STATE OF WISCONSIN

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

DISTRICT I

Case No. 2020AP785-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEYON D. GRANT,

Defendant-Appellant.

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

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

Defendant-appellant Keyon D. Grant maintains that he is entitled to a new trial for the denial of his Sixth Amendment right to assert a defense of innocence. Grant's claim raises the following questions for review:

Was the postconviction court's finding that Grant did not expressly assert a desire to maintain innocence prior to the trial's conclusion clearly erroneous?

This Court should answer no.

Do the facts, as found by the postconviction court, show that Grant was denied his right to assert an innocence defense?

The circuit court answered no.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither is requested. The issues may be resolved by reviewing the postconviction court's findings of fact, and applying those findings to the legal standard set forth in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).

INTRODUCTION

Under *McCoy*, a defendant has the right to decide that the objective of his defense is to maintain his innocence. But to exercise this right, the defendant must expressly assert to counsel his desire to pursue an innocence defense.

At Grant's trial on a charge of attempted first-degree intentional homicide, defense counsel discussed with Grant a proposed defense of conceding guilt on a lesser-included charge of reckless endangerment. Counsel executed this strategy, and the jury found Grant guilty of first-degree recklessly endangering safety.

Postconviction, Grant moved for a new trial on the ground that counsel ignored his express desire to pursue an innocence defense. Following an evidentiary hearing, the postconviction court denied the motion upon finding that Grant did not object to counsel's proposed defense or expressly assert a desire to maintain innocence.

On appeal, Grant argues that the postconviction court's dispositive finding is clearly erroneous, and that the facts show that he was denied his right to assert innocence. Grant is mistaken. The court's dispositive finding is well supported by defense counsel's hearing testimony, and the facts, as found, do not prove a violation of the right to maintain an innocence defense. Accordingly, this Court should affirm the circuit court's order denying Grant's motion for a new trial.

STATEMENT OF THE CASE

In October 2016, Keyon Grant was charged with attempted first-degree intentional homicide in the shooting of D.P., contrary to Wis. Stat. §§ 939.32 and 940.01(1)(a). (R. 1:1, A-App. 100.) According to the criminal complaint, on a night earlier that month, Grant picked up D.P. at a Milwaukee gas station. (R. 1:1, A-App. 100.) Grant drove D.P. and two other passengers to McGovern Park and parked in a secluded area. (R. 1:1, A-App. 100.)

Outside the vehicle, Grant shot D.P. at close range with a sawed-off shotgun, striking him with projectiles in the back of the head and neck. (R. 1:1, A-App. 100.) The State later filed an amended information adding a charge of possession of a short-barreled shotgun or short-barreled rifle, a prohibited firearm under Wis. Stat. § 941.28. (R. 26:1, A-App. 102.)

The Trial

The case was tried to a jury January 9-12, 2018. (R. 124–130.)

Counsel previews the defense's theory. In a short opening statement, defense counsel Glenn Givens argued that the evidence would indicate that the shooting was not intentional. (R. 137:32–33.) "I think the evidence shows if a person really wanted to kill someone" by firing a shotgun at him at close range, "then, we wouldn't be here talking about [an] attempted homicide case. We would be talking about [a] homicide case." (R. 137:32–33.) Counsel also provided reasons to doubt victim D.P.'s credibility, including that D.P.'s initial description of Grant's height and weight was inaccurate. (R. 126:12; 137:32–33.)

The trial evidence places Grant at the scene. The State presented the following evidence at trial. D.P. testified that Grant, whom D.P. said he had known for about three weeks, agreed to give D.P. a ride one night, and picked D.P. up at a gas station on Locust Street and Martin Luther King Drive. (R. 137:37.) Grant showed up in a tan car with two passengers, a female and a male. (R. 137:38.)

The male passenger, Talva McCall, also testified, and likewise said that Grant picked up D.P. at the gas station. (R. 126:47.) Video surveillance footage played at trial showed a tan, older Mazda identical to a car registered to Grant at the gas station at the testified-to pickup time. (R. 127:44–45; 137:36.) The footage showed individuals resembling D.P. and Grant walking around the gas station before getting into the car and driving off. (R. 127:46–51.)

