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

July 13, 2021

To:

Hon. Michelle Ackerman Havas
Circuit Court Judge
Electronic Notice

John Barrett
Clerk of Circuit Court
Electronic Notice

John Blimling
Electronic Notice

John D. Flynn
Electronic Notice

Lavontae W. Cooper 644647
Fox Lake Correctional Inst.
P.O. Box 200
Fox Lake, WI 53933-0200

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

2020AP936 State of Wisconsin v. Lavontae W. Cooper (L.C. # 2016CF3856)

Before Dugan, Donald and White, 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).

Lavontae W. Cooper, *pro se*, appeals an order denying his postconviction motion filed under WIS. STAT. § 974.06 (2019-20).[1] He claims that the circuit court erroneously denied him a new trial or, alternatively, sentence modification. He further claims that this court should grant him a new trial in the interest of justice pursuant to WIS. STAT. § 752.35. 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. We summarily affirm.

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

A jury found Cooper guilty as a party to the crime of armed robbery and first-degree recklessly endangering safety. The jury found that he did not use a dangerous weapon to commit the latter offense, and the jury acquitted him of possessing a firearm as a felon. With the assistance of counsel, Cooper pursued a direct appeal under WIS. STAT. § 974.02 and WIS. STAT. RULE 809.30. He alleged that the verdicts were inconsistent and that he was entitled to a new trial in the interest of justice. We affirmed. *See* ***State v. Cooper*** (***Cooper I***), No. 2018AP1695-CR, unpublished slip op. (WI App May 29, 2019).

Cooper next filed the motion underlying this appeal. He alleged that his postconviction counsel was ineffective for failing to raise claims that the trial court erroneously instructed the jury during its deliberations and erroneously exercised sentencing discretion. The circuit court concluded that the claims were barred.[2]

The nature of Cooper's current claims necessitates a brief overview of the trial proceedings. D.H. testified that on August 23, 2016, he was in his car when a passenger in a van fired a gun at him, leading him to flee from his vehicle. D.H. identified Cooper in the courtroom as the person who fired the gun. A detective testified and described interviewing Cooper, who admitted that he was riding in a van driven by his girlfriend, that he got out of the van, and that he drove away in D.H's car. Cooper denied, however, that he had a gun at the time or that he fired a gun at D.H. Rather, Cooper told the detective that he saw D.H.'s car following the van, so Cooper "called his friend who [Cooper] only knows as 'G'" and told G to "do whatever."

[2] The Honorable Frederick C. Rosa presided over the trial and sentencing in this matter and entered the judgment of conviction. We refer to Judge Rosa as the trial court. The Honorable Michelle Ackerman Havas presided over the postconviction motion underlying this appeal and entered the order denying postconviction relief. We refer to Judge Havas as the circuit court.

Cooper also told the detective that he did not direct G to shoot at D.H. The detective testified that he was unable to identify or interview G. Cooper elected not to testify, but he stipulated that he was a convicted felon as of August 23, 2016.[3]

The State requested jury instructions on party-to-a-crime liability in regard to the charges of armed robbery and first-degree recklessly endangering safety while armed. The trial court granted the request and instructed the jury that, before it could find Cooper guilty of those crimes, the State was required to prove that he either committed the crimes directly or that he intentionally aided and abetted the person who committed them. As relevant here, the trial court further instructed the jury that, if it found Cooper guilty of first-degree recklessly endangering safety, then the jury must decide whether he committed that crime while using a dangerous weapon.

During deliberations, the jury asked whether it could find that Cooper used a dangerous weapon while recklessly endangering safety only if Cooper personally possessed the dangerous weapon. The trial court consulted with counsel for the State and for Cooper. Both counsel agreed that the proper answer was: "You must determine whether Mr. Cooper possessed the dangerous weapon with respect to [the charge of first-degree recklessly endangering safety]."

