STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2015AP2344-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEREMY L. WAND,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR LAFAYETTE COUNTY, THE HONORABLE THOMAS J. VALE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Did the trial court properly exercise its discretion in denying Jeremy Wand's postconviction motion to withdraw his guilty plea without an evidentiary hearing?

The trial court denied Wand's postconviction plea withdrawal motion without an evidentiary hearing because his claim of a "manifest injustice" was based on allegations of ineffective trial counsel that were either conclusory or meritless on their face.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State agrees with Wand that this case does not warrant oral argument or publication.

STATEMENT OF THE CASE

Jeremy Wand and his brother, Armin, intentionally set fire to Armin's family home during the night of September 7, 2012, killing Armin's three small children and seriously injuring his wife, S.W. The pregnant S.W. also lost her unborn child. Another toddler narrowly escaped, but only because a neighbor took her from Armin when he tried to put her back inside the burning children's bedroom through a broken window after S.W. had rescued the child and gave her to Armin outside. Armin and Jeremy did nothing to rescue anyone and were unscathed. Jeremy ran home as the children screamed for their lives. The motive: Armin hoped to cash in life insurance policies he had taken out on S.W. and the children so he could "start fresh." Armin promised to pay Jeremy $300 of the insurance proceeds for his trouble (2:4-8; A-Ap. 104-08; 105:Ex. 26: 9/9/12 interview of Jeremy Wand at Clips 5, 6, 9; Ex. 27: 9/9/12 interview of Armin Wand at Clips 3-9, 13-15, 18).

Both men confessed within two days of the fire (2:5-8, ¶¶ 7, 10; A-Ap. 105-08, ¶¶ 7, 10; 105:Exs. 26; 27). Their confessions strongly corroborated each other.

Faced with their confessions, and the likelihood that Armin (who had earlier pled guilty) would testify against him, Jeremy pled guilty on the advice of counsel June 12, 2013, to three counts of first-degree intentional homicide, one count of attempted first-degree intentional homicide, one count of felony murder (reduced from intentional homicide of an unborn child) and one count of arson (119).[1] In exchange for his plea, the State agreed to dismiss but read in one count of attempted first-degree intentional homicide and to recommend concurrent sentences for all charges. Wand would be free to argue at sentencing that the court make him eligible for supervised early release (119:12-39). Wand assured the court, both orally and in writing, that no one made any threats or promises to coerce his guilty plea (92:2; 119:20-21, 26-27). The court ordered a presentence investigation and scheduled sentencing for July 19, 2013 (119:40).

The presentence report, filed July 11, 2013, was unfavorable to Wand. It recommended that he be sentenced to life in prison without eligibility for supervised release (93; 98:3). One week after receiving the presentence report, July 18, 2013, counsel for Wand drafted a motion to withdraw his guilty plea and filed it at the outset of the sentencing hearing the next day (95; 98:3, 7). Wand alleged that there was a "fair and just" reason for pre-sentence plea withdrawal in the form of new information about S.W. that came to light after his plea: S.W.'s alleged inconsistent statement in the presentence report that she saw Jeremy at the scene, and her recent pending misdemeanor charges.

[1] Armin Wand pled guilty before Jeremy did, and would have testified for the State had Jeremy gone to trial ((118:16; 121:12).

Wand wanted to withdraw his plea so he could use this new information to attack S.W.'s credibility at trial (95:1-2; 96; 120:4).[2]

The court took up the motion at what was supposed to be the July 19 sentencing hearing. In addition to the two grounds set out in his motion relating to S.W.'s credibility, Wand also told the agent who interviewed him for the presentence report that he was "not thinking clearly" when he confessed to police, and pled guilty on the "insistence" of one of his two attorneys, Miguel Michel (93:10; 120:5-6). Michel did not appear in court at any proceeding. Only Attorney Frank Medina appeared with Wand at the plea hearing, sentencing and all other proceedings. Wand had no complaints about Medina's performance (120:6, 10-11). Despite his claim that Michel coerced him to plead guilty, Wand said he still wanted both attorneys Michel and Medina to represent him if his case went to trial (120:15-17).

When questioned by the trial court, Wand claimed that he was never "on board" with pleading guilty but felt pressured by Attorney Michel to do so. Wand did not tell Attorney Medina about any coercion by Michel (120:8-9). Wand said he plead guilty to make "people happy [instead] of doing what I think is best" for himself (120:10). Wand admitted that Attorney Medina did not pressure him to plead guilty (120:10-11).

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[2] Wand eschewed those reasons as grounds for his postconviction "manifest injustice" challenge to his plea after the trial court rejected them as "fair and just" reasons for granting his pre-sentence plea withdrawal motion (121:26-32). Wand now faults trial counsel for presenting what he calls these "specious" reasons instead of the "real" reasons for presentence plea withdrawal. Wand's brief at 15-16, 19. That argument is in itself specious because S.W.'s credibility issues were offered by Wand to his attorneys as his "real" reasons for plea withdrawal before sentencing, not the other way around (121:8-9). Even now, Wand says he wants a trial to impeach S.W. with her "inconsistent" statement. Wand's brief at 20. If Wand's desire to challenge S.W.'s credibility at trial is not "specious" now, it must not have been then.

When questioned by the trial court, Attorney Medina testified he recommended that Wand accept the plea offer because he would stand a better chance at sentencing. Medina went over the plea questionnaire and waiver of rights form with Wand, who then signed it before the plea hearing (92; 120:12). The trial court adjourned the July 19 hearing and directed the parties to file briefs on the motion (120:22). The adjourned hearing was held August 22, 2013 (121).

Attorney Medina explained at the outset of the August 22 hearing that Wand wanted to withdraw his plea when he learned about S.W.'s inconsistent statement in the presentence report (121:8-9). Wand testified at the August 22 hearing that he pled guilty on the advice of his attorneys (121:15-16), but he felt pressured to do so because Attorney Michel repeatedly told him it was his "best choice" (121:16). When asked to explain further why he wanted to withdraw his guilty plea, Wand stated: "We have false statement by me. We got three recanted statements by the Defendant, and I don't believe all of the witnesses for the prosecution are being totally honest" (121:16-17). Wand explained further, on cross-examination, that both he and S.W. have "recanted" their statements to police (121:19-20). He could not be specific about what S.W. had "recanted" (121:20). Wand also claimed to have "other witnesses" (121:21).

The trial court denied the motion for presentence plea withdrawal from the bench at the close of the hearing. It agreed with the State that Wand only proved he had a change of heart and wanted to go to trial to put on defenses that he knowingly and voluntarily waived on June 12 (121:26-32). The court noted the thoroughness of the plea colloquy. It rejected the two reasons set out in the motion because S.W.'s supposed "inconsistent" statement in the presentence report was inculpatory of Wand and her pending misdemeanor charges would not be admissible at trial (121:29-31).

