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 A DENIAL OF A POSTCONVICTION MOTION ENTERED IN CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE JEFFREY WAGNER, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

MAAYAN SILVER
Attorney for Defendant-Appellant
State Bar No. 1052569

Silver Law Offices, LLC
2929 W. Highland Blvd.
Milwaukee, WI 53208
Telephone (414) 336-1446

Attorney for Defendant-Appellant

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 DENIAL OF A POSTCONVICTION MOTION ENTERED IN CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE JEFFREY WAGNER, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

Argument

I. The Circuit Court Improperly Denied Mr. Allen's Request for a *Machner* Hearing.

a. The Postconviction Motion Alleged Sufficient Facts to Show Deficient Performance and Prejudice.

Contrary to the State's assertion, Mr. Allen did satisfy the pleading standard. He explained that his trial counsel did not object to the inclusion of or further clarify the language of "other than a co-conspirator" in the jury instructions which

were, at the core, the center of his defense. Allen also argued that trial counsel was ineffective for not eliciting prior helpful statements relative to the coercion defense made by Seaberry, Stewart and Griffin. (R50:12-15).

The addition of this language in the jury instruction provided one more obstacle for Mr. Allen to obtain a verdict on second degree intentional homicide instead of first degree intentional.

This inaction on the part of defense counsel added to the ways that the jury could find that the coercion defense didn't apply. Either (1) the State proved Mr. Allen was not coerced, beyond a reasonable doubt or (2) the jury found that Mr. Allen was coerced but that Mr. Stewart was a co-conspirator and so the coercion defense didn't apply.

In deliberations, the jury actually asked the court whether or not Stewart was considered a co-conspirator by law. R83:2.

The state claims that it is unsure how to read this. (Response Brief (RB) at 11).

It is very clear why the jury asked this question.

The content of the question makes it clear that the jury was considering the *exception* to the coercion defense that discounts coercion if one was conspiring with another [Mr. Stewart.]

His counsel admitted on the record that "I don't really understand the question, so I don't want to weigh in without knowing more." R83:2. This also elicits that the failure to object to the language or to explain the language was an omission---not strategy.

The State assumes for the purpose of argument that defense counsel was deficient, but says that Mr. Allen wasn't prejudiced because "there was ample evidence at trial that Allen was not coerced by Stewart, and that the jury could

reasonably conclude that the State proved absence of coercion beyond a reasonable doubt." (RB at 7-8). First of all, the standard is that but for counsel's mistakes, "there is a reasonable probability that the result of the proceeding would have been different." *Strickland v. Washington*, 466 US 668, 687 (1984).

Mr. Allen highlights two potential different results of the proceedings: (1) the jury found that Mr. Allen was coerced into committing the homicide and found him guilty of second instead of first degree intentional, or (2) The jury was hung on his guilt.

Mr. Allen has briefed his reasons that a coercion finding was reasonable, including evidence corroborating Mr. Allen's story (independent of Allen's own testimony—that Stewart had pointed a gun at Allen to commit the crime R82:37), that:

1. Stewart was the leader of the gang and had instigated and was orchestrating the event. *Id.* at 131.

2. Stewart testified that if Mr. Allen went against his orders, it would be everyone against Allen. *Id.* at 145.

3. Five days before the homicide, Mr. Allen was beaten with a meat tenderizer for an hour and a half with Stewart pointing a gun at him for simply taking some marijuana cigarettes from a stash. R81: 142-44.

4. Stewart and McAlister had a gun at various points in the incident, which Stewart shot at one point to show authority. *Id.* at 87.

5. Seaberry testified that Stewart ordered Mr. Allen to hit EY. *Id.* at 204.

All this is independent of Mr. Allen's own testimony, in which he admitted his involvement in the homicide by explaining to the jury that he had hit and strangled EY.

According to Allen, "I felt like if I would not have cooperated with the nation, I'd be just as dead as well." R82: 32.

Allen testified about his fear of Stewart and about his worries for his own life and safety if he did not go along with the plan, not to mention admitting that drugs and alcohol had been involved. R81:70-72; R82:10-28. He said felt threatened to participate. *Id.* The State makes pains to call Mr. Allen incredible, when he was truthful about his participation in the crime, a path another defendant may not have taken.

