STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2019AP2383-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAIMON VON JACKSON, JR.,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE RACINE COUNTY CIRCUIT COURT, THE HONORABLE FAYE M. FLANCHER PRESIDING, AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE RACINE COUNTY CIRCUIT COURT, THE HONORABLE MARK F. NIELSEN PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did Defendant-Appellant Daimon Von Jackson, Jr. receive ineffective assistance of counsel warranting withdrawal of his no contest plea when his fourth trial counsel, Attorney Scott Anderson, failed to confer with Jackson more than twice prior to Jackson's trial date?

The circuit court held a *Machner* hearing and determined that Anderson performed deficiently in failing to meet with Jackson more, but that Jackson was not prejudiced by it because all of the investigation, motion practice, and preparation and explanation of the case with Jackson had been completed by Jackson's three prior attorneys; Anderson took over the representation with nothing left to do but resolve the case.

This Court should affirm the circuit court, but should also hold that Anderson did not render constitutionally deficient performance.

2. Does the circuit court's discretionary decision not to grant Jackson's request for Anderson to withdraw shortly before the trial date amount to a manifest injustice allowing Jackson to withdraw his plea?

The circuit court denied the request, noting that Jackson had made the same complaint about all of his previous attorneys, tried to fire each one as the trial date approached, and that the case had been pending for two years due to Jackson's repeated discharge of counsel.

This Court should affirm the decision of the circuit court.

3. Should this Court exercise its discretionary authority to allow Jackson to withdraw his plea or to order Jackson resentenced in the interest of justice because he does not believe the facts support a conclusion that he was the primary shooter?

This Court exercises its authority to reverse in the interest of justice only in extraordinary cases. Jackson has not shown that this case warrants reversal or resentencing in the interest of justice.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case deals only with the application of well-settled law to the facts, which the briefs should adequately address.

STATEMENT OF THE FACTS

Maurice Carter and a friend, Tauries Murry, were playing cards at a friend's house when Murry's girlfriend called and warned everyone to leave. (R. 1:2.) Murry told police he and Carter went toward their cars and after Murry got in his own car, he saw two people running towards Carter. (R. 1:2.) Murry heard a gunshot and saw Carter fall to the ground. (R. 1:2.) The men started going through Carter's pockets, and Murry drove his car at them in an attempt to scare them off. (R. 1:2.) They ran away and Murry stopped to help Carter, who later died of his gunshot wounds. (R. 1:2.)

Police found a handgun magazine at the scene that had Bobby Henderson's fingerprints on it. (R. 1:2–3.) Henderson admitted his involvement and told the police that he, Jackson, and another man, Travenn Webster, set out to commit a robbery with Webster waiting as a getaway driver. (R. 1:3.) He said Jackson had a handgun, which Henderson asked to see. (R. 1:3.) Henderson ejected the magazine, inspected the gun, and then gave it back to Jackson. (R. 1:3.) Henderson said he planned to rob Murry while Jackson robbed Carter, but Murry began to drive away. (R. 1:3.) Henderson saw Jackson struggling with Carter and heard two gunshots. (R. 1:3.) Henderson ran, and when Jackson and Henderson met

at Webster's car Henderson asked why Jackson had shot the man. (R. 1:3.) Jackson said he thought the man had a gun, so he shot him. (R. 1:3.) Jackson eventually admitted to police he was involved in the incident, but asserted he was only acting as a lookout. (R. 1:3.)

The State charged Jackson with one count of felony murder as a party to a crime, one count of felon in possession of a firearm as party to a crime, and one count of armed robbery with the use of force as party to a crime for his role in Carter's death. (R. 1.)

Trial Proceedings

Jackson, represented by Attorney Antoinette Rich, pled not guilty to all the charges. (R. 57:2.) Several months later, Rich moved to withdraw. (R. 59:2.) She said there had been a breakdown in attorney-client communication. (R. 59:2.)

The court allowed Rich to withdraw, but warned Jackson, "[t]his is not going to be a revolving door. You're not going to come back and back to this Court and say . . . [t]here's been a breakdown until you get a lawyer that you're satisfied with." (R. 59:3.) Jackson said he understood. (R. 59:3–4.)