The court also thought it significant that the motion was not filed until the sentencing hearing, and only after Wand had learned of the recommendation in the presentence report that he not be made eligible for supervised early release from prison. The court believed that this unfavorable recommendation was likely why Wand changed his mind the day before sentencing (121:31-32). The court found there was no reasonable probability of a favorable result at trial if S.W.'s inconsistent statement and misdemeanor charges were received into evidence (121:30-31).[3]

Sentencing took place later that same day, August 22, 2013, after a recess (122). At the outset, the State presented the testimony of Deputy State Fire Marshall William Boswell who discussed his findings as to the origin of the fire. Boswell testified that an electrical engineer who investigated the fire ruled out an electrical cause (122:17-18). Someone had removed the batteries from the smoke detectors (122:19-20). Boswell opined that, based on burn patterns he observed at the scene, there were two points of origin: the living room and the children's bedroom (122:32-34). These burn patterns were, Boswell testified, consistent with the statements by both Armin and Jeremy describing where and how they set the fire (122:35-36, 43). In Boswell's opinion, this fire was "intentionally set" (122:31). Boswell also noted that neither Armin nor Jeremy Wand were injured, while S.W. was seriously burned as she went in and out of the inferno trying to rescue her children (122:39). Boswell pointed to evidence of a bloody handprint next to the bedroom window where S.W. handed her daughter, J.W., through the window to Armin and where a neighbor stopped Armin from putting his two-year-old daughter back into the inferno to die. Boswell described a video that showed a neighbor carrying J.W. at 3:13 a.m. as the first responders arrived three minutes after the "911" call (122:18, 37-38).

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[3] Wand also knew at the time of his plea that his brother, Armin, had already been sentenced to life in prison without eligibility for supervised early release (119:18-19; 122:79, 95).

The State next introduced the testimony of State of Wisconsin, Department of Criminal Investigations Special Agent James Sielehr, who took statements from S.W. October 25 and 27, 2012, shortly after she came out of the coma she had been in since the fire (122:45-46). S.W. described to Sielehr how she awoke to find herself on fire, ran outside and rolled around on the ground to extinguish the flames, ran back inside to rescue her children, and rescued J.W. (122:46-48). Sielehr described the diagrams prepared by both Armin and Jeremy Wand showing where they started the fire near the television to make it look like an electrical fire (122:48-50). The State also introduced the tapes and transcripts of the September 9 interviews of both Armin and Jeremy Wand in which they admitted to intentionally setting the fire (122:50-51). The State pointed out the striking similarities in their detailed statements (122:51-60). Agent Sielehr testified that Armin admitted he tried to put J.W. back inside the burning bedroom through the broken window but, Armin said, someone stopped him and took the child from him (122:63-64).

As was her right as a victim, S.W. gave compelling remarks about what happened on the night of September 7, 2012, and the devastating impact it has had on her and her family (122:66-77).

As it agreed to do, the State recommended concurrent sentences, but also asked that Wand not be made eligible for early release (122:85). In accordance with the plea agreement, the court ordered that all sentences be served concurrently. Contrary to the State's request, however, the court ordered that Wand be eligible for early release after serving thirty-five years in prison on the three concurrent life sentences (122:99-100).

Wand filed a postconviction motion to withdraw his guilty plea July 16, 2015, in which he alleged that a "manifest injustice" was caused by the ineffective assistance of Attorneys Medina and Michel (150; A-Ap. 117-33). The State field a brief in opposition (157), and Wand filed a reply

brief (162). Wand argued in his motion that his attorneys were ineffective for not arguing the "real reasons" for plea withdrawal before sentencing: "[Wand] wanted to retract his confession, he wanted and expected to have a motion to suppress his confession, he was innocent, his attorneys (both Medina and Michel) were ineffective, and he felt pressured by his attorneys to plead guilty" (150:4, ¶ 9; A-Ap. 120, ¶ 9) (footnote omitted).

The trial court denied the motion at a non-evidentiary hearing held October 9, 2015 (165; A-Ap. 183-203). It held that Wand's motion failed to sufficiently allege that his trial attorneys were ineffective in any respect to sustain his "manifest injustice" claim (165:4-20; A-Ap. 187-203).

The court rejected Wand's claim that his attorneys were ineffective for not consulting an arson expert to refute Special Agent Boswell's anticipated trial testimony regarding the origin of the fire. Wand offered the testimony of a pro-defense California Private Investigator, Paul Bieber, who did not investigate the scene of the fire as Boswell had (156:Ex. 2-7-10; A-Ap. 179-82). The court pointed out that the attorneys for both Jeremy and Armin Wand *had hired* an arson expert (John Agosti) who, apparently, could not provide favorable testimony regarding the origin of the fire (165:10-11; A-Ap. 192-93; *see* 157:2, 14-15).

The trial court next rejected Wand's claim that counsel was ineffective for not pursuing a motion to suppress his September 9, 2012, statements to police as involuntary, and supporting that motion with the opinion from a supposed expert on false confessions, psychology professor Dr. Lawrence White (156:Ex. 1-1-6; A-Ap. 173-78). The court explained that defense counsel filed a suppression motion and *had hired* an expert, Dr. William Merrick, to determine whether Wand was competent to voluntarily and intelligently waive his *Miranda*[4] rights. The suppression

[4] *Miranda v. Arizona,* 436 U.S. 668 (1966).

motion was withdrawn after Dr. Merrick determined that Wand was able to understand and waive his constitutional rights (165:12-14; A-Ap. 194-96; *see* 88:4; 157:16; 161:Report of Dr. Merrick).[5]

The court rejected Wand's claim that his attorneys were ineffective because they coerced him to plead guilty. The court pointed to its colloquies with Wand throughout these proceedings during which he assured the court that no one pressured him to plead guilty and that he was satisfied with the quality of representation by his two trial attorneys. Wand followed their advice to plead guilty because in their professional judgment it was his best choice (165:14-18; A-Ap. 196-200; *see* 121:16; 157:13).

Finally, the court rejected Wand's claim that his attorneys were ineffective because they had a conflict of interest: though they forced Wand to plead guilty, they refused to argue coercion by counsel as a "fair and just" reason for plea withdrawal before sentencing because it would harm their reputations. The court held that Wand's allegation of coercion by counsel was only conclusory. Thus, there was no basis for his equally conclusory allegation that counsel labored under an actual conflict of interest (165:18-20; A-Ap. 200-02).

The trial court filed a written order denying the motion October 28, 2015 (164; A-Ap. 204). This appeal followed (166).

SUMMARY OF ARGUMENT

Wand believes the trial court should have ordered an evidentiary hearing because his four allegations of ineffective trial counsel, if proven, would support the

[5] Another psychiatric expert, Dr. Craig Schoenecker, found before his guilty plea that Wand was not suffering from a mental illness and was competent to stand trial (117:11-13, 23-25).

ultimate conclusion that withdrawal of his guilty plea was necessary to correct a "manifest injustice."

