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DISTRICT I

June 20, 2023

To:

Hon. Milton L. Childs Sr.
Circuit Court Judge
Electronic Notice

Hon. David A. Hansher
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Jeffrey W. Jensen
Electronic Notice

Anne Christenson Murphy
Electronic Notice

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

2021AP2000-CR State of Wisconsin v. Lavell Ireland (L.C. # 2016CF3148)

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).

Lavell Ireland appeals from a judgment of conviction and an order that denied his postconviction motion for plea withdrawal without a hearing. 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 (2021-22).[1] The judgment and order are summarily affirmed.

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

BACKGROUND

According to the criminal complaint, Ireland had been working on a tar crew led by J.H. for about a week and had caused problems the entire time. J.H. reported to supervisors that Ireland had a bad attitude and should not be working on his team. On July 12, 2016, Ireland began an argument with J.H., telling him, "You went and snitched on me." J.H. started explaining why Ireland was removed from his crew when Ireland pulled a box cutter out of his pocket and slashed J.H.'s throat. Ireland got into his truck and drove away. J.H. was able to flag down help; he was transported to the hospital and had surgery, requiring twenty stitches.

Ireland was charged with one count of attempted first-degree intentional homicide as a habitual criminal on July 14, 2016. An amended information filed in February 2017 added the dangerous weapon penalty enhancer to the attempted homicide charge and a new charge of first-degree recklessly endangering safety with use of a dangerous weapon.

The trial was set to begin on March 19, 2018. That morning, the State filed another amended information to add a third charge, first-degree reckless injury with use of a dangerous weapon. While the jury was assembling, Ireland accepted a plea offer from the State under which he would plead guilty to the reckless injury charge, minus the dangerous weapon enhancer, and the other two charges would be dismissed.[2] The circuit court accepted the plea and later sentenced Ireland to ten years of initial confinement and ten years of extended

[2] We observe that both the original judgment of conviction from March 2018 and the amended judgment of conviction from May 2019 include the weapon enhancer in the charge description. Presumably, this is a scrivener's error; counsel for Ireland may wish to seek a correction from the circuit court. *See* ***State v. Prihoda***, 2000 WI 123, ¶¶26-27, 239 Wis. 2d 244, 618 N.W.2d 857.

supervision, concurrent to anything he was then serving, out of a maximum possible twenty-five years' imprisonment.[3]

In July 2021, Ireland filed a postconviction motion seeking to withdraw his plea on two grounds. First, he alleged that trial counsel had been ineffective for failing to explain double jeopardy as it related to his charges. Second, he alleged that his plea was not knowing, intelligent, and voluntary because his attorneys told him the morning of trial that they had not subpoenaed witnesses, so he subjectively perceived that his attorneys were not ready to proceed with trial. The circuit court denied the motion after briefing but without a hearing, concluding that Ireland had not pled sufficient facts to support the motion.[4] Ireland appeals.

DISCUSSION

We review the circuit court's denial of a plea withdrawal motion for an erroneous exercise of discretion. *See* ***State v. Savage***, 2020 WI 93, ¶24, 395 Wis. 2d 1, 951 N.W.2d 838. A defendant who seeks to withdraw a plea after sentencing must show by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. *See* ***id.*** Examples of manifest injustice include ineffective assistance of counsel, *see* ***id.***, and a plea that is not knowingly, intelligently, and voluntarily entered, *see* ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906.

"A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106,

[3] The Honorable David A. Hansher accepted Ireland's plea and imposed sentence.

[4] The Honorable Milton L. Childs, Sr., denied the postconviction motion.

¶14, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the motion alleges sufficient material facts within its four corners is a question of law we review de novo. *See* ***id.***, ¶¶9, 23. If the motion does not raise sufficient facts, if the motion presents only conclusory allegations, or if the records conclusively demonstrate that the defendant is not entitled to relief, then the decision about whether to grant a hearing is committed to the circuit court's discretion. *See* ***id.***, ¶9. We review such a decision for an erroneous exercise of discretion. *See* ***id.***

I. Double Jeopardy/Multiplicity

Ireland's first claim of manifest injustice is that "his lawyers were ineffective in failing to explain to him the double-jeopardy implication of the charges in the amended information" and that, had he "known that, as a matter of law, he could not have been convicted of all of the charges he faced, he would not have pleaded guilty. He would have, instead, proceeded to trial." To demonstrate ineffective assistance of counsel, "the defendant must prove: (1) that trial counsel's performance was deficient; and (2) that this deficiency prejudiced the defendant." *See* ***State v. Dillard***, 2014 WI 123, ¶85, 358 Wis. 2d 543, 859 N.W.2d 44. The movant must prevail on both prongs to secure relief. *See* ***Allen***, 274 Wis. 2d 586, ¶26.

