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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**

November 22, 2022

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

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2021AP661-CR State of Wisconsin v. Fred L. Davenport (L.C. # 2019CF2866)

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).**

Fred L. Davenport appeals a judgment of conviction entered upon his guilty plea to first-degree reckless homicide as a party to a crime. He also appeals an order denying postconviction relief. 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 (2019-20).[1] Because the circuit court properly denied Davenport's motion to suppress his inculpatory custodial statements and properly denied his motions seeking to withdraw his guilty plea before and after sentencing, we summarily affirm.

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

The scope of Davenport's claims requires that we review the underlying facts and procedural history in some detail. Police found B.T. dead in the driver's seat of a car on April 24, 2019, near the 7000 block of West Medford Avenue in Milwaukee.[2] An autopsy determined that B.T. was killed by a bullet that entered the back of her head at close range and that her death was a homicide. Video surveillance in the area of the homicide and B.T.'s cellphone data linked Davenport to the crime. Additionally, an informant contacted the police and reported that an acquaintance had described shooting B.T. and then fleeing the scene with an accomplice. Police identified Davenport as the informant's acquaintance.

Law enforcement officers arrested Davenport in Michigan on July 1, 2019. Two Milwaukee detectives, Lori Rom and William Schroeder, then sought to question Davenport in a Michigan jail, but he invoked his right to silence and to an attorney. On July 3, 2019, the two detectives brought Davenport from Michigan to the Milwaukee County Jail in a transport van. The next day, Davenport stopped Detective Michael Saranec as he walked past Davenport's cell in the Milwaukee County Jail. Davenport said that he wanted to talk to Rom and Schroeder. Saranec relayed Davenport's message, and Rom and Schroeder met with Davenport that same day. During that July 4, 2019 meeting, Davenport gave a recorded statement admitting that he and an accomplice intended to rob B.T., but instead Davenport shot her in the head before fleeing the scene.

The State charged Davenport with one count of first-degree reckless homicide by use of a dangerous weapon as a party to a crime. He requested a jury trial and moved to suppress his

[2] As did the parties, we shield the identity of the victim.

inculpatory statements on the ground that detectives improperly interrogated him after he had invoked his rights to silence and to counsel.

The circuit court held a hearing to address Davenport's suppression motion a few days before his scheduled trial date. At the hearing, the State presented testimony from Detectives Saranec, Rom, and Schroeder. The State also submitted the audio recording of Davenport's interaction with Rom and Schroeder in the Michigan jail and the video recording of Davenport's interrogation in Milwaukee. Davenport testified on his own behalf, and he presented testimony from another arrestee who was on the transport van with Davenport during a portion of the ride to the Milwaukee County Jail on July 3, 2019. At the conclusion of the hearing, the circuit court denied the suppression motion, finding that the detectives interrogated Davenport only after he reinitiated contact with them on July 4, 2019, and waived his rights to silence and to counsel.

The parties returned to the courtroom for the start of trial on the morning of February 3, 2020. Before the case was called, Davenport tendered a signed plea questionnaire to the circuit court. The questionnaire reflected that he would plead guilty to first-degree reckless homicide as a party to a crime, the State would dismiss the allegation that he committed the crime by use of a dangerous weapon, and the State would not proceed on a contemplated amended information charging Davenport with first-degree intentional homicide. At the outset of the hearing, however, Davenport said that he did not want to enter a guilty plea but rather wanted a trial. One of his two trial attorneys, Vincent Guimont, therefore requested an adjournment, stating that he and his co-counsel, Attorney Nathan Opland-Dobs, had expected Davenport to enter a plea. However, in response to the circuit court's inquiry as to what more the defense needed to do to complete its trial preparation, Attorney Guimont responded that defense counsel required only twenty minutes to obtain appropriate clothing for Davenport. Accordingly, the circuit court

conducted a colloquy with Davenport, arraigned him on the amended charge of first-degree intentional homicide, then adjourned the proceedings to the afternoon for jury selection.