The ineffective assistance allegations in Wand's motion are at the same time conclusory and conclusively defeated by the record. Counsel cannot be faulted for failing to hire an arson expert to opine that the fire was of "undetermined" origin because counsel did hire an arson expert. Counsel cannot be faulted for failing to hire a false confession expert and produce him at a suppression hearing because they did hire an expert who found that Wand could voluntarily and intelligently waive his *Miranda* rights and, it follows, voluntarily confess after waiving those rights. The suppression motion would have failed even if the false confession expert testified.

Counsel did not coerce Wand's plea. They *advised him* to plead guilty because it would give him the best chance for a favorable disposition at sentencing. Wand knew all along that the decision was his to make, and he assured the trial court all along that no one coerced him to plead guilty. Counsel reasonably, and correctly, advised Wand that a guilty plea was his "best choice." Counsel was right: the trial court imposed concurrent sentences and, contrary to the State's request, gave Wand the proverbial "light at the end of the tunnel" when it ordered that he be eligible for early release from prison after serving thirty-five years. It follows that the conflict of interest claim, based on the hopelessly conclusory coercion-by-counsel claim, is meritless.

Wand's motion also made only conclusory allegations of actual prejudice. In all reasonable probability, Wand would still have pled guilty on the advice of counsel even if his confession was suppressed and his attorneys found an arson expert before his plea who would testify that the fire was of "undetermined" origin. The evidence of Wand's guilt remained overwhelming and his only real hope was for the favorable disposition at sentencing that he received.

ARGUMENT

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO DENY WAND'S POSTCONVICTION MOTION TO WITHDRAW HIS GUILTY PLEA WITHOUT AN EVIDENTIARY HEARING BECAUSE IT FAILED TO ALLEGE SUFFICIENT FACTS TO SUPPORT THE CONCLUSION THAT THERE WAS A "MANIFEST INJUSTICE" CAUSED BY INEFFECTIVE TRIAL COUNSEL.

A. The applicable law and standard for review.

1. The sufficiency of a postconviction motion to require an evidentiary hearing.

The sufficiency of a postconviction motion to require an evidentiary hearing is a question of law to be reviewed by this court de novo. *State v. Balliette*, 2011 WI 79, ¶ 18, 336 Wis. 2d 358, 805 N.W.2d 334.

To be sufficient to warrant further evidentiary inquiry, the postconviction motion must allege material facts that are significant or essential to the issues at hand. *State v. Allen*, 2004 WI 106, ¶ 22, 274 Wis. 2d 568, 682 N.W.2d 433. The motion must specifically allege within its four corners material facts answering the questions who, what, when, where, why and how Wand would successfully prove at an evidentiary hearing that he is entitled to withdraw his plea: "the five 'w's' and one 'h'" test. *Id.* ¶ 23. *See Balliette,* 336 Wis. 2d 358, ¶ 59; *State v. Love*, 2005 WI 116, ¶ 27, 284 Wis. 2d 111, 700 N.W.2d 62.

If the motion is insufficient on its face, presents only conclusory allegations, or *even if facially sufficient* the record conclusively shows that Wand is not entitled to relief, the trial court may, in the exercise of its sound discretion, deny the motion without an evidentiary hearing, subject to

deferential appellate review. *Balliette,* 336 Wis. 2d 358, ¶¶ 50, 56-59; *Allen,* 274 Wis. 2d 568, ¶¶ 9, 12; *State v. Bentley,* 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996); *Nelson v. State,* 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). *See State v. Roberson,* 2006 WI 80, ¶ 43, 292 Wis. 2d 280, 717 N.W.2d 111.

This specificity requirement promotes, "the policy favoring finality, the pleading and proof burdens that have shifted to the defendant in most situations after conviction, and the need to minimize time-consuming postconviction hearings unless there is a clearly articulated justification for them." *Balliette,* 336 Wis. 2d 358, ¶ 58.

2. The "manifest injustice" standard governing motions to withdraw guilty pleas after sentencing.

After sentencing, Wand would have to prove by clear and convincing evidence that there was a "manifest injustice" entitling him to withdraw his guilty plea. *State v. Dillard,* 2014 WI 123, ¶ 36, 358 Wis. 2d 543, 859 N.W.2d 44; *State v. Taylor,* 2013 WI 34, ¶ 24, 347 Wis. 2d 30, 829 N.W.2d 482; *State v. Brown,* 2006 WI 100, ¶¶ 18-19, 293 Wis. 2d 594, 716 N.W.2d 906; *Bentley,* 201 Wis. 2d at 311; *State v. Roou,* 2007 WI App 193, ¶ 15, 305 Wis. 2d 164, 738 N.W.2d 173. The issue of whether Wand proved a "manifest injustice" was left to the sound discretion of the trial court, reviewable for an erroneous exercise thereof. *State v. Lopez,* 2014 WI 11, ¶ 60, 353 Wis. 2d 1, 843 N.W.2d 390

Wand would have to allege and prove there was a serious flaw in the fundamental integrity of his plea; not just disappointment in the sentence. *Roou,* 305 Wis. 2d 164, ¶ 15. This stiff burden of proof is imposed on Wand, and deference is owed to the trial court's discretionary determination that Wand failed to prove a "manifest injustice," to protect the State's strong interest in the finality of criminal convictions once the plea has been accepted and

sentence has been imposed. *Id. See Lopez,* 353 Wis. 2d 1, ¶ 60; *State v. Cain,* 2012 WI 68, ¶¶ 25-26, 342 Wis. 2d 1, 816 N.W.2d 177; *State v. Higgs,* 230 Wis. 2d 1, 10, 601 N.W.2d 653 (Ct. App. 1999).

3. Proving ineffective assistance of counsel to establish a manifest injustice.

Wand contends that there was a manifest injustice caused by the ineffective assistance of trial counsel. To prevail, Wand would have to allege and prove all of the following: (a) he was in fact denied the effective assistance of trial counsel; (b) this violation caused him to plead guilty; and (c) at the time of his plea, Wand was unaware of a potential constitutional challenge because of counsel's deficient performance. *State v. Harris*, 2004 WI 64, ¶ 11, 272 Wis. 2d 80, 680 N.W.2d 737.

When it reviews a postconviction motion to withdraw a guilty plea based upon the alleged ineffective assistance of counsel, the trial court applies the two-pronged test for deficient performance and prejudice established in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Bentley*, 201 Wis. 2d at 311-12. Under *Strickland*, the defendant is entitled to relief if he is able to establish that counsel's performance was both deficient and prejudicial. *See Strickland*, 466 U.S. at 687; *Allen*, 274 Wis. 2d 568, ¶ 26.

