STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2020AP785CR

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 CHRISTOPHER T. DEE PRESIDING.

DEFENDANT-APPELLANT'S REPLY BRIEF

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Grant did make an assertion of innocence in a timely manner.

Grant wishes to reply to following argument by the State:

> Grant appears to argue that, going back to his initial conversations with counsel, he took a position that represented an assertion of the desire to assert his innocence. 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.
>
> But this is not an express assertion of innocence so much as it is 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.

State's brief at pages 16-17. Internal citations omitted.

The State is wrong. Grant's assertions were plainly assertions of innocence, if not actual innocence, at a minimum, legal innocence. With respect to the presumption of innocence, the circuit court, consistent with WIS JI-CRIM 140, instructed the jury as follows:

> Mr. Grant is not required to prove his innocence. The law presumes every person charged with the commission of an offense to be innocent. This presumption requires a finding of not guilty, unless in your deliberations you find it is overcome by evidence which satisfies you beyond a reasonable doubt that Mr. Grant is guilty.

> The burden of establishing every fact necessary to constitute guilt is upon the State. Before you can return a verdict of guilty, the evidence must satisfy you beyond a reasonable doubt that Mr. Grant is guilty. If you can reconcile the evidence upon any reasonable hypothesis consistent with Mr. Grant's innocence, you should do so and return a verdict of not guilty. 129:40.

The record demonstrates that Grant acted consistently with the circuit court's instruction regarding the presumption of innocence. The record demonstrates that throughout the case, Grant repeatedly expressed to trial counsel his intent to maintain his legal innocence, and to force the State to prove him guilty. This meant forcing the State to present credible witnesses who could rebut the presumption of innocence that Grant maintained. Throughout the case, Grant voiced to trial counsel his belief that the State would not be able to that.[1]

During the initial meeting with trial counsel, Grant told him that "there was nothing to worry about" because "one guy's his brother who would not testify against him," and the other

[1] In light of the State's comment in note 7 at page 21 of its brief, it is relevant to note here that trial counsel could have honored Grant's objective to maintain legal innocence without violating Wis. SCR 20:3.3. This is because such objective focused on the veracity of the State's evidence, the credibility of its witnesses, and the burden of proof, rather than an affirmative presentation of evidence, and argument about it, by Grant.

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…." 134:13.

The record indicates that Grant maintained such position for the duration of the case. Indeed, trial counsel testified that throughout the case, 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." 134:19. Such strategy was consistent with Grant's desire to maintain legal innocence.

The record indicates that Grant maintained this position well into the week before trial, and going into trial. 134:23. At this point, because, according to trial counsel, Grant wasn't doing "much listening," or giving trial counsel "a lot of input," trial counsel started "pretty much developing (his) own strategy…." 134:23-24. But it was actually trial counsel, not Grant who was not listening. From the onset of the case, Grant had made known to trial counsel that he did not believe that the State would be

able to produce credible evidence that would allow it to prove its case, and that therefore he wanted to put the State to its full evidentiary burden. In short, Grant wanted to maintain his legal innocence. And while trial counsel was perhaps sensible in assessing such objective as imprudent, he could not nonetheless, make any concession of liability or guilt without running afoul of such objective.

To be sure, trial counsel testified that he told Grant that his own strategy was "[t]rying to get this thing down to something less than attempted homicide," and that Grant did not oppose such strategy. 134:24. But nowhere does the record show that trial counsel informed Grant that as part of his strategy he would be conceding liability or guilt on Grant's part. The evidence in this regard allows for the inference that irrespective of trial counsel's stated strategy, Grant reasonably believed this his own objective of maintaining legal innocence would be honored. After all, it was conceivable that trial counsel's own strategy could have been implemented without conceding liability or guilt. Even as

part of arguing for a lesser-included offense, trial counsel did not have to explicitly place Grant at the scene with the gun in his hands. For instance, trial counsel could have argued that the State had not proven the elements of attempted first-degree intentional homicide, and that if the jury were to consider convicting on any offense, it should instead focus on a lesser offense. Perhaps trial counsel's strategy had more force and effect by conceding some measure of liability or guilt. But the strategy still could have been carried out without doing so. Like counsel in *McCoy*, trial counsel's sensibilities and good intentions here went too far.

The record is clear that throughout the case, Grant wished to maintain his legal innocence, and timely made known such objective to trial counsel. This is not a case like *Nixon*, where the defendant "never asserted any such objective." *McCoy*, 138 S.Ct. at 1509, discussing *Nixon*, 543 U.S. at 181. Under principles of *McCoy*, Grant sought to exercise his autonomy to insist that the State rebut the presumption of innocence that he maintained.

Trial counsel simply infringed this autonomy by making statements before the jury which ran counter to Grant's objective. Under *McCoy*, Grant is entitled to a new trial.

CONCLUSION

For the above reasons, this court should vacate the judgment of conviction and sentence, and remand for a new trial.

Dated this _____day of October 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 1175 words.

Dated this ___day of October 2020.

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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:

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

A copy of this certificate has been served upon all opposing parties.

Dated this ___ day of October 2020.

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