After the jury returned its verdicts, the State moved for judgment on the verdicts and Cooper objected. In opposing entry of the jury's guilty verdicts, Cooper argued that his acquittal of the charge of possessing a firearm as a felon and the jury's finding that he did not possess a

[3] The jury also heard testimony that police arrested Cooper's girlfriend, Breanna Fowler, but the jury did not learn that Fowler pled guilty to a charge—taking and driving a vehicle without owner's consent—that arose out of the August 23, 2016 incident.

dangerous weapon while recklessly endangering safety revealed that the jury did not believe the State's theory that Cooper himself fired shots at D.H. In Cooper's view, the instructions regarding party-to-a-crime liability for recklessly endangering safety and armed robbery therefore must have caused the jury "to misunderstand its function" and misled the jury to conclude that, because it did not believe he was the direct actor, it was required to convict him instead as a party to the crime.

The trial court rejected Cooper's arguments. It found that while "the State's presentation of evidence ... seem[ed] to suggest that Mr. Cooper was the shooter," nonetheless, the State had tried the case on a theory that Cooper was a party to the crimes of first-degree recklessly endangering safety and armed robbery because he had a co-actor—his girlfriend—who had pled guilty to a charge arising out of the incident. The trial court therefore determined that it had correctly instructed the jury on party-to-a-crime liability. The trial court then acknowledged that it had answered "yes," when the jury asked if it was required to determine whether Cooper personally used a gun while recklessly endangering safety. The trial court next stated: "that was probably an error by the court.... [T]he answer should have been, you can find that Mr. Cooper or the person who aided and abetted him possessed a weapon." The trial court found, however, that "that's a mistake that works to Mr. Cooper's benefit.... [I]t lessened his exposure." Following this discussion, the trial court ordered entry of judgment on the jury's verdicts.

The matters proceeded to sentencing. The trial court's sentencing remarks included observations that shootings endanger "not only the person being shot at ...but [also] a person that lives [near]by, driving by, whatever, the bullets pose a risk to those individuals too." The trial court went on: "I am sure you have read many times about somebody having the bullet come through the wall, the basketball courts, elsewhere, having nothing to do with whatever was going

on. You know, but they get shot, too. So these are serious, serious matters." The trial court ultimately imposed two consecutive, evenly bifurcated six-year terms of imprisonment.

After Cooper pursued an unsuccessful direct appeal with the assistance of counsel, he filed the postconviction motion underlying this appeal. Proceeding *pro se*, he alleged that his postconviction counsel was ineffective for failing to raise claims that the trial court: (1) misled the jury during its deliberations by answering a question with an allegedly erroneous instruction; and (2) erroneously exercised its sentencing discretion by commenting on the risks posed by gunfire in residential neighborhoods. The circuit court rejected the claims and Cooper appeals, renewing the claims he raised in his postconviction motion and additionally seeking discretionary reversal in the interest of justice.

Pursuant to WIS. STAT. § 974.06(4), a prisoner seeking to raise claims in a second or subsequent postconviction motion must demonstrate a sufficient reason for failing to raise or adequately address those claims in the first postconviction proceeding. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 184-85, 517 N.W.2d 157 (1994). Cooper asserts that he did not previously raise his current claims due to the ineffective assistance of his postconviction counsel.

Ineffective assistance of counsel for failing to raise claims in the original postconviction motion or appeal may in some circumstances constitute the sufficient reason required for an additional motion. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶36, 360 Wis. 2d 522, 849 N.W.2d 668. The convicted person must demonstrate, however, that the attorney who litigated the original postconviction motion or appeal was in fact ineffective. *See* ***id.***, ¶¶36-38.

We assess claims of ineffective assistance of counsel by applying the two-prong test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). *See* ***State v. Balliette***, 2011 WI 79, ¶28,

336 Wis. 2d 358, 805 N.W.2d 334. The test requires that the convicted person prove a deficiency in counsel's performance and prejudice as a result. *See* ***Strickland***, 466 U.S. at 687. To satisfy the deficiency prong, the convicted person must show that counsel's actions or omissions "fell below an objective standard of reasonableness." *See* ***id.*** at 688. Additionally, when—as here—the person claims that counsel was ineffective for failing to raise issues in an earlier proceeding, proof of the deficiency prong requires the person to allege and show that the neglected issues were "clearly stronger" than the claims counsel pursued. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶4. To satisfy the prejudice prong, the person "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. If the convicted person fails to make an adequate showing as to one prong of the analysis, the court need not address the other. *See* ***id.*** at 697.

