COURT OF APPEALS
DECISION
DATED AND FILED

April 1, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP311-CR **Cir. Ct. No. 2006CF4987**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

IVEN LEE CALDWELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KEVIN E. MARTENS and JEFFREY A. WAGNER, Judges. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Iven Lee Caldwell appeals from an amended judgment of conviction, entered upon his no-contest plea, on one count of first-degree intentional homicide. He also appeals from an order denying his most

recent postconviction motion to withdraw his plea and have a new trial.[1] Caldwell contends that his trial, original postconviction, and resentencing attorneys were all ineffective and that the circuit courts erred in refusing to allow him to withdraw his plea prior to sentencing. We conclude that the circuit courts properly exercised their discretion in refusing the withdrawal requests and that the attorneys were not ineffective. Therefore, we affirm the judgment and order.

BACKGROUND

¶2 On August 25, 2006, police were dispatched to a fire, where they discovered the body of Lusheena Watts burning. The medical examiner determined her cause of death to be consistent with strangulation. Police arrested Caldwell, Mekious Bullock, and Thomas Wilder in connection with the death. All three men gave statements to police.

¶3 Wilder told police that Caldwell wanted to kill Watts because she was feeding information to rival drug dealers, causing problems for Caldwell and Bullock. Wilder had allowed Caldwell to use his van to take Bullock and Watts somewhere to have sex, though Wilder did not know if the other men were really going to have sex with her or if they were going to kill her. When Caldwell and Watts came to pick up Wilder, he got in the van while Caldwell was driving and Bullock was in the back, choking Watts with both hands. Wilder admitted helping dispose of the body. He was willing to testify against Caldwell at trial.

[1] The Honorable Kevin E. Martens entered the challenged judgment; the Honorable Jeffrey A. Wagner entered the challenged order.

¶4 Bullock admitted his participation in Watts's death, telling police that Caldwell wanted to get rid of her for giving information to their rivals. Bullock told police that Caldwell arranged for them to have sex with Watts as a pretense for getting her into the van. Bullock also told police that Caldwell put on gloves and started choking Watts before telling Bullock to continue choking her.

¶5 Caldwell also admitted involvement in Watts's death, including driving the van and engaging Watts in a sex act. However, he claimed it was Bullock who wanted to get rid of her and who made arrangements to get her into the van. Caldwell and Bullock were charged with first-degree intentional homicide as a party to a crime and mutilating a corpse as a party to a crime; Wilder was only charged with mutilating a corpse.

¶6 After his first attorney was allowed to withdraw, Caldwell was represented by Attorney Scott Anderson. Anderson convinced Caldwell to plead no contest to the homicide charge. In exchange for the plea, the State would drop the mutilation charge and stand mute on Caldwell's eligibility for release to extended supervision. On March 24, 2008, the circuit court conducted a colloquy and accepted Caldwell's plea.[2]

¶7 On April 2, 2008, Caldwell sent a letter to the circuit court stating, in part, "I'm writing to inform you on the misconduct of my State appointed Attorney…. I wanted to enter a special plea, but my Attorney refused to motion it to the court. Given my diagnosis I would like to enter the NGI plea. I will not

[2] Judge Wagner took the plea and conducted the colloquy.

accept any other plea."[3] Shortly thereafter, Caldwell sent a second letter to the circuit court, complaining, among other things, that he had accepted a plea agreement that he did not feel was in his best interest; that his acceptance of the plea agreement violated his right to a jury trial; that Anderson "failed or made absolutely no meaningful attempt to construct any defense strategy" that Anderson "failed to investigate my other avenues as he'd been informed by the defendant had existed"; and that if it had not been for Anderson's "negative outlook and coercive tactics," Caldwell would not have accepted a plea agreement.

