STATE OF WISCONSIN

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

DISTRICT I

Case No. 2020AP404-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SKYLARD R. GRANT,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND DECISION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. WAGNER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

SARAH L. BURGUNDY
Assistant Attorney General
State Bar #1071646

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-8118
(608) 294-2907 (Fax)
burgundysl@doj.state.wi.us

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Cases

Statutes

ISSUE PRESENTED

Did the postconviction court soundly exercise its discretion in denying Skylard R. Grant's postconviction motion without an evidentiary hearing?

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither is warranted. This Court can resolve this appeal based on the parties' briefs and by applying the relevant facts to well-established law.

INTRODUCTION

Grant's guilty pleas waived his claims of pre-plea ineffective assistance of counsel. Alternatively, Grant has failed to adequately plead facts that, if true, would demonstrate that he was entitled to an evidentiary hearing. The circuit court soundly denied his motion. This Court should affirm.

STATEMENT OF THE CASE

Grant was convicted of second-degree reckless homicide, party to a crime, and possession with intent to deliver THC after he pleaded guilty to those charges. (R. 27:1.) The charges were based on evidence that Grant shot and killed Antwone Berry on December 25, 2017, along with drug evidence that police discovered in Grant's possession when they were investigating Berry's murder. (R. 1:2–7.)

The State originally charged Grant with first-degree reckless homicide as a party to a crime, with a dangerous-weapon enhancer, two counts of possession of a firearm by a felon, and the THC count. (R. 1:1–2; 5:1–2.) At the start of trial, the State explained that it had extended a plea offer to Grant to reduce the homicide charge to second-degree reckless

homicide, use of a dangerous weapon, as a party to a crime, with the remaining counts read in, but that Grant had rejected that offer. (R. 71:4.) The case proceeded to trial on the original charges. (R. 71; 72.)

A. The State had voluminous circumstantial evidence supporting Grant's guilt.

Based on the facts in the criminal complaint, the State's case was supported by the following evidence. Berry was reported missing on December 28, 2017, by Berry's girlfriend, who had last heard from Berry late on December 24, 2017. (R. 1:2.) Berry's girlfriend directed police to Grant, with whom Berry was selling marijuana and regularly hung out. (R. 1:2, 4.) Grant told police that he hadn't seen or talked to Berry on or after December 24. (R. 1:3.)

Contrary to Grant's statement, however, police learned from another witness, JR, that Grant, Berry, and others were at JR's residence in the early morning hours of December 25, 2017. (R. 1:4.) JR told police that Grant was drunk and angry at Berry over money issues and Berry's hanging out with people whom Grant considered "his people." (R. 1:4.) JR said that Grant left briefly to drive his girlfriend home, then returned and drove Berry away in Grant's truck, telling JR that he was going to shoot Berry with Berry's own gun. (R. 1:4.)

According to JR, Grant later drove back in his truck to JR's residence, used a vacuum cleaner from JR's garage to clean out his truck, and cleaned out the vacuum with bleach. (R. 1:4–5.) JR also saw Grant take a tree branch with sticky buds out of his truck and throw it on JR's lawn. (R. 1:5.) At JR's residence, police found the vacuum and branch, which did not match the vegetation on JR's property, where JR told police they would find those things. (R. 1:6.)

Police found Berry's body off a road in a rural area in Milwaukee on January 7, 2018. Berry had been shot twice. (R. 1:3.)

Additional evidence tied Grant to Berry's murder. The branch that JR said Grant had removed from his truck matched vegetation near where Berry's body was found. (R. 1:5.) Grant's girlfriend also told police that Grant was with Berry in the early morning hours of December 25, that Grant was arguing with Berry, and that after Grant dropped her off from JR's, he claimed that he would look for a parking spot, but she did not see him for another 90 minutes to two hours. (R. 1:5.)

In addition, Grant's phone records reflected that he regularly contacted Berry throughout the month of December, but that as of December 25 he ceased all attempts to contact Berry. (R. 1:6.) Cell phone data records also reflected that at 2:28 a.m. on December 25, Grant made a call to JR's cell phone utilizing a tower two blocks from where Berry's body was found. (R. 1:6.) In addition, a video from an address near where Berry's body was found showed a truck of the same model and color as Grant's traveling in the area at 2:41 a.m. on December 25. (R. 1:7.)