Attorney Aileen Henry was appointed to represent Jackson. (R. 60:2.) Six weeks later Henry, too, moved to withdraw. (R. 61:2.) She said Jackson's mother had intervened to the point where the attorney-client relationship between Henry and Jackson was "irretrievably broken." (R. 10:1.) The court admonished Jackson that his attorneys do not have any obligation to his mother, that the case was now 280 days old. (R. 61:4.) It did, however, allow Henry to withdraw. (R. 61:5.)

The public defender's office then appointed Attorney Richard Hart to represent Jackson. (R. 11.) Hart filed a number of pretrial motions and a speedy trial demand on Jackson's behalf. (R. 12; 13; 16; 18; 19; 20.) At the final pretrial conference, though, Hart informed the court that

Jackson wanted him to withdraw as well, alleging that Hart hadn't done anything Jackson asked him to do. (R. 64:3–4.) The court refused to allow Hart to withdraw. (R. 64:4.) The case was adjourned, though, because Webster was in federal custody and the federal authorities refused to release him to be a material witness. (R. 64:2, 7.)

On March 14, 2016, one of Hart's associates appeared and informed the court that Hart had suffered a serious leg injury requiring surgery and would be unable to drive for several months. (R. 66:2.) Given the circumstances, the court allowed Hart to withdraw. (R. 66:2–3.)

Attorney Scott Anderson was then appointed in March. (R. 21.) The State had filed another case against Jackson consisting of some felony drug charges in the meantime. (R. 68:1–2.) Anderson entered not guilty pleas in the new case and asked the court to set a new trial date in the old case, since he was newly appointed. (R. 68:11–12.)

In September, Jackson sent a letter to the court asking to replace Anderson. (R. 24.) The court addressed the request at the final pretrial conference in October and after allowing Jackson to explain why he was dissatisfied with Anderson, the court denied the motion due to the age of the case and Jackson's repeated requests for new attorneys. (R. 70:2–4.) It told the parties to be ready to proceed to trial on November 1. (R. 70:3.)

On November 1, Jackson provided a completed plea questionnaire and waiver of rights form and informed the court he had reached a plea agreement with the State. (R. 26; 71:2.) The State filed an amended information charging Jackson with one count of second-degree reckless homicide as a repeater and with a dangerous weapon and one count of possession of a firearm as a felon. (R. 71:2–3.) Jackson agreed to plead no contest to the reckless homicide charge in exchange for the possession charge and all of the charges in

the drug case being dismissed and read in. (R. 71:3.) Anderson and Jackson both confirmed that was their understanding of the negotiations. (R. 71:3.)

After a colloquy, which included some extra elaboration on whether Jackson understood the elements of the crime to which he was pleading and whether he was satisfied with Anderson's representation, the court accepted Jackson's no contest plea. (R. 71:3–14.) At sentencing, the court rejected Jackson's contention that he was just a lookout. (R. 75:23.) It sentenced him to 20 years of initial confinement and 10 years of extended supervision. (R. 75:23.)

Postconviction Proceedings

Jackson filed a postconviction motion seeking to withdraw his plea. (R. 46.) He claimed that Anderson was ineffective in myriad ways, and that the court had erred when it denied Jackson's request for a new attorney.[1] (R. 46:1.) The circuit court held a *Machner* hearing and both Anderson and Jackson testified. (R. 78.) Jackson alleged that he didn't understand that he was pleading to being the shooter but thought he was just pleading to being an accomplice. (R. 78:82–91.) He further complained that Anderson did not confer with him or keep him updated on the case, and claimed he had entered his plea only because he did not think Anderson was prepared for trial. (R. 78:79–80.)

The circuit court denied the motion, finding that Anderson should have kept in better contact with Jackson, but that Jackson was not prejudiced because his three prior attorneys had worked with him through all of the pretrial preparation and Anderson took over with nothing left to do

[1] Jackson raised a host of ineffective assistance claims in the trial court, but has not pursued most of them on appeal. The State therefore discusses only the facts relevant to the claims that he has raised in this Court.

but try the case. (R. 52:25–29.) It determined that there was not a reasonable probability Jackson would have opted for trial if Anderson met with him more. (R. 52:29–32.) It further found Jackson's assertions that he only pled because he did not believe Anderson was prepared, and that he did not understand what he was pleading to, not credible. (R. 52:29–30.) Finally, the court rejected Jackson's assertion that Judge Flancher erroneously denied his request to fire Anderson, noting that Jackson was given a chance to explain why he wanted new counsel and Judge Flancher's decision denying his request after Jackson had been through four attorneys and the case had been pending for two years was an appropriate exercise of discretion. (R. 52:33–34.)

