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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2020AP404

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SKYLARD R. GRANT,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

APPEAL FROM MILWAUKEE COUNTY CIRCUIT COURT, BRANCH 38,
CASE NO. 18CF2151
THE HONORABLE JEFFREY A. WAGNER, PRESIDING

KAY & KAY LAW FIRM
Attorney Timothy T. Kay
State Bar No. 1019396

675 North Brookfield Road, Suite 200
Brookfield, Wisconsin 53045
(262) 784-7110
Attorney for Defendant

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STATEMENT OF ISSUES

I. Did the trial court err when it denied Grant a *Machner* hearing for ineffective assistance of counsel when trial counsel failed to file a *Denny* Motion.

The Trial Court answered: "NO."

Appellant argues: "YES."

Respondent would argue: "NO."

II. Did the trial court err when it denied Grant a *Machner* hearing for ineffective assistance of counsel when trial counsel failed to provide notice of Grant's alibi.

The Trial Court answered: "NO."

Appellant argues: "YES."

Respondent would argue: "NO."

III. Did the trial court err when it denied Grant a *Machner* hearing for ineffective assistance of counsel when trial counsel failed to provide a witness list before trial.

The Trial Court answered: "NO."

Appellant argues: "YES."

Respondent would argue: "NO."

IV. Did the trial court err when it denied Grant a *Machner* hearing for ineffective assistance of counsel when trial counsel failed to give an opening statement, file any pre-trial motions, or make any objections during trial.

The Trial Court answered: "NO."

Appellant argues: "YES."

Respondent would argue: "NO."

V. Did the trial court err when it denied Grant a *Machner* hearing for ineffective assistance of counsel when trial counsel failed to sufficiently review case material.

The Trial Court answered: "NO."

Appellant argues: "YES."

Respondent would argue: "NO."

STATEMENT ON ORAL ARGUMENT

Defendant-Appellant, Skylard R. Grant, welcomes oral argument if the Court believes it is necessary; however, the issues in this appeal are clear and may be fully addressed through briefs of the parties.

STATEMENT ON PUBLICATION

Defendant-Appellant, Skylard R. Grant, does not request publication of this decision for the reason that the factual situation presented herein will not establish any new precedent.

STATEMENT OF THE CASE

This appeal stems from the trial court's Decision and Order Denying Motion for Postconviction Relief dated February 18, 2020 and the Judgement of Conviction dated April 26, 2019. For purposes of this appeal, Defendant-Appellant, Skylard R. Grant, will hereinafter be referred to as "Grant" and the State of Wisconsin will hereinafter be referred to as the "State."

STATEMENT OF FACTS

I. Facts:

On December 28, 2017, a missing person's report was filed for Antwone Berry by Berry's girlfriend. (R. 1:2). Berry's girlfriend told police that Berry hangs out with a friend who goes by the name of "Nip." (R. 1:2). She then gave police Nip's cell phone number. (R. 1:2).

On December 31, 2017, police called "Nip" at the number provided and left a message asking him to call back. (R. 1:2). On January 1, 2018, the police followed up on the investigation to Berry's place of work at Advanced Auto Parts store. (R. 1:2). There the police confirmed that "Nip" was Skylard Grant, that Berry's girlfriend mentioned, and that Grant drives a maroon 1999 Ford Expedition. (R. 1:2).

On January 1, 2018, Grant returned the police's call and told them that he had not seen the Berry in person since December 24, 2017, nor had he spoken to him or seen him since. (R. 1:3). Eventually, it was determined that the last time that Berry had been seen alive was the early hours of the morning of December 25, 2017, at a gathering at Jermel Robertson's house. (R. 1:3).

Angelo Buggs stated that Grant tried to sell him Berry's 9mm handgun that he knew was Berry's. (R. 1:6). Buggs stated that he asked Grant where Berry was, and Grant responded, "Man, fuck that nigga, you ain't gonna be seeing him no more, I had to take care of him." There is no

proof other than this man's belief that this gun belonged to Berry. (R. 74:21).

Grant and Robertson tell very different stories regarding the facts of the night Berry went missing. Robertson gave a statement to the police saying that Grant was drunk and arguing with Berry the night Berry went missing. (R. 1:4). According to Robertson, Grant told Berry he was going to take him home and shoot him. (R. 1:4). According to Robertson, Berry asked Grant if Grant was going to shoot him with his own gun, to which Grant responded, "absolutely." (R. 1:2). Finally, according to Robertson, Grant took Berry away in his "burgundy Ford Explorer," used a yellow vacuum cleaner from Robertson's garage to clean out the truck, cleaned out the vacuum with bleach, and returned without Berry. (R. 1:4-5). According to Robertson, Grant threw a tree branch on Robertson's property. (R. 1:4-5).

