**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**October 29, 2014**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2013AP2864-CR** **Cir. Ct. No. 2008CF426**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CESAR O. GARCIA,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Kenosha County: DENNIS J. BARRY and MARY KAY WAGNER, Judges.[1] *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

[1] Judge Barry presided over the judgment of conviction and Judge Wagner entered the order denying the postconviction motion.

¶1 PER CURIAM. Cesar O. Garcia appeals from a judgment of conviction and an order denying his motion for postconviction relief. He contends that his trial counsel was ineffective for failing to consider, request, and argue for lesser included offenses at his jury trial. We reject Garcia's claim and affirm the judgment and order.

¶2 In April 2008, Garcia was charged three counts of attempted first-degree intentional homicide, three counts of first-degree reckless endangerment, and one count of aggravated battery with intent to cause great bodily harm. The charges stemmed from a drive-by shooting of three individuals outside a residence in Kenosha. Garcia allegedly shot the individuals in a dispute over an ex-girlfriend.

¶3 At trial, the circuit court instructed the jury as to all charges. However, it did not inform the jury that they should consider the three counts of first-degree reckless endangerment only as lesser included offenses to the three counts of attempted first-degree intentional homicide.[2] Without a proper bridging instruction, the jury returned guilty verdicts on all counts.

¶4 Following Garcia's convictions, the State moved to dismiss the counts of first-degree reckless endangerment. Garcia, meanwhile, moved for a new trial based on trial counsel's failure to consider, request, and argue for the

[2] The State had charged one count of first-degree reckless endangerment and one count of attempted first-degree intentional homicide for each of the three victims. It did not realize until after trial that first-degree reckless endangerment is a lesser included offense of attempted first-degree intentional homicide. ***State v. Cox***, 2007 WI App 38, ¶8, 300 Wis. 2d 236, 730 N.W.2d 452. A defendant cannot be convicted of both a greater and lesser offense for the same act. ***Id.***, ¶7.

lesser included offenses. Ultimately, the circuit court granted the State's motion and denied Garcia's motion without a hearing. This appeal follows.

¶5 To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's representation was deficient and that he or she suffered prejudice as a result of the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court need not address both prongs of the analysis if the defendant makes an insufficient showing on either one. ***Id.*** at 697.

¶6 When a defendant pursues postconviction relief based on trial counsel's alleged ineffectiveness, the defendant must preserve trial counsel's testimony in a postconviction hearing. ***State v. Curtis***, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998). Nonetheless, a defendant is not automatically entitled to a hearing upon filing a postconviction motion that alleges ineffective assistance of counsel. A circuit court must grant a hearing only if the motion contains allegations of material fact that, if true, would entitle the defendant to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

¶7 Whether the motion contains sufficient allegations of material fact to earn a hearing presents a question of law that we review de novo. ***Id***. If the motion does not raise facts sufficient to entitle the defendant to relief, "or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." ***Id***. We review the court's discretionary decision under the deferential erroneous exercise of discretion standard. ***Id.***

¶8 On appeal, Garcia renews his claim of ineffective assistance of counsel. Again, he maintains that his trial counsel was ineffective for failing to

consider, request, and argue for the lesser included offenses of first-degree reckless endangerment at his jury trial.

¶9 Even assuming that trial counsel's representation was deficient in her handling of the lesser-included offenses, we conclude that Garcia has failed to show how he suffered prejudice as a result. As noted, the jury returned guilty verdicts on all counts against Garcia. The fact that they convicted Garcia of the greater offenses of attempted first-degree intentional homicide negates the possibility that they would have considered the lesser included offenses of first-degree reckless endangerment had counsel done more to bring those to their attention.[3]

¶10 In the end, the only prejudice suffered by Garcia was that he briefly stood convicted of more offenses than the law allows. However, that harm was remedied when the circuit court granted the State's motion to dismiss the counts of first-degree reckless endangerment. *See* ***State v. Cox***, 2007 WI App 38, ¶15, 300 Wis. 2d 236, 730 N.W.2d 452 (when a defendant is erroneously convicted of both a greater and lesser included offense, vacating the lesser conviction is a reasonable remedy). Without any remaining showing of prejudice, we are satisfied that the circuit court properly denied Garcia's motion without a hearing.

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

[3] Had trial counsel asked for and received the proper bridging instruction, the jury would have been told that they should not consider whether Garcia was guilty of the lesser included offenses of first-degree reckless endangerment unless they were unable to unanimously agree that he was guilty of the greater offenses of attempted first-degree intentional homicide. *See* WIS JI-CRIMINAL 112. We presume that the jury would have followed this instruction. *See* ***State v. Martinez***, 2011 WI 12, ¶41, 331 Wis. 2d 568, 797 N.W.2d 399.

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