STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP2355

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM F. KUEHN,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in the Milwaukee County Circuit Court,
the Honorable Ellen R. Brostrom, Presiding,
and from the Orders Denying Postconviction Relief,
the Honorable Jeffrey A. Wagner, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

CARLY M. CUSACK
Assistant State Public Defender
State Bar No. 1096479

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
cusackc@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

ARGUMENT

I. Mr. Kuehn was denied his Sixth Amendment right to effective representation of counsel when his trial attorney failed to pursue his third-party perpetrator defense motion.

A. Mr. Kuehn's ineffective assistance claim was not forfeited by his guilty plea.

The state argues that by pleading guilty, Kuehn forfeited his argument that his trial counsel was ineffective for failing to file a *Denny*[1] motion. (Response p.12-13). The state is wrong for two reasons.

First, Kuehn's ineffective assistance of counsel claim was not forfeited by pleading. The Wisconsin Supreme Court "adopted the 'manifest injustice' test under which a defendant *will be* entitled to withdraw a plea only when he is able to show that his plea was made under any of the following or similar situations: (1) *he was denied the effective assistance of counsel guaranteed to him by constitution, statute, or rule*;… (3) the plea was involuntary, or was entered without knowledge of the charge or that the sentence actually imposed could be imposed…." *State v. Rock*, 92 Wis.2d 554, 558, 285 N.W.2d 739 (1979) (emphasis

[1] *State v. Denny*, 120 Wis.2d 614, 357 N.W.2d 12 (Ct.App.1984)

added); *see also State v. Butler*, 2009 WI App 52, ¶2, 317 Wis.2d 515, 768 N.W.2d 46; *State v. Hudson*, 2013 WI App 120, ¶¶11-12, 351 Wis.2d 73, 839 N.W.2d 147; *State v. Cooper*, 2019 WI 73, ¶17, 387 Wis.2d 439, 929 N.W.2d 192. Kuehn properly sought plea withdrawal through his argument that he satisfied the manifest injustice test by proving he was denied effective assistance of counsel. (71:1, 5-6; Brief-in-chief p.12).

Nevertheless, the state insists Kuehn's ineffective assistance of counsel claim is forfeited because it "is not an 'attack' on 'the voluntary and intelligent character of his plea.'" (Response p.12-13). It relies on *State v. Villegas*, 2018 WI App 9, ¶47, 380 Wis.2d 246, 908 N.W.2d 198, and *Tollett v. Henderson*, 411 U.S. 258, 267 (1973), for the proposition that "a valid guilty plea 'represents a break in the chain of events which has preceded it in the criminal process.'" However, this argument is inapposite for the very reason this Court explained in *Villegas*: an ineffective assistance of counsel claim as an exception to the guilty plea waiver rule "is not applied as a general matter, *but when the alleged ineffectiveness is put forward as grounds for plea withdrawal*.'" *Villegas*, 380 Wis.2d 246, ¶47 (emphasis added). This Court developed this point in a footnote:

> [T]he test for ineffective assistance of counsel claims requires a defendant to prove: (1) deficient performance, and (2) prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove prejudice in the context of a plea withdrawal, the

> defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. *State v. Bentley*, 201 Wis.2d 303, 312, 548 N.W.2d 50 (1996) (*citing Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (defendant must allege facts to show "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial" (citation omitted))).

Id. at ¶47 n.17.

Accordingly, the second reason the state's argument fails is because Kuehn has consistently and explicitly maintained he would not have pled guilty, but would have gone to trial had his attorney filed his *Denny* motion. *Id.*; (71:1, 6-7, 11, 13; 86:6; 94:5; 107:6-7; Brief-in-chief p.23-24) Kuehn did exactly what was required: he put forward his trial attorney's alleged ineffectiveness as grounds for plea withdrawal. *Id.*; *see also Bentley*, 201 Wis.2d 303, 312; *Hill*, 474 U.S. 52, 59.

It is worth noting the state's forfeiture argument was first raised in its appellate response brief. (Response p.12-13). Consequently, the state forfeited this argument by failing to raise it in postconviction proceedings, which included postconviction briefing and the submission of proposed findings of fact and conclusions of law. *State v. Dowdy*, 2012 WI 12, ¶5, 338 Wis.2d 565, 808 N.W.2d 691 (applying the forfeiture rule to the party who won in the circuit court, who, on appeal,

furnished new arguments supporting the circuit court's order and explaining "As a general rule, issues not raised in the circuit court will not be considered for the first time on appeal."); (77:1-15; 93:1-5).