Grant tells a different story. Grant stated that Berry started making money by selling marijuana for Robertson. (R. 36:25; A-App. 101). According to Grant, Berry started missing payments and Robertson became very angry about it. (R. 36:25; A-App. 101-02). Grant said that Berry bought a gun because of how mad Robertson became. (R. 36:25; A-App. 102). Grant describes arriving at Robertson's house on Christmas Eve and asking Berry if he worked everything out with Robertson. (R. 36:28; A-App. 105). Berry responded, "Fuck em, it's Christmas, I ain't gone pay em

today." Grant recalls getting into an argument with Berry telling him to not be "fucking stupid." (R. 36:28; A-App. 105). After the argument, Grant remembers leaving Berry at Robertson's house and taking his girlfriend to get food. (R. 36:28; A-App. 105). As Grant was leaving, Grant heard Berry saying that he "don't give a fuck, and he got his gun on em." (R. 36:28; A-App. 105). Grant stated that after getting food, he and his girlfriend went back to Robertson's house to get wrapping paper for Christmas presents. (R. 36:29; A-App. 106). Grant said that he and his girlfriend left Robertson's home and that was the last time he saw Berry alive. (R. 36:29; A-App. 106).

Grant continued by stating that Berry needed a ride home, and Robertson elected to take him because he had to "get that paper for me [(Robertson)] anyway." (R. 36:29; A-App. 106).

Grant drove his girlfriend home and then drove around trying to find a parking spot. Eventually, Grant drove to the gas station. (R. 36:30; A-App. 107). At the gas station, Grant saw Robertson and followed him back to Robertson's house. (R. 36:30; A-App. 107). Grant says that Robertson told him that he dropped Berry off with a girl called "M," and then Robertson threw a twig off his car by the side of his house. (R. 36:30; A-App. 107). Grant stated that he wanted to head out by Berry and "see what up." (R. 36:31; A-App. 108). Grant went up Mill Road, texted Robertson saying, "I'm ah drop him off," referring to

dropping Berry off at home if he found him with "M."(R. 36:31; A-App. 108). Nothing was going on, so Grant went home. (R. 36:31; A-App. 108).

Grant said that he believes Robertson killed Berry because Berry would not pay Robertson his drug debts. (R. 36:34; A-App. 111). Grant believes that is why Robertson blamed the murder on him. (R. 36:34; A-App. 111). Grant also pointed out that there was a recording of Grant opening presents at 3:47 a.m. on December 25, 2017, approximately fifteen minutes away from where his car was seen on camera at 3:32 p.m. on December 25, 2017. (R. 36:16). Grant further points out that the only one who says they saw him with Berry was Robertson. (R. 36:21).

On January 4, 2018, Grant was arrested. (R. 1:6). On January 7, 2018, Berry's body was found in a ditch located in Milwaukee. (R. 1:3). The autopsy showed that Berry had died of two gunshot wounds. (R. 1:3). The branch found in Robertson's yard appeared to be similar to other "reddish twigs" found by where Berry's body was found. (R. 1:5).

Police also took a statement from Grant's girlfriend. (R. 1:5). Grant's girlfriend stated that Grant and Berry had been arguing, Grant left without his girlfriend for approximately two hours, and then Grant returned without Berry. (R. 1:5). However, according to Grant's statements, Grant was merely arguing with Berry about the trouble he could be in with Robertson. (R. 36:26; A-App. 103). Furthermore, Grant gives a statement of where he was

during that time and why he returned without Berry. (R. 36:29-31; A-App. 106-08).

An analysis of Berry's phone records showed contact almost every day between Berry and Grant, until December 25, 2017, when it stops completely. (R. 1:6). A search warrant for Grant's residence resulted in the police finding marijuana and a SCCY CPX-2 9mm handgun. (R. 1:7). This handgun is not believed to have caused Berry's death. (R. 74:21).

Grant stated that he had knowledge about Berry's death that he withheld, but that he did not kill his best friend. (R. 74:29-30). Grant has testified that he is still grieving about the loss of his best friend and being charged for killing him. (R. 74:29-30). Grant maintains his innocence throughout the entire process despite taking a plea, and states that this case is circumstantial for a reason. (R. 74:29-30). There is no DNA evidence, no murder weapon recovered despite a search of Grant's house, and no eye witnesses who saw Berry die.

II. Procedural History.

On March 11, 2019, the trial began. (R. 71). On March 12, 2019, Grant pled guilty to Second Degree Reckless Homicide - PTAC and Possession With Intent To Deliver Controlled Substance-THC. (R. 62:2). Grant maintained his innocence the entire time despite accepting a plea deal. (R. 74:30).