Following the recess, Davenport advised the circuit court that he had again changed his mind and now wished to accept the plea agreement that the parties had previously negotiated. The circuit court expressed reluctance to accept the plea, noting that another person's trial had been rescheduled to permit Davenport's trial to proceed. Ultimately, however, the circuit court agreed to accept his plea to first-degree reckless homicide as a party to a crime. During the plea colloquy, Davenport assured the circuit court that no one had threatened him or pressured him to plead guilty. He said that he was satisfied with both of his trial attorneys and described them as "fantastic." The circuit court accepted his guilty plea and set the matter for sentencing.

Shortly before his sentencing date, Davenport discharged Attorneys Guimont and Opland-Dobs. With the assistance of successor counsel, Davenport moved for plea withdrawal on two grounds: (1) his original trial attorneys, by their actions and inactions, had coerced him into entering his plea; and (2) the citizen informant—Vashon Bonds—had recanteed his allegation that Davenport admitted shooting B.T. Included with the motion was a memorandum from a private investigator retained by the defense. The investigator stated that she had spoken by telephone with Bonds, who was incarcerated, and he said that "everything he told to [police] was fabricated."

The circuit court conducted an evidentiary hearing on the motion. Davenport testified that he had agreed to plead guilty because his original trial attorneys were unprepared for trial on February 3, 2020, told him that they planned to "wing it," and forced him to plead guilty by stating that they had no defense. Davenport testified that he "was lying to the court" during the

plea colloquy when he said that he was satisfied with his lawyers' performances, and he explained that he would lie to a court when he believed that the lie "was what [he] was supposed to say." Additionally, he testified that Bonds's recantation "change[d Davenport's] feeling about going to trial."

Attorneys Opland-Dobs and Guimont also testified. Each described his many years of law practice and substantial trial experience. Attorney Opland-Dobs said that he was prepared for trial on February 3, 2020, and that his trial preparation was not affected when, a few days before the scheduled trial date, Davenport decided that he would plead guilty. Attorney Guimont similarly testified that the case was "prepped and ready" on February 3, 2020, explaining that the defense "had been preparing for months." He also testified that he never told Davenport that "he had to plead guilty" or that the defense was unprepared for trial. Attorney Guimont acknowledged that he came to court on February 3, 2020, expecting Davenport to plead guilty in light of counsel's discussions with Davenport a few days earlier. However, when Davenport decided instead to proceed to trial, the defense required only enough time to provide Davenport with appropriate clothes. In response to questions about the timing of Davenport's ultimate decision to plead guilty, Attorney Guimont testified that Davenport changed his mind about going to trial after speaking to his sister, Keshania Kimbrough, during the recess that preceded the plea. According to Attorney Guimont, Kimbrough indicated that she "did not want to see Mr. Davenport in prison for the rest of his life."[3]

[3] A conviction for first-degree intentional homicide carries a mandatory sentence of life imprisonment. *See* WIS. STAT. §§ 940.01(1)(a), 939.50(3)(a). A conviction for first-degree reckless homicide carries a maximum sentence of sixty years of imprisonment. *See* WIS. STAT. §§ 940.02(1), 939.50(3)(b).

In addition to presenting testimony, the parties stipulated to the admission of a letter that the prosecutor had recently received from Bonds. In the letter, Bonds advised that he was not recanting the statements he made to police. He acknowledged offering a recantation to Davenport's lawyer, but Bonds alleged that he was "forced to recant" because he felt threatened by Davenport and his associates.

The circuit court found that Davenport was not credible and instead believed trial counsels' testimony. The circuit court further found that Davenport's plea was not coerced and that he decided to plead guilty after assessing his risks and weighing his options. As to Bonds, the circuit court considered his various statements and found that "he flip flops." The circuit court concluded that no credible or believable basis existed for plea withdrawal and denied the motion.

The matter then proceeded to sentencing. The circuit court imposed a fifty-year term of imprisonment bifurcated as thirty-five years of initial confinement and fifteen years of extended supervision.

Following sentencing, Davenport moved for postconviction relief, alleging that the circuit court "erred in denying [his] motion to suppress." He also sought plea withdrawal on the grounds that his original trial attorneys were ineffective, and the circuit court had coerced his plea. The circuit court denied the postconviction motion without a hearing. The circuit court found that it had not coerced Davenport to plead guilty and stated that it otherwise stood by its earlier rulings. He appeals.