Jackson appeals.

ARGUMENT

I. Jackson has not shown that he received ineffective assistance of counsel rendering his plea involuntary merely because Anderson did not confer with Jackson more before Jackson entered his plea.

A. Standard of review

"Determining whether particular actions constitute ineffective assistance of counsel is a mixed question of law and fact." *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). This Court "will not overturn a trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy unless they are clearly erroneous." *Id.* (citation omitted). "[W]hether counsel's performance was deficient and whether the deficient performance prejudiced the defense are questions of law" reviewed de novo. *Id.*

B. To prevail on an ineffective assistance claim after pleading guilty, a defendant must show that counsel's advice about the plea was unreasonable and there is a reasonable probability that absent that advice the defendant would have insisted on a trial.

Wisconsin has adopted the United States Supreme Court's two-pronged *Strickland* test to analyze ineffective assistance claims. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To prevail under *Strickland*, a defendant must prove that his counsel's performance was both deficient and prejudicial. *Strickland*, 466 U.S. at 687.

The defendant does not show deficient performance "simply by demonstrating that his counsel was imperfect or less than ideal." *State v. Balliette*, 2011 WI 79, ¶ 22, 336 Wis. 2d 358, 805 N.W.2d 334. Rather, "a defendant must show specific acts or omissions of counsel that are 'outside the wide range of professionally competent assistance.'" *State v. Arredondo*, 2004 WI App 7, ¶ 24, 269 Wis. 2d 369, 674 N.W.2d 647 (citation omitted). To prove prejudice, the 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." *Strickland*, 466 U.S. at 694.

However, "a defendant who pleads guilty upon the advice of counsel 'may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel'" was not "within the range of competence demanded of attorneys in criminal cases." *Hill v. Lockhart*, 474 U.S. 52, 56–57 (1985) (citations omitted). To show prejudice, a defendant seeking to withdraw his plea must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would

have insisted on going to trial." *Id.* at 59; *see also State v. Bentley*, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) (citing *Hill*, 474 U.S. at 59).

C. Anderson's failure to spend more time meeting with Jackson in person, while not best practice, did not render his performance constitutionally deficient.

Jackson complains that Anderson only met with him in person two times before the trial date, and claims that amounts to deficient performance because it caused Jackson to doubt Anderson's investment in the case. (Jackson's Br. 7–8.) But Jackson hasn't shown any objectively unreasonable omission in preparation or readiness on Anderson's part that more in-person meetings would have prevented; he just argues that it led to Jackson's dissatisfaction with his representation and concerns about Anderson's preparation for trial. (Jackson's Br. 7–8.) That is insufficient to meet Jackson's burden because it does not show that Anderson was actually unprepared or that his advice to Jackson about the plea was unreasonable.

While Anderson's failure to have more contact with Jackson may amount to a breach of his ethical duties to Jackson under SCR (Rule) 20:1.4(a)(2), our supreme court has made clear that an attorney's failure to abide by the ethical obligation to reasonably communicate with the client does not *ipso facto* prove deficient performance. *State v. Cooper*, 2019 WI 73, ¶¶ 21–22, 387 Wis. 2d 439, 929 N.W.2d 192.

To the contrary, there is "no case establishing a minimum number of meetings between counsel and client prior to trial necessary to prepare an attorney to provide effective assistance of counsel." *United States v. Olson*, 846 F.2d 1103, 1008 (7th Cir. 1988); *See also State v. Osborne*, 130 Idaho 365, 372, 941 P.2d 337 (Ct. App. 1997) (claims that counsel failed to meet with the defendant an appropriate

amount of times, without pointing to some specific error by counsel, do not establish ineffective assistance because there is no minimum number of times an attorney must meet with the client in order to be adequately prepared for trial). And a defendant does not show deficient performance merely by showing dissatisfaction with his representation. Jackson has provided nothing showing that Anderson actually wasn't prepared for trial, and in fact, the record shows otherwise.