Grant went into the sentencing hearing and apologized for the part he played in Berry's death while maintaining that he did not kill him. On April 26, 2019, Grant was sentenced to fourteen years in the Wisconsin state prison system and nine years extended supervision for Second Degree Reckless Homicide - PTAC, and one year in the Wisconsin state prison system and one year extended supervision for Possession With Intent To Deliver Controlled Substance-THC. (R. 74:36).

Appellate counsel received from Grant's second trial counsel, Attorney Roth, two large boxes of documents pertaining to the case. The boxes contained twenty-eight pages of correspondence from Grant to Attorney Schwantes who was Grant's first trial counsel; four different letters from Grant to Attorney Roth; a letter from Attorney Schwantes to Grant; two letters Attorney Roth addressed to Grant and Milwaukee Secure Detention Facility respectively; one Juror Selection and Peremptory Challenges form; twenty-seven pages of Attorney Roth's notes; twenty-five transcribed interviews and interrogations; fifty-nine CD's of evidence and interrogations; eighty-two pages of notes and research done by original counsel Attorney Schwantes; twenty-seven witness statements; fifty-one police reports; and over three hundred other discovery documents. From those boxes the Post-conviction motion attached Exhibits C-M, supported

by affidavit, to further Grant's claims. Exhibits C-M of the Post-Conviction Motion are as follows:

Exhibit C of the Post-Conviction Motion is twenty-eight pages of notes and a letter written from Grant to original counsel Attorney Schwantes. (R. 36:6). These twenty-eight pages contain Grant's alibi, belief that Jermel Robertson shot the victim, and questions that he believes his attorney should ask. (R. 36:6).

Exhibit D of the Post-Conviction Motion is a nine-page letter from Grant to Attorney Roth dated August 8, 2018. (R. 36:35). These nine pages contain Grant's alibi, statement that Jermel Robertson is the culprit, and a request to bring a *Denny* motion. (R. 36:35).

Exhibit E of the Post-Conviction Motion is a one-page letter from Grant to Attorney Roth dated October 16, 2018. (R. 36:45). This letter contains Grant's questions about taking a plea deal. (R. 36:45).

Exhibit F of the Post-Conviction Motion is a one-page letter from Grant to Attorney Roth dated October 21, 2018. (R. 36:47). This letter contains general questions about his case. (R. 36:47).

Exhibit G of the Post-Conviction Motion is a two-page letter from Grant to Attorney Roth dated January 6, 2019. (R. 36:49). This letter contains a request to contact someone to corroborate his story. (R. 36:49).

Exhibit H of the Post-Conviction Motion is a one-page letter from original counsel Attorney Schwantes to Grant

dated July 12, 2018. (R. 36:52). This letter explains Attorney Schwnates' need to withdraw from the case after discovering a conflict during research for a *Denny* motion. (R. 36:52).

Exhibit I of the Post-Conviction Motion is a one-page letter from Attorney Roth to Grant dated August 21, 2018. (R. 36:54). This is the only letter from Attorney Roth to Grant, thanking Grant for his letters. (R. 36:54).

Exhibit J of the Post-Conviction Motion is a one-page letter from Attorney Roth to the Milwaukee Secure Detention Facility dated October 29, 2018. (R. 36:56). This letter requests inmate calls made by Arlester Jones in an attempt to see if Jones could be a potential witness. (R. 36:56).

Exhibit K of the Post-Conviction Motion is a two-page Jury Selection and Peremptory Challenges form dated March 11, 2019. (R. 36:58). This document shows some voir dire preparation by trial counsel. (R. 36:58). This is the only document that shows coherent trial preparation. Because everyone receives the Jury Selection and Peremptory Challenges form the day of trial, appellate counsel believes Attorney Roth may not have begun preparing for trial until the day of trial.

Exhibit L of the Post-Conviction Motion contains twenty-seven pages of trial counsel's notes dated August 6, 2018, through October 30, 2018. (R. 36:61). These notes contain difficult to interpret handwritten pages that make

it difficult to determine whether counsel had prepared for trial at all. (R. 36:61).

While appellate counsel reviewed the two boxes of case materials, they found fifty-nine CDs. Of those fifty-nine CD's, nineteen of them seemed to be interrogations or interviews of witnesses that original counsel had transcribed. Exhibit M of the Post-Conviction Motion contains a seventy-page transcript of a police interrogation of Grant, in which Grant makes many statements that corroborate his story. (R. 37:2).

ARGUMENT

I. Trial Counsel provided ineffective assistance when she (1) failed to file the *Denny* motion, (2) failed to provide notice of Grant's alibi, (3) failed to provide a witness list before trial, (4) failed to give an opening statement, and (5) failed to sufficiently review case material.