To obtain an evidentiary hearing on his ineffective assistance of counsel claims, Wand's motion had to allege with factual specificity both deficient performance and resulting prejudice. *Balliette,* 336 Wis. 2d 358, ¶¶ 20, 40; *Bentley*, 201 Wis. 2d at 313-18. Wand could not rely on conclusory allegations of deficient performance and prejudice, hoping to supplement them at an evidentiary hearing. *Id.* at 313, 317-18; *Levesque v. State*, 63 Wis. 2d 412, 421-22, 217 N.W.2d 317 (1974). The motion had to allege with factual specificity how and why the performance of his trial attorneys was both deficient and prejudicial to

the defense. *Balliette,* 336 Wis. 2d 358, ¶¶ 40, 59, 67-70; *Bentley*, 201 Wis. 2d at 313-18; *State v. Saunders*, 196 Wis. 2d 45, 49-52, 538 N.W.2d 546 (Ct. App. 1995). Even when the allegations of deficient performance are specific, the trial court in its discretion may deny the motion without an evidentiary hearing if the allegations of prejudice are only conclusory. *Bentley*, 201 Wis. 2d at 313-18. *See Balliette,* 336 Wis. 2d 358, ¶¶ 40, 56-59, 70.

a. Deficient performance.

To establish deficient performance, it would not be enough for Wand to allege and prove that his attorneys' performance was "imperfect or less than ideal." *Balliette*, 336 Wis. 2d 358, ¶ 22. The issue is "whether the attorney's performance was reasonably effective considering all the circumstances." *Id.* (citing *Strickland*, 466 U.S. at 688). Counsel is strongly presumed to have rendered reasonably competent assistance. *Balliette,* 336 Wis. 2d 358, ¶¶ 25, 27. Wand had to make specific allegations in his motion to overcome that strong presumption. Only then would he be entitled to an evidentiary hearing. *Id.* ¶ 78. *See generally Burt v. Titlow*, 134 S. Ct. 10, 17 (2013).

Wand's trial attorneys are strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 690; *Balliette,* 336 Wis. 2d 358, ¶ 25. There is a strong presumption that an attorney's decision is based on sound trial strategy. *Balliette,* 336 Wis. 2d 358, ¶ 26. *See Eckstein v. Kingston*, 460 F.3d 844, 848 (7th Cir. 2006). The reviewing court is not to evaluate the conduct of Wand's attorneys in hindsight, but must make every effort to evaluate their conduct from their perspective at the time of the strategic decision in light of all the circumstances. *Eckstein*, 460 F.3d at 848 (citing *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986)). "In sum, the law affords counsel the benefit of the doubt; there is a presumption that counsel is effective unless shown otherwise by the defendant." *Balliette,* 336 Wis. 2d 358, ¶ 27.

Ordinarily, the defendant does not prove deficient performance unless he shows that counsel's deficiencies sunk to the level of professional malpractice. *See State v. Maloney*, 2005 WI 74, ¶ 23 n.11, 281 Wis. 2d 595, 698 N.W.2d 583. Counsel need not even be very good to be deemed constitutionally adequate. *State v. Wright*, 2003 WI App 252, ¶ 28, 268 Wis. 2d 694, 673 N.W.2d 386; *State v. Mosley,* 201 Wis. 2d 36, 49, 547 N.W.2d 806 (Ct. App. 1996); *McAfee v. Thurmer,* 589 F.3d 353, 355-56 (7th Cir. 2009) (citing *Dean v. Young,* 777 F.2d 1239, 1245 (7th Cir. 1985)).

b. Prejudice.

Even if he alleged deficient performance with sufficient specificity, Wand would not prevail unless he also alleged that he would not have entered the plea but for his attorneys' deficient performance. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). If his attorneys' recommendation to plead guilty would not have changed even absent their alleged deficient performance, then it is not reasonably probable that Wand's decision to plead guilty would have changed. This determination would, in turn, depend in large part on whether his attorneys' performance would likely have changed the outcome of a trial. *Id.* at 59-60; *United States v. Villegas*, 388 F.3d 317, 323 (7th Cir. 2004).

It is not sufficient for Wand to merely allege that he would have rejected the plea offer and insisted on going to trial but for his attorneys' deficiencies; he must "present objective evidence" that there is a reasonable probability he would have done so. *Morales v. Boatwright,* 580 F.3d 653, 663 (7th Cir. 2009) (quoting *United States v. Cieslowski,* 410 F.3d 353, 359 (7th Cir. 2005)). Wand cannot ask the reviewing court to speculate whether the deficient performance was prejudicial. He must affirmatively prove prejudice. *Balliette*, 336 Wis. 2d 358, ¶¶ 24, 63, 70; *Allen*, 274 Wis. 2d 568, ¶ 26; *State v. Erickson,* 227 Wis. 2d 758, 773-74, 596 N.W.2d 749 (1999); *State v. Wirts*, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993). "The likelihood of a different outcome 'must be substantial, not just

conceivable.' [*Harrington v.*] *Richter*, 131 S. Ct. at 792." *Campbell v. Smith*, 770 F.3d 540, 549 (7th Cir. 2014).

This court may abandon review of the deficient performance issue if it is easier to dispose of the ineffective assistance challenge by holding there was an insufficient allegation of prejudice even assuming deficient performance. *See State v. Moats*, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

B. Wand's motion failed to sufficiently allege deficient performance in any respect.

The trial court properly exercised its discretion in denying Wand's motion without an evidentiary hearing because its allegations of deficient performance were only conclusory and, in any event, the record conclusively shows that he would not be entitled to withdraw his plea.

1. Failure to hire an arson investigator.

Wand faults trial counsel for not hiring an arson investigator such as the one he found in support of the postconviction motion, California Private Investigator Paul Bieber (156:Ex. 2-7-10; A-Ap. 179-82).

This claim has no merit because both his and Armin Wand's attorneys jointly hired arson investigator John Agosti before trial. Unlike Bieber, Agosti apparently inspected the property as part of his investigation (113:3; 157:2, 14-15; 165:9-11). Agosti also apparently found nothing exculpatory of either defendant. Obviously, if Agosti discovered anything to challenge the findings of Deputy State Fire Marshall Boswell as to the origin and intentional nature of the fire, Wand would have made those findings known in his motion.

Wand instead conceded in his motion that he did not know what Agosti's findings and opinions were. He argued "it can be inferred" that the lawyers for both men "might have disregarded even a favorable report from Agosti"

(162:7). Postconviction counsel admitted at the October 9, 2015 hearing: "I have to tell you, Your Honor, actually I have never seen that [Agosti's] report, but I know it's out there" (165:10; A-Ap. 192). Wand can only speculate, at page 28 of his brief, that counsel engaged in unethical conduct by suppressing an exculpatory report from Agosti.

Wand has it backwards. Absent any evidence to the contrary, it must be presumed that his (and Armin's) attorneys performed reasonably with respect to Agosti's report. It was postconviction counsel's responsibility to obtain Agosti's report ("I know it's out there") before filing his motion and find out: (a) whether it was favorable; and (b) if it was, why counsel did not present Agosti's testimony at a suppression hearing and trial.

