STATE OF WISCONSIN

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

District I

Case No. 2014AP000285 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

GABRIEL BOGAN,

Defendant-Appellant

ON APPEAL TO REVIEW THE JUDGMENT OF CONVICTION ENTERED ON JULY 3, 2012, THE HONORABLE RICHARD SANKOVITZ PRESIDING, AND THE DECISION AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF ENTERED ON JANUARY 31, 2014 THE HONORABLE JEFFREY WAGNER PRESIDING, BOTH ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY.

BRIEF AND APPENDIX OF THE APPELLANT

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ISSUE PRESENTED

I. Whether the trial court erred in denying Defendant's Motion for Postconviction Relief with respect to prejudicial

ineffectiveness of trial counsel when counsel failed to argue, and obtain a jury instruction, as to Defense of Others. The facts at trial clearly warranted such an argument and accompanying instruction. Defendant was protecting another individual. His only option was to shoot that these armed perpetrators that were hunting this individual. However, trial counsel's trial strategy was to deny that Defendant was this shooter, But, based upon the facts at trial, this strategy was unreasonable. Trial counsel's conduct was prejudicially ineffective.

Trial Court Answered: No.

POSITION ON ORAL ARGUMENT AND PUBLICATION

This Appeal involves issues of law which are not settled. Arguments need to be presented in more detail in oral argument. Therefore, oral argument and publication are requested.

STATEMENT OF THE CASE

Mr. Bogan was charged in a two Count Criminal Complaint filed on or about April 11, 2011. Count One charged him with First Degree Reckless Homicide, Use of a Dangerous Weapon. The underlying charge was a Class B felony. The victim of this Count was Yvontae Young. Count Two charged him with First Degree Recklessly Endangering

Safety, Use of a Dangerous Weapon. The underlying charge was a Class F felony. The victim of this group was Amari Burgess. However, the dangerous weapon enhancers provided an additional maximum penalty of five years for each Count.

The Criminal Complaint alleged that on or about March 18, 2011, Defendant recklessly caused the death of Yvontae Young and recklessly endangered the safety of Amari Burgess. There had been a dispute in the city of Milwaukee between two rival groups. Defendant became part of one of these groups. According to the Complaint, during this dispute Defendant fired his handgun at the other group. The Complaint contains a statement from Tavares Morgan. In this statement, Morgan indicates that Defendant was part of the group that contained Leroy Newman. As a result of this shooting, both of the two victims were struck. Young died as a result of the shooting. Burgess was injured. (2:1-4).

An initial appearance occurred on April 12, 2011. (44:1-5).

A preliminary hearing occurred on April 20, 2011 and April 27, 2011. Ann Bowe was Defendant's attorney. Both the medical examiner and a Detective testified. Probable cause was found and Defendant was bound over for trial. (46:17). The District Attorney's office filed a two-count Information charging Defendant with the same two Counts as in the Criminal Complaint. (4:1).

Arraignment occurred on April 27, 2011, immediately after the finding of bindover. At that time, Defendant acknowledged receipt

of the Information and entered pleas of not guilty to both Counts. (46:18).

A jury trial eventually occurred on the charges in the Criminal Information. Ann Bowe represented the Defendant at this trial. It lasted from May 21, 2012 until May 25, 2012. The jury found Defendant guilty of both Counts in the Information. (63:6; 23:1; 24:1).

On July 2, 2012, the trial court sentenced Defendant on Count One to thirty years prison, to consist of twenty two years initial confinement plus eight years of extended supervision. This was concurrent to Count Two, but consecutive to any other sentence. On Count Two, the trial court sentenced Defendant to ten years prison to consist of five years initial confinement plus five years extended supervision. (64:31, 35; 27:1-2; A 101-102). Defendant filed his Notice of Intent to Pursue Postconviction Relief in a timely fashion. (28:1).

Defendant filed a Motion for Postconviction Relief with attachments on December 6, 2013. By this Motion, Defendant sought a new trial. This, on the basis of an allegation of prejudicial ineffectiveness of trial counsel.(36:1-108).

In response to Defendant's Motion for Postconviction Relief, the trial court issued a Briefing Schedule. (37:1). The State filed a Response Brief. (39:1-10). Defendant filed his Reply Brief with attachments. (40:1-21).

After the completion of briefing, the trial court did not conduct an evidentiary hearing to determine trial counsel's prejudicial ineffectiveness. Instead, the trial court issued a scant one and one half page written Decision and Order denying the Motion. (24:1-12; A 107-108).

