STATE OF WISCONSIN

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

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2016 AP 885-CR

RON JOSEPH ALLEN,

Defendant-Appellant.

ON NOTICE OF APPEAL TO REVIEW A JUDGMENT OF CONVICTION AND THE DENIAL OF A POSTCONVICTION MOTION, ENTERED AND DECIDED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HONOROBLE JEFFREY WAGNER, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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Issues Presented

1. Should Mr. Allen Receive a New Trial Due to Ineffective Assistance of Counsel?

The trial court denied Mr. Allen's motion for a *Machner* hearing.

2. Was there Insufficient Evidence to Convict Mr. Allen of First Degree Intentional Homicide?

The trial court found that there was sufficient evidence.

3. Was There Prosecutorial Misconduct?

The trial court found that there was not.

4. Should Mr. Allen Receive a New Trial in the Interests of Justice?

The trial court denied this request.

5. Did the Trial Court Err When It Denied Mr. Allen's Pretrial Motions for Change of Venue or Sequestration of Jury?

The trial court denied the motions.

6. Did the Trial Court Err When It Sentenced Mr. Allen?

The trial court found proper exercise of discretion.

7. Should the Court Modify Mr. Allen's Sentence.

The trial court said no.

Position on Oral Argument and Publication

Neither are requested.

Statement of the Case and Facts

On January 24, 2013, Mr. Allen was charged with first degree intentional homicide as party to a crime, contrary to Wisconsin Statutes §§ 940.01(1)(a), 939.05. (R2). The complaint said that he allegedly helped beat and suffocate the victim (EY) before EY was shot by a codefendant. *Id.* It was a highly publicized case, as the victim was a rapper and also transgendered. R17. Before trial, the parties litigated motions to change venue, empanel a jury from a different county, sequester the jury and conduct individual voir dire of each jury. R71. On September 6, 2013, the trial court denied these

defense motions. *Id.* The jury trial began on February 10, 2014 and continued through February 12, 2014. R79-R83.

The State presented 31 witnesses ranging from homicide detectives to State Crime Lab analysts to lab technicians, with whose testimony the defense did not really object. *Id.* Mr. Allen's defense was not that he was innocent of the crime, as he admitted to beating and strangling EY in his own testimony. (R82:1-62). Mr. Allen's defense was that he was coerced into participating in the violence because he was afraid for his life. (*Id.* at 19-20, 23-37). Mr. Allen maintained that Mr. Stewart, the general of the Black P. Stones of which he was an "imam," would have killed or severely injured him had he not participated in the offense. *Id.* Mr. Allen indicated that EY's death was not his fight. *Id.* at pp. 15-17. His position was that Mr. Stewart initiated and coerced the killing because he wanted to teach his cousin Billy Griffin a lesson that "you don't turn your back on Black P. Stones" and because he wanted the free weed that Griffin provided. (*Id.* at p. 17). Mr. Allen's further basis for the coercion defense is discussed in the argument section.

With coercion being the central tenet of the defense, at trial, the jury was instructed that it must first consider whether:

1.) Allen was guilty of first degree intentional homicide. (R82:74.)

a.) The state must prove with evidence beyond a reasonable doubt that:

i.) Allen aided and abetted in causing the death of EY;

ii.) Allen or the person he aided/abetted acted with intent to kill;

iii.) Allen did not act under the defense of coercion. *Id.* at 78.

2.) Defense of coercion may reduce the charge of first degree intentional homicide to second degree intentional homicide. The State must prove beyond a reasonable doubt that Allen was not acting under

> the threat by another person, other than the defendant's co-conspirator, [that] caused the defendant to believe that his act was the only means of preventing imminent death or great bodily harm to himself and which pressure caused him to act as he did.

Id. at 79-80

If the jury did not agree on first or second degree intentional homicide, the jury must then consider:

3.) Whether Allen acted recklessly, under circumstances which show utter disregard for human life, (not intentionally.) **This would be first degree reckless homicide** *Id.* at 75, 83-84.

After closing arguments, the jury was supplied with four verdict forms: one: guilty of first degree intentional homicide as party to a crime, two: guilty of second degree intentional homicide as party to a crime, a lesser included offense, three: guilty of first degree reckless homicide as party to a crime, a lesser included offense, and four: "we the jury, find the defendant, Ron Allen, not guilty." *Id.* at p. 110.

After the close of the evidence and the closing arguments and instructions, the jury entered deliberations, resurfacing with this sole question: "Is Victor Stewart considered a co-conspirator by law?" (R83:2). Defense counsel responded by stating, "I don't really understand the question, so I don't want to weigh in without knowing more." *Id.* at 2. The State suggested that the trial court refer to the jury the instruction that was given. *Id.* The court ultimately returned the jury with a note that indicated that they "please

use your collective memories and refer to the instructions." *Id.* at 3.

The jury ultimately convicted Mr. Allen on the original charge: first degree intentional homicide. *Id.* at A presentence investigation was ordered and completed, and the sentencing occurred on April 14, 2014, wherein Mr. Allen was sentenced to life in prison without parole. (R84:23-24.)

Mr. Allen filed a postconviction motion for a new trial and, in the alternative, for a resentencing, with attachments, on March 24, 2015. R50. The State responded to the postconviction motion on March 1, 2016. R59. The defense filed a reply brief on March 12, 2016. R60. Without a hearing, the trial court issued a Decision and Order Denying Motion for Post-Conviction Relief on April 8, 2016. R61.

Notice of Appeal was timely filed on April 18, 2016. R62.

Argument

I. RON ALLEN SHOULD RECEIVE A NEW TRIAL DUE TO INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL (IAC)

a. Standard for New Trial Based on IAC

The United States Supreme Court established a two prong test for ineffective assistance of counsel. *Strickland v. Washington,* 466 US 668, 104 S.Ct. 2052 (1984). First, the defendant must show that counsel's performance was deficient and that counsel's errors were prejudicial. *Id.* Even if deficient performance is found, judgment will not be reversed unless the defendant proves that the deficiency prejudiced his defense. *State v. Johnson*, 153 Wis.2d 121, 449 N.W.2d 845 (1990). Deficient performance requires "showing that counsel made errors so serious that counsel was not

functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687, 104 S.Ct at 2064.

