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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2020AP000785 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

KEYON D. GRANT, Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE, AND ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT THE HONORABLE T. CHRISTOPHER DEE PRESIDING.

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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Issue presented

Is Grant entitled to a new trial under *McCoy v. Louisiana*, 584 U.S. ____, 138 S.Ct.1500 (2017) and the 6th Amendment to the United States Constitution because he was denied his right to choose the objective of his defense, and the assistance of counsel in pursuing such objective?

The circuit court answered no.

Position on oral argument and publication

Counsel does not request oral argument. Counsel believes that publication will not be warranted as this appeal requires the application of well-established law, *McCoy v. Louisiana*, supra, to a specific set of facts.

Statement of the case

The State charged Grant with attempted first-degree intentional homicide. 6:1. According to the criminal complaint, Grant used a shotgun to shoot D.P. in the head after Grant, D.P. and two other individuals drove in Grant's car to McGovern Park in the City of Milwaukee. 1:1.

At trial, the State amended the information to include a charge of possession of a short-barreled shotgun or rifle. 26:1.[1] Before submitting the case to the jury, the court additionally instructed the jury as to first-degree recklessly endangering safety and second-degree recklessly endangering safety. 129:45:48.

At trial, the jury found Grant guilty of first-degree recklessly endangering safety, and possession of a short-barreled shotgun. 130:3.

[1] The State had apparently electronically filed the amended information in November 2017 but it did not show up on the docket as being filed then. 127:4-10. Trial counsel agreed that he had received the amended information in November of 2017. 127:5-6.

At sentencing, the circuit court imposed 84 months initial confinement and 60 months extended supervision on the first-degree recklessly endangering safety charge, and 30 months initial confinement and 30 months extended supervision on the possession of a short-barreled shotgun charge. 133:19. The circuit court ordered that the sentences run consecutively. 133:20.

Grant timely filed a notice of intent to pursue posconviction relief, 91:1, pursuant to which the State Public Defender appointed the undersigned counsel to represent Grant on postconviction matters. By and through counsel, Grant filed a motion for new trial which raised the same issue before this court 98:1-7. After conducting an evidentiary hearing, 134:1-50, the circuit court entered a written decision denying Grant's motion for new trial. 109:1-4. Grant filed a notice of appeal, 110:1, and these proceedings follow.

Statement of facts

Facts pertaining to trial counsel's statements at trial.

During closing argument, trial counsel argued to the jury that Grant did not have the intent to kill D.P., and that the shooting of D.P. was an accident. 129:88,90,91,92,93, and 95.

After trial counsel's closing argument, and before the jury returned any verdict, Grant complained to the circuit court about the statements made by trial counsel to the jury:

> Your Honor, I—I told my—my—my attorney that I was not there. I was not there. I didn't shoot that man. And he made it seem like I accidentally shot that man. I didn't—I didn't even have possession of this gun at all. And he just went against what I said to him and made his own defense. I never—I never did—I never was in that park. If I was in that park, I could've took a plea. I could've told them that I—aggravated battery. I never agreed to this.
>
> – – –
>
> I never agreed to this your Honor. I think this not a fair trial. I think he didn't—he didn't—he didn't put—put something else in the jury's head like I accidentally shot this man. I never shot this man. Never. It was all a lie just to get out of trouble.
>
> They both incarcerated, they—one is incarcerated and the other is trying to get out of some type of altercation about the gun. I never

possessed that gun. I never even seen that gun, and I told my attorney that.

And how he just go telling them that I—I—I—possessed that gun? It's quite obvious that I never possessed that gun, and no—no video, no nothing. And how we just going to say that I possessed that gun? I never did. Because he trying to get out of trouble because he got caught with a gun.[2] And I never did shoot that man. That man, you could tell that man was obviously lying. I'm not agreeing with my attorney.

129:117-118.

Facts pertaining to Grant's motion for new trial.

In support of Grant's motion for new trial, Grant submitted his own affidavit. 99:9. Grant asserted that in response to the charges brought against him by the State, it was his objective to assert his innocence, and to pursue a defense based upon the premise that he was not present when the shooting of D.P. took place. 99:9.

Grant asserted that he had informed trial counsel that he was not present when the shooting of D.P. occurred, that he was not in the park, did not have the gun, and did not shoot D.P. 99:9.