D.P. further testified that, in the car, he asked Grant to drive him home. (R. 137:38.) McCall testified that he, too, was expecting Grant to drive him (McCall) home. (R. 126:47.) Both men testified that, instead, Grant drove to McGovern Park and parked the car in a deserted lot between the senior center and a pond. (R. 126:48–49; 137:40.) Video surveillance recordings played for the jury showed a car identical to Grant's car enter the park at the same general time Grant testified that they arrived there. (R. 127:63–64; 137:41.)

D.P. testified that, once there, Grant made an ominous remark[1] and got out of the car, carrying a sawed-off shotgun. (R. 137:40–42, 67.) D.P. said that he also got out of the car while the others remained. (R. 137:41–42.) D.P. testified that he asked Grant, who was talking on his phone, what was going on, and Grant told him to hold on. (R. 137:42.) D.P. said he felt that "something wasn't right," and so he turned to walk away from Grant. (R. 137:42–43, 69–70.) As he turned, D.P. felt the impact of the shotgun blast and heard ringing in his ears. (R. 137:42–43.) According to D.P., Grant shot him from about five feet away. (R. 137:70.) D.P. then struggled "a little" with Grant and tried to run away. (R. 137:43.)

McCall, who remained in the vehicle, testified that he heard a "[b]oom" and saw "a big cloud of dust in the air." (R. 126:43, 50.) McCall said that he heard D.P. say, "[W]hy you do that to me[?]" (R. 126:50.) McCall testified that the woman in the front seat screamed and ran from the car, and he (McCall) "got the hell out of there," too. (R. 126:51.) McCall identified the shotgun used in the shooting as Grant's. (R. 126:55.) Police recovered the gun from McCall's parents' house where, McCall admitted to police, he had hidden it for Grant after the shooting. (R. 126:56–59.)

Surveillance video from the park showed Grant's vehicle leaving the park a few minutes after entering. (R. 127:63–65.) The State presented items recovered from the scene, including a spent shotgun shell casing. (R. 127:60, 68–70.) By comparing markings on this casing with those of a test round fired from Grant's shotgun, a ballistics expert testified to the opinion that the casing found at the scene was fired from Grant's shotgun. (R. 128:27–28.)

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[1] "[T]his is where I come drop dead bodies in the river." (R. 137:40–41, 67.)

D.P. testified that, once he ran from the scene, he hid in some bushes and called 911. (R. 137:44.) Eventually, D.P. was found and paramedics transported him to the hospital. (R. 137:49.) In the ambulance, a police officer recorded an interview with D.P. played at trial in which D.P. said that he had been shot and identified Grant as the shooter. (R. 129:53; 137:49–52.) D.P. also identified Grant from a photo lineup shown at his hospital bed. (R.137:58–59.) D.P. testified that the blast tore off part of his ear, fractured his skull, and permanently embedded a bullet fragment in his brain. (R. 137:47–49.)

Grant elected not to testify, and the defense called no witnesses. (R. 129:3.)

Defense counsel argues that the shooting was an accident. In the first half of his closing, counsel attacked D.P.'s credibility. (R. 129:77–88.) For example, counsel argued that D.P.'s claim that he was shot as he turned to run away should have resulted in injuries to the *other* side of his head and neck, based on where D.P. and Grant were standing; that D.P.'s injuries showed that the shot was "not full impact," but "more like a graze"; and that, at a distance of only "five feet with a sawed off shotgun you don't miss" if Grant had actually raised the gun to intentionally fire at D.P. (R. 129:77–82.)

"[In] reality," counsel argued, "[D.P.] was the victim of an accident." (R. 129:88.) "I don't believe the State has demonstrated any kind of intent to kill." (R. 129:90.) Had "an intent to kill existed," the court continued, "[D.P.] would be quite dead." (R. 129:90.) "I suggest that this gun, this discharge was purely accidental. Was it reckless? I can't say it wasn't reckless," counsel conceded, noting that the gun was loaded when, in counsel's telling, it was mishandled and discharged. (R. 129:91–92.) Counsel also argued that, because Grant did not purposely discharge the weapon, he did not act with "utter disregard for human life," and thus he was not guilty of first-degree recklessly disregarding safety. (R.

