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

**December 18, 2012**

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



**Appeal No. 2011AP2741-CR** **Cir. Ct. No. 2002CF3153**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**SALVADOR PELESTOR-JIMENEZ,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Salvador Pelestor-Jimenez appeals from a judgment of conviction, entered upon a jury's verdicts, on one count of false imprisonment and one count of attempted first-degree intentional homicide, both as party to a crime. Pelestor-Jimenez also appeals from an order denying, without

a hearing, his postconviction motion for a new trial. Pelestor-Jimenez claims he received ineffective assistance of trial counsel when counsel failed to tell him that he could enter a plea to false imprisonment without admitting being armed with a dangerous weapon as charged. The circuit court rejected the motion as vague and insufficient. We agree and affirm.

## BACKGROUND

¶2 The victim in this case was forced at gunpoint into a vehicle by a group of individuals in order to be questioned about money he had allegedly stolen from Pelestor-Jimenez's brother. The car began heading to Oak Creek from Milwaukee. At some point, the victim was shoved from the car along the interstate, shot several times, and left for dead. Pelestor-Jimenez admitted his involvement in getting the victim into the car, but denied being armed himself. He also denied having anything to do with the shooting, telling police he had not gone along in the vehicle to Oak Creek.

¶3 Pelestor-Jimenez was originally charged with false imprisonment, as party to a crime, while armed with a dangerous weapon. The State's final offer during plea negotiations was that in exchange for Pelestor-Jimenez's guilty plea to the crime charged, the State would recommend three years' initial confinement and two years' extended supervision out of a potential maximum of nine years' imprisonment.[1] If Pelestor-Jimenez rejected the offer, the State would seek to

[1] The underlying crimes in this case occurred in May 2002. At the time, false imprisonment was a Class E felony subject to a maximum of five years' imprisonment. *See* WIS. STAT. §§ 940.30 (2001-02) & 939.50(3)(e) (2001-02). The addition of the "dangerous weapon" element increased the maximum possible amount of imprisonment by four years. *See* WIS. STAT. § 939.63(1)(a)3. (2001-02).

amend the information to include a charge of attempted first-degree intentional homicide as party to a crime. On the first day of trial, counsel told the circuit court that she had gone over the offer and potential amendment with Pelestor-Jimenez, but he insisted on going to trial. Upon direct questioning by the circuit court, Pelestor-Jimenez confirmed that he was rejecting the State's final offer.

¶4 The jury convicted Pelestor-Jimenez of false imprisonment and attempted homicide, but determined he was not armed with a dangerous weapon during the false imprisonment. The circuit court sentenced him to three years' initial confinement and two years' extended supervision for the false imprisonment, concurrent with fifteen years' initial confinement and ten years' extended supervision for the attempted homicide.

¶5 Pelestor-Jimenez filed a "motion to vacate his conviction and for a new trial based on ineffective assistance of counsel." He alleged, in relevant part, only that he "either misunderstood or was not properly advised by counsel that he could enter a plea to false imprisonment without admitting he was armed himself" and that if he had understood or been so advised, "he would have entered a plea to the offense of false imprisonment which carried a nine year maximum[.]" The circuit court denied the motion without a hearing, and Pelestor-Jimenez appeals.

## DISCUSSION

¶6 The issue in this case is whether Pelestor-Jimenez's motion is sufficient on its face to entitle him to an evidentiary hearing on his ineffective-assistance claim. *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. "[W]hether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief" is a question of law we review *de novo*. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. If

the motion does not allege facts sufficient to entitle the movant to relief, or if it presents only conclusory allegations, then the circuit court may grant or deny a hearing in its discretion. ***Id.*** The supreme court has suggested that a sufficient postconviction motion will allege "the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." ***Id.***, ¶23. We review only the allegations contained within the four corners of the motion. ***Id.***, ¶27.

¶7 To establish ineffective assistance of counsel, the defendant must show that the attorney performed deficiently and that the deficiency prejudiced the defendant. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Domke***, 2011 WI 95, ¶34, 337 Wis. 2d 268, 805 N.W.2d 364. "To establish deficient performance, the defendant must show that counsel's representation fell below the objective standard of 'reasonably effective assistance.'" ***Domke***, 337 Wis. 2d 268, ¶36 (citation omitted). "To establish prejudice '[t]he defendant must show that there is 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.'" ***Id.***, ¶54 (citation omitted; brackets in ***Domke***). Whether counsel's performance constitutes ineffective assistance is a question of law we review *de novo*. ***Id.***, ¶33.

¶8 The sole allegation of deficient performance is that Pelestor-Jimenez "either misunderstood or was not properly advised by counsel that he could enter a plea to false imprisonment without admitting he was armed himself." We agree with the circuit court that this claim is "vague at best."

¶9 Our minor concern is that it is unclear whether Pelestor-Jimenez is claiming that any misunderstanding is his own fault or whether he is claiming that it was caused by something trial counsel said or did. If the misunderstanding is

organic to Pelestor-Jimenez, then the deficiency is not counsel's. Yet if the misunderstanding was somehow caused by counsel, Pelestor-Jimenez has not alleged a single fact to indicate how counsel created the confusion.