Police also interviewed another individual, AB, who told them that on December 26, Grant attempted to sell him a 9mm gun that AB knew belonged to Berry. (R. 1:6.) AB told police that he asked Grant if he knew where Berry was, and that Grant responded, "Man, fuck that nigga, you ain't gonna be seeing him no more, I had to take care of him." (R. 1:6.)

B. The case proceeded to trial, but Grant accepted the State's plea offer shortly after the start of the State's case.

After the jury was selected and sworn, the trial began. The State had an extensive witness list, including numerous law enforcement officers and all of the citizens identified in

the complaint, in addition to other witnesses. (R. 71:7–9.) The State's opening statement reflected that it would present evidence supporting the facts set forth in the complaint. (R. 72:62–68.) Grant's counsel deferred her opening statement. (R. 72:69.) Nevertheless, the voir dire transcript reflected that Grant's counsel did not anticipate calling additional witnesses beyond those called by the State and that it was not yet clear whether Grant would testify. (R. 72:54.) The first day of trial ended with the State introducing and starting to question its first witness. (R. 72:69–81.)

The next morning, the trial did not continue. Rather, the parties reached an agreement by which Grant pleaded guilty to a reduced charge of second-degree reckless homicide, party to a crime, and the THC charge, with the use-of-a-dangerous-weapon enhancer and the remaining charges dismissed. (R. 13:1–2; 62:2–4.) Grant submitted a completed plea questionnaire and waiver of rights form and agreed, when asked, that he understood what he was waiving by pleading guilty. (R. 62:2, 5.) After the court accepted Grant's pleas, it sentenced Grant to concurrent sentences totaling 14 years' initial confinement and 9 years' extended supervision. (R. 27:1.)

C. The circuit court denied without a hearing Grant's postconviction motion for plea withdrawal based on the guilty-plea waiver rule and inadequate pleading.

Grant filed a postconviction motion seeking plea withdrawal based on multiple allegations that his trial counsel was ineffective for failing to file pretrial motions, witness lists, and notice of alibi, and for other failures with regard to her handling and preparation of the trial up until Grant's guilty pleas. (R. 34.) Grant claimed that as a result of counsel's alleged omissions and lack of preparation, he had no ability to present a viable defense and "would have accepted any deal" from the State. (R. 34:16.)

The postconviction court, in a written decision and order, denied Grant's motion without a hearing. (R. 57.) Though it addressed each of the ineffective assistance claims that Grant raised, it denied each of them as waived and otherwise inadequately pleaded to warrant a hearing. (R. 57:8–13.) Grant appeals.

The State will address additional facts in the argument below.

STANDARD OF REVIEW

The circuit court denied Grant's postconviction motion based on the guilty-plea waiver rule and Grant's failure to adequately plead to obtain a hearing.

Whether a guilty plea waives a defendant's right to appeal an issue or issues is a question of law reviewed de novo. *State v. Kelty*, 2006 WI 101, ¶ 13, 294 Wis. 2d 62, 716 N.W.2d 886.

Whether a postconviction motion satisfies the pleading standard required for a hearing is a question of law that this Court reviews de novo. *State v. Bentley*, 201 Wis. 2d 303, 308–09, 548 N.W.2d 50 (1996). This Court reviews for an erroneous exercise of discretion a circuit court's denial of a hearing when the defendant's motion fails to raise sufficient facts, presents only conclusory allegations, or is demonstrably not meritorious based on the record. *Id.* at 310.

ARGUMENT

The circuit court soundly exercised its discretion in denying Grant's postconviction motion without a hearing.

The circuit court, in denying Grant's motion without a hearing, concluded that Grant waived his claims by pleading guilty. (R. 57:8, 10, 12–13.) It also concluded that Grant's claims did not warrant a hearing because they were

speculative, conclusory, or were demonstrably unmeritorious based on the record. (R. 57:8–13.) That decision was wholly sound.

A. Grant waived his underlying claims of ineffective assistance of counsel when he pleaded guilty.

A defendant seeking to withdraw a guilty plea after sentencing bears the heavy burden of proving by clear and convincing evidence that there was a "manifest injustice" entitling him to withdraw the plea. *State v. Taylor*, 2013 WI 34, ¶ 24, 347 Wis. 2d 30, 829 N.W.2d 482.