To assess whether neglected claims are clearly stronger than those that counsel pursued, a reviewing court must "compare the issue[s] not raised in relation to the issues that were raised." ***Lee v. Davis***, 328 F.3d 896, 900 (7th Cir. 2003). The burden is on the convicted person to satisfy the standard. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶¶45-46, 58. Here, Cooper fails to show that his current claims have merit. Accordingly, they lack any comparative strength.

First, Cooper claims that the trial court "erred as a matter of law" when reinstructing the jury in response to its question about the weapons enhancer. This claim is not clearly stronger than those he raised in ***Cooper I***, however, because Cooper did not object to the reinstruction and therefore, as the circuit court correctly explained in its postconviction order, Cooper could not have raised the claim in a postconviction motion or on direct appeal. Our supreme court has unequivocally held that "even when an instruction misstates the law, the party must object to the

instruction to preserve a challenge to the instruction as of right on appeal. Failure to object to an instruction constitutes a waiver of the error." *See* ***Best Price Plumbing, Inc. v. Erie Ins. Exch.***, 2012 WI 44, ¶39, 340 Wis. 2d 307, 814 N.W.2d 419, (quoting ***State v. Shah***, 134 Wis. 2d 246, 251 n.4, 397 N.W.2d 492 (1986)).

Cooper asserts that his trial counsel was not required to object in order to preserve his claim of an erroneous jury instruction because "the trial court admitted its error." Cooper is wrong. The trial court's remarks made long after the jury was discharged are not a substitute for a specific and timely objection to a jury instruction. "The failure to place an objection on the record constitutes a waiver of any error in the submitted instruction." ***Steinberg v. Jensen***, 204 Wis. 2d 115, 121, 553 N.W.2d 820 (Ct. App. 1996); *see also* ***State v. Staples***, 99 Wis. 2d 364, 375-76, 299 N.W.2d 270 (Ct. App. 1980) (stating that "[f]ailure to object to the jury instructions at trial constitutes waiver of that issue on appeal"). In this case, Cooper not only failed to object, he affirmatively approved the instruction during the trial proceeding, and he subsequently reiterated his view that the instruction was proper in the memorandum he filed urging the trial court to set aside the guilty verdicts.

When a defendant has forfeited a claim of error in the jury instructions by failing to object, this court can review the alleged error as a challenge to trial counsel's effectiveness. *See* ***State v. Langlois***, 2017 WI App 44, ¶17, 377 Wis. 2d 302, 901 N.W.2d 768. Cooper, however, expressly eschews any reliance on a claim of ineffective assistance of trial counsel and instead advises us that such a claim has no relevance to his challenge. He therefore necessarily fails to carry his burden to show that a claim of ineffective assistance of trial counsel is clearly stronger than the claims that he raised on direct appeal. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶¶45-46, 58.

For the sake of completeness, however, we have considered whether a claim of ineffective assistance of trial counsel is clearly stronger than the issues that Cooper raised in ***Cooper I***. We are satisfied that the claim lacks merit because Cooper cannot show either deficiency in trial counsel's performance or resulting prejudice. *See* ***Strickland***, 466 U.S. at 687.