A. Standards of Proof Applicable to Plea Withdrawal.

A defendant has the right to withdraw a plea before or after sentencing. *State v. Sulla,* 2016 WI 46, ¶ 24, 369 Wis.2d 225, 880 N.W.2d 659 (citing *State v. Cain*, 2012 WI 68, ¶ 24, 342 Wis.2d 1, 816 N.W.2d 177). A different standard is appropriate depending on whether a defendant moves to withdraw his plea before or after sentencing. If a defendant moves to withdraw his plea before sentencing, the defendant may do so if he provides "any fair and just

reason" for withdrawal. *State v. Canedy*, 161 Wis.2d 565, 582, 468 N.W.2d 163 (1991).

However, if a defendant moves to withdraw a plea after sentencing, he or she carries the heavy burden of establishing that the trial court should permit a plea withdrawal to correct a "manifest injustice." *Id.* ¶ 24; see also *State v. Reppin*, 35 Wis.2d 377, 385-86, 151 N.W.2d 9 (1967). A manifest injustice is present whenever the defendant proves one of the following:

> (1) he was denied the effective assistance of counsel guaranteed to him by the constitution, state, or rule; (2) the plea was not entered or ratified by the defendant or a person authorized to so act on his behalf; (3) the plea was involuntary, or was entered without knowledge of the charge or that the sentence actually imposed or could be imposed; or (4) the defendant did not receive the charge or sentence concessions contemplated by the plea agreement and the prosecuting attorney failed to seek or not to oppose these concessions as promised in the plea agreement.

Reppin, 35 Wis.2d at 385-86; see also *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996).

A defendant can meet this burden if he or she did not "knowingly, intelligently, and voluntarily enter the plea." *Id.* (citing *State v. Brown*, 2006 WI 100, ¶ 18, 293 Wis.2d 594, 716 N.W.2d 906).

The defendant has two paths to withdraw a plea after sentencing. *Sulla*, 2016 WI 46, ¶ 25. The first option is a *Bangert* motion. *State v. Bangert*, 131 Wis.2d 246, 389

N.W.2d 12 (1986). The defendant invokes *Bangert* when the plea colloquy is defective. *State v. Howell*, 2007 WI 75, ¶ 74, 301 Wis.2d 350, 734 N.W.2d 48.

The second option is a *Nelson/Bentley* motion. A "defendant invokes *Nelson/Bentley* when the defendant alleges that some factor extrinsic to the plea colloquy, like ineffective assistance of counsel or coercion, renders a plea infirm." *Id.*

In the case before this Court, the manifest injustice at issue is ineffective assistance of trial counsel. The test for ineffective assistance of counsel in Wisconsin follows the United States Supreme Court test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a defendant's counsel must be both (1) deficient and (2) prejudicial. *Strickland*, 466 U.S. at 687.

To prove the first element—deficient performance—the defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990) (quoting *Strickland*, 466 U.S. at 687). In analyzing whether deficient performance occurred, courts use "an objective standard of reasonableness." *State v. Behnke*, 203 Wis. 2d 43, 62, 553 N.W.2d 265 (Ct. App. 1996). The reviewing court looks at whether the attorney acted within "the wide range of professionally competent assistance." *State v. Oswald*, 2000 WI App 2, ¶ 49, 232 Wis. 2d 62, 606 N.W.2d 207.

To prove the second element—prejudice—the defendant must show a reasonable probability that the result of the proceeding would have been different "but for" counsel's deficient performance. *State v. Huff*, 2009 WI App 92, ¶ 15, 319 Wis. 2d 258, 769 N.W.2d 154. A reasonable probability is one sufficient to undermine confidence in the outcome of the proceeding. *Id*.

In a case in which a defendant seeks to withdraw his or her guilty plea, in order to show prejudice a defendant must "allege facts to show 'that here is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Bentley*, 201Wis. 2d at 312.

Standard of Review. A "defendant's *Nelson/Bentley* motion must meet a higher standard for pleading than a *Bangert* motion," *State v. Howell*, 2007 WI 75, ¶ 75, in which a *Bangert* motion involves the defendant's on-record plea colloquy. If the defendant challenges something extrinsic to that plea colloquy under *Nelson/Bentley*, then the defendant must allege sufficient material facts that, if true, would entitle him to relief. *Id*.

Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433. There are two prongs to a *Nelson/Bentley* motion.

Under the first prong, the court determines whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. *Id*. This is a question of law that the court reviews de novo. *Id*. (citing *Bentley*, 201 Wis.2d at 309-10). If the motion raises such facts, the circuit court must hold an evidentiary hearing. *Id*.