¶8 Anderson did not file a formal motion to withdraw Caldwell's plea, but he did call the circuit court's attention to Caldwell's desire at the start of the sentencing hearing. Anderson advised the court that he had concluded a not-guilty-by-reason-of-mental-disease-or-defect (NGI) plea was not viable, and suggested that perhaps Caldwell just wanted to attempt plea withdrawal based on some claim of misconduct against him.

¶9 The circuit court turned to Caldwell for more information. Caldwell told the circuit court only that he "felt it was ineffective counseling on his behalf that caused my decision for the plea at that moment and it wasn't what I wanted to do." The circuit court, however, noted that there was nothing in Caldwell's letters showing any deficiency by Anderson, and it explained that "[j]ust to change your mind doesn't do it." The circuit court thus concluded that Caldwell had advanced no fair and just reason warranting plea withdrawal, denied the plea withdrawal

[3] Early in the proceedings, Caldwell was diagnosed with depressive disorder and deemed incompetent. He was treated to competency. Subsequent competency evaluations all resulted in findings of competence and suggested malingering: at one of the hearings, one of the examiners testified that Caldwell's results "were so elevated that the likelihood of him malingering was a hundred percent based on research studies."

attempt, and proceeded to sentencing. The State recommended life in prison without eligibility for extended supervision, and that is the sentence the circuit court imposed.[4]

¶10 Attorney Paul Bonneson was appointed as Caldwell's postconviction counsel. He filed a motion to withdraw the plea or to vacate the prior sentence because of the State's breach of the plea agreement when it commented on extended supervision eligibility. The circuit court agreed that there had been a material and substantial breach of the agreement. It denied the request for plea withdrawal but ordered resentencing in front of a new judge.[5]

¶11 Attorney Lori Kuehn was appointed to represent Caldwell at the resentencing hearing. Though she did not file a formal motion, Kuehn informed the resentencing court that Caldwell wanted to withdraw his plea. The State objected on the grounds that the matter had "already been determined" and that the timing was inappropriate. The resentencing court noted that Bonneson had filed a postconviction motion upon which relief was granted and upon which the parties were now proceeding, so raising other postconviction issues was not procedurally proper. The motion to withdraw was therefore denied, and Caldwell was resentenced to life imprisonment without eligibility for extended supervision.[6]

[4] Judge Wagner also conducted the sentencing hearing.

[5] The Honorable Jeffrey A. Conen granted the resentencing motion.

[6] The resentencing hearing was conducted by Judge Martens, who entered the judgment of conviction from which Caldwell appeals.

¶12 Current counsel was then appointed for new postconviction proceedings. Through her, Caldwell filed a motion to withdraw the no-contest plea and for a new trial. The motion alleged, in relevant part,

> that (1) trial counsel provided ineffective assistance of counsel in failing to investigate, develop and present valid defense evidence to the charged offense; and (2) post-conviction and successor trial counsel provided ineffective assistance of counsel in failing to investigate and timely assert a valid basis for withdrawal of Mr. Caldwell's No Contest plea[.]

The circuit court concluded, based on the motion, that a hearing was required pursuant to ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).[7] Following the hearing, the circuit court adopted the State's proposed findings of fact, denied the motion to withdraw the plea, and denied the new trial request.[8]

¶13 On appeal, Caldwell challenges both sentencing courts' decisions to deny his plea withdrawal requests. He also challenges the denial of the postconviction motion to withdraw his plea, reasserting his claims of ineffective assistance. Additional facts will be discussed herein as necessary.

DISCUSSION

I. Presentencing Plea Withdrawal

A. Standard of Review

¶14 "Before sentencing, the court should permit a plea withdrawal for 'any fair and just reason.'" ***State v. Cross***, 2010 WI 70, ¶42, 326 Wis. 2d 492, 786

[7] The Honorable Richard J. Sankovitz reviewed the motion and ordered the hearing.

[8] Judge Wagner conducted the hearing and entered the order appealed from.