When we consider whether trial counsel's performance was deficient, our role "is to determine whether defense counsel's performance was objectively reasonable according to prevailing professional norms." *See* ***State v. Kimbrough***, 2001 WI App 138, ¶31, 246 Wis. 2d 648, 630 N.W.2d 752. Here, trial counsel clearly performed in an objectively reasonable way by approving a supplemental jury instruction that did not encompass the State's theory of party-to-a-crime liability. A theory of party-to-a-crime liability expands the ways that a defendant may be found guilty of a crime. *See* ***State v. Hecht***, 116 Wis. 2d 605, 619, 342 N.W.2d 721 (1984). Because the supplemental instruction at issue here did not encompass party-to-a-crime liability, the instruction excluded consideration of whether Cooper aided and abetted a person who possessed a dangerous weapon and allowed consideration only of whether he personally possessed such a weapon. Trial counsel reasonably did not object to an instruction that made a conviction more difficult for the State to obtain. Moreover, Cooper was not prejudiced by trial counsel's decision not to object because an instruction that makes the State's burden of proof more onerous is favorable rather than detrimental to the defendant. *See* ***State v. Courtney***, 74 Wis. 2d 705, 716, 247 N.W.2d 714 (1976).

We turn to Cooper's claim that a challenge to the circuit court's sentencing discretion was clearly stronger than the claims raised in ***Cooper I***. According to Cooper, the trial court erred because, in fashioning his sentences, it discussed the dangers to the community that are inherent "when bullets start flying." Cooper argues: "the problem in this particular case is that

Cooper was not convicted of using a firearm nor possessing the firearm." Cooper fails to identify any error in the sentencing remarks.

A sentencing court is required to consider, among other matters, the gravity of the defendant's offenses and the need to protect the public. *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The trial court's sentencing remarks at issue here addressed those factors. Cooper nonetheless asserts that the trial court's concerns about gun violence were irrelevant because he was acquitted of the charge that he possessed a firearm while a felon and because the jury apparently concluded that he was not the gunman in the crimes that he committed. Cooper, however, was convicted of an armed robbery that involved a shooting, and the trial court expressly accepted the jury's finding that Cooper played a role in that incident. The trial court thus appropriately considered the dangers to the public that arise when crimes include gunfire. Moreover, Cooper's acquittal of some of the charges did not limit the trial court's discretion to consider all of the evidence against him. A sentencing court may consider unproven allegations and crimes for which the defendant has been acquitted. *See* ***State v. Leitner***, 2002 WI 77, ¶45, 253 Wis. 2d 449, 646 N.W.2d 341.

In sum, Cooper fails to show that the trial court made objectionable remarks at sentencing. Therefore, his postconviction counsel did not perform deficiently by failing to challenge those remarks. "[F]ailure to pursue a meritless argument does not constitute deficient performance." ***State v. Sandoval***, 2009 WI App 61, ¶34, 318 Wis. 2d 126, 767 N.W.2d 291. Because Cooper's sentencing challenge lacks merit, it is not stronger than the claims he pursued on direct appeal.

Finally, Cooper asks this court to grant him a new trial in the interest of justice under WIS. STAT. § 752.35, on the ground that the real controversy has not been fully tried. "[R]eversals under WIS. STAT. § 752.35 are rare and reserved for exceptional cases." ***State v. Kucharski***, 2015 WI 64, ¶41, 363 Wis. 2d 658, 866 N.W.2d 697. Here, Cooper seeks discretionary reversal based on the trial court's acknowledgment of a mistake in responding to a question from the jury during its deliberations. Cooper alleges that the jury was "misled and confused" by the response, but the trial court did not make such findings. Rather, the trial court found that the response "worked to [Cooper's] benefit because it lessened his exposure." Moreover, Cooper approved the response both before and after it was given, and the jury found in his favor in regard to the matter that the instruction addressed. These circumstances do not constitute exceptional circumstances warranting a new trial. While the jury delivered a mixed verdict, § 752.35 was not intended to vest this court with authority to permit a defendant to pursue an alternative approach at a second trial when the first approach was not as successful as the defendant had hoped. *See* ***State v. Hubanks***, 173 Wis. 2d 1, 28-29, 496 N.W.2d 96 (Ct. App. 1992). Accordingly, we reject Cooper's request for a new trial in the interest of justice.

IT IS ORDERED that the postconviction 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