The prejudice standard as set forth in *Strickland* states that "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068. Counsel's choices are deficient if they are mistakes, rather than the part of a reasoned, deliberate defense strategy. *State v. Moffett*, 147 Wis.2d 343, 353, 433 N.W.2d 572, 576 (1989). Secondly, they must be so serious as to deprive the defendant of a fair trial whose result is reliable. *Id.*

B. Failure to Request Conspiracy or Other Explanatory Jury Instruction for the Jury was Deficient

"The purpose of a jury instruction is to fully and fairly inform the jury of a rule or principle of law applicable to a particular case." *State v. Hubbard*, 2008 WI 92, ¶ 26, 313 Wis. 2d 1, 13-14, 752 N.W.2d 839, 845, (citations omitted). The objective of an instruction is not only to state the law accurately but also to "explain what the law means to persons who usually do not possess law degrees." *Id.* Pursuant to Wis. Stat. § 805.13(3)[1], at the close of evidence and before closing arguments, the trial court must conduct a jury instruction conference with counsel. Counsel may file written motions that the court instruct the jury on the law. *Id.* Counsel may "object to the proposed instructions or verdict on the grounds of incompleteness or other error, stating the grounds for objection with particularity on the record. Failure to object at

[1] Made applicable to criminal cases by Wis. Stat. § 972.11(1)

the conference constitutes a waiver of any error in the proposed instructions or verdict." *Id.* Therefore, failure to timely object to jury instructions is waiver of alleged defects in the instructions. *State v. Zelenka*, 130 Wis. 2d 34, 44, 387 N.W.2d 55, 59 (1986), citation omitted. The trial court has discretion as to whether to give a requested jury instruction, a decision that will not be reversed unless under erroneous exercise of discretion. *Hubbard*, 2008 WI 92 at ¶¶27-29. If the jury requests clarification of jury instructions during deliberations, the necessity for, the extent of and the form of re-instruction rests in the sound discretion of the court. *Id.* It is presumed that the jury followed the instructions given to them by the trial court. *State v. Truax*, 151 Wis.2d 354, 362, 444 N.W.2d 432, 436 (Ct.App.1989).

In *Moes v. State*, 91 Wis. 2d 756, 761, 284 N.W.2d 66, 68 (1979), the defendant, Moes, was charged with first degree murder. He was hired as a hit man, and his defense focused on the claim that he was threatened with his own death if he didn't complete the job. At trial, Moes raised the statutory defense of coercion. *Id.* at 762, 284 N.W.2d at 69. The trial court instructed the jury that:

> **If you are satisfied beyond a reasonable doubt from the evidence in this case that the defendant did commit the act of shooting…and if you are further satisfied that the defendant's participation in such act…was not coerced by threats of imminent death or great bodily harm to himself or his family by persons other than co-conspirators…then you should find the defendant guilty of murder in the first degree…**
>
> *Id.* at 769

Moes' attorney requested that the trial judge include the following jury instructions:

> **Likewise, a person who does not voluntarily agree or combine with one or more persons for the purpose of committing a crime is not a co-conspirator.**

Id. at 770.

The trial judge denied this request, indicating that he would be giving instructions on coercion and conspiracy. *Id.* The trial judge delivered what was Wis. JI Criminal 400B1: Co-conspirator. *Id.* at 771. This instruction repeatedly emphasized that "there must be 'agreement,' 'mutual understanding,' or 'a meeting of the minds,' to further 'common criminal objectives' for a 'common criminal purpose.'" *Id.* On appeal, Moes challenged the trial court's denial of his attorney's tailored jury instruction. *Id.* at 769-771. The Wisconsin Supreme Court held that

> **The evidence presented by the defendant obviously was intended to make clear that the focal point of his defense was the involuntary, coerced nature of the defendant's actions. Involuntary, coerced participation negates the possibility of 'agreement' or 'common purpose.' The trial court's phrasing of the required findings in terms of 'agreement' etc., rather than voluntariness was not 'likely to prejudice the defendant' and was therefore not error.**

Id. at 771.

Yes, the court held in *Moes* that it was not error to deny the proposed jury instruction, but this holding came *because* the trial court had already adequately explained what constituted a conspiracy or a co-conspirator. Specifically, the trial court in *Moes,* by reading the Wis. JI 400B on conspiracy, illuminated for the jury the crucial concepts of "agreement" and "common purpose*." Id.*

Unfortunately, in Mr. Allen's case, there was neither a jury instruction drafted on this co-conspirator concept by Allen's defense counsel, nor was there a stock instruction provided on conspiracy/co-conspirator. The current jury instruction for the crime of conspiracy is Wis. JI-Criminal 570. This jury instruction defines that:

> **A person is a member of a conspiracy if, with intent that a crime be committed, the person agrees with or joins with another for the purpose of committing that crime. A conspiracy is a mutual understanding to accomplish some common criminal objective or to work together for a common criminal purpose.**
> *Id.*

Additionally, in this case, Allen's attorney could have not only suggested that the court use this jury instruction, but also could constructed his own instruction and asked to add the phrase that, "a person is not a co-conspirator if there is no mutual agreement to accomplish the criminal objective." The defense could have also moved to strike that phrase.

C. The State Mentioned Conspirator Language in Closing Argument

In closing, the State spoke against the defense theory in the case:

> Ron Allen killed EY along with Ashanti…and because of that, ladies and gentlemen, and because it was not out of fear of Victor. **It was not out of fear of a co-conspirator**, ladies and gentlemen. You can't even say that the Black P. Stones is somehow what he's afraid of...

(R82:108)(emphasis added).

The State clearly conveyed in closing argument its opinion that Mr. Stewart and Mr. Allen were co-conspirators.

The trial court writes in its decision that:

> The State made only *one* small reference to "co-conspirators" when it argued in closing that Allen had killed EY with Ashanti, "not out of fear of Victor…not out of fear of a co-conspirator." The State posits that it was not arguing that they were co-conspirators at all; it was arguing solely that because there was no coercion or fear, the defense simply did not apply. That is certainly

> the gist of the State's closing argument. Thus, even if counsel had added a comment that Stewart and Allen were *not* co-conspirators during closing, the court is satisfied that the jury would nevertheless have found that the coercion defense did not apply because the evidence reasonably supported a finding that Allen had acted on his own directly, or as an aider and abettor, and *without* coercion.
>
> R61:6

Unfortunately, there were two ways the jury could have found the coercion defense did not apply for Mr. Allen. (1) If the State proved beyond a reasonable doubt that Mr. Allen did not act under the defense of coercion (ie: he wasn't threatened by death or great bodily harm to commit the crime) or (2) if the jury found that the exception to the coercion defense stood: that Mr. Allen conspired with others to commit murder and his co-conspirator coerced him. Wis. Stat. § 939.46(1).