Under the second prong, however, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing. *Id*. The appellate court requires the circuit court to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion. *Id*. The appellate court reviews a circuit court's discretionary decisions under the deferential erroneous exercise of discretion standard. *Id*.

Whether a defendant was denied effective assistance of counsel is a mixed question of fact and law. *State v. Breitzman*, 2017 WI 100, ¶ 37, 378 Wis. 2d 431, 904 N.W.2d 93. The factual circumstances of the case and trial counsel's conduct and strategy are findings of fact, which will not be overturned unless clearly erroneous. *Id*. Whether trial counsel's conduct constitutes ineffective assistance is a question of law, which the court reviews de novo. *Id*.

B. Attorney Roth provided ineffective assistance when she failed to file the *Denny* motion because Grant claimed Robertson was the actual killer.

Attorney Roth provided ineffective assistance when she failed to file the *Denny* motion because Grant claimed Robertson was the actual killer. Attorney Roth's decision to not file the *Denny* motion was both deficient and prejudicial.

It was deficient representation for Attorney Roth to not file the *Denny* motion that her predecessor counsel, Attorney Schwantes, determined was necessary and that Grant was relying on. On July 12, 2018, Attorney Schwantes wrote a letter to Grant stating that the defense strategy was to pursue a *Denny* motion, in which Grant would argue that Jermel A. Robertson was the person who killed Grant's best friend. (R. 36:52). However, Attorney Schwantes also stated in his letter that there was now a conflict of interest because his colleague represented Jermel A. Robertson. (R. 36:52). Accordingly, Attorney Schwantes was replaced by Attorney Roth. Grant was under the belief that Attorney Roth was still going to file the *Denny* motion. However, Attorney Roth never filed the *Denny* motion.

A *Denny* motion is when a defendant seeks to introduce evidence that another party committed the crime the defendant is charged with. Under a *Denny* motion, evidence that a third party committed the crime is

admissible "as long as motive and opportunity have been shown and as long as there is also some evidence to directly connect a third person to the crime charged which is not remote in time, place or circumstances . . . ." *State v. Denny*, 120 Wis. 2d 614, 624, 357 N.W.2d 12 (Ct. App. 1984). The test set forth in *Denny* is known as the "legitimate tendency" test. *Id.*

Under the legitimate tendency test, the defendant bears the burden of producing sufficient evidence from which a jury could find all three elements: (1) motive, (2) opportunity, and (3) direct connection. *State v. Wilson*, 2015 WI 48, ¶¶ 51-60, 362 Wis. 2d 193, 864 N.W.2d 52 (2015). "Overwhelming evidence against the defendant may not serve as the basis for excluding evidence of a third party's opportunity . . ." *State v. Wilson*, 2015 WI 48, ¶ 69. Grant was able to prove all three elements of the legitimate tendency test and *Denny* motion.

Element No. 1 – Motive. Grant would have been able to prove the first element of the legitimate tendency test, which was "motive." A "motive" is simply a "plausible reason" to commit the offense. *Wilson*, 2015 WI 48, ¶ 57. Grant was able to prove Robertson's motive to kill the victim, which was that the victim owed Robertson money from drug debts. The victim was not paying his drug debts to Robertson. It is plausible that Robertson killed the victim because the victim was not paying his drug debts.

On the contrary, the record is silent as to a plausible reason, or motive, why Grant would want to shoot his best friend in the head. The complaint states that Grant and the victim were arguing over "coming out to hang out with [Robertson], who the defendant considered to be 'his people.'" (R. 1:4). However, this argument about hanging out with Robertson is not a plausible reason why Grant would shoot his best friend in the head. The only plausible motive set forth in the record is that Robertson killed the victim because the victim was not paying his drug debts.

Element No. 2 – Opportunity. Grant would have been able to prove the second element of the legitimate tendency test, which was "opportunity." "The second element of the 'legitimate tendency' test asks whether the alleged third-party perpetrator could have committed the crime in question." *Wilson*, 2015 WI 48, ¶ 65. Robertson could have killed the victim because he was one of two people who last saw the victim alive. Robertson, Grant, and the victim were all at Robertson's house in the early morning house of December 25. Robertson said that the victim left with Grant. On the contrary, the record also reflects, in Grant's written statement that, that Robertson, not Grant, dropped off the victim. (R. 36-30). Therefore, Robertson had the opportunity to kill the victim because he was one of two people to have last seen the victim alive, and, by at least one account, Robertson drove the victim home and the victim was never seen alive again.