129:92–93.) Counsel concluded by asking the jury to find Grant not guilty of attempted first-degree intentional homicide and of first-degree recklessly endangering safety because the shooting was just "a dumb, stupid accident." (R. 129:95.)

Grant objects to counsel's closing. After the jury was excused from the courtroom to deliberate, defense counsel informed the court that the defendant was "very unhappy" and wished to address the Court. (R. 129:116.) The court recognized Grant, who said the following:

> 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—[committed an] aggravated battery. I never agreed to this.
>
> THE COURT: Go ahead, Mr. Grant.
>
> THE DEFENDANT: I never agreed to this, Your Honor. I think this [is] 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. Both of them was trying 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. I didn't know—Don't put that on me. And I never did shoot

> that man. That man, you could tell that man was obviously lying. I'm not agreeing with my attorney.

(R. 129:117–18.)

The jury convicts Grant of a lesser-included offense. The jury had been instructed on the charged offense of attempted first-degree intentional homicide, and on the lesser-included offenses of first- and second-degree recklessly endangering safety. (R. 129:41–48.) The jury found Grant guilty of first-degree recklessly endangering safety, and, on the second count, of possession of a sawed-off shotgun. (R. 130:3.) The court sentenced Grant to seven years of initial confinement and five years of extended supervision on the reckless endangerment count, and two and one-half years of initial confinement and two and one-half years of extended supervision on the illegal firearm count, to be served consecutively. (R. 88:1, A-App. 103.)

Postconviction Proceedings

Grant asserts that he told counsel he wasn't there and had nothing to do with the shooting, and that he expected this to be his defense. Several months after Grant's trial, the United States Supreme Court issued its decision *McCoy v. Louisiana*.[2] In 2019, Grant filed a Wis. Stat. § (Rule) 809.30 motion for a new trial, alleging that he was denied his right under *McCoy* to choose the objective of his defense and counsel's assistance in pursuing that objective. (R. 99:2.)

With the motion, Grant filed an affidavit in which he asserted the following:

- "In [pretrial] meetings, I informed [defense counsel] Givens that I was not present when the shooting of

[2] The new rule recognized by the Court in *McCoy* applies to Grant's case. *See Griffith v. Kentucky*, 479 U.S. 314 (1987) (new constitutional rules for the conduct of criminal prosecutions apply to cases on direct review or not yet final).

> [D.P.] occurred. I informed Mr. Givens that I was not in the park, did not have the gun and did not shoot [D.P.]"
>
> - "I wanted my defense to be that the[ ] witnesses" who testified for the State at trial "were not truthful and that they were lying."
> - "I expected my defense at trial to be based upon and consistent with the information that I communicated to Mr. Givens. I expected my defense at trial to be that I was not present when the shooting occurred, and that the witnesses who said that I was were not truthful."
> - "Prior to the state of the trial, I did not know that Mr. Givens would argue that I shot [D.P.] accidentally. Had I known prior to trial that [counsel] would argue [this], . . . I would not have agreed to such a defense."

(R. 99:9.)

Defense counsel offers a very different version of events. Upon the request of both parties (R. 99:8; 104:1), the postconviction court held an evidentiary hearing on the motion at which defense counsel Glenn Givens testified. (R. 134:1.)

At the hearing, counsel testified that, during their initial meeting, Grant told him that "there was nothing to worry about" because "one guy's his brother [McCall] who would not testify against him," and the other witnesses were "dope addict[s]" who the State wouldn't be able to find, and "he was going to be out [of jail] by May . . . ." (R. 134:13.)

But, counsel explained, McCall was then arrested and "had some very negative things to say about Mr. Grant." (R. 134:14.) Eventually, counsel and Grant "began to have some serious conversations about the case." (R. 134:14–15.) Counsel

said that Grant initially "made different denials." (R. 134:15.) But counsel showed Grant the surveillance video from the park and Grant admitted, "yeah, that's my car." (R. 134:15–16.) Counsel said that, in response to a witness statement that Grant had the shotgun on his lap, Grant "talked about how, based on the seating and arrangements" of the witnesses "in his car . . . the person could not possibly have seen what was on his lap." (R. 134:17.)