The State posits that the fact that Allen left the house and came back somehow shows he wasn't coerced into participating in the offense. (RB:11). The issue is: was Allen coerced into helping cause the death (ie: strangle) EY? Allen never left the scene at any point before that time. (R82:46). And the reason he left was to follow Stewart's orders. R82:32. Besides, Stewart knew where he lived, the threat doesn't somehow dissipate when you leave the building. *Id.* at 10.

Plus, Allen argued that he was prejudiced by the trial counsel's failure to cross Seaberry about his fear of Stewart, to cross Stewart about death as an option for failure to follow orders, and to subpoena Griffin about his plan to go witness protection on Stewart. R50:13.

Predictably, the State claims that Allen's arguments are insufficient. (RB:12). Allen addressed prejudice. The issue in this case was whether Allen was coerced into participating in the violent acts because he felt threatened with death or bodily harm from Stewart (and/or McAlister). It's simply obvious why the inclusion of this evidence prejudiced Mr. Allen: it fleshes out the power dynamics between Stewart and others. It validates Mr. Allen's testimony.

This court may note that it seems that Griffin and Seaberry did not engage in violence against EY. Allen was in a different spot in the gang than them. (R82:10-20). He was under Stewart's power sphere, and he had recently been the

target of Stewart's dissatisfaction, a target of violence himself. *Id.* at 18-20. Griffin, on the other hand, was Stewart's blood relative, a cousin who it appears Stewart respected greatly. Secondly, Seaberry did participate in the homicide, as Stewart testified that he was "cocking the gun back, getting it ready for Ashanti," before McAlister shot EY and "Devin get the gun ready because the gun, it was always jamming, so he was cocking it to get it ready, he gave it to Ashanti. Ashanti shoots into the direction where I believe EY to be." R81:98-99. Seaberry was offered and accepted a second degree reckless homicide PTAC charge, which did not require a coercion defense. R84:9.

On top of all this, the district attorney called Stewart a co-conspirator in closing, and since the jury was not explained what "conspiracy" was, as laypeople, they could have understood that "aiding and abetting" made Stewart and Allen "co-conspirators." In plain English, these involvements are not that different, especially when only one is explained. The point was: one avenue of liability was mentioned in a crucial jury instruction and not explained. The State's one paragraph statement that this argument of potential jury confusion and ambiguity is conclusory is, in fact, conclusory. (Appellate Brief (AB):15-17; RB:9).

Because of trial counsel's omissions, the coercion defense at the heart of the case became harder to establish.

Yet, Mr. Allen is not presuming to have the exact knowledge as to which jurors convicted him on the basis of the co-conspirator exception to the coercion defense and which, if any, on the basis of the State having proven that, beyond a reasonable doubt, Allen was not coerced. (Appellate Brief (AB) at 14-15). Mr. Allen is arguing that *even if one* of those jurors who didn't think that the State proved beyond a reasonable doubt that coercion didn't apply, (hence agreed that he wasn't lawfully coerced on the basis of this exception and voted to convict)…*Mr. Allen was prejudiced.* Not only is there

a reasonable probability of a different result on this evidence, but, without the erroneous jury instruction and other omissions by defense counsel, it's arguable that there is even a substantial probability of a different result.

Upon a trial to a jury, a defendant has a constitutional right to a unanimous verdict. Wisconsin Const. Art. 1 §§ 5, 7. All 12 jurors must agree as to the verdict*:* guilty or not guilty. *Id.*

If even ONE of those jurors was not convinced that the State proved that Mr. Allen was not coerced beyond a reasonable doubt and opted to convict Mr. Allen on the idea that Mr. Stewart was a co-conspirator and coercion didn't apply, then the jury would have been a hung jury. Mr. Allen argues that the record provides evidence that he was convicted, at least in part, because of the co-conspirator language, which affected the outcome of the trial.