N.W.2d 64 (citation omitted). "A fair and just reason is some adequate reason for defendant's change of heart, other than the desire to have a trial." ***State v. Nelson***, 2005 WI App 113, ¶11, 282 Wis. 2d 502, 701 N.W.2d 32 (internal quotation marks, brackets, and ellipses omitted; citation omitted). "The defendant carries the burden of proving by a preponderance of the evidence that he or she seeks the plea withdrawal for a fair and just reason." ***State v. Manke***, 230 Wis. 2d 421, 426, 602 N.W.2d 139 (Ct. App. 1999). When the necessary showing has been made, withdrawal should be permitted unless the State will be substantially prejudiced by allowing the withdrawal. *See* ***State v. Shanks***, 152 Wis. 2d 284, 288-89, 448 N.W.2d 264 (Ct. App. 1989).

¶15 The circuit court's factual findings relative to the withdrawal question are sustained unless clearly erroneous. *See* ***State v. Jenkins***, 2007 WI 96, ¶33, 303 Wis. 2d 157, 736 N.W.2d 24. The circuit court's decision whether to allow plea withdrawal will be sustained unless the circuit court erroneously exercised its discretion.[9] *See* ***State v. Bollig***, 2000 WI 6, ¶14, 232 Wis. 2d 561, 605 N.W.2d 199. This is so even if this court or another court might have reached a different decision. *See* ***Manke***, 230 Wis. 2d at 430.

¶16 Though presentencing plea withdrawal should be freely allowed upon a showing of a fair and just reason, "'freely' does not mean 'automatically[.]'" *See* ***Bollig***, 232 Wis. 2d 561, ¶¶28-29. There are several factors to be considered in evaluating whether a proffered basis for plea

[9] Caldwell's brief frequently refers to the circuit court's "abuse of discretion." However, the phrase "abuse of discretion" was replaced by "erroneous exercise of discretion" more than twenty years ago. *See* ***City of Brookfield v. Milwaukee Metro. Sewerage Dist.***, 171 Wis. 2d 400, 423-24, 491 N.W.2d 484 (1992).

withdrawal is fair and just, including a claim of innocence, genuine misunderstanding of a plea's consequences, hasty entry of the plea, coercion by trial counsel, and the promptness of the withdrawal request. *See* ***State v. Rhodes***, 2008 WI App 32, ¶12, 307 Wis. 2d 350, 746 N.W.2d 599; ***Shanks***, 152 Wis. 2d at 290. Courts should take "a liberal, rather than a rigid, view of the reasons given for plea withdrawal." *See* ***Bollig***, 232 Wis. 2d 561, ¶29.

B. The First Plea Withdrawal Attempt

¶17 Caldwell contends that the original sentencing court erroneously exercised its discretion in denying his withdrawal request. He contends that his two *pro se* letters put the court on notice of trial counsel's misconduct and failure to prepare a defense, both of which were fair and just reasons for withdrawal. Further, he complains that the court "conducted virtually no colloquy with Caldwell" regarding this request to withdraw his plea, a colloquy for which Caldwell believes the need "became more imperative" once he complained about trial counsel's misconduct.

¶18 First, we reject outright any notion that the circuit court was required to engage Caldwell in a colloquy regarding his request for plea withdrawal. Aside from the fact that Caldwell cites no authority for such a proposition, such a requirement would be inconsistent with the defendant's burden to establish a fair and just reason for the plea withdrawal. *See* ***Manke***, 230 Wis. 2d at 426.

¶19 Second, Caldwell's letters say very little about his reasons for seeking plea withdrawal. His first letter merely asserts that he "would like to enter the NGI plea [and] will not accept any other plea," while the second letter complains that Anderson "made absolutely no meaningful attempt to construct any defense strategy" and "failed to investigate … other avenues." However,

Anderson explained that an NGI plea "certainly was considered at some point … but deemed not to be a viable way to go based on the competency."[10] Caldwell presented nothing then, and offers nothing now, to show any basis for an NGI plea.[11] But fair and just reasons must be supported by evidence of record and must be plausible. *See* ***Shanks***, 152 Wis. 2d at 290.