During this time, counsel said that Grant was also "still . . . not believing these people were going to take the stand and testify against him." (R. 134:19.) Counsel agreed that Grant had "a two-part strategy": (1) "the State's not going to be able to prove their case" because nobody's going to show up; and (2) if people show up, the State can't prove its case because "nobody saw me fire this weapon." (R. 134:19.)

As preparations intensified in the week before trial, counsel said that he repeatedly told Grant that he did not believe that Grant wanted to kill D.P. because "with a shotgun to the head, if you wanted to kill him, he'd be dead." (R. 134:23.) "And so we had numerous discussions about that," counsel testified, "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. I want to hear what they're going to say." (R. 134:23.)

"So for, I'd say, about a week before the trial," counsel continued, "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." (R. 134:23–24.) Counsel said his strategy was "[t]rying to get this thing down to something less than attempted homicide." (R. 134:24.) "[T]hat's where I told him we're going to go," counsel said. "That's what I did at trial." (R. 134:25.) Counsel said that Grant did not oppose this strategy or insist that he wasn't there. (R. 124:24, 26.) "[H]e 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." (R. 134:24.)

Counsel said that it was only after the State rested, and he was talking with Grant about whether he would testify, that Grant said anything about not being at the scene. (R. 134:26.)

Counsel said he told Grant, "I think you're going to need to take the stand and testify about how this happened." (R. 134:26–27.) Counsel said Grant responded: "I can't take the stand; I wasn't there." (R. 134:27.) "And when he said, 'I wasn't there,' he had sort of a smirk on his face," counsel explained. (R. 134:27.) "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." (R. 134:27.) "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." (R. 124:27.)

Counsel said that, at first, he thought that "maybe [Grant] was having some type of mental breakdown. . . . because this is kind of ridiculous that, at this point now, he said he wasn't there." (R. 134:28.) Then he concluded that Grant was "just being silly" or "just clowning around." (R. 134:28.) "We'[d] had conversations where he . . . clearly admitted being there and knowing what was going on," counsel explained. (R. 134:28.) "At no point prior to that did he ever say, I wasn't there." (R. 134:29.)

Grant did not testify at the hearing.

The postconviction court finds counsel's version more credible and denies the motion. Following the hearing, the parties submitted briefs[3] on the *McCoy* issue, and the

[3] The State apparently prepared and served a post-hearing brief, but it does not appear in the appellate record. Record 104,

postconviction court issued a decision and order denying the motion. (R. 109:2–4, A-App. 106–08.) The court found that defense counsel's general testimony that Grant did not object to his trial strategy "prior to the conclusion of the trial" was more credible than Grant's averments to the contrary. (R. 109:3, A-App. 107.)

Applying these facts to the case law, the postconviction court concluded that Grant's case resembled *Florida v. Nixon*, 543 U.S. 175 (2004). (R. 109:3, A-App. 107.) Nixon, like Grant, failed to object to counsel's defense strategy in pretrial discussions, and thus forfeited his right to complain about the course taken by his lawyer. (R. 109:3, A-App. 107.) Accordingly, the court denied the motion.

Grant appeals.

ARGUMENT

Grant was not denied his *McCoy* right to decide that the objective of his defense was to assert innocence.

A. Standard of review

Whether a defendant was denied his right under the Sixth Amendment to determine the objective of his defense is a question of constitutional fact. *See State v. Martwick*, 2000 WI 5, ¶ 17, 231 Wis. 2d 801, 604 N.W.2d 552. ("A constitutional fact is one whose determination is decisive of constitutional rights."). A question of constitutional fact is a mixed question of fact and law to which this Court applies a two-step standard of review. *Id.* ¶ 16. This Court reviews the

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dated before the hearing, is the State's pre-hearing response to Grant's new trial motion. (R. 104:1.) But Record 105, Grant's "Reply to the State's Response," is dated *after* the hearing and includes Grant's arguments in reply to the State's arguments made in the missing post-hearing brief. (R. 105.)

circuit court's findings of historical fact under the clearly erroneous standard, and it reviews independently the application of those facts to constitutional principles. *State v. Post*, 2007 WI 60, ¶ 8, 301 Wis. 2d 1, 733 N.W.2d 634.