In this case, the jury was confused about whether or not Mr. Stewart was a co-conspirator in deliberations. They sent back a question to the court asking whether Mr. Stewart was a co-conspirator by law. (R82: 2). The jury instructions are the way that jurors understand the law. If a term is not defined for them, there is confusion. If was deficient performance for the defense not to anticipate that the jury would need an explanation of this exception to the coercion instruction so that they would give Mr. Allen every benefit of not forgoing the coercion defense.

After the jury sent the question to the court during deliberations, defense counsel stated, "I don't really understand the question, so I don't want to weigh in without knowing more." (R83:2). Thus, there was no strategic reason to fail to request or draft an instruction.

The court cannot be so certain that jury found that the evidence reasonably supported that Mr. Allen acted without coercion, because they could have found that the coercion

defense didn't apply because Mr. Stewart was a co-conspirator.

D. The State Focus on "Aider and Abettor" Party to a Crime Liability or Direct Actor Instead of Conspiracy Party to A Crime Liability Does Not Negate The Importance of Defining "Co-Conspirator"

The State wrote in its postconviction response that:

> [Defense] counsel never argued the coconspirator language because neither party argued the evidence or testimony in that way. As the evidence and the testimony clearly focused only on the defendant as an "aider and abettor" or as a direct actor.
> R59:16.

The State's argument as to party to a crime liability is a distinction without a difference. In *Nutley*, the Wisconsin Supreme Court outlined the difference between party to a crime/aider and abettor liability and party to a crime/conspiracy liability.

> ***Aiding and Abetting***
> Under the terms of sec. 939.05(2)(b) and (c), Stats., a person may be vicariously liable for a substantive crime directly executed by another. Under the complicity theory of sec. 939.05(2)(b), a person is liable for the substantive crime committed by another if (1) he undertakes conduct (either verbal or overt action) which as a matter of objective fact aids another person in the execution of a crime, and further if (2) he consciously desires, or 'intends' that his conduct will yield such assistance. He must consciously direct his conduct toward the realization of the criminal objective. He must have a 'stake-in-the-outcome.'
> However, it is not necessary that the **aider and abettor enter into an agreement with the**

> **perpetrator to assist him in consummation of the crime**.
>
> ***Conspiracy***
> Under the conspiracy theory of sec. 939.05(2)(c), Stats., a person may be vicariously liable for the substantive crime of another under either of two circumstances.
> (1) **The parties may enter into an agreement** to commit a particular crime. The fact of agreement imposes liability for the substantive offense on all conspirators when the crime is consummated by a single perpetrator.
> (2) **During the course of executing the crime on which there is agreement**, one person commits another crime which is, objectively, the natural and probable consequence of the agreed-upon crime. Under these circumstances, the fact of agreement renders all parties liable for the incidental crime.

State v. Nutley, 24 Wis. 2d at 554-56, 129 N.W.2d at 167 (1964) (overruled on other grounds)(emphasis added)

The court read the party to a crime jury instruction before closings, but nowhere in the instruction did it indicate that an agreement is not necessary to aid and abet. R82:75-76.

The legal difference between these two liabilities is simply having an agreement. See *Nutley*. Otherwise, they sound pretty similar. One of the general meanings of "to conspire," is "to act in harmony toward a common end."[2]

To aid and abet someone necessarily means to help another person as well. One of the general meanings of to "aid" "to provide with what is useful or necessary in achieving an end."[3]

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[2] "Conspire." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 13 Aug. 2016.
[3] "Aid." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 13 Aug. 2016.

Here, the State says it argued that Mr. Allen was aiding and abetting others in the homicide, not that there was a conspiracy. R59:16. It doesn't matter. The State may have been arguing a different party to a crime liability, but since no one explained to the jury the term "co-conspirator," it is reasonable to deduct that the jury thought that aiding and abetting someone can be a conspiracy. The State was arguing that Mr. Allen participated in the crime. R82:90. Since Mr. Allen seemed to follow Mr. Stewart's orders and do what Mr. Stewart was telling him to do and to go along with things, a layman not explained the difference could interpret that he was "conspiring" with Mr. Stewart.

E. Trial Counsel's Failure to Request Jury Instructions on Defining a Co-Conspirator or to Object to Co-Conspirator Language in Jury Instruction Prejudiced Mr. Allen

The trial court, in its postconviction decision, wrote that:

> Even if [a conspiracy instruction] had been given, or language [had been] provided to the jury that a mutual agreement was necessary, there is simply not a reasonable probability that the jury would have found all of Allen's actions coerced by Stewart. Therefore, it wouldn't have mattered if Stewart was a co-conspirator or not. The evidence at trial supported a finding that he was acting on his own and was neither threatened nor coerced. He himself testified about coercion and the jury didn't believe it, so whether an instruction about conspiracy explaining that a mutual agreement was necessary was given, it would not have been reasonably probable to affect the outcome.
>
> R61:5-6

There was ample evidence that the coercion defense applied, not that "he was acting on his own and was neither threatened nor coerced." *Id.* The jury needed to find that a threat by Victor Stewart and his agent, Ashanti McAlister,

caused Mr. Allen to believe that involvement in the murder of EY was the only means of preventing imminent death or great bodily harm to himself. See WIS JI-Criminal 790.