The law does not allow "notice pleading" followed by a discovery proceeding to let Wand depose witnesses "to find the answers to these questions." Wand's brief at 28. "The evidentiary hearing is not a fishing expedition to discover ineffective assistance; it is a forum to prove ineffective assistance. Both the court and the State are entitled to know *what* is expected to happen at the hearing, and *what* the defendant intends to prove." *Balliette,* 336 Wis. 2d 358, ¶ 68 (emphasis in original).

All Wand had to do was ask his or Armin's attorneys for Agosti's report and go from there. Wand would then bear the burden of specifically alleging, and then proving by clear and convincing evidence, how and why trial counsel performed deficiently for consulting only Agosti, or for suppressing exculpatory evidence from Agosti, or for not calling Agosti as a witness at a suppression hearing. For all anyone knew, Agosti might have been the most qualified arson investigator in America and provided counsel with unimpeachable findings and opinions consistent with those of Deputy Fire Marshall Boswell. Wand proffered nothing in his motion to overcome the presumption that counsel performed reasonably.

Wand also proffered nothing to show that Bieber (or someone like him) was available at the time of his plea, that Wand (or his family) had the financial means to hire such an expert, or that the public defender or trial court would have appointed one if asked. *See State ex rel. Dressler v. Racine County Circuit Court,* 163 Wis. 2d 622, 639, 472 N.W.2d 532 (Ct. App. 1991) (right to compel attendance of favorable witnesses "is not an unfettered right" giving "an indigent defendant unlimited access to blank checks to hire all expert witnesses that he or she desires"). *Ellison v. Acevedo,* 593 F.3d 625, 633-34 (7th Cir. 2010) ("By itself, however, the absence of a defense expert is not sufficient to establish that counsel's performance was deficient. For counsel's performance to be found deficient, the defendant must demonstrate that an expert capable of supporting the defense was reasonably available at the time of trial.") *Id.* at 634.

Assuming Private Investigator Bieber was available, affordable and qualified to render expert opinions as to the origin of the fire without having viewed the scene, his opinions would carry little weight or probative value at a suppression hearing or trial. *See Parker v. Matthews,* 132 S. Ct. 2148, 2153 (2012) ("But expert testimony does not trigger a conclusive presumption of correctness").

Private Investigator Bieber's *curriculum vitae* reveals him to be unabashedly pro defense (156:2-7-10; A-Ap. 179-82). Even so, Bieber could only conclude that the origin of this fire was "undetermined." Wand's brief at 27. Bieber's primary dispute with Deputy Fire Marshall Boswell was over whether the fire originated only in the living room, or in both the living room and the children's bedroom. Bieber believes the fire originated only in the living room and then spread to the bedroom (150:Ex. B-17, ¶¶ 91-95; A-Ap. 152, ¶¶ 91-95). There is no dispute, however, that the fire at least started in the living room. Both Jeremy and Armin Wand confessed to setting multiple fires in the living room with paper and then spreading the burning materials around with a stick to coax the fire along (2:5-6; A-Ap. 105-06;

105:Exs. 26; 27). S.W. was asleep on a futon with baby Joseph asleep on the couch in the living room as the men spread the fire. The other three children were asleep in the adjacent bedrooms.

Private Investigator Bieber's opinion of an "undetermined" origin would do nothing to disprove the compelling and undisputed evidence that the fire at least originated in the living room, and Jeremy did not help his screaming niece and nephews once the blaze took full force, choosing to run home instead. Armin did nothing to help his wife, S.W., who was engulfed in flames and desperately trying to rescue her four children as he stood by unscathed. Armin tried to put his terrified little daughter, J.W., back into the inferno after S.W. had run back into the burning house and brought J.W. to safety in Armin's arms outside. Only a neighbor prevented this fourth intentional homicide when she took J.W. from Armin after he tried to put her back inside through the broken bedroom window. The fire's origin may have been "undetermined," but it obviously originated inside the house and spread quickly with devastating results while the Wand brothers looked on (105:Exs. 5-25). Their shared murderous intent was obvious even if the men "only" ignited the fire in the living room.

2. Failure to hire a false confession expert.

Wand faults trial counsel for not hiring psychology professor Dr. Lawrence White to testify (apparently at both a suppression hearing and trial) that suspects sometimes give false confessions, and to render the opinion that police used tactics that could have produced a false confession from Jeremy Wand (156:Ex. 1-1-6; A-Ap. 173-78).

This claim has no merit because, as with the preceding claim, Wand's lawyers hired an expert to evaluate whether Wand was capable of understanding and voluntarily waiving his rights under *Miranda*. That expert, psychologist Dr. William Merrick, opined that Wand was capable of doing so

(161:Report of Dr. Merrick). Wand offers nothing to call into question Dr. Merrick's opinions or his qualifications to render them. Trial counsel also knew from Dr. Schoenecker's pretrial report and testimony that Wand was competent to stand trial (117:8-13, 23-25). It was reasonable for counsel to forgo a suppression motion because Wand knew and understood that he could stop the interview and demand counsel at any time, but chose to talk instead.

Wand faults counsel for not going far enough. It was not enough to have Dr. Merrick assess whether Wand could understand and voluntarily waive his rights under *Miranda*. Wand goes even further claiming that trial counsel retained an expert on the wrong issue. Wand's brief at 32. Counsel should have instead hired psychology professor White to prove that Wand did not have the psychological wherewithal to withstand normal police interrogation techniques. This is the sort of 20-20 hindsight strategic second-guessing that *Strickland* strictly prohibits.

To prevail on a claim that counsel was ineffective for failing to file a suppression motion, Wand must allege and prove that the suppression motion would have succeeded. *See, e.g., State v. Jackson*, 229 Wis. 2d 328, 344, 600 N.W.2d 39 (Ct. App. 1999) (citing *Kimmelman*, 477 U.S. at 375). This is because trial counsel is not as a matter of law ineffective for failing to interpose a meritless objection. *See State v. Harvey*, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987); *State v. Berggren,* 2009 WI App 82, ¶ 21, 320 Wis. 2d 209, 769 N.W.2d 110; *State v. Quarzenski*, 2007 WI App 212, ¶ 18, 305 Wis. 2d 525, 739 N.W.2d 844; *State v. Swinson*, 2003 WI App 45, ¶ 59, 261 Wis. 2d 633, 660 N.W.2d 12; *State v. Simpson*, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994).

The suppression motion would have failed. Wand does not offer any proof that he was peculiarly susceptible to police interrogation techniques. He was an eighteen-year-old adult with an eleventh grade education who was neither mentally ill nor mentally deficient. He was competent to

understand and waive his Fifth Amendment rights during the interview. He was capable of understanding his constitutional trial rights and common legal concepts. He was capable of communicating with his lawyers and competent to stand trial (117:11, 23-25; 119:27-28). The supposedly coercive factors identified by Dr. White in his report (156:Ex. 1-1-5; A-Ap. 173-78), are not different from those encountered by other adult male suspects being interrogated about homicides. *See State v. Moore,* 2015 WI 54, ¶¶ 57-65, 363 Wis. 2d 376, 864 N.W.2d 827 (rejecting a voluntariness challenge to a confession obtained after police employed techniques similar to those complained of here during multiple interviews of a fifteen-year-old homicide suspect).