Defendant filed his Notice of Appeal in a timely manner. (42:1-6).

This Appeal has been filed within the schedule set by the Court.

STATEMENT OF THE FACTS

Mr. Bogan was charged in a two Count Criminal Complaint filed on or about April 11, 2011. Count One charged him with First Degree Reckless Homicide, Use of a Dangerous Weapon. The underlying charge was a Class B felony. The victim of this Count was Yvontae Young. Count Two charged him with First Degree Recklessly Endangering Safety, Use of a Dangerous Weapon. The underlying charge was a Class F felony. The victim of this group was Amari Burgess. However, the dangerous weapon enhancers provided an additional maximum penalty of five years for each Count.

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a dispute in the city of Milwaukee between two rival groups. Defendant became part of one of these groups. According to the Complaint, during this dispute Defendant fired his handgun at the other group. The Complaint contains a statement from Tavares Morgan. In this statement, Morgan indicates that Defendant was part of the group that contained Leroy Newman. As a result of this shooting, both of the two victims were struck. Young died as a result of the shooting. Burgess was injured. (2:1-4).

A preliminary hearing occurred on April 20, 2011 and April 27, 2011. Ann Bowe was Defendant's attorney. Both the medical examiner and a Detective testified. The detective testified as to what a Leroy Newman had told him. Probable cause was found and Defendant was bound over for trial. (46:17). The District Attorney's office filed a two-count Information charging Defendant with the same two Counts as in the Criminal Complaint. (4:1).

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On the afternoon of May 22, 2012, Dontez Jefferson testified. He testified that he was involved in a dice game. About four people were shooting dice and other people were just standing around. He was shooting dice. Leroy was there. He identified Leroy in a photo array. (58:13-15). He and Leroy had a disagreement over the game. There was an argument. Leroy accused him of cheating. Jefferson left and went to Nakosi Humphrey's house. (58:17-18). Jefferson had a revolver gun at Humphrey's house. He got the gun and returned to the corner of 47th and Rohr with Nakosi. At the corner, Leroy had nine people with him. There was an exchange of words between Jefferson and these nine people. This did not work. Jefferson lifted his shirt to show them his firearm when Leroy's group tries to approach. (58:19-21). Jefferson also called other individuals which escalated the situation. He called Deangelo Lee and Keanan Mills. He called these people before he showed off his firearm. (58:22-23). Yvontae Young and Marcus also came to aid Jefferson. Furthermore, another group of friends arrive with Keanen and Deanglo. This included Amari Burgess and Ladarius Young. Burgess was the victim of Count Two. Now, Jefferson has eight people. He saw someone in Leroy's group talking to someone in a vehicle. (58: 24-25). Leroy was Leroy Newman.

Jefferson continued to testify. Now, there were two groups of people across the street from each other. Jefferson's group of eight people crossed the street and went at Leroy's group of nine

people. This all happened after Jefferson had shown Leroy's group the pistol. Leroy's group started running. They split up. Jefferson's group chased after them. (58:26-27). Jefferson's group saw Leroy and chased after him. Jefferson's group was all together. The group ended up at 46th and Rohr. His group split up and continued looking for Leroy's group. Yvontae and Amari split up and go a different way than he did. (58:28-29). At approximately 46th and Villard, Jefferson heard three shots. His group then ran to 47th and Villard. They saw Yvontae on the ground and Amari was with him. (58:30-31). Other than the firearm that he had, Jefferson did not see anyone else with a gun. In Leroy's group, he did not see either Leroy or another man, one with dreads, with a gun. He had never seen the Defendant before. (58:32). Amari Burgess and Yvontae Young began as part of Jefferson's group. (58:39).

Amari Burgess testified next for the State. Before he went to 47th and Rohr he was with friends at 50th and Center. The friends included Deangelo Lee, Keanen Mills, and Ladarius Young. He went to 47th and Rohr because his group had received a phone call that there was about to be a fight. The person that had called was Dontez Jefferson. (58:43-44). Burgess's group left to back up Dontez. When they arrived at 47th and Rohr they saw a group of dudes on the southwest corner. He saw Dontez halfway down the block. Burgess's group joined Dontez's group and became one group. (58:45-46). Yvontae also showed up, on his own. He joined Dontez also. Burgess

did not remember telling the detectives that his group chased the other group up to about 48th Street. The other group left. Burgess's/Jefferson's group crosses to the side of the street that the other group had just vacated. Yvontae was with Burgess's group. This group continued to walk westbound. (58:47-49).