When Victor Stewart testified on February 11, 2014, he admitted that his agent, Ashanti McAlister, was armed with a .22 caliber Smith and Wesson handgun that he always had on him. (R81:81-82). Mr. Stewart admitted that at one point he took hold of the gun and shot it in the floor to assert his dominance. *Id.* at 87, 134. Mr. Stewart admitted that he had ordered punishment against Mr. Allen for stealing a blunt of marijuana days before. *Id.* at 122. For that infraction, Mr. Allen was "beaten for hours with a meat tenderizer." *Id.* Mr. Stewart, Mr. McAlister and Mr. Seaberry took part in this execution of punishment. *Id.*

Mr. Stewart was the ringleader of the violence. Stewart admitted in cross examination as such. *Id.* at 131. He said, "I had the ability to stop the situation. All I had to say was no and that situation wouldn't have occurred." *Id.* Mr. Stewart admitted that Mr. McAlister was also Mr. Stewart's and the Black P Stones' enforcer and that if Mr. Allen did something contrary to Mr. Stewart, it would be everyone against Ron. *Id.* at 145. Mr. Stewart "could speculate" as to what would happen to Allen if he hadn't listened to Mr. Stewart during the EY incident. *Id.* In a prior trial, he had testified that death was a possibility. R50:15. Coactor Devin Seaberry testified that he heard Mr. Stewart tell Mr. Allen to hit Mr. EY again. R81:204. He said that Mr. Stewart orchestrated the cleaning and disposal of Mr. EY's body as well. *Id.* at 217, 220.

On February 12, 2014, Mr. Allen testified that Mr. Stewart had fired the shot into the floor and that Mr. Stewart had pointed the gun at him as well. (R82:62). Mr. Allen testified numerous times that he felt threatened by Mr. Stewart. *Id.* at 24- 27, 31, 32. He testified that "I punched her [EY] because Victor told me to. And he basically pointed the

gun at me and told me that she---I should hit the victim." *Id.* Mr. Allen confirmed that both Ashanti and Victor had the gun, but that Victor was certainly in charge. *Id.* Mr. Stewart supplied the chain and told Mr. Allen to choke out EY. *Id.* at 29. Mr. McAlister was testified to as a violence junky and agent of Mr. Stewart/ "enforcer" of the gang. *Id.* at 58.

Mr. Allen's coercion defense was present even before his testimony, back to his June 5, 2013 statement to Detective Timothy Graham, which says:

> Allen indicates that when he arrived [to his residence on Dec. 26, 2012] and found Stewart in the kitchen of his residence, Stewart told him to have a seat. Allen indicated that Stewart told him that the penalty for taking something from someone higher up in the Black P Stones is death. Allen indicates that he told Stewart that he didn't believe it was that serious and it was over cigarettes. Allen indicates that he told Stewart that he was sorry and asked what he could do to make up for it. Allen indicates that Stewart cited a passage from the Quran regarding taking something from a higher member of the Muslim family. Allen indicates that Stewart told him that he could make up for it but he had to be punished. Allen indicates that Stewart asked him which hand did he use to take the cigarettes and he told him his right hand. Allen indicates Stewart told him to put his hand on the table.
>
> **Allen indicates that Stewart then began to beat his right hand with a meat cleaver and continued to beat him for approximately an hour and a half. Allen indicates that at one point Stewart had to use the bathroom and gave the meat cleaver to McAlister. Allen indicates that McAlister beat him while Stewart was in the bathroom. Allen indicates that he was beaten on the hand and the entire right arm.** Allen indicates that after being beaten, Stewart left the residence. Allen indicates that he took himself to St. Joseph's Hospital where he was treated. Allen indicates that Stewart called him while he was in route to the hospital and told him that he did not want to do that but he has to show he was serious. **Allen indicates that several times during the beating that Stewart pointed the gun at him and he feared that he would be shot**.

R59: Exh. K p. 2/6 (emphasis added). The reports describe further:

> Allen indicates that Griffin told Stewart that he was leaving the gang because he has a daughter to look out for and he's trying to go straight. Allen indicates that Stewart told Griffin that there is only one way to leave the Black P Stones…Allen indicates that Stewart produced a silver handgun from his person. Allen indicates that Stewart began pointing the gun at everyone, states 'hope you brothers are with me.' Allen indicates that they all said yes to Stewart. Allen states that Stewart was waving the gun around and stated 'this bitch right here [EY] need to join the gang or you [Griffin] need to come back to the gang or he's [EY] going to be dead tonight.'
>
> Allen indicates that Stewart then grabbed EY in a chokehold and stated 'I'll kill this bitch.' …Stewart fires the gun one time in the kitchen floor. Allen indicates that Stewart continued his threats to kill EY and then fired the gun into the floor a second time, continuing his threatening tactics…McAlister was mocking EY. Allen indicates that McAlister is a violence type freak and was getting off on this. Stewart then passed the gun to McAlister.

R59: Exh. K at p. 3/6

Mr. Allen testified that both McAlister and Stewart had the gun at points and that it was pointed at him. (R82:32).

Billy Griffin was Victor Stewart's cousin, a blood relative with a long past with Stewart. (R59: Exh. A at 3.) Griffin's reports explain why he didn't feel coerced to go along with the homicide, even with the gun pointed at Griffin, Stewart said, "cuz, I love you and I wouldn't kill you." (R59: Exh. C at p. 2).

But even Mr. Griffin, when talking to police, "began to cry and say that he was scared and asked for witness protection from Victor Stewart." (R59: Exh. B at 1.)

Additionally, trial counsel was ineffective for not cross examining Seaberry and Stewart about prior testimony in Griffin's trial. R50:14-15. This would have elicited that Stewart was in control, that he told Allen what to do, and that death was a possibility for not following orders in the Black P. Stones. *Id.* (citing Griffin trial testimony exhibits).

The coercion defense was substantial in this case, and it was not a harmless error that the defense did not explain that the exception to the coercion defense did not apply here.

It is very difficult, if not impossible, to know what went on in the minds of jurors. Here, the jury sent back to the court a single question: "is Victor considered a co-conspirator by law?" (R83:2). This meant that the jury was confused about the law and whether the exception applied to the coercion defense.

The defense did not anticipate this confusing language and request to delete it from the instruction or explain it.[4] The State agreed conspiracy was not its angle.

Because of this lack of clarity, and because of the ample evidence in the case to find that Mr. Allen was coerced, if the coercion defense had been properly instructed and argued to the jury, there would be a "reasonable probability" of a different outcome, a "probability sufficient to undermine confidence in the outcome." *Strickland*, at 694, 104 S.Ct. at 2068.

Mr. Allen requests that this court of appeals reverse the trial court's decision denying a *Machner* hearing. The preservation of testimony of trial counsel is a prerequisite to a claim of ineffective representation made on appeal. *State v.*

[4] Defense counsel could have moved to delete the phrase from the instruction. (See WI JI Criminal 790 note 3. "If there is an issue about the threat coming from a co-conspirator, the phrase should be included in the instruction" ie: if there is no issue regarding a co-conspirator, the court need not include it.)