B. Trial counsel performed deficiently by failing to file Mr. Kuehn's third-party perpetrator motion.

Aside from its brand-new forfeiture argument, the state also argues Kuehn failed to meet his burden to show deficient performance and prejudice from trial counsel's failure to file his *Denny* motion. (Response p.13-21).

Specifically, the state insists trial counsel "did not perform deficiently because he strategically declined to pursue a *Denny* defense based on a reasonable assessment of the evidence." (Response p.14). The state cites *State v. Felton*, 110 Wis.2d 485, 502, 329 N.W.2d 161 (1983), which notably requires that strategic decisions *"must* be based upon rationality found on the facts *and the law*." (emphasis added); *see* (Response p.17-18). The state's position strains logic: it believes trial counsel made a reasoned decision not to file a third-party perpetrator motion *based on his assessment of the strong evidence against Kuehn* while simultaneously acknowledging trial counsel's testimony that he was unaware of the United States Supreme Court's holding in *Holmes v. South Carolina*, 547 U.S. 319 (2006) that *strong evidence of a defendant's guilt does not foreclose a third-party defense.* The state is wrong.

A decision made in ignorance of the law is not a reasoned decision. *Dixon v. Snyder*, 266 F.3d 693, 703 (7th Cir. 2001) ("If counsel was unaware of the statute, then his decision not to cross-examine Carlisle cannot be accorded the same presumption of reasonableness as is accorded most strategic decisions because it was not based on strategy but rather on a 'startling ignorance of the law.'"). Trial counsel testified he did not know about *Holmes*, and "It didn't cross my mind in making my analysis of whether we would pursue that or not." (111:25-26; App.125). When counsel's decision is the result of an erroneous view of the law rather than a reasoned strategy, the deficiency prong of the *Strickland* test is satisfied. *State v. Thiel*, 2003 WI 111, ¶51, 264 Wis.2d 571, 665 N.W.2d 305 ("Although counsel claimed that the failure to file the motion was for strategic reasons, the strategy was based on an erroneous view of the law and ultimately barred Thiel from presenting information contained in JoAnn's medical records.").

Citing *State v. Breitzman*, 2017 WI 100, ¶65, 378 Wis.2d 431, 904 N.W.2d 93, the state incorrectly asserts that the circuit court's determination regarding the reasonableness of counsel's strategy is "virtually unassailable in an ineffective assistance of counsel analysis." (Response p.13). The Wisconsin Supreme Court clearly explained that it is *the strategy* that is virtually unassailable—not the circuit court's determination. *Breitzman*, 378 Wis.2d 431, ¶65 ("In fact, where a lower court determines that counsel had a reasonable trial strategy, the strategy

'is virtually unassailable in an ineffective assistance of counsel analysis.").

Deference belongs to a reasonable strategy, not the circuit court's ruling. If this Court determines either there was no strategy or the strategy was not reasonable, no deference is warranted. "The ultimate determination[s] of whether counsel's performance was deficient and prejudicial to the defense are questions of law which this court reviews independently." *State v. Johnson*, 153 Wis.2d 121, 128, 449 N.W.2d 845 (1990).

The decision to forgo his client's *Denny* defense was not based upon relevant, applicable law upon which a prudent lawyer would have relied. His ignorance, or oversight, of the United States Supreme Court case law directly corresponding to his concerns about the viability of Mr. Kuehn's defense constitutes deficient performance. *Holmes* controverts his allegedly strategic decision.

This Court should conclude that trial counsel's failure to know the law bearing on whether his client would have a defense at trial constitutes deficient performance. *See State v. Coleman*, 2015 WI App 38, ¶43, 362 Wis.2d 447, 865 N.W.2d 190 ("A strategy based on an erroneous view of the law is deficient performance as a matter of law.").