[2] Grant here refers to T.M. who testified for the State at trial. 126:43. The gun allegedly used in the shooting was recovered from T.M.'s residence. 126:57-58.

Grant asserted that he understood that certain witnesses placed him at the scene of the shooting, and that in connection with these witnesses, he wanted his defense to involve a challenge to the credibility and truthfulness of these witnesses. 99:9.

Grant asserted that going into trial, he expected that his defense would be consistent with the information provided to trial counsel and his wishes. 99:9.

Facts pertaining to trial counsel's testimony at hearing.

Trial counsel's testimony appears in the record at 134:9-46. Trial counsel testified that Grant initially told him that the witnesses would not show up for trial. 134:14-15. Trial counsel testified that Grant told him that "one guy's his brother who would not testify against him; the other guy was a dope addict, you guys will never find him; and the woman who was in the car was also a dope addict, and you wouldn't find her, and that he was going to be out by May and there was nothing to worry

about." 134:13. At the time of the initial conversation, Grant was in custody and had made a speedy trial demand. 134:13-14. Grant was later released from custody when the State became unable to comply with the speedy trial demand. 134:14.

Trial counsel testified that after Grant was released, he learned that the individual who Grant referred to as his "brother" was actually not Grant's brother, and that the individual actually had "some very negative things to say about Grant." 134:14.

Trial counsel testified that Grant was ultimately arrested and taken back into custody as a result of "some bail issues." 134:15. At that point, they began to have "some serious conversations about the case." 134:15.

Initially, Grant "made different denials." 134:15. Trial counsel showed Grant a video which allegedly showed his car both driving to and leaving the park. 134:15. Grant initially said, "it's not my car," and "I don't have a car like that." 134:15. After pointing out to Grant that there was evidence regarding him

fleeing and being arrested in the car in Indiana, Grant then admitted that the car was his. 134:16.

Trial counsel testified that in reviewing the discovery, Grant's "take on the discovery was, no one saw me pull the trigger, so how can they testify they saw me shoot." 134:17. In discussing with Grant that somebody said that Grant had a shotgun on his lap, Grant "talked about how, based on the seating arrangements in his car, and how the car is put together, the person could not possibly have seen what was on his lap." 134:17. Grant stated that D.P. did not see who shot him as he was pointed in the other direction. 134:17. Grant stated that it could have been T.M. who shot him. 134:17.

Trial counsel indicated at this point, the strategy was not, "I wasn't there," but "they can't prove that I was the one that shot." 134:18. Going into trial, the strategy was two-fold. 134:19. The first part was that the witnesses would not show up, and the second part was that the State was not going to be able to prove its case. 134:19-20

Trial counsel indicated that he explained to Grant that as an experienced criminal defense attorney, he expected that the individuals in the vehicle were going to testify that Grant was in fact in the vehicle. 134:23.

Trial counsel explained to Grant "over and over again," what his strategy was in the case given the evidence that he saw. 134:23. "I said, look, I don't think that you tried to kill this guy, because, I mean, with a shotgun to the head, if you wanted to kill him, he'd be dead. I said, I think though, that there's some lesser crime that we can talk about that. I said, that's the only solution I see to the case." 134:23. Trial counsel specifically testified as follows:

> And so we had numerous discussions about that, but he didn't necessarily participate that much in the discussions. Because he, at that point, said I want to hear what they're going to say. So for, I'd say, about a week before trial, I was pretty much developing my own strategy, because he really wasn't giving me a lot of input, and I don't think he was doing much listening." 134:23-24.

Trial counsel testified that his strategy, as he was communicating with Grant the week before trial, was "[t]rying to

get this thing down to something less than attempted homicide." 134:24.

Regarding such strategy, counsel for the State asked trial counsel, "[a]nd he wasn't saying that - - he was not – he did not have issue with that strategy, he had issue with the fact that the State would not be able to prove its case; is that my understanding?" 134:24. Trial responded,

> That's correct. He never said - -he never said, no, no, no, no, I don't want to go that way. He just basically was - - he was kind of all over the place, to be honest with you. He was a little bit scattered. But yeah, I told him, I said, this is the only way we're going to get you out here without looking at - -I think he was looking at about 60 years, I believe. It would have carried a long sentence. And I said, let's try to get this down for something less. And that's basically - - that's where I told him we're going to go. That's what I did at trial. My approach at trial was pretty much to try to get - - go towards a lesser included, not an ID-type of situation, or anything like that." 134:24-25.