Machner, 92 Wis. 2d 797, 285 N.W.2d 905 (Wis. Ct. App. 1979)

F. Mr. Allen Would Have Taken The Plea Deal Had His Counsel Explained It To Him

A defendant must show that a plea offer was rejected due to deficient performance and that there is a reasonable probability that but for the deficiency, he would have accepted the earlier plea. *Missouri v. Frye*, 132 S.Ct. 1399, 1409 (2012). At trial, Mr. Allen rejected on the record the offer of first degree reckless homicide, which he was told was a class B felony. R79:14. Mr. Allen filed an affidavit with his postconviction motion indicating that had he known the best he could do at trial was a class B felony after coercion defense, he would have accepted the State's offer. R50.

The Feb. 6, 2013 transcript evidences confusion on the part of both defense counsel and Mr. Allen as to what felony the coercion defense would result in. R78:3 ("he would be, at best, convicted of second degree reckless homicide.") The State corrected counsel, and then said it would be second degree intentional, a class B felony. *Id.* However, there is no evidence on the record after that point, of statements by the court or defense counsel, that Mr. Allen was cautioned that the best he could do at trial was the same class felony as what he was being offered. *Id.* That entire hearing, Mr. Allen complained about the lack of contact he'd had with defense counsel. *Id.* Allen's affidavit asserts that he didn't understand this status of felonies and that his attorney did not explain it to him. R50.

Mr. Allen *does* assert in his affidavit that he would have pleaded to first degree reckless homicide had he known this, contrary to what the trial court thought. R50, R61:7.

Additionally, Mr. Allen was not asked on record if he understood that the best he could do with his defense at trial was the same class felony as what he was being offered. R78, R79. The logic of the situation, and Mr. Allen's affidavit shows that he would have accepted the plea agreement if he'd had this understanding.

II. There was Insufficient Evidence to Convict Mr. Allen of First Degree Intentional Homicide Because It Wasn't Proven Beyond a Reasonable Doubt that the Coercion Defense did not Apply, or that there was Intent to Kill

When reviewing a challenge to a jury verdict based on sufficiency of the evidence, the standard of review is extremely deferential to the jury verdict. *State v. Poellinger*, 153 Wis.2d 493, 501, 451 N.W.2d 752 (1990). An appellate court may not reverse a jury verdict "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient ... that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *Id.* The reviewing court will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible--- the kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts. *State v. Tarantino*, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Wis. App. 1990).

Mr. Allen challenges the sufficiency of the evidence on his conviction of first degree intentional homicide under two grounds. First, he argues that the State failed to prove beyond a reasonable doubt that Mr. Allen was not acting under the defense of coercion. *Moes*, 91 Wis. 2d at 765, 284 N.W.2d at 70. Mr. Allen has already discussed the merits of

his coercion defense under section (I) supra). Mr. Allen submits that no trier of fact, acting reasonably, could have found that the state had proven the absence of a coercion defense beyond a reasonable doubt.

Secondly, to prove the *mens rea* element of attempted first-degree homicide, the State must establish that the defendant "acted with the intent to kill," that is, "the defendant had the mental purpose to take the life of another human being or was aware that his conduct was practically certain to cause the death of another human being," *State v. Webster*, 538 N.W.2d 810, 815 (Wis. Ct. App. 1995). This "[i]ntent may be inferred from the defendant's conduct, including his words and gestures taken in the context of the circumstances." *State v. Stewart,* 143 Wis.2d 28, 35, 420 N.W.2d 44, 47 (1988). "The acts of the accused, however, 'must not be so few or of such an equivocal nature as to render doubtful the existence of the requisite criminal intent.'" *Id.* at 35–36, 420 N.W.2d at 47 (citation omitted), see *State v. Webster*, 538 N.W.2d 810, 815 (Wis. Ct. App. 1995).

In this case, there was no testimony that Mr. Allen ever had a gun. There was no testimony that Mr. Allen gave Mr. McAlister a gun. There was testimony that Mr. Allen participated in a beating/strangling of EY. Mr. Allen did testify that he strangled EY until he felt lifeless. (R82:31). Yet, Mr. Allen never testified that he was intending to kill EY. *Id.* No one else testified that Mr. Allen was intending to kill EY. *Id.* There was no testimony by Devin Seaberry, Victor Stewart or Ron Allen about communications between Allen and the others planning this homicide either on the way to the apartment or at the apartment or that Mr. Allen knew that a homicide would be taking place.

III. Mr. Allen Should Receive a New Trial or Have a Directed Verdict to a Lesser Included Offense in the Interests of Justice

A reviewing court may exercise its discretion to reverse and remand Mr. Allen's conviction if it concludes that either (1) the real controversy has not been tried or (2) that it is probable that justice has miscarried. Wis. Stats. § 752.35. This is used in rare circumstances. *Id.* In arguing a miscarriage of justice, Mr. Allen must show that "there is, 'a substantial degree of probability that a new trial would produce a different result." *Id.* (citations omitted.)

In this case, there is a substantial degree of probability that a new trial --with the co-conspirator special instruction and an explanation by the court that coercion negates a conspiracy unless a jury finds a conspiracy-- would produce a different result, with a jury finding Mr. Allen guilty of second degree intentional homicide instead of first degree (see IAC argument, supra).