*Motion to Suppress Statements*

Davenport first claims that the circuit court wrongly denied his suppression motion because the police compelled his incriminating statements by interrogating him in violation of his Fifth Amendment rights to silence and to counsel.[4] *See* ***State v. Hampton***, 2010 WI App 169, ¶28, 330 Wis. 2d 531, 793 N.W.2d 901. Review of an order denying suppression of evidence presents a question of constitutional fact. *See* ***State v. Delap***, 2018 WI 64, ¶26, 382 Wis. 2d 92, 913 N.W.2d 175. Such a question involves a two-step inquiry. *See* ***id.***, ¶27. We uphold the circuit court's findings of historical fact unless they are clearly erroneous, and then "we independently apply constitutional principles to those facts." ***Id.*** (citation omitted).

In this case, Davenport invoked his rights to silence and to counsel during his initial encounter with Detectives Rom and Schroeder in the Michigan jail. The applicable rule governing any subsequent interrogation provides that "[a]n accused ... having expressed his [or her] desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to [the accused], unless the accused [person] initiates further communication, exchanges, or conversations with the police."

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[4] A defendant who pleads guilty normally gives up the right to appeal nonjurisdictional issues that arose prior to the plea. *See* ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886; ***Hatcher v. State***, 83 Wis. 2d 559, 563, 266 N.W.2d 320 (1978). A statutory exception to this rule provides that, upon appeal from a final judgment or order, this court may review the denial of a suppression motion, "notwithstanding the fact that the judgment or order was entered upon a plea of guilty[.]" *See* WIS. STAT. § 971.31(10). Thus, we review the pretrial order denying Davenport's suppression motion. To the extent, however, that Davenport attempted in his postconviction motion to offer new grounds for suppression that he did not raise prior to his plea, such efforts were untimely. *See* ***Coleman v. State***, 64 Wis. 2d 124, 128, 218 N.W.2d 744 (1974) (explaining that motions to suppress must be made before or during trial). Accordingly, we limit our review of the suppression ruling to the grounds for suppression presented in Davenport's pretrial motion.

***Edwards v. Arizona***, 451 U.S. 477, 484-85 (1981). The parties dispute whether the detective violated the ***Edwards*** rule here.

The initial question is whether Detectives Rom and Schroeder interrogated Davenport in the Michigan jail after he invoked his rights to silence and to counsel.[5] When we review the question of whether police conducted an interrogation, we defer to the circuit court's findings of historical fact unless they are clearly erroneous. *See* ***State v. Cunningham***, 144 Wis. 2d 272, 281-82, 423 N.W.2d 862 (1988). Further, the circuit court is the sole judge of the credibility of the witnesses testifying at a suppression hearing. *See* ***State v. Harrell***, 2010 WI App 132, ¶8, 329 Wis. 2d 480, 791 N.W.2d 677. Whether the defendant's interaction with police constituted interrogation, however, is a question of law that we review independently. *See* ***Cunningham***, 144 Wis. 2d at 281-82.

Here, the audiotape of the encounter in Michigan reflects that Davenport and Detectives Rom and Schroeder conversed for approximately twelve minutes after Davenport invoked his right to silence. The circuit court found, however, that the continued interaction was a function of Davenport's custody; specifically, Davenport and the two detectives were locked in the Michigan jail's interview room while Schroeder knocked on the door to signal to the guard that the detectives were ready to leave. The circuit court also found that Davenport was "very

[5] Davenport asserts on appeal that after he invoked his rights in Michigan, all of his allegedly improper interactions with Detectives Rom and Schroeder "occurred in the car ride to Milwaukee." As the State points out, Davenport nonetheless refers to interactions that the detectives recorded in the Michigan jail following Davenport's invocation of his rights. In light of those references, and because the circuit court considered the propriety of the Michigan interaction, we consider it separately in our analysis. We caution Davenport's appellate counsel, however, that misleading information in briefs may lead to forfeiture of claims. A litigant must make clear what he or she is asking a court to decide. *Cf.* ***Bishop v. City of Burlington***, 2001 WI App 154, ¶8, 246 Wis. 2d 879, 631 N.W.2d 656.

gregarious and talkative" and that he filled the minutes of waiting time by making conversation with the detectives until they were able to leave the room. The audio recording of the Michigan interview supports the circuit court's findings, and therefore we will not disturb them. *See* ***id.*** Applying those findings to the applicable law, we conclude that the detectives did not violate the ***Edwards*** rule during their interaction with Davenport in Michigan. *See* ***State v. Harris***, 2017 WI 31, ¶31, 374 Wis. 2d 271, 892 N.W.2d 663 (explaining that police do not engage in interrogation merely by making context-appropriate comments or by responding to a suspect's inquiries).