This is a more difficult standard to satisfy that the fair-and-just standard required for presentencing plea withdrawal. *See State v. Cross*, 2010 WI 70, ¶ 42, 326 Wis. 2d 492, 786 N.W.2d 64 (the higher standard reflects the State's interest in finality of convictions and prevents defendants from testing the waters of possible punishments). Under either standard, when a defendant seeks to withdraw an otherwise legally sufficient plea before sentencing, the defendant must demonstrate that plea withdrawal is warranted by either relying on factors outside of the record or explaining why the court should "disregard the solemn answers the defendant gave in the colloquy" and grant plea withdrawal. *State v. Jenkins*, 2007 WI 96, ¶ 62, 303 Wis. 2d 157, 736 N.W.2d 24. "A failure to recognize the implications of a valid plea colloquy would 'debase[] the judicial proceeding at which a defendant pleads and the court accepts its plea.'" *Id*. (quoting *United States v. Hyde*, 520 U.S. 670, 676 (1997)).

A defendant may satisfy the manifest injustice test by showing that he or she received ineffective assistance of counsel. *Bentley*, 201 Wis. 2d at 311. But that basis is limited by the guilty-plea waiver rule. As discussed below, absent allegations that counsel performed ineffectively with regard

to the plea advice or negotiations, a defendant's valid guilty plea waives these constitutional claims.

1. To overcome the guilty-plea waiver rule, allegations of ineffective assistance must be related to the plea.

In Wisconsin, a knowing and voluntary guilty plea "constitutes a waiver of non-jurisdictional defects and defenses, including claims of violations of constitutional rights prior to the plea." *Foster v. State*, 70 Wis. 2d 12, 19–20, 233 N.W.2d 411 (1975) (identifying constitutional claims forfeited through a guilty plea).[1] "Like the general rule of waiver, the guilty-plea-waiver rule is a rule of administration and does not involve the court's power to address the issues raised." *Kelty*, 294 Wis. 2d 62, ¶ 18. Accordingly, the rule does not deprive this Court of competency and it could choose to consider the issues raised even though a defendant, by pleading guilty, waived the right to assert them. *State v. Riekkoff*, 112 Wis. 2d 119, 123–24, 332 N.W.2d 744 (1983).

A claim of ineffective assistance of counsel may provide an "exception" to the guilty-plea waiver rule "when the alleged ineffectiveness is put forward as grounds for plea withdrawal." *State v. Villegas*, 2018 WI App 9, ¶ 47, 380 Wis. 2d 246, 908 N.W.2d 198. "This is so because . . . a valid guilty plea 'represents a break in the chain of events which has preceded it in the criminal process.'" *Id.* (citing *Tollett v. Henderson*, 411 U.S. 258, 267 (1973)).

But when the defendant admits his guilt through a plea, "he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to

---

[1] Wisconsin Stat. § 971.31(10) creates a limited exception to the guilty-plea waiver rule to allow a defendant who pled guilty to appeal the denial of a motion to suppress evidence or a motion to challenge the admissibility of a defendant's statement. That exception does not apply here.

the entry of the guilty plea." *Tollett*, 411 U.S. at 267. Rather, the alleged ineffective-assistance claim must be related to the plea and whether it was voluntary, knowing, and intelligent. In other words, the defendant "may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel" was constitutionally infirm.[2] *Tollett*, 411 U.S. at 267.

In *Villegas*, this Court followed *Tollett* to hold that after "admitting guilt in open court, a defendant 'may not thereafter raise independent claims relating to the deprivation of constitutional rights' outside of an attack on the plea itself." *Villegas*, 380 Wis. 2d 246, ¶ 47. "[T]he 'exception' to the guilty plea waiver rule does not provide an independent ground to challenge the effectiveness of counsel during preplea proceedings outside of an attack on the defendant's plea." *Id.* This Court found resounding support for that conclusion from other jurisdictions. *Id.* ¶ 47 n.19 (and cases cited therein).

Thus, when a defendant pleads guilty, they can base a later motion for plea withdrawal on ineffective assistance of counsel if they claim that counsel failed to ensure that the defendant understood "the nature of the charge, of his constitutional rights which will be waived by virtue of the plea, and of the general legal effect of the guilty or no contest plea." *See State v. Bangert*, 131 Wis. 2d 246, 270–72, 279, 389 N.W.2d 12 (1986) (discussing rights generally). But a defendant can't seek plea withdrawal based on allegations that counsel was ineffective with regard to other pre-plea actions (or omissions).

---

[2] *Tollett* applied *McMann v. Richardson*, 397 U.S. 759 (1970), the pre-*Strickland* standard for challenges to counsel's performance.