The State, the trial court, and now the court of appeals cannot confidently say upon a review of the record that the co-conspirator language did not contribute to the verdict. Mr. Allen posits that it did affect the verdict: either preventing the jury from unanimously finding second degree intentional homicide, or from having been a hung jury. Mr. Allen posits that Mr. Allen was prejudiced… both a reasonable and a substantial probability of such. Without these omissions, there is a reasonable probability that he would not have been convicted of the most serious crime with the most serious penalty in the State of Wisconsin.

b. That Mr. Allen Risked Conviction of a Class A Felony at Trial Made It All The More Unreasonable to Go To Trial For a Class B with a Class B Offer.

Mr. Allen's argues that he lacked full knowledge of his plea options, resulting in him going to trial on a class A felony with the best result as a class B conviction. (Whereas he could

have accepted a deal for a class B). The State posits that this assertion is somehow inadequate because Mr. Allen did not say that he would have taken the class B felony (first degree reckless homicide) to avoid a class A (first degree intentional homicide.) (RB at 13-14).

Why go to trial and risk a harsher felony in order to at best be found guilty of a class B felony when you could plead guilty and receive a class B felony? Allen never stated that he didn't know a first-degree intentional homicide was a class A felony. R50. That benefit to pleading was implicit in Allen's reasoning as to why his lack of knowledge about the deal prejudiced him.

As for the class-of-felony information being relayed on the record: on the February 10, 2013 jury trial date, the State did declare that the rejected offer was to amend to a class B first degree reckless homicide, and Allen rejected it in court. R79:14. That exchange was preceded by a protracted discussion about whether or not Mr. Allen was comfortable at all with having defense counsel represent him due to communication issues. *Id.* at 2-14.

Asking Allen about what he understood of those exchanges would be something for a *Machner* hearing to establish what exactly were the conversations between defense counsel and Allen.

II. Mr. Allen's Due Process Rights Were Violated When the District Attorney Used His Prior Statement for Impeachment, and This Court Has the Discretion to Decide this Issue.

The general rule is that issues not raised in the circuit court are deemed waived, but this rule is not absolute. *State v. Moran*, 2005 WI 115, ¶¶ 30-31, 284 Wis. 2d 24, 42–43, 700 N.W.2d 884, 893, citing *State v. Polashek*, 2002 WI 74, ¶ 25, 253 Wis.2d 527, 646 N.W.2d 330. The waiver rule articulates this court's general policy of judicial administration, not the

extent of its power to hear issues. *Id.*, citing *Wirth v. Ehly*, 93 Wis.2d 433, 444, 287 N.W.2d 140 (1980). In *Moran*, because the issue involved a question of law and was of sufficient public interest to merit a decision, the court allowed the issue to be briefed by the opposing parties. *Id.* The Wisconsin Supreme Court then exercised its discretion to address the issue. *Id.*

Additionally, neither a trial nor an appellate court should deny a prisoner's pleading based on its label rather than on its allegations. If necessary, the court should relabel the prisoner's pleading and proceed from there. *bin-Rilla v. Israel*, 113 Wis.2d 514, 521, 335. In this case, Allen's counsel never objected to the use of the prior statements at trial. R82.

Allen has already raised multiple grounds of ineffective assistance of counsel in this case. It is Allen's position that a *Machner* hearing is warranted on the other grounds for ineffective assistance of counsel. It is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel. *State v. Machner*, 92 Wis. 2d 797, 803, 285 N.W.2d 905, 908 (Wis. Ct. App. Oct. 12, 1979). Appellate courts cannot otherwise determine whether trial counsel's actions were the result of incompetence or deliberate trial strategies. *Id.*

For the sake of judicial efficiency, (resolving all claims of ineffective assistance of counsel in this case at once), because Allen raised the claim during his 809.30 appeal, and because this court can exercise its discretion to decide issues, Allen requests that the court consider this aspect of ineffective assistance of counsel along with the others in deciding whether Mr. Allen was prejudiced during trial. The State had agreed not to use the statements, then did. The State brought up that Allen had previously said he wasn't involved in the homicide. R82: 43. This clearly undercut Mr. Allen's testimony, prejudicing the jury against him.