The next question is whether the detectives interrogated Davenport in the transport van. Relying on his own testimony at the suppression hearing, Davenport contends that the detectives "transporting Davenport to Milwaukee continued to talk to him about this case [and about] potential offers, and even pushed Davenport to speak without an attorney." He also claims that during the ride, the detectives promised him a "five in and five out deal," and offered to call the district attorney.

While Davenport did give such testimony, the circuit court found that he was not credible and did not believe him. Instead, the circuit court credited the testimony of the other prisoner in the transport van, finding that the second prisoner was a disinterested observer of Davenport's interaction with the detectives. According to that observer, Davenport never discussed the specifics of his charges with the detectives while in the van and instead volunteered that he had information, which he did not reveal, regarding other crimes. The circuit court reiterated its finding that Davenport "talk[s] a lot, a lot," and found that the detectives' portion of the conversation with Davenport in the transport van merely involved acknowledging his chatter with neutral responses. Again, the circuit court's findings are supported by the evidence presented at the hearing and are not clearly erroneous. We therefore will not disturb those

findings. *See* ***Harrell***, 329 Wis. 2d 480, ¶8. In light of the facts found by the circuit court, no basis exists to conclude that the officers violated the ***Edwards*** rule by interrogating Davenport while riding with him in the van. *See* ***Harris***, 374 Wis. 2d 271, ¶31.

Next, the circuit court found that while Davenport was confined in the Milwaukee County Jail, he asked to speak to Detectives Rom and Schroeder. The circuit court found that Davenport was not being interrogated at the time that he made the request and that he voluntarily sought out the detectives. When Detectives Rom and Schroeder responded to the request on July 4, 2019, Davenport confirmed that he wanted to talk to them. These findings are supported by the testimony and are not clearly erroneous. They show that Davenport independently reinitiated interaction with Detectives Rom and Schroeder. Because Davenport reinitiated contact with the detectives before they interviewed him on July 4, 2019, that interview did not violate the ***Edwards*** rule.

The remaining question is whether Davenport validly waived his rights to counsel and to remain silent before the detectives interrogated him in the Milwaukee County Jail on July 4, 2019. Davenport does not dispute that, as reflected in the video recording of the custodial interview, he waived his rights only after the officers provided the warnings required by ***Miranda v. Arizona***, 384 U.S. 436, 478-79 (1966).[6] "[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the

[6] In ***Miranda v. Arizona***, 384 U.S. 436, 478-79 (1966), the Supreme Court held that before questioning a suspect in custody, officers must inform the person of, *inter alia*, the right to remain silent, the fact that any statements made may be used at trial, the right to have an attorney present during questioning, and the right to have an attorney appointed if the person cannot afford one.

law enforcement authorities adhered to the dictates of ***Miranda*** are rare." ***State v. Ward***, 2009 WI 60, ¶61, 318 Wis. 2d 301, 767 N.W.2d 236 (citations omitted). This is not the rare case.

According to Davenport, his inculpatory statements were compelled because he was "worn down" by the pressure that the detectives previously applied in the transport van. Only Davenport testified that the detectives applied any pressure, however, and the circuit court rejected that testimony, explaining: "I don't find any of that credible." The circuit court found instead that Davenport was "a talkative person" who gave a statement because that was "what Mr. Davenport wanted to do."

For Fifth Amendment purposes, "[a] statement is not involuntary ... unless the statement was obtained by coercive police activity.... If the defendant fails to establish that the police used actual coercive or improper pressure to compel the statement, the inquiry ends." ***State v. Owen***, 202 Wis. 2d 620, 641-42, 551 N.W.2d 50 (Ct. App. 1996). In light of the circuit court's findings of fact, Davenport failed to establish coercion or improper pressure. The circuit court therefore properly denied the suppression motion.