Trial counsel indicated that as he conducted opening statements and questioned the witnesses, Grant was participating in the defense along those strategic lines. 134:25. Trial counsel testified that throughout the trial, Grant provided

him with information, "bits and pieces here and there, based on my theory of defense." 134:26.

Trial counsel testified that during the trial he and Grant "were having good communications," and that "there was not a breakdown of communications at all during the course of the trial." 134:26.

The following question and answer took place between counsel for the State and trial counsel as to trial counsel's and Grant's understanding of the trial strategy:

> Q: At any point did Mr. Grant indicate to you that he kind of changed his mind on what he believed his defense should be?
>
> A. Well, I think - -and I'm not clear here. I know it was either near the end of the State's case, or after the State rested. I was talking to him about the need for him to take the stand and testify, and we kind of had some general conversation about it before, where I said, you know, if you guys were just fooling around with this gun and the gun went off and shot somebody, you might need to take the stand; you might need to testify, okay, so the jury understands how this happened.
>
> We never had any serious conversations about it until, I think you rested, and then I, you know, said, I think you're going to need to take the stand and testify about how this happened. And he says, I can't take the stand; I wasn't there. And when he said, "I wasn't there," he had sort of a smirk on his face. And I wasn't sure if he was being serious initially. I says, come on. And he says, I wasn't there. And he's again, got this smile that's sort of laughing. And after a few more

times, he kept saying the same thing. So I said, okay, fine. And that was that, and I didn't do anything else.

Q: And was your understanding at that point more that that was a - - so all the way along, as I understand it, you were communicating what your strategy was, which is, I am going to try to get you a lesser crime?

A: Yes.

Q: Is that accurate?

A: Yes.

Q: You communicated with that – that to him, and he at that point, during your communications, didn't really have an issue with it, other than to believe that the State would not be able to prove its case; is that fair to say?

A: Yes.

Q: So the first time that you heard him say, I was not there, was at this point that you just described, a bit prior to the colloquy on whether he was going to testify?

A: That's correct.

Q: And when you had that conversation with him, you indicated that he had a smirk on his face, and you said you did not know if he was being serious or not; is that accurate?

A: That's accurate.

Q: So you did not see that as a change in strategy for you; you saw that maybe as another - -what did you see that as?

A; I'll be honest with you. Initially - - initially, the thought went through my mind that maybe he was having some type of mental breakdown. Initially, I said - - because this is kind of ridiculous that, at this point now, he said he wasn't there. We've had conversations where he clearly, even though he never went through detail, clearly admitted being there and knowing what was going on.

Now he wants me to completely change my strategy. I didn't know if he was having a mental breakdown, but then I saw the look on his face, and sort of this little smirk or smile on his face, and I said is he just being silly, or what? And at this time, I thought he was just clowning around.

Q: So is it fair to say that you still interpreted that his wishes for you to continue on with this strategy that you discussed with him?

A: Yes. At no point prior to that did he ever say, I wasn't there. Or you know - - because my whole strategy for trial would have been much, much different on a, you know, you've got the wrong guy, or the bad ID type of case. This was clearly not that type of case. I don't think I've done anything which would indicate that it was a, he wasn't there, as opposed to kind of, like, you know, the State hasn't really proved that this was an intentional attempt to take someone's life. And that was the thrust of my defense.

Q: So when, at closings, you discussed the recklessly endangering safety, as Mr. Grant was not intending to kill anybody, this is not an attempted homicide - -and I'm kind of paraphrasing what the criminal instructions are - -this is a lesser crime. You were following along with the intent and the strategy that you and Mr. Grant had agreed on as you prepared, and through trial; is that accurate?

A: That's correct. 134:26-29.

The following question and answer likewise took place:

Q: And he seemed to understand your opinion, given your months of relationship with him, your meetings with him, he seemed to understand that that was going to be your trial strategy?

A: Yes.

