The circuit court denied the motion to discharge appointed counsel, explaining that: the trial had been adjourned twice before; Owens had not demonstrated any conflict with his appointed counsel; he made the motion to discharge appointed counsel at the “eleventh hour,” when witnesses were present and the parties were ready to proceed; and the public interest in

judicial efficiency and the proper administration of justice outweighed Owens's interest in representation by his counsel of choice.

Later that morning, Kovac appeared in the courtroom and sought to expand on the reasons for Owens's motion to discharge appointed counsel. Kovac said that he had first met with Owens at the end of the previous week and that Owens had expressed concern about "three areas that hadn't been investigated [I]t involves getting some phone records which should be readily available" and "an issue about ... a fingerprint on the gun."

The State said it knew nothing about the two sets of phone records alleged to be at issue. As to the fingerprint, the State said it had previously advised Owens's appointed counsel that the print was not suitable for comparison and could not be matched to anyone.

The circuit court again denied the motion to discharge appointed counsel, emphasizing that the trial had previously been adjourned, Owens's appointed counsel was prepared to try the case, and substitution of counsel would necessitate a delay. The circuit court also found that Owens could pursue the "readily available" telephone records while the trial was in progress. The circuit court invited Kovac to "sit as co-counsel" but he declined the invitation, and Owens proceeded to trial represented solely by appointed counsel.

The evidence at trial included Kitts's testimony describing Pinkard's dying declarations. The State also presented surveillance video recorded by a local tavern's exterior security cameras. The recording showed that four individuals targeted Pinkard. The video alone, however, did not permit police to establish the identity of the assailants, and the State presented

witnesses to identify Owens as the person who shot Pinkard. Among them, Juiquin Pinkard, Pinkard's cousin,² testified that he saw Owens firing a gun at Pinkard on August 19, 2013. *See id.*, ¶19. As we explained in *Owens*, Juiquin “provided a detailed account of how the shooting occurred, never wavering in his identification of Owens as the shooter.” *Id.* In addition:

James Warfield, also Pinkard's cousin, testified at trial that he saw some of the shooting incident after first hearing gunfire while inside his father's house. Warfield also testified that he heard someone yell, “This is Ant doing this to you all.” A detective who interviewed Warfield just after the shooting testified that while Warfield told him he heard both gunfire and an individual yell, “This is Ant doing this to you all,” Warfield did not tell the detective that he witnessed any part of the gunfire.

Id., ¶20. The jury found Owens guilty as charged. The circuit court imposed an aggregate fifty-three-year term of imprisonment.

Owens filed a postconviction motion with the assistance of new counsel. He contended that the circuit court erred in admitting Pinkard's dying declarations to Kitts, the evidence was insufficient to support Owens's convictions, and the circuit court erroneously exercised its sentencing discretion. The circuit court denied the motion, and counsel pursued an appeal on Owens's behalf raising the same issues. We affirmed. *See id.*, ¶1.

Pursuant to WIS. STAT. § 974.06, Owens next filed the postconviction motion underlying this appeal. He alleged that postconviction counsel was ineffective for failing to pursue a claim that the circuit court improperly denied him his right to counsel of choice. He further alleged that his trial counsel was ineffective in many ways and that his postconviction counsel was

² Throughout the remainder of this opinion, we refer to the victim of the homicide as Pinkard and his cousin Juiquin Pinkard by his given name of Juiquin.

ineffective in turn for failing to challenge trial counsel's ineffectiveness. The circuit court denied the claims without a hearing, and Owens appeals.

Owens first alleges that postconviction counsel was ineffective for failing to challenge the circuit court's ruling denying him a substitution of counsel on the day of trial. This issue was preserved for direct appellate review when trial counsel moved to withdraw and to permit retained counsel to represent Owens. *See* WIS. STAT. § 974.02(2) ("An appellant is not required to file a postconviction motion in the trial court prior to appeal if the grounds are ... issues previously raised."). Appellate counsel, however, did not raise the issue in this court in *Owens*. To pursue a claim that appellate counsel was ineffective in this regard, Owens must file, not a postconviction motion in circuit court under WIS. STAT. § 974.06, but a petition for a writ of habeas corpus in the court of appeals. *See State v. Knight*, 168 Wis. 2d 509, 520, 484 N.W.2d 540 (1992). Accordingly, this issue is not properly before us, and we address it no further. We turn to the remaining claims.