*Motion to Withdraw Guilty Plea Prior to Sentencing*

A defendant who moves to withdraw a guilty plea prior to sentencing must show by a preponderance of the evidence that a fair and just reason exists for plea withdrawal. *See* ***State v. Lopez***, 2014 WI 11, ¶61, 353 Wis. 2d 1, 843 N.W.2d 390. To demonstrate a fair and just reason, the defendant must present an adequate reason for his or her change of heart other than a mere desire to have a trial. *See* ***State v. Bollig***, 2000 WI 6, ¶29, 232 Wis. 2d 561, 605 N.W.2d 199. If the defendant satisfies that standard, the defendant may withdraw his or her guilty plea if the prosecution has not been substantially prejudiced by its reliance on the plea. *See* ***id.***, ¶34.

The decision to grant or deny a motion for plea withdrawal prior to sentencing rests in the circuit court's discretion, and we will uphold that decision as long as the circuit court reasonably applied the correct standard of law to the facts of record. *See* ***State v. Jenkins***, 2007 WI 96, ¶30, 303 Wis. 2d 157, 736 N.W.2d 24. In conducting our review, we will accept the circuit court's findings of historical or evidentiary fact unless they are clearly erroneous. *See* ***id.***, ¶33. We defer to the circuit court's assessments as to the credibility of the witnesses, and our deference extends to any proffered explanation for the plea withdrawal request. *See* ***State v. Kivioja***, 225 Wis. 2d 271, 289-91, 592 N.W.2d 220 (1999). "If 'the circuit court does not believe the defendant's asserted reasons for withdrawal of the plea, there is no fair and just reason to allow withdrawal of the plea." ***Jenkins***, 303 Wis. 2d 157, ¶34 (citation omitted).

Here, Davenport claimed that he had two fair and just reasons to withdraw his guilty plea prior to sentencing. First, he alleged that he was coerced to plead guilty by his original trial attorneys, who told him that they were unprepared for trial and planned to "wing it." Second, he alleged that a private investigator working for his successor counsel had obtained a recantation from Bonds, who advised that "everything he told to [police] was fabricated."[7] The circuit court

[7] Davenport also sought plea withdrawal because, he testified, his original trial attorneys told him that he could appeal the denial of his suppression motion but neglected to explain that he "would be removing the burden from the State of proving [his] guilt and placing it upon [him]self to prove [his] innocence." We are unable to discern the error that Davenport alleged. Pursuant to WIS. STAT. § 971.31(10), a defendant who pleads guilty may indeed appeal an order denying a suppression motion. When a defendant pursues such an appeal, we independently apply the facts to the law. *See* ***State v. Sobczak***, 2013 WI 52, ¶9, 347 Wis. 2d 724, 833 N.W.2d 59. Moreover, if the defendant prevails on appeal, the defendant is entitled to reversal "unless the State proves that the defendant would have entered the plea even if the evidence had been suppressed." *See* ***State v. Abbott***, 2020 WI App 25, ¶41, 392 Wis. 2d 232, 944 N.W.2d 8. In light of the foregoing, Davenport's testimony failed to clarify how his trial attorneys misadvised him. Regardless, he does not develop any argument in his appellate briefs explaining why his trial counsels' advisements about an appeal should have earned him relief. We will not develop an argument for him. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

rejected these claims after hearing testimony from Davenport and from Attorneys Opland-Dobs and Guimont, and after considering the various statements that Bonds gave to Davenport's successor trial counsel and to the State.

Regarding the allegations of coercion and alleged lack of trial preparation, the circuit court found that Davenport was not credible and did not believe his testimony. In making that credibility assessment, the circuit court considered his admissions during the hearing that at times he is not truthful and that he had previously lied to the court. The circuit court instead believed the testimony of Attorneys Opland-Dobs and Guimont, who denied that they pressured Davenport to plead guilty and explained that the case was ready for trial on February 3, 2020, following months of preparation.[8] Based on the lawyers' testimony, the circuit court found that Davenport's trial attorneys had conducted "many, many jury trials," "had been in preparation mode for months," and were "ready, willing[,] and able" to try Davenport's case on February 3, 2020. The circuit court went on to find that Davenport knew that he faced life imprisonment if he was convicted of first-degree intentional homicide and knew that he would have an opportunity for a life outside of prison if convicted of a lesser offense. The circuit court found that Davenport "weighed [his] options [him]self and made a decision," specifically, to plead guilty to first-degree reckless homicide and avoid a first-degree intentional homicide trial at which the jury would have heard his confession. Because the circuit court did not believe

