OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

September 25, 2025

To:

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Circuit Court Judge
Electronic Notice

Julie Kayartz
Clerk of Circuit Court
Columbia County Courthouse
Electronic Notice

Joseph P. Bastien
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Michael C. Sanders
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You are hereby notified that the Court has entered the following opinion and order:

2024AP2-CR State of Wisconsin v. Michael S. O'Grady (L.C. # 2018CF419)

Before Graham, P.J., Kloppenburg, and Taylor, JJ.

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).

Michael O'Grady appeals a judgment of conviction and an order denying his postconviction motion. Based on 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 (2023-24).[1] We affirm.

[1] All references to the Wisconsin Statutes are to the 2023-24 version.

O'Grady pled guilty to two counts of stalking, two counts of false swearing, and one count of simulation of legal process. O'Grady filed a postconviction motion, which the circuit court denied without an evidentiary hearing.

On appeal, O'Grady makes numerous arguments. We have reviewed the circuit court's postconviction order and, based on our review, it is apparent that the postconviction court addressed in detail all of the arguments that were squarely presented by O'Grady's postconviction motion, and that, with one exception discussed further below, the court provided a thorough and persuasive analysis of why O'Grady had not presented claims that required an evidentiary hearing. The court also appears to have addressed some arguments that were not clearly presented or developed in O'Grady's postconviction motion, and it explained why those possible arguments would not be a basis for an evidentiary hearing.

We have also reviewed O'Grady's appellate brief, and we have not identified anything in the brief that shows that the postconviction court erred. We note that there are some occasions in O'Grady's brief in which he seeks to shift the focus of the arguments that were made in the postconviction motion and to present or develop arguments that were not developed before the circuit court in the postconviction motion. It is likely that O'Grady forfeited those issues by not squarely presenting them before the circuit court. In any event, even if we were to overlook that forfeiture, we have considered these newly developed arguments, and we reject them as contrary to law.

O'Grady has also advanced an argument on appeal about the circuit court's pretrial determination about the constitutionality of the stalking charges. O'Grady likely waived this challenge under the guilty plea waiver rule but, even if he had not, we have reviewed the

thorough written decision by the court, and O'Grady does not persuade us that the court erred on this issue.

The issue that requires further discussion relates to a proposed jury instruction on the charges of false swearing that the parties agreed to modify. Because O'Grady entered guilty pleas, the modified instruction was not presented to a jury and is not directly the basis for those convictions. Instead, we understand O'Grady's claim to be that the modified instruction erroneously stated the law, that O'Grady's trial counsel was ineffective by misinforming him that this was a correct statement of the law, and that this error prejudiced O'Grady by leading him to plead guilty when he would have otherwise gone to trial. As we next explain, we reject this argument because O'Grady did not sufficiently allege in his postconviction motion that either he or his trial counsel understood the modified instruction in a way that was an inaccurate statement of law.

As noted, the circuit court denied the postconviction motion without an evidentiary hearing. Therefore, the question here is whether O'Grady was entitled to such a hearing. The court first looks at whether the facts alleged in the postconviction motion, if true, would entitle the defendant to relief. ***State v. Jackson***, 2023 WI 3, ¶11, 405 Wis. 2d 458, 983 N.W.2d 608. Then, if they do, the court must determine whether the record conclusively demonstrates that the defendant is not entitled to relief. ***Id.***

In attempting to allege facts that would entitle him to relief, O'Grady must allege objective factual assertions which allow the reviewing court to meaningfully assess his claim. ***State v. Bentley***, 201 Wis. 2d 303, 313-14, 548 N.W.2d 50 (1996). This is a question of law that we decide without deference to the circuit court. ***Id.*** at 310.

Before we address O'Grady's ineffective assistance of counsel claim, we first clarify the history of the version of the jury instruction modification that was agreed to and the version that was attached to the plea questionnaire and read aloud to O'Grady during the plea colloquy.

In anticipation of trial, the State proposed a modification of the false swearing pattern instruction, WIS JI—CRIMINAL 1754. We now quote the pattern instruction, with the State's proposed addition italicized:

> 1. The defendant made a false statement.
>
> 2. The defendant did not believe the statement to be true when made. *The law does not require the defendant to know the statement is false, it is false swearing if the statement turns out to be false.*
>
> 3. The statement was made under oath.

The transcript of the hearing at which the parties discussed the State's proposal shows that they agreed to a different modification. That modification of element two again started with the sentence in the pattern instruction, as above, but then continued: *If the defendant does not know whether the statement is true or false, it is false swearing. If the statement turns out to be false, the law does not require that the defendant know the statement to be false*." As noted, this modified instruction was never presented to a jury because O'Grady entered guilty pleas on the false swearing charges.

Even though the parties orally agreed to this form of modification, the jury instruction materials that were attached to the plea questionnaire included the State's originally proposed modification, not the one that was actually agreed to. And, this was also the version that the circuit court read aloud as part of the plea colloquy to establish that O'Grady understood the elements of the charges that the State would have to prove beyond a reasonable doubt at trial.