¶20 Caldwell's claims that counsel failed to pursue a defense or that counsel engaged in "misconduct" are similarly unsupported—indeed, the circuit court noted that it found no ineffectiveness on the record before it—and Caldwell never indicates what "other avenues" he told Anderson about.[12] In addition, while Caldwell's second letter contends that the plea violated his right to a jury trial, Caldwell does not claim that the plea colloquy was deficient in any way. The plea questionnaire and colloquy specifically warned Caldwell he was surrendering the right to a jury trial. *See* ***Jenkins***, 303 Wis. 2d 157, ¶62 (When a plea colloquy is sufficient, the defendant should "be able to show why it is fair and just to disregard the solemn answers the defendant gave in the colloquy.").

¶21 Ultimately, the sentencing court determined that "based upon the record and the psychologist's and psychiatrist's reports and the issue of malingering and what's transpired with this defendant, I have not heard anything that would allow for the defendant to withdraw his plea. I have not heard any fair

[10] That is, Anderson appears to be referring to the proceedings in which the competency examiners concluded Caldwell was malingering.

[11] In fact, at the postconviction hearing, Caldwell testified that he lost interest in an NGI plea once he learned it would require him to admit having a role in Watts's death.

[12] To the extent that Caldwell's complaint about Anderson's "failure" to pursue a defense or "other avenues" relates to whether Anderson should have pursued a possible lesser-included defense, we shall see below why the lesser-included claim fails on appeal.

and just reason." Those are factual findings, which we do not disturb because they are adequately supported by the record, and they sufficiently support the sentencing court's determination that Caldwell offered no fair and just reason for plea withdrawal.

C. The Second Plea Withdrawal Attempt

¶22 Caldwell contends that the resentencing court erroneously exercised its discretion when it concluded that Caldwell was barred from seeking such relief and denied his request for plea withdrawal or, alternatively, for adjournment for counsel to perfect a withdrawal motion. Caldwell also contends that he offered fair and just reasons for withdrawal to the resentencing court—specifically, he "asserted his 'innocence'" by disputing that portion of the presentence investigation report that said Caldwell admitted planning Watts's murder with Bullock, and he claimed that "he was confused about the nature of the charge to which he hastily pled" and about the consequences of his plea.

¶23 A proper exercise of discretion requires application of appropriate legal standards, *see* ***Manke***, 230 Wis. 2d at 426, and ***Manke*** at least implicitly holds that a defendant, awarded resentencing because of a plea breach, is returned to presentencing posture for purposes of a plea withdrawal motion, *see* ***id.*** at 427-28. Thus, Caldwell contends that it was error for the circuit court to conclude he was procedurally barred from seeking the withdrawal. The State responds that its reading of the court's decision is not that Caldwell was procedurally barred from seeking plea withdrawal but that the court saw nothing new since the prior request.

¶24 We are not wholly persuaded to agree with the State's reading of the circuit court's comments. After Attorney Kuehn explained that Caldwell had a "genuine misunderstanding" of the plea consequences and asserted they had

offered fair and just reasons for a plea withdrawal, the circuit court explained that this "doesn't change my view of the law as to the circumstances we're in today." The State's reading—that Caldwell had not presented a sufficiently fair and just reason to warrant anything other than proceeding on the resentencing already ordered—would be more accurate if the circuit court had simply said nothing changed its view of the circumstances as opposed to its view of the law.

¶25 When an erroneous exercise of discretion by application of an incorrect legal standard is alleged, we review the issue *de novo* and affirm if we can independently conclude that the facts of record, applied to the proper legal standard, support the circuit court's decision. *See* ***Rogers v. Rogers***, 2007 WI App 50, ¶7, 300 Wis. 2d 532, 731 N.W.2d 347. Here, we conclude that even under a liberal view, *see* ***Bollig***, 232 Wis. 2d 561, ¶29, Caldwell's proffered reasons to the resentencing court did not constitute fair and just reasons for plea withdrawal.