Q: And at no time during the trial, but for the occasion that you discussed regarding him saying, I'm not here, did he ever ask you to deviate from that strategy?

A: No.

Q: And he was in court the whole time as you were asking your questions and making your arguments, that would be consistent with the trial strategy that you indicated that you would follow?

A: Yes. 134:34-35.

- -

Q: And that strategy, based on your interpretation of the evidence and how the evidence would have come in, was basically a strategy that, I am going to try to get you the lesser included; is it fair to say?

A: Correct.

Q: And you discussed that with Mr. Grant?

A: Yes.

Q: And it's your opinion, after - - given your relationship and the number of times that you met with him, that he understood that strategy?

A: Yes.

Q: And that he assented to that strategy?

A: Yes.

Q: Other than the fact that he had indicated, I think what you said is that he still had ideas that the State would not be able to prove its case?

A: Yeah. They were somewhat fantastical, yes.

Q: Is it fair to say that the first time that you felt that Mr. Grant was objecting to that strategy was after the case had been closed, prior to the jury reaching a verdict; is that accurate?

A: That's accurate. 134:44-45.

On cross-examination, trial counsel testified that he did not write Grant any letters where he explored trial strategy. 134:35. There is nothing in writing to confirm the trial strategy that trial counsel outlined in his testimony. 134:36.

On cross-examination, the following question and answer took place:

Q: Well, I guess Mr. Givens, in terms of the strategy, based on trying to get a lesser included offense, did you make it clear to Mr. Grant that

part of the execution of that strategy would be to place him at the scene of the crime?

A: Did I specifically make that - - I don't - - I believe that that was implied in any conversations that we had. But did I say, oh, Mr. Grant, we're going to have to say that you were there - -

Q: Right - -

A: You need to understand that he had already placed himself there in previous conversations with me. That the fact that you can sit in the car, and the fact, that - - well, first of all, that you identified the car as yours; it's coming from the park. The fact that you can tell me about the seating arrangements, where people were seated, what they could and couldn't see, and other conversations we had along those lines, clearly indicated that he was in the car, he was at the scene. So I didn't sit down and go, well, we'll have to place you at the scene, because it was understood he was there. 134:45-46.

Circuit court's determination of motion.

The circuit court's analysis and determination of Grant's motion appear in the appendix at A.105-108.

The circuit summarized the evidence pertaining to Grant's motion as follows:

In the instant case, Grant, via affidavit, contends that he had communicated to trial counsel that he was not present at the scene of the alleged crimes. Trial counsel, in his testimony, conceded that there was some discussion of that by Grant. But after reviewing the evidence

with him, it appeared to trial counsel that Grant pinned his hopes for an acquittal on the witnesses on appearing to testify, and if they did, there would have been other problems that would make them unreliable in the eyes of the jury. During his testimony, trial counsel further explained that while he was discussing strategy with Grant, he mentioned the "accident/lack of intent" defense. While conceding that he did not recall Grant's explicit endorsement of that strategy, he testified that Grant never explicitly rejected the strategy until after closing arguments had been made. Ap.107.

The circuit court made the following findings:

It is apparent that this Court must decide whose version of events to believe. Clearly, Grant objected on the record to the tactics of trial counsel after the case had been argued and sent to the jury for deliberations (but before verdicts were announced). No other on-the-record protestation by Grant is cited. Less clear is whether the objection to this strategy was apparent to trial counsel prior to the conclusion of the trial. On this issue, this Court finds trial counsel's version more credible. In reaching this finding, the Court notes trial counsel's thirty-four years of experience and the Court's own dealings with trial counsel in many other cases. With that level of experience, trial counsel would have filed a Notice of Alibi based on Grant's assertion of not being at the scene at all, pursuant to Sec. 971.23(8), Wis. Stats. No such notice appears in the record. Ap.107.

The circuit court determined that the facts of the case more similarly resembled the facts in *Florida v. Nixon*, 543 U.S. 175 (2004) rather than *McCoy v. Louisiana*, supra, and denied Grant's motion. Ap.107.

Argument

Grant is entitled to a new trial under *McCoy v. Louisiana* and the 6th Amendment to the United States Constitution because he was denied his right to choose the objective of his defense and the assistance of counsel in pursuing such objective.