2. Grant waived his claims of ineffective assistance, none of which relate to his plea.

Here, Grant does not allege any error by counsel with regard to her advice on the plea or his understanding of the charges and effects of his plea. Rather, he claims that counsel did not adequately prepare his defense such that by the time trial began, he "would have accepted any deal" from the State. (R. 34:16.) By that reasoning, though, *any* allegation of ineffective assistance would arguably overcome the guilty-plea waiver rule. Moreover, to accept Grant's position would permit a defendant who was allegedly aware of counsel's alleged omissions to not seek a contemporaneous remedy, but rather to sit on those complaints and play the odds by accepting a plea offer, pleading guilty, and getting sentenced before airing his complaints.

Nothing about Grant's claims of ineffective assistance relates to counsel's advice or performance with regard to the plea offer. The claims all involve defenses along with challenges to defenses and counsel's pretrial preparation and trial performance—issues that if Grant felt were lacking at the time, he willingly waived by pleading guilty. Accordingly, this Court may affirm the postconviction court's decision based on the guilty-plea waiver rule. Alternatively, should this Court choose to overlook Grant's waiver, Grant was not entitled to an evidentiary hearing because he failed to satisfy the pleading standards on all of his claims.

B. Grant's claims did not entitle him to a hearing because they were conclusory, speculative, and because the record conclusively demonstrated that he was not entitled to relief.

To withdraw a plea after sentencing, a defendant must show a manifest injustice justifying such relief. *Taylor*, 347

Wis. 2d 30, ¶ 24 (citation omitted). Ineffective assistance of counsel can satisfy the manifest injustice test. *Bentley*, 201 Wis. 2d at 311.

A circuit court must conduct a *Machner* hearing on a claim of ineffective assistance only when the defendant alleges sufficient material facts that, if true, entitle him or her to relief. *Bentley*, 201 Wis. 2d at 309–10; *Nelson v. State*, 54 Wis. 2d 489, 497–98, 195 N.W.2d 629 (1972). Thus, "the motion must include facts that 'allow the reviewing court to meaningfully assess [the defendant's] claim.'" *State v. Allen*, 2004 WI 106, ¶ 21, 274 Wis. 2d 568, 682 N.W.2d 433 (quoting *Bentley*, 201 Wis. 2d at 314) (brackets in *Allen*).

If the defendant fails to raise facts in the motion sufficient to entitle him 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 discretion to grant or deny a hearing. *Bentley*, 201 Wis. 2d at 310–11; *Nelson*, 54 Wis. 2d at 497–98.

Hence, to obtain a hearing on his ineffective assistance claims, Grant must sufficiently allege: (1) deficient performance, and (2) prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). If the court concludes that the defendant has not proven one prong of this test, it need not address the other. *Id.* at 697.

To prove deficient performance, the defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." *Id.* at 690. Counsel is strongly presumed to have performed competently. *Id.*

To prove prejudice, the defendant must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In the context of a claim for plea

withdrawal, the defendant must show that but for counsel's alleged errors, he would have rejected the plea offer and would have insisted on going to trial. *Bentley*, 201 Wis. 2d at 312 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

1. The lack of a *Denny* motion filed in this case does not warrant a hearing.

As he claimed below (R. 34:10–12), Grant argues that his trial counsel was ineffective for failing to file a pretrial *Denny* motion to allow him to argue that a third party, JR, was solely responsible for Berry's death.[3] (Grant's Br. 14–18.) He argues that the *Denny* motion would have been granted and that it would have allowed him to introduce the following evidence supporting a theory that JR was responsible for the crime: (1) Berry owed JR money; (2) JR (along with Grant) was one of the last people to see Berry alive; (3) according to Grant, JR drove Berry from his gathering shortly before Berry was killed; and (4) according to Grant, JR deposited the branch from the crime scene in his yard. (Grant's Br. 15–17.)

This claim does not entitle Grant to a hearing. To start, his evidence in support of a proposed *Denny* motion would not have established the direct connection prong of the *Denny* test. Moreover, on this record, Grant seemingly could have testified to his version of events and the jury would have heard and seen the evidence that Grant thinks he needed a *Denny* motion to present. Finally, Grant failed to allege that but for counsel's omission with regard to the *Denny* motion, he would have rejected the State's favorable plea offer and insisted on continuing the trial.

---

[3] *State v. Denny*, 2017 WI 17, 373 Wis. 2d 390, 891 N.W.2d 144.

a. Grant's "evidence" in support of his *Denny* theory is merely his own statement.