Keanen Mills testified for the State. He testified on the afternoon of May 22, 2012. He testified that he arrived at 47th and Rohr on March 18, 2011. He was with Amari Burgess. Deangelo received the phone call from Dontez. (58:83-84). The call was about Dontez getting into a confrontation with some other people. Keanen and three others went to back up Dontez. Keanen saw a group of males on a different side from Dontez. There were between five and six males on the different side. Keanen knew Yvontae Young. (58: 85-86). Someone called him to the location. His group built up. His group approached the males on the different side of the street. His group crossed the street. His group crossed the street to confront the other group about the situation. He did not see anyone in the other group with a firearm. His group had approximately eight people. When his group had crossed the street, the different other group of about five or six people ran. They all ran in one direction. His group chased after them for about one to two blocks. (58:87-88). The other group was running westbound. His group chased them into an alley. Then, his group split up because his group wanted to find them. His part of the group that had split up

included himself, Yvontae, and Amari. His group did not include Dontez. His group went up Rohr, westbound. Dontez's group went eastbound. (58:89-90). The two groups were trying to cut off the different group in an angle. The two groups were trying to "hem in" the different group. However, as his group was heading towards Rohr, he heard shots. Yvontae and Amari were right next to him. (58:91-92).

Tavares Morgan testified for the State. His testimony began on the afternoon of May 23, 2012. He testified that he knew the Defendant. He knew him as Gabe. He remembered bits and pieces of a shooting that had occurred on March 18, 2011. (60:53). He was at the dice game on that evening. Leroy Newman and Earl Meredith were there. Earl Meredith was known as little Earl. (60:55-56). Dontez Jefferson was also there. He had no personal knowledge of an argument at that game. He had left to go to the store. When he returned, both Leroy and Jefferson were there. Others told him that they had a little argument. After he returned, everybody left. (60: 58-59). There had been a disagreement between Leroy and the little guy. This was the guy that Leroy had been gambling with. The little guy came back. When the little guy came back, he had a gun. When he was talking, he pulled it out. Little dude was talking really loud. (60:61-62). The little guy brought back some other little person with him. When the little guy came back, he had a snubnose revolver. (60:63-64).

Tavares Morgan continued to testify. When the little guy came back, he showed the firearm. The little guy with the gun and his friend were down the street on the corner. The witness and his group were doing their thing. Little guy came to his group and showed the gun. He walked down the street and exchanged words with the victim's group. When little guy walked off with the other individual, he was mad. He was screaming and yelling. (60:65-66). Eventually, other individuals joined the little guy's group. This became a big group. Then, little guy's group chased the witness's group. The witness ran through an alley. He did not see where little Earl or Leroy ran. Every man was for himself. The situation was "basically get away, if you can." (60:69-70). Morgan returned to the area of 47th and Rohr. He and his buddies were chased again. This was possibly the same group of guys that had chased him the first time. He was ducking and diving. (60:72-73). He saw Leroy in the alley. He was there with a couple of people. (60:74).

Detective Marco Salaam testified for the State. He testified that he interviewed Tavares Morgan. Morgan told the police that when he returned from the liquor store, he had to separate two of the individuals that had been gambling at the time. One was Leroy Newman and the other was Dontez Jefferson. Jefferson was the little guy. This was the same guy that came back later with a firearm. He came back with a big brother, Nakosi Humphrey. (61:56-58). Morgan told the Detective when he got to an alley, he saw Gabe, Leroy

Newman, and a third individual in the alley. Gabe was Gabriel Bogan. He saw the Defendant firing at a group on the corner of 47th and Rohr. He thought that Defendant was just trying to scare the other individuals. (61:59-60). Clearly, Defendant was acting in defense of his group, to include Leroy Newman.

The trial court conducted a jury instruction conference with the parties. However, Ms. Bowe never requested a defense of others instruction. (61:93-94). Immediately after the conference, the trial court instructed the jury prior to closing arguments. However, the trial court never provided a defense of others instruction. (61:96-113).

Once again, on the afternoon of May 24, 2012, the trial court discussed the instructions with the parties. Ms. Bowe, once again, never requested a defense of others instruction. (62:2). The court provided further instructions prior to closing arguments. However, once again, the court did not provide a defense of others instruction. (62:3-5).