Anderson testified that he met with Jackson four times, three before the plea, and once after. (R. 78:7.) He testified that he reviewed all of the discovery, including a video of the perpetrators from the Potawatomi casino, DNA evidence reports, interrogation videos of Jackson and the other defendants, and the police reports. (R. 78:8–13.) He reviewed the material with Jackson, though he did not show Jackson the videos. (R. 78:8.) He acknowledged that the matter was set for trial. (R. 78:7–8.) He testified that if Jackson decided to reject the State's plea offer, his trial strategy would have been attacking the credibility of Henderson's and Webster's testimony pinning the shooting on Jackson by showing that they both received favorable plea deals in exchange for their testimony. (R. 78:26.) Anderson said Jackson decided to plead on the morning of trial after they had a discussion about the strength of the State's case. (R. 78:14–17.)

Further, the Seventh Circuit has recognized "that an experienced attorney 'can get more out of one interview with a client . . . than a less well-trained lawyer could get out of several." *Olson*, 846 F.2d at 1108. Anderson testified that he has been practicing criminal law for decades, since 1985, and is exclusively a criminal defense attorney. (R. 78:3.) Anderson's many years of experience weigh in favor of his ability to prepare adequately for a case without needing multiple lengthy interviews with his client. Additionally, Anderson noted Jackson had three prior attorneys who went through all of the discovery and preparation with him, and

Jackson had copies of the police reports and therefore knew all the facts. (R. 78:27.) He also testified that he did not think things would have gone differently if he had met with Jackson more. (R. 78:27–28.) Though Anderson acknowledged that he "could have done better" in communicating with Jackson, his testimony shows he was adequately prepared for trial and therefore did not perform deficiently.

More importantly for the inquiry here, Jackson has provided nothing showing that Anderson's advice about or explanation of the plea was unreasonable. The State offered Jackson the opportunity to plead to second-degree reckless homicide in exchange for all of the other charges being dismissed and read in—including the drug charges in the companion case—on October 17th, roughly two weeks before trial. (R. 78:22–23.) Anderson sent a letter to Jackson the next day, which he thought conveyed the plea offer.[2] (R. 78:24.) Anderson said he discussed the plea offer with Jackson. (R. 78:15.) He told Jackson that the state's case against him was strong, and testified that both Anderson and Jackson had known for months that his codefendants were going to testify against him. (R. 78:17–18.) Anderson said he went through the plea questionnaire with Jackson and explained the elements of second-degree reckless homicide to him, as well as attaching a copy of the elements to the plea form. (R. 78:29.) The transcript of the plea hearing shows that the court and Anderson explicitly told Jackson he was pleading to second-degree reckless homicide and that he was no longer

[2] Anderson could not precisely recall the contents of that letter and a copy was not in his file, though a note showed that the letter was sent on October 18th.

pleading to it as a party to a crime, which Jackson averred he understood.[3] (R. 71:9–11.)

All of that shows that Anderson provided constitutionally reasonable assistance in advising Jackson about the plea. Had Jackson gone to trial, he faced more than 120 years of imprisonment, and that does not include the sentences he could have received for the drug charges in the companion case. (R. 1.) There is virtually no chance Jackson would have been acquitted of the felony murder and armed robbery charges because they were charged as a party to a crime. (R. 1:1.) That means that even if the jury bought Jackson's lookout story it would only need to find he was an aider and abettor or a conspirator in committing those two crimes to find guilt, which Jackson's own statements would have sealed as a fait accompli—even without Henderson and