Grant's proposed third-party defense was based entirely on a written statement he gave his original lawyer, which Grant's postconviction counsel summarized in his motion. (R. 34:2.) According to Grant, JR was supplying marijuana to Berry to sell, and Berry was missing payments to JR. (R. 34:2.) Grant said that he saw Berry at JR's house on Christmas Eve and that he got in an argument with Berry about Berry's owing JR money and not setting things right. (R. 34:2–3.) Grant said that he and his girlfriend left JR's house, returned to get wrapping paper, and then left again; Grant claims that at that return to JR's was the last time he saw Berry alive. (R. 34:3.)

Grant says that JR had planned on taking Berry home. (R. 34:3.) He says that later that morning, he ran into JR at a gas station; Grant claims that JR told him that he had dropped Berry off to see a woman, "M." (R. 34:3.) Grant said that he wanted to find Berry and "see what up." (R. 34:3.) But Grant did not find Berry, so he went home. (R. 34:3.)

Grant's theory was that JR killed Berry over the money dispute and was trying to pin the murder on him. (R. 34:3.) Grant argues that because his version of events would establish that JR had a motive and opportunity to kill Berry and had a direct connection (through the branch found on his property) to the location where Berry's body was found, the motion would have succeeded and Grant would have been able to argue that JR, not he, was responsible for Berry's death. (Grant's Br. 15–17.)

b. Grant's evidence would not support a *Denny* motion.

Counsel cannot be deficient for not filing a motion that would have been denied. And here, it does not appear that Grant had a viable third-party perpetrator defense.

A defendant seeking to admit evidence that a known third party could have committed the crime must satisfy all three prongs of the *Denny* "legitimate tendency" test. *State v. Wilson*, 2015 WI 48, ¶¶ 52, 64, 362 Wis. 2d 193, 864 N.W.2d 52. Those prongs involve the following inquiries: *First*, the motive prong asks, "[D]id the alleged third-party perpetrator have a plausible reason to commit the crime?" *Id.* ¶ 57. *Second*, the opportunity prong asks, "[D]oes the evidence create a practical possibility that the third party committed the crime?" *Id.* ¶ 58. *Third*, the direct-connection prong asks, "[I]s there evidence that the alleged third-party perpetrator actually committed the crime, directly or indirectly?" *Id.* ¶ 59.

If Grant's statement that Berry had owed JR money was believable, that would likely satisfy the motive prong.[4] Moreover, JR had opportunity, given that Berry was at JR's residence in the early morning hours just before he was killed. But Grant cannot show a direct connection linking JR to Berry's murder.

A direct connection requires a link between the third party and the perpetration of the crime. *Wilson*, 362 Wis. 2d

---

[4] In arguing the motive prong, Grant appears to suggest that he had no motive to kill Berry. (Grant's Br. 16.) Whether Grant had a motive to kill Berry is irrelevant to whether JR did under the *Denny* test. In all events, Grant's suggestion that he was motive-free is contradicted by evidence that Grant was angry at Berry "for not putting money in [Grant's] books while [Grant] was in jail" and for hanging out with "[Grant's] people" (R. 1:4), and that multiple witnesses claimed that Grant got into loud arguments with Berry in the hours before Berry's death (R. 1:4–5).

193, ¶ 71. Direct connection can be established in any number of ways, including evidence that the third party had "[e]xclusive control of the weapon," or made a self-incriminating statement. *Id.* ¶ 72. "Mere presence at the crime scene or acquaintance with the victim, however, is not normally enough to establish direct connection." *Id.*

Here, Grant's "evidence" that JR had a direct connection to Berry's death is the branch found in JR's yard. As an initial matter, the branch and the fact that it was found in JR's yard was going to come in at trial. The State would have introduced it in its case-in-chief given JR's statement that Grant threw the branch in his yard when cleaning out his truck.

Moreover, at best, the branch found in JR's yard is evidence of "mere presence" at the scene. But there is no evidence that the branch arrived in JR's yard because JR was at the scene of Berry's death. Unlike with Grant, there was no cell phone or video evidence that JR was at the location where Berry's body was found. Indeed, the cell phone evidence indicated that around the suspected time and place of Berry's death, Grant called JR's cell phone, which indicates that JR was not at the scene when Berry was killed. Grant supplies no evidence that JR made self-incriminating statements, ever controlled Berry's gun, or bore any responsibility for Berry's murder. Again, the evidence indicates that if anyone had control over the murder weapon, it was Grant, who tried to sell the gun a day later and who incriminated himself to AB.