We begin with the applicable rules governing postconviction litigation under WIS. STAT. § 974.06 in general, and ineffective assistance of counsel claims in particular, because their familiar and multi-faceted components dictate the outcome of this appeal. A defendant pursuing a second or subsequent postconviction motion is procedurally barred from proceeding under § 974.06 unless the defendant presents a sufficient reason for failing to present his or her claims previously. *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994); *see also* § 974.06(4). "In some instances, ineffective assistance of postconviction counsel may be a sufficient reason for failing to raise an available claim in an earlier motion or on direct appeal." *See State v. Romero-Georgana*, 2014 WI 83, ¶36, 360 Wis. 2d 522, 849 N.W.2d 668.

To demonstrate that postconviction counsel was ineffective, a convicted person must satisfy a two-prong test by showing that counsel performed deficiently and that the deficiency prejudiced the defense. *See State v. Balliette*, 2011 WI 79, ¶¶21, 63, 336 Wis. 2d 358, 805 N.W.2d 334. Further, when a claim of ineffective assistance of postconviction counsel is premised on the failure to raise ineffective assistance of trial counsel, the convicted person must establish that trial counsel was ineffective pursuant to the same two-prong test. *See State v. Ziebart*, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

To prove deficient performance, a defendant must demonstrate that counsel's conduct fell below an objective standard of reasonableness. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). 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. Both deficient performance and prejudice present mixed questions of fact and law. *See State v. Jeannie M.P.*, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We uphold the circuit court's factual determinations unless they are clearly erroneous. *See id.* Whether the facts reveal deficient performance or prejudice, however, are questions of law that we review independently. *See id.* We may consider either the deficiency prong or the prejudice prong first, and if the defendant fails to prove one, we need not address the other. *See Strickland*, 466 U.S. at 697.

To succeed on a claim of ineffective assistance of counsel, the defendant must present counsel's testimony at an evidentiary hearing, *see State ex rel. Panama v. Hepp*, 2008 WI App 146, ¶¶9, 22, 314 Wis. 2d 112, 758 N.W.2d 806, but a defendant is not automatically entitled to such a hearing, *see State v. Allen*, 2004 WI 106, ¶¶13-14, 274 Wis. 2d 568, 682 N.W.2d 433. To secure a hearing, a defendant must file a motion that alleges sufficient material facts (i.e., who,

what, where, when, why, and how) that, if true, would entitle the person to relief. *See Allen*, 2004 WI 106, ¶¶9, 23. If, however, a motion contains insufficient allegations or is conclusory, or if the record conclusively demonstrates that the movant is not entitled to relief, the circuit court may deny the motion without a hearing. *See id.*, ¶9. Whether the motion alleges sufficient facts is a question of law that we consider *de novo*. *See id.*

Owens raises a host of allegations that postconviction counsel was ineffective for failing to bring claims challenging trial counsel's effectiveness. As set forth above, these allegations require him to prove deficient performance and resulting prejudice in relation to both counsels. Moreover, an essential component of the allegation that postconviction counsel performed deficiently by failing to bring a claim that should have been brought is a showing that the ignored claim was "clearly stronger" than the claims postconviction counsel actually raised. *See Romero-Georgana*, 360 Wis. 2d 522, ¶¶43-46. Accordingly, Owens cannot prevail unless he shows that the claims postconviction counsel ignored were clearly stronger than those actually pursued.

To satisfy his burden, Owens first asserts that the claims raised in *Owens* were "relatively weak." He alleges that: the challenge to the sufficiency of the evidence lacked merit "because the evidence is viewed in a light most favorable to the State"; the challenge to his sentences lacked merit because "great deference is given to the discretion of the [circuit] court"; and the challenge to the admission of the victim's dying declarations lacked merit because the issue "has been well-settled in the law." He concludes: "no one can argue that the issues were strong in the eyes of the courts."