[3] Though Jackson has not pursued the issue on appeal, it bears noting that Jackson's argument in the trial court that his plea was infirm because he thought he was pleading to second-degree reckless homicide as a party to a crime rather than as the principal shooter could not prevail because it is a distinction without a difference. When party to a crime liability attaches, the elements of the crime remain the same, as does the potential maximum sentence. The only difference is that people who participated in the crime but did not personally perform all of its elements can be convicted and sentenced for the full crime, even if it is not the crime the defendant intended. *See, e.g., State v. Stanton*, 106 Wis. 2d 172, 177–80, 316 N.W.2d 134 (Ct. App. 1982). Moreover, there are three ways a person can be found liable as a party to a crime: (1) directly committing the crime; (2) as an aider and abettor; or (3) as a conspirator. Wis. Stat. § 939.05(2). The State does not have to prove precisely which of these roles the defendant played, and the factfinder is not required to unanimously decide on one to find the defendant guilty. *Holland v. State*, 91 Wis. 2d 134, 142–43, 280 N.W.2d 288 (1979). So, had Jackson pled to second-degree reckless homicide as a party to a crime, the sentencing court still would have been free to reject his contention that he was just a lookout and sentence him as the principal shooter.

Webster. The plea deal reduced Jackson's maximum prison exposure to 40 years and eliminated the drug charges in the companion case altogether. Anderson's explaining to Jackson that the State's case was strong and advising him to take the plea was not deficient performance.

D. Jackson has not shown prejudice.

Jackson has also failed to show prejudice. His claim that he pled "to a crime he did not commit" is meritless, and any alleged misunderstanding about it on Jackson's part is belied by the plea colloquy. (Jackson's Br. 8–11.) Further, Jackson's claim that he would have insisted on going to trial had Anderson met with him more is based entirely on a mistake about what charge he would have been facing at trial. It is also patently incredible, given that his conviction on the original charges was all but certain and they carried far more prison exposure than the charge to which he pled.

Jackson's entire prejudice analysis is that if he had gone to trial, he could have offered some evidence suggesting he was not the shooter, and therefore he might not have been convicted of second-degree reckless homicide. (Jackson's Br. 8–11.) But Jackson was never going to be facing trial on a charge of second-degree reckless homicide. He was going to trial on charges of felony murder and armed robbery, both charged as party to a crime and as a repeater, and a charge of felon in possession of a firearm. (R. 1.) As explained above, Jackson's admission that he was acting as a lookout during these events alone ensured his conviction on the felony murder and armed robbery charges because it showed that, at least, he was either an aider and abettor or a conspirator in those two crimes. And those two convictions would have carried a potential 92 years of imprisonment. Jackson's insistence that he would have taken his chances at trial on a second-degree reckless homicide charge is therefore irrelevant to the analysis. (Jackson's Br. 8–11.)

Jackson's insistence that he pled "to a crime he did not commit" is also negated by the plea transcript. The criminal complaint expressly alleges that Jackson was the shooter, and the amended information states that Jackson recklessly caused the death of another human being. (R. 1:3; 25.) Jackson stated under oath that he reviewed those documents with Anderson and understood the charge he was pleading to and all of its elements. (R. 71:3–10.) He further stated that he understood that his no contest plea meant he was not contesting "the State's ability to prove those facts necessary to constitute this crime"—meaning he was not contesting the State's ability to prove that he was the principal shooter. (R. 71:11.) The court specifically noted that Jackson was pleading as a principal and asked Jackson if he needed more time to talk to his attorney about that, and Jackson said no. (R. 71:11.) And finally, the court asked if it could "use the underlying criminal complaint and information then in 14-CF-721 as a factual basis for the change of plea," and Anderson said yes. (R. 71:12.) That criminal complaint alleged that Jackson was the shooter. So, Jackson admitted in open court that he was the principal shooter. The fact that Jackson wants to continue insisting he was a lookout does not negate the answers he gave at the plea hearing.

Furthermore, a defendant can still be convicted as a party to a crime although the information does not charge the defendant as such. *Nicholas v. State*, 49 Wis. 2d 683, 693, 183 N.W.2d 11 (1971). Even if Jackson would not have admitted to being the shooter in open court during the plea colloquy, his participation in the crime still would have been sufficient for the court to accept his no contest plea to second-degree reckless homicide.