The state also argues trial counsel did not perform deficiently because Kuehn did not satisfy the *Denny* test. (Response p.18). The state claims Kuehn failed to demonstrate Szymanski had motive to

possess child pornography because his past child sex assault conviction is "stale propensity evidence." (Response p.18). This Court has explained that other crimes may go toward establishing motive when there is a relationship between the other crime and the charged offense: "the evidence that Normington viewed pornography showing the insertion of objects into persons' anuses is connected to the charged offense because it provides a reason why he would insert the toilet plunger into Bob's anus." *State v. Normington*, 2008 WI App 8, ¶30, 306 Wis.2d 727, 744 N.W.2d 867. That Szymanski was convicted for the sexual assault of a child goes toward establishing a motive for possessing child pornography. *See also State v. Freidrich*, 135 Wis.2d 1, 19-20, 398 N.W.2d 763 (1987). As noted in the brief-in-chief, a defendant is not required to prove motive with "substantial certainty," but rather, "relevant evidence of motive is generally admissible." *State v. Wilson*, 2015 WI 48, ¶63, 362 Wis.2d 193, 864 N.W.2d 52.

Next, the state argues Kuehn's contention that Szymanski had opportunity to commit the crimes was "marginal at best." (Response p.19). Nevertheless, it concedes the "dirty phone" was found in Szymanski's truck, used the internet at Szymanski's house, and that Kuehn testified that Szymanski was present when the phone used the internet connections from

the library and the health care facility. (Response p.19).[2]

The state last argues that, assuming motive and opportunity, Kuehn cannot show a direct connection between Szymasnki and the possession of child pornography. (Response p.19). The state relies on what it believes is "compelling circumstantial evidence linking Kuehn to the Samsung phone and the accounts used to access and exchange child pornography on the phone." (Response p.19). Kuehn has never denied the fact that the Samsung phone belonged to him and at one time was an actively-subscribed phone he used. That is why connections exist between that phone and Kuehn. However, the phone no longer had an active number or cellular service. (111:37; App.127). Just because a phone no longer has active service would not mean that the call log or contents would be. So, the fact that the phone contained records showing its original ownership

[2] Though conceding this prong, the state attempts to dispute Kuehn's argument that anyone can use a cellphone that is not password-protected. (Response p.19). While the Samsung phone was password-protected at the time it was seized by police, that does not indicate *who* protected the phone with a password, or *when* it was password protected. If it was an unused, inactive phone, anyone could have set up password protection. The fact that it was a phone originally belonging to Kuehn does not definitively establish he was using it at the time that it was downloading child pornography, that he set the password, or that he was using the email accounts on the phone to access child pornography.

does not impact Kuehn's argument that Szymanski could have been using it to access child pornography. Indeed, the state does not refute Kuehn's argument that there is evidence suggesting that Szymanski actually committed the crime of possessing child pornography, in that child pornography was accessed from Szymanski's home address, the Samsung phone was seized from Szymanski's vehicle, and Szymanski was placed at the locations at the time child pornography was accessed. (Brief-in-chief p.19; 1:1-8; Response p.19).

Kuehn had a viable *Denny* defense, and trial counsel performed deficiently by deciding to forgo it based on a failure to know the relevant law.

C. Mr. Kuehn was prejudiced by his trial attorney's deficient performance, because there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty but would have insisted on going to trial.

Finally, the state argues Kuehn did not prove his trial attorney's failure to file a third-perpetrator motion prejudiced him. (Response p.20-21). The state argues Kuehn's pleas reduced his maximum exposure from a 350-year term[3] of imprisonment to a maximum 125-year term of imprisonment, and his

[3] 15 counts of Class D felonies would have a maximum exposure of 375 years in the Wisconsin State Prison system. (34:1-3); WIS. STAT. §§948.12(1m), (3)(a), 939.50(3)(d).

pleas "provided a better resolution than had he exercised his right to trial." (Response p.20). The state ignores the fact that Kuehn kept his case in trial posture up until the day of trial, even after affirmatively giving up his opportunity to accept a *far* more favorable plea offer than the one he ultimately accepted. (108:4-6).

Kuehn testified about his subjective choice to enter the plea agreement: he testified that he is innocent and he would not have pleaded guilty, but for the position he was put in by trial counsel's failure to file his third-party perpetrator defense. (111:9; App.121). As the state notes, there was a robust circumstantial case against Kuehn because the child pornography was accessed on his old phone. (Response p.16). Without a *Denny* defense, Kuehn simply did not have a defense to present at trial. (107:6-7). Therefore, he had no feasible choice but to plead guilty—because his attorney refused to file the motion that would allow him to present his defense at trial. (111:7, 9; App.120-21).