¶26 First, while Caldwell claims to have asserted his innocence, a claim of innocence alone is not sufficient to support a motion to withdraw. *See* ***Rhodes***, 307 Wis. 2d 350, ¶13. "The claim must be backed up with credible evidence to support it."[13] ***Id.***

¶27 Second, with regard to the plea, Caldwell claims both that he misunderstood the nature and consequences of his plea and that he misunderstood the nature of the charge to which he pled. The key thing Caldwell apparently

[13] The resentencing court ultimately rejected Caldwell's claims that he had nothing to do with Watts's death, noting that Wilder's information was "consistent with what [Caldwell] acknowledged when [he] told police at the time of the incident…. It's different than what [Caldwell's] said now subsequent." It further concluded that Caldwell and Bullock "hatched a plot to kill her. I don't know who thought of it first but you ultimately agreed."

misunderstood about the nature of his plea was that it would prevent him from telling his side of the story at trial. As noted above, however, the plea questionnaire and colloquy advised Caldwell he would be surrendering that right with his plea, and there is no claimed error to the colloquy. Additionally, there must be more to a plea withdrawal request than a simply desire to have a trial. *See* ***Bollig***, 232 Wis. 2d 561, ¶29.

¶28 With respect to the nature of the charge, Caldwell appears to hint that he did not fully understand party-to-a-crime liability, because he claims he was merely a bystander. However, the circuit court clearly explained party-to-a-crime liability during the colloquy, specifically informing Caldwell that "you don't aid and abet if you're a bystander or spectator innocent of any unlawful intent and does nothing to assist in the commission of the offense." We therefore conclude that the resentencing court did not erroneously exercise its discretion when it declined to allow the plea withdrawal.

II. Postconviction Plea Withdrawal

A. Standards of Review

1. Post-sentencing Plea Withdrawal

¶29 A defendant seeking to withdraw a plea after sentencing must show, by clear and convincing evidence, that refusal to allow the withdrawal will result in manifest injustice. *See* ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. Ineffective assistance of counsel is one example of manifest injustice. *See* ***State v. Taylor***, 2013 WI 34, ¶49, 347 Wis. 2d 30, 829 N.W.2d 482. As with presentencing motions, a circuit court's decision to permit post-sentencing plea withdrawal is committed to that court's discretion and reviewed for an

erroneous exercise thereof. *See* ***State v. Cain***, 2012 WI 68, ¶20, 342 Wis. 2d 1, 816 N.W.2d 177.

2. Ineffective Assistance of Counsel

¶30 To succeed on claims of ineffective assistance of counsel, Caldwell must show both that each attorney performed deficiently and that said deficiency was prejudicial. *See* ***State v. McDougle***, 2013 WI App 43, ¶43, 347 Wis. 2d 302, 830 N.W.2d 243. To demonstrate deficient performance, Caldwell must show facts from which we can conclude that the attorney's representation fell below objective standards of reasonableness. *See* ***id.*** To establish prejudice, Caldwell "'must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *See* ***id.***, ¶13 (quoting ***Strickland v. Washington***, 466 U.S. 668, 694 (1984)).

¶31 Whether a defendant was deprived of effective assistance of counsel is a mixed question of fact and law. *See* ***State v. Mayo***, 2007 WI 78, ¶32, 301 Wis. 2d 641, 734 N.W.2d 115. The circuit court's factual findings are upheld unless clearly erroneous, but whether counsel's performance was deficient or prejudicial based on those facts is a question of law we review *de novo*. *See* ***id.*** In this case, the circuit court determined, after the postconviction hearing, that Caldwell had demonstrated neither deficient performance by nor prejudice from his attorneys.