To reiterate, Jackson's only argument is that he thinks he could have mounted a defense at trial to a charge of second-degree reckless homicide, and concludes he has therefore shown prejudice. (Jackson's Br. 8–11.) But again, he was

never going to trial on that charge, so his analysis misses the mark. Jackson has provided nothing explaining why he would have insisted on going to trial on the original charges of felony murder and armed robbery as party to a crime if Anderson would have spent more time with him, and his conviction on those charges was assured. Nor has he shown that there was anything improper about the court's accepting his no contest plea to second-degree reckless homicide, because he admitted he committed that crime in open court and the facts show he at least participated in it. Jackson has not shown prejudice from Anderson's failure to spend more time with him before the trial date.

II. The circuit court appropriately rejected Jackson's request for a fifth new counsel, and that decision does not result in a manifest injustice allowing Jackson to withdraw his plea.

A. Standard of review

"Whether trial counsel should be relieved and a new attorney appointed is a matter within the circuit court's discretion." *State v. Jones*, 2010 WI 72, ¶ 23, 326 Wis. 2d 380, 797 N.W.2d 378. "This court will sustain the circuit court's decision if the court 'examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Id.*

B. A circuit court's exercise of discretion in denying a request for substitution of counsel is evaluated using the three-factor test set forth in *State v. Lomax*.

This Court reviews the circuit court's exercise of discretion to deny a request for new counsel using the test set forth in *State v. Lomax*, 146 Wis. 2d 356, 359, 432 N.W.2d 89 (1988). The factors to be considered include:

> (1) the adequacy of the court's inquiry into the defendant's complaint; (2) the timeliness of the motion; and (3) whether the alleged conflict between the defendant and the attorney was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case.

Id. at 359. The weight appropriately given to each factor "will also depend on the circumstances." *Jones*, 326 Wis. 2d 380, ¶ 30. However, a court still properly denies a request if the defendant fails to show that the third factor was present, even if the inquiry by the court was sufficient and the motion was timely. *State v. Boyd*, 2011 WI App 25, ¶ 13, 331 Wis. 2d 697, 797 N.W.2d 546.

C. The *Lomax* factors show that the circuit court properly exercised its discretion in denying Jackson's request for a fifth attorney.

1. The circuit court appropriately inquired about the reasons for Jackson's request and considered the timeliness of the motion.

As Jackson observes, the trial court found that Jackson's complaints about Anderson were vague, that he had made the same complaints about all of his previous attorneys, that all of his previous attorneys were also ready for trial, and that the case had been pending for two years largely due to Jackson's repeatedly firing his attorneys. (Jackson's Br. 13.) It also noted that Anderson was not required to mindlessly follow whatever direction Jackson gave. (R. 70:3.) That was a reasonable assessment of the situation that satisfies the first two *Lomax* requirements. Jackson's claim that it does not overlooks several important facts of record.

As to the first two factors, the trial court and the postconviction court found that Jackson's assertions were

vague, that he'd made the same complaints about his other counsel, and that his motion was untimely. (R. 52:28–29; 70:3.) So, the court inquired into the reasons for Jackson's request for Anderson to withdraw, evaluated their merit in light of the entire record, and rejected them. It also considered the timeliness of the request and the delay Jackson's many requests for new counsel had already caused. And Jackson's complaints about Anderson *were* vague, and they were the same complaints he made about his three previous attorneys. They were also made shortly before trial, and the case had already been delayed repeatedly.

Attorney Rich moved to withdraw on July 28, 2015, stating there had been a breakdown in communication between she and Jackson. (R. 59:2.) Next, Attorney Henry moved to withdraw, stating that the antagonistic relationship between Jackson's mother and Henry also led to a breakdown in communication between her and Jackson. (R. 61:3.) Though Jackson claims that is a different reason than he had for wanting Rich to withdraw (Jackson's Br. 13), it is not. The obvious implication from the record is that Jackson was no longer willing to work with Rich or listen to her advice due to his mother's influence, which caused him to want a new attorney. And contrary to what he implies in his brief, Jackson did indeed ask that Attorney Hart be replaced, and he did so based on the same complaints he lodged about his other attorneys and later about Anderson. (*See* Jackson's Br. 13.) At the final pretrial conference, Hart told the court,

> In talking to my client early this morning, he wants a new lawyer.
>
> He feels that I have not represented his best interests. He has multiple complaints about me. I told him, obviously, I'd bring that to the court's attention if that's what he wants. I am not here to make myself represent him.
>
> THE COURT: Are you the first lawyer?