The double jeopardy issue to which Ireland refers is one of multiplicity. "Multiplicity is defined as the charging of a single criminal offense in more than one count." ***State v. Grayson***, 172 Wis. 2d 156, 159, 793 N.W.2d 23 (1992). "Multiplicitous charges are impermissible because they violate the double jeopardy provisions of the Wisconsin and United States Constitutions." ***Id.*** The double jeopardy provisions protect three interests, one of which is "protection against multiple punishments for the same offense." *See* ***State v. Lechner***, 217 Wis. 2d 392, 401, 576 N.W.2d 912 (1998) (citations omitted). This particular protection, along

with multiplicity concerns, is generally invoked in cases involving lesser-included offenses. *See* ***id.*** at 402; *see also* WIS. STAT. § 939.66 (stating that "Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime, but not both.").

As a preliminary matter, we note that Ireland is correct that he could not have been convicted on all three counts as charged. First-degree recklessly endangering safety is a lesser-included offense of both attempted first-degree intentional homicide and first-degree reckless injury. *See* ***State v. Cox***, 2007 WI App 38, ¶8, 300 Wis. 2d 236, 730 N.W.2d 452; ***State v. Weso***, 60 Wis. 2d 404, 408, 210 N.W.2d 442 (1973). However, first-degree reckless injury is not a lesser-included offense of attempted first-degree intentional homicide.[5] Thus, although Ireland could not have been convicted of first-degree recklessly endangering safety along with either of the other, greater charges, he nevertheless could have been convicted of both attempted first-degree intentional homicide and first-degree reckless injury.

Ireland contends that he was led to believe "he was gaining a significant benefit" from dismissing the attempted homicide and reckless endangerment charges because there was "significant additional exposure to prison time" if he were to be convicted on all three charges. However, Ireland argues, "[t]his purported benefit … is largely illusory" because he could not have been convicted on all three offenses. "That is, dismissing counts one and two is of no real

[5] Wisconsin uses the "elements only" test from ***Blockburger v. United States***, 284 U.S. 299, 304 (1932), to determine whether charges are multiplicitous by evaluating whether the charges are identical in law and fact. *See* ***State v. Brantner***, 2020 WI 21, ¶25, 390 Wis. 2d 494, 939 N.W.2d 546. If offenses differ in law, they are not multiplicitous. *See* ***id.*** "[T]wo offenses are different in law if each statutory crime requires for conviction proof of an element which the other does not." *See* ***State v. Lechner***, 217 Wis. 2d 392, 405, 576 N.W.2d 912 (1998). First-degree reckless injury and attempted first-degree intentional homicide differ in law because reckless injury requires proof of an injury where attempted homicide does not, and attempted homicide requires an intent to kill where reckless injury does not.

benefit to Ireland because he could not have been convicted of both of those counts anyway." Had he known that, Ireland says, he would not have accepted the State's officer and would have chosen to go to trial. Thus, he contends, "[t]rial counsel's failure to explain this double-jeopardy analysis to Ireland is deficient performance."

Rejecting Ireland's motion, the circuit court stated that Ireland "has not explained why he would have not have pled and would have gone to trial and risk a de facto life sentence." The plea agreement in this case took that possibility off the table. The defendant's bare-bones allegation is not sufficient to warrant an evidentiary hearing." In his brief, Ireland counters:

> This is simply untrue. Ireland's motion did explain why he would have proceeded to trial. The motion alleged that if Ireland had known that he could only have been convicted of two of the three counts at trial, he would not have pleaded guilty, and he would have gone to trial. That is Ireland's reason. In deciding whether to grant an evidentiary hearing, the circuit court must assume that this allegation is true.

Assuming without deciding that trial counsel did, in fact, perform deficiently, that is only half of the ineffective assistance equation, and Ireland's motion fails to allege sufficient material facts to establish prejudice.

To prove prejudice in the plea withdrawal context, "a defendant must establish a reasonable probability that he or she would not have pled and would have gone to trial but for counsel's ineffective performance." ***State v. Jeninga***, 2019 WI App 14, ¶12, 386 Wis. 2d 336, 925 N.W.2d 574. This requires a defendant to "make more than a conclusory allegation that he or she would not have pled but would have gone to trial"; the defendant "must provide a 'specific explanation'" of *why* he or she would have gone to trial. *See* ***id.***, ¶14 (citations omitted). Though Ireland's motion asserted that his "testimony at the [evidentiary] hearing"

would establish he would not have pleaded guilty if he had known more about double jeopardy, "[a] defendant may not rely on conclusory allegations of deficient performance and prejudice, hoping to supplement them at an evidentiary hearing." ***State v. Amonoo***, 2012 WI App 27, ¶11, 339 Wis. 2d 491, 809 N.W.2d 901.