B. Trial Attorney Anderson

¶32 Caldwell launches a litany of complaints against Anderson, which we consolidate into three subject areas. First, he complains generally that

Anderson was deficient for failing to go over the facts of the case with him. In particular, he complains that Anderson: (1) did not thoroughly review with him the accuracy of statements attributed to Caldwell by police by reading them to Caldwell verbatim, even though Caldwell told one of his competency evaluators that he contested them; (2) failed to meet with Caldwell to discuss his inculpatory statements once a suppression motion was denied; (3) failed to follow-up on Caldwell's claim that he wanted to contest the homicide charge because he did not "have anything to do with the death" of Watts; (4) failed to conduct reasonable or effective communication with Caldwell regarding the underlying facts of Caldwell's role in order to prepare and present a defense to the two charges; (5) failed "to consider, prepare and present the only reasonable defense to the intentional homicide charge—some degree of reckless homicide"; and (6) first assessed the defense strength with Caldwell on the morning set for trial.

¶33 We are not convinced that Caldwell has demonstrated any deficient performance. Anderson testified that Caldwell was so preoccupied with an NGI plea that he never said much when Anderson did meet with him. One of the competency examiners, who ultimately deemed Caldwell to be malingering, noted that he was "generally avoidant of discussing relevant issues." We are not persuaded that it is deficient to not schedule additional meetings with an uncooperative client. Further, there was no evidence, save for the self-serving affidavit from Caldwell that the circuit court rejected, that Caldwell ever told Anderson he was a mere bystander who did not "have anything to do with" Watts's death. Caldwell also does not explain the deficiency in first assessing the strength of the case against him on the morning of trial; absent some additional factual details, we cannot say that Anderson was deficient merely for his timing.

¶34 Even assuming deficient performance, though, we are also unable to discern any prejudice. Caldwell asserts that the aforementioned deficiencies created prejudice in two ways. First, if Anderson had more thoroughly reviewed the record and facts, he "would have been able to develop and present a lesser-included offense to the intentional homicide charge." Second, Caldwell would not have felt compelled to enter a "hasty and unknowing" plea "rather than pursue the lesser-included defense at trial." But Caldwell has not demonstrated the viability of any lesser-included offenses as possible defenses. Though he evidently believes he could have argued for a conviction on first- or second-degree reckless homicide, he does not explain what facts exist that would allow a jury to reject the intentional homicide charge and convict him on either lesser-included offense. We cannot conclude that Anderson's performance was prejudicial for failing to pursue defenses that have no apparent basis in fact.

¶35 Caldwell's second area of complaint is that Anderson was ineffective for not thoroughly reviewing the presentence investigation with him. Because of this failure, Anderson supposedly failed to determine and advise the court that Caldwell took issue with certain statements in the report; specifically, the author's claim that Caldwell admitted that he and Bullock agreed to kill Watts prior to August 25, 2006.

¶36 Caldwell contends this failure was prejudicial for two reasons. First, because Anderson noted no disputes with the presentence investigation, it allowed the State to argue against the plea withdrawal request and to argue that the first sentencing should go forward because witnesses and victims[14] were present.

[14] As best we can tell, Caldwell is using "victims" to refer to Watts's family.

Second, had Anderson properly reviewed the report with Caldwell, he would have learned that Caldwell denied telling the authorities that he and Bullock planned or agreed in advance to kill Watts the day before her death—an "assertion of innocence" highly relevant to plea withdrawal.

¶37 Again, we discern no prejudice. The circuit court did not reject plea withdrawal because the witnesses and victims were present and ready for sentencing but because it concluded that Caldwell had offered no fair and just reason for the withdrawal. Moreover, the issue was essentially cured by the resentencing hearing at which Kuehn brought Caldwell's disputes with the PSI to the court's attention. Further, Caldwell's "assertion of innocence," as described, merely disavows planning the homicide the day before it happened; it does not deny responsibility for Watts's death.