IV. The Prosecutor Engaged in Misconduct for Arguing That One of the Witnesses was Credible and For Using Mr. Allen's Prior Statement to Police

At one point in closing argument, the prosecutor stated:

> Victor Stewart, ladies and gentlemen, he's trying to get a deal from detectives, and they won't give it to him. They won't give him the piece of paper. They won't give it to him. And he talks about what happened. And he talks about his role. And he talks about the defendant with the bag and the defendant with the chain and Ashanti shooting and his role as the general, and when this was over. Without deals, ladies and gentlemen. Without

> deals, they told the detectives. Did they get them? Yes, they did, ladies and gentlemen. We needed witnesses to testify. I'm not asking you to like the deals, ladies and gentlemen, but the question is, are they telling the truth? They are.
>
> (R82: 94-95)

Trial counsel never objected to the statement by the prosecutor. A defendant's failure to move for a mistrial before the jury returned its judgment constitutes a waiver of his objections to the prosecutor's statements during closing arguments. *State v. Davidson*, 2000 WI 91, ¶ 86, 236 Wis. 2d 537, 578, 613 N.W.2d 606, 625

While a failure to object by defense counsel does not preserve an asserted error for appeal and is ordinarily required to be raised by ineffective assistance of counsel, the plain-error doctrine allows errors that were waived by a party's failure to object to be reviewed on appeal. Wis. Stats. § 901.03(4); *State v. Mayo,* 2007 WI 78, ¶ 29, 301 Wis.2d 642, 734 N.W.2d 115. Plain error is "error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time." *State v. Jorgensen*, 2008 WI 60, ¶¶ 21-27, 310 Wis. 2d 138, 153-58, 754 N.W.2d 77, 84-87 (citation omitted). The existence of plain error will turn on the facts of the particular case and should be used sparingly. *Id.* When a defendant alleges that a prosecutor's statements constituted misconduct, the test to apply is whether the statements "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* at ¶¶ 21-27 (citations omitted.)

In *US v. Young*, the Court established two major problems with a prosecutor vouching for the credibility of witnesses. 470 U.S. 1, 18-19, 105 S.Ct. 1038, 1048 (1985). First, the comments can convey the impression that evidence not presented to the jury, but known to the prosecutor,

supports the charges against the defendant and "can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury." *Id.* Secondly, the opinion "carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence. *Id.* citing *Berger v. United States*, 295 U.S. at 88-89, 55 S.Ct. t 633.

Federal Courts of Appeals have shown that it is inappropriate for a prosecutor to make a personal observation or opinion as to credibility. As stated in *United States v. Trujillo*, "[i]mproper vouching occurs when a prosecutor supports the credibility of a witness by indicating a personal belief in the witness' credibility thereby placing the prestige of the office of the United States Attorney behind that witness." 376 F.3d 593, 607 (6th Cir.2004) (citation omitted.) Improper vouching includes both "blunt comments [and] comments that imply that the prosecutor has special knowledge of facts not in front of the jury." *Id.* at 607–608.

The statement that "I'm not asking you to like the deals, ladies and gentlemen, but the question is, are they telling the truth? They are," is, indeed, a blunt comment about truthfulness, and the prosecutor's opinion on truthfulness.

Byrd v. Collins provides another example of a vouching statement. 209 F.3d 486 (6th Cir. 2000). In that case, the prosecution heavily relied on the testimony of a jailhouse snitch, Ronald Armstead, who testified that the defendant, John Byrd, had bragged about murdering a convenience store clerk during an armed robbery. *Id.* During his closing argument, the prosecutor made the following improper appeal:

> Armstead said that he was told by Byrd that Byrd stabbed Monte Tewksbury. I haven't heard any evidence to contradict that. I have seen a lot of circumstantial evidence to support that. I have heard no evidence direct

> or circumstantial to contradict what Armstead said. I believe him, and I submit that you should believe him.

Id. at 537

The court did not grant a new trial because this was federal habeas review in which the standard was whether the comments constituted a due process violation. *Id.* But the court noted that "'it is improper for a prosecuting attorney in a criminal case to state his personal opinion concerning the credibility of witnesses or the guilt of a defendant.' " *Id.* In our criminal justice system, the determination of witness credibility belongs to the jury alone. *United States v. Scheffer*, 523 U.S. 303, 313 (1998) A fundamental premise of our criminal trial system is that "the *jury* is the lie detector." *United States v. Barnard,* 490 F.2d 907, 912 (C.A.9 1973) (emphasis added). This argument tainted the jury, as it took away their "lie detector" capacity through vouching.

Additionally, pre-trial, the defense and the defendant had filed motions to suppress Mr. Allen's statement to police. R14, R23. Mr. Allen's counsel raised this issue at the September 27, 2013 pretrial hearing. R72:5. Defense counsel stated:

> [ADA] Huebner did tell me that he did not intend to use the contested statement of Mr. Allen. So I think we should put that on the record.
> ...
> ADA Huebner: That's correct.
>
> *Id.*

ADA Huebner did use portions of Mr. Allen's statement on cross examination to impeach him on the issue that Mr. Allen had previously denied involvement in the homicide but was now admitting involvement. R82:60-61.

This denied Mr. Allen due process because he did not go through with a motion to suppress, with the understanding that the statements would not be used. It is true that prosecutors can impeach with statements obtained in violation

of *Miranda* if found otherwise voluntary. *Harris v. New York*, 401 U.S. 222, 225-226 (1971).

This is because "every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury." *Id.*

Due process was violated here, however, because Mr. Allen implicated himself in the crime on the stand, as opposed to shirking responsibility and committing perjury, therefore, there was no reason to impeach him in honor of preventing perjury. Additionally, trustworthiness of prior statement must meet legal standards for the State to use statement to impeach. *State v. Novy*, 2012 WI App 10, 338 Wis. 2d 439, 809 N.W.2d 889, 895 (Wis. Ct. App. 2011), aff'd, 2013 WI 23, ¶ 14, 346 Wis. 2d 289, 827 N.W.2d 610. Because there was no suppression hearing, the defendant relied on the State's proclamation that it wouldn't be using the statement, and thus the State's using of it violated due process.

V. The Trial Court Erred In Denying Mr. Allen's Pretrial Publicity Motions

This court reviews a ruling on a motion to change the place of trial for the erroneous exercise of the trial court's discretion. *Hoppe v. State*, 74 Wis.2d 107, 110, 246 N.W.2d 122, 125 (1976). Although the review is deferential to the ruling, the court must "make an independent evaluation of the circumstances." *State v. Messelt*, 504 N.W.2d 362, 364 (Wis. Ct. App. 1993), aff'd, 185 Wis. 2d 254, 518 N.W.2d 232 (1994). The factors include:

> The inflammatory nature of the publicity; the degree to which the adverse publicity permeated the area from which the jury panel would be drawn; the timing and

> specificity of the publicity; the degree of care exercised, and the amount of difficulty encountered, in selecting the jury; the extent to which the jurors were familiar with the publicity; and the defendant's utilization of the challenges, both peremptory and for cause, available to him on *voir dire.* In addition, the courts have also considered the participation of the state in the adverse publicity as relevant, as well as the severity of the offense charged and the nature of the verdict returned.