¶10 Our major issue, though, is with Pelestor-Jimenez's claim that counsel should have advised him "that he could enter a plea to false imprisonment without admitting he was armed himself." It is wholly unclear what Pelestor-Jimenez means by this allegation.[2]

¶11 One possibility is that Pelestor-Jimenez expected trial counsel to try to negotiate having the charge amended to simple false imprisonment with the dangerous-weapon component dismissed. However, the State would have to agree to ask the circuit court to approve that amendment, and Pelestor-Jimenez does not allege that the State was amenable to such a counter-offer.

¶12 It appears more likely, however, that Pelestor-Jimenez means to allege that counsel should have recommended that he enter an ***Alford*** plea. *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970). Pelestor-Jimenez did not dispute his role in the false imprisonment but was evidently adamant that he had not been

[2] To support his claim of deficient performance, Pelestor-Jimenez's motion cited, without elaboration or even a pinpoint, ***State v. Villarreal***, 153 Wis. 2d 323, 450 N.W.2d 519 (Ct. App. 1989). However, a review of ***Villarreal*** sheds no light on Pelestor-Jimenez's claim of ineffective trial counsel.

In ***Villarreal***, the sole issue was "whether an express personal waiver of the right to a jury trial was required when Villarreal, in the midst of a jury trial, elected through counsel to remove the dangerous weapon element from jury consideration and have the element determined by the trial court." ***Id.*** at 324. We explained that the dangerous-weapon enhancer is more than a mere penalty enhancer: it becomes an element of the crime when charged as such and, therefore, any jury waiver on the element must be personally made by the defendant, not his or her attorney. ***Id.*** at 324, 329-30. While Pelestor-Jimenez points to this "additional element" holding in his appellant's brief, he never develops an argument about how it supports his case, and we are unable to discern its relevancy to this case.

armed, and an ***Alford*** plea is a plea wherein a defendant pleads guilty while maintaining his innocence. *See* ***State v. Johnson***, 105 Wis. 2d 657, 659 n.1, 314 N.W.2d 897 (Ct. App. 1981). But here, too, the State would have had to agree to the plea. Moreover, the circuit court's acceptance of an ***Alford*** plea is entirely discretionary. *See* ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 651, 579 N.W.2d 698 (1998). Pelestor-Jimenez does not allege that either the State or the circuit court would have approved an ***Alford*** plea, and if the plea was not available, we would not deem counsel deficient for failing to recommend it.

¶13 The circuit court, in its written order denying the motion, noted both possibilities and the related deficiencies of the motion. In response, Pelestor-Jimenez in his appellate brief suggests that an evidentiary hearing would allow him to develop the necessary facts. This assertion ignores Pelestor-Jimenez's obligation to allege "sufficient material facts that, if true, would entitle the defendant to relief." ***Allen***, 274 Wis. 2d 568, ¶9. Indeed, a defendant must make allegations sufficient to show that there is a reason to hold an evidentiary hearing and that the defendant is not simply on a fishing expedition. *See* ***State v. Hampton***, 2002 WI App 293, ¶22, 259 Wis. 2d 455, 655 N.W.2d 131.

¶14 The allegation of prejudice is likewise unclear. Pelestor-Jimenez claims that if he had understood "that he could enter a plea to false imprisonment without admitting he was armed himself" then "he would have entered a plea to the offense of false imprisonment which carried a nine year maximum instead of taking his case to trial and facing sixty years." However, "false imprisonment" carried a maximum five-year penalty; false imprisonment *while armed with a dangerous weapon* carried the nine-year maximum, and Pelestor-Jimenez had already declined the opportunity to enter a plea to the crime with the nine-year maximum.

¶15 Moreover, Pelestor-Jimenez appears to now believe that entering an ***Alford*** plea might have allowed him to avoid an adjudication of guilt on the dangerous-weapon element of his crime. However, "an ***Alford*** plea is not the saving grace for defendants who wish to maintain their complete innocence."[3] ***Warren***, 219 Wis. 2d at 633. An ***Alford*** plea places a defendant in the same position as though he had been found guilty by a jury, and the defendant's protestations of innocence extend no further than the plea itself. *See* ***Warren***, 219 Wis. 2d at 631-32. In other words, an ***Alford*** plea and a guilty plea have the same practical legal effect, and Pelestor-Jimenez does not adequately allege why he would have accepted the former when he rejected the latter.

¶16 Pelestor-Jimenez's motion does not allege sufficient material facts which, if true, would entitle him to relief. The decision whether to grant a hearing was thus committed to the circuit court's discretion. ***Allen***, 274 Wis. 2d 568, ¶9. That discretion was properly exercised.

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

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

[3] To the extent that Pelestor-Jimenez believes that he could enter an ***Alford*** plea solely to the dangerous-weapon element of his crime while entering a guilty plea to the remaining elements, it is not clear that he could enter two pleas to a single offense.