¶38 Finally, Caldwell also complains that Anderson's post-plea and presentencing representation was deficient because he failed to meet with Caldwell to discuss his two *pro se* letters to the court. Caldwell claims prejudice because this failure prevented Caldwell from timely presenting "fair and just" reasons for Caldwell's plea withdrawal, like:

> (a) Caldwell's genuine misunderstanding of the nature of the No Contest plea and its consequences; (b) Caldwell's haste and confusion in entering the plea when confronted with Anderson's negative assessment of the case for the first time on the morning of trial; (c) coercion on the part of trial counsel in assessing the trial defense without even considering or discussing a lesser included defense with Caldwell; (d) Caldwell's confusion regarding a trial defense based upon Anderson's misleading advice that there was no chance for success at trial, when a lesser-included defense existed; (e) Caldwell's assertion of innocence (or a lesser degree of guilt); and (f) Caldwell's promptness in contacting the court and Anderson after his plea.

¶39 Yet again, we discern no prejudice; nor, in some instances, can we discern deficient performance. With respect to the "misunderstanding" of the nature of the no-contest plea, Caldwell claimed that he believed he was not admitting guilt but only that he could be found guilty "by me being there on the scene of the crime." This, however, is belied by the plea colloquy, where, as noted above, Caldwell was specifically told that a mere bystander cannot be convicted as a party to a crime. While Caldwell claims that he only later realized that a plea "prevented [him] from proceeding to trial" to tell his side of the story, this too is belied by the plea colloquy.

¶40 With respect to his "haste and confusion," Caldwell's primary complaint appears to be that Anderson did not fully assess the strength of the State's case for him until the morning set for trial. As noted above, Caldwell does not tell us what is deficient about this timing. Anderson indicated that this was not a "good case to try" given Caldwell's statements to police and the witness statements against him, and there was "very little theory of defense to go on," so it is not evident that the assessment required any particular length of time such that the morning of trial was inadequate preparation.

¶41 Caldwell claims "coercion" because Anderson assessed the case without discussing lesser-included defenses with him, and "confusion" because Anderson misleadingly told him there was no chance for success at trial. These complaints, however, are contingent upon successfully advancing a lesser-included defense. Again, though, Caldwell has not established the viability of

such a defense.[15] Also, to the extent that Caldwell still thinks he could have entered an NGI plea, he does not show the viability of that plea, either.

¶42 Finally, with respect to Caldwell's assertion of innocence[16] and the promptness of his claims, neither of those suffices as an independently fair and just reason for plea withdrawal. *See* ***Shanks***, 152 Wis. 2d at 290.

C. First Postconviction Attorney Bonneson

¶43 Caldwell contends that Attorney Paul Bonneson was deficient for his failure to investigate and present a meritorious basis for plea withdrawal—that is, Anderson's failure "to prepare and present an available lesser-included defense to intentional homicide"—when Caldwell insisted that he wanted to withdraw his plea. Additionally, Caldwell contends that Bonneson should have known that the preferred remedy for the State's plea breach was resentencing rather than plea withdrawal. The prejudice Caldwell claims is that "failure to plead that alternative and independent claim was unreasonable under the circumstances and prejudiced Caldwell by possibly waiving that claim for future litigation."[17]

¶44 First, Caldwell does not show any prejudice because, as already explained, he has not established the viability of a lesser-included defense. If a

[15] In many instances, Caldwell's complaints seem to be an attempt to use the criteria for plea withdrawal from ***State v. Rhodes***, 2008 WI App 32, ¶12, 307 Wis. 2d 350, 746 N.W.2d 599, like haste or coercion, as magic words whose invocation automatically warrants relief even without developing any specific facts.

[16] We question whether an assertion of, or alternative argument about, a "lesser degree of guilt" should be considered an assertion of innocence.

[17] *Possible* waiver does not amount to prejudice. Either there is no waiver, in which case there is no prejudice, or there is waiver, in which case there is only possible prejudice. Possible waiver is merely speculative.

lesser-included defense was not viable, Anderson was not ineffective for failing to pursue it and Bonneson was not ineffective for failing to challenge Anderson's performance. *See* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987).