Because the evidence Grant offered in support of a potential *Denny* motion was weak and could not establish a direct connection between JR and the crime, he cannot show that his *Denny* motion would have succeeded. Accordingly, he cannot show that counsel was deficient for not filing the motion.

c. Even so, Grant would have likely been able to testify to his version of events without a *Denny* motion.

The State agrees that a defendant seeking to admit third-party perpetrator evidence generally must file a *Denny* motion to establish and ensure that the evidence is admissible and to put the State and court on notice of the defense. But on this record, the absence of a *Denny* motion would not have seemingly prevented Grant from testifying to his version of events or the jury from hearing much of the evidence Grant thinks he needed a *Denny* motion to introduce.

Grant's argument is premised on an inaccurate claim that his original counsel, before withdrawing from the case and transferring the file to Grant's trial counsel, deemed a *Denny* motion "necessary." (Grant's Br. 14.) But Grant's original attorney did not state that the *Denny* motion was "necessary." He simply wrote that he was working on a *Denny* motion for Grant's case before he learned he had to withdraw due to a conflict. (R. 36:53.) Moreover, counsel wrote that letter in July 2018, four months before the State filed its witness list in November 2018, and eight months before trial. (R. 9; 71.) It very well may have appeared in July 2018 that a *Denny* motion was a necessary filing. That doesn't mean that it remained so as trial approached, let alone that it would have been meritorious.

And the circumstances here indicate that Grant would have been able to testify to his version of events and cross-examine JR without a *Denny* motion. To start, Grant did not have—or at least, he doesn't identify any—evidence or witnesses beyond those that the State was presenting in its case-in-chief that a *Denny* motion would have allowed him to introduce. Rather, the main source of the purported *Denny* evidence was Grant's own version of events, which could have had to come in through Grant's testimony. In all events,

whether Grant would have chosen to testify was not a foregone conclusion. As the postconviction court noted, "[p]utting [Grant] on the stand would have been a risky proposition" and subjected him to certain cross-examination and impeachment on Grant's lies to police that he had not seen Berry on or after December 24. (R. 57:9.)

In addition, JR was a State's witness. All of the evidence that Grant argues he wanted to present, including JR's relationship with Berry, his role in the moments preceding and following Berry's death, and the branch found in JR's yard, would have been elicited during the State's case-in-chief, would have been relevant, and would have been fair game for cross-examination. As the prosecutor pointed out in its response in opposition to Grant's postconviction motion, it fully expected that Grant would claim that JR was one of the last people to see Berry alive and would have cross-examined JR on his own biases and credibility. (R. 53:6.) In addition, the jury would have learned about the branch found in JR's yard through the State's case-in-chief. A *Denny* motion was not necessary for Grant to cross-examine JR about the branch or again claim that it was JR, not Grant, who disposed of the branch after Berry disappeared. In all, there's nothing to suggest that the lack of *Denny* motion would have prevented Grant from presenting his version of events, arguing that JR's version of events was not credible, or arguing that the State did not overcome its evidentiary burden.

d. Grant failed to allege prejudice based on counsel's not filing a *Denny* motion.

Finally, even if Grant adequately pleaded facts alleging that trial counsel was deficient with regard to the *Denny* motion, he did not sufficiently allege that but for counsel's failure, he would have rejected the State's plea offer and continued the trial.

In his postconviction motion, Grant simply stated that counsel "had nothing to lose" in filing a *Denny* motion and that such a motion was "Grant's main argument." (R. 34:11–12.) So too, here, Grant simply states that because counsel did not file a *Denny* motion, his "strongest argument—that [JR] shot the victim—was not even heard by the court." (Grant's Br. 18.)

As noted, there was nothing to suggest that anyone would have objected to or precluded Grant from arguing that he was not responsible and pointing out that JR was one of the last people to see Berry alive. Even if the third-party perpetrator defense was Grant's "strongest" defense, it still wasn't reasonably probable to succeed. As the postconviction court pointed out, the State had significant circumstantial evidence that Grant killed Berry or at the very least was involved in his death. (R. 57:9–10.) And as the court observed, Grant's claims that JR was actually responsible did not explain why Grant lied to police about when he last saw Berry, why his truck and cell phone (detected when he was making a call to JR) were near where and when Berry disappeared, why he tried to sell AB Berry's gun, or why he told AB that AB would not see Berry again and that he "had to take care" of Berry. (R. 57:10.)