Owens's assertions are conclusory. As the State points out, Owens fails to explain why the facts underlying the claims pursued in *Owens* plainly defeated his challenges to the sufficiency of the evidence and to his sentences, or why, in light of the facts surrounding the victim's dying declarations, the law governing admission of those declarations was "well settled." Further, his assertions are belied by the actions of this court. We issued an authored, published opinion to resolve the issues pursued in *Owens*. Our conclusion that *Owens* satisfied the publication criteria reflects our view that Owens raised significant claims and that our opinion would be helpful to the bench and bar. Cf. WIS. STAT. RULE 809.23(1); see also *Deutsche Bank Nat'l Tr. Co. v. Wuensch*, 2018 WI 35, ¶26 n.13, 380 Wis.2d 727, 911 N.W.2d 1. Accordingly, we reject Owens's claim that the issues raised in *Owens* were "well-settled" and "lacked merit."

Moreover, no matter the strength of the claims pursued in *Owens*, Owens must show that the claims postconviction counsel did not raise were clearly stronger. See *Romero-Georgana*, 360 Wis. 2d 522, ¶46. He fails to do so.

Owens alleges first that postconviction counsel ignored a claim that his appointed trial counsel was ineffective when presenting Owens's motion for a substitution of counsel. According to Owens, his appointed trial counsel's performance was prejudicially deficient because appointed trial counsel did not cite *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). Owens fails to explain, however, why and how a citation to *Gonzalez-Lopez* would have changed the circuit court's ruling. We observe that while *Gonzalez-Lopez* recognized a person's right to representation by a lawyer that the person can afford, see *id.* at 144, *Gonzales-Lopez* explicitly explained that a trial-level court nonetheless has "wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of [the court's]

calendar,” *id.* at 152 (internal citation omitted). In the instant case, the circuit court balanced the relevant considerations and explained that they militated against further delaying Owens’s trial. Moreover, unlike *Gonzalez-Lopez* where the trial-level court prohibited the defendant from receiving assistance from his counsel of choice, *see id.* at 143, the circuit court here accommodated the various interests of the parties, the public, and the court by permitting dual representation, expressly inviting Kovac to act as co-counsel. Because Owens fails to show that *Gonzalez-Lopez* required the circuit court to rule differently than it did, he fails to show that he was prejudiced when trial counsel did not cite the case. Accordingly, this issue is not clearly stronger than the issues raised in *Owens*. *See Strickland*, 466 U.S. at 694.

Owens next claims postconviction counsel should have alleged that trial counsel was ineffective for failing to request an adjournment on the day of trial in order to conduct further investigation. In the postconviction order resolving this claim, the circuit court explained that it addressed Owens’s concern about additional investigation when Owens sought to discharge his appointed trial counsel and that Owens “set forth nothing [in his WIS. STAT. § 974.06 motion] that would have altered the court’s prior determination: the jury trial was going to proceed as scheduled.” Owens therefore suffered no prejudice when trial counsel did not request an adjournment on the day of trial. *See State v. Giebel*, 198 Wis. 2d 207, 219, 541 N.W.2d 815 (Ct. App. 1995) (no prejudice where the circuit court found it would have acted no differently had trial counsel performed as the defendant suggested). Accordingly, this issue is not clearly stronger than the issues pursued in *Owens*. *See Strickland*, 466 U.S. at 694.

Next, Owens names nine witnesses and claims that postconviction counsel should have alleged trial counsel’s ineffectiveness for failing both to investigate them and to present them at trial. Owens fails to show that either claim is stronger than those pursued in *Owens*.

First, Owens does not show that his trial counsel in fact failed to investigate the nine witnesses he names. Instead, he points to counsel's statement on the day of trial that "there are certainly some other avenues that certainly could be investigated in this case. Unfortunately, [the] SPD only allows me to spend so much on an investigator." This vague remark does not confess a failure to investigate witnesses, let alone a failure to investigate the nine witnesses Owens identifies now.³ Accordingly, Owens offers nothing but a conclusory assertion regarding trial counsel's alleged deficiency in regard to investigating witnesses. Because conclusory assertions are insufficient to earn postconviction relief, *see Allen*, 274 Wis. 2d 568, ¶9, the claim that trial counsel failed to investigate witnesses lacks merit and is not clearly stronger than the issues pursued in *Owens*.