> HART: I am actually the third.
>
> THE COURT: All right. Is that accurate, Mr. Jackson?
>
> [JACKSON]: Yes, sir.

(R. 64:3.) The circuit court told Jackson that Hart was "a very capable, competent, and zealous advocate for his clients." (R. 64:3.) It admonished Jackson, though, that his attorney is "not your hand puppet. He doesn't do your bidding. He doesn't do everything you ask him to do." (R. 64:4.) Jackson said Hart "hasn't done nothing I asked him to do." (R. 64:4.) The court informed Jackson that there was likely a reason for that, and refused to allow Hart to withdraw based on Jackson's complaints. (R. 64:4.) So, while it is true that the court eventually did allow Hart to withdraw after his leg injury, Jackson's assertion that he did not make the same complaints about Hart as he did with the rest of his attorneys is not accurate. (Jackson's Br. 13.)

Regarding Anderson, Jackson sent a "motion to withdraw legal counsel" to the court on September 20, 2016. He said he wanted Anderson replaced because Anderson "failed to promptly comply with reasonable [sic] request by the defendant for information," "failed to act with reasonable diligence and promptness in representing the defendant," and "failed to maintain a client-lawyer relationship with the defendant." (R. 24.) As the circuit court aptly observed, those reasons are vague, and as with his prior requests, it was made mere weeks before the trial date of November 1, 2016—the latest of nearly two years of delayed trial dates as Jackson rotated through attorneys.

And, when asked why he wanted Anderson to withdraw, Jackson said the exact same things he had said about Hart: "[b]ecause he hasn't – he doesn't keep in contact with me. He hasn't been properly representing me at all. He hasn't filed any motions on my behalf that I asked him about.

He hasn't done anything for me." (R. 70:3.) As it did with Attorney Hart, the court informed Jackson that Anderson was not required to do everything he asked including filing his motions, and refused to set this now-two-year-old case over once again to appoint Jackson his fifth attorney. (R. 70:3.) As Jackson observes, the court is allowed to balance society's interest in the prompt and efficient administration of justice when considering a substitution of counsel request (Jackson's Br. 13 (citing *Lomax*, 146 Wis. 2d at 360)), and this case had been languishing for years largely due to Anderson's repeated changes of counsel.

So, the court made a sufficient inquiry into Jackson's reasons for the request. It also considered the timeliness of the motion not only in respect to the request itself, but in respect to the rest of the record. The first two *Lomax* factors are met.

2. The record shows that there was not a total lack of communication between Jackson and Anderson that prevented an adequate defense.

The third *Lomax* factor assesses "whether the alleged conflict between the defendant and the attorney was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case." *Jones*, 326 Wis. 2d 380, ¶ 25 (citation omitted). Again, if the record does not show a total lack of communication that prevented an adequate defense, the circuit court properly denies the motion. *Boyd*, 331 Wis. 2d 697, ¶ 13. And though Anderson admitted he should have maintained better communication with Jackson, their relationship was not so strained as to amount to "a total lack of communication that prevented an adequate defense" or "frustrated a fair trial." *Id.*

Anderson testified that he met with Jackson four times, three times before the entry of his plea, and once afterward. (R. 78:7.) He further testified that he received and reviewed all of the discovery in the case, and that he went through the evidence with Jackson including the codefendants' statements implicating him as the shooter. (R. 78:8.) Anderson ordered a transcript of Henderson's plea hearing to learn impeaching information about the deal he received. (R. 78:20.) He also sent Jackson a letter on October 18 explaining the State's plea offer. (R. 78:24.) Anderson said he had a conversation with Jackson the morning of trial about the strength of the State's case, but testified that he was ready to proceed to trial, and that his strategy would have been to discredit Henderson's and Webster's testimony. (R. 78:17, 26.)

The record thus conclusively demonstrates that there was not a total lack of communication between Anderson and Jackson that prevented an adequate defense or frustrated a fair trial. Anderson talked to Jackson about the case several times and gave him a fair assessment of what he thought the best course of action was. That is sufficient to defeat Jackson's claim under *Lomax*. *See Jones*, 326 Wis. 2d 380, ¶ 45.