B. A defendant has the right to decide to assert a defense of innocence, but must do so in an express and timely manner.

"The Sixth Amendment guarantees to each criminal defendant 'the Assistance of Counsel for his defence.'" *McCoy*, 138 S. Ct. at 1507. But "[t]o gain assistance, a defendant need not surrender control entirely to counsel." *Id.* at 1508. In fact, while "[t]rial management is the lawyer's province . . . . [s]ome decisions . . . 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." *Id.*

In *McCoy*, the United States Supreme Court recognized that the "[a]utonomy to decide that the objective of the defense is to assert innocence" is among the decisions the client has a right to make. 138 S. Ct. at 1508. "When a client expressly asserts that the objective of '*his* defence' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." *Id.* at 1509.

This requirement does not relieve counsel of the responsibility of "develop[ing] a trial strategy and discuss[ing] it with her client," *McCoy*, 138 S. Ct. at 1509, or impose on counsel the duty to obtain the client's express consent to employ a concession-of-guilt defense. *See id.* (discussing *Nixon*, 543 U.S. at 181) (no violation of right to assert innocence where counsel informed defendant of plan to concede guilt at trial and defendant did not object or assert a desire to maintain his innocence until after trial).

Rather, the burden is on the client to "expressly assert[ ]" his desire to pursue an innocence defense, and he forfeits

that right by acquiescing to counsel's strategy. *McCoy*, 138 S. Ct. at 1508–09 (discussing *Nixon*, 543 U.S. at 181). Implicit in the requirement that the defendant "expressly assert" the right is that he do so in a timely manner. Thus, the defendant in *Nixon* who failed to express to counsel his wish to assert an innocence defense when counsel was formulating the defense strategy could not later assert a violation of his autonomy right. *Nixon*, 543 U.S. at 181.

Finally, a claim that counsel ignored her client's express wish to assert innocence implicates "[the] client's autonomy, not counsel's competence." *McCoy*, 138 S. Ct. at 1510–11. Thus, the familiar ineffective assistance standard of *Strickland v. Washington*, 466 U.S. 668 (1984), does not apply to the questions of whether the defendant expressly asserted the desire to maintain innocence, and whether counsel respected that choice. *Id.* A defendant proceeding under *McCoy* also need not prove prejudice. *McCoy*, 138 S. Ct. at 1511. Because denial of the defendant's right to determine the objective of the defense is structural error, it is not subject to review for harmless error. *Id.*

C. The postconviction court's dispositive finding that Grant did not expressly assert to counsel a desire to maintain innocence is not clearly erroneous.

The State had a strong case against Grant, up to a point. Video and testimonial evidence put Grant at the crime scene, and direct and circumstantial evidence identified him as D.P.'s shooter. (R. 126:43, 50; 127:63–64; 128:27–28, 60; 137:40–42, 68–70.) But the State lacked a motive, and no one (other than D.P., and only as he was turning from Grant) witnessed the moment Grant fired the shot that injured D.P.

On these facts, counsel settled on what was likely the only reasonable defense available: That the shooting was an accident. (R. 129:88–95; 137:32–33.) Grant's conduct was

"dumb" and "reckless," counsel conceded (R. 129:91–92, 95), but the State failed to show that he intended to kill D.P. (R. 129:88–95; 137:32–33.) By this strategy, counsel sought to reduce Grant's criminal exposure from 60 years of imprisonment for attempted first-degree intentional homicide, a Class B Felony, see Wis. Stat. §§ 939.32(1)(a), 939.50(3)(b); to either 12 years and 6 months of imprisonment for first-degree recklessly endangering safety, a Class F felony, Wis. Stat. §§ 939.50(3)(f) and 941.30(1); or 10 years of imprisonment for second-degree recklessly endangering safety, a Class G felony, Wis. Stat. §§ 939.50(3)(g) and 941.30(2).

The strategy appears to have succeeded. The jury found Grant guilty of first-degree recklessly endangering safety, and the court sentenced Grant to seven years of initial confinement and five years of extended supervision on this offense. (R. 88:1, A-App. 103.)

But no matter the wisdom or success of counsel's strategy, if Grant expressly asserted to counsel in a timely manner that he wished to maintain his innocence, then he would be entitled to a new trial. *See McCoy*, 138 S. Ct. at 1508–11.