Ireland's *ipse dixit* reasoning does not, in fact, tell us why, had he known he could not have been convicted of all three offenses, he would have instead opted for a trial in which he faced attempted first-degree intentional homicide and first-degree reckless injury charges with enhancers. Ireland faced over 118 years' imprisonment on the three enhanced charges. Eliminating the reckless endangerment charge,[6] Ireland's maximum exposure on the enhanced attempted homicide and enhanced reckless injury charges was 101 years' of imprisonment. However, the maximum exposure for the single, unenhanced recklessly injury charge to which Ireland pled was twenty-five years' of imprisonment. This means that even without considering the effect of dismissing the reckless endangerment charge, the plea agreement reduced Ireland's exposure by over seventy-five percent. Nowhere does Ireland explain how this reduction is "largely illusory" or not a "significant benefit" to him. We agree with the circuit court that Ireland's conclusory allegations were insufficient to require an evidentiary hearing, and we discern no erroneous exercise of the circuit court's discretion in refusing to grant one.

II. Invalid Plea

Ireland's postconviction motion also alleged that his decision to plead was "driven by his reasonable belief that his lawyers were unprepared to proceed to trial. Specifically, on the

[6] Had Ireland been convicted on all three offenses and the multiplicity matter not resolved before appeal, the remedy would have been to vacate the conviction on the lesser-included offense. *See* ***State v. Kloss***, 2019 WI App 13, ¶37, 386 Wis. 2d 314, 925 N.W.2d 563..

morning of trial, the lawyers informed Ireland that they had not subpoenaed any of his witnesses." He contends that his plea was not "freely, voluntarily, and intelligently made" because "at the time he entered his guilty plea, his subjective perception was that his attorneys were unprepared to defend him at trial[.]" Ireland expressly states that he is not claiming ineffective assistance from his attorneys, so he need not show prejudice; rather, he says, his claim should be "analyzed under due process principles: did Ireland freely, voluntarily, and intelligently give up his right to trial."

Regardless of his ultimate legal theory, Ireland must still allege sufficient facts that allow a reviewing court to meaningfully assess his claims. *See* ***Allen***, 274 Wis. 2d 568, ¶21. Here, while Ireland identifies the witnesses whom he believes trial counsel should have subpoenaed, and what he believes those witnesses would have said, he fails to explain why that testimony was relevant, how its unavailability led Ireland to conclude that trial counsel was unprepared for trial, and why that conclusion made him believe his only option was to enter a plea. Ireland also does not explain why, if he felt his attorneys were unprepared, he gave an affirmative answer when the circuit court asked him at the plea hearing if he was satisfied "with the way both of [his] attorneys [had] represented [him.]"

We agree with the circuit court that Ireland's claim of an unknowing plea was also conclusory. Thus, an evidentiary hearing was not required, and we are unpersuaded that the circuit court erroneously exercised its discretion when it declined to grant one.[7]

Therefore,

IT IS ORDERED that the judgment and 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

[7] In his motion, Ireland cites to ***State v. Hoppe***, 2009 WI 41, 317 Wis. 2d 161, 765 N.W.2d 794, and argues that although the circuit court in that case ultimately disbelieved Hoppe's claim "that his plea was involuntary because he believed his attorney was unprepared to defend him at trial," the claim was nevertheless "the subject of an evidentiary hearing. Here, then, the court must conduct an evidentiary hearing[.]"

Hoppe does not stand for the proposition that a postconviction evidentiary hearing is required whenever a defendant alleges his plea was involuntary because he believed counsel was unprepared. ***Hoppe*** secured an evidentiary hearing because he had satisfied the defective-plea-colloquy pleading requirements of ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). *See* ***Hoppe***, 317 Wis. 2d 161, ¶¶7, 43. ***Bangert*** presents a different path to plea withdrawal than the path of ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996) and ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972), which relies on factors extrinsic to the plea colloquy as Ireland did here. *See* ***Hoppe***, 317 Wis. 2d 161, ¶59. Although the circuit court in ***Hoppe*** conducted evidentiary proceedings on Hoppe's ***Nelson/Bentley*** claims, there is no separate discussion of whether that portion of the postconviction motion was sufficiently pled to secure a hearing had it been a standalone claim.