[8] We observe that Davenport's successor counsel conceded at the conclusion of the testimony that she "ha[d] no doubt that Attorneys Opland-Dobs and Guimont did preparation to have Mr. Davenport's trial," but argued that Davenport "lost confidence" in those lawyers when they asked for an adjournment to accommodate his changing wishes on the day of trial.

Davenport when he testified that his trial attorneys coerced his plea, that testimony did not establish a fair and just reason for plea withdrawal. *See **id.***

The circuit court also rejected Bonds's alleged recantation as a basis for Davenport to withdraw his plea. A recantation can constitute a fair and just reason for plea withdrawal, *see **Kivioja***, 225 Wis. 2d at 290-95, but "the circuit court must determine that the recantation has reasonable indicia of reliability," *see **id.*** at 295. Here, the recantation lacked traditional assurances of trustworthiness: it was not spontaneous, corroborated, or against Bonds's penal interest. *See **id.*** at 296-97. Additionally, the circuit court considered the recantation in conjunction with a subsequent letter that Bonds sent to the prosecutor disavowing the recantation and asserting that he recanted only because he and his family had been threatened by Davenport and his "people." In light of these various statements, the circuit court found that Bonds "flip flops," and Davenport agreed. The circuit court's uncontested assessment of Bonds's conflicting statements together with the lack of indicia of reliability constituted a finding that the recantation was incredible as a matter of law, *see **id.*** at 297-98, 301, and supported the circuit court's decision to reject the recantation as neither credible nor believable.

In sum, Davenport failed to demonstrate that he had a fair and just reason to withdraw his plea before sentencing. The circuit court reasonably exercised its discretion in denying the motion.

*Motion to Withdraw Plea After Sentencing*

A defendant seeking to withdraw a plea after sentencing must establish by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. *See **State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. To demonstrate a manifest

injustice, the defendant is required to show "a serious flaw in the fundamental integrity of the plea." ***Id.*** (citations omitted). Both ineffective assistance of counsel and an involuntary plea may constitute a manifest injustice. *See* ***State v. Cain***, 2012 WI 68, ¶26, 342 Wis. 2d 1, 816 N.W.2d 177.

Davenport sought post-sentencing plea withdrawal primarily on the basis of his interlocking allegations that his trial attorneys were ineffective and coerced his guilty plea. In support, he renewed his allegations that his attorneys were unprepared for trial and pressured him to enter a guilty plea. He coupled these allegations with claims that the circuit court "badgered" and coerced him to plead guilty, and he additionally alleged that he did not receive a copy of the discovery before pleading guilty and therefore "did not know his case."

When a defendant seeks plea withdrawal based on factors extrinsic to the plea colloquy, the defendant is entitled to a hearing on the motion only if the defendant alleges "'sufficient material facts' that would allow a reviewing court 'to meaningfully assess' a defendant's claim." *See* ***State v. Sulla***, 2016 WI 46, ¶26, 369 Wis. 2d 225, 880 N.W.2d 659 (citations omitted). The circuit court has discretion to deny the motion without a hearing if the defendant does not allege sufficient material facts, "or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief[.]" ***Id.***, ¶27 (citations omitted). To assess the sufficiency of a postconviction claim, a court considers whether the defendant alleged "the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." ***Id.***, ¶26 (citation omitted). Under the foregoing analysis, we conclude that the circuit court properly rejected Davenport's post-sentencing claims for plea withdrawal without conducting a hearing.

First, the record conclusively defeats Davenport's claim that his original trial attorneys were ineffective for failing to prepare for trial. A defendant raising claims of ineffective assistance of counsel must satisfy a familiar two-prong test that requires the defendant to show both that counsel's performance was deficient and that the deficiency was prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If the defendant fails to satisfy one prong of the analysis, a court need not consider the other. *See* ***id.*** at 697.