The postconviction court addressed this question of fact and found that Grant did not expressly assert to counsel a desire to pursue a defense of innocence.

The court explained: "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." (R. 109:3, A-App. 107.) "Less clear is whether the objection to this strategy was apparent to trial counsel[4] prior to the conclusion of the

[4] Counsel's subjective view—what "was apparent" to him—wasn't the correct perspective for this analysis. The issue is

trial. On this issue, this Court finds trial counsel's version more credible." (R. 109:3, A-App. 107.) "In reaching this finding, this Court notes trial counsel's thirty-four years of experience and the Court's own dealings with trial counsel in many other cases." (R. 109:3, A-App. 107.)

On appeal, Grant maintains that this dispositive finding of fact is clearly erroneous. (Grant's Br. 22–30.) Grant is mistaken.

Under the "clearly erroneous" standard of review, an appellate court is "bound not to upset the trial court's findings of historical or evidentiary fact unless they are contrary to the great weight and clear preponderance of the evidence." *State v. Turner*, 136 Wis. 2d 333, 343, 401 N.W.2d 827 (1987).

Here, the court's finding that Grant did not expressly assert a desire to assert innocence is not clearly erroneous because it is well supported by defense counsel's hearing testimony. Specifically, counsel testified that, "[a]t no point prior to" Grant's surprise statement to counsel at the close of evidence "did he ever say, I wasn't there." (R. 134:29.)

In fact, counsel explained, "[w]e'[d] had conversations where he . . . clearly admitted being there and knowing what was going on." (R. 134:28.) Counsel testified that, once counsel and Grant started to have more serious conversations about his defense, Grant admitted he was at the park when the

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whether Grant communicated or *made apparent to counsel* his opposition to counsel's "tactics" (*i.e.*, his proposed defense of conceding guilt to a lesser offense) and "expressly asserted" the desire to assert innocence. *McCoy*, 138 S. Ct. at 1509. But, of course, the court *did not* find that Grant actually communicated his objections but that, for whatever reason, these objections were just "not apparent" to counsel. Thus, despite language mistakenly focusing on counsel's subjective awareness, the postconviction court resolved against Grant the dispositive factual issue of whether Grant "expressly asserted" an objection to counsel's proposed defense and the desire to maintain innocence.

crime occurred. (R. 134:14–16.) Counsel played for Grant surveillance video showing Grant's car entering and leaving the park around the time of the shooting, and Grant admitted, "yeah, that's my car." (R. 134:15–16.) Additionally, as counsel explained, Grant placed himself in the car on the ride from the gas station to the park by talking about whether, from the backseat, McCall and D.G. could have seen a shotgun on his lap, as one of them had told to police. (R. 134:17.)

Counsel's surprise and disbelief at Grant's statement to him at the close of evidence that he "wasn't there" further supports the court's finding that Grant had not asserted an innocence defense to counsel before the end of the trial. (R. 134:28.) Counsel said he was initially concerned that Grant was having a break with reality ("some type of mental breakdown") "because this is kind of ridiculous that, at this point now, he said he wasn't there." (R. 134:28.) But counsel took in the "smirk on [Grant's] face," the "smile that's sort of laughing," and determined that Grant was "just being silly" or "just clowning around." (R. 134:27, 28.)

Grant appears to argue that, going back to his initial conversations with counsel, he took a position that represented an express assertion of the desire to assert his innocence. (Grant's Br. 23–25.) This position, as counsel testified, was that the witnesses would not testify against him, and, if they did, the jury would not find them to be credible. (R. 134:13.)

But this is not an express assertion of innocence so much as a prediction or an opinion about what other people will do. It states *no admission or denial* (express or otherwise) on whether Grant was there and committed the crime. It merely expresses the view that the State will not be able to make its case, *whether or not Grant was there and did it*, because the witnesses won't show up and they won't be credible if they do. At most, this position suggests an opinion that it will not be necessary to concede anything because the

State's evidence will be weak. But it is not an assertion of innocence.