Jackson presents no real argument that there was a total lack of communication preventing an adequate defense or fair trial; he just declares there was because he alleged Anderson did not keep in contact with him as much as he would have liked. (Jackson's Br. 13–14.) However, "the Sixth Amendment does not guarantee 'a friendly and happy attorney-client relationship," *Jones*, 326 Wis. 2d 380, ¶ 45, and "as an indigent defendant, [Jackson] [was] not entitled to be represented by counsel of his choice." *Id.* ¶ 41. He was entitled only to effective assistance of counsel, which, shown above, he received. *Id.* ¶ 45. This Court should affirm the decision of the circuit court.

III. This case does not warrant vacating the plea or resentencing in the interests of justice.

A. This Court only exercises its discretionary reversal power in extraordinary cases.

"The court of appeals has the discretionary power to reverse a conviction in the interest of justice." *State v. Avery*, 2013 WI 13, ¶ 23, 345 Wis. 2d 407, 826 N.W.2d 60. This Court may order a new trial under Wis. Stat. § 752.35 if it appears that "(1) the real controversy has not been fully tried, or; (2) it is probable that justice has for any reason miscarried." *State v. Jones*, 2010 WI App 133, ¶ 43, 329 Wis. 2d 498, 791 N.W.2d 390 (citation omitted).

This Court only exercises its discretionary reversal power "in exceptional cases." *See State v. Kucharski*, 2015 WI 64, ¶ 23, 363 Wis. 2d 658, 866 N.W.2d 697. This Court and the Wisconsin Supreme Court have held that such cases exist when a "pivotal" piece of evidence was later discredited, or such evidence was withheld from the jury at trial. *Id.* ¶¶ 37–58 (discussing exceptional cases). This discretionary reversal power "should be exercised sparingly and with great caution." *State v. Williams*, 2006 WI App 212, ¶ 36, 296 Wis. 2d 834, 723 N.W.2d 719 (citation omitted).

B. Jackson has not shown that justice has miscarried or that there is anything exceptional about this case.

Jackson argues that justice has miscarried because, according to him, "the facts of this case do not support Jackson's conviction" and because "[t]rial counsel's representation was fundamentally unfair to Jackson." (Jackson's Br. 14–15.) He again claims that the facts show he was only a lookout, and that he received ineffective assistance of counsel. (Jackson's Br. 15.) That is insufficient to warrant reversal in the interests of justice.

First, Jackson's entire argument on this point consists of conclusory statements that merely restate his conclusions about his prior two issues. (*See, e.g.,* Jackson's Br. 15 (claiming that unspecified "errors infected the plea negotiations.").) An interests of justice claim fails when it merely rehashes the defendant's previous arguments. *State v. Ferguson*, 2014 WI App 48, ¶ 33, 354 Wis. 2d 253, 847 N.W.2d 900.

Second, there is nothing exceptional about this case. Jackson participated in an armed robbery that led to a man's death. The State charged him with felon in possession of a firearm and felony murder and armed robbery as a party to a crime. His codefendants flipped on him and offered to testify against him in order to secure favorable deals for themselves. Jackson was certain to be convicted at trial, and the State was unwilling to offer a plea to anything other than second-degree reckless homicide. Jackson was unhappy with his many appointed attorneys and felt they should have been doing more for him—a frequent occurrence. Despite Jackson's displeasure, his attorney went over the facts with him and was prepared to try the case. He told him, though, that he'd be better off taking the plea. Jackson decided to plead no contest to second-degree reckless homicide, which he admitted in open court that he understood, rather than face certain conviction.

So, the facts of this case are, Jackson was displeased with his attorney but decided to plead to a less severe offense that he did not want to admit committing, in order to secure a more favorable sentence than he was likely to get after an assured conviction at trial. As the circuit court noted, that is "[a] weekly occurrence." (R. 78:69.) There is nothing exceptional about this case.

CONCLUSION

This Court should affirm the decision of the circuit court.

Dated this 9th day of December 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,148 words.

Dated this 9th day of December 2020.

Electronically signed by:

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that:

A copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 9th day of December 2020.

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