

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 7, 2017**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2016AP2311-CR  
2016AP2312-CR**

**Cir. Ct. Nos. 2014CF5079  
2015CF491**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**LEANDER J. HEARVEY,**

**DEFENDANT-APPELLANT.**

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APPEALS from judgments and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions 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).

¶1 PER CURIAM. Leander Hearvey appeals judgments convicting him of two counts of sexual assault of a child. He also appeals an order denying his postconviction motion to withdraw his pleas. The motion alleged ineffective assistance of counsel because Hearvey's trial attorney did not inform him that entry of the guilty pleas would waive his right to appeal the circuit court's order granting the State's motion for joinder of the two cases. The circuit court denied the postconviction motion, finding it conclusory. We affirm the judgments and order.

### **BACKGROUND**

¶2 In Milwaukee County case No. 2014CF5079, Hearvey was charged with first-degree sexual assault of a fifteen-year-old girl. According to the complaint, they met on a website and arranged a meeting at the victim's home to smoke marijuana. Hearvey called the victim before arriving at her house. When he arrived, he grabbed her and spun her around, covered her mouth with his hand, and told her to be quiet. He pulled a handgun from his pocket and held it to her head. Hearvey told her that if she screamed, he would shoot her. He then took his hand from her mouth and held a box cutter to her throat and repeatedly sexually assaulted her. The victim identified Hearvey by his Facebook photo, and police confirmed that Hearvey owned the telephone used to call the victim.

¶3 In Milwaukee County case No. 2015CF491, Hearvey was charged with first-degree sexual assault and kidnapping of a sixteen-year-old girl. According to the complaint, Hearvey attacked the victim as she walked through a cemetery. Hearvey approached her from behind, covered her mouth with his hand, and told her not to scream. He then removed his hand from her mouth, pulled a knife from his pocket and held it to her throat. He repeatedly sexually

assaulted her. During the assaults, Hearvey said, “They already looking for me. You aint [sic] the first person I did this to.” The victim eventually identified Hearvey from a photo array, and the semen collected from the victim matched Hearvey’s DNA.

¶4 The State filed a motion for joinder of the two cases, arguing evidence from each case was admissible as other acts evidence and citing the “greater latitude rule.” Over Hearvey’s objection, the circuit court granted the motion. Hearvey then entered guilty pleas to two counts of second-degree sexual assault of a child pursuant to a plea agreement that reduced his prison exposure by sixty years.

¶5 According to Hearvey’s postconviction motion, his trial attorney advised him to accept the State’s offer of a plea agreement because the joinder decision made it impossible for Hearvey to prevail at trial. Hearvey’s affidavit in support of the motion says his trial attorney told him it was error for the court to allow the cases to be tried together and that he therefore had grounds for appeal. Hearvey avers that his attorney did not inform him, nor did he ever understand, that by entering the pleas he would be waiving his right to appeal the joinder of the two cases. The circuit court denied the postconviction motion without a hearing.

## DISCUSSION

¶6 The circuit court may deny a postconviction motion without a hearing if it presents only conclusory allegations. *State v. Balliette*, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. A valid postconviction motion must include details regarding who, what, when, where, and how the facts alleged in the motion entitle the defendant to the relief. *State v. Allen*, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433. A motion to withdraw a guilty plea after

sentencing requires a showing of a manifest injustice. *State v. Duychak*, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). Ineffective assistance of trial counsel would constitute a manifest injustice. *State v. Dillard*, 2014 WI 123, ¶84, 358 Wis. 2d 543, 859 N.W.2d 44. However, to establish ineffective assistance of counsel, Hearvey must show, not merely allege, that but for counsel's ineffective representation, he would not have accepted the plea agreement and would have chosen to go to trial on these charges. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

¶7 Hearvey argues he was entitled to a hearing for the purpose of presenting additional facts in support of his motion. No hearing is required to shore up a deficient motion. Rather, facts supporting plea withdrawal must be alleged in the motion for a defendant to be entitled to a hearing. *State v. Bentley*, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996).

¶8 Hearvey's motion was too conclusory because it did not adequately explain why he would have rejected a plea agreement that reduced his prison exposure by sixty years merely to preserve his right to appeal the order granting the State's motion for joinder. In light of the State's strong case and the reduced charges offered in the plea agreement, preservation of the right to appeal the joinder order would be a substantial factor leading to the guilty pleas only if there was a substantial likelihood of prevailing in an appeal and if separate trials would have produced a more favorable result. Hearvey's motion does not address the potential merits of the appeal nor does he provide any factual basis for believing separate trials would have lead to an acquittal. To the contrary, the joinder order would have been affirmed because of the similarities of the victims' ages, Hearvey's holding sharp instruments to their necks while he repeatedly assaulted them, and the overlapping evidence of his admission to the second victim "You

aint [sic] the first person I did this to” and the greater latitude rule. All of these support the circuit court’s conclusion that evidence of both crimes would have been admissible at separate trials. *See State v. Linton*, 2010 WI App 129, ¶17, 329 Wis. 2d 687, 791 N.W.2d 222. In the absence of a reasonable explanation for why Hearvey would have gone to trial merely to preserve his right to appeal the joinder order, his assertion to that effect is too conclusory to justify a hearing.

¶9 Finally, in his reply brief, Hearvey faults the circuit court for failing to inform Hearvey at the plea hearing that entry of a guilty plea would waive his right to appeal the joinder order. He contends the court’s duty under *State v. Bangert*, 131 Wis. 2d 246, 270-76, 285, 389 N.W.2d 12 (1986), to ensure that a defendant understands the constitutional rights he waives by pleading guilty, compelled the court to inform him of that waiver at the plea hearing. That issue was not clearly presented in Hearvey’s brief-in-chief, and we do not address arguments made for the first time in a reply brief. *See Northwest Wholesale Lumber, Inc. v. Anderson*, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995). In addition, Hearvey cites no authority for the proposition that the court must identify at the plea hearing issues that are waived by pleading guilty.

*By the Court.*—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