A. Standard of review.

Historical facts, as found by the trial court, will not be reversed unless clearly erroneous. See *State v. Harvey*, 139 Wis. 2d 353,382, 407 N.W.2d 235 (1987). The application of constitutional principles to those facts is matter for a reviewing court's independent determination. See *id*.

B. Principles of McCoy v. Louisiana.

In *McCoy v. Louisiana*, the Supreme Court recently affirmed a criminal defendant's right to assert his innocence at trial and have counsel's assistance in doing so, even if trial counsel disagrees with such objective:

The Sixth Amendment guarantees to each criminal defendant "the Assistance of Counsel for his defence." At common law, self-

representation was the norm. See *Faretta v. California,* 422 U.S. 806, 823, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (citing 1 F. Pollock & F. Maitland, The History of English Law 211 (2d ed. 1909)). As the laws of England and the American Colonies developed, providing for a right to counsel in criminal cases, self-representation remained common and the right to proceed without counsel was recognized. *Faretta,* 422 U.S., at 824-828, 95 S.Ct. 2525. Even now, when most defendants choose to be represented by counsel, see, *e.g.,* Goldschmidt & Stemen, Patterns and Trends in Federal *Pro Se* Defense, 1996-2011: An Exploratory Study, 8 Fed. Cts. L. Rev. 81, 91 (2015) (0.2% of federal felony defendants proceeded *pro se*), an accused may insist upon representing herself — however counterproductive that course may be, see *Faretta,* 422 U.S., at 834, 95 S.Ct. 2525. As this Court explained, "[t]he right to defend is personal," and a defendant's choice in exercising that right "must be honored out of `that respect for the individual which is the lifeblood of the law.'" *Ibid.* (quoting *Illinois v. Allen,* 397 U.S. 337, 350-351, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970) (Brennan, J., concurring)); see *McKaskle v. Wiggins,* 465 U.S. 168, 176-177, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) ("The right to appear *pro se* exists to affirm the dignity and autonomy of the accused.").

The choice is not all or nothing: To gain assistance, a defendant need not surrender control entirely to counsel. For the Sixth Amendment, in "grant[ing] to the accused personally the right to make his defense," "speaks of the `assistance' of counsel, and an assistant, however expert, is still an assistant." *Faretta,* 422 U.S., at 819-820, 95 S.Ct. 2525; see *Gannett Co. v. DePasquale,* 443 U.S. 368, 382, n. 10, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979) (the Sixth Amendment "contemplat[es] a norm in which the accused, and not a lawyer, is master of his own defense"). Trial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence." *Gonzalez v. United States,* 553 U.S. 242, 248, 128 S.Ct. 1765, 170 L.Ed.2d 616 (2008) (internal quotation marks and citations omitted). Some decisions, however, are reserved for the client — notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal. See *Jones v. Barnes,* 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

> Autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category.
>
> *McCoy v. Louisiana*, 138 S.Ct. at 1507-1508.

In *McCoy*, the Supreme Court additionally held that the violation of a defendant's "autonomy right" under the Sixth Amendment ranks as structural error and is not subject to a harmless error review. See *McCoy v. Louisiana*, 138 S.Ct. at 1511.

The *McCoy* court additionally distinguished *Florida v. Nixon*. In that case, the Supreme Court considered whether the Constitution bars defense counsel from conceding a capital defendant's guilt at trial "when [the] defendant, informed by counsel, neither consents nor objects," *Florida v. Nixon*, 543 U.S. at 178. The Court distinguished *Florida v. Nixon* by finding that "Nixon's attorney did not negate Nixon's autonomy by overriding Nixon's desired defense objective, for Nixon never asserted any such objective." *McCoy v. Louisiana*, 138 S.Ct. at 1509. Rather, the Court found that Nixon "was generally unresponsive" during discussions of trial strategy, and "'never verbally approved or

protested" counsel's proposed approach.' *Id.* at 1509. In contrast, the defendant in *McCoy* "vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." *Id.* at 1509.

The circuit court reasoned that "the decision in this case boils down to whether the facts are more closely aligned to McCoy or Nixon." Ap.107. The circuit court determined that the case "more similarly resembles the facts in Nixon, and further finds, based on the record in this case, that no structural error as described in McCoy, occurred herein."Ap.107. Grant maintains that in reaching this conclusion, the circuit made findings of fact that were clearly erroneous.