Element No. 3 – Direct Connection. Grant would have been able to prove the third element of the legitimate tendency test, which was "direct connection." The third element of the legitimate tendency test is satisfied "as long as there is also some evidence to directly connect a third person to the crime charged which is not remote in time, place or circumstances . . . ." *Denny*, 120 Wis. 2d 614, 624. There is direct evidence that connects Robertson to the crime scene, which was the twig that was found in Robertson's yard. There was a tree twig that police found on Robertson's property that was determined to match trees in the area of the victim's death. Further, Robertson knew exactly were the twig was located when asked by police. Therefore, there was a direct connection between Robertson and the crime scene because a twig from the crime scene was found on Robertson's property.

Accordingly, since all three elements of the legitimate tendency test could have been satisfied, Attorney Roth should have pursued the *Denny* motion and argued that Robertson, not Grant, killed the victim. Attorney Roth's failure to pursue the *Denny* motion was deficient representation.

Attorney Roth was in possession of several letters from Grant requesting the *Denny* motion, and knew that bringing the *Denny* motion was Grant's main argument because using that defense was the reason original counsel withdrew from the case. (R. 64:2; R. 36:52). Because

original counsel, Attorney Schwantes, discovered that a *Denny* motion was necessary and Attorney Roth had those materials, (R. 36:52), Attorney Roth should have reviewed the files and filed her own *Denny* motion. Attorney Roth's failure to file the *Denny* motion was outside "the wide range of professionally competent assistance," *State v. Oswald*, 2000 WI App 2, ¶ 49, and, therefore, deficient representation of Grant.

It was prejudicial for Attorney Roth to not file the *Denny* motion because there was a reasonable probability that the result of the proceedings would have been different "but for" counsel's deficient performance. *Huff*, 2009 WI App 92, ¶ 15. But for Attorney Roth not filing the *Denny* motion, Grant strongest argument—that Robertson shot the victim—was not even heard by the court. The ineffective assistance of counsel of Attorney Roth was a manifest injustice and prejudiced Grant as he was charged with murdering his best friend despite stating that Robertson was the killer.

C. Attorney Roth provided ineffective assistance when she failed to provide notice of Grant's alibi.

Attorney Roth provided ineffective assistance when she failed to provide notice of Grant's alibi. Attorney Roth's failure to provide proper notice of Grant's alibi was both deficient and prejudicial.

It was deficient representation for Attorney Roth to fail to file the notice of Grants alibi. A defendant must give

notice to the district attorney at arraignment or at least thirty days before trial if the defendant intends to rely upon an alibi as a defense. Wis. Stat. § 971.23(8). Grant has made it clear in his letters to both Attorneys Schwantes and Roth that he has an alibi. Grant's alibi was that after he left Berry at Robertson's house he dropped off his girlfriend at home, tried to find a parking spot but couldn't find one, then drove to the gas station and saw Robertson, then drove to Robertson's house, then tried to find Berry but could not find him, and then drove home to open Christmas gifts. (R. 36:29-31; A-App. 106-08).

However, by the time trial came, Attorney Roth had not given proper notice to the district attorney of reliance on an alibi defense, witnesses counsel intended to call, or even a list of exhibits counsel planned to use. Attorney Roth did not come close to meeting the statutory notice of thirty days, and thus could not have used Grant's main defense. Not only did Attorney Roth not provide notice, but counsel also failed to ask for an extension of time to file the notice.

Attorney Roth's failure to provide notice of Grant's alibi defense was outside "the wide range of professionally competent assistance," *Oswald*, 2000 WI App 2, ¶ 49, and, therefore, deficient representation of Grant.

It was prejudicial for Attorney Roth to not file notice of Grant's alibi because there was a reasonable probability that the result of the proceedings would have been different "but for" counsel's deficient performance. *Huff*, 2009 WI

App 92, ¶ 15. But for Attorney Roth not providing notice of the alibi, Grant would have been able to use his main argument—that he wasn't at the crime scene. The ineffective assistance of counsel of Attorney Roth was a manifest injustice and prejudiced Grant as he could not use his main defense at trial.

D. Attorney Roth provided ineffective assistance when she failed to provide a witness list before trial.

Attorney Roth provided ineffective assistance when she failed to provide a witness list before trial. Attorney Roth's failure to provide a witness before trial was both deficient and prejudicial.

It was deficient representation for Attorney Roth to not provide a witness list before trial. Upon demand, the defendant or his or her attorney shall disclose a list of all witnesses before trial. Wis. Stat. § 971.23(2m)(a). The State provided Attorney Roth with a long and thorough list of witnesses. However, Attorney Roth failed to provide a witness list or name a single witness for trial. Because Attorney Roth did not name any witnesses, the defense could not have called any witnesses of their own at trial.