Interestingly, Ms. Bowe argued during her closing that Leroy was the one who had a gun pulled on him by Jefferson. Jefferson had been trying to face him down. Leroy was the one that had been chased by the group. Jefferson was the one who got all of the people together and then started going after Leroy and his friends. Leroy was the one who had been chased. (62:28). These arguments clearly would have justified a self defense instruction on the part

of Leroy Newman had he been on trial for doing the shooting. However, Ms. Bowe never argued that Defendant was privileged for defending Newman.

The jury eventually returned verdicts of guilty as to both Counts in the Information. (63:6; 23:1; 24:1).

Defendant was eventually sentenced. On Count One, the trial court sentenced him to thirty years prison concurrent to Count Two. Count One consisted of twenty two years initial confinement plus eight years extended supervision. On Count Two, the court sentenced him to five years initial confinement plus five years extended supervision. (64:31, 35; 27:1-2; A 101-102).

Defendant filed his Notice of Intent to Pursue Postconviction Relief in a timely fashion. (28:1).

Defendant filed a Motion for Postconviction Relief with attachments on December 6, 2013. By this Motion, Defendant sought a new trial. This, on the basis of an allegation of prejudicial ineffectiveness of trial counsel. Defendant had argued that trial counsel had failed to argue, and request a jury instruction, as to Defense of Others. Defendant had argued that this was an appropriate, reasonable, and necessary, trial strategy. Trial counsel's failure to pursue this strategy was prejudicially ineffective. Defendant requested an evidentiary hearing pursuant to State vs. Machner. (36:1-108).

In response to Defendant's Motions for Postconviction Relief,

the trial court issued a Briefing Schedule. (37:1). The State filed a Response Brief. (39:1-10). Defendant filed his Reply Brief with attachments. (40:1-21).

After the completion of briefing, the trial court did not conduct an evidentiary hearing to determine trial counsel's prejudicial ineffectiveness. Instead, the trial court issued a scant one and one half page written Decision and Order denying the Motion. (24:1-12; A 107-108).

Defendant filed his Notice of Appeal in a timely manner. (42:1-6).

This Appeal has been filed within the schedule set by the Court.

ARGUMENT

I. MS. BOWE WAS PREJUDICIALLY INEFFECTIVE DURING THE JURY TRIAL FOR FAILING TO REQUEST A DEFENSE OF OTHERS INSTRUCTION AS WELL AS FOR FAILING TO ARGUE SUCH A DEFENSE. THE EVIDENCE WOULD HAVE MERITED SUCH AN INSTRUCTION AND DEFENSE. ACCORDINGLY, THIS INEFFECTIVENESS ENTITLES DEFENDANT TO HAVE THE JUDGMENT OF CONVICTION VACATED. THE TRIAL COURT'S DECISION AND ORDER FAILS TO ADEQUATELY REBUT THIS CONCLUSION.

A. The Constitutional Standard and procedural requirements

The right to effective assistance of counsel stems from the Sixth Amendment of the United States Constitution and Article I, Section 7, of the Wisconsin Constitution, which guarantee a Defendant a fair trial and effective assistance of counsel. The

test for ineffective assistance of counsel is two pronged. First, the Defendant must demonstrate that his trial counsel's performance was deficient; and second, the Defendant must demonstrate that the deficient performance prejudiced him. Strickland vs. Washington, 104 S.Ct. 2052, 466 U.S. 668 (1984); State vs. Sanchez, 201 Wis.2d 219, 227-228, 548 N.W.2d 69 (1996). In order to show 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. State vs. Sanchez, 201 Wis.2d 219 at 236 citing Strickland vs. Washington, 466 U.S. at 694

Once the Defendant shows prejudicial ineffectiveness of his counsel in his Motion papers, then the trial court must conduct an evidentiary hearing to determine whether or not counsel's representation was deficient and fell below an objective standard of reasonableness. State vs. Machner, 92 Wis.2d 797 (Ct.App. 1979); State vs. Curtis, 218 Wis.2d 550 (Ct.App. 1998).

Effective representation requires a prudent lawyer who is skilled and versed in criminal law. State vs. Peardot, 119 Wis.2d 400, 351 N.W.2d 172 (Ct.App. 1984). Trial counsel is expected to know law relevant to a case, particularly when it is closely tied to defense strategy. Trial counsel may be prejudicially ineffective for failing to utilize such law to his or her client's advantage. State vs. Dekeyser, 221 Wis.2d 435, 585 N.W.2d 668 (Ct.App. 1998).