Wand also never claimed in his colloquies with the court that his confession was coerced; he only claimed that it was false (121:16-17). Wand told Dr. Schoenecker before trial that, rather than exercise his rights, he decided to "lie" to police so they would stop "badgering him" (117:18-19). This demonstrates that Wand knew his options but, as with so many other suspects older and more experienced than he, made the dubious decision to try and talk his way out of trouble rather than exercise the constitutional rights he knew he had. Wand's conscious decision to lie rather than

remain silent shows his attempt to take control of the interview rather than his helpless acquiescence to interrogation in the face of unrelenting police pressure.[6]

Dr. White's report would have had little probative value at a suppression hearing or trial. In White's words: "I cannot offer a professional opinion as to the truthfulness of the statements made by Jeremy Wand in response to investigators' questions" (156:Ex. 1-5-6; A-Ap. 177-78). Wand's confession was, of course, not false because it was strongly corroborated by Armin's confession, the Deputy Fire Marshall's findings, S.W.'s eyewitness account and the neighbor's eyewitness account. The trial court would have denied the suppression motion, and a jury would have believed Wand's confession even if White were called and testified that he could not render an opinion whether the confession was true.

Dr. White's report does not mention, let alone challenge, Dr. Merrick's opinions that Wand was fully capable of understanding and waiving his rights to refuse to be interviewed, to stop the interview or to demand counsel. Dr. White's report also does not mention Dr. Schoenecker's psychiatric expert opinion testimony that Wand was competent to stand trial, understood standard legal concepts and could communicate with his attorneys (117:4-14, 23-24,

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[6] The suppression motion that counsel filed but later withdrew alleged that Wand tried to exercise his rights to silence and to counsel to no avail during the September 10, 2012 interview, the day *after* he initially confessed (161:2, ¶¶ 2-3). The motion alleged: "[Wand] invoked his right to remain silent in response to agent [sic] question, and [Wand] stated he did not want to talk about statements that he had made the previous day [September 9]." (161:2, ¶ 2). This best demonstrates Wand's understanding of his rights and his ability to exercise them on September 9. If the psychological pressures were not so great to prevent Wand from invoking his rights on September 10, it follows that those pressures did not prevent Wand from invoking those same rights the day before. Wand's September 9 confession was not the product of overbearing psychological tactics or, as on the next day, of an alleged *Miranda* violation.

28-30). *See State v. Williams,* 2001 WI App 155, ¶ 17, 246 Wis. 2d 722, 631 N.W.2d 623 ("a contradictory [psychiatric] report merely confirms that mental health professionals will sometimes disagree on matters of diagnosis"). Those shortcomings would all have been brought out on cross-examination of Dr. White. Even with White's opinion, the suppression motion would have failed because Wand plainly had the knowledge and wherewithal to stop the supposed police coercion or ask for a lawyer when he confessed on September 9, 2012. Instead, by his own admission, he tried to lie his way out of trouble.[7]

Because the suppression motion would have failed, Wand's trial attorneys were not ineffective for withdrawing it. Their advice that Wand plead guilty would have remained the same, and Wand would have followed that advice, after the unsuccessful suppression hearing.

3. Failure to argue that Wand's guilty plea was coerced by counsel.

Wand faults his trial attorneys for not seeking plea withdrawal before sentencing on the ground that his plea was coerced by them. The record conclusively shows that this challenge has no merit. The trial court made absolutely certain that Wand was pleading guilty of his own free will.

At a meeting with Wand six days before the guilty plea, June 6, 2013, Attorney Michel explained to Wand, "that it was his decision to make as to whether or not to go to trial and that we could only make recommendations as to his options" (150:Ex. A at 2; A-Ap. 135).

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[7] Wand also voluntarily and intelligently waived his right to a preliminary hearing on the advice of counsel (116:7-12). Wand stated on the record at a hearing May 10, 2013, that he agreed with his attorneys' decision to withdraw the suppression motion (118:4-7), rendering spurious Wand's claim at page 21 of his brief that he "felt helpless" when the suppression motion was not heard at the June 12 hearing over a month later.

On the written plea questionnaire and waiver form filled out and signed by him on June 12, 2013, Wand assured the court as follows: "I have decided to enter this plea of my own free will. I have not been threatened or forced to enter this plea" (92:2). Wand also acknowledged on that form that he would be giving up his rights to present evidence and to confront his accusers at a jury trial where the State would have to prove him guilty beyond a reasonable doubt (92:1). Both Wand and Attorney Medina assured the court at the June 12 plea hearing that they went through the form together, Wand had sufficient time to go through the form with Medina, and Wand understood everything on the form before signing it (119:26-27).

Plea questionnaire and waiver forms such as this are useful tools for assessing the voluntary and intelligent nature of a guilty plea on appellate review. *State v. Bangert*, 131 Wis. 2d 246, 268, 389 N.W.2d 12 (1986). *See State v. Brandt*, 226 Wis. 2d 610, 619-21, 594 N.W.2d 759 (1999); *State v. Garcia*, 192 Wis. 2d 845, 866, 532 N.W.2d 111 (1995); *State v. Moederndorfer*, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). *Also see State v. Johnson*, 210 Wis. 2d 196, 200 n.1, 201, 565 N.W.2d 191 (Ct. App. 1997).

Wand and the court engaged in the following colloquy at the outset of the June 12, 2013, plea hearing:

> THE COURT: And has anyone made any threats or promises to get you to go ahead and enter a plea here today?
>
> DEFENDANT JEREMY L. WAND: No, they haven't, Your Honor.
>
> THE COURT: And you had adequate time to discuss any questions that you have with Mr. Medina?
>
> DEFENDANT JEREMY L. WAND: Yes I have, Your Honor.

(119:7-8).

The court did not accept Wand's plea at the time. It adjourned the hearing for several hours because, in the court's words, "I don't want you in any respect to think that you are being forced or coerced or hurried or rushed into making a decision on this" (119:9). The court then took a recess from 9:57 a.m. to 1:30 p.m. to give Wand plenty of time to think about his decision (119:10).

After the recess, the court engaged Wand in a plea colloquy that could serve as a model for courts everywhere (119:11-40). It was as thorough as thorough could be. The court revisited the issue of coercion with Wand:

> THE COURT: I will ask you again, has anyone other than this plea agreement, the charges you are going to be pleading to, has anyone made any threats or promises to get you to enter into this plea today?
>
> DEFENDANT JEREMY L. WAND: No, they haven't, Your Honor.
>
> THE COURT: Can you tell me why, then, in your own words, you have decided to enter your plea today?
>
> DEFENDANT JEREMY L. WAND: I decided to enter the plea today because I thought that I could get less time and also to be able to rememberance [sic] of my nephews in a different way and to get a second chance and so I could be able to have a family one day.