The exhibits appellate counsel attached to the Post-Conviction Motion, (R. 34; R. 35; R. 36; and R. 37) are a small sampling of the documents from the large boxes of materials that could have assisted Attorney Roth in finding witnesses. The boxes contained twenty-eight pages of correspondence from Grant to Attorney Schwantes; four

different letters from Grant to Attorney Roth; a letter from Attorney Schwantes to Grant; two letters Attorney Roth addressed to Grant and Milwaukee Secure Detention Facility; one Juror Selection and Peremptory Challenges form; twenty-seven pages of Attorney Roth's notes; twenty-five transcribed interviews and interrogations; fifty-nine CD's of evidence and interrogations; eighty-two pages of notes and research done by original counsel Attorney Schwantes; twenty-seven witness statements; fifty-one police reports; and over three hundred other discovery documents. However, despite all of this information, Attorney Roth still failed to provide a witness list.

Attorney Roth's failure to provide a witness list before trial was outside "the wide range of professionally competent assistance," *Oswald*, 2000 WI App 2, ¶ 49, and, therefore, deficient representation of Grant.

It was prejudicial for Attorney Roth to not provide a witness list because there was a reasonable probability that the result of the proceedings would have been different "but for" counsel's deficient performance. *Huff*, 2009 WI App 92, ¶ 15. But for Attorney Roth not providing a witness list, Grant would have been able to call several witnesses that may have supporting his case. The ineffective assistance of counsel of Attorney Roth was a manifest injustice and prejudiced Grant as he could not call witnesses to defend himself at trial.

E. Attorney Roth provided ineffective assistance when she failed to give an opening statement, file any pre-trial motions, or make any objections during trial.

Attorney Roth provided ineffective assistance when she failed to give an opening statement, file any pre-trial motions, or make any objections during trial. Attorney Roth's failure to perform before or during trial was both deficient and prejudicial.

It was deficient representation for Attorney Roth to not give an opening statement. Attorney Roth did not give an opening statement, and reserved the right to make one later. (R. 72-69). A failure of trial counsel to provide an opening statement is unusual and can be deficient performance of counsel unless there are specific circumstances.

Attorney Roth did not give an opening statement; however, Grant communicated with her and provide written statements to her. Grant wrote several letters to counsel to ensure that there was plenty of material for an opening statement. (R: 36:6-47). Attorney Roth should have given an opening statement. Otherwise, the inference of the jurors is that that defense has no counter argument to the accusations made in the state's opening statement.

Attorney Roth did not merely fail to give an opening statement or make a *Denny* motion, Attorney Roth also did

not make any objections or motions pre-trial, during trial, or after trial.

It was prejudicial for Attorney Roth to not give an opening statement, not to file any pre-trial motions, or not make any objections during trial because there was a reasonable probability that the result of the proceedings would have been different "but for" her deficient performance. *Huff*, 2009 WI App 92, ¶ 15. But for Attorney Roth not giving an opening statement or not making any pre-trial motions, Grant would have been in a better position to evaluate his chances of winning at trial and would not have entered into a plea deal.

F. Attorney Roth provided ineffective assistance when she failed to sufficiently review case material.

Attorney Roth provided ineffective assistance when she failed to sufficiently review case material. It was deficient and prejudicial for Attorney Roth to not review all case material.

Grant's appellate counsel requested from Attorney Roth, a standard SPD Appellate Questionnaire; transcript explaining reasons counsel believed post-conviction relief is necessary; why counsel believed a Notice of Intent to Pursue Post Conviction Relief was appropriate; and what counsel believed to be the appealable issues on June 10, 2019. (R. 36:2). After receiving nothing from Attorney Roth, appellate counsel requested the materials from Attorney Roth once more on July 11, 2019. (R. 36:4). Appellate

counsel was never provided with the standard SPD Appellate Questionnaire or any of the information requested.

Appellate counsel did receive two boxes of random materials from Attorney Roth that included some letters from Grant requesting that Attorney Roth bring a *Denny* motion and ask questions he had thought of. (R. 36. 6-47). Upon organization and review of those files, appellate counsel could not find evidence that attorney Roth had prepared for trial or responded to Grant's requests. (R. 36:54-68).

The exhibits appellate counsel attached to the Post-Conviction Motion, (R. 34; R. 35; R. 36; and R. 37) are a small sampling of the documents from the large boxes of materials. The boxes contained twenty-eight pages of correspondence from Grant to Attorney Schwantes; four different letters from Grant to Attorney Roth; a letter from Attorney Schwantes to Grant; two letters Attorney Roth addressed to Grant and Milwaukee Secure Detention Facility; one Juror Selection and Peremptory Challenges form; twenty-seven pages of Attorney Roth's notes; twenty-five transcribed interviews and interrogations; fifty-nine CD's of evidence and interrogations; eighty-two pages of notes and research done by original counsel Attorney Schwantes; twenty-seven witness statements; fifty-one police reports; and over three hundred other discovery documents. However, none of the box's materials show that

Attorney Roth read any of the materials, other than a few discover notes set forth in the record at R. 36:79.