Plea questionnaires are normally prepared by defense counsel, and there is no indication to the contrary in this record.

O'Grady argues that the added language is problematic, and we agree, as to both versions of the modified jury instruction.

In the State's proposed modification, the problem lies in the second clause, "it is false swearing if the statement turns out to be false." Read literally, this clause appears to say that the crime being charged here, false swearing, has occurred if the defendant's statement turns out to be false. In other words, the clause appears to say that a finding that the statement is false, *by itself*, is enough for the jury to find the defendant guilty of false swearing, regardless of the jury's findings on element two (that the defendant did not believe the statement to be true when made) and element three (that the statement was made under oath). Obviously, this would not be an accurate statement of the law.

Turning to the modified version actually agreed to by the parties, the problem is in the sentence that reads: "If the defendant does not know whether the statement is true or false, it is false swearing." While the State's original proposal could be read as making the *first* element dispositive of the entire charge, this version's statement that "it is false swearing" could be read as making the *second* element dispositive. That is, the problematic sentence in this version can be read to say that a finding that the defendant's lack of knowledge about whether a statement was true or false, *by itself*, is enough for the jury find the defendant guilty of false swearing, regardless of the jury's findings on the other elements (that the defendant made a false statement, and did so under oath).

With both versions of the instruction, we believe that many readers, when reading the problematic clause in the context of the full instruction, would question whether that literal reading is the intended one. Even so, there does not appear to be any substantive reason that can readily be pointed to as a proper reason for either version to use the clause "it is false swearing." As a result, this added clause makes the instruction potentially confusing.

Turning to O'Grady's ineffective assistance of counsel claim, that claim, as we understand it, is that counsel's agreement to the modified instruction language evinces counsel's misunderstanding of the applicable law concerning the swearing charges to which O'Grady pled guilty, and that counsel's misunderstanding was, in turn, communicated to O'Grady. As a result, O'Grady alleges that he had a misunderstanding of the actual elements of the false swearing charges that the State would have to prove at trial, which led him to plead guilty when he would have otherwise gone to trial. O'Grady's ineffective assistance claim can be separated into two components. One is that his trial counsel misunderstood the applicable law. The second is that O'Grady himself misunderstood the law.

We first address O'Grady's claim about his trial counsel. As framed above, the claim is that counsel's agreement to the modified instruction language evinces counsel's misunderstanding of the applicable law by showing that counsel held a specific belief about the modified instruction language. Above we described that language as "potentially confusing" in its use of the phrase "it is false swearing." However, the potential for confusion is not the same for all audiences. It is unlikely that criminal defense counsel would believe that a finding on just one of the three elements would be dispositive of the entire charge. That belief would be inconsistent with the concept of elements, and with the general understanding in the legal world that a favorable finding on *all* elements of a crime is required before a defendant can be found

guilty. Furthermore, even though counsel agreed to a version of this language, there is no indication in the transcript of that hearing that counsel actually held the improbable belief that is now alleged.

Apart from trial counsel's agreement to the modified instruction language, O'Grady's postconviction motion is thin on alleging additional facts that could support a finding that counsel held this improbable belief negating the burden on the State of proving all elements of a crime beyond a reasonable doubt to secure a criminal conviction. For example, O'Grady does not appear to allege any specific statement by counsel in which counsel expressed the belief that a finding on one element could be dispositive of the charge.

For these reasons, we conclude that O'Grady has not alleged sufficient facts from which we can conclude that his trial counsel misunderstood applicable law. There is no basis in these allegations for a fact-finder to reasonably find that counsel believed that a jury finding against O'Grady on only one of the elements would be a proper basis for a jury to convict on the entire charge.

That leaves the question that ultimately matters, which is whether O'Grady has sufficiently alleged that he himself believed the law to be that a finding that proof of only one element would be dispositive of the false swearing charges against him. Because O'Grady is not an attorney, it is more plausible that he would misunderstand the modified instruction language than that his attorney would misunderstand it. However, mere plausibility is not enough, and his motion is again thin on factual allegations of what he specifically believed, and why. The closest the motion may come is a statement that O'Grady pled guilty to these false swearing charges

"only after acquiescing to misinformation from trial counsel that he would be found guilty of all the charges."

To the extent that O'Grady is alleging that trial counsel provided him with misinformation about the applicable legal theory and therefore preformed deficiently, we have already concluded that O'Grady has failed to allege that counsel misunderstood the legal theory. And, beyond that, O'Grady does not allege any specific statement that counsel made to him about the alleged incorrect legal theory. While the plea questionnaire and plea colloquy relied in part on one of the modified versions of the instruction, O'Grady's motion does not appear to contain any specific statement of what trial counsel said to O'Grady that resulted in O'Grady misunderstanding the elements of the false swearing crime. Accordingly, we conclude that O'Grady has failed to sufficiently allege that he entered his pleas to these counts based on a deficiency of trial counsel which resulted in O'Grady's misunderstanding of the elements of the crime and the State's burden of proof on the elements at trial.

IT IS ORDERED that the judgment and order appealed from are summarily affirmed under 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