(119:20-21).

Attorney Medina twice assured the court of his belief that Wand, "has entered into this plea freely, voluntarily and intelligently" (119:27, 36). Wand never complained that either of his two attorneys forced him to plead guilty. The trial court accepted the guilty plea after finding that Wand entered it "knowingly, freely, and voluntarily" (119:38).

Wand claimed for the first time at the scheduled sentencing hearing on July 19, 2013, that his plea was coerced by Attorney Michel and not by Attorney Medina (120:6), and he was never "on board" with pleading guilty. He pled guilty just to "make people happy" (120:8-10). This was not one of the grounds listed in the plea withdrawal motion filed by Attorney Medina that same day (95; 120:3-4).

Attorney Medina explained that he advised Wand to plead guilty, and helped him fill out the plea questionnaire and waiver form, because Medina believed it would give Wand a better chance for a favorable disposition at sentencing (120:12). Incongruously, despite his claims of coercion by Attorney Michel, Wand wanted to keep both Attorneys Medina and Michel on the case if it went to trial (120:15-17).[8]

The thrust of Wand's complaint here is that his attorneys should have pursued the motion to suppress his statements on June 12 before they coerced him to plead guilty. Yet, Wand waited until the day he was sentenced, July 19, to tell Attorney Medina that he wanted to withdraw his plea. Even then, the only reason Wand gave Medina was S.W.'s inconsistent statement in the presentence report (121:8-9). Moreover, the basis for the suppression motion would now apparently be that Wand's confession was false. But, Wand knew whether his confession was false long before he decided to plead guilty. Nothing changed.

Wand testified at the August 22 hearing that his attorneys advised him to plead guilty because it was "the best choice that I could get" (121:16). The real reason Wand now wanted a trial, however, was his change of heart. He now wanted the jury trial that he knowingly and voluntarily waived on June 12 so he could prove his confession was

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[8] Wand's expressed desire to have Medina and Michel continue to represent him undermines his claim that they were laboring under an actual conflict of interest that would have adversely affected their representation of him.

false, the State's witnesses were not being "totally honest," and S.W. somehow "recanted" (121:16-17, 19-20; *see* 150:5; A-Ap. 121). Although he denied this was merely a change of heart, Wand conceded that nothing changed since he pled guilty on June 12. He wanted to withdraw the plea not because he was coerced, but because it was "what's best for me and my family and friends" (121:18).

The trial court denied the motion, noting that it was not filed until just before sentencing when Wand learned that the presentence investigation report recommended that he serve a life sentence without eligibility for early release. The court found that Wand merely had a change of heart at the last minute (121:31-32).

In its October 9, 2015, oral decision denying Wand's postconviction motion to withdraw his plea, the court summarized the salient portions of the June 12 plea colloquy and its colloquy with Wand at the July 19 hearing (165:15-18; A-Ap. 197-200). In response to Wand's argument that it should ignore the colloquy, the court reasoned: "Well, I think the only way I can determine if there was undue pressure is to ask the defendant and to … listen to his answers, so I think the colloquy is very important here, and it drives a lot of the court's decision-making process" (165:15; A-Ap. 197). The court found to be only conclusory Wand's complaint that he "felt pressure" from Attorney Michel. The motion failed to answer the following question: "Well, what did he do? He said I should take the plea. Having a strong recommendation … by itself is not grounds to say that there was undo [sic] coercion or pressure to accept that plea" (165:19).

The trial court was correct as a matter of fact and law. The motion failed to allege when and how Attorney Michel coerced Wand's plea. Missing from the motion was any offer of proof as to what Attorney Michel would testify to at an evidentiary hearing. It is highly unlikely Attorney Michel would admit that he forced Wand to plead guilty against his wishes and took the decision out of Wand's hands. The only

evidence produced by Wand shows that Attorney Michel told Wand six days before his plea that the decision whether or not to go to trial was Wand's to make and his attorneys could only make recommendations (150:Ex. A at 2; A-Ap. 135). That is what occurred here. Wand's attorneys recommended that he take the plea offer in hopes of improving his chances at sentencing and Wand followed their sound advice. Nothing more.

The antiseptic plea colloquy is the best evidence that Wand's plea was not coerced by anyone. In *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), the supreme court set forth certain mandatory procedures to be followed by trial courts when accepting a guilty or no contest plea to ensure that the record reflects the voluntary and intelligent nature of the plea. *Id.* at 260-62, 266-72. *See* Wis. Stat. § 971.08. Those mandatory procedures help to ascertain the defendant's understanding of the elements of the offense to which he is about to plead, his understanding of the constitutional trial rights being waived by the plea, and his assurance that no threats or promises were made to coerce the plea. *Bangert,* 131 Wis. 2d at 260-66. The court must also inquire into the factual basis for the plea to make sure that the facts supporting the charge actually constitute the offense to which the defendant is about to plead. Wis. Stat. § 971.08(1)(b). Those procedures were followed here to the fullest (119:11-40).

It is of great significance that Wand's plea satisfied the mandatory procedures set forth in Wis. Stat. § 971.08, and as interpreted in *Bangert*, for accepting a voluntary and intelligent plea. The antiseptic plea colloquy raises a "strong presumption" that the plea is binding and the defendant "bears a heavy burden" to show that some alleged misunderstanding outside the record of the plea colloquy requires withdrawal of this otherwise proper plea. *State v. Jenkins,* 2007 WI 96, ¶ 60, 303 Wis. 2d 157, 736 N.W.2d 24. *See United States v. Lambey*, 949 F.2d 133, 137 (4th Cir. 1991).

> If we determine that there was no error in the taking of the defendant's plea, we will be extremely reluctant to reverse the district court, even if the defendant makes out a legally cognizable defense to the charges against him. That is, a defendant who fails to show some error under [Federal] Rule 11 has to shoulder an extremely heavy burden if he is ultimately to prevail.

United States v. Cray, 47 F.3d 1203, 1208 (D.C. Cir. 1995). *Also see United States v. Abdul*, 75 F.3d 327, 329 (7th Cir.), *cert. denied*, 518 U.S. 1027 (1996) (the defendant "faces a heavy burden" even when he protests his innocence if the record at the plea hearing demonstrates that the plea was voluntarily and intelligently entered).

Even plea withdrawal motions brought before sentencing under the lower "fair and just reason" standard are not to be granted "simply on a lark" because of the great care with which pleas are taken. *See United States v. Hyde,* 520 U.S. 670, 676-77 (1997). *See also State v. Bollig*, 2006 WI 6, ¶¶ 28-29, 232 Wis. 2d 561, 605 N.W.2d 199; *State v. Garcia*, 192 Wis. 2d 845, 861-62, 532 N.W.2d 111 (1995); *United States v. Messino*, 55 F.3d 1241, 1248 (7th Cir. 1995).