The failure of Attorney Roth to review key documents and formulate a defense theory was highly prejudicial to Grant because of his loss of ability to show someone else committed the murder.

After finding four letters from Grant to Attorney Roth, Attorney Roth had only responded with one letter thanking Grant for his ideas. (R. 36-54). As far as trial preparation, the only documents found were one letter attempting to contact a single witness, one voir dire page, and some handwritten notes. (R. 36:56-68).

Attorney Roth's failure to prepare and review the client file was outside "the wide range of professionally competent assistance," *Oswald*, 2000 WI App 2, ¶ 49, and, therefore, deficient representation of Grant.

Further, it was prejudicial for Attorney Roth to not prepare because there was a reasonable probability that the result of the proceedings would have been different "but for" counsel's deficient performance. *Huff*, 2009 WI App 92, ¶ 15.

Because Attorney Roth did not provide information to appellate counsel or file a *Denny* motion, Grant is limited in his post-conviction relief avenues. With no preparation, no motions, no witness list, no opening statement, and no objections made, Grant felt Attorney Roth was unprepared and would have accepted any deal. Furthermore, Grant

requested from Attorney Roth that he wanted to testify, but was never called to the stand or placed on a witness list. Trial counsel's ineffective assistance of counsel prejudiced Grant and created a manifest injustice. But for trial counsel's ineffective assistance, Grant could have proven that Robertson was the killer creating a different outcome.

CONCLUSION

WHEREFORE, for the reasons stated above, the defendant, Skylard R. Grant, respectfully requests that his case be remanded for an evidentiary hearing for plea withdrawal.

Dated this 19th day of October, 2020.

Respectfully submitted,

Electronically signed by
TIMOTHY T. KAY

_____

Attorney Timothy T. Kay
State Bar No. 1019396

KAY & KAY LAW FIRM
675 North Brookfield Road, Suite 200
Brookfield, Wisconsin 53045
(262) 784-7110

Attorney for Defendant

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 5,873 words.

Dated this 19th day of October, 2020.

Respectfully submitted,

Electronically signed by
TIMOTHY T. KAY

_____

Attorney Timothy T. Kay
State Bar No. 1019396

KAY & KAY LAW FIRM
675 North Brookfield Road, Suite 200
Brookfield, Wisconsin 53045
(262) 784-7110

Attorney for Defendant

CERTIFICATE OF ELECTRONIC FILING OF BRIEF (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 19th day of October, 2020.

Respectfully submitted,

Electronically signed by
TIMOTHY T. KAY

_____

Attorney Timothy T. Kay
State Bar No. 1019396

KAY & KAY LAW FIRM
675 North Brookfield Road, Suite 200
Brookfield, Wisconsin 53045
(262) 784-7110

Attorney for Defendant

CERTIFICATION OF ELECTRONIC FILING OF APPENDIX

I hereby certify that I submitted and electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13).

I further certify that this electronic appendix is identical in content and format to the printed form of the appendix field as of this date.

Dated this 19th day of October, 2020.

Respectfully submitted,

Electronically signed by
TIMOTHY T. KAY

_____

Attorney Timothy T. Kay
State Bar No. 1019396

KAY & KAY LAW FIRM
675 North Brookfield Road, Suite 200
Brookfield, Wisconsin 53045
(262) 784-7110

Attorney for Defendant

INDEX TO APPENDIX

CERTIFICATION AS TO 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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) 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 first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 19th day of October, 2020.

Respectfully submitted,
Electronically signed by
TIMOTHY T. KAY
Attorney Timothy T. Kay
State Bar No. 1019396

KAY & KAY LAW FIRM
675 North Brookfield Road, Suite 200
Brookfield, Wisconsin 53045,(262) 784-7110
Attorney for Defendant

CERTIFICATION OF MAILING

I certify this brief was deposited in the U.S. mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on October 19, 2020. I further certify that the brief was correctly addressed and postage was pre-paid.

Respectfully submitted,

Electronically signed by
TIMOTHY T. KAY

_____

Attorney Timothy T. Kay
State Bar No. 1019396

KAY & KAY LAW FIRM
675 North Brookfield Road, Suite 200
Brookfield, Wisconsin 53045
(262) 784-7110

Attorney for Defendant