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COURT OF APPEALS

DISTRICT I

Case No. 2020AP404-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SKYLARD R. GRANT,

Defendant-Appellant.

REPLY BRIEF OF
DEFENDANT-APPELLANT

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

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CASES

Wisconsin Cases:

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State v. Huff, 2009 WI App 92, 319 Wis. 2d 258,
769 N.W.2d 154 5, 6, 7

State v. Wilson, 2015 WI 48, 362 Wis. 2d 193, 864
N.W.2d 52 (2015) 1, 2

Wisconsin Statutes:

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ARGUMENT

I. The State is incorrect in arguing that the lack of a *Denny* Motion filed does not warrant a hearing.

The State is incorrect in arguing that the lack of a *Denny* Motion filed does not warrant a hearing. The State argues that the lack of a *Denny* motion filed in this case does not warrant a hearing. State's Brief at 11. The State is incorrect because Grant was able to prove all three elements of the legitimate tendency test under the *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. *State v. Wilson*, 2015 WI 48, ¶ 57, 362 Wis. 2d 193, 864 N.W.2d 52 (2015). 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.

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. 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. The State is also incorrect in arguing that Grant cannot show a direct connection linking Robertson to Berry’s murder. State’s Brief at 13. 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 where 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.

In analyzing the third element of the legitimacy test, the State focuses on Grant's connection to the scene. However, the analysis should be focused on Robertson's connection to the scene, not Grant's.

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.

II. The State is incorrect in arguing that Grant's right to testify negates his trial counsel's failure to file a *Denny* motion.

The State is incorrect in arguing that Grant's right to testify negates his trial counsel's failure to file a *Denny* motion. The State argues that Grant had the right to testify about Robertson killing Berry, which negated the fact that the trial counsel did not file the *Denny* motion. State's Brief at 15. However, the State is arguing an irrelevant point. Grant did not argue that he would not have been able to testify (though

defendants actually testifying is rare). On the contrary, Grant did argue that the trial counsel's failure to file a *Denny* motion was ineffective assistance of counsel because trial counsel was deficient and it was prejudicial.

The fact that Grant has a right to testify regarding his theory of Robertson killing Berry does not excuse trial counsel's failure to file a *Denny* motion.

The State also argues that the *Denny* motion was not "necessary." State's Brief at 15. However, the State is incorrect because the first trial counsel would not have pursued a *Denny* motion if it was not necessary. Further, Grant insisted he was not the killer, and, therefore, the *Denny* motion was necessary to put the State and Court on notice that a third-party, Robertson, was the actual shooter.

III. The State is incorrect in arguing that Grant failed to allege prejudice based on trial counsel's failure to file a *Denny* motion.

The State is incorrect in arguing that Grant failed to allege prejudice based on trial counsel's failure to file a *Denny* motion. The State argues that Grant failed to allege prejudice based on trial counsel's failure to file a *Denny* motion. State's Brief at 16. However, Grant did allege prejudice based on trial

counsel's failure to file a *Denny* motion. Grant alleges prejudice on page 18 of Grant's Brief.

As stated on page 18 of Grant's Brief, 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. *State v. Huff*, 2009 WI App 92, ¶ 15, 319 Wis. 2d 258, 769 N.W.2d 154. But for Attorney Roth not filing the *Denny* motion, Grant's 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.

IV. The State is incorrect in arguing that Grant is not entitled to a hearing based on trial counsel's failure to file a notice of alibi.

The State is incorrect in arguing that Grant is not entitled to a hearing based on trial counsel's failure to file a notice of alibi. The State argues that Grant is not entitled to a hearing based on trial counsel's failure to file a notice of alibi. State's Brief at 18. However, the State is incorrect because 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 Grant's 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).

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.

V. The State is incorrect in arguing that trial counsel's failure to file a witness list was not ineffective assistance of counsel.

The State is incorrect in arguing that trial counsel's failure to file a witness list was not ineffective assistance of counsel. The State argues that trial counsel's failure to file a witness list was not ineffective assistance of counsel. State's Brief at 19. However, the State is incorrect because 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.

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 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.

VI. The State is incorrect in arguing that Grant did not adequately plead a basis for a hearing regarding counsel's pretrial and trial decisions and investigations.

The State is incorrect in arguing that Grant did not adequately plead a basis for a hearing regarding counsel's pretrial and trial decisions and investigations. The State argues that Trial counsel's failure to give any opening statement, file any pre-trial motions, make any objections, and lack of review of the case material was not ineffective assistance of counsel. However, the State is incorrect because all of these failures were deficient representation and prejudiced Grant.

The State's brief deflects on the issue of ineffective assistance of counsel and, instead, argues that Grant plead guilty because a favorable plea deal was offered. Whether or not the State offered a favorable plea deal does not negate the trial counsel's ineffective assistance of counsel through the failure to give any opening statement, file any pre-trial motions, make any objections, and lack of review of the case material.

CONCLUSION

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

Dated this 5th day of February, 2021.

Respectfully submitted,

s/ TIMOTHY T. KAY

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1784 words.

Dated this 5th day of February, 2021.

Respectfully submitted,

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**CERTIFICATION OF ELECTRONIC FILING OF
BRIEF**

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

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

Dated this 5th day of February, 2021.

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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 February 5, 2021. I further certify that the brief was correctly addressed, and postage was pre-paid.

Respectfully submitted,

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