Failure to raise a viable defense at trial may be prejudicial

ineffectiveness of counsel. State vs. Felton, 110 Wis.2d 485, 329 N.W.2d 161 (1982).

Failure to request a jury instruction on a defensive matter may be prejudicially ineffective assistance of counsel. State vs. McMahon, 187 Wis.2d 688, 523 N.W.2d 573 (Ct.App. 1994); Arrowood vs. Clusen, 732 F.2d 1364 (7th Cir. 1984).

In Arrowood, the Seventh Circuit found that the omitted instruction was critical to the proper presentation of one of the defense theories. The lack of tactical basis for the failure to request this instruction constituted error. The Court found that this error may have prejudiced the defense. If the jury had received the omitted instruction, they may well have considered the evidence differently, in favor of the Defendant. Id. at 1372.

B. Trial Counsel Ann Bowe was prejudicially ineffective for failing to both: (1) argue for defense of others, and (2) request a jury instruction for defense of others, force intended or likely to cause death or great bodily harm. The evidence was sufficient to provide such an instruction. The evidence supported such a defense.

A theory of defense instruction is appropriate if the defense is not adequately covered by other instructions and the defense is supported by sufficient evidence. State vs. Gonzalez, 328 Wis.2d 182, 789 N.W.2d 365 (Ct.App. 2010; rvrs'd on other grounds 2011 WI 63, 335 Wis.2d 270). The Court of Appeals in Gonzalez did not indicate that Gonzalez had testified at trial. Furthermore, the Court did not indicate that his testimony, or his supporting

Affidavit, is necessary in order to obtain a theory of defense instruction.

A judge is not to weigh the evidence. Only slight evidence is required to create a factual issue and put the defense before the jury. Weak or doubtful evidence entitles a Defendant to the instruction unless evidence is rebutted by the prosecution to the extent that no rational jury could entertain a reasonable doubt as to any element of the defense. State vs. Schuman, 226 Wis.2d 398, 595 N.W.2d 86 (Ct.App. 1999).

The jury instruction for law of Defense of Others, Force Intended or Likely to Cause Death or Great Bodily Harm, is as follows:

The law of defense of others allows the Defendant to threaten or intentionally use force to defend another only if:

(1) the defendant believed that there was an actual or imminent unlawful interference with the person of (name of third person); and

(2) the defendant believed that (name of third person) was entitled to use or to threaten to use force in self-defense; and

(3) the defendant believed that the amount of force used or threatened by the defendant was necessary for the protection of (name of third person); and

(4) the defendant's beliefs were reasonable.

The defendant may intentionally use or threaten force which

is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to (name of third person). Wis. Criminal Jury Instructions 830 (2005).

Here, clearly, the third person was Leroy Newman.

First, Ms. Bowe was prejudicially ineffective for failing to argue defense of others, force intended or likely to cause death or great bodily harm. She had presented an argument during closing that Leroy Newman had a self defense, force intended or likely to cause great bodily harm, had he been on trial. The facts at trial clearly supported such a defense. Jefferson had left the dice game to go to his brother's residence. He then obtained a snubnose revolver. However, instead of "forgetting about the situation," he returned to the scene to confront Newman. He showed Newman's group the firearm from his waistband. Jefferson then "rounded up" a number of friends to assist in the confrontation. Jefferson indicated that he had eight friends. Jefferson indicated that Newman's group numbered about nine. However, Keanen Mills testified that Newman's group actually numbered about five or six. Morgan's statement was that Jefferson was loud, screaming, mad, and confrontational.

Jefferson and his group met Newman's group at a street corner. After Jefferson had showed Newman his gun, and had rounded up his friends, Jefferson's group had crossed the street to confront

Newman's group. However, Newman's group attempted to flee and avoid a confrontation. Of both groups, only Jefferson had shown a firearm. No other individual in either group had shown a firearm. After Newman's group tried to flee in order to basically "get away," according to Morgan, Jefferson's armed group began to chase them. Jefferson's group split up in order to essentially "corner" Newman's group from both the west and the east. Newman was justifiably afraid for his life. Jefferson was angry, armed, and chasing after him with a large number of friends. Jefferson was attempting to corner and trap him. Clearly, had Newman shot at this group, under the circumstances, he would have acted in self-defense. Such force would have reasonably have been necessary in order to prevent imminent death or great bodily harm to him. Reasonably, there would have been no other purpose for Jefferson's group to trap Newman except to probably shoot and/or severely injure him. Otherwise, Jefferson's group would have left and not bothered to chase and corner Newman and his group. Essentially, Jefferson's group was a "lynch mob."