Moreover, Grant's argument "was not even heard by the court" because, as noted, Grant waived presenting any evidence or defense when he pleaded guilty shortly after the State called its first witness. Again, Grant did not—and does not—claim that but for the lack of a *Denny* motion, he would have rejected the State's plea offer and continued the trial. Because Grant failed to adequately plead prejudice in the plea-withdrawal context, the postconviction court soundly denied Grant's motion without a hearing.

2. Grant is not entitled to a hearing based on counsel's not filing a notice of alibi.

Grant next claims that counsel was ineffective for failing to file a notice of Grant's alibi. (Grant's Br. 18–20.) Wisconsin Stat. § 971.23(8) requires a defendant to give notice of an alibi defense and identify all witnesses to that defense.

Alibi evidence is evidence indicating that it would have been physically impossible for the defendant to have been present at the crime. *See State v. Harp*, 2005 WI App 250, ¶ 22, 288 Wis. 2d 441, 707 N.W.2d 304. Evidence that does not tend to show that the defendant could not have been present at the crime does not require notice under section 971.23(8).

To start, in his motion and brief, Grant does not identify what, if any, alibi witnesses counsel should have planned on presenting and what they would have said that would have necessitated such notice. As best as the State can tell, Grant's "alibi" evidence would have been his own testimony that while looking for a parking spot after dropping off his girlfriend, he got sidetracked, saw JR, drove to JR's house, and then drove home to open Christmas presents. (Grant's Br. 19.) Though Grant does not mention it in his brief, apparently he had a video in which he was opening presents at 3:47 a.m. on December 25, 2017, that he believes supports a defense that he was somewhere else when Berry was killed. (R. 57:11.)

As the postconviction court noted, however, that evidence did not support a viable alibi defense. Grant could not account for his whereabouts between 2:00 a.m. and 3:47 a.m., which is the window during which the evidence shows that Berry was likely killed. Indeed, the evidence indicates that Grant was likely involved in Berry's death during that time span. Grant's girlfriend told police that Grant was gone for an hour and a half to two hours after dropping her off and

purportedly looking for a parking spot. (R. 1:5.) JR told police that after dropping off his girlfriend, Grant returned to his place, Grant got into an argument with Berry, and then Grant and Berry left in Grant's truck. (R. 1:4.) Video and cell phone evidence showed that a truck identical to Grant's and Grant's cell phone at 2:28 and 2:41 a.m. were within two blocks of where Berry's body was later found. (R. 1:6–7.)

Hence, Grant's only possible alibi evidence—his competing testimony and a video placing him at home at 3:47 a.m. and a 15-minute drive from where Berry's body was found—would not have established that it was impossible for him to have been present where and when Berry was shot. Accordingly, Grant had no viable alibi evidence necessitating notice, and counsel cannot have been deficient for not filing it.

In all events, Grant failed to link his decision to end the trial and accept the State's plea offer with counsel's not filing an alibi notice. He simply indicated that he was prejudiced because he could not advance his "main argument—that he wasn't at the crime scene." (R. 34:13; Grant's Br. 20.) In addition to not satisfying the pleading requirement, that premise is simply wrong. Grant's version of events was not an alibi; thus, the lack of notice was not deficient or prejudicial. He is not entitled to a hearing on this claim.

3. Counsel's decision to not file a witness list was not ineffective assistance.

Grant next faults counsel for not filing a defense witness list before trial. (Grant's Br. 20–21.) His argument in support is especially conclusory, as the postconviction court aptly noted that not presenting witnesses beyond whom the State would present was part of the defense strategy:

> It is true that [counsel] did not file a witness list, but as counsel explained during *voir dire*, "We do not plan on calling any additional witnesses other than those that have been submitted by the prosecution." [(R.

> 71:10.)] Counsel asked the jury panel during *voir dire* if anyone would hold it against her if she did not call any witnesses, including the defendant, and none of the jurors indicated that they would. [(R. 72:53–54.)]

(R. 57:11.) The postconviction court further observed that Grant failed to identify any witnesses beyond those on the State's witness list that counsel should have noticed, deeming that Grant's "claim in this regard is entirely conclusory." (R. 57:11.)

Grant's argument in his brief likewise is conclusory. He does not identify any witnesses that counsel should have noticed. (Grant's Br. 21.) As for prejudice, he recites that but for counsel's alleged failure in this regard, "there was a reasonable probability that the result of the proceedings would have been different." (Grant's Br. 21.) Yet, as with the other ineffective assistance claims, Grant fails to connect his decision to accept the State's plea with this alleged failing by counsel. He is not entitled to a hearing on this claim.