III. The Trial Court Erroneously Denied Individual Voir Dire and Sequestration and Did Not Properly Admonish the Jury

Mr. Allen argued on appeal that the trial court erred in denying his pretrial publicity motions. AB:29-31. Specifically, he argues that there was not enough vetting of the jurors. *Id.* At The State argues that "during the change of venue hearing, Allen requested that there be no extensive discussion of the publicity during voir dire because that would only inform others who were unaware of the attention this case had garnered." RB:26 citing R71:9.

What the State omits is that Mr. Allen had requested *individual voir dire,* because to talk about the extent of pretrial publicity in front of the entire jury would only serve to educate the unaware. 71:9. The court denied individual voir dire, saying, "that will only happen if we have an issue come up with individual jurors." *Id.* at 10.

Mr. Allen asserts that decision was error, because jurors were never asked about the pretrial publicity and whether they harbored any prejudices because of outside knowledge. R79. Additionally, the court failed to admonish the jury regarding outside research. *Id.* The court told the jury that the case had generated publicity, but only said 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." *Id.* at 39. That's not explicitly stating not to conduct outside research.

IV. The Court Did Not Properly Exercise Discretion when it Sentenced Mr. Allen to Life in Prison without Extended Supervision, and Mr. Allen's Sentence was Unduly Harsh and Excessive

Mr. Allen agrees that he must establish an unreasonable basis for the court's decision that he is ineligible for release to

extended supervision. *Elias v. State*, 93 Wis. 2d 28, 281-82, 286 N.W.2d 559 (1980).

First of all, taking the arguments made in section I of this reply brief, it can be established, to a level of clear and convincing evidence, that Allen's jury was not properly instructed on his coercion defense.

Therefore, the court's assumption that the jury did not believe that Mr. Allen's life was on the line when he participated in the crime was not based on a jury decision that was arrived at properly, with due process and effective assistance of counsel. 84:22. Instead, Mr. Allen was convicted by a jury who was instructed with another option for finding him guilty of first degree intentional homicide, by finding Stewart was a co-conspirator---not simply by the state having proven the absence of a coercion defense.

Mr. Allen said in response, "that is the truth coming from me. I'm sorry." *Id.*

True, Mr. Allen may have chosen to join the Black P. Stones, he may have put himself with that company. He is understandably expecting a significant prison sentence in this case. But there was no evidence that he plotted or conspired to kill another human being on January 1, 2013. His position, as supported by Stewart and Seaberry's testimony, was that the idea for the violence and the enforcement of its orchestration came from Stewart. R81:80-87. Allen's position was that he was so afraid of Stewart's authority that he participated in the offense. R82:19-26.

Additionally, the State writes that it was reasonable for the court to find Mr. Allen the most culpable "because he was the individual that actually choked the life out of the victim's body," and because "unlike his co-actors, Allen faced a *mandatory* life sentence." RB:31, 34. First of all, McAlister also faced a mandatory life sentence. Secondly, that is how Mr. Allen described the choking, but it is impossible to know if he actually killed the victim. Shooting a gun point blank at

someone one or multiple times is as egregious, as is coming up with and diabolically orchestrating the crime in the first place.

The court did address the seriousness of the offense, 84:24, but didn't determine that protection of the community required Mr. Allen's life-long incarceration. In fact, there was no mention by the court that Mr. Allen was likely to reoffend. For instance, there was no pattern of conduct, nor was his history violent. Mr. Allen admitted and accepted responsibility at trial for his role in the crime.

The court's sentence is unjustifiable and excessive.

Conclusion

This Court therefore should reverse the judgment of conviction on a new trial and/or resentencing and/or reverse the denial of the hearing on the postconviction motion.

Dated at Milwaukee, Wisconsin, this 20th of November, 2016.

Respectfully submitted,

MAAYAN SILVER
Attorney for Defendant-Appellant
State Bar No. 1052569

Silver Law Offices, LLC
2929 W. Highland Blvd.
Milwaukee, WI 53208
Telephone (414) 336-1446

Attorney for Defendant-Appellant

CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and(c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The length of the brief is 2,999 words.

_____
MAAYAN SILVER
Attorney for Defendant-Appellant

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, excluding the appendix, 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, excluding the appendix, filed with the court and served on all opposing parties.

Dated this 20th day of November, 2016.

_____
MAAYAN SILVER
Attorney for Defendant- Appellant