Here, the logic and argument that supports an argument that would have justified Newman's self defense also justifies the Defendant's shooting. There was a reasonable belief that there was an imminent and unlawful interference with Newman. Newman reasonably was entitled to use or to threaten to use force in self defense. The amount of force used or threatened by the Defendant

was necessary for the protection of Newman. Furthermore, these conclusions are reasonable under the circumstances.

For the aforementioned reasons, the evidence supported a defense of others, force intended or likely to cause death or great bodily harm argument and instruction. The evidence was sufficient for such a defense and instruction. Failure to argue this defense and request this instruction was prejudicially ineffective assistance of counsel.

Any argument by attorney Bowe that she failed to both argue the Defense of Others defense and to request the appropriate jury instruction as a tactical decision must also fail. A reviewing court will not ratify a trial lawyer's decision simply because it is labeled "trial strategy." Trial counsel's decisions must be based upon fact and law upon which an ordinarily prudent lawyer would then have relied. This standard implies deliberateness, caution and circumspection and the decision must evince reasonableness under the circumstances. It must be reasonable under prevailing professional norms and considering all of the circumstances. State vs. Hicks, 195 Wis.2d 620 (Ct.App. 1995) citing State vs. Felton, 110 Wis.2d 485 at 502. In State vs. Hicks, the Court of Appeals found a trial lawyer's decision to forego DNA testing of public hair specimens to be prejudiciallly ineffective because it was not rationally based, even though the lawyer testified at the Post-Conviction Motion hearing that this was trial

strategy. State vs. Hicks, 195 Wis.2d 620 at 627-629. A trial strategy must be objectively reasonable. State vs. Snider, 266 Wis.2d 830, 668 N.W.2d 784 (Ct.App. 2003) citing State vs. Hubanks, 173 Wis.2d 1 at 28, 496 N.W.2d 96 (Ct.App. 1992). This standard is without dispute. This would be the same situation here if attorney Bowe asserts "trial strategy", as indicated previously. There is no rational basis for such strategy, short of a stipulation, without Defendant's consent.

C. The Trial Court's Decision and Order Fails to Adequately Rebut the Conclusion that Trial Counsel was Prejudicially Ineffective by Failing to Argue, or Present a Jury Instruction, as to Defense of Others.

The trial court's scant page and one half Decision had relied solely upon the State's Response Brief. The Decision and Order had concluded that trial counsel was not prejudicially ineffective for failing to pursue a trial strategy antagonistic to her trial strategy. Her trial strategy was that Defendant was not the shooter. The trial court's conclusion was that a Defense of Others strategy would have been inconsistent with the actual trial strategy. A Defense of Others strategy, contrary to the actual strategy, would have required Defendant to have conceded being the shooter. However, this conclusion is erroneous. This conclusion appears to indicate that the actual trial strategy was reasonable. The Decision never indicates that trial counsel's strategy was unreasonable. However, this is incorrect.

Also, the Decision and Order indicates that either Defendant should have testified at trial, or Defendant's Motion should have contained an Affidavit setting forth factual circumstances that would have supported a Defense of Others defense. Once again, this conclusion is erroneous.

Finally, the Decision and Order indicates that Defendant has failed to explain in his Motion how Defendant had acted in Newman's defense when he shot the victims. This, even though the Decision and Order concedes that the Motion establishes that Newman was running for his life from Jefferson's group. However, the Motion itself, and this present Brief, clearly explain Defendant's conduct. Hence, the court, at the time of authoring the Decision and Order, had already known of this explanation. The victims were part of Jefferson's group. This group, while armed, were hunting Newman after a confrontation. Newman and his group had tried to leave after the confrontation and after Jefferson had flashed a weapon. Accordingly, Newman's group knew that Jefferson's group was armed. However, Jefferson's group hunted them. Defendant had no choice but to act as he did in defending Newman. As indicated, the Decision and Order's statement that the Motion explains that Newman was running for his life concedes the need for Defendant's conduct.

As also indicated, the Decision and Order's conclusions that: (1) trial counsel was not obligated to present an antagonistic defense; and (2) either Defendant's trial testimony, or a

supporting Affidavit, was necessary, are both erroneous conclusions.