Hoppe, 74 Wis.2d at 110, 246 N.W.2d at 125.

Here, the charge is the most severe available in the State. The jury returned a guilty verdict given numerous lesser included options. Mr. Allen reiterates the argument of defense counsel during the September 6, 2013 hearing for the court of appeals. R71, R17.

The case attracted substantial publicity as documented in the affidavit of defense counsel. R17:10-15. The victim was transgender and there was media focus on the victim's family and the nature of the crime. *Id.*, R71:4. Prior codefendants' trials had been publicized heavily before Mr. Allen's trial. *Id.* at 3. The publicity was saturating the public for the year in between the homicide and Mr. Allen's trial, given the four codefendants. *Id.*

In voir dire, the trial court told the jury the case had generated publicity and that "anything you heard outside the courtroom is not evidence in this case. You're only to strictly pay attention to the evidence that's brought before the Court. Does everybody understand that?" R79:39.

That seems to be the only question brought to the jury, from the court, the State or the defense relating to pretrial publicity. R79. So, no one asked any juror whether or not s/he had heard pretrial publicity and whether or not s/he could be impartial. Thus, no peremptory challenges or for cause were based on pretrial publicity, because the defense couldn't have

known about it. Thus, there was a low degree of care taken with this issue.

Based on the record laid with pretrial publicity, the trial court erroneously exercised discretion when it denied Mr. Allen's motions to change venue or sequester the jury.

VI. Mr. Allen Should Be Resentenced Because the Trial Court Did Not Properly Exercise Discretion and the Length of the Sentence was Excessive

In evaluating a trial court's sentence, the issues are (1) whether the trial court properly exercised its discretion and (2) if so, it must be determined whether the trial court abused that discretion by imposing an excessive sentence. *State v. Glotz*, 122 Wis. 2d 519, 524, 362 N.W.2d 179 (Ct. App. 1984). Trial courts must make a complete record of their reasoning for the sentence and by reference "to the relevant facts and factors, explain how the sentence's component parts promote the sentencing objectives." *State v. Gallion*, 2004 WI 42, ¶¶38, 46, 270 Wis. 2d 535, 678 N.W.2d 197. A court must back up its decision by clear, logical reasoning on the record. *Id.*

The twelve sentencing factors for trial courts to consider outlined in *Harris v. State* and reiterated in *Gallion* are as follows:

> (1) Past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention.

75 Wis.2d 513, 519-20, 250 N.W.2d 7 (1977).

The court must thoroughly examine the sentencing factors and objectives as they specifically apply to the defendant. *State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Wis. App. 1994). In reviewing a sentence for an abuse of discretion the presumption is that trial court acted reasonably, and defendant must show some unreasonable or unjustifiable basis in record for sentence of which he complains. *Jung v. State*, 32 Wis. 2d 541, 145 N.W.2d 684 (1966). A sentence is unduly harsh if it is "so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *State v. Daniels*, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Wis. App. 1983). In fashioning a sentence, the circuit court should "impose the minimum amount of confinement which is consistent with the protection of the public, the gravity of the offense, and the defendant's rehabilitative needs." *Gallion* at ¶ 7, citing, *McCleary v. State*, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971).

In this case, the State concurred with the presentence investigation recommendation of life without parole. (R84:5). The State said that Mr. Allen lied in his initial police contacts, taking "zero percent responsibility" for EY's death. *Id.* at 7. For the record, Mr. Stewart and Mr. Seaberry took "zero percent responsibility" at first upon arrest and questioning, and Mr. McAlister never took any responsibility whatsoever at any point. R81:109-116, R59. Ultimately, Mr. Allen did confess his involvement fully: on the stand. (R82:6-63).

The defense asked for parole eligibility in 30 years, noting that Mr. Allen took the stand and admitted to his involvement. *Id.* at 15. The defense spoke of Mr. Allen's other identity besides being a gang member, a long term job

at Cousin's Restaurant. (he had been employed for 7 years at Cousin's and his manager said he had been a "great employee," who was a hard worker and very reliable—R29:11). R84:15-16. The defense noted that Mr. Allen was a high school graduate who pays child support. *Id.* He donated a kidney to his dying brother. *Id.* Mr. Allen addressed the court, apologizing to EY's family, remarking that taking a life is never justified, that he never would have thought in a million years that he'd be involved in something like this. *Id.* at 16-17. He apologized to court for not being cooperative until the end. *Id.* The COMPAS assessment indicated that Mr. Allen had a low risk of violent and general recidivism, potentially on the basis of his education, employment, lack of mental illness or serious drug addiction, stable family and relatively minimal record compared to others similarly situated. R29 (Risk Assessment at pp. 1-2). He was evaluated as low likelihood of antisocial personality. *Id.* at 4. The highest risk factor was his association with a gang and gang associates. *Id.*

When the court was evaluating what it called a depraved, and the ultimate offense, "a significant amount of pain and torture that resulted at your hands," Mr. Allen responded: **"my life was on the line."** R84:22.

> **The court**: your life was on the line then? Your life is, as you know it, going to be spending time in a state institution because this calls for a life sentence. That was your choice.
> **Mr. Allen**: if my life was not on the line I would not have reacted.
> **Court**: I don't think the jury believed that
> **Mr. Allen**: The truth is coming from me.
>
> *Id.*

The court ordered a life sentence with no parole. *Id.* The court apparently held it against Mr. Allen that the jury

did not believe his coercion defense. Thus, the coercion defense not being properly argued not only affected Mr. Allen's conviction, but also his sentence. The court also did not take into consideration the fact that Mr. Allen admitted to the crime on the stand, directly relating to his remorse, repentance and cooperativeness. Mr. Allen testified that he was involved in the death of EY. (R82:31-37). He also explained *why* he was involved in the death. *Id.* As Mr. Allen maintained throughout the trial, he participated as part of the Black P. Stones gang and under the threat of and fear from retribution from Victor Stewart such as what happened to him days earlier in response to a minor gang infraction. He endured a beating with a meat tenderizer because of pilfering some weed from the gang stash. (R81:122). Mr. Allen maintained that he feared not going ahead with the gang behaviors, facing death or great bodily harm from McAlister or Stewart. *Id.*

The issue at trial was not innocence, the issue was relative culpability. While he certainly had a part to play, Mr. Allen was not the only person who caused the death of EY. None of the other codefendants, specifically Victor Stewart, Ashanti McAlister and Devin Seaberry, received *life in prison without parole*. Some of them received incarceration in the teens. The court erred by not giving proper assessment of Mr. Allen's remorse, repentance and cooperativeness and role in the offense. The court did not consider that Mr. Allen's prior record, at the age of 28, was no juvenile adjudications and one adult felony for which he completed probation. (R29:10). Additionally, the court failed to explain why a sentence of a lesser duration would not have served the court's sentencing objectives. *See Gallion* at ¶ 24 ("The justification for the length of the sentence should always be set forth in the record, as well as the reasons for not imposing a sentence of

lesser duration.") The sentence is excessive given the circumstances.