Strong advice by defense counsel that Wand enter a guilty plea is not coercion so long as he knows the decision whether or not to go to trial remains his to make. *State v. Rhodes,* 2008 WI App 32, ¶ 11, 307 Wis. 2d 350, 746 N.W.2d 599 ("forceful advice" was not coercion).

If Wand wanted an evidentiary hearing, his motion had to "at least inform the circuit court in some fashion what was said to mislead him." *State v. Howell,* 2006 WI App 182, ¶ 44, 296 Wis. 2d 380, 722 N.W.2d 567. Wand's motion only alleged that he received strong advice from his attorneys to accept the plea offer, but the decision remained his to make. Wand may not use an evidentiary hearing to call Attorney Michel or anyone else in hopes of developing facts that he failed to proffer in his motion. *See Id.* ¶ 18. ("Thus, the supreme court recognized the need to avoid hearings that amount to nothing more than fishing expeditions for

defendants."). Wand's motion alleges that he is innocent, but that allegation is not backed up with credible evidence of innocence. *Rhodes,* 307 Wis. 2d 350, ¶ 13.

4. The alleged actual conflict of interest.

Wand contends that his attorneys engaged in unethical conduct to save their reputations. Rather than admit that they forced Wand to plead guilty against his wishes, they conjured up a specious reason in their motion for plea withdrawal before sentencing (S.W.'s credibility issues) to cover up their bad behavior. Wand's motion does not support these serious allegations with facts.

A criminal defendant's right to effective assistance of counsel includes the corresponding right to representation free from conflicting interests. *State v. Street*, 202 Wis. 2d 533, 541, 551 N.W.2d 830 (Ct. App. 1996). A claim that a defense attorney labored under an actual conflict of interest is treated as a "sub-species" of an ineffective assistance of counsel claim. *State v. Love*, 227 Wis. 2d 60, 68, 594 N.W.2d 806 (1999). Wand would bear the burden of proving by clear and convincing evidence at an evidentiary hearing that his attorneys were actively representing competing interests. *See State v. Kaye,* 106 Wis. 2d 1, 8-9, 315 N.W.2d 337 (1982); *State v. Kalk,* 2000 WI App 62, ¶¶ 15-16, 234 Wis. 2d 98, 608 N.W.2d 428. He would not meet that burden by proving a mere possibility or suspicion of conflict under hypothetical circumstances. Wand must prove his attorneys' advocacy on his behalf was adversely affected by competing loyalties. *Id.*

The discussion in the preceding section puts this utterly baseless claim to rest. Because Wand's allegations of coercion by his attorneys were at once conclusory and conclusively defeated by the record, his allegation of unethical conduct by his attorneys to hide an actual conflict of interest was also conclusory and defeated by the record.

Wand insists that merely alleging his attorneys were ineffective, without any proof to back it up, is enough to create a conflict and requires their removal from the case. Wand's brief at 25. Wand cites no authority for that startling proposition because there is none. If there were, defendants could routinely back out of guilty pleas just by making conclusory and baseless claims, either before or after sentencing, that their attorneys were ineffective. All authority is directly to the contrary. *E.g., Balliette,* 336 Wis. 2d 358, ¶¶ 50, 56-59, 68; *Howell,* 296 Wis. 2d 380, ¶ 18. This argument also makes no sense because Wand wanted to keep his supposedly conflicted attorneys on the case (120:15-17).

The record conclusively shows that there was no coercion by counsel, just sound advice that Wand wisely followed.

C. The insufficient allegation of prejudice.

The allegation of actual prejudice in Wand's motion was also at the same time conclusory and conclusively defeated by the record.

By all accounts, Wand would still have accepted the favorable plea offer even if his attorneys succeeded in having his confession suppressed, and were prepared to call arson investigator Bieber to testify that the fire was of "undetermined" origin; and called a false confession expert to testify at a suppression hearing or trial that he does not know whether Wand's confession was true. *See Premo v. Moore,* 131 S. Ct. 733, 742 (2011) ("It is not clear how the successful exclusion of the confession would have affected counsel's strategic calculus."); *id.* at 745 ("Given all this, an unconstitutional admission of [Wand's] confession to police might have been found harmless even … if [he] had gone to trial after the denial of a suppression motion").

The evidence of Wand's guilt was too overwhelming for even the most skilled defense attorney to overcome. Wand would have gone to trial in the face of his brother's confession and in-court testimony directly implicating him; S.W.'s powerful testimony about her heroic efforts to rescue her children while Armin stood by and Jeremy ran home; the neighbor's testimony that she came upon Armin trying to put his daughter, J.W., back into the inferno through the broken bedroom window after S.W. had just rescued J.W. and placed her safely into Armin's arms; the neighbor's testimony that she took J.W. from Armin before he could kill her; and Deputy State Fire Marshall Boswell's expert testimony regarding the origin and intent of this fire that was fully corroborated by Armin's confession.

This was not a proof case. It was a sentencing case. It was the job of Wand's attorneys to obtain the most favorable disposition reasonably possible and counsel did so. They negotiated a plea agreement whereby the State would recommend concurrent sentences on all charges, would dismiss one attempted homicide count and reduce another homicide count to felony murder. Wand was free to argue for early release eligibility on his three mandatory life sentences. Thanks to the efforts of his skilled attorneys, Wand received concurrent sentences on all charges and, contrary to the State's recommendation, was made eligible for early release after serving thirty-five years in prison.

> The plea process brings to the criminal justice system a stability and a certainty that must not be undermined by the prospect of collateral challenges in cases not only where witnesses and evidence have disappeared, but also in cases where witnesses and evidence were not presented in the first place. The substantial burden to show ineffective assistance of counsel, the burden the claimant must meet to avoid the plea, has not been met in this case.

Premo, 131 S. Ct. at 745-46.

Whether viewed with foresight before the plea, or in hindsight now, no reasonably competent defense attorney would have recommended that Wand go to trial faced with the near certainty that he would be convicted of the original charges and risk a sentence of life in prison without any possibility for early release. A reasonably competent attorney would do what Wand's attorneys did here: recommend that Wand accept the favorable plea offer and hope for the best at sentencing. In all reasonable probability, Wand would still have followed their sage advice despite his conclusory claim to the contrary. *See Id.* at 744.

CONCLUSION

Therefore, the State of Wisconsin requests that the judgment of conviction and order denying Wand's postconviction motion to withdraw his guilty plea be AFFIRMED.

Dated this 20th day of April, 2016.

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), (c) for a brief produced with a proportional serif font. The length of this brief is 9,855 words.

Dated this 20th day of April, 2016.

_____
DANIEL J. O'BRIEN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 20th day of April, 2016.

_____
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