C. The circuit court's finding that Grant's objection to trial counsel's tactics was not apparent to trial counsel prior to the conclusion of the trial was clearly erroneous.

In deciding Grant's postconviction motion, the circuit court stated, "[i]t is apparent that this Court must decide whose version of events to believe." Ap.107. The circuit court found that "[c]learly Grant objected on the record to the tactics of trial counsel after the case had been argued and sent to the jury for deliberations (but before verdicts were announced)." Ap.107. The circuit court additionally found that "[l]ess clear is whether the objection to this strategy was apparent to trial counsel prior to the conclusion of the trial." Ap.107. On this issue, the circuit court found that trial counsel's version was more credible. Ap.107. Such version is encapsulated by the following question and answer:

> Q: Is it fair to say that the first time that you felt that Mr. Grant was objecting to that strategy was after the case had been closed, prior to the jury reaching a verdict; is that accurate?
>
> A: That's accurate. 134:44-45.

The record belies trial counsel's contention, and the circuit court's finding, that Grant's objection to trial counsel's tactics was not "apparent" prior to the conclusion of trial.

According to trial counsel's own testimony, from the incipient stages of the case up until at least one week before trial, Grant's position was twofold: one that the witnesses would not testify against him, and two, if they did, they would not be deemed credible by the jury. 134: 17,18,19,20. From a timing perspective, this means that for nearly one year, from the time of Grant's arrest, February 6, 2017 until trial in January 2018, Grant's stated objective had remain consistent. Inconsistent with such objective was any strategy or admission that he had indeed been at the crime scene, that he had maintained possession of the gun, and that he had shot D.P. on accident. See 99:9.

To be sure, trial counsel testified that he discussed with Grant the "accident" strategy the week before trial. 134:22-23. But according to trial counsel's own testimony, Grant did not

endorse such strategy, and instead maintained his previous position. In this regard, trial counsel testified as follows:

> And so we had numerous discussions about that, but he didn't necessarily participate that much in the discussions. Because he, at that point, said I want to hear what they're going to say. So for, I'd say, about a week before trial, I was pretty much developing my own strategy, because he really wasn't giving me a lot of input, and I don't think he was doing much listening." 134:23-24.

Trial counsel's testimony makes clear that he unilaterally developed his own strategy, "I was pretty much developing my own strategy," which was ultimately inconsistent with Grant's stated objective of making no admissions of liability or guilt, and challenging the credibility of the witnesses, and the veracity of their stories. Perhaps, like that of trial counsel in *McCoy*, trial counsel's preferred tactic made sense, and was eminently prudent in light of the anticipated evidence about how the shooting occurred. Perhaps, it was the better course to pursue. But it was not the course that Grant wanted to pursue. And while trial counsel's chosen course offered mitigation to the charge of attempted first-degree intentional homicide, it had the collateral

effect of admitting liability, and effectively conceding guilt on the possession of a short-barreled weapon charge.

Further, despite the fact the trial counsel may have been "developing (his) own strategy" during the week before trial, it does appear that even as the trial began, trial counsel initially honored Grant's objective. In this regard, during trial counsel's remarks during voir dire (125:16-33), and opening statements (137:31-33), trial counsel made no statement or reference to the shooting being accidental. Rather, consistent with Grant's strategy and objective, trial counsel during opening statements, highlighted that the description of the shooter given by D.P. to the police was inconsistent with features of Grant's own physical stature. In this regard, trial counsel emphasized that D.P. described the person who shot him as being "5 foot 7, a hundred forty pounds." 137:33. Trial counsel then pointed out that Grant was over 6 feet tall and weighed over 185 pounds. 137:33. Trial counsel emphasized, "[c]learly, that does not meet." 137:33. Trial counsel's remarks as such belie the notion that upon the start of

trial, Grant had agreed to trial counsel's strategy of "accident/lack of intent" defense. If that had actually been the case, trial counsel's remarks during voir dire and opening statement reasonably would have reflected such a defense. They do not. Instead, they focus on a wrongful identification of the shooter.