¶45 Second, we also discern no deficient performance. Caldwell cites to ***Gray v. Greer***, 800 F.2d 644 (7th Cir. 1985), for the proposition that "post-conviction counsel's omission of significant and obvious issue constitutes deficient performance." From this, he argues that Bonneson's failure to challenge Anderson's performance is deficient performance. However, Caldwell misreads ***Gray***. That case notes that counsel's failure to raise a significant and obvious issue "*could be* viewed as deficient performance," but when a claim of ineffectiveness is premised on such a failure, the unraised issues are to be compared to issues that were raised. ***Id.*** at 646 (emphasis added).

¶46 "Generally, only when ignored issues are clearly stronger than those presented will the presumption of effective assistance of counsel be overcome." ***Id.***; *see also* ***State v. Starks***, 2013 WI 69, ¶60, 349 Wis. 2d 274, 833 N.W.2d 146 (formally adopting ***Gray***'s "clearly stronger" pleading test). Here, given the weakness of an ineffective-assistance claim against Anderson for not pursuing a lesser-included defense, and given the fact that Bonneson actually prevailed on the issue of the State's plea breach, we cannot conclude that Bonneson was deficient for failing to challenge Anderson's performance.

¶47 Finally, though it is true that resentencing is the preferred remedy for a plea breach by the State, it is not the only remedy available. *See* ***State v. Howard***, 2001 WI App 137, ¶¶31-36, 246 Wis. 2d 475, 630 N.W.2d 244. The circuit court may permit a plea withdrawal if it believes the facts of the case so warrant. *See* ***id.*** Ultimately, though, the choice of remedy belongs to the circuit

court, not the defendant. Bonneson moved the circuit court for both forms of relief; the circuit court simply chose a remedy other than what Caldwell preferred.[18]

D. Resentencing Attorney Kuehn

¶48 Finally, Caldwell contends that Attorney Kuehn was ineffective for not investigating or filing a motion to withdraw his plea prior to resentencing. It appears that Kuehn, like the circuit court, believed that such a motion could not be brought. Caldwell contends that he was prejudiced because Kuehn was unable to support her request for adjournment to investigate his plea withdrawal request. Further, Caldwell claims he was prevented from offering a fair and just reason for withdrawal to the circuit court—"i.e., a viable lesser-included defense and a misunderstanding as to the nature of and consequences for" his no-contest plea.

¶49 As noted earlier in this opinion, it appears that any belief a plea withdrawal motion was barred prior to resentencing was erroneous. *See* ***Manke***, 230 Wis. 2d at 427-28. To that end, Kuehn may have performed deficiently. However, there is no prejudice from Kuehn's performance, either. Again, Caldwell does not establish a viable lesser-included defense, and there is no clear indication of his misunderstanding of the nature or consequences of the plea in light of the unchallenged plea colloquy.

[18] Of course, to the extent that Caldwell is complaining about the remedies for a plea breach because he thinks that Bonneson should have also specifically sought plea withdrawal based on Anderson's ineffectiveness, we reiterate that Anderson's ineffectiveness has not been established.

¶50 Based on the foregoing, we agree with the circuit court's conclusion that there was no ineffective assistance of counsel. Also, aside from the lack of any prejudice from the specific claims Caldwell makes, we note that the evidence of Caldwell's guilt is overwhelming. *See* ***McDougle***, 342 Wis. 2d 302, ¶23. Caldwell admitted his role to police and to the PSI author, subsequent challenges notwithstanding. Caldwell took full responsibility at his first sentencing hearing. Bullock's statement largely corroborated Caldwell's admission to police, as did Wilder's statement. Wilder was also expected to testify against Caldwell if he went to trial. Accordingly, we conclude the circuit court properly denied the postconviction motion for relief.

By the Court.—Judgment and order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).