Second, Owens does not show that he was prejudiced by his trial counsel's failure to call the nine witnesses he discusses, even assuming some investigative deficiency on trial counsel's part and even assuming that the witnesses would have offered the hypothetical testimony that Owens described in his motion. The circuit court found that one witness's hoped-for statements were "belied by the video evidence," two others would have provided "no material benefit" to Owens, and "the purported testimony of the other witnesses is of such limited value that there is no reasonable probability that their testimony would have changed the outcome of the trial." Owens fails to offer any argument in his appellate brief that the circuit court's factual determinations were clearly erroneous. Accordingly, he fails to show that a challenge to trial

³ As we have seen, the discussion surrounding Owens's request for new counsel on the day of trial reflects that the areas of investigation at issue were telephone records and a fingerprint on a firearm.

counsel's effectiveness for failing to call the nine listed witnesses was clearly stronger than the claims postconviction counsel pursued in *Owens*. See *Strickland*, 466 U.S. at 694.

Next, Owens claims postconviction counsel should have alleged that trial counsel was ineffective for failing to obtain telephone records that, according to Owens, would refute a statement Juiquin made to police shortly after the homicide. Similarly, Owens claims postconviction counsel should have alleged that trial counsel was ineffective for failing to “investigate and follow up with a witness named Tywan Wilson” regarding an alleged recorded telephone call between Wilson and Juiquin in which Juiquin said the State was “pressuring” him to testify falsely. Owens, however, did not produce any telephone records or recordings to support these claims. Therefore, they are merely conclusory and necessarily not clearly stronger than the claims pursued in *Owens*. See *State v. Starks*, 2013 WI 69, ¶¶70, 73, 349 Wis. 2d 274, 833 N.W.2d 146.

Owens next claims postconviction counsel should have alleged trial counsel's ineffectiveness for failing to impeach Juiquin's “sworn testimony at trial ... that [Juiquin] was promised nothing for his testimony.” According to Owens, “this testimony was false” because the State “granted immunity” to Juiquin in exchange for his testimony. The record shows, however, that Juiquin was not offered anything for his trial testimony. The circuit court found when addressing this issue that Juiquin received limited use immunity only for testimony he provided during a pretrial deposition. Accordingly, Owens fails to show that Juiquin testified falsely in regard to promises from the State. Moreover, as the circuit court explained, there is no reasonable probability that the outcome of the trial would have been different if trial counsel had exposed the limited use immunity, given the totality of the evidence in this case. See *State v. Trawitzki*, 2001 WI 77, ¶45, 244 Wis. 2d 523, 628 N.W.2d 801 (holding that trial counsel's

failure to impeach a witness was not prejudicial when the witness was not the only person implicating the defendant). As this court recognized in *Owens*, Kitts’s testimony “on its own is particularly damning to Owens.” *Id.*, 368 Wis. 2d 265, ¶18. Accordingly, this issue is not clearly stronger than the issues presented in *Owens*. See *Strickland*, 466 U.S. at 694.

Owens next claims postconviction counsel should have alleged that trial counsel was ineffective for failing to impeach Juiquin with an alleged discrepancy between his trial testimony about the shooting and his pretrial testimony. As we explained in *Owens*, however, inconsistencies between Juiquin’s trial testimony and his pretrial statements—including inconsistencies about the shooting—were aired at trial and “[i]t was up to the jury to resolve these conflicts and assess Juiquin’s credibility.” See *id.*, ¶19. Assuming without deciding that Owens has identified an additional inconsistency, he fails to show why exposing it would have affected the verdict. See *Trawitzki*, 244 Wis. 2d 523, ¶¶44-45. Accordingly, this issue is not clearly stronger than the issues pursued in *Owens*. See *Strickland*, 466 U.S. at 694.