Next, trial counsel's own testimony indicates that Grant had objected to trial counsel's chosen defense prior to the end of trial. In this regard, trial counsel testified about talking with Grant after the State had rested its case, about testifying in support of an accident defense. According to trial counsel, Grant told trial counsel that he could not testify because he was not there:

> Well, I think - -and I'm not clear here. I know it was either near the end of the State's case, or after the State rested. I was talking to him about the need for him to take the stand and testify, and we kind of had some general conversation about it before, where I said, you know, if you guys were just fooling around with this gun and the gun went off and shot somebody, you might need to take the stand; you might need to testify, okay, so the jury understands how this happened.
>
> We never had any serious conversations about it until, I think you rested, and then I, you know, said, I think you're going to need to take

> the stand and testify about how this happened. And he says, I can't take the stand; I wasn't there. And when he said, "I wasn't there," he had sort of a smirk on his face. And I wasn't sure if he was being serious initially. I says, come on. And he says, I wasn't there. And he's again, got this smile that's sort of laughing. And after a few more times, he kept saying the same thing. So I said, okay, fine. And that was that, and I didn't do anything else. 134:26-27.

Trial counsel's own testimony in this regard conveys that prior to closing argument, he specifically knew that arguing that Grant shot D.P. on accident was inconsistent with Grant's objective. Trial counsel's testimony supports the premise that even as late as the presentation of the defense's case, Grant did not want the defense to involve placing him at the crime scene with a gun in his hand. It is true that trial counsel related that Grant had a "smirk" on his face when he told trial counsel that he was "not there." But this characterization is subjective and open to interpretation. While trial counsel's characterization suggest that Grant was being disingenuous, another interpretation is that Grant was frustrated and flabbergasted with trial counsel's efforts to force his own theory of the defense upon him. It is also reasonable to conclude that if Grant had actually consented to

the "accident/lack of intent" defense, he would have supported it by testifying. Here, Grant obviously declined to do so. In any event, given the discussion about whether Grant would or would not testify, trial counsel knew going into closing argument that it was inconsistent with Grant's express objective to place Grant at the scene of the crime with a gun in his hand. Nonetheless, trial counsel did just that.

Perhaps this explains the timing of Grant's complaints about trial counsel. Grant did not voice his complaints after the jury had reached its verdicts, but rather, immediately after the jury left the courtroom to begin deliberations. 129:15-16. Grant was not upset that trial counsel's arguments had failed, and led to his conviction. Indeed, at the time of Grant's complaint, trial counsel's arguments very well could have prevailed, and led to an acquittal save for the possession of a short-barreled shot gun charge. Arguably, trial counsel's argument did prevail in that Grant was not convicted of attempted first-degree homicide, but of a lesser charge, first-degree recklessly endangering safety.

What Grant was upset about was that trial counsel specifically did what Grant did not want him to do. Trial counsel went against Grant's objective:

> Your Honor, I—I told my—my—my attorney that I was not there. I was not there. I didn't shoot that man. And he made it seem like I accidentally shot that man. I didn't—I didn't even have possession of this gun at all. And he just went against what I said to him and made his own defense. I never—I never did—I never was in that park. If I was in that park, I could've took a plea. I could've told them that I—aggravated battery. I never agreed to this.
>
> – – –
>
> I never agreed to this your Honor. I think this not a fair trial. I think he didn't—he didn-t—he didn't put—put something else in the jury's head like I accidentally shot this man. I never shot this man. Never. It was all a lie just to get out of trouble.
>
> They both incarcerated, they—one is incarcerated and the other is trying to get out of some type of altercation about the gun. I never possessed that gun. I never even seen that gun, and I told my attorney that.
>
> And how he just go telling them that I—I—I—possessed that gun? It's quite obvious that I never possessed that gun, and no—no video, no nothing. And how we just going to say that I possessed that gun? I never did. Because he trying to get out of trouble because he got caught with a gun. And I never did shoot that man. That man, you could tell that man was obviously lying. I'm not agreeing with my attorney.

129:117-118.