In the present matter, trial counsel's choice of defense, that Defendant had not shot the firearm, was objectively unreasonable. Here, the Decision and Order attempts to essentially opine that the State's evidence of four independent witnesses, testifying that the Defendant was the shooter, is somehow reasonably legally insufficient to support a conviction. An argument or conclusion that such a number of witnesses, who testify consistent with each other, must somehow all be disbelieved, is unreasonable. However, a discussion of the totality of all of these circumstances is necessary herein in order to analyze the reasonableness of trial counsel's defense.

First, Tavares Morgan told law enforcement that Defendant was the shooter. Although he did not testify before the jury that he saw the Defendant shooting the firearm, he did testify that he did not remember telling the detectives that he saw Defendant shooting the gun. He did admit talking to them. (60:77). He also testified that he could not remember signing a photograph of the Defendant. (60:80-81). He never denied any of these statements or this conduct. However, he just simply indicated that "he did not remember." He also testified that he "somewhat" remembered telling the detectives that Defendant was one of the three individuals in the alley. He testified that "he could not remember" any details

of what he had told the police. (61:8-9). Morgan never denied making these statements to the police.

In response to Morgan's testimony, the State had introduced the testimony of Detective Marco Salaam. Salaam testified that Morgan told him, and his partner Tom Casper, that he had observed the Defendant shoot the firearm during the shooting in question. (61:59-60). Morgan identified the Defendant as having been the shooter in a photoarray. (61:70-71). The State had entered the videotape of Morgan's interrogation into evidence. (61:54).

Here, clearly, the State had established to the jury that Morgan had indicated that Defendant was the shooter. This was the State's position at trial. It is reasonable given Salaam's testimony and Morgan's non-recant before the jury. Salaam's testimony was highly credible given that Morgan, when interrogated, had no motivation to lie. The Defendant never presented such a credible motivation.

At trial, the State had also presented three jail house informants against the Defendant. These informants were Ricky Chiles, Nathaniel Richmond, and Robert Brown. All three of these witnesses were jail cell mates of the Defendant and were independent of each other. All three testified that Defendant had bragged about the shooting. Each informant's contact with the Defendant was independent and distinct from the other informants' contacts.

Interestingly, there was no evidence that Chiles, Brown, and Richmond had somehow coordinated a campaign to maliciously inculpate Defendant as having been the shooter. All three of these witnesses testified consistent with each other, without any evidence of conspiring to inculpate Mr. Bogan. The Defendant never presented evidence, or argument, as to any such conspiracy. Clearly, this had enhanced their credibility.

Ricky Chiles testified that he had spoke with the homicide detectives on this case after a sentencing on an original armed robbery charge. He also testified that the detectives never made him any promises. They did not ask for anything other than to tell the truth. As a matter of fact, he had been promised no deals by any prosecutor in exchange for his testimony in this case. He had been told that if he sought to receive some credit on his current sentence, that the State would inform the court of that, if he had testified truthfully. He knew nothing about the case except what the Defendant had told him when they were roommates. His information came only from the Defendant. (58:117-118). His testimony was materially consistent with the facts of this case and the testimony of the other witnesses, to include Morgan.

Nathaniel Richmond testified also for the State. He testified that he was hoping to receive some consideration on his pending sentence. However, he testified that he had not been offered any deals by the detectives or by the prosecutors in exchange for his

testimony in this case. He had just been told that, if he did file a motion, the State would talk about his truthful testimony or cooperation, but that anything that would happen would be up to a judge. (59:27-28). The State was not filing a motion on his behalf. Once again, essentially, his testimony was consistent with the testimony of the other witnesses and evidence in the case, to include Morgan.

Robert Brown also testified for the State. Once again, his testimony was essentially consistent with the testimony of the other witnesses. He testified that he was coming forward to hopefully get credit on two sentences, one federal and one state. However, he also testified that this was only a small portion of why he came forward. He came forward to help the family of the victim receive some justice. The Defendant's conduct was wrong. He was bragging and boasting like it was nothing. The only agreement was that if a federal sentence modification motion came forward, he could hopefully possibly get some time off. This was his understanding. However, besides this agreement, he had been promised nothing by the detectives when he had talked to them. When he talked to the detectives, he did not even know whether that would be a possibility. They told him that there were not any promises being made or any guarantees. Neither the State nor the U.S. Attorney had not promised him anything in exchange for him talking to the detectives. When he had talked to the detectives,

he had been promised nothing. Any sentence modification would be up to a judge. He had not read any newspaper articles about the case. He never spoke with Ricky Chiles about the case. He did not know Nathaniel Richmond. He never spoke with anyone besides the Defendant about this case. He never spoke with any other inmates. He never reviewed any police reports other than the medical examiner's report. (60:23-27).