Grant concedes that, in the week before trial, counsel discussed with him counsel's proposed strategy of conceding guilt as to a lesser included offense of recklessly endangering safety. (Grant's Br. 23–24.) But Grant argues, based on counsel's own testimony, Grant "did not endorse such strategy, and instead maintained his previous position." (Grant's Br. 23–24.) Grant notes that counsel testified that Grant "didn't necessarily participate much in the discussions," and so counsel "was pretty much developing my own strategy, because he wasn't giving me a lot of input, and I don't think he was doing much listening." (R. 134:23–24.)

But Grant's "previous position" was not an express assertion of innocence; it merely represented a view about the strength of the evidence against him. And counsel, in carrying out his responsibility to develop the best defense for his client, was not required to obtain Grant's "endorse[ment]" (Grant's Br. 24) for this defense. *See McCoy*, 138 S. Ct. at 1509. Rather, *McCoy* allows counsel to develop a defense "unilaterally" when the defendant is not "participat[ing] much" in discussions about strategy. (Grant's Br. 25; R. 134:23–24.) So, even assuming that Grant maintained his "previous position" during the critical time when counsel was formulating Grant's defense (counsel actually says Grant "didn't . . . participate that much in the discussions"), that position was not an assertion of innocence in the face of counsel's proposed strategy.[5] (R. 134:23–24.)

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[5] Grant also argues that counsel's opening statement indicates that counsel "initially honored Grant's objective," noting that counsel attacked D.P.'s credibility and, specifically, challenged D.P.'s (inaccurate) physical description of Grant. (Grant's Br. 25.) The State is unclear about how this point advances Grant's

Finally, Grant argues that Grant's statement to counsel at the close of evidence that he "wasn't there" shows that the postconviction court clearly erred in finding that Grant did not expressly assert a desire to make an innocence defense "prior to the conclusion of the trial." (Grant's Br. 26.)

As to the statement's timing, the State does not dispute that this statement was made to counsel "prior to the conclusion of the trial." But, as argued below, the court's finding was not clearly erroneous because this statement was not an express assertion of the desire to make an innocence defense. And, as argued in the next section, even if it was such an assertion, it was not timely under *Nixon* and *McCoy*.

The postconviction court did not separately address this statement in its decision. But counsel's account of this exchange with Grant supports the court's implicit finding that this statement also did not constitute an express assertion of the desire to pursue an innocence defense. *See Martwick*, 231 Wis. 2d 801, ¶ 31 (when circuit court fails to make express findings, we may assume that the court made implicit findings that support its decision).

As he explained, counsel was taken aback by Grant's sudden assertion that he wasn't there. By counsel's telling, Grant had long acknowledged to counsel that he was present on the scene. (R. 134:28.) Now—after all the evidence was in and it overwhelmingly put Grant at the scene—Grant said, with a smirk or "laughing smile" on his face, that he wasn't there. (R. 134:28.) "At no point prior to that did he ever say, I wasn't there," counsel said. (R. 134:29.) "We'[d] had conversations where he . . . clearly admitted being there and knowing what was going on." (R. 134:28.) Moreover, while Grant asserted that he wasn't there, his words fell short of

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argument. Regardless, counsel also plainly argued in his opening that the evidence at trial would show that the shooting was not intentional. (R. 137:25–26.)

being "express statements of [his] will to maintain innocence," *McCoy*, 138 S. Ct. at 1509. At no point did Grant expressly assert that he wanted counsel to change his defense—a defense to which he did not object in preparing for trial—on the spot minutes before closing argument.

Based on the foregoing, including Grant's demeanor and facial expressions, counsel testified that he concluded in the moment that Grant was not serious but was just "being silly" and "clowning around." (R. 134:28.) This conclusion was reasonable under the circumstances, no matter the more serious tone Grant struck for the court after the jury left to deliberate.[6] (R. 129:117–18.) The record therefore supports the court's implicit determination that Grant's statement to counsel after the close of evidence was likewise not an express assertion of the desire to pursue an innocence defense.

Based on the foregoing, the postconviction court's finding that Grant did not expressly assert to counsel a desire to pursue an innocence defense was not contrary to the great weight and clear preponderance of the evidence. *See Turner*, 136 Wis. 2d at 343.

D. On the facts found by the postconviction court, Grant's right to maintain a defense of innocence was not violated; this is a *Nixon* case, as the court correctly determined.