Finally, in denying Grant's motion, the circuit court found that a notice of alibi had not been filed. Ap.107. The circuit court

inferred that absence of a notice of alibi was inconsistent "Grant's assertions of not being at the scene at all." Ap.107. With respect to the fact that no notice of alibi was filed, Grant would point out that the absence of a notice of alibi was not inconsistent with Grant's assertions. A person can arguably be absent from and at the commission of a crime, yet not be able to produce an alibi witness. For example, a person may be sleeping, taking a walk, watching a movie, or doing a myriad of other things by himself or herself. Such circumstances would not generate an alibi. As such, the fact that a notice of alibi was not filed means little.

For the above reasons, the circuit court's finding that Grant's objection to trial counsel's strategy was not apparent to trial counsel prior to the conclusion of the trial was clearly erroneous, and should be rejected by this court.

D. *McCoy v. Louisiana* applies rather than *Florida v. Nixon*.

It may be that the facts of this case fall somewhere between the facts presented in *McCoy v. Louisiana* and those in *Florida v. Nixon*. But wherever such facts fall on the continuum, they fall closer to *McCoy*. In *Florida v. Nixon*, the defendant "was generally unresponsive" during discussions of trial strategy, and "'never verbally approved or protested" counsel's proposed approach.' *Id.* at 1509. In contrast, the defendant in *McCoy* "vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." *Id.* at 1505.

In this case, it cannot reasonably be argued that Grant was "unresponsive" during discussion of trial strategy. For over a year, Grant expressly made known to trial counsel his objective and strategy for serving such objective. This message remained consistent up to, and even during, trial. As Grant listened to voir dire and opening statements, he expected trial counsel would

honor his objective. In that trial counsel did not during voir dire or opening statement, alert the jury of a defense based on "accident/lack of itent," Grant's expectations were reasonable. Once the State rested, and trial counsel re-visited with Grant whether he would testify or not, Grant again affirmed his objective when he told trial counsel, "I can't take the stand; I wasn't there." Trial counsel of course, chose to ignore Grant's protestation, and argued to the jury a defense which was wholly inconsistent with what Grant had been telling him throughout the case. After hearing trial counsel's closing argument and obviously hearing what trial counsel told the jury, Grant, with a measure of indignancy, re-lodged his protestation.

To be sure, trial counsel, in his postconviction testimony took the position that Grant somehow endorsed or acquiesced to trial counsel's strategy. But, for reasons previously discussed in this brief, the record does not support trial counsel's effort to recast the facts in this way. It makes no sense that if Grant had at some point during trial, endorsed or acquiesced to trial

counsel's strategy, and abandoned his own objectives, he would have so explicitly and forcefully complained to the circuit court when he did, before even knowing the jury's verdict. Rather, the timing and content of Grant's complaint more accurately depict a defendant who has been betrayed by the one person who was supposed to give voice to his objective.

In arguing that Grant shot D.P. by accident, trial counsel admitted Grant's factual liability for the shooting of D.P. Trial counsel effectively placed Grant at the scene, placed the gun in Grant's hands, and acknowledged that Grant shot D.P. and caused his injuries. In this regard trial counsel's statements effectively admitted guilt for purposes of the possession of a short -barreled shotgun charge. They also exposed Grant to liability for any other criminal offense associated with the discharge of a firearm which causes injury, for instance, injury by negligent handling of a dangerous weapon (Wis. Stat. 940.24), or as aptly applied in this case, recklessly endangering safety.

The defense made before the jury by trial counsel was entirely inconsistent with Grant's objective of asserting his innocence, denying any and all legal liability, civil or criminal, for D.P.'s shooting, and presenting a defense based upon the premise that he was not present when the shooting of D.P. took place. Trial counsel's statements to the jury during closing argument compromised Grant's objective. Trial counsel's statements similarly deprived Grant of the assistance of counsel for the defense that he wanted and was rightfully due.

Under *McCoy v. Louisiana*, Grant's Sixth Amendment "autonomy right" to assert his complete innocence in connection with the shooting of D.P. was violated by trial counsel's statements during closing argument. This was structural error which requires a new trial.

Conclusion

For the above reasons, this court should remand for a new trial.

Dated this _____day of July 2020.

Respectfully submitted,
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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Wis. Stat. Rule 809.19(8)(b) and (c) in that is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 6985 words.

Dated this ___day of July 2020.

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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 s.809.19(2)(a) and that contains: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial 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 the 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.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

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