Clearly, trial counsel knew of the four independent witnesses that had inculpated Defendant: Morgan, Chiles, Richmond, and Brown. She knew of the substance of the testimony and, based upon her opening statement and standard discovery procedure, had been provided all relevant discovery with respect to all of these witnesses. This would include Salaam's report(s). Nevertheless, she believed that a reasonable defense strategy of attacking the credibility of each of these witnesses and arguing that they were all incredible was reasonable. However, as discussed, this was an incorrect conclusion and an unreasonable analysis. This strategy was unreasonable. To argue that all four of these witnesses were not credible, under the circumstances herein, is not reasonable. The only reasonable defense strategy, whether considered by trial counsel or not, was Defense of Others.

The Decision and Order has concluded that Defendant has not provided any sort of Affidavit as part of his Postconviction Motion. In the alternative, the Decision also states that Defendant

should have testified as to the Defense of Others. However, the Decision and Order has failed to indicate any need for such an Affidavit or testimony. Defendant has relied completely upon the testimony and evidence at the trial. No independent witness(es) are necessary for the formulation of Defendant's conclusion that trial counsel was prejudicially ineffective. As noted earlier in this Brief, the Court of Appeals in Gonzalez had failed to indicate in its Opinion either that Gonzalez's testimony was necessary, or that he even needed to testify. Furthermore, the Court of Appeals in Schuman never indicated that Defendants need to testify. All that the Schuman Court indicated was that slight evidence was necessary to create a factual issue and put the defense before the jury. Even weak or doubtful evidence is sufficient to entitle the Defendant to an instruction. Here, The Decision and Order has failed to provide any law, or factual support, to support its conclusion and to contradict Defendant's position and this valid supporting case law. The only case law provided in this matter supports the Defendant's positions and rebuts the trial court. Hence, the Decision and Order has failed to provide any legal or factual support for the need for either Defendant's testimony or such an Affidavit.

Here, contrary to the Decision and Order, the facts supported a Defense of Others instruction. The facts and evidence, as known to the trial counsel prior to trial, did not objectively reasonably

support an argument that all four independent witnesses were "lying," under the circumstances present here. Hence, contrary to the Decision and Order, trial counsel's trial tactics and performance was unreasonable. The only reasonable defense, based upon the facts at trial, was Defense of Others. Defendant's testimony was not legally required. Contrary to the Decision and Order, this is not "second guessing" a choice between two reasonably viable defenses. Trial counsel's defense was unreasonable, under the circumstances. For the reasons indicated herein, trial counsel's decision not to pursue a Defense of Others defense and request an appropriate jury instruction was prejudicially deficient. A new jury trial is warranted. As discussed, the trial court's ruling disputing this contention is erroneous and improper. For the reasons discussed, it must be reversed.

CONCLUSION

For the reasons indicated within this Brief, trial counsel was prejudicially ineffective. Based upon these reasons, the trial court erred in denying Defendant's Postconviction Motion.

As indicated, the trial court erred in deciding contrary to Defendant's Postconviction Motion. Defendant respectfully requests that this Court either grant a new jury trial, or grant an

evidentiary hearing, to determine whether or not trial counsel was prejudicially ineffective.

Respectfully Submitted,

_____

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INDEX TO APPENDIX

CERTIFICATION

I hereby certify that the Appellant's Brief of Defendant-Appellant in the matter of State of Wisconsin vs. Gabriel Bogan, 2014AP000285 CR conforms to the rules contained in Wis. Stats. 809.19 (8)(b)(c) for a Brief with a monospaced font and that the length of the Brief is thirty (30) pages.

Dated this 10th day of April, 2014, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-
Appellant

CERTIFICATION

I hereby certify that filed with this Brief, either as a separate document or as a part of this Brief, is an appendix that complies with Wis. Stats. 809.19(2)(a) and that contains:

(1) a table of contents;

(2) relevant trial court record entries;

(3) the findings or opinion of the trial court; and

(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decision showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 10th day of April, 2014, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-
Appellant

CERTIFICATION

I hereby certify that the text of the e-brief of Defendant-Appellant's Appellant's Brief in the matter of State of Wisconsin vs. Gabriel Bogan, Case No. 2014AP000285 CR is identical to the text of the paper Brief in this same case.

Dated this 10th day of April, 2014, in Waukesha, Wisconsin.

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Attorney for Defendant-Appellant