Grant had the right to choose a defense of innocence. *See McCoy*, 138 S. Ct. at 1507–08. But to exercise this right, Grant had to expressly and timely assert that choice to counsel. *McCoy*, 138 S. Ct. at 1509 (discussing *Nixon*, 543 U.S. at 181). Because the facts, as found by the postconviction

[6] Counsel testified that he thought that Grant's "bl[o]w up" after the jury left to deliberate "was always, you know, something he was doing to try[ ] to impress the judge . . . ." (R. 134:30.)

court, show that Grant did no such thing, his *McCoy* claim fails.

Rather, as the postconviction court determined, this is a *Nixon* case. In *Nixon*, a capital case, counsel formulated and discussed with Nixon a strategy of conceding guilt on the murder charge as a part of bid for clemency to avoid the death penalty. 543 U.S. at 181. Nixon's attorney tried to explain this strategy to Nixon, but he "was generally unresponsive" during these discussions and "never verbally approved or protested" counsel's proposed approach. *Id.*

Postconviction, Nixon asserted that counsel rendered ineffective assistance by conceding his guilt without obtaining his express consent. *Nixon*, 543 U.S. at 185. Eventually, the Florida Supreme Court agreed and ordered a new trial. *Id.* at 186. The U.S. Supreme Court granted certiorari and reversed, rejecting a blanket rule that a concession to murder in the guilt phase of a capital prosecution requires the defendant's express consent. *Id.* at 188–92.

In distinguishing *Nixon*, the *McCoy* court explained: "Nixon's attorney did not negate Nixon's autonomy by overriding Nixon's desired defense objective, for Nixon never asserted any such objective." *McCoy*, 138 S. Ct. at 1509 (discussing *Nixon*, 543 U.S. at 181). In essence, Nixon forfeited the right to choose a defense of innocence by not expressly and timely asserting his desire to maintain such a defense. *Id.*

This also describes Grant's situation. In the week before trial, counsel discussed with Grant a strategy of conceding guilt to a lesser offense of recklessly endangering safety. (R. 134:24.) Counsel testified that Grant did not oppose this strategy or insist that he wasn't there. (R. 134:24, 26.) "[H]e never said, no, no, no, no, I don't want to go that way." (R. 134:24.) Instead, Grant "didn't necessarily participate that much in the discussions" about defense strategy, saying only

"I want to hear what they're going to say." (R. 134:23.) Neither this, nor anything else Grant said before or during trial, constituted an express assertion of the will to maintain an innocence defense.

Only after the close of evidence did Grant suddenly say anything about not being at the scene. However, as argued, the circuit court's implicit finding that this statement was not an assertion of the right to maintain an innocence defense was not clearly erroneous. Moreover, even if the statement constituted such an assertion, it was untimely. The time for Grant to object to counsel's proposed strategy was when counsel was formulating it—not after counsel had completed his opening statement, cross-examined witnesses, and was about to make his closing argument.[7] Like Nixon, Grant forfeited the right to maintain an innocence defense by not asserting it before trial. *See McCoy*, 138 S. Ct. 1509 (discussing *Nixon*, 543 U.S. at 181).

Grant argues that, unlike Nixon, he was not "nonresponsive," and instead "expressly made known to trial counsel his objective" "[f]or over a year." (Grant's Br. 31.) He did no such thing. He merely offered an opinion that the witnesses would not testify, and that, if they did, they would not be credible. As the circuit court found, he did not expressly state to counsel an objective to assert innocence. (R. 109:3, A-App. 107.)

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[7] Additionally, even assuming Grant's statement to counsel at the close of evidence was a clear and timely expression of the will to assert innocence, counsel likely could not have carried out this request without violating his professional duty of candor to the tribunal. That's because, as counsel testified, Grant had admitted to counsel that he *was* at the scene. *See* Wis. SCR 20:3:3 (a)(1) ("A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal . . .").

Because Grant did not expressly and timely assert his will to pursue an innocence defense, he is not entitled to a new trial on his *McCoy* claim.

CONCLUSION

This Court should affirm the judgment of conviction and the circuit court's order denying postconviction relief.

Dated this 1st day of October 2020.

Respectfully submitted,

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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 6,421words.

Dated this 1st day of October 2020.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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