Kuehn further observes the significant risk he faces by seeking to withdraw his pleas. Plea withdrawal does not absolve him of the charges against him; rather, he would still face those charges—which means the ten dismissed and read-in counts would be reinstated and he would again face the 375-year term of imprisonment.

Finally, the state blames Kuehn for failing to assert "that the allegations in the complaint,

including those connecting him to accounts and activity on the phone, are untrue. Nor has Kuehn offered credible evidence that undermines the complaint's allegations." (Response p.21). While the state seeks to pile additional hurdles on Kuehn, that is not the state of the law. Kuehn has met his burden to show that his attorney provided constitutionally ineffective assistance constituting a manifest injustice, entitling him to plea withdrawal.

II. The ten child pornography surcharges assessed for Mr. Kuehn's dismissed and read-in charges should be vacated.

The state argues Kuehn's interpretation of WIS. STAT. §973.042(2) would render the second sentence of the statute superfluous. (Response p.23). It argues, "Had the Legislature intended to limit the court's authority to impose a surcharge on a per conviction basis as Kuehn advocates, it would have drafted section 973.042(2) differently. It would have tracked the language of other surcharge statutes in Chapter 973 that direct circuit courts to assess a surcharge on a per conviction or per count basis." (Response p.23-24).

The same logic applies to the interpretation for which the state advocates: had the legislature wished to allow the surcharge to be imposed on read-in counts for which probation or a sentence was not imposed, it could have done so. It could have tracked the language of the restitution statute, for example,

and explained that "associated with the crime" included dismissed and read-in counts. It did not.

The plain language of the child pornography surcharge statute specifies that the surcharge shall be imposed for each image associated with the crime *if* a court imposes a sentence or orders probation. WIS. STAT. §973.042(1). Therefore, because "a sentence" was only imposed on Kuehn on five counts, assessing the surcharge for each of his dismissed and read-in counts was improper. Accordingly, this Court should vacate the ten child pornography image surcharges for the ten dismissed and read-in counts.

III. The circuit court's requirement that Mr. Kuehn have no contact with his girlfriend is unreasonable and should be vacated.

This Court should reverse the requirement that Kuehn have no contact with his girlfriend because it is overly broad, unreasonable, and unjustly impinges on his constitutional freedom of association.

Because the circuit court did not explain its basis for imposing the no-contact order between Kuehn and his girlfriend, the state constructs reasons supporting that order. (Response p.28). It emphasizes Kuehn's danger to J.S.'s children as the underlying basis for the no-contact order with *her*. (Response p.29). However, J.S.'s children are already accounted for by virtue of the no-contact order with E.K. or with anyone under the age of eighteen without the presence of a DOC-approved chaperone

and prior approval of the agent. (103:45-46). Using J.S.'s children as justification for preventing Kuehn from having contact with his adult girlfriend for his twenty-year term of extended supervision where there are other orders in place preventing him from having contact with children is plainly unreasonable and impinges on his constitutional right to freedom of association. *See Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 545 (1987) ("the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights.").

The state correctly points out the fact that convicted persons are not treated the same as citizens who have not violated the law. Yet, simply because a convicted individual is not entitled to "enjoy the same degree of liberty as citizens who have not violated the law" does not mean that impinging on a convicted person's liberty interest is reasonable. In this case, the court's no contact order with J.S. was not reasonable and the fact that Kuehn has been convicted of serious crimes does not transform that condition into one reasonably related to the protection of the public and to his rehabilitation.

CONCLUSION

Mr. Kuehn respectfully requests that this Court enter an order allowing him to withdraw his pleas. If this Court does not grant plea withdrawal, he requests an order vacating the child pornography surcharges assessed on his dismissed and read-in charges, as well as the no-contact order with J.S.

Dated this 12th day of August, 2019.

Respectfully submitted,

CARLY M. CUSACK
Assistant State Public Defender
State Bar No. 1096479

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
cusackc@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,978 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 12th day of August, 2019.

Signed:

CARLY M. CUSACK
Assistant State Public Defender