Here, Davenport supported his postsentencing claim that his attorneys were unprepared for trial by pointing to his own testimony at the presentence hearing for plea withdrawal. The circuit court, however, explicitly disbelieved his testimony. The circuit court found instead that his trial attorneys were "ready, willing[,] and able" to try the case on February 3, 2020. Davenport did not identify any new or different information that might affect this finding.[9] Accordingly, Davenport did not demonstrate any deficiency in his trial attorneys' performance. The circuit court therefore properly rejected this claim.

Second, Davenport failed to offer sufficient material facts in his postconviction motion to demonstrate that his trial attorneys improperly pressured him to plead guilty. As to this claim, Davenport did not rest on his own discredited testimony but instead relied on a letter that his sister, Kimbrough, provided to his postconviction counsel. According to Kimbrough, Davenport

[9] In this regard, we have considered Davenport's assertion on appeal that Attorney Guimont told the circuit court on the day of trial that he and his co-counsel "were not prepared to go to trial." We have carefully examined the record citation that Davenport offers in support of that assertion, as well as the surrounding pages of the applicable transcript. The transcript does not include such a statement. To the contrary, Attorney Guimont told the circuit court that the defense was "going to need to ... get [Davenport] some jury clothes; and we'll start picking a jury." We caution appellate counsel that attorneys must ensure that the facts stated in documents filed in this court are an accurate reflection of the record. Misrepresenting the record is grounds for sanctions.

decided to plead guilty because "his attorneys said it was the best thing for him." That allegation does not support a claim that trial counsel acted improperly. "[A] lawyer has the right and duty to recommend a plea bargain if he or she feels it is in the best interests of the accused." ***State v. Provo***, 2004 WI App 97, ¶17, 272 Wis. 2d 837, 681 N.W.2d 272. Davenport thus shows no deficiency here.

Third, Davenport offered only a conclusory assertion that he should be permitted to withdraw his plea because his trial attorneys did not give him a copy of the discovery evidence. The assertion appears to be a claim of ineffective assistance of trial counsel, but Davenport failed to support that claim with allegations of material fact. *See* ***Sulla***, 369 Wis. 2d 225, ¶26. He did not describe what information he lacked at the time of his guilty plea, and he did not offer any reasons why the allegedly missing information would have led him to reject a plea agreement and insist on a trial. Accordingly, Davenport failed to demonstrate any prejudice arising from the alleged deficiency. *See* ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) (holding that to satisfy the prejudice prong of ***Strickland*** in the context of a request for plea withdrawal, a defendant must show a reasonable probability that, but for counsel's alleged error, the defendant would not have pled guilty but would have gone to trial).

Fourth, the record does not offer any support for Davenport's contention that the circuit court coerced his plea. The record instead shows that when Davenport told the circuit court that he wanted a trial, the circuit court questioned him to ascertain his wishes and to ensure his understanding that if "convicted of first-degree intentional homicide, that is a life sentence.... [If] convicted of first-degree reckless homicide, it is not a life sentence[.]" The circuit court's inquiry fits well within the parameters of an appropriate colloquy and was not coercive. A circuit court may properly ensure that a defendant has carefully considered the risks of

proceeding to trial. *See* ***State v. Hunter***, 2005 WI App 5, ¶12, 278 Wis. 2d 419, 692 N.W.2d 256. Moreover, "[t]he fact that a defendant must make a choice between two reasonable alternatives and take the consequences is not coercive of the choice finally made. The distinction between a motivation which induces and a force which compels the human mind to act must always be kept in focus." *See* ***Rahhal v. State***, 52 Wis. 2d 144, 151-52, 187 N.W.2d 800 (1971).

Last, and relatedly, the record conclusively refutes the claim that the circuit court "badger[ed]" Davenport to plead guilty. The circuit court in fact advised him that it was "very reluctant" to accept the guilty plea that he offered. Indeed, Davenport fails to direct our attention to anything that supports his claim; he points solely to the circuit court's inquiries to determine whether he wanted an adjournment. We observe that his allegation of circuit court "badgering" comes perilously close to the line that separates a feeble claim from a frivolous one. For all the foregoing reasons, we affirm.

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.

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*Sheila T. Reiff*
*Clerk of Court of Appeals*