4. Grant failed to adequately plead a basis for a hearing regarding counsel's pretrial and trial decisions and investigation.

Grant's last two claims vaguely fault counsel for a variety of things, including not filing pretrial motions, for not objecting during trial, for not making an opening statement, and not adequately reviewing the discovery material. (Grant's Br. 23–26.) Grant's pleading in this regard, in which he fails to identify any specific motions counsel should have filed, objections counsel should have made, or evidence that counsel did not review the discovery material, does not come close to what is required for an evidentiary hearing. In addition, counsel's decision to waive or defer opening argument is a tactical decision that does not support a claim of ineffective assistance. *See, e.g.*, *United States v. Salovitz*, 701 F.2d 17, 20–21 (2d Cir. 1983) ("It is common knowledge that defense

counsel quite often waive openings as a simple matter of trial strategy. Such a waiver . . . ordinarily will not form the basis for a claim of ineffective assistance of counsel.").[5]

Grant likewise fails to adequately allege prejudice. He claims that based on all of counsel's omissions, he felt that counsel "was unprepared and [he] would have accepted any deal." (Grant's Br. 25.) He insists that he wanted to testify, but he argues that counsel did not put him on the stand or on a witness list. (Grant's Br. 25–26.) But trial ended shortly after the State introduced its first witness; counsel did not have an opportunity to put Grant on the stand. And counsel did not have to notify the State that Grant was a potential witness. Grant had a right to testify and a right to waive his testimony.

In all events, the record reflects that Grant pleaded guilty because the State made a highly favorable offer, not because of anything counsel did or didn't do. As noted, the State had a significant arsenal of circumstantial evidence that Grant killed Berry and was guilty of the other charges. The original murder charge—first-degree reckless homicide with the use-of-a-dangerous-weapon enhancer—exposed Grant to up to 65 years' imprisonment (including up to 45 years of initial confinement), and the lesser charges exposed him to over 13 additional years of imprisonment. (R. 1:1–2.) On the first day of trial, the State offered, in exchange for Grant's guilty plea, to reduce the main count to second-degree reckless homicide while armed. That offer would have reduced Grant's maximum initial confinement to 20 years. (R. 71:4.) Grant rejected that offer and held out until the second day of trial, when he accepted the State's offer that reduced

---

[5] *See also Huffington v. Nuth*, 140 F.3d 572, 583 (4th Cir. 1998); *Nguyen v. Reynolds*, 131 F.3d 1340, 1350 (10th Cir. 1997); *United States v. Rodriguez-Ramirez*, 777 F.2d 454, 458 (9th Cir. 1985).

his maximum initial confinement by an additional 3.5 years on the homicide count and the significantly less serious THC count. (R. 53:11; 62:2–3.) Grant's motivation to plead was not anything counsel did or did not do, but the massive reduction in his exposure in a case where the State's evidence of guilt was strong.

Moreover, in the materials Grant provided with his motion, Grant made statements to counsel reflecting his willingness to accept a favorable plea. He told his original counsel that he had hoped to bargain for the best possible deal from the State. (R. 36:7; 53:11.) He told trial counsel that he wanted the State's offer to reflect no more than 15 years' initial confinement and 10 years' extended supervision. (R. 36:44; 53:11–12.) The State's offer, which capped Grant's exposure to 16.5 years, was in line with what Grant told counsel would be acceptable.

In all, far from feeling pressured by any perceived lack of preparation by counsel, Grant held out for the favorable plea offer that the State ultimately provided. To the extent that Grant has not waived these claims of ineffective assistance with his guilty plea, he has wholly failed to allege that counsel performed deficiently or that but for those deficiencies, Grant would have rejected the State's plea offer and continued the trial. The postconviction court soundly exercised its discretion in denying the motion. Grant is not entitled to a hearing on these claims.

CONCLUSION

This Court should affirm the judgment of conviction and the decision and order denying postconviction relief.

Dated this 22nd day of January 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

s/ Sarah L. Burgundy
SARAH L. BURGUNDY
Assistant Attorney General
State Bar #1071646

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-8118
(608) 294-2907 (Fax)
burgundysl@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6554 words.

Dated this 22nd day of January 2021.

Electronically signed by:

s/ Sarah L. Burgundy
SARAH L. BURGUNDY
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that:

A copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 22nd day of January 2021.

Electronically signed by:

s/ Sarah L. Burgundy
SARAH L. BURGUNDY
Assistant Attorney General