Owens next claims his postconviction counsel should have alleged that trial counsel was ineffective in cross-examining Kitts. A claim that trial counsel was ineffective for failing to conduct an adequate cross-examination must demonstrate exactly what the allegedly necessary cross-examination would have revealed and how the answers would have altered the outcome of the trial. See *State v. Provo*, 2004 WI App 97, ¶16, 272 Wis. 2d 837, 681 N.W.2d 272. Here, Owens describes areas of inquiry that he believes should have been explored on cross-examination but he fails to show how Kitts would have responded to the questioning, let alone how any such responses would have affected the verdict. Therefore, the allegation that trial counsel was ineffective in cross-examining Kitts is conclusory and any claim of prejudice is

speculative. This claim is thus not clearly stronger than those pursued in *Owens*. See *Allen*, 274 Wis. 2d 568, ¶9.

Finally, Owens offers two interrelated claims that postconviction counsel should have alleged that trial counsel was ineffective for: (1) failing to impeach Warfield with his inability to pick Owens out of a photo array during the investigative phase of this case; and (2) failing to object when Warfield identified Owens in the courtroom as the person who shot the victim. According to Owens, “the jury never even heard about the photo array and Mr. Warfield’s inability to identify Mr. Owens as the shooter.” These claims are based on misstatements of the record.

The record shows that Warfield gave a pretrial statement to police describing what he heard at the time of the homicide and acknowledging that he did not see the shooting. When Warfield nonetheless testified at trial that Owens was the shooter, the State called Detective Michael Walisiewicz to impeach Warfield’s trial testimony with the prior statements Warfield gave to police. Owens’s trial counsel then cross-examined Walisiewicz, further emphasizing that Warfield never told police that he saw the shooting and never described or identified the shooter during the investigation of the homicide.

Further, Detective Keith Kopcha testified at trial that he was present when his partner showed Warfield a six-person photo array that included Owens’s picture, and Kopcha told the jury that Warfield did not identify Owens as the shooter. Trial counsel cross-examined Kopcha at length about the identification procedure, driving home that Warfield failed to pick Owens’s

picture from the array as the person who shot the victim.⁴ In short, Warfield's in-court identification of Owens was thoroughly impeached with the testimony of law enforcement witnesses who made clear that Warfield could not identify the shooter at the scene or in the investigative phase of the case. A claim to the contrary is therefore meritless and necessarily not clearly stronger than the claims presented in *Owens*.

As to the claim that trial counsel should have objected to Warfield's in-court identification, questions about the reliability of eyewitness testimony are normally for the jury because "evidence with some element of untrustworthiness is customary grist for the jury mill." See *State v. Hibel*, 2006 WI 52, ¶53, 290 Wis. 2d 595, 714 N.W.2d 194 (citation omitted). Here, the State as well as defense counsel ensured that the jury understood all the reasons that Warfield's in-court identification was unreliable. Because Owens does not explain why Warfield's in-court identification was anything other than a jury question, Owens fails to show that trial counsel had any legitimate basis to seek the exclusion of that testimony. See *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 678, 556 N.W.2d 136 (Ct. App. 1996) (attorney has no obligation to pursue meritless claims). Accordingly, this claim was not clearly stronger than those pursued in *Owens*.

⁴ As our discussion shows, Owens's claim that the jury never heard about Warfield's inability to pick Owens out of a photo array is patently untrue. We caution Owens that misrepresentation of the record is ground for sanctions. See WIS. STAT. RULES 809.19(1)(d)-(e), 809.83(2). While we recognize that *pro se* litigants may misunderstand the law, we do not countenance misleading remarks about the facts from any litigant, *pro se* or otherwise.

In sum, none of Owens's postconviction claims is clearly stronger than those presented in *Owens*, and postconviction counsel therefore was not ineffective for failing to raise those claims. See *Romero-Georgana*, 360 Wis. 2d 522, ¶46. Owens thus lacks a sufficient reason for a second or subsequent postconviction motion. See *id.*, ¶48. Accordingly, the circuit court properly denied his claims without a hearing. See *Escalona-Naranjo*, 185 Wis. 2d at 185. We affirm.

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