VII. Mr. Allen's Sentence Should Be Modified As It Was Unduly Harsh and Because the Disparity Between His Sentence and Stewart's and McAlister's

Equal protection of the laws requires that in the administration of criminal justice, no one shall be subjected for the same offense to a greater or different punishment than that to which other persons of the same class are subjected. *Jung,* 32 Wis. 2d at 547-55, 145 N.W.2d at 687-91. At the same time, people convicted of the same crime may receive different sentences based on individual culpability and rehabilitative needs. *Id.*, *see also Drinkwater v. State,* 73 Wis. 2d 674, 679, 245 N.W.2d 664 (1976).

At Mr. Allen's sentencing, the State noted that Mr. Seaberry received 8 years prison and 7 years extended supervision and a second degree reckless homicide charge in exchange for testifying. R84:9. Mr. Stewart received an amendment to second degree reckless homicide and got 16 years initial confinement and 7 years extended supervision in exchange for testifying. *Id.* at 9-10. Mr. McAlister was convicted of first degree intentional homicide at trial. The State noted that Mr. Stewart was the first one to cooperate, and his testimony allowed the State to charge Mr. Seaberry and Mr. Allen. *Id.* at 10. Mr. Mcalister was 18 at the time he was sentenced, with a recommendation of life without parole, but because of his young age the state believed in a parole eligibility date in 50 years. *Id*. The State noted that Mr. Allen was 28 years old and had 10 extra years to mature. *Id.* at 11.

Ron Allen in relation to Victor Stewart: Mr. Stewart was admittedly the ringleader, the one from whom the idea originated, the one who was calling the shots. R81:67. Mr.

Stewart shot into the floor, establishing his dominance. *Id.* at 87. Mr. Stewart had a motive and a "beef" with EY because he wanted his cousin Billy Griffin to return to his side and show him loyalty instead of Evon and other non-family. *Id.* at 61-67. Mr. Stewart was not forthright at first with the authorities about his involvement. *Id.* at 137. Victor Stewart was *more* culpable in the death of EY than Mr. Allen, and even his willingness to testify does not justify a distinction in incarceration time between **sixteen (16) years** and **LIFE.** As far as rehabilitative needs, yes, Mr. Stewart evidenced an ability to cooperate with authorities; however, Mr. Allen accepted responsibility in this case at trial, confessed on the stand, and was not trying to escape responsibility. Mr. Stewart's willingness to plead guilty and not testify against codefendants also did not justify such a distinction in penalty, indicating somehow that he had more remorse and repentance. He didn't.

Ron Allen in relation to Ashanti McAlister: Mr. McAlister was known as the violent one of the group, the one who always carried a .22 caliber Smith and Wesson semiautomatic handgun. (R81:81-82). As to individual culpability, Mr. McAlister was arguably the one who actually killed EY, and potentially Mr. Allen caused him to pass out. Stewart testified that McAlister also went "overboard" in the beating of EY. (*Id.* at 93-95). McAlister and Allen were both instrumental in the death and in the disposal of the body, and they were both acting at the behest of Mr. Stewart. Culpability is pretty equal here.

The State's brief notes that Billy Griffin said in his police reports that "Stewart told Ron Allen to hit the victim." (R59:Exh. C at p. 2) Seaberry also confirms Stewart gave Allen orders at Allen's trial. (R81:204). Griffin also says that Stewart had the gun while the group was upstairs. (R59:Exh. C at p. 2). Griffin describes Stewart as orchestrating the

violence, a fact that State concedes. (*Id.* at 3). Griffin never mentioned Allen as having a gun at any point, and no one confirms Seaberry's alleged statement that Allen had a gun. (R59:Exh. C, H). Evidence shows that Ron Allen was "gunless" during this incident. (R81:80-106). Victor Stewart was the one who shot the gun into the floor to assert his dominance. *Id.* at p. 87. Mr. McAlister was the one who shot EY. R81:81-82.

As for rehabilitative needs, the State argued that Mr. McAlister was 18 at the time of the incident, thereby having potentially less rehabilitative needs because he is likely to age out of these behaviors. From a defense perspective, Mr. McAlister was still an *adult.* Mr. Allen was not the one with the reputation of violence, with the background of bloodthirstiness. Mr. Allen had spent his adult life working at Cousins (R84:15), he had done positive things with his life, and he had an explanation of being coerced into violence. Individual culpability and rehabilitative needs do not justify such a disparity in sentence.

Conclusion

This Court should reverse the decision of the trial court denying Mr. Allen a *Machner* hearing, a new trial and resentencing.

Dated at Milwaukee, Wisconsin this 15th day of August, 2016.

Respectfully submitted,

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APPENDIX

INDEX TO APPENDIX

CERTIFICATION OF APPENDIX

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 s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues. I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency. 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 one or more initials or other appropriate pseudonym or designation 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.

Signed:_____,
MAAYAN SILVER
Attorney for Defendant-
Appellant

CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 9,507 words.

Signed:_____,
MAAYAN SILVER
Attorney for Defendant-Appellant-Petitioner

CERTIFICATION OF ELECTRONIC FILING

Pursuant to Rule 809.19(12)(f), I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix. The text of the electronic copy of the brief is identical in content and format to the text of the paper copy of the brief. 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.

Signed:_____,
MAAYAN SILVER
Attorney for Defendant-Appellant-Petitioner

CERTIFICATION OF MAILING

I certify that this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Wisconsin Court of Appeals by express mail on _____. I further certify that the brief was correctly addressed and postage was pre-paid.

Date: _____

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